

MR. WILLIS: If the court please, it seems as John Kummer is made a defendant in this action, and Kummer was dead at the time of the bringing of that action. I am under the impression that all the interest that Kummer has is water stock in the Midway Irrigation Company, but, however, I desire at this time to ask to have substituted in the name of John Kummer the name of Emma Bond as administratrix of the estate of John Kummer, deceased, and, if I shall find, after an investigation that he has interests that have never been adjudicated, I would like the privilege of filing an answer.

I also ask the court at this time to amend by interlineation the answer of Joseph Hatch and others by adding the words Alfred L. Alder four acres, following the words William Winter 8.91 acres found on page 4, line 3, sub-section C of paragraph 3 of defendants' affirmative defense.

Also to amend by interlineation the answer of Joseph Hatch and others by adding the word John B. Fowler, 2.91 acres following the words W. W. Wright 12.50 acres, found on page 4, line 5 sub-section of paragraph 3 of defendants said affirmative defense; and so far as we are concerned the reply of the plaintiff may apply to these amendments the same as though they were included prior to this time.

THE COURT: Very well, amendments may be made, and substitution may be made unless there is some objection.

MR. A. C. HATCH: If the court please, as to the substitution, the heirs of John Kummer are made defendants, and personally served with summons. They are John Kummer, Rosina Kummer, Edward Kummer, Frederick Kummer, Elizabeth Hamilton and Salina Foreman. All the children were made defendants. We presumed that the estate had been administered. He had been dead for many years.

MR. WILLIS: The estate is just now being probated, Judge Hatch, and in fact on recently has action been brought to probate the estate, and there would be no question

anyway as to the jurisdiction by the substitution. As it is there is a question.

THE COURT: You may investigate, and if you feel so advised, you may present a complaint in intervention, or cross complaint by the administrator, and it may be determined then whether it is necessary to file it.

MR. WILLIS: If the court please, before proceeding with the defense, I think it hardly wise for me to remain here during the proceedings as to Utah County, and the testimony regarding the defendants here, but I would like the court, if possible, to indicate whether or not the court will go to Wasatch County to take testimony as to the defendants up there. We believe that considering the number of witnesses, that it will be required, and some of them having interests so small that it would be almost as much as their property is worth to come down here, and further fact, we thing the court ought to go up there and view the situation that when it shall come to the taking of testimony to the defendants in Wasatch County, that the court should grant us that privilege. I have gone over the law some, and I do not find anything specific on that further than that the court has jurisdiction over matters within the district in the whole district.

THE COURT: I am of the opinion that the court cannot hold court at any place except in Provo in this case unless it is by a consent of the parties. I know of no provision of the statute which permits it.

MR. WILLIS: There are certain provisions of the statute wherein there must be a stipulation of all parties concerned to change from one district to the other, but I do not find anything in respect to that, taking testimony in the same district and within a county where the conditions are involved, such as this.

THE COURT: If the court took the evidence merely as a deposition the court could take it in the district, but if it is in the sense of holding court in that county, I know of no provision of the law which would permit it, unless it was by consent.

MR. WILLIS: The law provides this, that where property is situated in both counties that the action may be brought in either.

THE COURT: Yes.

MR. WILLIS: But that does not say the court would not have jurisdiction to take testimony in one of the counties where the property is involved simply because the action is brought in the one they offer to select, or want to select. I do not think there will be any objection on the part of the attorneys.

THE COURT: If there is no objection, the court will go there and hear your evidence there. If it is not by unanimous consent the court will not go.

MR. JACOB EVANS: If the court please, I would suggest we do not determine that matter at this time. There are a great many defendants in Utah County, and will undoubtedly take up all the time the court can give us at this time unless we get together, and it may be many stipulations will be made, and I think there ought not to be any determination of that matter made at this time.

MR. WILLIS: The only trouble with that, your Honor, is this, what we do not know where we are at. We perhaps will have to come down here with witnesses and wait the result, whereas, if it was indicated that when they do get to the testimony up there then it would not necessitate the coming here and bringing of witnesses.

THE COURT: I have indicated what the decision of the court will be, I have indicated what that will be, I will go to Wasatch County and hear the evidence there if the unanimous consent of the parties is given. If it is not given the court will not go. I would not want to have injected into this case as serious a question as would result from the court opening and holding court in different counties in this case without a consent entered of record of all the parties.

MR. WAHLQUIST: Of course, I appreciate the view of the court on that, but that would not interfere with your Honor making a trip over the ground.

THE COURT: Oh no, that is not before the court now,

and it won't inconvenience any witnesses for the court to go up there and see that situation. I am inclined to think the court will want to do that.

MR. WAHLQUIST: I think it would be very proper.

THE COURT: I think so. That is not involved in this matter. Now, if there is nothing further at this time of a miscellaneous nature--

MR. A. J. EVANS: I would like to inquire from the court -- the court asked if there were any objections, and indicated if there were none, he would go. Now, what is the present status, does the court take it under the present status we have consented?

THE COURT: No, I do not understand the matter is determined.

MR. JACOB EVANS: We would not consent at this time. What we might do later, we don't know.

THE COURT: Provo City may proceed with their proof.

MR. McDONALD: Before proceeding, I would like to have the record show we reserve the right, so far as the clients I represent are concerned, to move the court for a non-suit as to the clients I represent in Wasatch County at such time as may be proper under the proceedings in the case. Plaintiff not having rested their case yet in a sense, of course, cannot do it yet.

MR. THOMAS: I understand plaintiff has rested its case, except for a mere matter of introducing certain items of measurement of acreage. So far as any other proof is concerned, they have rested.

MR. THURMAN: Would that change the grounds of your motion, testimony we are going to put in?

MR. McDONALD: No, I don't think it would.

MR. THURMAN: Might just as well make it now.

MR. WAHLQUIST: If the court please, I don't understand the case as being one in which any party can be non-suited. While it is true the action is entitled the

Provo Reservoir Company--

THE COURT: Mr. Wahlquist, no motion for a non-suit has been made. There is nothing to argue.

MR. WAHLQUIST: If the court will permit me to explain my position in the matter.

THE COURT: There is nothing before the court. If there is a motion made for a non-suit against anyone you represent, the court will hear you fully, but until that time there is no use taking the time of the court.

MR. WAHLQUIST: I will say now as to the plaintiff, we could adjourn now, if were ~~x~~ joint individuals against the plaintiff, because, in their reply they admit everything that the Sunrise Irrigation Company has in the way of affirmative relief in their answer, but I have been under the impression we were more or less cross complaining against each other in this suit besides being adverse to the plaintiff in this matter.

THE COURT: When it comes time for your client to introduce proof you can determine whether you want to introduce any.

MR. WILLIS: If the court please, before our matters come up, we might have a notice from the clerk a few days before the time.

THE COURT: I could not promise you a few days before. I can instruct the clerk to keep you advised of the progress. Possibly the court would not be able to give you that much notice.

MR. WILLIS: Only trouble is coming here and staying indefinitely.

THE COURT: You would not be required to do that. I take it there will be no difficulty in your ascertaining the situation long enough to get witnesses here. I trust that will be the situation.

THE COURT: Now, some question arose during the trial that probably some additional pleadings would probably be filed on behalf of the Provo Bench I remember particularly. I think probably before an adjournment is taken the court ought to fix the time when that should be done so that preparation may be made to meet whatever issue that presents.

MR. RAY: We are somewhat dependent upon getting copies of papers in the case, but will proceed diligently to the preparation of the answer. I suppose the time that ought to be filed will depend somewhat on the date we reconvene.

THE COURT: Are the parties willing to stipulate the court may hear the evidence in relation to the controversy in Wasatch County at Heber City?

MR. RAY: Provo Bench, who were protestants before is willing to so stipulate, your Honor.

MR. THOMAS: My clients in Summit county are very anxious that be done.

THE COURT: Then I take it you will join in the stipulation?

MR. THOMAS: Yes.

THE COURT: If there is no objection, all the parties stipulate to that effect, the court will take some of the testimony at Heber City.

MR. A. C. HATCH: Would the court require a written stipulation filed?

THE COURT: No, I think not, I think a minute entry may be made to that effect, that the parties all being present in court represented by their counsel, so stipulate. However, that will not be possible now, there are some defendants who are not represented here, I take it.

MR. A. C. HATCH: The plaintiff consents, and will stipulate.

MR. BAGLEY: The company I represent, Timpanogos, consents to it, and I would like any order your Honor may make

in respect to time to plead in behalf of the Provo Bench to apply also to the Timpanogos Canal.

THE COURT: Very well, it may apply to any parties who may desire in view of the evidence as it is in to file pleadings. The thought I have with reference to continuing the case is that I will take it up here again on the 28th day of August. Now, in view of the fact it has been suggested that many of the features of controversy existing between the parties in Wasatch County and those in Summit County may be eliminated by agreement, I will, unless all of them stipulate, I will commence the taking of testimony there one week earlier and give one week for the taking of testimony at Heber City before coming here. In other words, I will convene court in Heber City on the 21st. If I am not mistaken, that occurs on Monday.

MR. THURMAN: That means then that the court will change the order of proof to that extent?

THE COURT: Yes, necessarily. And then on the 28th court will reconvene here to finish the matter here, and we will finish it as rapidly as we can.

MR. JACOB EVANS: I take it the Provo Bench will be the first party to introduce testimony.

MR. RAY: We assume so, your Honor.

THE COURT: Judge Hatch, upon further consideration, I am of the opinion that probably it would be better that we have a written stipulation signed by the attorneys of the several parties in view of the fact that a number are not here, and to save any question. If the plaintiff-- not the plaintiff, but the Wasatch county users who are interested in this matter-- Mr. Thomas, and I take it Judge Hatch represents some of those there, do you?

MR. A. C. HATCH: No.

MR. RAY: Mr. Willis, Mr. Wahlquist and Mr. McDonald.

THE COURT: You might take the matter up.

MR. THOMAS: I shall, your Honor.

THE COURT: And prepare such a stipulation and see that the parties who are not here sign it, and those who are here I take it will sign it without question, and, unless I hear there has been some who has refused to sign it, I will make my arrangements to go to Heber City on the 21st at ten o'clock.

MR. THOMAS: Should there be any refusals I will advise your Honor.

MR. THURMAN: The hour should be two o'clock if you are going by train.

THE COURT: It may be two o'clock then.

MR. A. C. HATCH: And ten o'clock at Provo on the 28th?

THE COURT: Ten o'clock at Provo on the 28th. The court will then stand adjourned.

AT HEBBER, AUGUST 21, 1916, 2:00 O'CLOCK P.M.

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THE COURT: What is the situation with reference to this case. Shall we proceed or is there a prospect that some matters may be eliminated by stipulation?

MR. A. C. HATCH: The parties resident in this county have been in conference for two days, and there is a prospect that they will, most of them agree. As I understand the conditions now, there are some matters upon which testimony will be taken, I think as to acreage. Possibly as to the time of the use of the water, that is the time the first appropriation as to secondary rights. I do not know how they progressed this morning. Were you at that meeting this morning?

MR. WILLIS: Yes, we did not arrive at anything. I want to look that proposition over and see what that contains, I have not had a chance. I think, your Honor, we would like your Honor to go over the situation up here and we might arrange for that this afternoon if convenient to your Honor, and perhaps in the meantime we might be able to do something among ourselves.

THE COURT: Let me ask, in the event you do not arrive at an arrangements and we are to take evidence Has a stipulation been signed so that we may take the evidence here?

MR. WILLIS: I don't know.

MR. A. C. HATCH: Mr. Thomas was looking after that.

THE COURT: If it has not been signed by all the parties the court will not take any evidence here.

MR. WILLIS: I was not present when the court adjourned, so I don't know.

MR. A. C. HATCH: Have you signed it?

MR. WILLIS: No.

THE COURT: It is perfectly satisfactory for the court to go over and see what the court is to see this afternoon. That will give you an opportunity probably to finish up these

negotiations.

MR. McDONALD: I have a stipulation signed by most, if not all of the attorneys in Utah county.

THE COURT: Possibly that can be arranged.

MR. THOMAS: I think so.

MR. McDONALD: The persons who have signed it are myself, Grant C. Bagley, E. E. Corfman, Jacob Evans and A. J. Evans. Mr. Jacob Evans and A. J. Evans have not signed as counsel for the plaintiff, they just sign it as --

MR. A. C. HATCH: Harvey Cluff?

MR. McDONALD: Harvey Cluff is not an attorney.

MR. A. C. HATCH: Coleman?

MR. McDONALD: Yes, he is attorney.

THE COURT: Now, is it desired to do anything this afternoon, or is it desired the court go out and look over the system. I understood some part of the system it is desired I should examine.

MR. McDONALD: That is my understanding, your Honor, look over everything you can this afternoon, and in the meantime we may be able to stipulate everything.

MR. SHIELDS: I represented a client who had a right below the Knight dam, and my client has sold out her interest in the farm, and she has not put in an appearance in the case yet, and the purchaser called me up about five o'clock yesterday afternoon. I do not know anything about the proceeding, but I will ask time. I have a stipulation here that is perfectly satisfactory to me, it is one of the old Fulton ranch, Judge Hatch.

THE COURT: You can have time to file an answer and cross complaint, and it may be taken up at Provo when we proceed with the evidence there.

MR. WAHLQUIST: On June 15th I asked permission on behalf of the Midway Waterworks Company to file a petition in intervention, and it was then granted. I have now the petition, and would like to serve a copy of it on the plaintiff,

and I suppose it should be filed in Utah county, and may be left with the reporter.

THE COURT: Now, I would not want to burden the reporter.

MR. WAHLQUIST: Leave it with the clerk?

THE COURT: No, we are merely here to take evidence. You can serve it on the parties and send it to Provo to have it filed. The only thing we will do in this county will be to take some evidence if the stipulation is filed. Now, are there any other matters before the court takes an adjournment until tomorrow morning. Court will stand adjourned until tomorrow morning at 9:30 o'clock.

HEBER, AUGUST 22, 1916.

MR. WILLIS: The defendants, Joseph Hatch, et al, are asking the court at this time for the privilege of filing a second amendment to the answer heretofore filed, and ask that Earl Stringfellow be substituted as defendant in lieu of John O. Edwards, he having succeeded to the interests of John O. Edwards in this action. That John W. Stead be substituted in lieu of John B. Fowler and Elizabeth Fowler as executors of the last will and testament of John Fowler, deceased; that Emma Bond be substituted as and for John Kummer, deceased, and the heirs of John Kummer, deceased, she now being the duly and regularly appointed and acting administratrix of the estate of said John Kummer, deceased; that George H. Edwards be substituted in lieu of George W. Daybell & Sons, he having succeeded to the interest of George W. Daybell & Sons to the waters of the Daybell Springs; that sub-section "C" of paragraph 3 of said defendants' answer be amended to read as follows, to-wit: Repeating sub-sections 3 as alleged in the amended answer of the defendants heretofore filed and adding thereto an additional acreage of four acres for Alfred L. Alder in addition to that that has already been set forth. That paragraph 2 is a repetition of paragraph 2 in the amended answer filed. Paragraph 3 is a repetition of the amended answer heretofore filed. That subsection "Y" is a repetition of subsection "Y" in the amended answer heretofore filed. That subsection "Z" be amended by increasing the acreage of John B. Fowler, 2.91 acres, situated in Section 10, Township 4 South, Range 4 East, Salt Lake Meridian. That Hyrum Winterton be interpleaded as the owner of 9 acres of land situated in Section 10, Township 4 South, Range 4 East, Salt Lake Meridian. That the estate of John Kummer deceased is the owner of six acres of land, situated in Section 2, in Township 4 South, Range 4 East, Salt Lake Meridian. That Charles Mitchell is the owner of 25 acres of land in Section 26,

Township 3 South, Range 4 East, Salt Lake Meridian, and also 16 acres of additional land situated in Section 25, Township 3 South, Range 4 East, Salt Lake Meridian, in addition to that heretofore pleaded by the said Charles Mitchell.

MR. A. C. HATCH: We have no objections for the plaintiff to the filing of the paper, and we would ask that it be allowed to be filed only upon the condition that it be subject to the stipulation heretofore entered into in the cause, that it be deemed and taken as denied by all of the other parties to the action.

MR. WILLIS: To which we consent.

THE COURT: The amendment may be filed. Gentlemen, are you still discussing stipulations, trying to agree upon it?

MR. THOMAS: I understand so, your Honor.

THE COURT: Now, Judge Willis has suggested he has some evidence he desires to put in regardless of the stipulation in reference to some acreage.

MR. MCDONALD: Power right.

THE COURT: Do the parties interested in the stipulation wish to be present during the taking of the testimony?

MR. MCDONALD: We are not interested in it.

MR. WILLIS: Mr. Clegg will be sworn in that matter.

THE COURT: We can take his testimony then.

JOHN H. CLEGG, called by Joseph Hatch et al, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Willis.

Q What is your name?

A John H. Clegg.

Q Where do you reside?

A Heber City.

Q What is your occupation?

- A Oh, I don't know, little of everything, farmer, I guess we would call it.
- Q Do you hold any official position in the Wasatch Irrigation Company?
- A Yes sir, I do now.
- Q I will ask you if you know the aggregate acreage that is irrigated under the Wasatch Canal system, to which the waters of the Wasatch Canal are distributed?
- A We have somewheres about twenty-five hundred acres.
- Q Is the acreage within Heber City included in that twenty-five hundred acres?
- A What is that?
- Q Is the acreage within Heber City included in that twenty-five hundred acres? A. Yes sir.
- Q What is the acreage within Heber City?
- A I don't know exactly. We have about, I think about four hundred and thirty, I think.
- Q Are you acquainted with the tract of land owned by Joseph Hatch lying just east of Heber City, and under the Wasatch Canal known as the Green farm? A. Yes sir.
- Q Of twenty acres? A. Yes sir.
- Q Now, is that twenty acres included within your totals?
- A Yes sir.
- Q That you have named? A. Yes sir.
- Q Are you acquainted with Lots 3 and 4, Block 78, the present residence of Joseph Hatch in Heber City, and the lot lying just east of his residence?
- A Yes, I know the lots.
- Q Are those two lots included within the total acreage that you have stated as being under the Wasatch canal?
- A I ain't sure about that. The lots are under the canal, but I ain't sure whether they have the shares of water for that or not. I am just referring to the shares that were watered.
- Q Could you determine so that you could state definitely whether

or not those two lots are included in the total acreage that you have mentioned, and report later?

A No, I could not definitely, but I think they are.

Q Do you know of anyone of your company who could state definitely as to that?

A Yes, the secretary of our company could tell.

Q Who is he?

A John Ohlwiler.

Q Is he in court? A. No sir.

Q Acquainted with Lot 2 in Block 98 in Heber City, the present-- Block 94, the present residence of Dr. Wherry?

A Yes sir.

Q Can you state whether or not that lot is included within the total acreage that you have mentioned as being under the Wasatch Canal?

A No, I could not. The lot is there, but I could not state positive whether he has a share of water for it or not from the canal.

Q Are you acquainted with the lot owned by Joseph Hatch lying west of Heber City, known as the coal yards?

A Yes sir.

Q Do you know whether or not that acre of land is included in the total acreage that you have named?

A No sir, I know the lot is under the irrigation system, but I don't know whether he has a share of water for it.

Q If he did have a share of water for it then would it be included within the total acreage that you have named?

A Yes sir.

Q And could you say the same thing in regard to Lots 3 and 4 in Block 78?? A. Yes sir.

Q And could you say the same thing with regard to Lot 2 in Block 94? A. Yes sir.

Q In each of those cases then, if water was distributed to them, those lots are included within the total acreage that you have named as being under the Wasatch Canal? A. Yes sir.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q You mean by share of water for it, a water right to the land?

A Yes sir.

Q Recognized by Wasatch Canal Company, and that water has been distributed to it? A. Yes sir.

Q Whether or not the parties are stockholders of your company?

A Yes sir.

Q I understand that the parties W. R. Wherry and Joseph Hatch are not stockholders of the Wasatch Canal Company?

A No sir.

MR. WILLIS: The property is in the name of Emil Wherry.

A Yes.

Q And the lands mentioned by Mr. Willis have been irrigated regularly, have they not?

A Those lots-- the land has.

Q Don't you know the lots have been irrigated?

A Yes, I think they have-- well, I am sure they have.

Q And from waters of the Wasatch Canal?

A Yes sir.

Q Do you know anything as to the lot known as the Coal Yard property, whether or not it has been irrigated from Wasatch Canal?

A I don't know whether it has or not.

Q Whether it was ever irrigated?

A Yes, I think it was before Joseph Hatch died.

Q By waters from the Wasatch Canal?

A Sir?

Q By water from the Wasatch Canal? A. Yes sir.

CROSS EXAMINATION By Mr. Chase Hatch.

Q Is this condition true of all lots that are within ~~the~~ Heber City that have been watered by water from the Wasatch Canal?

A I don't know as I understand your question.

Q I say does the same condition apply to all the lots that have

been watered by waters flowing through the Wasatch Canal?

A Yes, I think so.

MR. A. C. HATCH: That is, all are included within the twenty-five hundred acres?

A Yes sir.

MR. WILLIS: I would like to ask at this time, if the court please, is the plaintiff willing to stipulate that the amount of acreage belonging to John M. Rich, in what is known as the Enoch Rich land is 90 acres?

MR. A. C. HATCH: Not at this time. I will say we had understood we would take this matter up in the regular order, and I understand the stipulation, when it is entered into, then we will stipulate as to the acreage as to all of which we have knowledge. As to that which we have not knowledge we will ask you make proof.

MR. WILLIS: Would that be the condition as to the 28 acres of Joseph Hatch down west of town in Section 1, 4 South, 4 East?

MR. A. C. HATCH: As to what?

MR. WILLIS: Do you want the same condition as to the 28 acres of land owned by Joseph Hatch situated in Section 1, Township 4 South, Range 4 East, Salt Lake Meridian. In each of these cases Judge Hatch-- Mr. Reporter, you don't need to take that-- in case of John M. Rich you dispute the acreage, and it would be necessary to stipulate or else for us to put on proof as to the acreage of Joseph Hatch in Section 1. You deny for lack of knowledge. Of course, it would be necessary for us in each of those cases to prove the acreage, unless you are willing to stipulate it. In talking with President Murdock I understood it might be so stipulated. If you want to let it go until later we are willing.

MR. A. C. HATCH: There is another thing that enters into it. The actual acreage we might stipulate, but we might not stipulate that irrigation was necessary for all of it, or even half of it.

MR. WILLIS: That is a different thing. I take it that could be a question of the stipulation. I don't see why, if you are willing to acknowledge that the acreage is there that that would not be permissible at this time.

THE COURT: Now, gentlemen, how much time do you think you need to finish this stipulation, if you can enter into it?

MR. MCDONALD: I would suggest an hour.

MR. WILLIS: If your Honor please, this matter of proof k as to the Heber Light & Power plant might go over until after we see if we can enter into a stipulation.

THE COURT: I am not disposed to give you much more than an hour, because if we have to take this evidence I want to get at it, because we are limited to a week, and if we have to go into the evidence we must commence. The court will take an indefinite recess. I will convene court at eleven o'clock, but if you reach your conclusions before you may notify me, and I will convene before.

(RECESS)

MR. WILLIS: May it please the court, may I call a witness in relation to further testimony as to the lots?

MR. MCDONALD: I suggest we take up this other item first.

MR. WILLIS: Just as to the three lots in Heber City.

THE COURT: Probably better dispose of the stipulation first.

MR. SHIELDS: Your Honor please, I ask that the record of the court show I appear for Julia M. Davis in this case, and if there is a stipulation suitable to her I will plead, and if not, I will ask leave to plead at Provo next week.

MR. MCDONALD: I understand your Honor now that we have agreed, and stipulation will be formulated in accordance

with the agreement as to the duty of water involving practically all the waters of the river from the Midway upper dam to the head of the river. That is, we have agreed on a duty of water, and so far as we know the acreage we have agreed on the acreage, and so far as we know priorities where they come outside of the Fulton decree, we can agree on that, and where we do not know the acreage we will probably have to have an engineer measure the land, or produce some proof.

THE COURT: And that proof can be introduced at Provo, can it?

MR. MCDONALD: Yes. However, if your Honor is going to be here, I think that in 90 per cent of the cases we will agree as to priority and acreage.

THE COURT: I made that suggestion because the court would not want to stay until you had engineers measure the land. You made the suggestion you would agree upon those situations that were outside of the Fulton decree. Those that were determined by the Fulton decree will be determined according to that decree.

MR. MCDONALD: We have used that as the base. We can prepare that decree, take an hour or two to get it out-- the stipulation rather-- we can prepare the stipulation, take us an hour or hour and a half probably to prepare it, and then we can work out the details either here or at Provo, as to the other questions.

MR. THURMAN: Let us get at it.

MR. MCDONALD: Let us go right now then.

THE COURT: That disposes of all matter except the matter suggested by Judge Willis he wanted to introduce some evidence in relation to the town lots and your power.

MR. WILLIS: I don't know whether we will agree on the lands from the Midway upper dam to the Wright ranch or not. We have not done so so far, but we are ready to proceed with the trial, or at the pleasure of the court with regard to the Heber City Power & Light. I should like to

introduce the testimony of one witness in regard to these lots, perhaps half a dozen questions.

THE COURT: You examined a witness this morning. I did not refer to the matter of the consent of the taking of this evidence here, I suppose you have that cleared up, have you?

MR. THOMAS: We haven't Story and Steigmeyer, or Mr. Ray. Mr. Story's signature is represented by Mr. Corfman, and the only interest would be by Mr. Ray. Mr. Bagley signed it and all parties have signed.

MR. WAHLQUIST: I did not understand whether the court inferred besides the stipulation that would be all the testimony that would be heard here. I would like to present testimony in relation to the Midway Water-works Company, notwithstanding the complaint is not filed. We have permission to file it and N. J. Johnson, Intervenor, who has a mill right on the river here and one other party while the court is at Heber. I am not prepared at this minute, if that is what the court has reference to.

THE COURT: I am not going to stay here very long, unless you are ready to proceed.

MR. WAHLQUIST: And the acreage of the Sunrise Irrigation Company I would like to proceed with.

THE COURT: Are you prepared to proceed with it?

MR. WAHLQUIST: As to the Sunrise Irrigation Company, acreage, I am.

THE COURT: Now, the parties who are going to prepare this stipulation are not interested in this matter.

MR. THOMAS: We are not.

THE COURT: Then you may proceed.

ROBERT DUKE, a witness called for and on behalf of the defendant Emma Wherritt, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Willis.

Q What is your name, please?

A Robert Duke.

Q Where Do you reside?

A Heber City.

Q What is your occupation?

A Farmer.

Q State whether or not you have made out the water certificates for lots within Heber City for water distributed by the Wasatch--

A Water certificate?

Q Time certificate, irrigation certificates, of the time of the use of water for lots within Heber City?

A I have made out the city water tickets for the irrigation of the lots.

Q For how many years?

A For a number of years, seven or eight years, I guess.

Q I will ask you if you are acquainted with Lots 3 and 4 in Block 78, that is the lot where Joseph Hatch resides and the lot just east of that?

A Yes sir.

Q During the five or six years-- seven or eight years you have spoken of?

A. Yes sir.

Q And for each year?

A. Yes sir.

Q I will ask you if you are acquainted with Lot 2 in Block 94, owned by Emma Wherritt and used for their residence?

A Yes sir.

Q Have you made out tickets for that lot for the last seven or eight years for each year?

A. Yes sir.

MR. SHASE HATCH: If the court please, I would like to make this witness my witness for two or three lots

under similar conditions.

THE COURT: You may do so, Mr. Hatch.

DIRECT EXAMINATION By Mr. Chase Hatch.

Q Mr. Duke, acquainted with the south half of Lot 1, Block 75, where one Betsey Olsen resides?

A Yes sir.

Q Do you know whether or not during the time you have referred to in your former testimony you made out water tickets covering that? A. Yes sir.

Q You did, did you? A. Yes sir.

Q During all the years you made out the tickets?

A I think so.

Q And as to north half of that lot owned by Antone Olsen?

A Yes sir.

Q You made out tickets during all the time for that?

A Yes sir. I don't know it was a full ticket, I think it was three-quarters of a share used on the lot, the two half lots, I ain't certain as to that, there has been tickets made for both places.

MR. WILLIS: We have no further testimony as to that.

THE COURT: Are you ready to proceed with your power right?

MR. WILLIS: Any time.

THE COURT: You may call your witnesses.

EDWARD PARLEY CLIFF, called by Heber City Light & Power Company, being duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Willis.

Q What is your full name?

A Edward Parley Cliff.

Q What is your business?

A I am superintendent of the Heber Light & Power plant.

Q What is the nature of the firm of Heber Light & Power plant?

A It is an operating company that manufactures and distributes electrical energy, composed of the municipalities of Heber, Midway town and town of Charleston.

Q Are you an employee of that firm?

A Yes sir.

Q How long have you been in their employ?

A Something over six years.

Q What position do you hold?

A I am the manager, or superintendent and manager.

Q Have you been the superintendent and manager during the six years you have spoken of?

A No sir.

Q What position; how long were you manager?

A I have been manager three years last July.

Q What position did you hold prior to that time?

A I was just operator at the power plant most of the time.

Q When did they first commence business?

A You mean the use of water?

Q No, I mean when did they first commence manufacturing or creating electrical energy?

A November 1, 1909, I think.

Q Have you been with them during all that time, that is in their employ?

A Yes sir.

Q Now, state your duties, please?

A Now or before?

Q Well, during the time you have been in their employ?

A Well, while chief operator I had charge of the power plant, and water course, run a shift there operating, and was also in charge of all the lines. Since that time I have been in charge of the business end of it, also the superintendent of the plant itself, and the water system, that is the canal and flume.

MR. WILLIS: I come off without the application for the water right and approval. Will you admit Abram Hatch

applied for one hundred and fifty second feet of water from the Provo river for power and light purposes; that that was approved, and it was assigned by him to Heber City?

MR. A. C. HATCH: If it be the fact I would admit it, but I don't know.

MR. WILLIS: I can get the application; I thought I had it with me.

Q Have you used the water during each and every year and all the time since the plant first begun in the year 1909?

A Yes sir.

Q As you have testified? A. Yes sir.

Q Whereabouts is your diverting works?

A It is just above the Provo-- or the bridge on the Provo river between Heber and Park City, about three hundred yards above.

Q What is the nature of your means of diversion, or means of transmission, I mean to say, from the river to the plant?

A We have little over a mile of flume, and three sections of canal, dirt canal.

Q What is the nature of the flume?

A Flume is a square wooden flume, uncovered.

Q And what is done with the water after it passes through the plant?

A It is conveyed back to the Provo river, or to the Wasatch canal; goes to the Provo river but Wasatch canal intercepts it and takes it, before it gets there in the summertime. In the winter time it goes directly to the river.

Q Has the Heber Light & Power Company created a tail race leading from the plant to the Provo river, in which to convey the water after it has passed through the plant to the Provo river?

A Yes sir.

Q Now, who intercepts that water that you speak of during the irrigation season?

A The Wasatch Canal Company intercepts part of it and North Field, all in the one canal, Wasatch canal.

- Q The Wasatch canal then are the parties who divert the water from this race, tail race, and prevent it from flowing into the Provo river, are they?
- A Yes sir.
- Q Now, whereabouts is the water discharged into the Provo River or whereabouts would it be if it were not intercepted by the Wasatch Irrigation Company, with reference to the head of the Wasatch canal, or the head of the North Field canal?
- A It is about one half mile below the head of the Wasatch canal as near as I can tell.
- Q Below or above?
- A Below where it enters the river.
- Q Below what was formerly the head of the Wasatch canal?
- A Yes sir, what is now at the river.
- Q I don't just understand you Mr. Cliff; is the head of the Wasatch canal above the point, or the discharge of your tail race?
- A. Yes sir.
- Q And it would then be-- the water would then be discharged below the head of the Wasatch canal, if they did not intercept it in its course to the river?
- A Yes sir.
- Q What with relation to the North Field Irrigation Company?
- A As I understand it the North Field and Wasatch take their water out at the same point in the river.
- Q So that by the Wasatch Irrigation Company intercepting the flow of the water in the tail race, it is converted then after being used in the plant into the Wasatch canal and North Field canal for their use?
- A Yes sir.
- Q State whether or not the diversion of the water at the point where it is diverted for your purposes, interferes with the rights of any other persons, or rights of any person?
- A No sir, I think not.
- Q What is the distance from the intake of your canal to the point of discharge of your tail race in the Provo river?

A As near as I can tell without exact measurement, about two miles and a half. It is two miles to the plant, and then it is about half a mile from the plant to the discharge.

Q What would it be following the court of the river, or the river channel, Provo river channel?

A It would be perhaps a little less than that, I think it would.

Q About what would you say the distance would be from the intake to the discharge following the channel of the Provo River?

A I would say a quarter of a mile less, or two miles and a quarter.

Q Now are you familiar with the conditions of the Provo River between the point of your intake and the point of discharge of the waters used in the plant?

A Yes sir.

Q What is it?

A Mean the condition--

Q I mean the conditions of the channel of Provo river?

A The river is quite winding and in places, wide, and rocky all the way down. There are several little streams that go out of the river and back into it again at different points along that section, quite brushy.

Q Now, in your opinion would you say that there would be a saving of water by taking it through the canal and flume of the power plant, and from that discharging it through the tail race into the Provo river, over its being allowed to go down the natural channel of the Provo river?

MR. A. C. HATCH: We object to the opinion of the witness in regard to it.

THE COURT: I am inclined to think he has not shown his competency. You may show the conditions and from that the court will deduce the fact whether it is a saving or not.

Q You said the river was wide; could you state what the width of it would be?

A Oh, in places it is perhaps hundred feet, other places much

narrower than that.

Q What would be the narrowest point; I am speaking of the channel between the intake of our plant canal and the point of discharge of the water after its use?

A I could not say exactly what the narrowest point would be.

Q Well, approximately?

A I don't know.

Q Haven't you any idea?

A It would be different; the width of the stream itself is different at different periods of the year.

Q Do you know what surface a stream of water of say a hundred and fifty second feet would cover, or to what extent it would spread out in flowing down the natural channel of the river between the intake and point of discharge of your canal?

A Narrowest place in that regard be about twenty-five feet-- twenty feet I will say.

Q Now, what do you mean by saying the bottom of the river is rocky, is it loose gravel?

A No sir.

Q Large boulders?

A It is more cobble rock than gravel, all the way down the bottom of the river.

Q And that is true as to the whole length between the intake and the discharge point?

A Yes sir.

THE COURT: Let me ask a question. Judge Hatch, is it contended there is a loss of water, decrease of quantity by virtue of it being taken through the canal of the power company and its flume?

MR. A. C. HATCH: Yes, I think if the witness would proceed to tell the conditions, there are large seepages and outflows from their canal.

MR. WILLIS: We will go into that Judge Hatch before we get through with the witness.

THE COURT: I will say, gentlemen, ordinarily the court decrees the right to use the water for power purposes--

MR. A. C. HATCH: We admit the right to use for power purposes.

THE COURT: The court usually includes in the decree they must use it without waste or loss by seepage to any appreciable quantity.

MR. WILLIS: We want to show there is none if we can, your Honor.

MR. A. C. HATCH: The question is just here. If they have had a tight dam, concrete dam in and took the water, tight flume, and delivered all the water back into the river they diverted, and took all the water out of the river and carried it through their flume, there would be no loss. They don't take all the water out of the river. The loss from evaporation down the stream continues just the same as though they took out no water. They reduce the surface area very little, except for a short distance and then the waste besides from their flume, almost from its intake to the plant continuously.

THE COURT: I see. You may proceed, Mr. Willis.

Q Now what periods of the year, if you know, Mr. Cliff, do you put in a tight dam in the river?

A We don't have what you call a tight dam any period of the year.

Q Let me withdraw that. Can you state the periods of the year in which you attempt to dam off all ~~the~~ of the waters of Provo river and convey it through your canal?

A Period of the year is what is known as the low water period, about the first of July. I will say there because we take some for the Timpanogas Irrigation Company through that as well, to the first of October.

Q State the condition of your canal as to that part of it that is made in the earth, whether on level ground or whether it is on the hillside?

A The part of the water course that is of earthen canal, is on level ground.

Q What is the nature of the ground that it passes over and through?

A The nature of the ground that the flume passes over?

Q No, I mean that that is earth channel?

A The nature of the ground?

Q Yes.

A Why it is loam, sand, sandy bottom, there is no rocks except in one part of it, the upper part.

Q Is any part of the bottom or sides of the canal, does it pass through a hard or cement formation?

A The formation is hard.

Q Now, state the condition of your flume?

A The flume is built as I said in a square wooden flume, and is made as tight as we have been able to make it so far. There is some leak from the flume, due to the construction of it in the first place.

Q Now, I will ask you if that-- if repairs could be made within a reasonable figure to overcome even the loss by that condition?

A We have overcome most of it I will say.

Q Now, state whether or not measurements have ever been made at the intake of your canal, and also at the power plant, to determine the loss of water between that-- that is converted at the intake, and the amount that is in the canal at the plant?

A Yes sir, measurements have been made.

Q Now, do you know what the loss is by actual measurements?

MR. A. C. HATCH: Just a moment, we object to that unless the witness made the measurements himself, and testifying of his own knowledge.

MR. WILLIS: We will withdraw that for the present.

Q Do you know of your own knowledge of measurements having been made, or did someone tell you?

A I have report of it from the water commissioner.

Q If that is the course of it it is all right. I will ask you whether or not you know of your own knowledge of any measurements having been made as to the amount of water diverted, and as to the amount of water discharged back into the Provo river? Speaking of your own knowledge?

A I have made no measurements myself.

Q No, I am asking-- it would be within your knowledge if you were there and saw someone else make the measurements?

A Yes sir.

Q Do you know what they were? A. No sir.

MR. A. C. HATCH: Just a moment. If he did we would object to his testifying.

Q Do you know of your own knowledge whether there is any appreciable loss between the waters that are diverted into the channel, and those that are discharged into the Provo river, after use, or during transmission?

A I know there is some leakage out of the flume. It is not a loss however, because it is diverted by small channels back into the river after it leaves the flume.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q How many of those small channels are there?

A There are three.

Q How many places are there leakages in your flume above the upper one of these three small channels?

A I could not say how many. There are a lot of little dribbles all the way along.

Q All the way along the flume? A. Yes sir.

Q Not sufficient to form streams?

A They form streams as they run together.

Q I mean into the hollow next the flume?

A Yes, the ditch nearest to the leak.

Q That is what was the old channel, that comes out from the Provo river right at the point of the intake of your flume?

A No sir, not there.

- Q There are leaks all along the flume, are there not?
- A There are leaks at that point that you mention, but that is not in these three canals.
- Q That is what I am asking about additional to the three streams you mention, there are other leaks all along the canal?
- A That is only in the one flume, the upper flume.
- Q And the lower flume are there any leaks besides those that form these three small channels?
- A No sir, not that I know of.
- Q Have you any idea of the quantity of water in each of those channels?
- A No sir, it varies.
- Q As a matter of fact the water from neither of those channels ever gets back into the Provo river, does it?
- A Yes sir.
- Q Whereabouts?
- A The upper channel gets back in at the road-- no, the middle channel. The upper one gets back through the Jordan ditch, the old Jordan ditch that run through there, and the lower one gets back through the Wasatch canal.
- Q Wasatch canal never goes back to the Provo river, except by such seepage as finds its way through the channel and--
- A I don't mean it goes to the Provo river, it goes to the Wasatch canal.
- Q There is one stream crosses the dugway immediately above the plant?
- A. Yes sir.
- Q There is another on top of the ridge at what is known as Potter's place?
- A There should not be one there.
- Q There is one there, that is a fact, isn't it?
- A No sir.

MR. WILLIS: If the court please, we object to counsel testifying.

MR. A. C. HATCH: I am asking the witness.

- A There wasn't one there last time I saw it, Thursday, last Thursday.
- Q Prior to last Thursday for the past four or five years, hasn't there been a stream there?
- A No sir.
- Q When did you last see a stream of water running through that flume in the road there?
- A What point?
- Q Right at the top of the ridge, Potter's house?
- A I could not say when last; I know there has been some in the past.
- Q And that was leakage from the flume? A. Yes sir.
- Q There is another right up near to the north end of that Potter field on the county road, another flume crosses?
- A There is a little ditch across the road there, and runs back into another channel around the road.
- Q Runs back where?
- A It runs to another channel that comes from Jordans.
- Q I am speaking of the Potter field and below the Valeo road.
- A Below the Valeo road?
- Q Yes.
- A There is a stream there, yes.
- Q That is leaking from the power plant flume, isn't it?
- A Yes.
- Q Now, that never gets back into the Provo river, does it?
- A I think so.
- Q You don't know, however, do you?
- A Yes sir.
- Q Whereabouts in the Provo river?
- A It goes down the hill just off the Valeo road into that little spring ditch.
- Q And the little spring ditch runs on down those fields into the Wasatch canal?
- A No, I think it goes above the intake of the Wasatch canal, one you speak of; the one below there does not.

Q Now still above that is the Jordan slough or ditch you speak of?
A. Yes sir.

Q And from the point where your flume leaves that Jordan ditch on to the head, there are seeps all the way along it?

A There are seeps in that upper flume, yes.

Q Do you have any idea as to the quantity of water in all of these channels that you refer to and all the seeps?

A I can give you my judgment on it.

Q In second feet? A. Yes sir.

Q What is it?

A It varies from about three to six.

Q That is owing to the condition of the water in the flume?

A Yes sir, whether it is muddy or whether it is clear.

Q When does it lose the most?

A When it is clear.

Q Now that is the present condition, is it?

A That is the present condition as near as I can state it.

MR. A. C. HATCH: May I ask, Judge Willis, you concede do you not, that the appropriation by Abram Hatch was subsequent to the appropriation of the Timpanogos Irrigation Company?

MR. WILLIS: I think so. We can tell that though when we get the appropriation or the application.

Q I will ask you if you keep your canal clean of moss?

A Yes sir.

Q That is the earth part of it?

A Yes sir.

Q And so that the water has free flow through the earthen part of your canal?
A. Yes sir.

Q Do you know the length of these ditches of which you have testified, formed by the leakages of your canal?

A No, I don't.

Q You know approximately the length of them before they would reach a channel that is used for irrigation by appropriators of water from the Provo river?

A I could only state it would be the length of course, dis-

tance from the flume to the nearest practicable point. I could not state the distance.

Q We will have that by other witnesses. Now your flume is also for a part of its distance the canal of the Timpanogas Irrigation Company? A. Yes sir.

Q And the Timpanogas Irrigation Company takes its water at your power plant?

A At the pressure box on top of the hill at our plant, yes sir.

Q And from there on it is Timpanogas canal alone?

A Yes sir.

Q So that the water is divided at your pressure box between your company and the Timpanogas Irrigation Company?

A Yes sir.

Q So that your flume must carry enough in addition to what is used by the power plant to supply the water to which the Timpanogas Irrigation Company is entitled?

MR. WILLIS: Object to that as incompetent, irrelevant and immaterial, for the reason that it is immaterial whether their canal must, or their flume must carry water to supply the Timpanogas Irrigation Company or not; it is not material to this cause.

THE COURT: Objection is overruled.

MR. WILLIS: Exception.

A I will say that it carries some water for the Timpanogas Irrigation Company.

THE COURT: Let me understand, does all the water of the Timpanogas canal at that point go through this canal?

MR. A. C. HATCH: Yes, your Honor.

THE WITNESS: Yes.

THE COURT: I took it from your answer only part did, when you say it carried some.

THE WITNESS: I said it carries some water for the Timpanogas Irrigation Company.

Q Carries all the water that is used by the Timpanogas Irrigation Company? A. Yes sir.

Q Do you know whether or not your company took the Timpanogas Canal at its head and for a considerable distance along its length?

MR. WILLIS: Object to that as incompetent, irrelevant and immaterial.

THE COURT: I will hear from you, Judge Willis, on your objection.

MR. WILLIS: My attitude in that is this, that it can have no bearing upon whether or not, or what the conditions are between the Timpanogas Irrigation Company and this company, as to a right of way that the Timpanogas Irrigation Company might have had. The quantity of water to which the Timpanogas Irrigation Company, and their right to flow water, or their flowing water through this flume, I take it would be immaterial, but the question is this, to attempt in any way to fix whether or not the power plant is liable to the Timpanogas Irrigation Company, in any way, manner, shape or form, does not enter into any rights the power plant company has to the waters of Provo river for power purposes.

THE COURT: I think it does. The court in any award of water either to the Timpanogas Company or this power company, will require this waste of three to six second feet be eliminated. It is very material so the court may know who must do that. Possibly the Timpanogas must do it or part of it.

MR. WILLIS: Of course we think that is material.

THE COURT: You are objecting to it, however, on the ground it is not material. Someone must provide against this loss. It is not a beneficial use of water to convey it through a flume, that loses the quantity that Mr. Wentz says they lose there. Someone must correct it, and I think this is material evidence, so the court may know who must correct it.

MR. WILLIS: Pardon me just a moment. I say that as to the question of the commingling of the water of the Timpanogas and plant is material, but whether they run over

a right of way, or whether they have to furnish something to the Timpanogas is immaterial.

MR. A. C. HATCH: Priority of the Timpanogas over the plant is material.

THE COURT: I am inclined to think the objection should be overruled.

MR. WILLIS: Exception.

THE COURT: I think the court should be in possession of all those facts, so as to determine who must correct this loss, and the relative priority of rights.

MR. A. C. HATCH: What was the question?

(Question read)

Q And constructed upon that Timpanogas canal their flume and used a portion of the Timpanogas canal by enlarging it, as the present canal of your company?

A I don't know that of my own knowledge, It was done before I had anything to do with it.

Q Do you know whether or not there is an agreement between your company and the Timpanogas Canal Company, as to the construction and keeping of this flume, and delivery of water to the Timpanogas Company?

MR. WILLIS: Object to that as incompetent, irrelevant and immaterial.

THE COURT: Objection is overruled.

MR. WILLIS: Exception.

THE COURT: Answer it by yes or no.

A There is no agreement as far as I know.

Q Do you know how the-- you say you know nothing about it of your own knowledge-- you say there is no agreement, what do you mean by that?

A I mean there is no written agreement at present, governing the use of the water through the flume by the two companies.

Q How do you know that?

A I have all the documents.

Q Of both companies?

- A Of my company; there would be a written copy of it I should think.
- Q Then, as a matter of fact, if there is an agreement you know nothing of it?
- A I know nothing of it.
- Q That is what you mean?
- A I will state there was an agreement for one year, 1915.
- Q That was for 1915? A. Yes.
- Q Was that a written agreement? A. Yes sir.
- Q For 1915? A. Yes sir.
- Q As to the upkeep of the flume, or delivery of the water?
- A As to the delivering of the water and expense that the Timpanogas would stand of the upkeep of the flume.
- Q There was a break in your flume that year, wasn't there?
- A I don't remember.
- MR. WILLIS: Object to that as irrelevant, incompetent and immaterial.
- Q Wasn't there an agreement that the Timpanogas would pay to the company, your company, one hundred and seventy-five dollars, and that you would keep up the flume?
- MR. WILLIS: Object to it as incompetent, irrelevant and immaterial.
- THE COURT: Objection is sustained.
- MR. A. C. HATCH: Note our exception.
- THE COURT: I understood the witness to say the agreement was in writing.
- MR. A. C. HATCH: It was not the agreement of 1915 I was asking about. Probably the witness misunderstood me too. I will repeat it.
- Q Wasn't there and isn't there an agreement, not in writing, that the Timpanogas Company shall pay to your company one hundred and seventy-five dollars per year, and that you will keep up the flume and canal and deliver to them their water?
- A Not that I know of.

MR. WILLIS: Wait, we object as--

THE COURT: The witness has said he doesn't know so it is unnecessary to object.

REDIRECT EXAMINATION by Mr. Willis.

Q What is the relative amount of water that flows through your canal or flume, that is claimed by the plant and the Timpanogas Irrigation Company, or delivered to it or used?

A That has been used?

MR. A. C. HATCH: Just a moment, we object to that as immaterial and irrelevant. If he knows what it is from year to year it might have some bearing upon the rights of the parties here, but if he doesn't know, it is a matter that can be established by positive proof.

MR. WILLIS: I will withdraw the question, Judge Hatch.

MR. A. C. HATCH: Water commissioner has made measurements of all this from year to year.

THE COURT: It is withdrawn.

Q Do you know the amount of water at the present time, or during the past year, past season, we will say, or the present season, I mean to say, that was used by the power plant, and the amount that was used by the Timpanogas Irrigation Company?

MR. A. C. HATCH: Object to that unless he knows the quantity.

THE COURT: He is asked if he knows the quantity.

MR. A. C. HATCH: Asked if he knows the relative.

THE COURT: No, the quantities.

A I know, yes, through report and by record, I have the record of it.

Q You did not make any of the measurements yourself, or divisions?

A No sir.

RECROSS EXAMINATION by Mr. A. C. Hatch.

Q There was one other question; you stated all the water was intercepted in your tail race by the Wasatch and North Field Irrigation Companies?

A No, I didn't say all of it.

Q Oh, I understood you to say all of it. Part of it flows on into the Provo river?

A Yes sir, I didn't mean to say all of it, Judge.

Q You have heretofore diverted and used water of the storage waters of the Provo Reservoir Company, used it through your plant?

A We have used any and all water that came down the river, we wouldn't know whether it was reservoir water or what it was.

Q And that water was carried on back to the Provo river, was it not?

A I think so.

Q Don't you know? A. Yes sir.

Q You understand that--

A Yes sir.

Q It is your duty to see that it does get back to where it belongs, don't you?

A Yes sir, I know it goes to the river.

Q And you know the quantity that goes to the river, don't you?

A No sir, I don't know the quantity.

Q Do you know it is measured and diverted from the Wasatch canal, carried on to the Provo river through your tail race?

A Yes sir.

MR. WILLIS: What was that last question.

MR. A. C. HATCH: There is water carried to the Provo river through their tail race, that the Wasatch and North Field does not take all the water that goes through the dam.

REDIRECT EXAMINATION by Mr. Willis:

Q The North Field, you turn the water down your tail race,

and the North Field and Wasatch Canal Companies take such parts, or such portion of that water as they choose, do they, do you know anything about that?

A They take such parts as the commissioner says belongs to them.

T. F. WENTZ, Recalled.

DIRECT EXAMINATION by Mr. Willis:

Q Mr. Wentz, you have been sworn in this cause, and have testified heretofore, haven't you?

A Yes sir.

Q You are the water commissioner acting under appointment by this court for the Provo river water system?

A Yes sir.

Q How long have you acted in that capacity?

A This is my fourth year on the Provo.

Q In the capacity of water commissioner?

A Under the present system I have been--

MR. A. C. HATCH: If the court please, that has all been gone into.

THE COURT: It is all in the record.

MR. WILLIS: The only question in my mind is to what extent it has been gone into, that is all, I know it was touched on to some extent down at Provo, and I believe your Honor-- I don't desire to overburden the record, but I believe we have the right to learn to what extent Mr. Wentz is familiar with the conditions.

THE COURT: If you think the record has not been made.

MR. WILLIS: I am not certain about it.

THE COURT: I am not certain about it. It has been gone into very thoroughly, all his experience with reference to this river, and it is very complete and extensive too.

Q Have you made measurements as to the amount of water that is

diverted into the Heber Light & Power plants canal, Mr.

Wentz?

A Yes.

Q When?

A May 12, 1916.

Q Now, have you made measurements to determine the amount of water that is diverted into that canal at the intake, and also at the power plant?

A No, just the one measurement in the canal, about half a mile from the head.

Q Have you made any measurements to determine the amount of discharge that is returned to the Provo river, or to users who are entitled to it, after it has passed through the power plant flume?

A No, there have been no measurements made to determine the transmission losses in the canal.

Q Have you made any estimates as to the transmission losses?

A I made an estimate on the visible flow coming from the flume crossing the road on this day.

Q Between the intake and plant?

A Yes.

Q State what that is if you please?

A On this day of May 12th it was three second feet.

Q Now, have you made any measurements at the plant to divide the water between the Timpanogas Irrigation Company and the power plant?

A On this day of May 12, 1916, I measured the amount in the flume, and the amount that was being diverted to the Timpanogas Irrigation Company.

Q State what the amount in the flume was at the time of that measurement, Mr. Wentz?

A The amount in the flume was 120.77 second feet.

Q Now, what was the amount that was measured to the Timpanogas at that time?

A The amount in the Timpanogas was 59.21 second feet.

Q You have not made any measurement since that, Mr. Wentz?

A No.

Q Have you made an estimate of the amount of water that is discharged through the tail race of the power plant, if you haven't made any measurements for this year?

A No, not this year.

Q Did you make any measurements of the discharge last year, as compared with the amount that was diverted to the canal?

A Mr. Pratt made a measurement last year under my direction.

Q All you know about it last year is what he reported to you as the measurements?

A Yes.

MR. A. C. HATCH: Let me suggest, those reports are part of the files in this case.

Q Yes, that is true, they are, aren't they?

A Yes.

Q Can you state then from your knowledge of the report that was made of those measurements, what the losses were during last year between the amount that was diverted into the canal, and amount that was discharged into Provo river, or delivered to those who are entitled to it after it had passed through the plant?

A No, I haven't that data at hand at present.

Q That is down at Provo?

A No, it is at Heber, the files are here.

Q Are you acquainted with the Provo river, familiarly acquainted with it, between the intake of the Heber Power Plant Canal, and the point of discharge of the waters from the tail race of the plant?

A Yes sir.

Q Are you acquainted, are you familiar with the entire canal and flume from the intake to the plant, and with the tail race from that to the river?

A Yes sir.

Q What would you say, Mr. Wentz, as to whether or not there was a saving by reason of taking the waters through the power plant

flume or canal and tail race, ever being allowed to run down the natural channel?

A If the flume and canal were in good shape I would say there would be a saving. The leakage from the canal and flume varies so much that judgment on that would vary accordingly. When the canal is in good shape, canal and flume in good shape I would say there would be a saving in the total quantity of water taken from the river.

Q What would you say with relation to the canal and flume being in good shape at the time that you made the measurement on May 12 or not?

A I would say it wasn't in good shape.

Q You think that a loss of three second feet in seepage would indicate a bad condition of the flume would you?

A Yes, that is a bad condition.

Q Would you say that there would be a less loss than three second feet between the intake of the plant canal and the point of discharge, if the water was to be-- if the same amount of water were to be floated down the natural channel between those two points?

MR. A. C. HATCH: If the court please, we object to that question as being immaterial for any purpose, it only covers a portion of the ground, for instance, if the waters were all conveyed in the flume and the flume was in proper condition, it would be a saving of water, but there is no allowance made for this mile of tail race that they don't go into at all. It is not taken into consideration as I understand in the questions asked the witness.

THE COURT: The objection is overruled. Of course if all the elements or factors necessary to be taken into consideration are not produced, this would not be of any value, possibly under your theory, yet, the court is inclined to agree with you, but those other matters may be supplied later.

MR. A. C. HATCH: Not supplied at all the testimony

is useless.

THE COURT: The question as I understand it is, whether in the condition of the stream, taking into consideration the condition of the original bed of the channel, and the quantity of water that is not taken into the canal, which is permitted to run down, whether taken as it now is, with the three feet of loss, that would be a greater loss than would occur, if it was permitted to go with the other water, down the stream. That is the substance of the question.

MR. A. C. HATCH: Let me ask the witness, did you understand that to be the question?

THE COURT: Read it, and see if I get the correct understanding of it.

(Question read)

THE COURT: I take it that is in the condition of the natural channel at the time this measurement was made, last made?

MR. WILLIS: If not it may be so considered because the date was named.

A I have been misunderstood on the three feet loss. The three second feet I refer to, is the three second feet crossing the road from the flume, and into the other ditches and channels leading to the river. Now, the loss in transmission in addition to this along the flume, or along the canal is in addition to that three second feet.

Q Do you know what that is?

A No, I have not measured that. The flume-- the water is under the flume, and water running along under the flume, practically the same as the canal. The three second feet I don't mean to be understood as a loss. It is the amount of water leading from the canal across the road.

Q Could you estimate what the loss would be, in addition to the three second feet?

A No, I have not made those measurements.

Q Then you are not in a position to testify whether or not there is in fact, or would be a saving of water by reason of

flowing it through the canal and flume and tail race, over flowing it down the natural channel?

A No, no, I haven't the information.

Q Mr. Wentz, for the purpose of refreshing your memory, do you remember having a talk with me about three weeks ago in relation to the conditions as to the water taken out by the Heber Power Plant, and the amount of losses and so on by reason of their taking it out and using it?

A Yes, I remember talking to you.

Q Do you remember telling me then that there was no actual loss between the taking of that water through the power plant flume and race, and discharging into the Provo river; you remember telling me that?

A I may have told you that, I don't wish to be misunderstood on this loss. Now the three second feet crossing the road, I don't consider is a loss, because we return that in channels to the Wasatch canal. Now there is a small loss of this water seeping through as it runs under the flume and under the canal, and through the canal section. Those two are entirely independent.

Q Do you know what that actual loss is, Mr. Wentz?

A No, I don't know what that loss is.

Q Could you estimate what it would be?

A No.

Q I am not sure, Mr. Wentz, and for that reason I am asking you this question to be certain; do you remember in that talk of my asking you if you had made a measurement of the amount of water that was diverted into the power plant canal at its intake, and measurement of the loss and seepage, or the loss through seepage and other causes, and the amount that was discharged into the Provo river, and you answered me that you had, and that there was no perceptible loss; is that true or not?

A Those are the measurements that Mr. Pratt made last year.

Q You are basing it on that?

- A Those are the measurements, and the losses shown by those measurements.
- Q Then would you be able to say at this time from your knowledge and experience, whether or not there is an actual loss by reason of that diversion, over its being permitted to flow down the natural channel; what is your judgment as to that if you have any?
- A When those leaks from the flume are taken care of and carried back to the natural channel in good shape, and not spread over the country, taken back say in two or three channels, I don't think there is a very material loss there, or very great difference either in taking through the flume or through the river channel.
- Q Could you say at this time whether or not that waste water was being taken care of through two or three channels as you speak of?
- A They were being taken care of on the 14th of July, that is my last trip in that division.
- Q What with relation to the time you made the measurement on the 12th day of May?
- A They were all right then, and going to the river channel.
- Q Can you state whether or not there is any difference in the amount of loss between this year and last year?
- A It is a great deal better this year. The flume is in better shape, great deal better shape.
- Q And consequently the loss would be less?
- A Yes.
- Q When you saw the condition on May 12th and during July, that you have just testified to, would you say that there was no perceptible loss between the amount that was diverted into the canal, and the amount that was either delivered to Provo river, or to parties who are entitled to the use of it below the power plant?
- A I say there would be very little difference in the two, when the water from that flume was carried directly back to

the channel.

 12:10 P.M., RECESS TO 1:00 P. M.

EDWARD PARLEY CLIFF, Recalled.

DIRECT EXAMINATION by Mr. Willis:

- Q Mr. Cliff, I hand you defendant Heber Light & Power Plant Exhibit B, and ask you to state what that is?
- A It is appropriation or application to appropriate water made by Abram Hatch to appropriate water from Provo river for power purposes.
- Q What is the date of that?
- A September 10, 1907.
- Q What is the amount of water applied for there, the quantity?
- A Hundred and fifty cubic feet per second.
- Q I show you defendant Heber Light & Power Plant's Exhibit A, and ask you to state what that is?
- A This is proof of appropriation of water for power purposes.
- Q By whom?
- A It is by George A. Wootton, superintendent of the Heber City Light & Power Plant.
- Q I will ask you if Heber City is the assignee from Abram Hatch of that appropriation?
- A Yes sir.
- Q And is Heber City the present owner of that appropriation, by Abram Hatch? A. Yes sir.

MR. A. C. HATCH: Just a moment, as I understand the three cities are interested.

MR. WILLIS: The three cities are operating that plant under the name of the Heber Light & Power Company, but Heber City owns certain interests, and each of the other municipalities do, and they combined their interests, and operate them under the Heber Light & Power plant, and each owns their respective interests in that property, and operate it,

and for the purpose of the operation they created a company known as the Heber Light & Power Company, and it is only the agent for the three municipalities. That is the facts in the case.

MR. A. C. HATCH: I didn't so understand it.

MR. A. C. HATCH: The record may show that, your Honor.

Q I will ask you, Mr. Cliff, if the Heber Light & Power Company is an operating institution only, as an agent for the Heber City, Midway Town, corporation, and Town of Charleston?

A Yes sir, only.

Q Does Heber City own a separate and distinct interest in the property of the concern, that is as a municipality?

A Heber City owns three fourths of the entire system, that is outside of its municipality.

Q And Midway, what does it own?

A One-eighth.

Q And Charleston?

A One-eighth.

Q And Heber is the present owner of the water appropriation made by Abram Hatch, as shown by plaintiff's Exhibit, or defendants' Exhibit B?

A Yes sir, it has never been assigned to the Heber Light & Power Plant.

Q But it has been combined with the other property, and the Heber Light & Power Company are operating that for the interests of the three municipalities?

A Yes sir.

Q I hand you plaintiff's Exhibit C, ask you to state what that is?

MR. A. C. HATCH: Let me ask a question here of counsel if you intend by this to show that the town of Charleston and the town of Midway have no interest or right in this water?

MR. WILLIS: No, no, they have an interest, for the

reason that they are-- the property of the three are combined, and they have an interest by reason of that, and the property, all of it, is combined under an agreement that it shall be operated, and used for the interests of the three municipalities and their inhabitants.

MR. A. C. HATCH: Then I understand Charleston and Midway have an equal undivided interest in that?

MR. WILLIS: It has never been assigned.

MR. A. C. HATCH: They don't own separate interests, and they are partners in a sense in the ownership of the whole.

MR. WILLIS: That is true, the assignment ~~is~~ has never been made from Heber City.

MR. A. C. HATCH: The other parties are entitled to take it at any time they demand it.

MR. WILLIS: They are entitled to so much of it as their one-eighth interest.

MR. A. C. HATCH: The purpose of my question is this; under the testimony there is no need to have Charleston and Midway entered as parties to the suit.

MR. WILLIS: I think, your Honor, the Heber Light & Power Company is a party to the suit, and as it is a partnership, the three municipalities would be necessary to determine the rights.

Q Did you state what the exhibit is?

A That is a certificate of appropriation of water.

Q Is it a certificate of appropriation?

A Yes sir.

Q Are you sure?

A It so states.

Q Isn't it the certificate of the State Engineer approving the appropriation?

A It says certificate of appropriation of water, certificate 123 B., Utah Lake Water Division.

Q Doesn't it state the appropriation is approved--

THE COURT: You might introduce it and the court will

determine what it is.

Q Very well, what is the date of it?

A March 18, 1911.

Q Who is it signed by?

A W. D. Beers, State Engineer.

MR. WILLIS: We offer now in evidence your Honor, defendant Heber Light & Power Company's Exhibits A, B and C. Do you have any objection, Judge Hatch?

MR. A. C. HARCH: No.

THE COURT: They may be received.

MR. A. C. HATCH: Of course, I understand this does not show the interest as yet in Heber Light & Power Company.

Q Mr. Cliff, are you acquainted with the condition of the flume of the Heber Light & Power Company, or were you on or about the twelfth day of May, 1916?

A Yes sir.

Q I will ask you how often after that period of time you saw that flume and examined it as to the leakage and waste from it?

A About once a week during the entire year.

Q Up to the present time?

A Yes sir.

Q Can you state whether or not it is now in the same condition as to the leakage that it was during the month of May, 1916?

A Yes sir, I think that it is in the same condition as near as I can tell.

Q What as to between this and the month of May?

A It has been all along in the same condition as it was on the fifteenth of May.

THE COURT: This certificate seems to refer to a transfer.

MR. A. C. HATCH: We admit so far as the plaintiff can do the assignment by Abram Hatch of all of his rights and the sale of the ground upon which the plant is built.

THE COURT: To Heber City?

MR. A. C. HATCH: Was made to Heber City.

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THE COURT: To Heber City?

MR. A. C. HATCH: Was made to Heber City.

MR. WILLIS: I would like Judge Hatch to be sworn and let the record show. I can show by him as to the transfer.

A. C. HATCH, Recalled.

DIRECT EXAMINATION by Mr. Willis:

Q Judge Hatch, you are a practising attorney in the State of Utah?

A Yes.

Q And you were acquainted with Abram Hatch during his lifetime?

A I was.

Q And I will ask you if as the agent of Abram Hatch, you did not negotiate a sale of his water rights, such as are represented by plaintiff's Exhibits A, B & C, was not sold and assigned to Heber City.

A There are three or four questions in that. I did not as the agent of Abram Hatch negotiate any sale.

Q Did you then on your own right?

A I had an option from Abram Hatch to purchase the water appropriation and certain grounds that were then belonging to him as a power site, and I negotiated the sale for myself with Heber City, and had the transfer made directly from Abram Hatch to Heber City.

Q And that is the water right that is in question?

A That is the appropriation that is mentioned and introduced in evidence.

MR. WILLIS: That is all. If I should find the assignment later, I should like to introduce it.

THE COURT: I take it there will be no objection.

MR. KING: Your Honor please, representing the Pioneer Company, McPhee and others, for whom I appear as shown by the answer and counterclaim in this case, I just had a talk with Mr. J. A. Murdock, not in the presence of his attorneys, however-- Judge Hatch is here-- and it was understood between us, agreed, in fact, between us, if Mr. Tanner and myself could not agree

on the duty of water-- we have agreed on the acreage, priorities and so on, and that they are as pleaded in our answer and counter-claim-- that we could take the matter up at Provo, and if we fail to agree then that either party might offer such proof as it saw fit. I am inclined to think that Mr. Tanner wants to examine the land and ditches a little further with a view to determining what, in his opinion, the duty of water is. I think we will get together without any difficulty, and, if we shall not, we will offer some proof at Provo.

MR. A. C. HATCH: I understand you have agreed upon the acreage and priorities of appropriation?

MR. KING: Yes.

MR. A. C. HATCH: The only question that will be submitted will be as to the duty of water on the land owned by your client.

MR. KING: That is all, and I am inclined to think if Mr. Tanner makes further examination we will get together,

MR. WAHLQUIST: In the matter of the Sunrise Company, I believe everything I was aiming to prove will be taken care of in the stipulation. If the court will permit me, I will introduce some proof in the matter of the Midway Water-works Company. I had expected these matters would come up in the order and therefore I am not prepared with all the witnesses, but if I may introduce such as I have, it will save bringing such witnesses to Provo and introduce further proof there.

THE COURT: Very well.

ALFRED L. ALDER, called by the Midway Water-works Company, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Wahlquist.

Q. What is your name?

A. Alfred L. Alder.

Q. Where do you reside?

A Midway.

Q And are you in any way connected with the Midway Water-works Company? A. Yes sir.

Q In what capacity?

A I am president of that company.

Q Is that company a corporation? A. Yes sir.

MR. WAHLQUIST: Will you admit that, Judge, or require proof?

MR. A. C. HATCH: Yes.

Q How long approximately has the Midway Water-works Company been in existence as a corporation?

A I cannot say definitely, somewhere around about sixteen years.

Q In the complaint in intervention, paragraph C, you allege that it came into existence on or about the 15th of July, in 1895, that would be about nineteen years?

A Perhaps that is--

Q Or twenty-one years, I should say.

MR. A. C. HATCH: That is approximately the date of their incorporation.

MR. WAHLQUIST: I got that from the papers on file.

Q For what purpose did the Midway Water-works Company organize?

A To furnish domestic waters for the city of, town of Midway, all culinary purposes and for town use of the town.

Q Prior to the organization of the company what water was used by the citizens of Midway?

A They took it out of their irrigating ditches, as domestic streams, they term them. Every place had a little stream to furnish water.

Q And what water is being used by the Midway Water-works Company since its organization?

A What is known as the Gerber spring.

Q Are you familiar with the proceedings whereby the water-works company acquired title to the Gerber spring?

A In a general way, yes sir.

MR. A. C. HATCH: If the court please, I don't

think that is material, we will admit they have been using the water in their pipes to the capacity of their pipes for twenty years last past in the town of Midway from the Gerber spring. As to how they acquired it-- they are entitled to the use of whatever they have used.

MR. WAHLQUIST: We are a good deal like Provo, we cannot concede we shall be limited to what we have used, because that would mean the town of Midway must grow no larger than it is today.

THE COURT: How much do you claim in addition?

MR. WAHLQUIST: We claim the whole of that spring of the Gerber spring. I want to show how we became-- approximately what the amount of it is.

THE COURT: Is the Gerber spring part of this water system?

MR. WAHLQUIST: I think originally it was.

Q Was the Gerber spring originally a part of the Provo River system?

A Yes sir.

Q What stream did it enter into?

A It run into an irrigating ditch. Originally it run directly to Snake creek, which is a tributary of Provo.

Q In making the exchange, who did you acquire it from?

A From the Midway Irrigation Company.

Q What were the terms of the exchange?

A They traded their domestic rights for all these various ditches, numerous ditches, for this spring, in order to conserve water and use it more carefully. They traded all these little domestic streams for water to supply the city.

Q Have you up to now been able to use the whole flow of the Gerber spring in your system?

A No sir.

Q What has been done with the excess flow of the Gerber spring?

A We have rented it to the Midway Irrigation Company.

Q Has the Midway Irrigation Company been paying you an annual

rental? A. Yes sir.

Q For the use of the excess waters of the Gerber springs?

A Yes sir.

Q Has the system as yet been extended to the extent that it was contemplated at the time of the organization of the company and the purchase of the spring?

A No sir.

Q What has been done by the Midway Water-works Company towards making an appropriation of the water and completing its system?

A Speaking of it since I have become interested in the company, last five years, we have built a cement tank at the head of the spring, right against the mountain that receives the spring into the tank, so everything flows in the tank to insure a constant supply of water to the system. We put in an eight inch intake pipe for a short distance, then we have run three thousand feet of six inch pipe, and we hope to run that on down this fall to complete the system. We have never had enough water in Midway yet since we have had the system.

Q That is, the residents have never been supplied with all they needed?

A Never have given them sufficient water, all they needed.

Q But that has not been by reason of shortage in the spring, but your system has not been large enough to carry it?

A It was a long haul, and we did not have money enough to built the right system.

Q Do you recall what size pipe was first put in?

A Yes.

Q What?

A A three inch pipe flowed all the water we got in the original system. Started off with a four inch pipe, then it was reduced to a three before we hit our first lateral.

Q You have since extended.-

A Three thousand feet.

Q I will hand you an instrument marked by the stenographer

Exhibit "D", and which purports to be a map of the Midway water-works system, and ask you if you ever seen that map before?

A. Yes sir.

Q Do you know who prepared it? A. Yes sir.

Q Who?

A George Barzee.

Q Did you assist in making the surveys from which it was prepared?

A. Yes sir.

Q Does that show the present extent of the Midway Water-works system?

A. No sir.

Q Doesn't it show the entire present extent?

A No sir.

Q What is shown here?

A Just shows the main line from the spring until it hits one of the main laterals in the system. When the system is eventually completed it will flow down what is known as Spring Town, down below the town.

Q Parties down in that portion you call Springtown are owners of capital stock in the system?

A Yes sir, it runs down below the town through all these various blocks. This is just showing the fall and length of our main line and the blocks in the town.

Q And it is the intention of the corporation to eventually supply all its shareholders?

A All of its inhabitants down here who have not yet received the water.

Q Do you sell any water to other parties that are not stockholders?

A The company is not organized for commercial business, it simply supplies renters. Where a family comes in there and has no stock, they will rent the water.

Q That is, residents of Midway?

A That is residents of Midway only.

Q Within corporation limits? A. Yes.

MR. A. C. HATCH: Outside of the corporate limits also.

Q Do you extend the system to renters, non-stockholders, outside of the corporate limits?

A We never have.

Q Now, coming back what is the approximate flow of the Gerber spring?

A About two second feet.

Q Do you know whether or not it has ever been measured by engineers?

A I tried to get Mr. Barzee to measure it, but it is very difficult proposition. It flows out of the mountain and into this tank.

Q But the whole spring now flows direct into the tank?

A At the very extreme head it does.

Q What goes to the Midway Irrigation Company is what flows-- the overflow from the tank?

A Yes sir.

Q For that they pay you a rental?

A They pay us a rental.

MR. WAHLQUIST: I offer this in evidence, Exhibit D, on behalf of the defendant Midway Water Works Company.

THE COURT: It may be received.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q How many inhabitants are there that can be supplied by the water system?

A Approximately between a thousand and eleven hundred.

Q At the present time?

A At the present time.

Q That would include all of the residents below the Gerber spring on the west side of the Provo River in this valley, would it not?

A No sir, I don't think it would.

Q How many are there that could be supplied from your system with

water?

A I would judge about twelve hundred.

Q You don't know?

A I don't know definitely.

Q How many are now being supplied?

A There is about nine hundred and fifty, I think.

Q You think there are one hundred and fifty that should be that are not supplied?

A. Yes sir.

Q Do you have any idea of the quantity of water necessary to supply the people to whom it is furnished at the present time?

A Where they have all those herds of stock in the winter to water as well as the people, I am afraid a six inch pipe would not haul enough, still it was all we were able to put in at present.

Q I thought you said an eight inch pipe?

A That was just at the intake, Judge, just a short distance to feed the intake pipe.

Q You don't know-- any idea of the quantity of water that flows in that pipe?

A We have had engineers tell us, but I haven't the knowledge.

Q What engineer?

A Some Salt Lake engineer, some of the best we could get down there, I forget his name.

Q Did you ever have a measurement of the Gerber spring flow from the Gerber spring?

A In the interest of the Midway Irrigation Company we measured at it a time or two.

Q You never have used all of the water of that spring for any purpose, your company, have you?

A We could not haul it.

Q Sir?

A We were not able to haul it, did not have a system to haul it.

Q And your present system won't haul it?

A I don't know until we get it completed just what portion she will haul of it.

Q Your eight inch pipe that you have at your head will not carry the waters that flow from the spring, will it?

A If it were disconnected at the eight inch pipe she would pretty close haul it.

Q You think if it was just an eight inch pipe a few feet long, all the water of the spring would flow through it?

A Yes, x all that is now flowing in the tank, I think it would nearly haul it.

Q And without any pressure, would it?

A It would have a certain pressure, tank being full.

Q How deep is the tank?

A How is that?

Q How deep is the tank?

A It is about nine feet.

Q And what is the shape of it-- oval in the bottom?

A Square in the bottom.

Q Square tank?

A Square tank.

Q Why do you say the flow of that spring is about two second feet?

A I have had those engineers estimate at it, and guess at it. That is what we have always considered it to be.

Q You heard the testimony of Jorvis, did you not, in the Midway Irrigation suit as to the flow of that spring?

A No sir, I wasn't present.

Q What engineer did you have here say it flowed about two second feet?

A George Barzee was one, and this Salt Lake engineer, I can't call his name, told me it was about two second feet, as near as he could estimate it.

Q What proportion of the waters of the spring has the Midway Water Company ever used itself through its pipes?

A It is a hard question. Could I refer you to a pipe there. That is a technical question, I can't answer that exactly. Used all the pipe would haul, pipes we had in. I think it would go through a three inch pipe under the pressure.

Q You don't know what the head is, do you, on a three inch pipe?

A That plan tells you the fall.

Q Probably your engineer can answer those questions.

MR. WAHLQUIST: He can, if we can reach him. I was under the impression the court wanted to get away on the train, and I put in as much as I can.

Q The Midway Irrigation Company and the Midway Water Works Company are composed of practically the same stockholders, are they not?

A To a certain extent.

Q When they were exchanging their irrigation streams for this Gerber spring they were trading with themselves?

A No sir, not in that sense.

Q Agreeing to seek the use of the irrigating stream and take it through the pipe from a cleaner, purer source?

A I would like to answer that question in my own way.

Q Yes sir, I have no objection.

A Out first stockholders in the irrigation company today live down on the bench south of Midway.

Q Pardon me, I am speaking of the time this exchange was made.

A Well, conditions existed the same then as now.

Q Very well.

A And they are not interested in the Midway Water Works Company. Largest stockholders in the Irrigation Company are not parties in the Water Works Company. They are two separate companies.

Q How many of those larger stockholders are there?

A Well, there is quite a number of them.

Q Isn't ninety per cent of the owners of the Midway Water Works Company stockholders of the Midway Irrigation Company?

A I don't think that many, Judge. I judge about eighty per cent.

REDIRECT EXAMINATION by Mr. Wahlquist.

Q And you mean eighty per cent of the stockholders, not the owners of eighty per cent of the stock?

A I didn't catch you.

Q I say you mean there are about eighty per cent of the stockholders that are members of the Irrigation Company, and not the holders or owners of eighty per cent of the stock?

A No sir, I mean eighty per cent of the Irrigation Company owners own stock in the Midway Water Works Company.

Q That is those who represent eighty per cent of the Irrigation Company's stock? A. Yes sir.

Q Would be also interested--

A In the water works.

Q But they are owners in the Irrigation Company as small holders, compared with some larger owners who are not in the Water Works Company?

A Yes sir, great many cases.

MR. WAHLQUIST: I have here an annual report of the water commissioner of ~~the~~ Wasatch County for the year 1902 that shows that said water commissioner made a measurement of the Gerber spring on August 6, 1902, and determined the water to be 2.21 second feet. I would like to introduce that, if you have no objection.

MR. A. C. HATCH: Who was this commissioner?

MR. WAHLQUIST: O. J. Call.

MR. A. C. HATCH: We object to that, he was not a commissioner of this court.

MR. WAHLQUIST: No, he was county water commissioner.

MR. A. C. HATCH: Object to it as not the best evidence. In fact, we do not think it is any evidence of the quantity of water in the spring.

MR. WAHLQUIST: It is the only evidence we have of any measurement ever being made of the stream.

MR. A. C. HATCH: Object to that, it is now shown he is competent.

MR. WAHLQUIST: He is in Idaho, and I could not get him.

MR. A. C. HATCH: He was not in Idaho two days ago, he was in Heber City.

MR. WAHLQUIST: Yes, he was in Heber City Saturday, I think.

THE COURT: Objection is sustained.

MR. WAHLQUIST: I have two other witnesses, but their testimony would be simply corroborative.

THE COURT: Then that is all except the stipulation.

MR. CHASE HATCH: I have one witness I could put on in relation to those lots.

ANTONE OLSEN, called and sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Chase Hatch.

Q You are the Antone Olsen who was one of the defendants in this action? A. Yes sir.

Q And are you the owner of the north half of Lot 1, in Block 75 of Heber City Survey? A. Yes sir.

Q And do you know who is the owner of the south half of Lot 1? A Mrs. Olsen, that is Betsey Olsen.

Q One of the defendants here? A. Yes.

Q When you acquired those lots from whom did you acquire them? A Anderson.

Q And have you any water right, or shares in the Wasatch Irrigation Company covering that ground?

A I should have.

Q Was the stock ever issued to you by the company?

A NO.

Q And for that lot have you any credit on the books of the company?

A I don't know how that is. I get my water ticket every year, so I must have.

Q But you have used water on there for how long?

A Three or four years, ain't it, something like that, four years. On the half of the lot where the house is standing, I have used it for the last fifteen years.

Q That is all I am talking about, is the half of the lot, and that half of the lot did you ever receive any interest in the Wasatch Irrigation Company for it, that half lot where your house is standing?

A No, I have no paper.

Q But you have been issued a ticket by the city watermaster?

A Yes sir.

Q And received water through the Wasatch Canal Company?

A Yes sir.

Q And for that half of the lot how much water have you received?

A Seven-twelfths of a share.

Q Seven-twelfths of a share? A. Yes.

Q For a half of the lot? A. Yes.

MR. CHASE HATCH: I will say, your Honor, we will ask to put the secretary of the Wasatch Canal Company on as to the interest shown by the books if we can get him here in time.

MR. WAHLQUIST: This is the claim of Nels J. Johnson. I will put in some proof on that. I will say in explanation that Mr. Nels J. Johnson came in as an interpleader. He was not served in the first instance, and ask either that his right to the use of the water of Provo river and its tributaries and springs for the purpose of running a flour mill be adjudged and that he disclaims any interest in the water for any purpose except power purpose running through his mill.

NELS J. JOHNSON, called in his own behalf, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Wahlquist.

Q What is your name?

A Nels, Joseph Johnson.

Q Where do you reside?

A Midway.

Q What is your business?

A Running a flour mill.

Q Where is your mill situated?

A It is situated in Midway between Heber and Midway.

Q What is it known usually?

A Peoples Roller Mills.

Q With reference to Provo river where is it situated, how far from the river?

A Well, it is situated I guess less than a quarter of a mile from the river.

Q And which way from the Heber-Midway road?

A West.

Q On which bank--

A It is between the Heber and Midway road, up on the north of the road.

THE COURT: I saw it yesterday, large, big square building.

A Yes sir.

Q To the west side of the river? A. Yes sir.

Q You read the complaint that you have filed here, did you?

A Yes sir.

Q And the description of the land in that complaint, what does that include?

A I could not say as to the description of the land.

Q Not by directions, but what piece of ground is described in that; is it your mill and mill pond?

A There is a mill and mill pond.

Q You have a deed for it?

A Yes sir, but I couldn't say, I haven't read that for a long while, I could not give the description of that.

MR. WAHLQUIST: I think that is undenied, that is a correct description.

Q Where do you get the water for supplying the power to run your mill?

A We get the water, part of it, out of the main Provo river, and the other part out of what they call the Birkamshaw springs, I guess, known as the Birkamshaw springs. There is a stream comes from the river tunnel or gulch tunnel, in a branch like that cuts off, that runs in where the springs are. Then we take that, put a dam across that part of the river-- I suppose you would call it part of the river.

Q About how long is your canal there down from your mill dam to that?

A I think it is about a mile.

Q Are there more than the Birkamshaw springs come into it during the irrigation season? A. Yes sir.

Q It catches other seepages?

A It catches other seepages, and then I have a pipe into the main river. way up farther than that, twenty-four inch diameter pipe. I and some of the people use the water for irrigation purposes above.

Q They use the same ditch?

A Same ditch, yes sir.

Q How much water do you use in your mill for running your mill?

A Well, I think the capacity of the wheel is about twelve second feet. We run about 40 horsepower.

Q Prior to your connecting up with the river, did you at any time have to shut your mill to let the dam fill up?

A Yes sir, at times we had to do that.

Q Since you connected up with the river, did you find it necessary at any time to close down and let your dam fill up?

A Not when the reservoir water is running. We can get all the water we want then.

Q That is, even during the extreme low water?

A Yes sir, and there is really no need of interfering with anybody.

Q What means have you for regulating the flow and preventing it from standing in your mill pond, and shutting off?

A We have a gate, a regular gate, and try to keep the mill pond full.

Q And spillway?

A And spillway, yes sir, besides the water wheel.

Q Where does the water that flows over the spillway unite with the water that flows through your wheel?

A Goes back into the river just a short distance, probably two or three hundred yards.

Q Does the water from the spillway commingle with the water that passes through the wheel before it reaches the river?

A No sir.

Q Runs direct to the river?

A Runs direct to the river.

Q And the water that runs through the wheel, what becomes of that?

A Goes, I think, to the river.

Q How far apart is the mouth of those two different channels?

A I suppose they would be two or three hundred yards.

Q Not two or three hundred yards?

A Yes, one runs up the river farther, and the other down the river.

Q Are they both above the lower Midway dam?

A Yes sir.

Q Is there any water taken out for irrigation purposes between where the upper and lower one goes to the river?

A No sir.

Q So that it makes no difference which channel the water flows through, so far as affecting people for irrigation purposes?

A Doesn't make a bit of difference.

Q What, in your opinion is the difference as to loss by having sufficient head of water so that there is some running out all the time, or having it shut off dead, and accumulating part of the time?

A That is a question I cannot answer and answer correctly.

Q You have never experimented?

A I have never experimented with it, but I have never heard any complaint as to that, and when the water man has been measuring the water down below me, I have never heard one of them find

fault with it. I have tried to carry the water as near regular as possible.

Q Prior to the time you connected up with the river, did you ever have any complaint about filling up your mill pond?

A Yes sir, the ditch below has made complaint to me several times about holding the water.

Q How long since you quit doing that by connecting up with the river?

A I don't think they have made any complaint in the last five or six years.

Q You have been taking water from the river in low water season?

A We have always taken all we could get from the river. Of course, when the reservoir commenced running in they have more water than we could use.

Q That has been during the later season?

A Later season, yes sir.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q You had your intake from the river at the time the mill was built?

A Yes sir.

Q But you didn't have sufficient water--

A I have been there thirteen years, and since the thirteen years that I have been operating the mill, there has been times, I expect, that we have been connected square up to the river, that is to make a regular dam through into the river, but in a few years, or a year or two after that, we did, I and the farmers there, and we have taken the water out from the river all that come down, but some seasons there has been but very little coming down.

Q Now, you are saying a lot of things you said before, I wanted to ask you a question.

A Yes sir.

Q Did you have sufficient water during the entire year to run your mill without holding it back in the pond?

A No sir.

Q And you had not that quantity during the low water season until the reservoirs of the plaintiff-

A No sir.

Q Were built. Since then you have had plenty of water?

A Yes sir.

Q By diverting the reservoir water and using it through your mill?

A Yes sir.

Q About how long a period was the low water such during each of the years that you had to hold the water back in your pond in order to get sufficient supply?

A Well, Judge, I can't answer that just as it ought to be answered for this reason, there is some seasons we have had more rain and had more water. Now, I could not say the season, but a few seasons there has been a little while in August I have had to hold the water-- the first season I got the mill.

Q But there is plenty now?

A There is plenty now.

ALFRED L. ALDER, called by the defendant Nels J. Johnson, being duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Wahlquist.

Q What is your name?

A Alfred L. Alder.

Q Where do you reside?

A Midway.

Q Are you acquainted and familiar with the location of the Peoples Roller Mill? A. Yes sir.

Q And do you know what is the first ditch diverting water from the Provo river below where the water from the Peoples Roller Mill comes into the river?

A Yes sir.

Q What stream?

A Island Ditch.

- Q Are you interested in that? A. Yes sir.
- Q How long have you been so?
- A About fifteen years.
- Q Do you remember what the conditions have been during that time with reference to the mill interfering with the flow of the water?
- A Yes sir.
- Q What have they been?
- A Why, my early experience then there was considerable fluctuations of water. Mill would stop the water off and then it would come down with a rush, and gush, break through our dams and as a result, we did not water right, but of late years it has improved.
- Q In what manner?
- A We felt less fluctuation of that water.
- Q It keeps a constant flow?
- A Yes, to a certain extent. We have had some few fluctuations from time to time but not serious like it used to be.
- Q In your judgment would it be to the advantage of all parties concerned that the appropriator be permitted to use-- to divert a larger stream than actually necessary, so that there might be a continuous overflow over the spillway of the dam, and when the mill is closed it would simply mean turning the whole stream through the spillway?
- A It would materially assist us as water users if there could be something to regulate a steady flow.
- Q That is, to the advantage of the parties below using water that the flow should be left uninterrupted?
- A Uninterrupted.

MR. WAHLQUIST: That is all we have on this.

MR. HATCH: That I may understand-- I don't understand you are claiming a right to have a reservoir people furnish you a larger quantity, or any quantity of water from the reservoir to run the mill?

MR. WAHLQUIST: I don't know that we are if we are permitted to take all the water that belongs normally in the

river, and the Reservoir Company wants to go to the trouble of segregating that part of the water in the river that belongs to them from the part that is natural flow in the river, I presume we would be limited so far as actual right of appropriation is concerned.

THE COURT: I took Judge Hatch's question to mean this, whether you claimed the right to require the Reservoir Company to turn water out of their reservoir at any particular time for the use of their mill.

MR. WAHLQUIST: Certainly not, only we claim the right to use it when it is coming down the channel, commingled with the other waters of the river.

MR. A. C. HATCH: I would like to recall Mr. Johnson.

NELS J. JOHNSON, Recalled.

CROSS EXAMINATION by Mr. Hatch.

- Q How far below the Midway upper dam is your intake of your mill race?
- A Well, Judge, I couldn't answer that and do it correctly, because I have never been from my dam to the Midway dam.
- Q You have been across the river bridge leading from Midway to the Park City road, haven't you?
- A Yes sir.
- Q And you know where the intake of the Midway ditch is by that bridge, don't you?
- A Yes sir.
- Q Now, approximately how far is it from that point down to your intake of your mill, a mile or mile and a half, two miles?
- A Well, I wouldn't think it would be more than a mile and a half, but I have never been up that way.
- Q You don't claim the right to any except seepage and spring waters coming into the river below the upper Midway dam, do you?
- A. No sir.
- Q As of right. That is all.

MR. WAHLQUIST: That is all.

THE COURT: Is that all the evidence for the plaintiff, Mr. Wahlquist?

MR. WAHLQUIST: Yes, I think that is all I shall introduce with reference to Mr. Johnson.

MR. MCDONALD: We have a little evidence we might put in as to one item.

THE COURT: Very well.

JOHANNAHJ. C. ANDERSON, called in her own behalf being duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. McDonald.

Q What is your name?

A Johannah Anderson.

Q Do you own some land on Deer Creek in this county?

A Yes sir.

Q How much land do you own there?

A Two hundred and ten acres.

Q How much is there of that under cultivation or irrigated?

A I am not the engineer, The engineer was down yesterday, and he was to give a report to Mr. McDonald in three hours, and we can't find him. I got rights there and that belongs to me. That is what the patent is.

Q If you could tell the court as near as you can how much land has been irrigated there?

A I could not tell you this year because the reservoir --

Q Can you state about how much land is irrigated there? How much do you water?

A I think seventy acres, but I am not an engineer.

Q And how long has that seventy acres been irrigated?

A It has been irrigated, we have irrigated all we could since 1902.

Q Did somebody irrigate this land or a portion of it, before

you got it?

A Yes sir, Mr. Newall's father, he died, I guess, 1897, so he irrigated before that, he had irrigated.

Q We will prove that by other witnesses. Have you irrigated this land since 1902?

A Yes sir, all that we could until this year and last year. We have been tied, we have been put back.

Q Could you tell the court about the kind of land it is, is it all good soil or some rock in it, or what is the character of it?

A It is of different kind. I think it is the best place is the reason I fight for my right.

Q What kind of soil is it generally, gravelly, or is it clay, loam, what is it like?

A Finest land you can find, raise finest potatoes, and have planted first of June until now, planted some first of June was big now, I got some yesterday.

Q You say that you have irrigated this land since 1902 yourself?

A Yes sir, I helped make the ditches in 1902 when we buy it.

CROSS EXAMINATION by Mr. Thurman.

Q Just one question, Mrs. Anderson, how much land had been irrigated before you went there?

A Pretty near the same as it is now, because we can stop it back.

Q Pretty near seventy acres?

A I could not tell, pretty near the same because 1903 we got the same place, and Mr. Murdock got eleven bushels of oats for his cattle to come in and eat up.

Q That is all.

A No, I want to tell one thing if I can.

THE COURT: Go on and tell it.

A Mr. Murdock said to me last year he don't claim the water in Deer Creek spring, but I sent a letter to the governor, and the city commission call me to court for what my contract,

and they never told me, and I lost the case, so I am an owner of Deer Creek stream, and as user, and I take all my rights. I am willing to give them all down in the river, it is not mine, but the Deer Creek, it belongs to me. I said I have nothing to do with Mr. Murdock, here is my witness. (Unintelligible)

MR. A. C. HATCH: Mrs. Anderson, I think the Judge understands it now.

WITNESS: You understand, and I have used the water twenty years. I have three witnesses here, Mrs. Newall and Mr. Wright and Mr. Bagley, from Charleston. Thank you, I hope I get my rights.

WILLIAM: BAGLEY, called by the defendant Johannah J.C. Anderson, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. McDonald.

Q State your name, please?

Q William Bagley.

Q Where do you live?

A Charleston.

Q Are you acquainted with the land Mrs. Johannah C. Anderson owns on Deer Creek?

A Yes sir.

Q How long have you known that land?

A How long have I known it; since '64.

Q Do you know whether or not any portion of it has been irrigated?

A Yes sir.

Q How long?

A I don't know as I can't tell right to the year, but somewhere about twenty-two years. William Wright had a crop there and irrigated it.

Q Do you know about how much he irrigated?

A No, I don't.

Q Can you tell the court, Mr. Bagley, about what kind of land

it is, what character of land, whether it is gravel or soil?

A There is a good many boulders like washes down these streams, and the soil, though, is fine, good soil, that is, with the exceptions of the rocks, good many rocks in it that could be taken out, and good portion of it that is taken out.

Q You say that the land, some portion of it has been irrigated for twenty-two years?

A Yes, some portions, I could not say the number of acres.

Q You don't know just the quantity of it?

A No.

MYRON C. NEWALL, called by the defendant Johannah C. J. Anderson, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. McDonald.

Q State your name, please?

A Myron C. Newall.

Q Where do you reside?

A At Provo.

Q Are you acquainted with the land of Mrs. Johannah C. Anderson on Deer Creek in this county? A. Yes sir.

Q How long have you been acquainted with it?

A About twenty years.

Q And can you say whether or not that land has been irrigated?

A I know some of it has.

Q Do you know how much of it?

A I could not say just how much.

Q Did your father or yourself own it one time?

A My father owned it and I was administrator after his death.

Q So all you know about it is there has been some portion of it irrigated for about twenty years?

A Yes sir.

Q Can you give the court any opinion as to the character of land it is?

A There is part of the land up on the bench that is sort of a sandy loam and down in the bottom it is streaky some places boulders, and be a spot of good ground. The soil, however, is very good soil, in the way of producing, I should judge.

THE COURT: Water for irrigation comes from Deer Creek?

A Yes sir.

WILFORD D. WRIGHT, called by the defendant Johannah C. J. Anderson, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. McDonald.

Q State your name, please?

A Wilford D. Wright.

Q Where do you reside?

A Charleston.

Q Are you acquainted with the land on Deer Creek owned by Mrs. Johannah C. Anderson? A. Yes sir.

Q How long have you known the land?

A Well, pretty near very much all my life you might say I know the land.

Q Put it in years then the reporter can get it.

A It has been used, part of it, about twenty-two years.

Q Do you know whether some portions of it have been irrigated?

A That is what I am referring to, some of it at least has been irrigated about twenty years.

Q And, can you give the court any information as to the quantity?

A Not as to any more than a few acres, all I know of at that time.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q About how many acres, when you say a few acres, about how many acres were irrigated twenty years ago?

A About three or four acres about twenty years ago.

Q Do you know how much was irrigated seven or eight years ago?

A No, I don't.

Q Approximately?

A Well, I couldn't hardly say, because I have not been interested down that way since.

Q And have not been out over the land?

A Not in eight years, I have not.

JULIUS C. ANDERSON, called by the defendant Johannah J. C. Anderson, being first duly sworn, testifies as follows:

DIRECT EXAMINATION By Mr. McDonald.

Q State your name?

A Julius C. Anderson.

Q You are a son of Mrs. Anderson? A. Yes sir.

Q Do you know anything about how long the land in Deer creek, owned by your mother, has been irrigated?

A Well, I think it has been irrigated between twenty and twenty five years.

Q Can you give the court any information as to the quantity?

A No, I could not, I could not give any exact acreage, I only know what they have told me.

Q You have no estimation of your own?

A I could not give an estimate of my own.

Q I will ask you if you were present at any time down in Provo and heard a conversation between your mother and Mr. Murdock relative to the waters of Deer Creek?

A Yes sir.

Q What was it?

A Why, mother was in Mr. Murdock's office, and talking to Roy J. Murdock the secretary, about her water claim, and during the conversation Roy Murdock made the statement that they did not claim any water from Deer Creek.

MR. McDONALD: That is all, your Honor. I will ask to file the answer of Johannah C. Anderson when I go to Provo.

THE COURT: You may have permission to file it.

MR. WAHLQUIST: I will ask permission to withdraw Exhibit D, I believe it is called, of the Midway Water Works Company, and have a blue print prepared for filing in the files.

THE COURT: Very well, you may substitute a blue print copy, You should substitute it before the case is concluded so that if a bill of exceptions is necessary, it will be there as part of it.

MR. CHASE HATCH: I have one set of defendants I can prove up now if you care to hear them. It is Joseph Hatch, Abram C. Hatch and others, who were substituted in lieu of Abram Hatch and Ruth Hatch as executors. Call A. C. Hatch.

A. C. HATCH, called by the defendants Joseph Hatch et al, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Chase Hatch.

- Q You are the A. C. Hatch named as a defendant in the separate answer filed as a substitute to the answer of Ruth Hatch and Abram Hatch executors?
- A Yes.
- Q Who succeeded to the interest of Abram Hatch in the property known as the Heber City Mills?
- A Myself, Joseph Hatch, Lucy Farnsworth, John Turner and Minnie Dodge, my brother and three sisters, as children of Abram Hatch. We are now the owners of the Heber City Mills and the land upon which it is situated, twenty acre tract.
- Q By virtue of a decree of distribution in this court on file here?
- A Yes.
- Q What water right out of the Provo River did you succeed to with that property?
- A An interest in the Wasatch Canal, giving to the mill owners a right to flow water from the Provo river through the canal and through its mill, through the mill for power purposes

during the entire year.

Q And when was that right acquired by your predecessor in interest?

A At the time of the construction of the Wasatch canal by building a portion of the canal.

Q Approximately how many years ago?

A Oh, thirty-five or forty years ago, I have forgotten.

Q Do you know whether or not that right has been used continuously?

A It has been used during the irrigation season of every year, that is, during all the time that the water was used through the Wasatch canal for irrigating purposes, and nearly every year up to about the first day of December, when the water would freeze up in the canal, and the snow fill it up, so that it was practically impossible to convey water through it, but during several years the water was kept running through the canal during the greater portion of the winter months.

Q And would be used again in the spring as soon as it could be conveyed through the canal?

A As soon as the ice would permit water to be run through the canal in the spring. I will say in connection there with that during the non-irrigating period beginning by stipulation with the water owners to certain streams arising in the mountains east of Heber City and flowing down to Heber City and to the farmers lying east of and above the mill the waters of those streams are diverted back into the natural channel and from there to the mill-- streams and springs, and used during the winter-- fall, winter and spring months of every year, and the quantity in the Wasatch Canal used by the mill after the irrigation season is over is reduced so as to supply only the deficiency, or the quantity not sufficient coming from those springs and streams mentioned.

Q After flowing through the power wheel of this mill, where does this water go?

A Part of it goes to Heber City for irrigation of the city, all that is used for irrigation purposes within Heber City flows through the mill wheels and part of it is conveyed to farms

south and southwest through the laterals of the Wasatch canal for the irrigation of farm lands.

Q Does any part of it after going through the mill go into any other channel than some of the laterals or ditches of the Wasatch Canal Company?

A During the winter season it flows into what is known as Spring creek and goes directly into the Provo river.

Q That is after all irrigation has ceased?

A Yes; during the irrigation season all of the water is carried from the mill through the laterals of the Wasatch canal, to the users of water for irrigation purposes through the Wasatch canal.

Q Do you know as to the quantity of water-- do you know whether the quantity of water being used during the present season and running through the wheel is approximately the same as the water that has been used during each season?

A Well, I think it is somewhat less now than has been prior to two years ago used at the mill, because of improved method of putting it to the wheel-- our wheels-- and better dams made at the mill ponds.

Q Do you know whether or not the quantity being used during the present season has been sufficient to furnish power for the full capacity of the mill?

A It has.

Q And that is all of the water right claimed by you and the co-defendants named in this particular separate answer for that mill property out of the Provo river system?

A Yes. I would like to add that we claim the right to the use of the water of the Wasatch canal irrigators to the capacity of the mill during the irrigation season.

T. F. WENTZ, called by the defendants Abram Hatch et al, testifies as follows:

DIRECT EXAMINATION by Chase Hatch.

Q Have you been sworn, Mr. Wentz?

A Yes.

Q You are the water commissioner appointed by the court for this Provo river system? A. Yes sir.

Q Have been acting as such for what length of time?

A 1915 and '16.

Q Are you acquainted with the mill race and wheel at the Heber City mills, located east of Heber City in Wasatch county?

A Yes.

Q You are an engineer by profession? A. Yes.

Q Have you made any measurements of the flow of water through the mill race or wheels of the Heber City mills?

A Yes.

Q When?

A On the 29th day of July, 1916.

Q State to the court the result of your measurements and investigation?

A The first measurement I made was with the mill running on partial load, not a full load on, that is, the chopper was not working, and the discharge through the wheel and tail race was 15.69 second feet. The mill on full load with the chopper running, the discharge through the wheel and tail race was 18.04 second feet. The operating head while the mill was running on full load, was twenty feet, seven and one-half inches. On examination of the wheel and the surroundings of the mill, there is no loss of water whatever. Every particle of water that enters through the headgate to the wheel goes through the wheel. The intake pipe is a thirty-six inch steel pipe. Outlet pipe twenty-four inch steel pipe. The wheel is a McCormick Turbine 15.

THE COURT: What was this twenty feet, seven and a half inches?

A That is the operating head.

MR. A. C. HATCH: If the court please, I do not deem it necessary at this time, probably not necessary at all-- we

have written agreements and stipulations with different parties with regard to the use of this water. I do not take it it has anything to do with the case.

THE COURT: Your agreements are with parties interested in the Wasatch Canal Company?

MR. A. C. HATCH: And the springs above.

THE COURT: I would not think it would interest anyone else, or affect anyone else.

(Recess to 7:30 P.M.)

THE COURT: Court may be regarded as in session, and you may proceed with your reading of the stipulation.

MR. THOMAS: Thomas and Soule, representing the South Kamas Irrigation Company, Washington Irrigation Company, James Prescott, Ernest J. Prescott, William L. Prescott, Hattie J. Prescott Page, Martha E. McNeal, Nephi Moon, Heber Moon, Hyrum Moon, John Swift, Mary E. Pace, Christy Bisel, William Lewis, Samuel Gines, Sr., Ellen Gines, Samuel Gines, Jr., Charles L. Gines, Abram Gines, James Leffler, Marshall Leffler, Moroni O. Turnbow, William Lemon, James A. Knight, R. W. Barnes, Riley Fitzgerald, Ether Webb, John D. F. Bradshaw, Ernest Will Horton, George R. Hartiman, Ole W. Larsen, Rasmus Larsen, Fred A. Peterson, Mary E. Pace, Mary A. White, Mary A. White, administratrix of the estate of Thomas H. White, deceased, Mins Lark, Mins Lark, administratrix of the estate of William Lark, George O. Ellis, Henry Fraughton, Julia Potts, William Moon, Benjamin Turnbow, Frank Turnbow, Abram Leffler, Abram Leffler, Jr., James Duncan, John Leffler, S. A. Peterson, and, I think some heirs of, I think it is William Prescott, deceased-- we just learned today that the estate of Prescott, deceased had never been administered, and we are representing some of the heirs, and we wish it understood now that when the administrator is duly appointed that we will enter the stipulation for him, and we hope to have that attended to very shortly.

MR. THURMAN: With Judge Hatch and others, I appear for the plaintiff Provo Reservoir Company, and I separately appear for the Timpanogos Irrigation Company, and the Extension Irrigation Company.

MR. WAHLQUIST: I appear for the Sunrise Irrigation Company, and also for the Midway Irrigation Company. That is as far as the parties I represent are interested in this stipulation.

MR. THOMAS: May it please the court, Christina Fraughton is the successor in interest of Henry Fraughton. Henry Fraughton died since the institution of the suit, and prior to his death conveyed his interest to Christina Fraughton.

THE COURT: Now, I take it you may proceed with the reading of the stipulation.

MR. WAHLQUIST: Just a moment. Mr. McDonald has taken an active part in preparing the stipulation, and should be here.

MR. THURMAN: He should be, and probably will be.

THE COURT: You may proceed with reading the stipulation, and Mr. Willis, I take it took some part; did he have some interest in it?

MR. WAHLQUIST: I thought he did.

THE COURT: When they come in they can enter their appearance in connection with it.

MR. A. C. HATCH: Chase Hatch represents several parties who were also parties.

MR. THURMAN: We will ask Mr. Wentz to read the stipulation, if he will, just after the title.

MR. WENTZ: (Reading) It is hereby stipulated by and between the parties hereto by their respective counsels whose names are subscribed to this stipulation, that when the decree is entered in this cause the waters of the Provo river and its tributaries awarded to the parties to this stipulation shall be as hereinafter stated.

Paragraph 1. That as to priority of right the findings

and decree of the Fourth District Court in and for Wasatch County State of Utah, in the case of the Wasatch Irrigation Company et al, vs. Edward M. Fulton, et al, entered May 6, 1899, be adopted as defining the rights of the parties to this action named in said decree from first to tenth class rights, inclusive, said waters to be measured at the head of the laterals.

Paragraph 2. That the Spring Creek Irrigation Company is entitled to a first class water right of one second foot for sixty acres of land irrigated for seven hundred and twenty acres--

MR. WAHLQUIST: Probably these other parties could enter their appearance now.

MR. MCDONALD: I appear for the Wasatch Irrigation Company, the North Field Charleston Irrigation Company, and Mary Davis, George Jordan, John A. Johnson, Phillip L. Ford, Levi M. North, Thomas Winterton,

MR. A. C. HATCH: Those parties are not parties to the stipulation.

MR. MCDONALD: North will be. He owns the Dillon place up here. Strike out the name of Thomas Winterton. Joseph Morris. I believe I appear for the Sage Brush Irrigation Company, and, I believe, the Spring Creek Irrigation Company, but I am not sure.

MR. CHASE HATCH: Thomas Lowry, Samuel Lowry, E. D. Hatch, Vermont Hatch, Joseph Hatch, A. C. Hatch, Minnesota A. Dodge, Lacy H. Farnsworth and Jane H. Turner. The last five names are copartners running the Heber City Mill.

THE COURT: Now, Mr. Wentz, you may proceed with the reading of the stipulation.

MR. WENTZ: (Reading) I will give paragraph 2 again.

That the Spring Creek Irrigation Company is entitled to a first class water right of one second foot for sixty acres of land irrigated for seven hundred and twenty acres; and the parties above the Midway upper dam that

were not included in the Fulton decree that appropriated waters from Provo River and its tributaries prior to the filing of said decree are entitled to one second foot for seventy acres of land as irrigated at the time of said appropriation, and are entitled to be included in the classes of said decree according to its date of appropriation as classed in said decree.

Paragraph 3. That John A. Johnson is entitled to one and one-half second feet of water for ninety acres of land as a first class water right and Phillip L. Ford is entitled as a first class water right to one second foot ~~foot~~ for the sixty acres of land irrigated by him; both of whom take said water from the river at the upper Midway dam.

Paragraph 4. That the Midway Irrigation Company and the parties whose waters the said company controls and distributes are entitled to, (a) five and one-half second feet of water as described in the said Fulton decree as coming from the Ontario Drain Tunnel, which is not a part of the natural flow of Provo River, to be diverted and measured at the Midway upper dam; (b) A first class water right to the waters of Snake Creek, Pine Creek and all springs heretofore used by them, and two and a half second feet of the waters of Provo river to be diverted at the Midway upper dam, or such portions thereof which, when added to the five and a half second feet of Tunnel water heretofore specified, will not exceed a quantity greater than one second foot for sixty acres of land irrigated for three thousand five hundred and eighty-five acres, exclusive of the Island Ditch acres.

Paragraph 5. That the foregoing quantities constitute the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth classes of water of the parties to this cause that divert and appropriate the waters of Provo River and its tributaries in Wasatch and Summit Counties.

Paragraph 6. That whenever the water flowing in said river and the canals of the parties heretofore stated exceeds in

volume the aggregate of the quantities hereinbefore specified, then the parties to said findings and decree referred to in paragraph 1 hereof, are entitled to one second foot of water for each sixty acres of irrigated land.

The foregoing amount is denominated as the eleventh class.

Paragraph 7. That whenever the water flowing in said river and the canals of the parties heretofore stated exceeds in volume the aggregate of the quantities hereinbefore specified, the Sage Brush Irrigation Company is entitled of such excess to one second foot of water for sixty acres of land irrigated, for five hundred acres.

The foregoing amount is denominated as the twelfth class.

Paragraph 8. That whenever the water flowing in said river and the canals of the parties heretofore stated exceeds in volume the aggregate of the quantities hereinbefore specified, the Midway Irrigation Company and parties whose waters the said Company controls and distributes, are entitled of such excess, in addition to the quantity specified in paragraph 4, to be diverted at said upper Midway dam, to twelve and seventeen one-hundredths second feet, or such portion thereof which when added to the quantity specified in paragraph 4 as is necessary to and will not exceed a quantity greater than one second foot for sixty acres of land irrigated as specified in paragraph 4.

The foregoing is denominated as the thirteenth class.

Paragraph 9. That whenever the water flowing in said river and the canals of the parties heretofore stated exceeds in volume the aggregate of the quantities hereinbefore specified as belonging to the parties above named, the following named parties are entitled of such excess to the following quantities:

(a) The Stewart Brothers ten second feet for the irrigation of six hundred acres of land.

(b) The Timpanogaw Irrigation Company, thirty-three and

thirty-three one hundredths second feet for the irrigation of two thousand acres of land.

(c) The Extension Irrigation Company, thirteen and $33/100$ second feet for the irrigation of eight hundred acres of land.

(d) The Sunrise Irrigation Company two and $4/10$ second feet of water for one hundred and forty-four acres of land.

The foregoing quantities are denominated as the fourteenth class.

Paragraph 10. That whenever the water flowing in said river and the canals of the parties heretofore stated exceeds in volume the aggregate of the quantities hereinbefore specified, the Midway Irrigation Company and the parties whose waters the said company controls and distributes, are entitled to twenty second feet of such excess, to be divered at the Midway upper dam, in addition to the quantity specified in paragraphs 4, and 8, or so much thereof as is necessary to supply to the three thousand five hundred and eighty-five acres of land above the Island Ditch one second foot for sixty acres of said land.

The foregoing quantities are denominated as the fifteenth class.

Paragraph
/ 11. That whenever the water flowing in said river and the canals of the parties heretofore stated exceeds in volume the aggregate of the quantities hereinbefore specified, the lands in Wasatch and Summit counties not included in the foregoing that have been brought under an appropriation prior to September 15, 1908, are entitled of such excess to an amount of one second foot for sixty acres of such irrigated land.

The foregoing is denominated as the sixteenth class.

Paragraph 12, During the period of September 15 to April 15 of the following year the parties to the above entitled cause in Wasatch and Summit counties and each of them, are entitled only to the use of such portions of the amounts heretofore specified as their necessities may require, not to exceed one second foot for each seventy acres.

Paragraph 13. That to control and distribute the waters of Provo River and to insure the full measure of service from the waters of said river to all the parties to the above entitled cause the water commissioner shall have reasonable discretion, but such authority shall not interfere with the rights specified in the first to sixteenth classes, inclusive, as hereinbefore stated.

Paragraph 14. That whenever the water flowing in said river and the canals of the parties heretofore stated exceeds in volume the aggregate of the quantities hereinbefore specified as belonging to the parties above named, the said parties and each of them are entitled in proportion to their respective quantities before specified, of such excess in any and all irrigation seasons from May 1 to August 10, to an amount which when added to the quantities hereinbefore specified will amount to one second foot for forty acres of such specified land; and when the volume of flow is insufficient to supply one second foot for forty acres of such specified land, but is more than sufficient to supply the sixteen classes aforesaid, such amount is to be distributed to the said parties and each of them in proportion to the quantities heretofore designated, each of them receiving the same amount of water per acre of said specified land; that is, the duty shall range uniformly from forty acres to sixty acres per second foot of water.

The foregoing is denominated as the seventeenth class.

Paragraph 15. For the purpose of designation the following districts are numbered:

From and including the Stewart Ranch down to the Hailstone ranch is designated as the First District.

From the Hailstone ranch down to and including the diversion at the upper Midway dam, is designated the Second District.

Paragraph 16. When the amount hereinbefore denominated as the seventeenth class is insufficient to supply the two districts

above named, the full amount of said seventeenth class, and prior to June 25 of any year, the first district shall have the right to its full amount of said class against the second district.

Paragraph 17. That whenever the waters flowing in said river and the canals of the parties heretofore stated exceed in volume the aggregate of the quantities heretofore specified and all the parties to this stipulation are being supplied with amounts of water not less than the quantities found to be necessary for their beneficial uses, the commissioner may extend the time limit specified in paragraph 16.

Paragraph 18. That whenever a party to this stipulation in Wasatch or Summit County, by mishap or accident to canal or ditch, or by conditions that cannot be controlled, is deprived of its quantity of water and is in danger of sustaining material loss, and for immediate use for a period of one rotation, needs a quantity of water greater than its proportion of the volume of flow, and such additional quantity can be given to such party without material injury to the other parties to this stipulation, then it shall be the duty of the water commissioner to supply said additional quantity from the waters in excess of the first to sixteenth classes, inclusive, before specified.

The water commissioner shall use due dilligence and discretion to give the parties hereto the maintenance and development of the Provo River and shall use his discretionary authority to maintain and develop such river and to advance and maintain the crop production that is dependent upon said river.

Paragraph 19. That, except as specified in (a) and (b), paragraph 4, fixing the point of measurement where the flow of water in a canal is diminished by conditions that cannot be reasonably avoided, there shall be added to the amount sufficient water to make up such losses. In case the flow of a canal is increased, such increase shall be counted as a part of such respective quantities so as to give to the parties at the head of the distributing laterals the quantities herein specified.

The quantity of loss or inflow provided for in this paragraph shall be determined by the water commissioner with the system in good working order and repair and in such condition as will reduce the losses to the lowest quantity practicable. Only the quantity of inflow that is available to the lands in the canal system as determined by the water commissioner shall be counted as a part of the quantity of inflow as herein specified. The allowable losses shall include only the actual, reasonable, unavoidable transmission loss, and no mechanical loss such as leaky gates, and shall extend only over a section of the canal that carries more than one irrigating stream, continuously.

Paragraph 20. That the plaintiff and any of the defendants to the above entitled cause having the right to store in their own several reservoirs the waters of Provo River shall have the right to release the water so stored by them and commingle the same with the waters of Provo River and recapture the same at their several points of diversion, any loss in transmission to be determined by the decree to be entered herein.

Paragraph 21. That the plaintiff and the defendants in the above entitled cause, having reservoirs in Wasatch or Summit County, that appropriate and store water under applications approved by the State Engineer of the State of Utah, have the right to store quantities of water in the high or flood water season that are in excess of the quantities herein awarded; said reservoirs are also entitled to store all the waters that can be stored in them between September 15 and April 15 of each and every year.

Paragraph 22. It is further stipulated and agreed that the parties hereto and the several corporations to the above entitled cause in Wasatch and Summit Counties that are above the upper Midway dam may at any time exchange water one with another when such exchange does not conflict with or impair the rights of the other parties to this stipulation.

Paragraph 23. It is further stipulated and agreed that whenever the quantity of water flowing in said river and in the canals of the parties entitled thereto is insufficient to supply the quantity of water herein specified to a class, then the persons and parties in said class entitled thereto as hereinbefore stated, shall have the same distributed to them pro-rata, according to the quantities to which they are entitled as hereinbefore stated.

Paragraph 24. It is further stipulated and agreed that the classes and parties herein named are entitled to the right to use the waters of said river in the order above named and no class or party in said class shall be entitled to the use of any such waters so long as the water flowing in said river and in said canal is insufficient to supply the preceding classes and parties herein with the quantity of water to which they are entitled as hereinbefore provided.

Paragraph 25. It is further stipulated and agreed that for the purpose of equitably dividing and distributing the waters of said river so that the parties interested therein as herein provided may receive the quantity to which they are entitled, none of the parties hereto shall have the right to extend the use of the waters awarded to them upon other lands than those now irrigated so as to cause the seepage or drainage therefrom to be diverted away from the channel of said river or from the lands heretofore irrigated thereby.

That so long as the waters of said river in any season exceed in volume the aggregate quantity awarded to the several parties to this stipulation as herein provided, said parties are entitled to use said excess without restriction, and extend the same upon other lands, according to their necessities.

Paragraph 26. That for the purpose of equitably dividing and distributing the waters of said river so that the parties hereto may receive for use the quantity to which they are entitled, all of the waters of said river and canals shall be

measured in such a way so as to include, as far as practicable, all the seepage water and inflow waters, so that the same may be distributed among the parties entitled thereto as a part and portion of the waters of said river.

Paragraph 27. It is further stipulated and agreed that all persons and corporations, parties to this stipulation, respectively construct or cause to be constructed at their own expense and under the direction and supervision of the water commissioner appointed by the court, proper appliances for the diversion and accurate measurement of the waters awarded to them, respectively: And thereafter shall maintain and keep in place all dams, head-gates, flumes, canals and other means by which water is diverted, conveyed or used, in a good state of repair, together with appliances for the diversion and measurement of said water; to the end that no unnecessary loss from seepage or leakage shall occur, and that the water shall be economically applied to the use for which it is awarded.

Paragraph 28. It is further stipulated and agreed that all the rights fixed, declared and decreed shall be founded upon appropriation of water necessary for some beneficial use and that all rights fixed, declared and decreed shall be subject in their exercise to the conditions that they are required and necessary for some beneficial use, and that all rights are subject to the limitations and conditions that all of such water is used for some beneficial purpose and is used economically, without waste, with due care, and is reasonably and fairly necessary for such use.

Paragraph 29. It is further stipulated and agreed that each of the parties to this stipulation and his successors and assigns and they and each of their agents, servants and employees and all persons acting for them or in their interest, shall be forever enjoined and restrained from in any manner or at all interfering one with the other in the full, free and unres-

stricted use of the quantity of the waters of said river awarded to them; and from in any manner or at all interfering with the distribution of said water by the commissioner appointed by the court.

Paragraph 30. It is further stipulated and agreed that the court shall retain original jurisdiction of this cause and the subject matter thereof, and of the parties thereto, their successors and assigns for the purpose of all necessary supplementary orders and decrees which may be required to make effectual the rights the court may award by its decree therein.

Paragraph 31. It is further stipulated and agreed that any party to this stipulation who is dissatisfied with any of the regulations, requirements, discretionary acts of control of the distribution, or orders of the commissioner, may appeal to the court for review and relief.

Paragraph 32. It is stipulated that Isaac R. Baum shall have the right to change the point of diversion of the ten acres water right which was decreed in said Fulton decree to W. H. Walker from the farm formerly owned by said W. H. Walker to the farm now owned by said Isaac R. Baum, with a loss of three-tenths thereof.

MR. THURMAN: Now, I will dictate a thirty-three.

33. It is understood that the parties to this stipulation are all of the parties diverting the waters of Provo River at and above the Midway upper dam, and this stipulation is not intended to affect any water right below said dam.

34. It is further stipulated that in addition to the areas of land already specified in this stipulation the areas of other lands owned by parties hereto so far as at present known, are as follows, to-wit:

The Wasatch Irrigation Company 2500 acres.

The North Field Irrigation Company 2500 acres.

The Charleston Irrigation Company, through its upper

canal, 720 acres.

The Timpanogas Irrigation Company an additional 1,000 acres of land that will come under paragraph No. 11 of the stipulation.

MR. THOMAS: We can give some of ours.

South Kamas Irrigation Company 1700 acres.

Washington Irrigation Company 1262 acres, and the acreage of the various individuals cannot be given exactly, because of the fact that some of them have succeeded to the interests of original parties in the Fulton decree. We have got them partially listed.

MR. THURMAN: Can you furnish that later?

MR. THOMAS: That can be furnished. In this list which I have here the individuals are credited with certain acreage, some from certain springs and some from one ditch and another, so that the actual acreage as received from the predecessors in interest in the Fulton decree cannot be given tonight, but we have the acreage so that it can be furnished.

THE COURT: Now, Mr. Wahlquist,

MR. WAHLQUIST: The Sunrise Irrigation Company 240 acres, under the Fulton decree an additional 144 acres, making a total acreage of 384 acres.

MR. A. C. HATCH: That is already in.

MR. WAHLQUIST: Yes, but you offered testimony by Mr. Stewart of less, and I want to protect my client's rights.

MR. THURMAN: That all areas of land not herein specifically stated which may not be settled by stipulation hereafter shall be determined in the trial of this cause at Provo.

THE COURT: Under that would not as the stipulation now give stands, ~~xx~~ the Sunrise, your client, a double quantity of land?

MR. WAHLQUIST: I think not, or at least, I would not want it to.

MR. THURMAN: I am afraid it will, as it is worded now.

MR. WAHLQUIST: No, I will say it is not our desire we should receive more.

THE COURT: I understand. Is there anything further?

MR. WAHLQUIST: The Midway Irrigation Company would like to stipulate at this time as to the amount of land they have under the Island Ditch, to save making a special trip to Provo later.

MR. THURMAN: That is below the Midway upper dam?

MR. WAHLQUIST: We might get the testimony into the record, if it is agreed on, they claim 277 acres, is that agreed?

MR. A. C. HATCH: We admit it.

THE COURT: Is that all?

MR. WAHLQUIST: Yes, your Honor.

THE COURT: If there is nothing further, the court will stand adjourned at this time.

AUGUST 28, 1916, AT PROVO, UTAH.

MR. WAHLQUIST: With reference to the stipulation that was entered into at Heber on Tuesday evening, Mr. Jack Bates, one of the land owners on the Provo River above the Heber dam has since retained me, and I ask to be entered of record, and ask he be made a party to that stipulation with the privilege of proving his acreage and time of bringing it under cultivation as the last clause of the stipulation provided.

THE COURT: Under what canal?

MR. WAHLQUIST: It is a private ditch out of the Provo river, and above the Wasatch dam.

MR. A. C. HATCH: The acreage is not stated.

MR. WAHLQUIST: He was not prepared to tell me the acreage, I instructed him to have it surveyed. He was under the impression the Reservoir Company had the acreage, and it may be agreed upon later, I don't know.

THE COURT: Gentlemen, what defendant proceeds this morning?

MR. RAY: As I understood the order at the time of the last adjournment from here, the Provo Bench was to proceed this morning, but as I remember the record, Provo City reserved the right at that time to introduce some additional documentary evidence or statutes, and rested except for them.

MR. THOMAS: We are not prepared this morning to introduce any further testimony. Next day or two we will have such evidence as we care to put in. It will be brief.

MR. RAY: I would like to ask counsel whether among the statutes to which they made reference and have introduced, they called attention to the charter of Provo City?

MR. THOMAS: That was introduced, as I remember.

MR. RAY: And it is in the record now?

MR. THOMAS: As I remember it it is.

THE COURT: You may proceed, Mr. Ray.

MR. RAY: The answer of Provo Bench Canal & Irrigation Company to the complaint of the Provo Reservoir Company, I think need not be read to your Honor, because of the fact that in the original statement we indicated the matters in the complaint which we controverted. In addition to the answer the Provo Bench Canal & Irrigation Company has filed a cross complaint and counterclaim, and in addition to that have filed a further and supplemental answer to the cross complaint of Provo City, and in that answer set forth the facts upon which they predicate their claim to the use of water from Provo river.

The proof of Provo Bench Canal Company will be somewhat limited, because of the proof introduced by the respective plaintiffs and defendants who have preceded us. They have sometimes flirted with us to the extent I thought they were going to confess everything, but there are matters which they have put the burden upon us to prove. However, I think in the main the facts upon which our water right is predicated are admitted, but the extent of the water right perhaps is not made definite by any of the evidence to date.

The evidence will show that sometime about 1862 certain residents of the bench north of Provo Canyon, mouth of Provo Canyon, and to the west, began the construction of a canal, the design of which was to water the land lying to the north of the river on the bench, and below the canal as far north as Pleasant Grove, aggregating substantially ten thousand acres of land. That the present company and its predecessors in interest did build a canal of several miles in about 1864. That they applied to the Probate Court here under the then existing statute, for the privilege to organize an irrigation district for the purpose of irrigating these lands and the construction of a canal, and later the canal was extended by what is referred to in the evidence as the North

Union Canal Company, which is merely an extension of the Provo Bench Canal, but not a part of it, except as a stock owner. The Provo Bench Canal Company as finally incorporated had fifteen hundred and twenty shares of stock. Of this stock the North Union, as a corporation, took five hundred and twenty shares, and incorporated with a stock issue of ten hundred and forty shares, making one share of the old stock of the Provo Bench equal to two shares of the North Union Canal Company. They extended it out a distance of substantially fourteen miles near to the limits of Pleasant Grove, and ever since its original construction have conducted waters through it diverted from the Provo River.

In about 1878 and '9, they enlarged the canal to its present carrying capacity and to its present length. Each year since 1879 at the beginning of the irrigation season they have taken from the river water to the extent of the capacity of their canal when it was available; and as the river has receded they have acceded to the rights of prior claimants, whether those claims were actually prior or not, they have conceded, in some instances to that, because of the use of force, and in other instances they have submitted in the quantity they have taken to the decrees and injunctions of this court, but always they have taken such a quantity from the supply in the river as their canal would carry, and as they could get.

They have brought under actual cultivation to date four thousand three hundred and thirty-three acres of land out of a total irrigable area under the canal which it was originally designed to cover of sixty-five hundred acres of land. The twenty-two hundred acres of land is an integral part of the land under the canal, but have not been brought under cultivation because of their inability to get at times a sufficient quantity of water to supply all the land. The capacity of the canal since 1878 has been from one hundred

thirty-nine and a fraction second feet, to one hundred forty-three second feet. It has been more recently enlarged, and, since the beginning of this suit, under the decree of this court as confirmed in the Supreme Court of the United States in the case of Caleb Tanner against the Provo Bench Canal & Irrigation Company, and they have carried some water through it during the past three years.

Under our further answer and counterclaim and out answer to the counterclaim of Provo City, it will appear, I think, from the evidence that Provo City has 2058.6 acres of irrigable lands now using water through its system, and in addition to that about seven hundred acres of city lots, which seven hundred acres includes the streets, buildings and out buildings.

MR. THOMAS: I think you are not properly advised. That acreage does not include the streets.

MR. RAY: I think the record will show it includes at least all the solid blocks, and my impression is, streets, but I will call the court's attention to the record on that, if I am in error.

MR. A. L. BOOTH: My recollection is they said one city lot was reckoned equal to an acre of ground, but contained seventy-two rods.

MR. RAY: That has nothing to do with the stipulation of seven hundred actual acreage. The actual acreage if you include everything, is in the neighborhood of seven hundred acres, which would make a total of about twenty-seven hundred acres including all the buildings, houses, homes, out buildings, corrals, structures of every kind. That since the entry of the decrees made in this court, Provo City has irrigated substantially that acreage, and that it never has had since then, irrespective of what it might have had before, and could not have a beneficial use for a quantity of water in excess of the quantity set forth in our answer, and conceded to them. Your Honor will find in our answer that is a maximum liberal

quantity for the city under its municipal uses, and for the irrigation of its acreages, but it has not the acreage and cannot have the acreage upon which the original decrees were predicated. This statement is made, not for the purpose of disputing the verity of the decree, but for the purpose of showing under our answer that for a period of ten, twelve, or fourteen years they have not beneficially used the quantity of water specified in that decree. If you shall eliminate xxx from the decree six, fourteen and fifteen, which we particularly quote in our answer, those are the sections which provide, the water herein decreed is based upon a beneficial and economical use, we shall contend through the past fifteen years they have not been able, and have not used beneficially and economically water in excess of the quantity of water which we set forth in our answer as the quantity to which they are entitled.

I think in the main, your Honor, that covers the proof which we will introduce.

Now, counsel those who follow may desire to know how long it will take us to finish our proof. I shall assume we will not be longer than three days, unless the cross examination is somewhat protracted, unusually so, I expect we will finish in about three days.

MR. THOMAS: Gentlemen, I would like to call your attention to an apparent typographical error in your prayer. You say, Wherefore defendant prays Provo City under its said cross complaint and counterclaim, except its present interests as a municipal corporation, and there seems to be a line left out, the ~~xxxx~~ sense is not completed.

MR. RAY: I assume that is in the copy served upon Mr. Thomas, but I will examine the record.

MR. THOMAS: I would like to ask if in this plea of abandonment on the part of Provo City, the Provo Bench claims to have succeeded to the right of the water abandoned?

MR. RAY: We claim the right to the use of the water.

MR. THOMAS: Without making appropriation therefor?

MR. RAY: We claim we have made an appropriation for it.

MR. THOMAS: You claim the right under the decree? Is it your intention to claim as one of the sources of your right the decree heretofore pleaded?

MR. RAY: Yes, claim our right is in the river, and our right is limited only to your necessities. Call Mr. Goddard.

AUGUST 31, 1916.

MR. WILLIS: May it please the court, before proceeding with the trial of this case, I would like to submit an item or two to the court. In the first place when the court was at Heber I ask for the privilege of filing a second amended answer to my answer to certain defendants and I served that but never filed it for the reason that other parties came in subsequent to that time and asked to be made defendants, and I am asking at this time that I be permitted to file a second amended answer to my answer taking in these other parties in lieu of the one that I served on counsel at Heber City. This seems, perhaps like a good deal of child's play, and yet it is not my fault for the reason that other parties came in and made application to be made defendants subsequent to that time; really places me in a position where their rights cannot be adjudicated without a second amended answer being filed, including those who have since asked to be made defendants. I think we can stipulate as to the rights all right.

THE COURT: The amendment may be filed.

MR. WILLIS: I will prepare and serve counsel.

Now, at Heber City, the Heber Light & Power Plant submitted certain documents as exhibits in the case of the appropriation of Abram Hatch to the waters of Provo River for power purposes, and at that time I told the court there were other exhibits that I thought I have. Since that I have found them, and ask at this time to introduce them.

(Papers marked Exhibits G and H.)

THE COURT: Those are transfers of the rights?

MR. WILLIS: Yes, your Honor. I ask at this time the privilege of introducing Heber Light & Power Plant Exhibit G, which is an agreement of sale and option to purchase from Abram Hatch to A. C. Hatch, and an assignment of that agreement of sale and purchase from A. C. Hatch to Heber City.

THE COURT: They may be received.

MR. WILLIS: We ask at this time to introduce Heber Light & Power Plant Exhibit H, which is a deed from Abram Hatch to Heber City of the interest represented, the water, and certain lands and so forth-- water of the appropriation of Abram Hatch and the lands covered by the power plant in its race and tail race;-- Abram Hatch and his wife Ruth Hatch to Heber City.

THE COURT: They may be received.

MR. MCDONALD: Your Honor please, if counsel could designate about where we are at this morning, I have one client at the mouth of the canyon that I want to introduce testimony, but under the order plan, if they are called in order there is something like a hundred or one hundred and fifty still ahead of that client, but I understand so many are falling out, if counsel could indicate where we are at.

MR. CORFMAN: We could probably conclude this case within an hour.

MR. BAGLEY: I think the Timpanogas, your Honor please, I don't think will take a half a day.

MR. MCDONALD: There are something like a hundred or one hundred and fifty others named ahead of the party I refer to.

MR. JOHN E. BOOTH: If your Honor please, until recently I anticipated all that I represent which are a great many of those individuals names, would be settled by stipulation without any question, but an amended answer, counterclaim and cross complaint filed by the Timpanogas coming in, I scarcely know just where we are at.

MR. BAGLEY: , I might say, Judge, so far as the West Union and Smith Ditch that are complained against in that cross complaint, we don't make any contention, you got more water than you want. Only people that we complaint about is the river bottoms.

MR. JOHN E. BOOTH: Well, that will eliminate considerable then, and the West Union then will practically be out of the way because I anticipate we will settle that before the evening closes today.

MR. MCDONALD: And as to the people designated as users of Spring Creek, do you claim anything against them, their water rights?

MR. BAGLEY: No, we don't only we claim that the water that they use ought to be measured as a part of the river and counted as a part of the river in the distribution, and that they are a part of the river bottoms who is awarded a certain amount of water ~~xxxxxx~~ under the decree, but instead of that all the water is kept in two small ditches they put on the east side of the river and the people along the Spring Creek on the west side of the river have been counted out in the measurement. We don't want any of the water, but want the water measured and counted as part of the river as it increases the river for distribution.

MR. MCDONALD: So that will be the only question between the clients you represent and the Spring Creek users, whether or not the water they use shall be counted as part of the river water.

MR. JOHN E. BOOTH: That won't make any difference to you.

MR. MCDONALD: Well, it may.

MR. JOHN E. BOOTH: I don't see where it will as you don't get any from the river anyway.

MR. JACOB EVANS: They don't want to pay any portion of the expense and cost.

MR. MCDONALD: There may be that one point that will require a little evidence, but the one client I speak of I do not think will be reached today.

THE COURT: I don't know, it may possibly be they will. You can tell more about it by noon. You can get them

here, can you?

MR. MCDONALD: I think so. This is a busy season, of course.

MR. WILLIS: There is one further question; what is known as the Island Ditch in Wasatch county, certain parties I represent whose rights have never been decreed, are using water in connection with the Midway Irrigation Company. As to those clients, the Midway Irrigation Company refused to recognize the stipulation that the other parties entered into, and, as they are users through the same ditch, we feel, of course, that we ought to be in harmony and possibly-- I understand the court adjourns tomorrow for some length of time, and it is possible we might get together with the plaintiff on that question, but if not, would we be privileged later on to introduce testimony as to that part of it?

THE COURT: Oh yes. Any of the parties whose claims are not reached in this hearing, would not be precluded, of course, from introducing any evidence that was pertinent to the issue, at the next hearing.

MR. JOHN E. BOOTH: Not being able to be here yesterday, I did not learn when your Honor is likely to adjourn.

THE COURT: I will adjourn to the Monday following the election. I don't know the date, but it will be the second Monday.

MR. JOHN E. BOOTH: May I beg indulgence for a minute. Perhaps you have already heard that the "Best-laid schemes o' mice an' men, Gang aft a-gley". I am much surprised with regard to the River Bottoms people and Faucett Field and others where we thought we had a stipulation all ready and practically agreed on in a few minutes. We find now we have to have some more information that is impossible to get at this time, and I call your attention to it now because a great many people are here and are busy, and I would very much like to have those matters go over until the next setting.

THE COURT: Very well, unless there is some objection that may be done.

MR. A. C. HATCH: We have none.

MR. RAY: With that announcement I would like to inquire whether anybody will be ready to go on this afternoon.

MR. McDONALD: Yes, I think so.

THE COURT: Will there be any other?

MR. COREMAN: We will be prepared, may it please the court, to proceed with the defendants case, Fort Field Irrigation Company, if the time is not consumed by others.

THE COURT: We will adjourn this afternoon at little after half past four. The car that the parties would take, I assume is the four forty-nine.

MR. JOHN E. BOOTH: There is a car at four forty-nine.

MR. JACOB EVANS: I will suggest that Mr. Wentz would like the court to go over the ground again now after hearing this evidence.

THE COURT: Probably it would be better to do that.

MR. JOHN E. BOOTH: I think it would be better to do it now than to wait until November.

THE COURT: Very well, I will do that then. Are there any other matters that ought to be understood or stated in the record before I adjourn to the November session. If not, the

court will take an adjournment at this time.

MR. A. C. HATCH: If the court please, if the several parties could have copies of the stipulations that were read into the record at Heber City so that they may be prepared to pass upon it at the opening of the next session of the court. I will state for the information of counsel that the plaintiff and all of the defendants who divert the water from Provo River at and above what is known as the upper Midway dam, which is a dam in the river at the point where the bridge crosses the river leading from Midway to the Heber-Park City road, have agreed upon the duty of water for the lands, and have stipulated, many of them, as to the acreage irrigated, leaving it only as to a very few to prove the acreage.

MR. RAY: The Provo Bench would like to have a copy of that stipulation, and we can find from that what it contains.

MR. A. C. HATCH: I will ask the reporter --

THE COURT: There is no order the court can make.

MR. A. C. HATCH: I will ask the reporter at the cost of the several parties to the stipulation, to furnish the counsel for the several parties to the action with a copy of that stipulation.

THE COURT: Do the parties to the stipulation agree the court can make such an order?

MR. MCDONALD: I do, representing a lot of them.

MR. RAY: I would assume, however, where one attorney represents a great many individual clients he would not want copies for each of those clients.

MR. A. C. HATCH: I say the attorneys for each of the respective parties.

THE COURT: That order may be made, if there is no objection, and copies may be made at the cost of the parties to the stipulation. You may arrange with the reporter for procuring it.

MR. A. C. HATCH: I requested a witness to bring some documents at the opening of the court this afternoon. If the court will instruct the witness to do that.

THE COURT: Yes, they will understand they do not need to have them this afternoon, but have the documents here at the opening of court on the 13th of November.

12:00 NOON, RECESS TO 10:00 A. M., NOVEMBER 13, 1916.

MR. THURMAN: There is a matter of the stipulation in Heber Valley. I would like to ask those attorneys down here who have received a copy whether they have looked at it and are ready to sign it.

MR. JOHN E. BOOTH: So far as we are concerned, we consent to it.

MR. THOMAS: So far as the Summit County interests are concerned the stipulation there made was entirely satisfactory, and is complete except the addition of a few individuals whose rights were thereupon passed. Mr. Davis did not have the data at the time he made the stipulation and it is incomplete as far as that is concerned. That I will get as soon as our engineer will furnish the data, which, I think, will be tomorrow. Mr. Corman and I will go over it.

MR. COREMAN: I will know in the morning.

THE COURT: I might make one suggestion at this time. If it is to be stipulated that I may finish the case after the end of the year that stipulation ought to be determined upon at once, and it must be in writing, and must be signed by all the parties by themselves or their attorneys. To leave out one person, the stipulation, I take it, under the statute would not be binding, because the statute requires that all the parties. Now, we will adjust this work very differently if that stipulation is made, or if it is not made, than we would if it should be made, because we will be under the necessity of finishing the case completely and having a decree signed before the expiration of the year if such a stipulation is not made. I think it is desirable for all parties to know as soon as possible whether that stipulation is to be made so we can adjust this work with reference to it.

MR. THURMAN: I would like to suggest the attorneys here present remain a few minutes, if your Honor is going to adjourn soon, and see if we can determine that question.

THE COURT: The reason I made the suggestion was

because of the fact attorneys come and go and get away, not being under the necessity of remaining all the time, and if that stipulation is to be signed, it had better be prepared for attorneys to sign while here, and if it is not to be signed we should know it as soon as possible so we can adjust the work accordingly.

 4:20 P.M., RECESS TO 9:30 A.M., NOVEMBER 15, 1916.

MR. WAHLQUIST: When the court was in Heber, there was testimony offered on behalf of the Midway Water Works Company, and I would now ask leave to file the complaint in intervention as of the date of August 21, 1916, that being the date on which it was served on the plaintiff and the evidence taken.

THE COURT: I think that was understood at the time. That may be done.

MR. WAHLQUIST: Then, if your Honor please, at that time I introduced a map which was afterwards withdrawn, with the understanding I might submit a blue print to take its place, and ask that be marked now as the Exhibit D.

On behalf of Jack Bates, who was a party to the stipulation that was filed there but the acreage was not determined, I will ask leave to submit a map of his lands showing the area irrigated.

MR. MCDONALD: Your Honor please, I would suggest relative to the Bates matter to the court and Brother Wahlquist, we could probably adjust that out of court and come in here and stipulate what water belongs to him and what class he comes in.

MR. WAHLQUIST: I will say this only covers-- as to Fulton decree, he is not claiming anything in excess of what is awarded in the Fulton decree, except some land that is irrigated for pasture land, & that is shown here as land irrigated from natural sources. I am willing to submit that

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THE COURT: What claim is this?

MR. MCDONALD: This claim pertains to the water right of George B. Jordan in Wasatch county.

GEORGE B. JORDAN, called in his own behalf, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. McDonald.

Q Your name is George B. Jordan?

A Yes sir.

Q You live in Wasatch county? A. Yes sir.

Q You own some land there that is irrigated from the Provo River? A. Yes sir.

Q What is the quantity of land?

A Two hundred and seventy acres.

Q How much of that is irrigated from the Provo River?

A One hundred and eighty-one acres and some fraction.

Q One hundred and eighty-one and a fraction acres irrigated from the Provo river? A. Yes sir.

MR. THURMAN: Where is it situated?

MR. MCDONALD: It is situated just south of the river bridge going to Park City, near the Heber power plant.

Q Mr. Jordan, this land will be north of the power plant?

A Yes sir.

Q And south of the river bridge that goes to Park City?

A Yes sir.

Q And above the upper Midway dam?

A Yes sir.

MR. THURMAN: How many acres is there?

Q How many acres?

A All told?

Q All told.

A Two hundred and seventy acres all told of land, one hundred and eighty-one and some fraction irrigated.

Q How long has that land been irrigated?

A Why, it is in different pieces, part of it has been irrigated as long as I can remember. It is part of my father's homestead.

Q Give us that then. Stop there now and tell how long and how much of the land has been irrigated that was in your father's homestead?

A There is eighty acres of this land--

MR. THURMAN: Just a moment, is this in the Fulton decree?

MR. MCDONALD: There is a small portion of it covered by the Fulton decree.

Q Proceed, Mr. Jordan.

A I can't tell just exactly how much of that--

Q Give us the best you can, your best judgment?

A I would say sixty acres of the eighty-one of my father's homestead.

Q And how long has that been irrigated?

A That has been irrigated as long as I can remember.

Q How long is that?

A I dare say thirty to thirty-five years.

Q All right, now the next tract that has been brought under cultivation since?

A That is the forty I bought from H. W. Clyde.

Q How long has that been irrigated?

A I have irrigated that for nineteen or twenty years.

Q All of it, or some portion?

A Not all of it.

Q What portion?

A I would say twentyfive acres out of the forty. There is a little on the hill.

Q How long has that been irrigated?

A Since 1900 or 1901, I couldn't just say.

Q That is twenty-five acres?

A Yes sir.

Q All right now, the next tract?

- A The next tract is a piece of one hundred and fifty acres I bought it in 1914.
- Q How long has some portion of that been irrigated?
- A It has primary right for a portion of it, of course.
- Q What portion?
- A About five acres.
- Q And how long has some portion of that been irrigated outside of the five acres?
- A Well, two or three years before I got it.
- Q When did you get it?
- A In 1914.
- Q In 1914? A. Yes sir.
- Q How much of that tract?
- A I would say about eighty acres of that.
- Q Eighty acres irrigated since when, Mr. Jordan, since 1912, did you say, two or three years before you got it?
- A Yes sir.
- Q You got it in --
- A 1911 or '12, that would be I got it in 1914, and it was irrigated two or three years prior to that.
- Q Was there any other?
- A No sir, that is all.
- Q That covers it? A. Yes sir.
- Q What character of land is it?
- A It is sandy, gravelly soil.
- Q River bottom?
- A River bottom, yes sir.
- Q Do you have any idea as to the duty of water on it?
- A Well, I have an idea what quantity it takes to water it.
- Q Give us what idea you have, will you?
- A It requires a large stream to run over it or do anything with it. Seems like you have to soak it, get the ground full of water. It gets dry, it is impossible to run it over with a small stream especially.

- Q Well, do you have any idea as to the quantity that it would take, say by cubic feet?
- A I know what they have been measuring out to me the last two or three years since we have been using the water by the commissioner.
- Q From that do you have any idea how much water it takes to irrigate a given quantity of land?
- A I know about what I have been using on that land.
- Q What have you been using?
- A Well, six to eight feet.
- Q All the time?
- A Until low water. I never have that after it gets down to low water.
- Q Of course, all you have for this eighty acres you speak of, or all the water you claim would be high water?
- A For this--
- Q For the eighty acres you speak of?
- A Yes sir.

CROSS EXAMINATION by Mr. Thurman.

- Q You say you have irrigated one hundred and eighty-one acres?
- A Yes sir.
- Q Fifty acres an old right?
- A Yes sir.
- Q Twenty-five acres since 1901? A. Yes sir.
- Q And how many acres did you say since 1914 or 1912?
- A About eighty acres, I said.
- Q Eighty acres, you bought that eighty acres, did you?
- A Yes sir.
- Q The man you got it from had used it two or three years before?
- A Yes sir.
- Q Twenty-five acres since 1901, did you buy that?
- A Twenty-five?
- Q The twenty-five acres you irrigated since 1901 or 1900?

A Yes sir, I bought that.

Q Had it been irrigated before?

A Some portion of it had.

Q How much of it?

A A few acres, I couldn't say just how much.

Q You say here five acres was irrigated of this land you bought in 1914, five acres been irrigated sometime before?

A Yes sir.

Q How long?

MR. MCDONALD: Judge Thurman, that is covered, as I understand, by the Fulton decree, that five acres.

MR. JACOB EVANS: Is that all he has in the Fulton decree?

MR. MCDONALD: I think that is all there is in it, the five acres.

Q Who did you buy that from, the five acres?

A I didn't buy any five acres.

Q Part of one hundred and fifty acres, five acre water right?

A I bought that from Richard Wellington.

Q When did you buy that?

A I bought it in 1914.

Q Do you know why this fifty acres old right was not put in the Fulton decree?

A No, it was not used at that time, I guess.

Q How?

A I say it was not irrigated at that time, I think.

Q Well, the Fulton decree is about 1898, about eighteen years ago; wasn't it watered at that time?

A No, I think not.

Q You think not, that is the fifty acres I am talking about.

MR. MCDONALD: Was that fifty or sixty? I got it sixty?

Q Which was it, fifty or sixty of your father's homestead?

A Sixty. Is that what you are talking about, what is on my father's homestead?

Q Yes sir.

A I made a mistake, I thought it was the other.

Q You say that has been watered thirty or thirty-five years?

A Yes sir.

Q Why didn't that go in the Fulton decree when all the lands up there, water rights, were being determined at Heber?

A Well, we put in for more water right, but didn't get it for some cause.

Q Were any of your lands in that decree?

A Yes sir.

Q And the court gave you a decree for such as he thought you were entitled to, is that it?

A I guess that's it.

Q And this fifty acres right was in existence at that time, and he didn't allow it to you?

A We didn't get the fifty acres, no.

Q The court passed on that question, didn't he?

A I guess so.

Q In that case? A. Yes sir.

Q You don't know why it was not allowed?

A No sir.

Q Did you attend court at the trial of that case?

A Yes sir.

Q Made proof of this? A. Yes sir.

Q You are sure you put in the fifty acres of land in that case, or sixty?

A No, not sixty.

Q How much?

A It was fifty.

Q How?

A Fifty.

Q Put fifty in? A. Yes sir.

Q Did you get a water right allowed for it?

A For the fifty?

Q Yes. A. No sir.

Q Didn't you get any right for that at all?

A Yes sir.

Q How much?

A Thirty acres.

Q Thirty acres? A. Yes sir.

Q You got that in the Fulton decree?

A Yes sir.

Q Is that thirty acres a part of this sixty acres?

A Yes sir.

Q You have given here? A. Yes.

Q You have already got a decree for that amount in that?

A Yes sir, for the thirty acres.

Q But he didn't give you what you asked by twenty acres?

A No sir.

Q Now, who did you get this water from that you commended to use in 1912, this eighty acres of the one hundred and fifty, who did you get that water from?

A I got the right from the man I bought it from is all. The land with the water right to it.

Q He had only used it since about 1911 or '12?

A Yes sir.

Q Never made any application for it to the State Engineer's office, did he?

A Not that I know of.

Q Just went and used it? A. Yes.

Q How much had been irrigated when you bought it, of this late water land.

A As much as there is now. Fenced it and irrigated the bottom land there.

Q All been irrigated?

A Yes sir, eighty acres or so of it.

MR. THURMAN: As to that land, if the court please, we want to register an objection to it being considered as an appropriation of water at this time.

THE COURT: I will hear you upon that when you argue the case. I don't understand you object to the evidence, but you object to the effect of it.

MR. THURMAN: Object to the effect of it as incompetent evidence to prove a water right at that date is my point; simply want to save it at this time.

THE COURT: Is that all the cross examination? I want to ask Mr. Jordan a question or two when you are through.

MR. THURMAN: That is all.

EXAMINATION by the Court.

Q Mr. Jordan, I don't know I just have clearly in my mind what your claim is. I understood you to say you irrigated one hundred eighty-one and a fraction acres?

A Yes sir.

Q Of that number sixty acres was on your father's homestead?

A Yes sir.

Q And that was irrigated a long time ago?

A Yes sir.

Q Now, would you give me the other quantities of land that make up the one hundred and eighty-one irrigated land; and when do you claim it was first irrigated?

A The next would be the forty that I bought from J. W. Clyde. I think twenty-five acres of that I commenced to irrigating in 1900 and 1901.

Q That would be twenty-five acres of the Clyde land?

A Yes sir.

Q In 1900 or 1901?

A Yes sir, the balance of that, this Wellington land.

Q Balance of the one eighty-one? A. Yes sir.

Q That would be ninety-five acres or ninety-six acres?

A Yes sir.

Q Ninety-six acres would be all the land that you bought in 1914? A. Yes sir.

Q I understand it now, and that ninety-six acres you say was

irrigated by the former owner two or three years before you got it?

A. Yes sir.

REDIRECT EXAMINATION by Mr. McDonald.

Q Did you live right adjoining this land at the time Wellington owned it?

A Yes sir.

Q And you know of your own knowledge it was irrigated?

A Yes sir.

Q You said something about having a primary water right with five acres of the Wellington land-- did your Honor get that straight now?

THE COURT: No, I didn't, I didn't think of that when I was asking him.

Q I didn't understand it either, so if you will explain now. You said something about getting a primary water right with the Wellington land?

A Yes, I got a primary right with the Wellington land of five acres.

Q Would that be in addition to this ninety-six acres, or included in the ninety-six acres?

A It would be included in it.

MR. MCDONALD: I understand it now.

MR. THURMAN: Isn't that the land you said was watered since 1901?

A No.

MR. THURMAN: Five acres of it in 1901?

A No, this is not land that I said was irrigated since 1901. It is land that was irrigated since 1912, 1911 or '12.

THE COURT: I understood the 1901 land was the Clyde land.

MR. MCDONALD: I think I can make that clear.

Q Wellington got this land from Hatch, did he not?

A Yes sir.

Q And Hatch has proved a primary right in what we call the Fulton case? A. Yes sir.

Q To five acres of water? A. Yes.

Q So that five acres which is in the Fulton decree passed to you through this man Wellington? A. Yes sir.

THE COURT: Then through irrigation ninety-one acres of the ninety-six that was irrigated for the first time about 1911 or '12?

A Yes sir.

THE COURT: That is the way--

A That is about the way it would be.

HARRY MORRIS, called by the defendant George B. Jordan, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. McDonald.

Q State your name, please?

A Harry Morris.

Q Are you acquainted with the land of George B. Jordan?

A Yes sir.

Q How long have you known it?

A Since '93-- 1893.

Q Since that time do you know whether or not he has irrigated any portion of the land to which he has testified, known as the Jordan farm? A. Yes sir.

Q Do you have any idea as to the quantity of land he has irrigated?

A No sir, I do not.

Q During the time since '93 has he irrigated land there to your knowledge? A. Yes sir.

Q But you don't know how much? A. Yes sir.

Q Can you give any idea as to the quantity of land?

A No sir.

MR. THORMAN: No idea how much land is irrigated there today, do you?

A No sir.

CROSS EXAMINATION by Mr. Jacob Evans.

Q Where is this land located, Mr. Morris?

A I should judge about half a mile below the river bridge on the Park City road between there and Heber Power plant.

Q Is it on the river bottoms?

A Yes sir.

Q Is it covered with brush and trees?

A Some of it, yes sir.

Q It is not farming land then?

A Not all of it.

Q Portion of it is?

A Portions of it.

Q You don't know what portion? A. No sir.

Q You don't know whether the title to the land has been acquired from the government recently or not, do you?

A No sir.

MR. MCDONALD: That is all, your Honor.

THE COURT: Now, is there something else we can take up. I will say that the court will have to announce that all parties will be expected to be ready tomorrow morning to introduce their proof, and hold their witnesses in readiness to introduce such evidence as they have within the next few days. I make that announcement so parties will be ready.

MR. MCDONALD: Your Honor please, we will put on a little evidence in relation to Mr. Morris.

MR. THURMAN: I desire before court adjourns to call attention again to the stipulation that was made in the upper valley. Now, the parties interested in the lands up there signed that stipulation. May have to be a little correction made on one point, but the parties below have not signed it. Now, in view of your Honor's suggestion we should be ready to go ahead, I have not contemplated bringing either the Timpanogas Company or Wasatch Extension Company here.

THE COURT: I will make this suggestion in connection with that. If, for any reason we find that stipulation fails

by reason of failure of the parties to sign it, I will fix a time early next month.

MR. THURMAN: We would like to have it fixed.

THE COURT: To take the evidence made necessary by reason of failure to join the stipulation, but I have reference now merely to the matters not contemplated in the stipulation, and especially to any rebuttal the parties may have. If the plaintiff has any rebuttal-- I understand the city will have a little and Provo Bench probably, but during the next two days I am in hopes, and it seems we might expect to finish the evidence, aside from some contingency such as you suggest. If that should arise, of course, I will fix a time to take care of it. I think in that connection I might suggest now that probably it will be necessary to fix a time when I will come back in the course of two or three weeks to pick up any odds and ends by way of stipulation and get the record complete before the time is fixed definitely for your arguments. Now, I will hear this evidence in regard to Mr. Morris.

MR. MCDONALD: If your Honor please, this is an item that we thought probably it would be advisable to take a little evidence on notwithstanding the fact we will be able to cover it, I think, by stipulation, so that the witness may go home, and it is only in connection with high water. While the evidence will go back to low water period, yet, we donot claim anything but high water, and inasmuch as we have fixed no place in the stipulation we have prepared for this class of water right, we can in the future prepare a place for it.

HARRY MORRIS, Recalled, in behalf of the defendant Joseph Morris, testifies as follows:

DIRECT EXAMINATION by Mr. McDonald.

Q What is your name?

A Harry Morris.

Q I believe your father owns a farm on which you live, doesn't

he? A. Yes sir.

Q Joseph Morris? A. Yes sir.

Q How much land is there in that farm?

THE COURT: This is the Joseph Morris land?

MR. MCDONALD: Joseph Morris land in Wasatch county.

Q How much is that land is irrigated?

A Why, I should think about one hundred and seventy-five acres.

Q One hundred and seventy-five acres, and how long has that one hundred and seventy-five acres been irrigated?

A I have been there since 1893, it has been watered since then and before by somebody.

Q To your knowledge it has been irrigated since 1893?

A Yes sir.

Q Do you know whether or not it is one of the oldest farms in Wasatch county? A. Yes sir, known as the Hailstone ranch.

Q What part of this land, if any, is covered by what is called the Fulton decree by way of water right?

A One hundred and thirty acres.

Q And the difference between that and one hundred and seventy-five is not covered by that decree?

A No sir.

Q And all the land I understand you has been irrigated to your knowledge since 1893? A. Yes sir.

Q And you don't know how long before that?

A No sir.

MR. JACOB EVANS. You say there is one hundred and thirty acres covered by the Fulton decree?

MR. MCDONALD: Covered by the Fulton decree.

Q Do you know the duty of water as fixed by the Fulton decree?

A No, I don't exactly know.

CROSS EXAMINATION by Mr. Thurman.

Q You say one hundred and thirty acres covered by the Fulton decree?

A Yes sir.

- Q And you now say one hundred and seventy-five is irrigated?
- A Yes sir.
- Q How long has that been irrigated?
- A Ever since I have been there, 1893, I watered it.
- Q Why wasn't it all covered by the Fulton decree?
- A I couldn't say.
- Q Were you a witness in that case?
- A No sir, I didn't have anything to do with it.
- Q Do you know who was, who did attend court in that case?
- A Mr. McDonald attended to it.
- Q How?
- A Mr. McDonald was the attorney for us. The case was in his hands.
- Q You say this is known as the Hailstone Ranch ?
- A Yes sir.
- Q How much water did you get in the Fulton decree?
- A I think one and six-sevenths foot.
- Q One and six-sevenths? A. Yes sir.
- Q For one hundred and thirty acres?
- A Yes sir.
- Q That would be a duty of seventy, wouldn't it?
- A Yes sir.
- Q That is what was allowed your land. Well, is this other land now the additional land you are asking, is it part of the same piece that was in evidence before the court?
- A Yes sir.
- Q Part of the same tract?
- A Under the same field, same fence, on the same piece.

MR. THURMAN: Did I understand your Honor to say the matter of rebuttal would be disposed of at this hearing?

THE COURT: I think you can.

MR. THURMAN: Mr. McDonald, I want to say to you any time I think proper this will be contested, but I mention it to you so that you can tell Mr. Morris. I don't think this will be conceded, this additional right. Mr. Hatch being absent, I am unable to say. If he were here probably it

would be all right.

W. H. DAVIS; called by the defendant Joseph Morris,
being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. McDonald.

Q What is your name?

A W. H. Davis.

Q Are you acquainted with the Morris place, what is known as the
Hailstone Ranch? A. Yes sir.

Q How long have you known it?

A I have known it thirty-five years, I guess.

Q During that thirty-five years do you know whether this farm
has been irrigated? A. Yes sir.

Q That is the farm Mr. Morris has testified to as being enclosed?

A Yes sir.

Q Do you know whether or not it is necessary to irrigate the
farm? A. Yes sir.

Q And it has been irrigated since the last thirty-five years?

A Yes sir.

CROSS EXAMINATION by Mr. Thurman:

Q Do you know how much there is in it?

A No sir, I don't.

Q Irrigated? A. No sir.

Q Do you know that there is some land there that has been
irrigated for thirty-five years?

A Yes sir.

GEORGE B. JORDAN, recalled by the defendant Joseph
Morris, testifies as follows:

DIRECT EXAMINATION by Mr. McDonald.

Q Your name is George B. Jordan? A. Yes sir.

Q How long have you known the Joseph Morris farm, what is commonly called the Hailstone Ranch, in Wasatch county?

A I have known it as long as I can remember.

Q How long is that?

A Thirty-five years anyway.

Q Do you know whether or not that farm has been irrigated so far back as you can remember?

A Yes sir.

Q The farm as it is now known?

A Yes sir, it has.

Q Do you know whether or not it is necessary to irrigate it?

A Yes sir.

Q In order to produce crops?

A Yes sir, I know it is.

CROSS EXAMINATION by Mr. Thurman.

Q Is all the land enclosed, irrigated?

A Yes sir, I think it is.

Q Has it all been irrigated for thirty-five years as it is now enclosed?

A Yes sir, I think it has.

Q Well, are you quite sure of it? A. Yes sir.

Q What is it cultivated in?

A At the present time it is in hay, timothy.

Q In hay? A. Yes sir.

Q It has been farmed, has it, some of it?

A Yes sir, some of it has been farmed.

Q Lays right on the river? A. Yes sir.

Q North side? A. Yes sir.

Q Or west, I don't know how it runs?

A It is on the north side.

Q It is on the right hand side as you go down the river?

MR. MCDONALD: No, be on the left.

A On the left hand side coming down, on the right hand side as you go up.

MR. MCDONALD: Which are you talking about, Judge, the river or the road?

MR. THURMAN: I am talking about the farm.

MR. MCDONALD: I am asking you what are you referring to, to locate it, the river or road?

MR. THURMAN: The river, of course, is what we are talking about.

A Yes, it is on the left hand side of the river going up?

Q As you go up? A. Yes sir.

Q I ask you as you go down if it was not on the right hand side as you go down the river?

A Yes, I was thinking of the road though.

Q It is between the road and the river, ain't it?

A Yes sir.

Q You don't know how many acres there are in it?

A No sir, I don't.

Q Your land that you have put in here a claim for is below that ranch, isn't it? A. Yes sir.

MR. MCDONALD: That is all, your Honor.

MR. JACOB EVANS: Will it be presumed the plaintiff will be the first in rebuttal?

THE COURT: I take it the plaintiff will be the last. The plaintiff is entitled to the last say in the matter.

MR. A. J. EVANS: One of our witnesses, at least one, is in Salt Lake.

THE COURT: I made the suggestion I did after having spoken to nearly all the parties and having been informed the rebuttal would be very short. Of course, I am not going to crowd any of you gentlemen, and shorten your time.

MR. A. J. EVANS: We are anxious, your Honor, to get throug, of course.

THE COURT: If you do not finish Friday, I will come back, but I had hoped in the situation as it has developed we might finish this week, it seems we are approaching the end of the evidence very rapidly.

THE COURT: Judge King, now you may present your matter.

MR. KING: If the court please, in the answer of John Allen, Arthur Allen, T. W. Allen, Samuel McAfee, and Pioneer Irrigation Company, we have omitted to add the name of John H. Murdock in the caption. Later on toward the close where he sets up affirmatively his right, his name is mentioned. I ask the clerk to insert his name in the following place, now come the above named defendants Pioneer Irrigation Company, John Allen, Arthur Allen, T. W. Allen, Samuel McAfee and John H. Murdock.

THE COURT: That amendment made be made.

MR. KING: I will say, if your Honor please, I have had a stipulation, not in writing, however, with Mr. Thomas, Mr. Ray and Mr. Bagley in his lifetime, relative to the rights of the defendants and counterclaimants whom I represent, and they assented to our claim of a duty of thirty acres water delivered at the land. They stated it is immaterial to them how much water we put on this land. I make that statement this morning before proceeding to offer any testimony.

JACKSON R. ALLEN, a witness called on behalf of the Pioneer Irrigation Company et al, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. King.

Q Mr. Allen, you are one of the defendants in this case, are you?

A. Yes sir.

Q Are you an officer of the Pioneer Irrigation Company?

A Yes.

Q What office do you hold?

A President.

Q Will you please describe, Mr. Allen, the ditches of the Pioneer Irrigation Company, their relation to the river approximately, their size, the quantity of water which they contain, the

amount of water which has been flowed through those ditches, since your familiarity with them, and the use to which that water is put. Take your time and explain in detail those points I have just suggested-- here is a little map, if your Honor cares to follow it.

A What is called the Pioneer Ditch B is a ditch taken out from Provo River, about two miles above any of the land irrigated there, above the land irrigated by the Pioneer Ditch Company. It runs along the side hill through the shale rock for a distance of two miles, varying in distance from the river from eight feet to maybe seventy-five feet. Then it takes around the foot hills farther from the river. The greatest point from the river would be approximately half a mile, maybe a little less than half a mile, greatest distance from the river. This ditch carries about three and a half to four second feet of water, its capacity.

There is two ditches. There is a ditch A that branches in the two branches. This ditch is taken out from the river about two miles down the river from where Ditch B takes out. One branch runs approximately close to the river, within say a hundred yards of the river, farthest distance from the river. The other branch gradually climbs the hill as fast as the grade will permit, and farthest place from the river maybe is half a mile. The Ditch B is about three and a half miles long.

Q Length of the Ditch A?

A The longest branch of Ditch A would be probably two miles long.

Q And the **shortest** branch?

A The shortest branch would be, well, three quarters of a mile easy.

Q What is the character of the soil through which Ditch A is constructed?

A Ditch A is constructed pretty much altogether through river bottom land, land that had been built from the silt that formed in the river bottom. That is, the river is spread all

over that river bottom sometime, and the ditch is constructed through this soil. It is a boulder gravelly formation in the bottom, and covered with silt, thereby the soil has a great deal of humus in it. The lower end of the ditch and lower end of Ditch B climbs on the side hill, where it is simply a soil and gravel formation, more soil made on the side hill than there is in the bottom, deeper soil.

Q What is the capacity of Ditch A?

A Ditch A carries between-- either branch--

Q The ditch and its branches?

A The ditch and its branches carries about ten second feet, ten to eleven second feet about its capacity.

Q What do you say as to the waste or loss by percolation in the transmission from the head to the land?

A There is a very great loss in all these ditches.

Q Have you observed so that you can tell approximately and with more or less accuracy what the loss is?

A I think so.

Q What is the loss?

A The loss say, taking the water that starts in at the head of these ditches and runs the full length, it varies from a third to a half.

MR. A. C. HATCH: I didn't hear.

A The loss amounts to one third to one half of the water, amount that is turned in at the head of the ditch.

Q How many acres of land are there under the Pioneer ditches?

A Four hundred and fifty-five acres.

Q Are you familiar with that land?

A Yes sir.

Q Have been how many years?

A Last fifteen or sixteen years.

Q Have you been familiar with the ditches during that same period?

A. Yes sir.

Q And has that land been irrigated during all that period?

A Yes sir.

Q When you became acquainted with the land was there evidence of former irrigation?

A Yes sir.

Q The ditches were old and land bore evidence of having been long cultivated? A. Yes sir.

Q The houses were on it? A. Yes.

Q And bore evidence of having been improved?

A Yes sir, there was crops on it.

Q When does the irrigation season commence?

A That varies according to the season, earliest date would be about the 15th of April.

Q And the latest?

A We have irrigated there pretty well toward the first of November.

Q What crops are raised on these lands?

A Mostly hay, some grain.

Q Do you pasture your land after the hay crop is cut?

A Yes sir.

Q Does that require the use of water upon the land in order to give you a good pasturage?

A Yes sir.

Q Now, there are other defendants here in this same answer and counterclaim, what lands have they got and where are they with reference to the Pioneer lands that you have just been describing?

A There is defendants T. W. Allen and J. H. Murdock own a parcel of land lying between the Denver & Rio Grande Railroad track and the river to the south of this land owned by the Pioneer Irrigation, to the south and east, I think. T. W. Allen has about fifty-two acres and J. H. Murdock about twelve acres. This land is watered from a ditch taken out from the river about a mile below the intake of the Pioneer Ditch A. The ditch carries about two second feet of water.

Q Is this land cultivated?

- A Yes sir.
- Q How long have you known it?
- A As long as I have been acquainted with the ground there, fifteen or sixteen years.
- Q Has it been irrigated each and every year, and does it require water for the irrigation of the land?
- A Yes sir.
- Q How many second feet have been used here?
- A About two second feet.
- Q Does this ditch lose water the same as the other ditch you have described?
- A About the same, I see very little difference.
- Q By the way, are these lands and these ditches so situate with reference to the river that the water that is lost by percolation finds its way back into the river?
- A Yes sir.
- Q Is that obvious there upon an examination--
- A Yes sir.
- Q Of the country? A. Yes sir.
- Q Now, proceed, are there any other ditches of these answering defendants and counterclaimants I refer to?
- A There is another ditch, the Allen-McAfee ditch that takes out of the river-- Jacob Allen and Samuel McAfee and A. T. Allen. This ditch takes out of the river maybe three quarters of a mile, from half to three-quarters of a mile below the intake of the T. W. Allen ditch.
- MR. A. C. HATCH: Which side of the river?
- A On the south side of the river, south and east side of the river.
- Q All of these lands that you are now describing lie upon the east and south side of the river?
- A The T. W. Allen land and McAfee and Arthur P. Allen lie on the east side, the others are on the west side.
- Q The Pioneer lands are principally on the west?

- A All of that. T. W. Allen is on the west most of it. T. W. Allen has some on the east as well. This ditch starts out from the river and its greatest distance from the river is maybe a quarter of a mile, maybe eighty rods. It waters for T. W. Allen forty-six acres, Samuel McAfee thirty-nine acres, A. P. Allen twenty acres and J. W. Allen seventy-five acres. This is a ditch that will hold approximately ten second feet, but the water is used there about two-thirds of the time. About one-third of the time there is no water in the ditch. They would use on an average, I think about between six and seven second feet.
- Q And you have given all the acreage irrigated?
- A Yes sir, I think so.
- Q Was that an old ditch when you became acquainted with it, fifteen years ago?
- A. Yes sir.
- Q Were the lands irrigated very old lands in the sense they had been cultivated for many years?
- A Yes sir.
- Q Have you used approximately the same amount each year since you have been acquainted with the district?
- A Yes sir.
- Q What is the character of crops upon this land?
- A Mostly hay, some grain.
- Q And the irrigation season is the same as you have indicated?
- A Same as on the Pioneer.
- Q Does this ditch sustain loss in transmission from the head to the land?
- A Yes sir, very much loss.
- Q What would you say the loss was?
- A I would figure the loss close to one half of the water.
- MR. THURMAN: How long is that ditch?
- A This ditch is about a mile in length.
- Q Now, have you given all the ditches that are owned in this section by the Pioneer Irrigation Company and the answering

defendants and counterclaimants?

A I think so.

Q And the lands that are irrigated by them?

A Yes sir.

Q Except a spring that is referred to in the pleadings. Just describe that spring and the use to which it is put?

A The McAfee spring is a spring that rises near the lower end, or the south end of J. W. Allen's property.

Q That is a small spring, is it?

A A small spring, flowing approximately two thirds of a second foot, I should judge.

Q From half to two thirds second foot?

A Yes.

Q Who uses that?

A Wilford Wright and J. W. Allen.

Q In what proportion do they use it?

A J. W. Allen irrigates about five acres, and Wilford Wright about twenty-five acres.

Q So they use it in the proportion of one-sixth to five-sixths?

A Yes sir.

Q They claim that spring, do they? A. Yes sir.

Q That has been used on those lands--

A Ever since I have been familiar with it.

MR. KING: Mr. Wright, Judge Hatch, has not been served, but I will file an answer for him, just claiming his five-sixths of that spring. It never has been claimed, really as a tributary to that creek.

MR. A. C. HATCH: I think he was served with summons.

MR. KING: Then I will answer for him.

SAMUEL McAFEE, called by the defendant Pioneer Irrigation Company et al, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. King.

Q What is your name?

A Samuel McAfee.

Q What is your age?

A Going on my seventy-five--

Q Where do you reside?

A At Charleston.

Q How long have you resided in Charleston?

A Fifty years.

Q How do you spell your name?

A M-c-A-f-e-e.

Q Are you acquainted with the lands irrigated by the Pioneer Ditches; and by the ditches called the Allen & McAfee Ditch, and the land and the ditch that irrigates the land of Allen & Murdock?

A. Yes sir.

Q How long have you been acquainted with those ditches and those lands?

A I have been acquainted with them for fifty years.

Q Were you one of the first settlers in Wasatch county?

A Yes sir.

Q Were those ditches constructed when you became acquainted with them fifty years ago?

A Yes sir.

Q And were they of the same size then they are now?

A Just about the same size.

Q Was the same quantity of water being taken then upon these lands as has been taken since, and is taken now for irrigation purposes?

A. Yes sir.

Q Were these lands then irrigated and cultivated, fifty years ago, when you became acquainted with them?

A Yes sir.

Q Same lands and same ditches were there?

A Yes sir.

Q And used for the same purposes then as now?

A Yes sir.

Q And have been during all the years since you have been acquainted with it? A. Yes.

Q You got your water from the river, did you, by those ditches?

A Yes sir.

Q The Midway lower dam and those other dams were not in the river at the time these appropriations were made through these ditches? A. No sir.

Q You heard Mr. Allen state when the irrigation season commenced and when it closed, is that about right?

A That is about right.

Q And about the character of the ditches, the great loss that results in transmitting the water through them, is that correct? A. Yes sir.

Q His testimony in respect to that matter-- you are acquainted with the spring known as the McAfee spring, are you?

A Yes sir.

Q Is that named after your father? A. Yes sir.

Q Was it taken up and used upon the land now owned by Mr. Wright and Mr. Allen, many years ago?

A Yes, and used with my father, and Mr. Goddard used to dam across and take the water out.

Q You put a dam across the spring?

A Yes.

Q And took the water out?

A And took the water out there.

Q That was more than fifty years ago?

A Just about fifty years ago, we moved to Heber in 1866. It was there ever since, right on the river.

Q And that spring then, water of that spring was taken by means of a dam from the spring? A. Yes.

Q And has been used on this land that has been described?

A Yes sir.

Q And it has not been a tributary to the river since. That is all.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q Did you ever make any measurements to determine the loss in transmission of the water at any of these ditches?

A Well, good deal of seepage seeps right off, and water seeps right down.

Q But, you don't know, as a matter of fact, what the seepage is and what the loss is in any of the ditches, do you?

A I would judge about one-third or little more loss before we get it to the ground.

Q You never have tried to determine by actual measurement?

A No.

Q Do you know of anyone else ever having done so?

A No.

MR. A. C. HATCH: I understand, Judge King, that is a matter that will be determined later by the engineer.

MR. KING: Mr. Wentz made some measurements and found the loss as we have stated, approximately.

JOHN W. ALLEN, called by the defendant Pioneer Irrigation Company, et al, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. King.

Q What is your full name?

A John W. Allen.

Q You hear the testimony of your brother Jackson Allen with respect to the ditches, their size, capacity and places where they are constructed and the sources from which they get their water and the lands irrigated by those ditches?

A Yes sir.

- Q Without going in detail into that matter, is your testimony the same as his? A. Yes sir.
- Q Have you made any measurements of those ditches?
- A I have of the Pioneer Ditches.
- Q What is the capacity of those ditches?
- A The capacity of the ditches is about the same as J. R. gave, average.
- Q Just state it there?
- A Measurement of Class A West Fork.
- Q What do you mean?
- A There is two forks to A, one follows the river and another leaves the river.
- Q That is A and B?
- A A is the west fork, one that leaves the river farthest. Shall I give the different dates of measurement?
- Q That is the water flowing in them.
- A Flowing in the ditch, yes sir,
- Q Give it for one season to get it into the record?
- A They run from about 5.7 feet to 7.55 feet in the west fork Class A, and in the east fork, Class A they vary from 4.42 to 5.25.
- Q Then the two forks together would aggregate what of Class A?
- A Twelve second feet.
- Q Now, B?
- A B. ditch varies from 3.7 to about four feet. 3.96 is the most I found in Class B.
- Q Now, during what period of the year was that?
- A The first measurement was taken May 21, the last measurement was taken September 25th.
- Q What year?
- A 1915.
- Q What do you say as to whether the amounts flowing in the ditches during the times you made those measurements would correspond approximately with the amount flowing in the ditch, the quantity flowing in the ditches other years?

A Be about the same.

Q And was it necessary for the irrigation of the lands?

A Yes sir.

Q Did you measure the loss by percolation there?

A No sir, I didn't make any measurements.

Q From your observations there what do you say it was?

A Well, I figure from a third to a half loss, in my estimation.

Q You heard your brother's testimony relative to the McAfee ditch and ditch which Murdock and T. W. Allen used for the irrigation for the fifty-two acres of Allen lands and tract of Murcock lands?

A. Yes sir.

Q Is your testimony substantially the same as your brother's?

A Yes sir.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q The days when you made these measurements in the ditches, approximately the irrigation season beginning to the end, do they not?

A I started with them about the first that our ditches were cleaned. We usually irrigate once before we clean our ditches in the spring.

Q Why do you do that?

A Well, we are busy getting our crops in, and we don't usually get time to clean our ditches before the water is required on the land.

Q How many acres do you irrigate, or are irrigated from this A Pioneer ditch, both branches of it?

A About three hundred and sixty-five acres.

Q Three hundred and sixty-five? A. Yes.

Q How many from the B ditch?

A About ninety acres.

Q In the ninety acres did you measure the water at the lands, or at the intake of the ditch in getting these figures?

A In the Class A ditch my measurements were taken near the river.

- Q And the Class B?
- A The Class B ditch was taken little over two miles from the head of the ditch.
- Q That would be down near the lower end of it?
- A Yes sir, near the Bagley crossing, as we call it.
- Q That would be after the percolation would practically--
- A In the B ditch the most of our percolation would be already lost.
- Q There is much land that you don't irrigate at all until along in July or August? A. No.
- Q Under Class A isn't there much land overflowed by that river by the high water? A. No sir.
- Q Is that true ~~if~~ of B? A. No sir.
- Q What land is it there that is overflowed?
- A Nothing in the Pioneer.
- Q What ditch does that land lie under?
- A The Allen & McAfee Ditch is affected by that.
- Q That is practically all overflowed up until the high water season is over?
- A Some seasons it is not overflowed at all, Some seasons never overflows until June.
- Q Some seasons the crops are entirely destroyed by the overflow, aren't they?
- A Right near the river there has been times, perhaps.
- Q How many acres are irrigated by the upper Pioneer Ditch or B?
- A About ninety acres.
- Q About ninety acres? A. Yes sir.
- Q And that is the one in which you made the measurements down near the Bagley place, Bagley ranch.
- A Near the Bagley crossing.
- Q Where the water is applied?
- A The water is nearly all applied below that point, some applied above ~~that~~ there. The ditch runs about a mile below where I made my measurement.
- Q Do you say that all of this water is necessary to the production

of the crops grown on your land?

A Yes sir.

Q You have never been under any regulation with any ditches, have you?

A What do you mean?

Q You took the water when you choose and used it as long as you choose, and turned it in when you wanted it, there was no one to interfere with your use in any way?

A There was no one interfered with the amount of water we have taken from the river.

Q And you regulated the time of use among yourselves, the several owners?

A Yes sir, each man takes out in his turn.

Q And use it until he gets through?

A He uses it until his turn goes off.

Q You had regular turns of irrigating?

A Yes sir.

Q How long does it require to irrigate the ninety acres with the four second feet of water?

A We use it continuously.

Q That is during the entire season?

A Yes sir.

Q Do you have any idea as to the quantity that flows off of the land directly into the river?

A From Class B ditch there would be none flow into the river to speak of.

Q I am speaking of the Pioneer ditches.

A Well, Class B is one of the Pioneer ditches.

Q You say there would be none flow directly into the river?

A Very little.

Q It would flow down into Class A ditch and be used on lands lower down, would it not?

A If there was any waste water it would go into Class A ditch.

Q There is always more or less waste water in irrigating the land, isn't there?

A Well, there is some waste water.

Q But do you have any idea of the quantity that flows directly off the lands from Class B ditch into Class A ditch during the season.

A I would say it would not amount to anything to speak of.

Q Do you know how much of this water is actually applied upon the land, have you ever made any tests?

A I have made no tests, no sir.

Q From either ditch?

A I don't know what you mean as to tests.

Q That is as to acre feet.

A What portion of it is applied?

Q Yes, how many acre feet is applied upon the land during the season?

A No sir, I haven't made any estimate.

Q That would be a duty of twenty-two and a half acres.

MR. KING: Judge, he has stated there is fifty per cent loss.

MR. A. C. HATCH: Yes, but he measured it at the land where he commences to use it and below where some of it is used.

Q That is what you said, wasn't it, Mr. Allen.

A They start to use the water at about the point that I made my measurements, but the ditch extends for a mile below there. They are watering all the way along the ditch.

Q How many months do you apply the water during the year, when ~~ix~~ do you begin and when do you cease irrigating?

A Well, the season of irrigation, spring varies, some years we start as early as the middle of April, some years it may be the 10th of May before we will start.

Q Ordinarily it is about the 15th of May before you apply the water at all, isn't it?

A I think not, I think ordinarily about the first of May.

Q How late do you use it?

A Usually until the first of October, sometimes middle of October.

- Q These lands all slope there rapidly from the ditches to the river, do they not?
- A The upper land slopes quite rapidly, the bottom land is very flat.
- Q That is the lower part of the bottom land?
- A Yes sir.
- Q The upper part of the south land is quite rapid slope, isn't it?
- A. Yes sir.

T. F. WENTZ, Recalled by the Pioneer Irrigation Company, et al, testifies as follows:

DIRECT EXAMINATION by Mr. King.

- Q Mr. Wentz, did you make any measurement of the losses in either of these ditches?
- A. Yes sir.
- Q Which ditch?
- A B, Pioneer B, the larger one.
- Q Where did you make your measurement-- it is the smaller ditch if it is B, it is the upper ditch, is it?
- A Yes, it is the largest of the three, I have it designated B.
- Q Then there is A ditch?
- A Designated by Mr. Allen as A.
- Q Where did you measure?

MR. KING: May I have this little diagram marked?

THE COURT: Yes.

(Paper marked Exhibit 131.)

- Q Inviting your attention to Exhibit 131, where did you make the measurement, just make a little cross there and then I will pass it to the court.
- A The measurement is made about one half mile below where it branches at a point which I marked X, which is just below the wagon bridge. That is the first measurement. The discharge on September 5th at that point was 5.86 second feet. The other measurement was made at Johnson's ranch, one and a half miles below, at a point that I marked on Exhibit 131 Y.

The discharge at this point was 4.11 second feet, a loss of one and three-fourths second feet.

Q That approximately is what percent?

MR. A. C. HATCH: Is that the ditch designated as the largest ditch?

A That is the largest of the three.

MR. A. C. HATCH: The measurement at the head was 5.89.

Q What per cent was that, Mr. Wentz?

A Thirty per cent.

Q You just took a segment of the ditch then?

A Yes.

Q The upper end of the segment being how far from the head of the ditch?

A Approximately one half mile.

Q And made a measurement there and then one below about half a mile?

A Below a mile and a half.

Q Below a mile and a half, and made another measurement?

A Yes.

Q How far is that from the lower end of the ditch where you made the last measurement?

A It is about a mile from the lower end.

Q And would the conditions of the ditch be substantially the same, that is, would the losses be as great?

A Yes, I think so.

Q In other parts of the ditch as in this segment that you measured?

A. Yes.

MR. A. C. HATCH: Judge King, I understand that we have agreed you would accept a sixty acre duty for these lands, water measured at the land.

MR. KING: Yes.

MR. A. C. HATCH: Then we can save all this.

MR. KING: I wanted some little record.

MR. A. C. HATCH: The ditches to be in good condition

as determined by the commissioner.

MR. KING: I wanted to make a record to support a decree, some parties may not be here. It is stipulated, your Honor please, between the plaintiff in the case and these defendants and counterclaimants whom I represent that the lands referred to under these ditches are entitled to a duty of sixty acres of water to be delivered at the lands. The ditch to be in reasonably good condition. Of course, if there should be controversy as to what is reasonably good condition, reference could be had to the court.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q What is the condition of the ditch when you made these measurements?

A The condition was fair, it was neither good nor bad, it had been cleaned of moss sometime previous.

MR. KING: You mean the same year?

A Yes sir.

Q Is it one of those ditches that if allowed to go without repair fills up with moss so that practically all the water would be loss, isn't it?

A Yes, the losses would be greater and the percentage greater. The loss in this ditch, in this particular ditch with the three second feet in bad condition would be substantially the same as with ten second feet in good condition. The loss is a factor of the amount of wetted surface there.

MR. KING: I suppose we will stipulate that spring is owned by these people as stated by Mr. McAfee never goes into the river. I will file an answer for Mr. Wright, your Honor please, setting up his interest in the spring. I think that is all.

MR. THURMAN: If the court please, I desire again to call attention to the fact of the stipulation of parties up in the valley. Some of the parties I know have read that stipulation, and have not said whether there is any objection to it or not. The parties above representing interests in Provo Valley have stipulated, and Kamas. What about the parties down here. Mr. Ray, did you get a copy of that stipulation?

MR. RAY: I never have seen it.

MR. THURMAN: The stenographer undertook--

MR. RAY: Beg pardon, I did get a copy, if that is the one you refer to, the one that was distributed by order of the court.

THE COURT: The one at Heber.

MR. THURMAN: We met there. Do you know whether you have any objection to that?

MR. RAY: No objections I know of today.

MR. THURMAN: Mr. Cluff?

MR. CLUFF: No, we have no objection. I think I signed it, if I remember.

MR. THURMAN: Mr. Corfman wanted to look at it. He is not here, we furnished him a copy to examine. I speak of that because I represent two parties up there whose rights are settled by that stipulation except a slight change that is agreed upon that will be made, which won't affect you people at all, just between the parties up there. I apprehend there will be no objection. I will stand on the proposition that your Honor suggested yesterday, if there are objections when we come to the final round-up, you will give us a chance to be heard.

THE COURT: Certainly, if there be any parties who decline to sign the stipulation you may then introduce enough evidence to support a finding against the parties who do not sign it. The stipulation was not signed by the parties who entered into it. It was taken in open court by the stenographer,

and sent to the parties.

MR. THURMAN: I think it would be just as well for the stenographer now to take additional names of those attorneys down here. The record up there, as I remember it shows the attorneys that were present at that time. Now, if they are added here as fast as they come in, be no necessity of signing up a stipulation.

MR. RAY: As I understand the stipulation, your Honor, my acquiescence in it is contingent upon my understanding it, does not provide for any change in the place of hearing without the upper valley there provide for a transfer of the water?

THE COURT: I don't understand it takes from that valley any of the water, it is all diverted in the valley, as I remember it.

MR. JACOB EVANS: I suggest you get Mr. Corfman over here. He represents a lot of individual defendants and if the names are going to be called he knows better than anyone else who he represents.

MR. JACOB EVANS: If the court please, I have one suggestion to make before court adjourns. That is whether or not your Honor will see fit to fix some time now when persons served with summons would be required to file their answers, otherwise default might be taken against them.

THE COURT: Are there a number of such?

MR. JACOB EVANS: That I cannot say definitely, I presume there are quite a number of them, I could not say definitely without checking them up, and that would take some considerable time to check up and determine.

THE COURT: Yes, I think unless the answers are filed at the time we close the evidence, I think there should be default. The service of summons upon all the parties I take it who were served was had before we commenced to take the evidence.

MR. JACOB EVANS: Oh yes, long before.

THE COURT: So they had a long time in which to appear if they desired to.

MR. RAY: May it please the court, I assume the court will adjourn until nine thirty?

THE COURT: Yes.

MR. RAY: It is necessary for me to go to Salt Lake, and I wondered whether or not some witness might be put on until I could get here on that ten o'clock train?

THE COURT: Yes, we will suspend the further examination of Mr. Thompson until ten o'clock. There will be some short claims to be presented in the morning.

MR. WILLIS: May it please the court, I want to file at this time a second amended answer for certain defendants that I represent. The court heretofore allowed me the privilege of filing it later with the consent of counsel, and I desire to file at this time.

THE COURT: It may be filed.

MR. COLEMAN: If the court please, in the case of the Sege Irrigation Company, one of the defendants in this case, there is a matter which Mr. Whitecotton had in charge. It seems, in looking over the files there has been no answer filed, but a stipulation was entered into of some kind. We desire to file an answer, counterclaim and cross complaint with the court's permission, and we will serve it.

THE COURT: It will follow the lines of a stipulation that has been filed, so that it will not be necessary to take further testimony.

MR. COLEMAN: A stipulation was only entered into with the plaintiff. We will have to have brief testimony.

MR. STEWART: If the court please, at the time your Honor had a hearing at Heber City, there was a stipulation entered into between all the parties present. The stipulation in a general way followed the distribution of the water which had been made under a certain proposal of the plaintiff, and I was not present at that time. Now, the stipulation, so far as the Stewart ranch is concerned, is satisfactory, with the exception that they have omitted in this stipulation to give the ranch the number of acres to which it is entitled. I have gone over this matter with most of the attorneys and they have agreed that the acreage-- Number 9 of the stipulation is as follows: "Whenever the water flowing in said river and canals of the parties heretofore stated exceeds in volume the aggregate of the quantity hereinbefore specified as belonging to the parties above named, the following named parties are entitled of such excess to the following quantities":

Stewart Brothers-- which means the Stewart ranch-- the stipulation reads ten second feet for the irrigation of six hundred acres of land. Now, I have gone over this matter with the attorneys and they have agreed, I think practically all of them, that that should be sixteen and two thirds second feet for the irrigation of a thousand acres of land, instead of the way it reads ten second feet for the irrigation of six hundred acres of land, and I would like that incorporated in and to become a part of the stipulation in accordance with this understanding.

MR. THOMAS: Of course, we cannot consent to that at this time. That would materially affect the rights of the water users, as I understand it, of Summit county. Until I could get in communication with them, I could not consent to any such change in the stipulation.

MR. STEWART: Of course, if that is the attitude of the defendants then I take the attitude, of course before I would consent to a stipulation which pertains to the Summit county people I would have to make some further investigations concerning that.

MR. THOMAS: That is the gentleman's privilege, of course.

MR. STEWART: I was not present when that stipulation was introduced. I have taken the matter up with Mr. Murdock and the other attorneys, and I thought Mr. Murdock had taken it up with Mr. Thomas, and I understood that had been agreed to.

MR. THOMAS: No, I cannot make any such agreement. It may be perfectly agreeable with my clients, but until I can consult with them, I cannot agree to it.

MR. STEWART: How long will that be?

MR. THOMAS: They are in Summit county, they are not here.

MR. STEWART: Do you know upon what basis the six hundred was included in this stipulation?

MR. THOMAS: I know that agreement was acceptable to the representatives of my clients who were there. That was discussed. Now, any further concession I would not be authorized to make. They may make it, but I could not make it or consent to it at this time.

THE COURT: You will be in a situation to either consent to it at the return of the court here to take further evidence, or Mr. Stewart can introduce evidence at that time.

MR. STEWART: Then, if I am required to introduce all my evidence I shall insist the Woodland people and the people Mr. Thomas represents bring in their evidence, because I shall have a right to question them.

MR. THOMAS: That is your perfect right, that would not deter me in making any objection at this time. I have stated my case fully.

MR. STEWART: My position is I was not present at that particular time, and the stipulation was entered into, and if I can agree to this stipulation so as to be in harmony with all the procedure that has taken place, I want to do it, and propose to do it.

THE COURT: Very well, you can bring the matter up when the court returns, and if it can be settled that way all right, if not, the evidence will have to be introduced. The court cannot assist you in making a stipulation.

MR. STEWART: At this time I would like to ask the court to substitute the name of Charles H. Rampton as party defendant, in lieu of the name of Harold C. Best. Mr. Best has sold all his property to Charles H. Rampton.

THE COURT: That may be done.

MR. STEWART: I was called to the telephone yesterday and it was suggested to me this hearing was going to conclude, and there was one client I represent, Mr. Best, and it was suggested if I had any proof that I had better bring Mr. Best down to put in the proof, and I have Mr. Best here and would

like to have the opportunity.

THE COURT: When we finish with what we have on now, you can put it in. Mr. Slater was on the stand.

MR. THOMAS: Mr. Slater had concluded and excused. Mr. Nelson was called.

MR. THOMAS: Now, your Honor, through a misunderstanding one of the witnesses is not here, government servant, he has been sent for, so we can let some other party go ahead.

MR. CLUFF: In a very few minutes we can dispose of the balance of the South Fork.

MR. STEWART: If the court please, may I put on one witness?

THE COURT: Yes, I think some of the witnesses appeared especially for today.

HAROLD C. BEST, called on behalf of the defendant Charles H. Rampton, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Stewart.

Q Mr. Best, what is your name?

A Harold C.

Q Where do you live?

A Salt Lake City.

Q Do you know the location of the old Swift Ranch on the Provo river?

A. Yes sir.

Q Where is it located?

A It is located about a half a mile east of the Utah Light & Power Company's dam intake.

Q Known as the Murdock Ranch?

A Yes, known as the Murdock ranch.

Q Who is your neighbor on the east?

A Mr. Bates, John Bates.

Q What is the area of the Swift ranch, how many acres?

A Three hundred and twenty.

Q Of this three hundred and twenty, how much has been irrigated?

A One hundred acres.

Q Of this hundred acres how much has been plowed and cultivated?

A About sixty acres.

A And the other forty acres has been used as what?

A Pasture.

Q You purchased the Swift Ranch, did you not?

A Yes sir.

Q And you have since sold the Swift Ranch to Charles H. Rampton one of the defendants in this case?

A Yes sir.

Q Mr. Best, when did you first go on the place?

A 1911.

Q When you were on the place was all this land under irrigation?

A Yes sir.

Q State whether or not the ditches had the appearance of having been there for a number of years?

A They did.

MR. STEWART: Now, if the court please, at this time I will state to the court I have talked with a number of attorneys concerning just what this water right should be. By the original decree there was awarded to Mr. Swift as a first class water right twenty acres of land, that is the right to water twenty acres of land.

MR. THURMAN: What decree is that?

MR. STEWART: Fulton decree.

THE COURT: This land is in Wasatch county?

MR. STEWART: This land is in Wasatch county.

Now, I have not the witness here who can fully give just how all that additional land came under irrigation or cultivation. In talking with Mr. McDonald and Judge Hatch and Mr. Murdock, who are more or less familiar with conditions up there, they have agreed that it might be stipulated that forty acres of this be included in what is in the stipulation the 14th class water right, and the other forty acres in what would be the 16th class water right. I don't know whether Mr. Thomas will agree to that, or whether he will want to make some further investigation.

THE COURT: That would make eighty acres.

MR. STEWART: There should be a hundred, if you include the twenty acres that was awarded under the Fulton decree. They are somewhat familiar and have agreed as far as this one client is concerned it may be disposed of in that way, unless there is some objection.

MR. THOMAS: I think we won't have any objection, but I cannot state. Being below the point of use of my clients, I do not know they will make any objection, but such objection as can be made will be made shortly.

THE COURT: Let Mr. Stewart know in time to bring his witnesses on the 11th.

MR. STEWART: I will ask, so we will have some understanding, I will ask Mr. Thomas to indicate to me whether or not he will agree to this stipulation the others have agreed to in reference to the Stewart ranch, at an early date.

MR. THOMAS: Yes, I will get the position we will take so you will have it before December 11th.

CROSS EXAMINATION by Mr. Thomas.

Q You have not been on the land prior to 1911?

A No sir.

Q And how much of this pasture land is in grass?

A Forty acres.

Q Considerable brush there?

A There is some trees and some brush.

Q About what proportion of that is in brush?

A Very little of it now.

Q And when, do you know, was these sixty acres brought under cultivation by plowing?

A That was under cultivation when I went there.

Q You don't know when, however, they began to develop more than the twenty acres of water right that was alleged to have been given to it under the Fulton decree?

A No, not exactly, I don't know exactly.

Q Only as given to you by someone else?

A Yes.

Q You can only testify from 1911? A. Yes.

Q Has the water been used continuously since 1911?

A Yes.

Q Upon the sixty acres of plowed land and forty acres of
pasture? A. Yes sir.

MR. STEWART: That is all, your Honor.

MR. A. J. EVANS: If the court please, Brother Wahlquist telephoned down this morning, and asked if I would have a little map he left here put in, and I will have it marked.

THE COURT: For the purpose of showing the acreage of some property?

MR. A. J. EVANS: Yes.

THE COURT: I remember he spoke about it.

(Paper marked Exhibit 139)

MR. A. J. EVANS: Submit Exhibit 139, ask it be admitted in evidence.

THE COURT: It may be received.

MR. RAY: Those are as to Wasatch county lands?

MR. A. J. EVANS: Yes sir.

THE COURT: Are any of the parties prepared to introduce any further evidence today?

MR. McDONALD: Your Honor please, counsel for Provo City and some of the other parties are just going over the details of the stipulation that involves some rights below the Midway dam, and they will be in in a moment.

THE COURT: In Wasatch county?

MR. McDONALD: In Wasatch county, although the people here are affected by it.

MR. THOMAS: Provo City has nothing further to offer at this time, unless it be something in relation to the claim of Mr. Tanner, and, I believe, we will not be to exceed thirty minutes on any other matter we may have.

MR. RAY: I understand that you will have further witnesses on the afternoon?

MR. THOMAS: Yes, that will be very brief.

MR. RAY: Do I understand, your Honor, Mr. Tanner is reserved for further cross examination as to his drainage waters? I understood so the other day, Mr. Corfman asked Mr. Tanner may be examined further.

MR. THOMAS: I stated too, Mr. Ray, Provo City would

have some further rebuttal as to that, as to Mr. Tanner's claim.

MR. THURMAN: Can't you proceed with that cross examination on the Tanner matter?

MR. CORFMAN: No, it is a new thing to us.

MR. THURMAN: It was new last night, but should be old this afternoon.

MR. CORFMAN: We have not had any opportunity to go out there and observe the physical conditions, and we want to take witnesses there, look the ground over, see what is there.

MR. THURMAN: Been in the pleadings all the time, Mr. Corfman.

MR. CORFMAN: First intimation we had any claim of that kind being made in the case.

MR. THURMAN: It was in the answer here.

MR. CORFMAN: Like to send out city engineer out there, someone to see what the conditions are before we undertake to cross examine Mr. Tanner.

MR. THURMAN: The claim was very plainly stated and has been for two years in the brief.

MR. RAY: Those pleadings have never been served on counsel, Judge.

MR. THURMAN: I know, but they have been filed. It was agreed they need not be served, but the files were here where any attorney could see them.

MR. MCDONALD: As Judge Corfman stated none of us knew there was any such pleadings in the files. Of course, there are hundreds of pages, and without any intimation there was any such pleading, there, we did not hunt for it.

THE COURT: I will permit time to prepare for cross examination. Are any of the parties prepared to introduce further evidence today? The court will suspend the hearing now until the 11th day of December.

MR. RAY: Prior to the order of suspension, there was one or two matters I wish to call the counsels' attention to

while they are here.

THE COURT: I was going to suggest while making this announcement I think it would be well to have some publicity given to the fact that on the 11th, or at that hearing, default will be entered against all parties who have been served and who have not appeared or answered in the case, and all parties who have appeared and answered will be expected at that time to produce all the evidence they have either in support of their claims or in rebuttal of the other claims. In other words, that will be the last session of the court for the purpose of taking testimony, and defaults will be entered at that time.

MR. RAY: I wanted to call to counsels' attention the fact of the stipulation which we are trying to enter into for the protection of our case in this court, and I think it is of extreme importance that someone be charged with the responsibility of getting that stipulation up. That is a matter, of course, between counsel, that the court would make no order upon, would not ask any, but I think counsel should meet for a minute at the conclusion of the hearing and see what is going to be done.

THE COURT: It is very questionable whether the court has any jurisdiction unless all the parties are parties to that stipulation. It was suggested by some of the counsel during the discussion those who signed it would probably be bound by it, but there is a serious question in the mind of the court whether that is true. This is an extraordinary and special provision of the statute, and provides that when all the parties to an action enter into a stipulation that certain powers shall be conferred upon the person mentioned in the stipulation, and I have serious doubts whether any powers are conferred on the person unless all the parties who have been summoned in the case, and are here, unite in the stipulation.

MR. THURMAN: For that reason, if your Honor please, I think it very important to see that the defaults are taken

and proper record made by this court.

THE COURT: I think so:

MR. THURMAN: In the present capacity.

MR. A. C. HATCH: I was going to suggest that be done the first thing at the opening of court on December 11th.

THE COURT: Yes, I think it should be.

MR. A. C. HATCH: And the stipulation might be filed then immediately following.

MR. JACOB EVANS: I will suggest this too, that the court request the clerk to mail notices to each of the attorneys of record in this case to appear here on the 11th, so that we may check this matter up, and if perchance any of them have not signed the stipulation, they could sign it at that time.

THE COURT: I would hardly feel justified in directing the clerk to notify them, they are ordered to be here. Of course, they ought to be notified of the fact that an adjournment is had and the purposes. I think the court may notify all attorneys that have appeared in the case of the fact of adjournment to that time, and the fact also that defaults will be taken at that time.

MR. A. L. BOOTH: I believe there are several parties who have signed the stipulations, but have not appeared by attorneys, and I do not know whether the clerk ought to notify them also. If they are not in here by attorneys, but are in here by stipulation, then it seems they would be in before the court at least with the stipulation.

THE COURT: All parties who have appeared by attorney or in person are before the court, and must be considered.

MR. A. E. BOOTH: If they are not here by attorney then they would have to sign this stipulation.

THE COURT: Certainly.

THE CLERK: As a practical proposition on the part

of the clerk, I take it it would be almost an impossibility for him to notify these parties, for the reason there is no address of these parties appears any place in the files.

THE COURT: Yes, I think it would be very difficult.

MR. COLEMAN: I think we might obviate that by having the clerk publish notice in a paper of general circulation here. We did that once before.

THE COURT: I think as much publicity of the situation ought to be given as possible. Of course, publication of such notice would not bind anyone, yet it would probably result in what we desire, probably result in the parties being present at that time. If there is nothing further, no other matters to come before the court, the court will stand adjourned until the 11th day of December.

 5:00 P.M., RECESS TO 10:00 A.M., DECEMBER 11, 1916.

THE COURT: Gentlemen; I forget where we were at the adjournment.

MR. A. C. HATCH: Mr. Tanner was on the stand, and Mr. Corfman asked the privilege of recalling him for cross examination at the opening of the court.

THE COURT: Very well.

MR. WILLIS: If the court please, before proceeding with testimony, I ask to add to my answer other parties and change in acreage in some of the instances. I move the court at this time to add to the defendants that I represent as shown by the second amended answer of Joseph Hatch and others the name of Elisha Webster; that I be permitted to write that in the amended answer on file in this court. That under Subdivision E of Section 5 of said second amended answer, I ask to add the figure one before the figure five under the name of E. R. Brunson, making it fifteen acres

instead of five acres as shown in the amended answer on file. I ask to amend the acres of William Bonner from five to six acres under said Subdivision E of Section 5, and to change the acreage to read 135.90 acres under Subdivision E. I ask to add a new subdivision to be known as FF-a immediately following Sub-section FF, to read as follows: "Webster Spring Ditch. Elisha Webster ten acres in Section 11, Township 4 South, Range 4 East, Salt Lake Meridian, irrigated through what is known as the Webster Spring Ditch, and a slough leading from Provo river, total ten acres.

THE COURT: If there is no objection, amendment may be made.

MR. WILLIS: With the consent of counsel I ask to amend the stipulation that has heretofore been filed, signed by the plaintiff and certain defendants to cross complaint with the amendments that I have asked for in my second amended answer.

MR. RAY: That is the Wasatch county stipulation?

MR. WILLIS: By interlineation in the answer and stipulation that are now on file in this court.

MR. RAY: Is that the Wasatch county stipulation?

MR. WILLIS: No, it is as to defendants from the Midway upper dam down to the Wright ranch.

MR. A. C. HATCH: We will object at this time to the amendment of the stipulation. We know nothing about these matters, I know nothing about them, that is, as to this acreage and as to Elisha Webster. He is in default here this morning. If he wants to answer, I think he should be required to put in his answer with leave of court, and set up his claim of what he owns. Brunson is already in court. I understand, by Judge Willis' former amended answer. This Elisha Webster claim is something I know nothing about, and he has never appeared in the court, but was served with process, I understand some two years ago, and as to the Brunson enlarged claim and the other enlarged claim, I don't remember what they were, and

the stipulation has been entered into fixing these rights, once agreed upon by counsel and by the plaintiff, and we would object to changing the acreage without proof.

THE COURT: The only question that is presented to the court is the question of the permission to make this amendment to the pleadings. I am disposed to permit the parties to set up their claims in this way if he desires to do it, rather than require them to prepare a new pleading, because they may join with the others in this way, and as to the stipulation, that is ~~the~~ a matter the court has nothing to do with. The court cannot make a stipulation for the parties. You must among yourselves determine whether you can stipulate as to these matters, and if/you can-not, then you may introduce your evidence.

MR. A. C. HATCH: Then, if the court please, he is bringing in new parties and setting up new claims. There are so many amendments, unless we have pleadings showing what they are, or a new amended complaint is afterwards filed, we cannot keep track of it.

THE COURT: Mr. Willis may furnish you with the substance of this amendment so that you may have it before you.

MR. WILLIS: If the court please, I will say in regard to E. R. Brunson and William Bonner that it was represented to me that they owned certain acreage under the Island ditch, what is known as the Island ditch, and on the strength of that, I filed an answer for them. I later discovered that as to the acreage, it is incorrect, and the ~~xx~~ plaintiff has agreed that the acreage might be made, and I think that-- and as to Elisha Webster--we have until this morning, according to the order of the court, to answer, and I take it the objections are untimely and should not be sustained.

THE COURT: The court has suggested the court will permit you to make the amendment but you should serve in

writing on the other parties the substance of the amendment in some form that it can be attached to your original cross complaint.

MR. WILLIS: If the court please, I wish to say this, that the stipulation referred to is a part of the stipulation here in this court, and I take it without the consent of the plaintiff and the court that we could not interline those amendments.

THE COURT: Oh no, you cannot change the stipulation unless they consent to it, and the court cannot do anything.

MR. WILLIS: I take it without the court's consent we have no right to tamper with stipulations that are on file.

THE COURT: You can make a new stipulation, if you wish to. The stipulation is something the court has nothing to do with, that is merely an agreement between the parties and the court cannot make it for you. Now, if that matter is disposed of--

MR. JACOB EVANS: If the court please, I might suggest we have made an alphabetical list of the names of the parties to this action. The list shows the persons that have been served with process, those that have answered and those that have been stipulated with. We find in making up this list quite a number of people that have been served with process, but no answers have been filed. In accordance with the statement of the court at the adjournment last hearing, we published notice that defaults would be taken against all persons who had failed to answer or otherwise appear, and that notice was given, I think, to our local papers here as well as to the Wasatch paper, and I don't know but a copy of it was sent to the Summit County paper, but I am not sure as to that. Anyway, we gave as wide a publicity to the matter as we could under the circumstances, and we feel now at liberty to take defaults against all persons who have failed to answer at this time, and if there are any persons here who have not answered, I would like to have it made known so

that we may know what to do with respect to that matter.

THE COURT: I think those defaults ought to be taken at this time.

MR. JOHN E. BOOTH: If the court please, until this morning I knew nothing of it. Looking over the record I find there has been no answer filed by Robert Burkin. Robert Burkin died some six months ago, and, I believe that all his interests are included in the Little Dry Creek. I represent the estate, and I knew nothing of this, and I want to ask the indulgence of counsel until this afternoon, that I may look it up. I have sent for the administrator to come right up.

THE COURT: Under ordinary circumstances in the trial of a case such as this it is always deemed best to take those defaults the last thing, but under the circumstances of this case, I do not think we ought to delay any longer. Defaults ought to be taken this morning, because, as we all understand, it is impossible to finish this case and have a decree settled and signed during my term of office, and, unless the stipulation is signed that I may do that as judge pro tem later, we might just as well stop now. Now, in order to determine who must sign those stipulations the defaults ought to be taken at once, so that you may proceed to see those who are not in default and see if that stipulation can be made, and that is the reason I suggest the defaults should be taken immediately.

MR. JOHN E. BOOTH: I suppose then, if I have to, I may ask to have the default set aside in that particular instance.

THE COURT: Oh yes, the court won't hesitate at all to set aside a default in a case like that, but the parties who have in charge the other matter must know who they must see to sign this stipulation. I think it should be determined as soon as possible.

MR. JOHN E. BOOTH: The stipulation as to your--

THE COURT: Yes, that must be signed by all the parties in the case.

MR. JOHN E. BOOTH: I understood that had been done.

MR. RAY: No.

MR. JACOB EVANS: I think the stipulation has been signed by every attorney in this case. Whether or not there are some parties that made their appearance here--

THE COURT: I understood there were, I may be mistaken as to that.

MR. JACOB EVANS: I believe every attorney who appeared of record has signed the stipulation. That is my understanding.

THE COURT: That may include all the parties, but in order to clarify the situation, those defaults ought to be taken.

MR. HUFFAKER: Your Honor please, I am just advised there are three other defendants who have not answered, Nephi Huber, Joseph Huber, and, I think, the estate of John Huber, deceased. I will ask permission at this time to file an answer for the gentlemen, either through the Midway Irrigation Company, or individually. We have not decided as to that yet.

THE COURT: You may present your answer.

MR. HUFFAKER: Yes, I will have it prepared.

THE COURT: I will make the order then permitting you to file it, if there is no objection. You can file it at once and be prepared to present your evidence at once?

MR. HUFFAKER: Yes.

THE COURT: So that you can put in your evidence at this hearing?

MR. HUFFAKER: Yes.

THE COURT: Now, do you desire to make some motion with reference to default?

MR. JACOB EVANS: I do not know it is necessary to make any motion with reference to that. I call it to the

attention of court and counsel that are now present, we will take default as to all those persons who have failed to answer or otherwise appear.

THE COURT: Defaults may be entered as to all those parties.

MR. A. C. HATCH: Now, will you read the list. Would it not be well to read the list he claims as defaulted.

THE COURT: Yes, I think so, so that it will become part of the record.

MR. JACOB EVANS: Mr. Booth has prepared this list, and he can read the names of those who have been served and no answer.

MR. A. L. BOOTH: I will state there may be some oversight to the long list, but the attorneys are here and perhaps can correct, if we have done anything of that kind.

MR. WILLIS: May we be permitted to suggest corrections? I notice a number of errors in there, and as they are read, we can make corrections so that they may be straightened out.

MR. A. L. BOOTH: The paper I have shows that J. W. Brown has been-- no, he is dead. He was not served with summons, and I do not know what should be done in a case of that kind.

THE COURT: I do not think you can enter default against him if he died before service.

MR. A. L. BOOTH: There was no service shown.

In the matter of George Baum, he was served with summons, but since then has died, and his interests have been succeeded to by his sons, represented by Mr. Cluff. Now, George Baum himself has not answered, and I presume the proper thing would be to move to dismiss as against him, his interest having been succeeded to by those parties.

THE COURT: I think the proper method would be merely to make an order, if any order is necessary at all, to permit the successors in interest to proceed in their name. I understood you to say Mr. Cluff has represented them and

introduced the evidence.

MR. A. L. BOOTH: Yes, introduced the evidence and it is before the court, but the record shows George Baum was served with summons and has not answered.

MR. A. C. HATCH: Had the time expired as to Baum before he died?

MR. A. L. BOOTH: Yes, the time expired long before he died, after service.

MR. A. C. HATCH: Default should be entered against him.

THE COURT: In what way was the appearance made for the successors in interest?

MR. CLUFF: They were served with summons, and I answered for them. They proved their claim last session.

MR. JACOB EVANS: After the death of Baum I think we made them parties, and served them with process.

MR. A. L. BOOTH: They were just brought in last year.

THE COURT: You can make any order you desire to. I do not think it makes any difference whether any order is made at all.

MR. CLUFF: I don't know whether there is property still belonging to the George Baum estate, and that has better be ascertained. I think the deputy clerk, Mr. Gee is administrator.

MR. A. L. BOOTH: Here is Samuel E. Bunnell who was served with process. There appears to be no answer, or appearance, by Mr. Bunnell.

THE COURT: I think if you will just read the names so the reporter can take them; all those persons who have been served with process, and not answered, it will be sufficient.

MR. A. L. BOOTH: Joseph T. Carter-- I beg your pardon-- Joseph T. has answered. Robert Cordner, John W. Clark, Arthur C. Candland, Samuel Carter. Do you appear for him, Judge Booth?

MR. JOHN E. BOOTH: I think he is included in the answer of the Carters.

MR. A. L. BOOTH: I don't have him marked as having answered here. Henry T. Coleman.

MR. HUFFAKER: Just a second, I will ask the same for Mr. Coleman. He has an independent right under the Midway Irrigation Company-- permission to file an answer at the same time I do in the other cases.

MR. A. C. HATCH: Do you appear now for Mr. Coleman?

MR. HUFFAKER: I think I shall, although I have not talked to him. I know that he is interested there.

THE COURT: If you have no authority to appear for him, we will enter the default.

MR. HUFFAKER: It is part of the Midway Irrigation Company, it may go in that.

THE COURT: We will let the default be entered, then if you desire you may ask to have it set aside and answer.

MR. A. L. BOOTH: Arthur Clyde, George A. Clark, Mary A. Cook. Now, here is Henry B. Coleman, administrator of the estate of Nathan Springer, deceased.

MR. HUFFAKER: That is in the same condition.

MR. A. L. BOOTH: Bish Corbett. M. L. Moore, named in the complaint as demurred, but there seems to be no further appearance, I don't know whether that demurrer has been disposed of or not.

MR. A. C. HATCH: My recollection is all demurrers were overruled.

MR. A. L. BOOTH: Is that the recollection of the court?

THE COURT: I think so. I don't remember what time was given to answer, but I assume it would be the ordinary statutory time. Some such order, I think, was made.

MR. A. L. BOOTH: This person evidently would be in default. John W. Carlyle. He has been served, and I have no record of any appearance or stipulation.

MR. A. C. HATCH: I think he has no interest now, He should be defaulted.

MR. A. L. BOOTH: Leroy Dixon, John H. Emmons, Mary Ann Emmons, Owen Ellis, Elizabeth A. Farrer, Emily E. Forsyth, Frederick Farrer, W. W. Ferguson, John B. Fowers, executor of John Fowers, deceased.

MR. WILLIS: If the court please, there has been an answer filed in that, and it has been stipulated.

MR. A. L. BOOTH: I see there is a stipulation marked here, so strike that out. John H. Gordon, Jr., James R. Glade estate, Henry W. Goddard.

MR. A. C. HATCH: I move that be stricken out as to Glade, the default should be against Earl J. Glade.

MR. A. E. BOOTH: Default should be against Earl J. Glade, Administrator of the estate of James R. Glade, deceased. Lyman Gines, D. A. Gibson, James R. Hooks, James B. Hamilton, John W. Hoover.

MR. HUFFAKER: Just a minute, I represent Mr. Hamilton there, and I will ask permission to file an answer.

THE COURT: Very well.

MR. A. L. BOOTH: John W. Hoover.

MR. A. C. HATCH: Do I understand the default will be entered, and they will move to set it aside?

THE COURT: Default may be entered in all where they have not answered.

MR. COREMAN: May I call attention to the name Henry Goddard. It was stipulated his interests are represented by the Fort Field Irrigation Company.

MR. A. L. BOOTH: I presume that is a fact. The Fort Field Irrigation Company has put in its proof, and Henry Goddard was served personally, and has not answered.

MR. COREMAN: Except through the Fort Field Irrigation Company. It was stipulated those interests had merged into the Fort Field Irrigation Company.

MR. A. L. BOOTH: I think that is correct.

MR. A. C. HATCH: But the default of Goddard personally would be entered.

THE COURT: Yes, it should be.

MR. A. L. BOOTH: In order to make the record complete I presume all these who have been served with process and not personally answered would have to be defaulted. Nephi Hoover, Joseph Hoover, Lucien N. Hinkley, John Hoover, Orson Hicken.

MR. WILLIS: There has been an answered filed asking to substitute Fred Hicken in lieu of Orson, because Orson does not own any land in any way coming under-- I mean Alonzo A. Hicken.

MR. A. L. BOOTH: We have Alonzo Hicken farther down. That seems to have been stipulated.

MR. WILLIS: And he asked to be substituted in lieu of the other one.

THE COURT: Default may be entered against this one.

MR. A. L. BOOTH: Heber City.

MR. WILLIS: Heber City is not interested in any way. It is a mistake making that list. They appear as part of a partnership and have answered, but Heber City has no interest, and it is a mistake in it being there.

MR. A. C. HATCH: Now, if the court please, Heber City is a part of a co-partnership, necessary to serve each member of a partnership in order to bind it. If Heber City has answered it should not be defaulted, if it has not answered, it should be defaulted.

MR. WILLIS: It has answered, your Honor.

MR. A. L. BOOTH: I didn't find it that way.

MR. WILLIS: They answered as a co-partnership known as the Heber Light & Power Plant.

MR. A. L. BOOTH: I have that in another place. The Heber Light & Power Plant demands, but I do not find any record of an answer.

MR. A. C. HATCH: Heber City then will be defaulted.

THE COURT: I don't know; if the partnership has answered and it was served, merely an order that every member of the partnership should be brought before the court, it should not be defaulted if the partnership has answered.

MR. WILLIS: If the court please, I will ask I may move to set aside any default after I have gone into the record. I came into it late, and it might be possible that an answer would be necessary.

THE COURT: You need not make the motion now.

MR. A. C. HATCH: Have they filed an answer-- Heber Light & Power?

MR. WILLIS: Yes.

MR. A. C. HATCH: Then it should not be defaulted.

THE COURT: No, if it was served merely to bring in that partnership.

MR. A. L. BOOTH: I have a record James Hamilton demurs. He was not served with process and seems not to have answered or further appeared. I do not know whether that is the same as James B. Hamilton or not that we read a little while ago.

MR. A. C. HATCH: Just a moment. I understand from Mr. Tanner that the Heber Light & Power Company have not answered.

MR. WILLIS: We will ask for the privilege of answering, if we discover that is true.

MR. A. C. HATCH: In that case we will ask the default of Heber City may be entered, and the court may set it aside if they have answered.

MR. A. L. BOOTH: I take it an appearance by demurrer would entitle us to a default.

THE COURT: Certainly, if the demurrer was overruled.

MR. A. L. BOOTH: Although they were not served with summons.

THE COURT: No question about that. If the demurrer was overruled and they had not answered within the time given by the court, you would be entitled to default.

MR. A. L. BOOTH: James Hamilton would come under that, and I think Heber Light & Power Plant the same thing, and Mary Hunter the same thing.

THE COURT: Defaults may be entered in all those cases subject to being set aside, of course.

MR. A. L. BOOTH: Lars Jacobsen, Jr, as administrator of the estate of Lars Jacobsen, deceased. Albert Jacobsen, Parley Lewis Jacobsen, Alfred J. Jorgenson, Anna Jones, Mark Jeffs, Jane McD Johnston, William Johnston.

MR. WAHLQUIST: If the court please, I think those are all included by naming them in that stipulation that was entered into at Heber, although the paper does not so show. As I recall reading that over yesterday, those estates are named in that stipulation.

MR. A. L. BOOTH: I will state I don't remember. That stipulation was among these files. I distinctly remember the names of Jeffs and Mrs. Mc-- something, Johnston, as being represented by Mr. McDonald.

THE COURT: Default may be entered against all these names Mr. Booth has on his list subject to being set aside. I think you had better read them as rapidly as you can and the matter whether that is to be set aside may be taken up later.

MR. A. L. BOOTH: T. H. Knudson, Frederick Kummer, Reed J. Knudson, Edward Kummer, Rosind Kummer, Hyrum Knudson.

MR. WILLIS: I think all those Kummer interests are represented in the Kummer estate, I don't think they own afoot of land individually.

MR. A. L. BOOTH: W. D. Lewis. Mims Lark administrator of the estate of William Larson enters demurrer.

MR. A. C. HATCH: As to the several Kummers, if the court please, they were the heirs of one John Kummer, deceased,

and no administrator had been appointed.

MR. WILLIS: Oh, yes, there is.

MR. A. C. HATCH: At the time of the commencement of this action.

MR. THOMAS: We have made answer for Mims Lark, and Mims Lark, administrator of the estate of William Lark. There is no Larsen-- the original pleadings show Larsen.

THE COURT: I understand you don't appear for Mr. Larsen.

MR. THOMAS: No.

MR. A. L. BOOTH: There was a demurrer entered in that case, and I have nothing further to say.

MR. THOMAS: There was no demurrer entered for Mims Larsen, it was Mims Lark, administrator of the estate of William Lark.

MR. A. L. BOOTH: We cannot settle it here now. Niels Larsen. I find another place where Mims Lark appears as administrator of the estate of William Lark. Abe Leffler, Jr. enters demurrer, but nothing further. Miller Leffler, Richard Lambert, David H. Madson, Caroline H. Madson, Parley W. Madson, George A. Madson, Lucy Warnott, Wilhelmina Madson, James T. McClellan. That should be, I think James F., it is a mistake of the stenographer very likely. Thomas Monks, David McGimpsey, Leslie Murphy, Timothy Murphy demurs. Julia Murphy demurs.

MR. A. C. HATCH: Mr. Shields appears for Julia Murphy, and filed an answer. I understood that. I guess I am in error, but Shields appeared for her.

THE COURT: Judge Shields appeared for some persons, I don't remember the names, and was to send an answer down.

MR. A. C. HATCH: Julia Murphy Davis, who was served as Julia Murphy, but did not answer, but he made the statement here, as I remember, that she would come under the old decree, and just claimed her rights under the old decree, something to that effect. As to Julia Murphy, he made her a party to this stipulation entered into at Heber City with the privilege of

filing an answer if it should be deemed necessary.

THE COURT: I remember some such statement with reference to someone.

MR. A. L. BOOTH: That stipulation seems not to be in the files of the court here yet. Daniel Peay, George T. Peay, Sr., Major Pierce, Mrs. Francis Page, Julia Padfield. I found Julia Radfield, and Sons entered demurrers. I don't know whose typographical error that is, but in one case the return showed Julia Padfield and demurrer showed Julia Radfield, and there has been no answer in either case. Amos Prescott; that is one you spoke about, Mr. Thomas.

MR. THOMAS: Yes.

MR. A. L. BOOTH: S. E. Peterson demurs. Mrs. O. A. Page demurs, Mile Prescott, administrator of the estate of William Prescott, deceased,

MR. THOMAS: We have made answer for those people, and all those interests are stipulated at Heber.

MR. A. L. BOOTH: Strike out that last Prescott. Adolphus Sessions, C. A. Springer, Sage Brush Irrigation Company, Joseph B. Smith, Leo E. Smith, Henry V. Smith, T. Deverd Smith, administrator of the estate of Phillip Smith, deceased. N. V. Spaulding, Henry T. Coleman, administrator of the estate of Nathan Springer, deceased, Joseph Schoni, John W. Sweifel, Mary Schoni, Hugh L. Symes is shown to have been served with process, Leslie Symes has answered and stipulated, and I think that he is the same person.

MR. JOHN E. BOOTH: They are the same person.

MR. A. L. BOOTH: Hugh L. should be defaulted and Leslie's rights adjudicated then. John R. Stubbs, George Sizemore, William Sizemore, Vincent Shepperd, Arthur N. Taylor, James Ure, E. V. Vincent, administrator of the estate of Charles Vincent, deceased, D. L. Vincent.

MR. A. C. HATCH: Edward C. Vincent that should be instead of E. V.

MR. A. L. BOOTH: James L. Wright, Joseph Winterton,

George Wilson, Sarah Z. Williams, James Wilson, Henry Watkins, Cordelia Wilson, Brigham Wilson, Isabella West. Now, I will state that Elizabeth West who was not an original party, has answered. I think she is the same as Isabella.

MR. A. C. HATCH: We want a default against Isabella.

MR. A. L. BOOTH: Who is the administrator of the estate of Thomas Thite?

MR. A. C. HATCH: Mary Ann White, as administratrix of the estate of Thomas White, deceased.

MR. THOMAS: We represent her, and have made answer in that estate.

MR. A. C. HATCH: It doesn't show.

MR. A. L. BOOTH: Esther Webb.

MR. WAHLQUIST: Should be Ether Webb.

MR. A. L. BOOTH: The record shows Esther Webb was served with summons and Ether Webb served with summons. Esther Webb should be defaulted.

MR. THOMAS: We have made answer for Ether Webb, who appears named in the plaintiff's complaint as Esther. Also for Mary A. White, administratrix of the estate of Thomas White, deceased.

MR. A. L. BOOTH: I will state I have not had time to check up the stenographer's copy with the original notes I have.

MR. A. C. HATCH: I will ask to strike out the name of Mary A. White as administratrix among those names for default.

THE COURT: Very well.

MR. A. L. BOOTH: Elisha Webster, Richard Wellington. In the case of Elisha Webster, the court has permitted the amendment to the answer that would make him not subject to default.

THE COURT: That is the one you had an amendment this morning.

MR. WILLIS: Yes.

THE COURT: That may be stricken out.

MR. A. L. BOOTH: Levi York, H. E. Young. So far as I know, that completes the list.

MR. WILLIS: If the court please, the last time I tried to find a stenographer here in town had a good deal of trouble, and I would like to know if answers will have to be filed today.

THE COURT: I would not want to make an arbitrary rule.

MR. WILLIS: Very well then, if I can get a stenographer.

THE COURT: They ought to be filed in time so that any evidence you desire to introduce under the answer can be introduced at this session of the court at this sitting.

MR. WILLIS: If I should find the Heber Light & Power Plant has not answered, as soon as I can get a stenographer I will prepare one.

THE COURT: I was going to suggest the parties sometime during the day, Mr. Huffaker and Willis, and parties who represent some of these persons, make your investigation so that we may know whether there is to be anything else in the matter of defaults as soon as we can.

MR. WAHLQUIST: My attention has been called to the case of Richard Wellington. Over a month ago George B. Jordan was entered and proof put in proving the claim of the lands, the water to the lands formerly owned by Richard Wellington, and his name substituted as defendant by attorney McDonald, who is not here.

THE COURT: Default may stand as against Mr. Wellington.

MR. WAHLQUIST: The other party's claim was put in in his name.

THE COURT: His claim is not affected, want to get rid of Mr. Wellington on the record some way. Now, are there any other matters in connection with the entry of these defaults?

MR. A. C. HATCH: We ask at this time that the names of all those read by Mr. Booth for default, that as to all of them the default be now entered for failing to appear after service of summons, or failing to appear and answer after demurrers were overruled.

THE COURT: Defaults may be entered, and it will be well, Judge Hatch that you examine the record and see if those demurrers were overruled and some record made of it.

MR. A. C. HATCH: I have no doubt about it, but I will examine it further.

THE COURT: My recollection is that was done at the time when I was here in February.

MR. RAY: May it please your Honor, one of the officers of the Sage Brush Irrigation Company has asked me if I would state to the court and counsel that Mr. McDonald had been employed to represent that company and is now at Vernal, and they will investigate on behalf of their name among the defaults.

MR. A. L. BOOTH: I will say this, if the court please. I spent two days trying to check up these things and then handed my notes to the stenographer and just got them back this morning, and have not had an opportunity of comparing the original with this, and there may be some errors.

THE COURT: If there are any errors discovered they may be corrected, of course?

 12:00 NOON, RECESS TO 2:00 P.M.

MR. STEWART: If the court please, during the last day that your Honor sat in the trial of this case it was agreed by all the parties, with the exception of the client represented by Mr. Thomas, that paragraph 9 of the Stipulation which was entered into at Heber City might be modified so that that pertaining to the Stewart Ranch might read as follows, under the first subdivision A. "The Stewart Brothers sixteen

and two-thirds feet for the irrigation of a thousand acres of land! It read theretofore ten second feet for the irrigation of six hundred acres. Mr. Thomas has consulted with his clients and they agreed that modification might be made.

MR. THOMAS: That is correct.

MR. STEWART: So that all the parties now have stipulated, I understand, this modification should be made. Now, if the court please, I would just like to put in a little testimony, may I do that at this time?

THE COURT: It is perfectly agreeable to the court. I don't know whether the parties who were engaged in putting in evidence will give way for you.

MR. STEWART: I don't know who they are.

MR. CORFMAN: That is all right, we are agreeable.

BARNARD J. STEWART called on behalf of the Stewart Brothers, being first duly sworn, testifies as follows:

The Stewart Ranch has acquired a water right and the land to which the water right was appurtenant, which was decreed under the Fulton decree to J. D. Jones and R. L. Jones, one second foot of water under first class water right; under the Class 2 John Jones five-fourteenths second feet, under Class 3, Emil Sackerson five-sixths second feet. Under Class 5, A. S. Potts, William Potts, George Potts and T. and P. Potts in common being A. S. Potts' entry, three-fourths second feet; Carl Wilkin under the 5th Class, 3/35ths, William Paul 6/35ths.

Now, under the 6th Class water right Samuel H. Wilkin 37/70ths; 7th Class William Paul 9/35ths; 8th Class Carl H. Wilkin, 3/35. We have purchased the land-- Stewart Ranch has purchased the land to which this water was appurtenant.

THE COURT: And it was awarded under the Fulton decree?

A It was awarded under the Fulton decree.

MR. WILLIS: If the court please, I move at this time that the default of Heber City heretofore entered, be set aside, upon the ground that Heber City has never been made a party to this action, except as a member of a co-tenancy, and as a member of the co-tenancy of Heber Light & Power Plant, they have already answered. I will come to that later.

MR. A. C. HATCH: You say Heber Light & Power Plant has answered?

MR. WILLIS: Yes, but Heber City has not been made, as may be seen by referring to the record, has never been made a party to this action.

MR. A. C. HATCH: Our understanding, if the court please, is the Heber Light & Power Company have not answered. If they have answered--

MR. WILLIS: They have, and I will show by the record, your Honor.

THE COURT: You have examined the record?

MR. WILLIS: I have.

THE COURT: And find they have answered?

MR. WILLIS: The Heber Light & Power Company, Midway Town Corporation and Town of Charleston have answered, as may be shown by pouch 3, page 268, and default has been entered against Heber City--

THE COURT: The only question is whether the answer had been filed.

MR. WILLIS: It has, as may be seen by reference to the record.

MR. A.C. HATCH: There is no objection.

THE COURT: Default may be set aside as to Heber City.

MR. WILLIS: And also as to the Heber Light & Power Plant?

THE COURT: That is the party itself.

MR. WILLIS: They have entered default against Heber City and then entered default against the Heber Light & Power

Plant, and we ask it be set aside in each case.

THE COURT: It may be set aside if that is the case.

MR. WILLIS: One thing more, your Honor. I have been asked to ask for the default of James Piper to be set aside, and ask that my answer be amended under subdivision E of Section 5 by adding the name of James Pipe, 5 acres.

THE COURT: I think I had better adopt this rule. I have been thinking about it during the forenoon since you made your other amendments, to require parties who desire to make such amendments to prepare them in writing, just what you want to attach. Then when you present that the court will permit you to do it, and you can serve the parties.

MR. WILLIS: May I include those I have asked for?

THE COURT: I think so, so that those pages or pieces of paper upon which you make this amendment may be attached to the several copies the parties have, and avoid confusion.

MR. STORY: I have a witness here, Mr. Parker, who is required to attend court in Delta tomorrow, so that it will be necessary for him to leave this afternoon, and if it could be arranged to hear his testimony this afternoon.

MR. THOMAS: I think the cross examination of Mr. Tanner was in progress. With consent of counsel we can waive that and allow Brother Story to proceed.

THE COURT: Then you may do that, Mr. Story.

MR. JACOB EVANS: This is the witness we stipulated he would testify the same--

MR. STORY: It was stipulated, but I decided to have Mr. Parker present and give his testimony rather than rely on the stipulation, rather have it here personally.

THE COURT: Mr. Parker may come forward.

MR. A. C. HATCH: If the court please, this is being out of the regular order at this time; our engineer, and one upon whom we relied for information in regard to these matters is not present.

MR. STORY: Will he be here a little later?

MR. JACOB EVANS: We think so.

MR. A. C. HATCH: He should have been here at the opening of the court, as he was on the stand when court adjourned last.

MR. STORY: Then let Mr. Parker stand aside for a moment.

MR. TUCKER: The Sego Irrigation Company is now ready to be heard, and we also have a witness who has an engagement at Salt Lake City, and if it can be heard now, it will take about half an hour.

THE COURT: I think that can be done.

MR. TUCKER: We have a stipulation between the Provo Reservoir Company and Sego Irrigation Company which will be binding between those two parties only. We wish to offer this as defendant's Exhibit Number 140.

THE COURT: It may be received.

JAMES CLOVE, called on behalf of the Sego Irrigation Company, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Tucker.

Q What is your name?

A James Clove.

Q Your residence?

A Provo, Utah.

Q Have you any official position with the defendant, the Sego Irrigation Company?

A. Yes sir.

Q What is that position?

A President of the company.

Q How long have you been president of the Sego Irrigation Company?

A Ever since the organization of the company.

Q And do you recognize that paper?

A Yes sir.

Q What is it?

A It is an application for high water from Provo River filed with the state engineer, No. 2575.

Q Who made this application, Mr. Clove?

A Mr. C. E. Loose and myself.

Q Do you know in whose right this application now stands?

A It stands in the right of the Sego Irrigation Company.

Q Is that by an assignment from yourself and Mr. C. E. Loose?

A Yes sir, by assignment.

Q And Sego Irrigation Company now owns the right to this application?

A. Yes sir.

MR. RAY: May I ask the number of that application in the State Engineer's office?

MR. TUCKER: 2575. Inasmuch as the plaintiff has stipulated to allow this water to the Sego Irrigation Company, the application only applies to the other defendants I take it. We offer this as defendant's Exhibit 141.

THE COURT: It may be received.

Q Has the Sego Irrigation Company any other water rights you know of, Mr. Clove?

A It has.

Q Will you describe those?

A It has a fourteenth interest in the Union Reservoir filings, at the head of Provo River, Washington Lake, Trial Lake, and Wall Lake and tributary lakes.

Q Do you know the number of the filing by which the Union Reservoir Company got this water?

A. Yes sir.

Q What is that number?

A 442. Number 442 in the State Engineer's office.

MR. TUCKER: We wish to call the attention of the court to plaintiff's Exhibit No. 1, which is that filing 442.

Q Has the Sego Irrigation Company any further right you know of?

A It also has the same fourteenth interest in a diversion from Shingle Creek to Provo River, known as Number 944, as I remember it, in the State Engineer's office.

MR. TUCKER: We call the court's attention to plaintiff's Exhibit No. 6, which is that filing No. 944.

Q Do the stockholders of the Sego Irrigation Company own land?

A Yes sir.

Q How much land?

A Two hundred acres.

Q Has all the water of the Sego Irrigation Company been applied to this land beneficially?

A It has.

Q Since what date was that first applied?

A As I remember it, spring of 1911.

Q And it has been applied every year since that year?

A Every year since then.

Q Do the land owners of that two hundred acres have sufficient water to irrigate their land?

A Not in the dry season, or the middle of the summer.

Q I understand it that you use as much as you can get of this ten second feet of high water, as long as the high water lasts?

A. Yes sir.

Q Then when the high water ceases, you use your one-fourteenth proportion of the water from the Union Reservoir Company?

A Yes sir.

Q And the one-fourteenth portion is not sufficient to irrigate your land?

A Not sufficient, no.

Q What is the nature of the lands there?

A It is very rocky and gravelly, with a small surface of soil above, sometimes six inches, and not to exceed ~~x~~ fourteen inches, I think.

Q What crops do you raise on the land?

A Fruit and alfalfa.

CROSS EXAMINATION by Mr. Ray.

Q Mr. Clove, these lands are located west of the mouth of Provo Canyon, and north of the river, are they not?

- A West of the river, yes, and north.
- Q North and west of the river? A. Yes sir.
- Q Have the entire three hundred acres been brought under cultivation?
- A Two hundred acres.
- Q Is there an ownership of three hundred in toto, or two hundred?
- A Two hundred.
- Q And has the entire two hundred acres been brought under cultivation?
- A Well, it has, as far as the water would permit.
- Q And how far has the water permitted that to be brought under cultivation?
- A I can only testify as to 40 that I own, I have had thirty two acres under cultivation.
- Q You think that is about the same proportion as the other irrigators there?
- A I haven't really been over the other one hundred and sixty sufficient to testify. Other witnesses know better.

CROSS EXAMINATION by Mr. A. C. Hatch.

- Q Mr. Clove, from what point on the Provo River do you divert the water for the use of the stockholders of the Sege Irrigation Company?
- A The engineer could give you the exact point, but in a general way I can say it is through the Telluride flume.
- Q Is the water diverted prior to passing through the power wheel of the Telluride Company?
- A Prior, yes sir.
- Q So that the water that goes through the Telluride flume and used by you is not used for power purposes by Utah Power & Light Company?
- A Not used for power purposes, no.
- Q Do you know the quantity which you have used during the past four or five years?
- A Our pipe line can take a little in excess of five second

feet, just how much, I can't say. We reckon five second feet.

Q Have you your certificate of appropriation from the State Engineer under this application?

A I couldn't say, the secretary has all the files, I am not advised as to that.

Q Do you know whether or not any proof has been made of appropriation to the State Engineer?

A Proof has been made, yes sir.

REDIRECT EXAMINATION by Mr. Tucker.

Q Mr. Clove, isn't the Exhibit we just placed before the court an application for appropriated water, and hasn't that been granted?

A That has been granted, as I understand it.

CROSS EXAMINATION by Mr. Wahlquist.

Q You spoke about ten second feet of water being used during high water season, then you say your pipe line will only convey a little over five second feet?

A I say our filing is for ten second feet.

Q But your pipe line, in answer to Judge Hatch, I understand will only carry something over five second feet?

A Yes, something over five and a half, I believe is the full capacity of it.

Q Then, as a matter of fact, you have not at any time been able to use in excess of what your pipe line would carry, have you?

A We have not used in excess of that, no.

Q So you at no time have used ten feet on that land?

A No.

Q Nor any amount but slightly in excess of five second feet?

A That is all.

CROSS EXAMINATION by Mr. Corfman.

Q You spoke of the water being diverted from the flumes of the Utah Power & Light Company? A. Yes sir.

Q Under what kind of an arrangement, temporary arrangement or permanent?

A It is a temporary arrangement.

REDIRECT EXAMINATION by Mr. Tucker.

Q Mr. Clove, before you diverted water from the pipe line of the Utah Power & Light Company, how did you get water around to that land?

A We took it through the old Blue Cliff canal.

Q In case any arrangement could not be effected or could not be continued with the Utah Power & Light Company, whereby you could not get water through their lines, could you not rebuild that ditch and take water around that way?

A We could rebuild the ditch, or get it through, as we have had an offer to do it through the Provo Reservoir pipes. We can reach the land through those two ways.

Q You anticipate any greater use of water than your pipe line, your present pipe line will provide for in the future?

A The applications have been made for the use of water, but we have not had it so far, needed it all on our lands.

Q Are there other lands which you could irrigate and which it has been proposed you irrigate if you had the water?

A Yes sir.

Q What are those lands?

A Adjoining lands that have not sufficient water in the reservoirs, and then the Orem Townsite has been negotiating for water from us.

Q Have there been any plans made for conveying water to the Orem Townsite, if water could be obtained by you?

A Yes sir.

Q What plans are those?

A They have laid a pipe from the townsite to connect with our pipeline at the corner of Colonel Loose's land, southeast corner.

Q Has water ever been placed in that pipe line, or ever been

furnished to the Orem Townsite?

- A Not by any authority of the company. I believe they tested out their pipes once, but never have furnished water there, did not feel we could furnish it, had not sufficient quantity of water to furnish it.

FRANK W. DEMING, called by the Sego Irrigation Company, testifies as follows:

DIRECT EXAMINATION by Mr. Tucker.

- Q What is your name, please?
- A Frank W. Deming.
- Q Have you testified in this case before?
- A Yes.
- Q Have you made a survey of lands on Provo Bench as to soil conditions? A. Yes.
- Q Did that survey include lands owned by stockholders of the Sego Irrigation Company? A. No.
- Q Did it include lands adjacent to those lands near those lands? A. Yes.
- Q Could you testify as to the quality of those lands?
- A The lands irrigated by the Sego Irrigation Company are in the same class mentioned in my testimony at the time the soil map was submitted, and classed by it as gravelly loam soil. It is a gravelly soil, averaging foot and a half to two feet in depth, and underlaid by a loose, porous sub-soil.
- Q Would that character of soil require a great deal of water for irrigation?
- A Yes.
- Q Have you been employed by the Sego Irrigation Company?
- A Yes.
- Q In what capacity?
- A I made a survey and superintended construction of their pipe line, and subsequently made survey and prepared maps for proof

in the case of water filing 2575 for submission to the State Engineer's office.

Q Describe shortly the diversion system of the Segó Irrigation Company, also their distributing system?

A The water is diverted from Provo River to the flume of the Utah Power & Light Company, and is carried in that flume and tunnel for a distance of twenty-three thousand six hundred and seventy-six feet. Then it is carried in the pen stock a distance of approximately three hundred ninety-two feet, and from that point is conducted in steel pipes to the land which is irrigated in Sections 11 and 12, Township 6 South, 2 East. In this pipe system after it is diverted from the pen stock, there is ten hundred and forty feet of eight inch pipe, eleven hundred and seventy feet of double six inch pipe, which would be a total of twenty-three hundred and forty feet, but it is two parallel lines of six inch pipe, and forty-nine hundred feet approximately of ten inch steel pipe in the main system, and the lateral of ten inch pipe approximately six hundred feet in length.

Q What is the capacity in second feet of that pipe line?

A It is a fraction over five second feet, five and three-tenths, I think, or four-tenths is the maximum it has ever carried, and I think the capacity of it.

PRESTON G. PETERSON, called by the defendant Segó Irrigation Company, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Tucker.

Q What is your name?

A Preston G. Peterson.

Q Where do you live?

A Provo.

Q What is your occupation?

- A I handle the offices of the mining companies controlled by Mr. Loose, and irrigation companies, and look after-- have looked after his farms.
- Q Have you had any special training in agricultural lines, technical training?
- A I was graduated in 1907 from the State Agricultural College of Utah in agriculture.
- Q You have had charge of the farm lands belonging to Mr. Loose and others, which is located under the Sege Irrigation Company system? A. Yes.
- Q What is the extent of that land?
- A The land controlled by Colonel Loose, owned by Colonel Loose and Mr. Nunn consists of slightly in excess of one hundred and fifty-nine acres of land. One hundred and sixty, with some roads coming out.
- Q What sort of crops have you raised on that land?
- A The entire quarter section was planted about 1911 to alfalfa, and the last two years somewhere between thirty and forty acres have been broken up and put into wheat.
- Q What was the reason for the change?
- A And I changed because the amount of water we received proved inadequate to produce a full crop of alfalfa, and I figured by putting in grain, that by giving that one or two irrigations while we had plenty of water, I could get a crop of wheat, and then use all of our storage water on the amount of alfalfa land that was left.
- Q When did you change from alfalfa to wheat?
- A As I recall, we grew wheat there this year and last year.
- Q What sort of crops of alfalfa did you get off of that land?
- A The crops have been very light.
- Q How heavy?
- A This year has been our best year, and out of about one hundred and twenty-nine, between one hundred and twenty-five and one hundred and twenty-nine acres of land there, we produced ~~xxx~~

194.6 acres of hay.

Q Tons?

A Tons, I mean.

Q How many tons is that to the acre?

A Just 1.5.

Q Have you used all the water that has been accessible under the-- as a shareholder of the Sego Irrigation Company?

A Indeed we have. We used all the high water we could get through the pipes, and all of the storage water that we were able to get from the water commissioner as our fourteenth of the storage waters.

Q From your knowledge of agriculture and irrigation, would you say the land which you irrigate requires a great deal of water?

A Without a question, yes. Being a light soil with a very deep porous substrata.

Q Did you raise any fruit on your land?

A None whatever.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q How did the high water run?

A How is that, Mr. Hatch?

Q How did the high water, quantity of water serve the area irrigated by you?

A Well, with something slightly in excess of five second feet we have almost enough, not quite, but with the two second feet we are able to get our storage water in the quantity we desire, and apread it out ~~to~~ where we had a flow of about two and five-eighths second feet; that proved inadequate to produce a decent alfalfa crop, and each year after getting a pretty good first crop, it was necessary to let considerable of the second crop go in order to concentrate the water on the better pieces and bring them up to a larger production.

CROSS EXAMINATION by Mr. Ray.

Q Mr. Peterson, are you able to say how much, or what percentage

of your alfalfa you were required to abandon when your flow of water was cut down to two and five eighths second feet?

A I could only say roughly, Mr. Ray, I should say we permitted-- I think probably there was at least forty acres there we did not cut for the second or the third crops. It is there now, and be simply used for grazing.

MR. RAY: May it please your Honor, I understand from Mr. Wentz, his reports for 1914, '15 and '16 show measurements of the quantity of water distributed to the Sego Irrigation Company, and I ask now they may be considered in evidence for that purpose.

THE COURT: It may be received for that purpose.

MR. TUCKER: That is all, your Honor, we rest.

THE COURT: (To Mr. Story) Now, I think you may proceed with your witness.

MR. CHASE HATCH: If the court please, I have two witnesses that will only take a short time, if it is possible to have them heard tonight I will appreciate it.

THE COURT: If there is no objection, you may proceed with them.

MR. HUFFAKER: There is a matter I ought to take up at this time, and I shall move the court to set aside the defaults entered this morning for the following defendants. There is Henry D. Coleman, James B. Hamilton, Nephi Huber, Joseph Huber, Fred Kummer, Ed Kummer, Rose Kummer, Thomas Monks, David McGimpsey, C. A. Springer, Joseph Schoni, John Sweifel, Mark Schoni, George Wilson, James Wilson, Henry Watkins, Cordelia Wilson and Brigham Wilson. I think that is all.

MR. A. C. HATCH: Pardon me, Rosa Kummer, that is not Rosa Kummer, it is Rosind.

MR. HUFFAKER: That is the one now in the complaint of the Midway Irrigation Company. These parties are all represented in that complaint, they all belong to the same water system, that is, the Midway Irrigation Company contains all the waters of Snake Creek, and some tributaries there, but these parties do not belong to the corporation, but the water is distributed to them through the Midway Irrigation Company, and it is so alleged in the answer of the Midway Irrigation Company, and naming all of these parties they set up their answer in conjunction with the Midway Irrigation Company.

THE COURT: Then they are not in default, they have answered.

MR. HUFFAKER: They have answered in that way. Comes now the Midway Irrigation Company, together with these other defendants I have named. Their rights are mutual. Then again, in the stipulation that was entered into up at Heber City, it provides that the waters up there shall be distributed to the

Midway Irrigation Company and to these parties. I don't know whether it names them or not, but also to the parties to whom the Midway Irrigation Company distributes the water.

THE COURT: I am inclined to think--

MR. HUFFAKER: As to whether or not that would be sufficient.

THE COURT: It would not be sufficient. There is a question in the mind of the court. That would hardly mean anything if you from that language are seeking to base a right decreed to you independent of the Midway Irrigation Company.

MR. HUFFAKER: As I understood your Honor the water is distributed by the Midway Irrigation Company to these people, they look to them for the water, and it is decreed to the Midway Irrigation Company to be distributed to these other people, while they are not stockholders, but get their water through it.

THE COURT: If that is the case default was properly entered.

MR. A. C. HATCH: If the court please, there seems to be a misunderstanding in regard to that matter. These parties are separate and independent parties and claim nothing by and through the Midway Irrigation Company, and some of them do not even admit the Midway Irrigation Company's right to regulate and distribute the water to them, and their answer is-- does not purport to be an answer of any of these parties.

THE COURT: I so understood Mr. Huffaker to state. I don't yet understand Mr. Huffaker's view why this default should be set aside.

MR. HUFFAKER: Here is the language of the stipulation.

THE COURT: Just a moment, if you are asking this default to be set aside so you may be permitted to file a pleading, I understand it thoroughly, but if you are seeking to set it aside because they are already in court, your statements are at variance to that.

MR. HUFFAKER: That is what I want to ascertain. I want these people in here, I didn't draw the answer, but they are named in that answer, come in, associated with the Midway Irrigation Company; then again in the stipulation it is stipulated that the Midway Irrigation Company and the parties whose waters the said company controls and distributes-- that is these parties-- are entitled to so much water.

THE COURT: Is there anything in the record which indicates that it is these parties? Are your parties satisfied with that indefinite and uncertain and vague reference to their rights. It would not vest them in a way they could enforce anything.

MR. HUFFAKER: No, I realize that, but I understood it would be agreeable to the other parties if a decree could be entered that way, under that showing.

THE COURT: That would be very agreeable to the court.

MR. HUFFAKER: It would save a whole lot of trouble and time, because if they did not I would be compelled to draw about twenty answers here.

THE COURT: I don't think you would have to do that. I think you could put them all together, draw them in one answer.

MR. HUFFAKER: Here is the answer, your Honor, you can look it over.

MR. A. C. HATCH: What we think we ought to have is something here filed, whereby we will know who these parties are and what they individually claim, and until we have that, we cannot determine for ourselves anything that is controlled by that stipulation.

THE COURT: In paragraph --

MR. A. C. HATCH: I will say further, your Honor please, I think they should either be in court by attorney sign for them, or their default should stand.

THE COURT: I think so.

MR. HUFFAKER: I agree with your Honor, it would make a better decree.

THE COURT: And safer for your people. I would not be satisfied if I were you to have a decree in your favor as indefinite and uncertain as this language.

MR. HUFFAKER: It is very true, but that is going to take quite a little time, and if somebody else could appear here tomorrow and give me tomorrow off to do this, and then put in my testimony Wednesday morning, it would be a big accommodation

THE COURT: Possibly you won't need to put in any testimony. If you have a pleading here so that the plaintiff and other parties interested may know what your claim ~~here~~ is, it may be included in the stipulation, they may be willing to concede you are entitled to what you claim, but I understand you have not made any claim yet to the water. There is nothing on the record to show.

MR. HUFFAKER: Only in this way, in connection with the Midway Irrigation Company, they claim all the water from the Snake creek and eight or nine second feet from the other place.

THE COURT: Are you satisfied they take a decree for all the waters of the Snake Creek to be distributed, with the provision they distribute it?

MR. HUFFAKER: We are satisfied with that stipulation.

THE COURT: Then the default may stand, and you don't need to come in if you are satisfied with that kind of a protection. you have no interest in that then, you are satisfied the decree may run to the Midway Irrigation Company.

MR. HUFFAKER: Of course, your Honor, as provided by the stipulation. That does not include the Island ditch. We expect to introduce testimony.

MR. A. C. HATCH: If the court please, we do not concede to them in the stipulation all the waters of Snake Creek by any means. We concede they are entitled to a certain

acreage for certain lands, and Provo River waters enter into that.

THE COURT: I think, Mr. Huffaker, you had better prepare an answer for those parties setting up what they claim, what their rights are. Possibly when you present that all the parties may agree it may be incorporated in the stipulation.

MR. HUFFAKER: I think I would rather do that, but it will take a little time. If I could get until tomorrow afternoon.

THE COURT: Possibly you can. I think from the appearance now there will be plenty to occupy the court until the afternoon session, but keep in touch and have your witnesses here so that if it necessary to introduce evidence you may do it. I do not want to be unreasonable or arbitrary with any of the parties, but I only have so many days remaining of my term of office, and I have got so much to do, I have got to get back.

MR. RAY: May I inquire whether or not there is going to be any more Wasatch county testimony than Mr. Huffaker's.

MR. WILLIS: Just preliminary preliminary to the introduction of the stipulation.

MR. RAY: How long would that take?

MR. WILLIS: Take ten minutes.

MR. RAY: Do you know whether Mr. McDonald has any?

MR. WILLIS: No.

MR. RAY: Have you any, Mr. Thomas?

MR. THOMAS: None. May it please the court, Mr. Booth and I have been checking over these answers and find many of our Summit county people have been in his mind guilty of default because we were all in that stipulation. It was reduced to writing and made a part of the minutes of the court by the stenographer in Heber, and copies were served by your Honor's order upon the various parties, but Mr. Booth does not

seem to have a copy, and merely to correct the motion that was made this morning, I wish to move to set aside the default in the case of R. W. Barnes, John Bradshaw, John P. F. Bradshaw, Christie Bissel, George O. Ellis, Henry Fraughton, Riley Fitzgerald, Samuel Gines, Jr., Samuel Gines, Sr., Abe Gines, Ellen Gines, Charles L. Gines, James A. Knight, Mims Lark.

MR. A. C. HATCH: Pardon me just a moment. There seems to be a question whether these parties have answered.

MR. THOMAS: There is no question whether they have answered or not. We have answered for them, and our answer is on file. It was served and filed. There is no question about that. I don't know where the answer is now, I haven't seen it, but we have served an answer, and it has been filed. Mims Lark, Marshall Leffler, Thomas Leffler, Abe Leffler, Abe Leffler, Jr., John Leffler, Millie Leffler, Hyrum Moon, William Moon, Mrs. Thomas McNeil, Nephi Moon, Heber Moon, Julia Potts, Ernest Prescott, Mile Prescott, Amos Prescott, Mrs. A. E. Page, Mary E. Pace, James Prescott, William L. Prescott. You did not enter default against the Washington Irrigation or South Kamas Irrigation Companies?

MR. A. L. BOOTH: Nothing that shows an answer. I did not ask for default, either answer or stipulation.

MR. THOMAS: Benjamin Turnbow. All of these have answered and were all within this Heber City stipulation.

MR. A. L. BOOTH: If this paper I furnished you shows anyone answered, I didn't read his name. I did not require a stipulation and answer, but if they were there then we did not default.

MR. THOMAS: In all of these instances we have not only answered, but entered into this Heber City stipulation.

MR. A. L. BOOTH: You have read off a lot of names there that we did not ask for default.

MR. THOMAS: It would make assurance doubly sure.

THE COURT: I would not want to make an order setting aside defaults of a number of persons against whom no default

has been taken. That adds to the confusion of the record.

MR. THOMAS: That would certainly confuse it. I am either in error or my brother is. Maybe I am. I understood this morning that he had entered default against certain parties, and at the time I had corrections made, since which time I understood him to say this list which was included in the stipulation at Heber he had entirely defaulted. I wanted to make assurance doubly sure, because I have not only answered for them, but they have entered into the stipulation. Stipulation was made part of the minute record of the court at Heber.

MR. A. L. BOOTH: If the court will examine this paper here that shows the names of the defendants, so far as I could ascertain them from any source. We have indicated in this column here those who have answered, those upon whom summons was served. This one shows who have answered and those with whom stipulations have been entered into. It took me a little time to see whether people had been summoned, and neither answered or entered into stipulation, and it was only those I found neither an answer or stipulation I asked to have defaults entered against.

MR. A. C. HATCH: If the court please, there was a general appearance entered by Mr. Thomas and Soule--

THE COURT: I have in mind only a few of the names you have included in your motion, and I know some of them are not marked default at all on this paper.

MR. A. L. BOOTH: I have made a marking since that time, I have gone over it and checked, and I tried not to enter or have default entered against any that showed either a stipulation or an answer, and I am certain he has read over numerous ones.

THE COURT: I think under those circumstances the only thing the court could do is to deny your motion, because you have included a number of parties against whom default was not made. That will put upon you the burden of having the

stenographer read over to you at some time the names of the persons who were defaulted so that you can make a motion to set aside the defaults you want, because you are asking the court to set aside defaults against a number of parties when no default has been entered.

SAMUEL E. LOWERY, called in his own behalf, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Chase Hatch.

Q What is your name?

A Samuel E. Lowery.

Q You are one of the defendants in this case?

A Yes sir.

Q Acquainted with the defendant Thomas Lowery?

A Yes.

Q You and Thomas Lowery are joint owners of certain lands and water right that you claim under your pleading in this case?

A Yes.

Q From whom did you purchase your land and water right?

A Benjamin A. Norris.

Q And purchased all the water right that was decreed to Benjamin A. Norris under the Fulton decree?

A Yes.

Q Do you remember how much that was?

A It is fifteen acres low water right, I think that is it.

Q In addition to that low water right, what low water right have you used upon your land?

A We have got several small springs that we use, and high water, we always flood it with high water.

Q These springs are what is known as the Norris springs, are they not?

A. Yes.

Q And you use all the water of those during the entire irrigation season?

A. Yes.

- Q Do you know how much water there is in these springs, have you had it measured?
- A No, we have never measured it. In four or five small streams.
- Q They spring up on your land, do they not?
- A No, they don't all spring up on our land.
- Q Do any of them? A. Yes.
- Q How many?
- A There is two of them anyway.
- Q And do the others spring up adjacent to your land, right near to it?
- A Yes, on the next place up there.
- Q And flow right on to your land? A. Yes.
- Q And where do the waters that you use in irrigation drain after going off of your land?
- A Right into the river again.
- Q Back into Provo river? A. Yes.
- Q How many acres of land do you irrigate from the waters of Provo river and these springs?
- A Between fifty-nine and sixty.
- Q You have had that measured to determine it?
- A Yes.
- Q And you irrigate all of this fifty-nine to sixty acres with the high waters of Provo river? A. Yes.
- Q And use the B. A. Norris water right decreed to him?, and the Norris springs for your low water right?
- A Yes.

CROSS EXAMINATION by Mrl A. C. Hatch.

- Q What did you give as your given name?
- A Samuel E. Lowery.
- Q All of these springs will not flow more than half a second foot of water, do they?
- A Well, around that somewheres.
- Q About half a second foot?
- A We never measured them. I would judge so.

Q Do you know how many acres you irrigate from the springs?

A Well, they all go into the same ditch as we get the other water.

GEORGE B. JORDAN, called by the defendants Edwin D. Hatch and Vermont Hatch, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Chase Hatch.

Q State your name?

A George B. Jordan.

Q Where do you reside?

A I reside six mile north of Heber on the Provo River.

Q What is your occupation?

A Farmer.

Q Acquainted with the lands owned by Edwin D. Hatch and Vermont Hatch, north of Heber on the Provo river?

A Yes sir.

Q The river flows through these lands, does it not?

A Yes sir.

Q About how many acres, if you know, are there in the river bottom?

A Why, I judge two hundred acres or more.

Q Do you know what portion of these lands are flooded, are irrigated by the high waters of Provo river?

A Well, the biggest part of it is watered, flooded by the high water, I could not say hardly what portion.

Q Would there be one hundred and seventy-five acres?

A I think there would be around that.

Q Are there sloughs that fill up with the high waters that run through these lands? A. Yes sir.

Q Do you know whether or not there have been any dams placed in the sloughs for the purpose of flooding the lands?

A Yes sir, we have.

Q In your judgment there would be one hundred and seventy-five

acres that are flooded with the high waters?

A Yes sir.

Q Do you know how many acres of these lands are cultivated?

A No, I could not say to that.

Q Do you know what the lands other than the cultivated lands are used for?

A Used for pasture.

Q And is it necessary that they be irrigated to make good pasture?

A Yes sir, it is.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q Most of this land is covered with timber, isn't it?

A Yes sir, there is timber on the most of it.

Q About how many acres are under cultivation? Crops raised upon of grain and under cultivation, and mowed for hay?

A Between thirty and forty acres, probably more, I could not hardly say to that.

A. C. HATCH called by the defendants Edwin D. Hatch and Vermont Hatch, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Chase Hatch.

Q You are one of the executors of the last will and estate of Abram Hatch, deceased? A. Yes sir.

Q The property in that estate has been distributed under the decree of the court, has it not?

A Yes sir.

Q At the time of the distribution was there pleaded in that estate certain water rights decreed under the Fulton decree to one Samuel Lee to the lands appurtenant to said water rights?

A Yes,

Q And to whom were those lands and water rights decreed in the decree of distribution of the estate of Abram Hatch, deceased,

if you know?

THE COURT: Pardon me, I didn't get the name.

THE WITNESS: Abram Hatch.

THE COURT: No, the name of the person to whom this water was originally--

MR. CHASE HATCH: Samuel Lee.

A I don't have a distinct recollection of the decree or will, and I presume the lands were distributed as provided by the will.

MR. JACOB EVANS: We object to this, if the decree shows this, it seems to me it would be the best evidence. If Judge Hatch does not recollect what the decree contains it seems to me we ought to find out what it is, and get it as a fact without guessing at it.

A I can say this that the lands are now owned by E. D. Hatch and Aldura Hatch, and that they have succeeded to the interests of Abram Hatch through Vermont Hatch and others.

Q Aldura Hatch has succeeded through Vermont Hatch?

A Edwin D. Hatch and Aldura Hatch succeeded to the interests of Abram Hatch, and through Vermont Hatch. Vermont Hatch, since the commencement of this suit, has disposed of his interest to Edwin D. Hatch, since the filing of the answer.

MR. CHASE HATCH: If the court please, the water rights are set forth in the Fulton decree pertaining to this, and offer the testimony of the acreage and succession of the Samuel Lee is all.

THE COURT: And the water rights you are claiming for these parties were decreed to Samuel Lee in the Fulton decree,

MR. A. C. HATCH: Portion of it, and portion of it to Abram Hatch.

MR. JACOB EVANS: You only claim the same quantity of water as given in the Fulton decree?

MR. CHASE HATCH: Same quantity of low water, claiming the use of high water.

MR. A. C. HATCH: I will say that as to the plaintiff

if you know?

THE COURT: Pardon me, I didn't get the name.

THE WITNESS: Abram Hatch.

THE COURT: No, the name of the person to whom this water was originally--

MR. CHASE HATCH: Samuel Lee.

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MR. A. C. HATCH: Portion of it, and portion of it to Abram Hatch.

MR. JACOB EVANS: You only claim the same quantity of water as given in the Fulton decree?

MR. CHASE HATCH: Same quantity of low water, claiming the use of high water.

MR. A. C. HATCH: I will say that as to the plaintiff

in this case there was a stipulation filed and agreement entered into before I became attorney for the plaintiff, or about that time, whereby the plaintiff would not contest any claim that was made by the estate of Abram Hatch, I being at that time one of the executors of the estate, and being a party defendant. Without some positive understanding as between the plaintiff and the estate I could not accept a retainer for the plaintiff, and therefore that agreement was entered into, and I say that, so that other parties, if they have objections here, the plaintiff is in effect barred from contesting any claim that was made by the estate or is made.

MR. WILLIS: If the court please, since Mr. Chase Hatch is going home in the ~~xxx~~ morning, I want to ask him about half a dozen questions, as he is the only party I can prove certain matters in my case, if the court will indulge it.

THE COURT: Certainly.

CHASE HATCH, called by the defendant, the estate of Mrs. E. L. Hanks, deceased, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Willis:

- Q What is your name, please?
- A Chase Hatch.
- Q Where do you reside?
- A Heber, Utah.
- Q State whether or not you are a practising attorney in the State of Utah? A. Yes sir.
- Q I will ask you if you were acquainted with Mrs. E. L. Hanks during her lifetime? A. Yes sir.
- Q Has she died since the bringing of this action?
- A Yes sir.
- Q I will ask you to state whether or not her estate is now being probated in Wasatch county?
- A It is.

Q State who is the administrator appointed and acting administrator at the present time of her estate?

A Joseph E. Hanks of Charleston, Wasatch county, Utah.

Q Is it Joe or J?

A Joseph E is the correct name.

Q I will ask you if you are--

MR. JACOB EVANS: Has she filed an answer in this case?

MR. WILLIS: Yes, she filed the answer and we are asking now to substitute the administrator in lieu of her. We will ask at this time under that testimony, your Honor, to substitute the administrator of the estate in lieu of Mrs. Hanks, who was served and answered during her lifetime.

THE COURT: Substitution may be made.

Q I will ask you if you are acquainted with Erminee C. Cummings?

A Yes sir.

Q With Lavina E. Murdock? A. Yes sir.

Q William T. Everett? A. Yes sir.

Q Edison Ford? A. Yes sir.

Q Joseph D. Ford? A. Yes sir.

Q Bustatia Ford? A. Yes.

Q Do you know whose children they are?

A Children of William Ford, deceased, and Lizzie Ford.

MR. A. L. BOOTH: If the court please, I would like to ask permission tomorrow to have the files in the judge's chambers in order to check over these matters we have been going over, subject to their being called for in court.

THE COURT: That will be all right. Now, if it would be to the advantage of the parties for the court to hold a session this evening, I can hold a session, if there are any parties ready to proceed with any evidence.

MR. WILLIS: I have a few short matters I would like to take up.

THE COURT: Unless the other parties interested are so situated they could not be here, I will take that up this

evening.

MR. JACOB EVANS: I will suggest this, we had arranged to confer with our engineers to put them on in the morning to rebut the testimony of the Utah Light & Power Company, and that arrangement has already been made. It is matters in which we are interested.

THE COURT: Then it would not be convenient for you to be here?

MR. JACOB EVANS: It would not be convenient.

5:10 P.M., RECESS TO 9:30 A.M., DECEMBER 12, 1916.

MR. WILLIS: May it please the court, may I put a witness on this morning who wishes to catch a train?

THE COURT: Yes.

JOHN M. RICH, called by the defendant George H. Edwards, being first duly sworn, testifies as follows:

DIRECT EXAMINATION By Mr. Willis.

Q What is your name, please?

A John M. Rich.

Q Where do you reside?

A Charleston.

Q I will ask you if you are acquainted with the lands that were at one time owned by George Daybell and Sons under what is known as the Daybell springs?

A Somewhat acquainted with it.

Q Ask you if you know whether or not George H. Edwards is the successor to Daybell and Sons to that land?

A Yes sir.

Q I will ask you if you know whether or not J. W. Subbs is successor to the rights and -- I will withdraw that-- and also the water right represented by the land owned by George Daybell and Sons?

A. Yes sir.

Q I will ask you if you know whether or not J. W. Stubbs is successor to the lands and water rights that were formerly owned by John Fowers estate, under the Provo river?

A Yes sir.

Q I will ask you whether or not Earl Stringfellow is the successor to the interests of John O. Edwards as to his lands and water rights under the Provo river?

A Yes sir.

W. S. WILLIS, called by the defendant Emma Kummer Bond, being first duly sworn, testifies as follows:

My name is W. S. Willis, I reside at Heber City, Utah; I am a practising attorney within the State of Utah. I was acquainted with John Kummer during his lifetime, and know that he is dead. His estate is being probated in Wasatch county at the present time, and I am attorney for the administratrix. Emma Kummer Bond is the duly appointed and acting administratrix of the estate of John Kummer, deceased.

MR. WILLIS: Now, I have some stipulations that I would like to offer in evidence at this time. I do not see Harvey Cluff here. He is supposed to represent one Hyrum Winterton in perhaps what might be contested. Otherwise, I am through with this matter.

THE COURT: If you think Mr. Cluff will contest the matter probably had better wait.

MR. WILLIS: I understand the Provo Reservoir Company although they have stipulated as to all the interests of all the clients I represent, I am advised by them that they would contest the rights of one Hyrum Winterton, notwithstanding the fact they had stipulated, and I withdrew from the case as Mr. Winterton's attorney on this contest, and he has engaged Mr. Cluff. Perhaps Mr. Cluff ought to be here with these stipulations are read.

THE COURT: Possibly that is true, we will take up some other matter.

MR. THOMAS: May it please the court, pursuant to the arrangement at Heber at the time of the stipulation of counsel affecting the rights of Summit county people, I have now just handed me by the committee representing the people and the engineer the list of names of the litigants, together with the amount of water and the quantity of land the water is to be applied to in that district. The paper that I have is filled with so many interlineations I feel I ought to have it re-written before having it filed. There are several notes in the paragraph here calling attention to the certain individuals being successors to certain former claimants under the Fulton decree to whom this was made. Judge Hatch suggests that testimony ought to be introduced as to that. I was under the impression that our stipulation, while it did not so state in terms, was sufficiently broad to permit those who are present users to come in and claim. If the judge resists that then it will necessitate our putting in testimony as to that. They are the actual owners and have been for years in many instances. No other rights have been acquired in most instances other than those granted under the Fulton decree. I think when the judge will have this copy and goes over it, he will see that statement will be correct, so that is the stipulation could be broadened to that extent to permit these people to come in as the original owners, it would save a good deal of time.

MR. A. C. HATCH: Of course, I did not understand that anyone would be accepted or conceded to be the successor to another without some testimony in regard to it. It was stipulated here that the evidences of transfers need not be introduced, that is, the evidences of title or deeds, transfers and so on in the beginning, but I never did understand that it went so far as to admit that one was the successor to another without some evidence of some kind.

THE COURT: The statement of someone at least of the fact.

MR. A. C. HATCH: Yes, a statement from the knowledge of the party making the statement, a statement ought to be made under oath, I take it.

MR. THOMAS: Now, we could somewhat irregularly put on our committee, Mr. Atkinson, Mr. Parker and Mr. Knight, who are generally familiar with them, but that testimony in some sense would be hearsay testimony. If that would be acceptable we could do that now. They know by general reputation at least of certain transfers.

THE COURT: That evidence has been received without objection all through this trial.

MR. A. C. HATCH: Yes, we have not objected to it. Just now given by the witness John Rich. If there should be some--

MR. THOMAS: I can do that in just a moment.

THE COURT: Just call one of your witnesses if one has knowledge of all these matters, one witness will be sufficient.

THOMAS ATKINSON, called and sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Thomas.

Q Your name is Thomas Atkinson?

A Thomas A.

Q You reside in Kamas?

A Francis.

Q Summit County? A. Yes sir.

Q What official position have you, or let me ask you, are you connected with one of the irrigation companies defendant in this case? A. Yes sir.

Q Which one?

A Washington Irrigation Company.

Q What official position have you in connection therewith?

A I am secretary and treasurer.

Q Mr. Atkinson, you were appointed as one of the committee to represent the litigants in this case, the water users on the upper Provo river, were you not?

A Yes sir.

Q What is within Summit county? A. Yes sir.

Q How long have you resided in Kamas or Francis?

A Since '90.

Q State if you are generally familiar with that territory covered by the water irrigated from the Provo river at the upper end?

A In general I am.

Q Been over it a great deal? A. Yes sir.

Q Been familiar with the people there?

A Yes sir.

Q Know them? A. Yes sir.

Q You hold some position in an ecclesiastical sense, do you not?

A Yes sir.

Q You are one of the bishops of Francis Ward?

A Yes sir.

Q As such you know the people generally in that district?

A Yes sir.

Q Can you tell me from your general information as to certain of these water rights under the Fulton decree?

A Yes sir, some of them I am acquainted with.

Q I will have Mr. Prescott testify to his own. Do you know of the Martha E. McNeil interest? A. Yessir.

Q That was Martha McNeil's successor to James Murphy and William Reed under the old Fulton decree?

A Yes sir.

Q Also from Robert Mitchie? A. Yes sir.

Q You know, do you not, these people whose names-- who are made parties litigant in this action have been actually using the water on the lands there in Francis and Woodland?

- A Yes sir.
- Q And they are the people who are named in this case as parties defendant? A. Yes sir.
- Q And part of the people whom you represent as the committee man?
- A Yes sir.
- Q You know they have been using this water for a number of years on their land at Francis and Woodland?
- A Yes sir.
- Q William Moon is successor to Mary A. Moon, is he not?
- A Yes sir.
- Q John Swift is successor to Mary A. Moon?
- A Yes sir.
- Q Mary E. Pace is successor to Thomas P. Potts?
- A Yes sir.
- Q Christie Bisel successor to Robert Mitchie?
- A Yes sir.
- Q William Lewis successor to T. A. White?
- A Yes sir.
- Q And also to E. B. Leffler, two acres? A. Yes sir.
- Q Ellen Gines successor to Samuel Gines, Sr.?
- A Yes sir.
- Q Samuel Gines, Sr. is not dead? A. No sir.
- Q Samuel Gines, Jr., successor to Samuel Gines, Sr., and G. O. Ellis? A. Yes sir.
- Q Charles L. Gines successor to J. M. Reed and J. L. Larson and William Reed? A. Yes sir.
- Q William Lemon successor to John O. Driscoll?
- A Yes sir.
- Q Marshall Leffler successor to Henry Bisel ?
- A Yes sir.
- Q And also successor to Woodland School District?
- A I am not much acquainted with that.
- Q That is a right in the 10th class, amounting to one acre?
- A Yes sir.
- Q James A. Knight will testify to himself. Riley Fitzgerald

successor to George O. Ellis and T. O. Potts?

A I am not acquainted.

Q With T. P. Potts?

A The Ellis part I am acquainted with.

Q R. W. Barnes successor to George O. Ellis?

A Yes sir.

Q Just a moment, is there a T. A. Potts?

A I am not acquainted with him.

Q It may be there is a typographical error, it may be T. P. Potts?

A There is a T. P. Potts, I don't know T. A. Potts.

Q It is nine acres. Let me repeat that. Riley Fitzgerald is successor in part to George O. Ellis for seventeen acres and to T. P. Potts to nine acres? There is other right which he evidently has in his own name. R. W. Barnes, successor to George O. Ellis?

A. Yes sir.

MR. A. C. HATCH: How many acres?

MR. THOMAS: Seventy acres. One and one-tenth cubic feet of water irrigation of seventy acres of land, successor to George O. Ellis. Ether Webb successor in part to Daniel Mitchell?

A. Yes sir.

Q John D. F. Bradshaw successor in part to Isaac Hunter?

MR. JACOB EVANS: What part, how can we determine?

MR. THOMAS: I am not reading in detail here from this data which is prepared ~~from~~ by the engineer. You shall have a copy of this. This is to hasten the testimony as to the transfer. You will have a copy of the acreage and water.

Ernest H. Horton successor to John Vincent?

A Yes sir.

Q George R. Hardman successor to Robert Mitchie?

A Yes sir.

MR. A. C. HATCH: There are two you have given us successor to Robert Mitchie, and have not mentioned any part.

THE WITNESS: I think one of those should be Robert Mitchie, Jr., the other Sr.

MR. THOMAS: One is eleven acres.

Q Ole H. Larson, successor to Joseph Ketchum?

A Yes sir.

Q And there is a mark here that indicates that thirty eight acres should be in the 5th Class?

A Yes sir.

Q That is divided from the 1st to the 5th Class? Rasmus Larson successor to Daniel Simperts?

A Yes sir.

Q Sixty acres in the 1st Class and 140 acres in the 5th Class, that is marked here according to the surveyor's notes?

A Yes sir.

Q Fred A. Peterson successor to Eldora Rose, four acres, and P. F. Bowers for four acres?

A I am not much acquainted with that piece in there.

Q Mary A. White, administratrix of the estate of Thomas H. White, successor to the estate of Thomas H. White, deceased?

A Yes sir.

Q A' S. Carlile, successor to John Phillips?

A I am not sure that he is a direct successor from Phillips, or from White, I could not answer that.

Q This is under the Phillips ditch, is it not?

A Yes sir.

Q And John Phillips was the original ?

A Yes sir.

Q Owner of that? A. Yes sir.

Q Mims Lark, administrator of the estate of William Lark, deceased, successor to William Lark, deceased?

A Yes sir.

Q Christie Fraughton administrator of the estate of Henry Fraughton, deceased? A. Yes sir.

Q Successor to Henry E. Parry for fifteen and three-fourths acres? and successor to Marshall Leffler, one and one-fourth acres?

A Successor to the Leffler, but I am not sure about the Parry.

Q Benjamin Turnbow successor to Mary A. Moon?

A Yes sir.

Q John Leffler successor to Abe E. Leffler?

A I am not sure of that.

MR. A. C. HATCH: That is two successors to Mary Moon, Mary A. Moon, if I remember correctly.

MR. THOMAS: I think that is right, I think there were two transfers from Mary A. Moon.

THE COURT: First one was William Moon.

MR. THOMAS: William Moon, successor to Mary A. Moon for three acres, and William Moon-- he had four acres of his own, and successor to Mary A. Moon for three acres.

MR. A. C. HATCH: The acreage has not been given.

MR. THOMAS: No, I have not given any acreage.

MR. A. C. HATCH: In some instances you said successor in part.

MR. THOMAS: Where it was not so designated it was evidently the entire former holding.

Q Mary Ann White, successor to Mary A. Moon. are you familiar with that?

A No sir, I am not.

Q E. L. Murphy successor to George O. Ellis for five acres?

A Yes sir.

Q Abram Gines successor to M. O. Turnbow, ten acres?

A What Turnbow?

Q M. O., Martin O.

A I am not acquainted with that either.

Q Is the name wrong?

A No sir, Mr. Turnbow has land in there, but I am not sure.

Q James Leffler, successor to T. P. Potts?

A Yes sir.

Q For three acres.

JAMES PRESCOTT called and sworn, testifies as follows:

DIRECT EXAMINATION By Mr. Thomas.

Q Your name is James Prescott? A. Yes sir.

Q You reside where?

A Francis.

Q You are one of the committee representing the parties litigant, resident in Summit county, are you not?

A Yes sir.

Q How long have you lived at Francis?

A About twenty-one or two years.

Q You are familiar with the water users and the land they cover, of all the water from the Provo river in that territory?

A I am out on the bench, I ain't so well acquainted with the river people, as I be with the canal.

Q You know what use of water they have made?

A Yes sir.

Q And they have actually used the water upon the land there?

A Yes sir.

Q You are the James Prescott mentioned in this action, are you not? A. Yes sir.

Q You are a successor to William R. Smith, are you not?

A Yes sir.

Q For ten acres of land? A. Yes sir.

Q And water to irrigate the same? A. Yes sir.

Q You know of the right of Ernest J. Prescott?

A Yes sir.

Q And Hattie J. Prescott Page?

A Yes sir.

Q Are you familiar with the land formerly owned by Eldora Rose and P. F. Bowers, transferred to Fred A. Peterson?

A Yes sir.

Q Do you know if that water has been used upon the land?

A Yes sir.

Q Fred A. Peterson claims to be the successor to Eldora Rose for four acres and P. F. Bowers for four acres?

A Yes sir.

Q Are you familiar with the claim of Mr. Carlile, A. S. Carlile, who claims to be successor to John Phillips for forty acres?

A Yes sir.

Q That is correct, is it?

A Yes sir, that is correct.

Q Are you familiar with the claim of John Leffler as successor to E. B. Leffler for ten acres as decreed in the Fulton decree?

A No, I am not.

Q Are you familiar with the claim of Mary Ann White, successor to Mary A. Moon, are you familiar with the location of that land? A. No sir.

ERNEST KNIGHT, called and sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Thomas.

Q State your name?

A Ernest Knight.

Q You are one of the committee representing parties litigant resident under the Francis and Woodland ditches under the Provo river, are you not?

A Yes sir.

Q Are you familiar with the water rights and lands irrigated on the river as claimed by the litigants in this action, that is, the Summit County people? A. Yes sir.

Q I want to direct your attention to the claim of Mary Ann White, are you familiar with her claim as being successor to Mary A. Moon? A. Yes sir. That should be Mary Ann Moon in the decree. It is the same woman just married.

Q Mary Ann White and Mary Ann Moon?

A It is Mary Ann Moon in the decree.

Q Then her true name is Mary Ann Moon White?

A Yes.

Q Are you familiar with the claim of John Leffler as successor to E. B. Leffler? A. Yes sir.

Q And the claim that he makes is correct, that is, he is the successor to E. B. Leffler for the amount of land?

A Yes, partial successor.

Q He has one acre aside from this. He is claiming eleven acres and successor to E. B. Leffler for ten acres?

A Yes sir.

MR. THOMAS: That covers all of them. I shall have this rewritten and copies submitted.

MR. A. C. HATCH: Before it is accepted as part of the stipulation we want an opportunity to check it.

MR. THOMAS: Surely, yes.

THE COURT: Certainly.

MR. WILLIS: If counsel will permit me to put a--

MR. THOMAS: Just a moment, how many copies would you gentlemen like?

MR. A. C. HATCH: Two copies will be sufficient.

MR. WILLIS: Will counsel permit me to put another witness on as to successor in interest before you go on with your rebuttal.

MR. THOMAS: Just a moment.

Q Mr. Knight, just where you are, you are familiar with the claim of James A. Knight?

A Yes sir.

Q He is successor to Henry Fraughton for ten acres, and successor to J. J. Jenkins for forty acres?

A Yes sir.

Q Aside from the lands he himself had under the decree?

A Yes sir.

MR. JACOB EVANS: Before this witness is examined I will ask the court to have the bailiff call Mr. S. H. Belmont. He is in town here, and we want to cross examine him a little more concerning the Provo Pressed Brick Company. He is a man that is out of town quite a good deal. I saw him this morning. His attorney, Mr. Cluff, is here, was a minute ago, and we would like to cross examine him.

THE COURT: Mr. Cluff, can you tell where he could probably be found?

MR. CLUFF: No, I don't know.

MR. JACOB EVANS: I saw him standing on the post office steps. I think he can be found, telephone him and have him come over.

MR. CLUFF: Very well.

CHARLES J. WAHLQUIST, called and sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Willis:

Q What is your name, please?

A Charles J. Wahlquist.

Q Where do you reside?

A Heber City.

Q What is your profession or calling?

A Attorney at law.

Q Were you acquainted with Ulric H. Abegglen during his lifetime?

A Yes sir.

Q Has he died since the commencement of this action?

A Yes sir, he died on the first of July, 1915.

Q Is his estate now being probated in Wasatch county?

A Yes sir.

Q Are you the attorney for that estate?

A I am the attorney for the administrator, yes sir.

Q Has distribution been ordered in that estate?

A The real property, consisting of three parcels of land has been set apart to the widow, by decree of court entered on the 29th of September, 1916.

Q Is she the owner of four acres of land and the water right belonging thereto under what is known as the Phil Smith slough, was that distributed to her?

A She is the owner of a tract of land in Section 25, Township 3

South, 5 East, consisting of about nineteen acres of which, I understand four acres is irrigated through the Phil Smith slough.

Q What is her name, please?

A Anna Elizabeth Abegglen.

Q I understand she is the successor in interest to that water right being claimed for Mr. R. Bdgland estate?

A She is the successor of whatever there is. I am not advised as to the area, because I was not in that.

MR. CLUFF: If the court please, I have the claim of Benjamin Richmond like to present this morning.

THE COURT: Very well.

THE COURT: Judge Hatch, I will hear the matter of Mrs. Anderson at this time.

MR. JOHN E. BOOTH: If the court please, while they are getting ready, may I have the indulgence. I desire to move to set aside the default in case of Alma Jorgenson, Albert Jorgenson, Lucy Jacobsen, Sarah Williams, Anna Glade, Zions Savings Bank & Trust Company, Charles Mathison, Edwin A. Mathison, W. W. Ercanbrack, Caroline K. Mathison. It appears they have taken default yesterday, stirring up the dry bone some, and ask to have the privilege of setting these defaults aside and filing answers.

THE COURT: Do you have the answers prepared?

MR. JOHN E. BOOTH: I have.

THE COURT: You may file them. You are ready to introduce the evidence in support of them?

MR. JOHN E. BOOTH: We will be ready if we know when they will be reached.

THE COURT: I cannot give you any time with reference to that. Under the present circumstances the parties having giving this matter no attention or interest whatever, they will have to wait upon the court now.

MR. JOHN E. BOOTH: I recognize that. I suppose there is no contest in regard to these matters. I have got three of them can be put through in half an hour.

THE COURT: Possibly we can arrange it to put them in sometime tomorrow.

MR. JOHN E. BOOTH: If we can then tomorrow.

THE COURT: Now proceed, Judge Hatch.

MR. A. C. HATCH: Mrs. Anderson had some papers which she wanted to offer in evidence in addition to the papers which she had offered heretofore, as I understand her, and her attorney is out of town, Mr. McDonald, and I told her that I would call the matter to the attention of the court, and ask they be admitted. The papers consist of some plats drawn by her, and some by others, and an abstract of title to

her property and the water for irrigation purposes. You want it marked and left as evidence?

MR. ANDERSON: Yes, this is a patent of 1891 (Unintelligible).

MR. A. C. HATCH: This may be admitted?

THE COURT: Yes.

MR. JACOB EVANS: If the court please, Mr. Jacobs is here in connection with her testimony. I believe he surveyed the land that is under irrigation, and if the court will hear it.

THE COURT: I think that was all gone into fully at Heber, evidence of it, if I remember correctly. Am I not correct, Judge Hatch?

MR. CHASE HATCH: At this time I move to set aside the default of Nephi Huber, Joseph E. Huber and John Huber, and substitute John M. Huber administrator of the estate of John Huber, deceased in place of John Huber, who has defaulted. We will file an answer and serve copies.

THE COURT: It may be done.

MR. CHASE HATCH: We can produce our testimony, we could be ready for a night session.

MR. HUFFAKER: Several of these defendants against whom defaults were taken yesterday I have their answers ready and complete with the exception of filling in the number of acres for each, and the secretary of the company just got here, so I will ask permission to file this amendment in the morning.

THE COURT: Very well.

MR. A. C. HATCH: If the court please, we have been unable to find any record of the overruling of the demurrers filed in this case, and if there is any record of it it is in the stenographer's notes, taken while Judge Morgan was sitting in the case, and by reason of that condition we feel that it would be necessary as a matter of safety and precaution to have the order of default heretofore entered against the parties whose names I will state to the court set aside, and we ask that that be done as to the following named defendants: J. R. Allen, J. W. Allen, A. P. Allen, W. R. Allen, George Baum, Louisa J. Brown, Robert Berkin, John Burrows, Samuel E. Bunnell, Gottlieb Buhler, Andreas Burgener, Peter Boice, Jack Bates, Henry Bisel, Demming Barrows, John Buttery, John Bradshaw, Lucy Bisel, John W. Clark, Arthur C. Candland, Robert Cordner, Samuel Carter, George A. Clark, Mary A. Cook, Henry T. Coleman as administrator of the estate of Nathan Springer, Deceased, Henry T. Coleman individually, Arthur Clyde, Bish Corbet, appearing by demurrer M. L. Corbett, John W. Carlile, G. N. Doty, Leroy Dixon, John H. Emmons, Mary Ann Emmons, Owen Ellis, Elizabeth A Farrer, Emily E. Forsyth, Frederick Farrer, W. W. Ferguson, Henry J. W. Goddard, Lyman Gines, D. A. Gibson, Edwin S. Hinckley, James B. Hamilton, John W. Hoover, Nephi Huber, Joseph Huber, Lucian N. Hinckley, Arson Hicken, James Hamilton, Heber Light & Power Plant. That has been set aside, and they have answered.

MR. WILLIS: Yes, that is right.

MR. A. L. BOOTH: Of course, I took this from the clerk's papers last night, some things were filed yesterday.

MR. WILLIS: Oh no, their answer is on file as may be seen by the record, I have forgotten the page and pouch.

MR. A. C. HATCH: Mr. Booth has gone all through those files since you made that statement the other day, and now makes this report.

MR. WILLIS: I will give the page.

MR? A. C. HATCH: Mary Hunter, Lars Jacobseon, Jr., as administrator of the estate of Lars Jacobson, deceased, Annie Jones, Mark Jeffs, Jane McD Johnston, William Johnston, Mathias Knudsen, Frederick Kummer, Reed J. Knudsen, Edward Kummer, Rosind Kummer, Hyrum Knudsen, W. D. Lewis, Mims Lark, as administrator of the estate of William Larsen, deceased, Niels Larsen, Millie Leffler, Richard Lambert, Parley W. Madsen, George A. Madsen, Lewis Mariott, Wilhelmina Madsen, James F. McClellan, Marie Mitchell, David McGimsey, Thomas Monks, O. P. Matthews, Leslie Murphy, Timothy Murphy, Julia Murphy, Daniel Peay, George T. Peay, Major Pierce, Mrs. Francis Page, Julia Radfield, summoned as Radfield and named in the complaint as Padfield, Julia Radfield and Sons, Emily Prescott, Amos Prescott, S. E. Peterson, Mrs. O. A. Page, Adolphus Sessions, C. A. Springer, Joseph V. Smith. If the court please, it seems I have made a mess of this, and we are not prepared to properly present this matter to the court, and I will ask that the motion and the names given be stricken at this time for that reason.

THE COURT: Very well, that may be done.

MR. HUFFAKER: If your Honor please, at this time I shall ask that the defaults entered yesterday or day before against the following named defendants be set aside, and defendants be permitted to file their answers. There are some defendants named here or rather parties that are not defendants, and who own, are using and own water in the river system there that I have joined in. I say, Judge, there are some here we have entered just recently, found they own and claim water, and they were not made parties defendant, and I thought it best to add them all so as to adjudicate all the rights.

MR. A. C. HATCH: Have you conferred with them as to appearing for them?

MR. HUFFAKER: Yes, their water is distributed

through the Midway Irrigation Company, and the Midway Irrigation Company has the power to have their rights adjudicated here.

MR. A. C. HATCH: I do not so understand, if the court please. The Midway Irrigation Company is not an attorney at law, and this is a right of real estate, and the power to appear in the court required by any person other than an attorney at law must necessarily be by power in writing, and we do not recognize the right of the Midway Irrigation Company to appear here and represent a lot of people, I don't know how many. They would not be bound by the decree of the court, and except they appear and answer, setting up their rights in this case, their rights cannot be adjudicated.

MR. HUFFAKER: I appear, your Honor-- not the Midway Irrigation Company is an attorney at law, but I appear for these people in the matter myself, and Mr. Wahlquist, as shown by the pleadings.

MR. A. C. HATCH: Then I have no objection, my objection was based upon your statement.

MR. HUFFAKER: I had not finished my statement, Judge. That was the reason it was misinterpreted. Now, the following named defendants, John Buhler, Gottlieb Buhler, O. P. Matthews, Henry Watkins, J. Brigham Wilson, Andreas Burgener, Frederick Farrer, David McGimsey, Thomas Monks, Henry Zenger, Mary Schoni, Joseph Schoni, Maria Mitchell, Cordelia Wilson, James Wilson, George Wilson, D. A. Gibson, James Hamilton, Jr., administrator of the estate of James D. Hamilton, deceased,

MR. CHASE HATCH: That is an error.

MR. HUFFAKER: I understand since the commencement of this action the defendant James B. Hamilton died, and I was informed that his son James Jr., was appointed as administrator.

MR. CHASE HATCH: It is Martha J.

MR. HUFFAKER: Then I will ask permission to put in the name Martha J. instead of James, Jr. Stephen Smith,

Frederick Remund, William Bonner. I will state here that William Bonner is represented part of his interest by Mr. Willis, and has filed an answer as to part of it, and the same with Felix Marton, Jacob Kummer, William L. Van Wagonen, John U. Probst is not a party defendant, but owns an interest in the waters of the system, irrigates one acre. George Schear is another in the same condition. Polly Schear is another, Mile Cormack is another and George A. Huntington is another. All excepting those whom I have indicated were not parties defendant, your Honor, I will ask that the defaults be set aside, and they be permitted at this time to file their answer.

THE COURT: That may be done.

MR. WILLIS: If the court please, I find here on page 268 of pouch No. 3 an answer filed by Heber City, Midway Town Corporation and the Town of Charleston. I came into this matter, - Mr. McDonald was attorney in the first place for these parties. I believe this answer ought to be amended for the reason that I find no where do they say these parties are doing business as the Heber Light & Power Plant, and I believe it should be amended to so state otherwise I think the answer sets forth facts sufficient to be a complete answer to the complaint as to the parties. It alleges and denies certain facts. Alleges that they commenced to carry on the business and facts sufficient, so far as that is concerned, but in no place does it say as Heber Light & Power Plant.

THE COURT: As a matter of fact, they are partners under that firm name.

MR. WILLIS: I do not think they are partners, I think they are tenants in common.

THE COURT: Under that name?

MR. WILLIS: Yes, but I believe this answer ought to allege that, and with the court's permission I would like to amend to so state.

MR. THURMAN: Does the complaint allege their business?

MR. WILLIS: Yes, the complaint, I think alleges the facts sufficient except it does not say they are doing business as the Heber Light & Power Plant.

MR. THURMAN: Why don't you admit the complaint?

THE COURT: I understand Mr. Willis desires to admit it by an affirmative allegation to that effect.

MR. THURMAN: It occurs to me if the complaint alleges the business and the answer admits that part of the complaint, it is not necessary to set it up.

MR. WILLIS: I take it it does. It admits certain paragraphs of the complaint. It perhaps ought to allege affirmatively they are doing business in that capacity.

MR. JACOB EVANS: If they allege it and they admit it shouldn't that be necessary?

MR. A. C. HATCH: They admit certain portions of the complaint, and they admit that. I think the answer is sufficient without the amendment.

THE COURT: If that is true, I think that would be sufficient.

MR. WILLIS: If the court would so hold.

THE COURT: If the allegation is made and admitted.

MR. A. C. HATCH: Paragraph 6 of the complaint reads, "The defendant Heber City" etc. (Reading). And paragraph 22, "That defendant Heber City, Midway Town Corporation" etc. (Reading). The answer admits paragraphs 1 to 27 inclusive.

THE COURT: That is sufficient, I take it, Now, if you are ready.

MR. HUFFAKER: There is one other matter, your Honor. At this time I shall ask to offer an amendment to the answer of Wilford Van Wagener, as follows: That in the year 1897, ~~xxxxxx~~ the predecessors in interest of the said Wilford Van Wagener entered upon the banks of the said Deer Creek, and began the construction of a canal to divert the waters of

said Deer Creek. That at the time of commencing said construction the said predecessors duly filed notice of their intention to appropriate sufficient water from the said Deer Creek to irrigate two hundred acres, and duly posted a copy of said notice at the point of diversion, and one at the nearest post office. That the said canal was completed within a reasonable time, and the work thereon was diligently prosecuted to completion after the beginning of the said construction work and the waters of the said Deer Creek applied to a beneficial purpose. I think the stipulation entered into at the time of the beginning of the action would cover this, but in order to have the record more complete, I would like to have this amendment to the answer as I have stated.

MR. JACOB EVANS: What particular answer is that you want it added to?

MR. HUFFAKER: It is just showing the original appropriation.

MR. JACOB EVANS: What answer?

MR. HUFFAKER: Wilford Van Wagenen. I have spoken to Mr. Evans about it.

THE COURT: It may be filed, you may serve copies on the other parties so they may attach it to their copies.

MR. A. C. HATCH: If the court please, we now move the court to set aside the order of default against the following named defendants: J. W. Allen, A. P. Allen, W. B. Allen, Henry Bisel, John Bradshaw, Lucy Bisel, M. L. Corbett, Owen Ellis, Lyman Gines, James Hamilton, Mary Hunter, Anna Jones, Mims Lark, as administrator of the estate of William Larsen, deceased, Timothy Murphy, Julia Murphy, Mrs. Francis Page Julia Radfield & Sons, S. E. Peterson, Mrs. O. A. Page.

THE COURT: The orders entering defaults may be vacated, and these defaults set aside.

MR. A. C. HATCH: And we would now ask the court to pass upon the demurrers of the several parties in the case as named.

THE COURT: Anyone representing them desiring to be heard before the court passes upon the demurrers. If not the demurrers may be overruled, parties may be given ten days in which to answer.

THE COURT: Gentlemen, are you ready to proceed in the matter of entering defaults?

MR. ROBINSON: If the court please, a default has been entered against the defendant John W. Hoover, and we have stipulated with the plaintiff in regard to the rights that he claims, so that there is no disagreement as to that, but our answer has not been filed, and while we have it prepared ready for filing Mr. Hoover has not been in to sign it, may be he is snowed up in the canyon. We would like to have this default set aside and have leave to file our answer. I think we can file it sometime during the day. We are expecting him today.

THE COURT: If the default has been entered, it may be set aside unless there are some objections.

MR. WAHLQUIST: In the matter of Jack Bates, I have now a formal answer prepared, and will ask leave to file. I don't believe there was any default entered in his case, because I appeared before.

THE COURT: I remember the name.

MR. WAHLQUIST: We have no further testimony to offer as to him, so that we rest as to him.

MR. A. C. HATCH: We have a precipe for default as to all those who have not answered.

MR. WILLIS: At this time I want to ask for the privilege of filing a separate answer of Joseph R. Murdock as to the complaint of the plaintiff, as to mill rights and power rights Mr. Murdock has in the waters of Provo river near Charleston?

THE COURT: It may be filed.

MR. McDONALD: I want to say to all parties present Mr. Wentz has presented a claim for ^{one} hundred and fifty dollars for services which he has rendered in addition to services ordered by the court, and for the information of the members present I will read his claim. Comes now T. F. Wentz, the

commissioner heretofore appointed by this court in the above entitled cause, and respectfully shows that he has served as such commissioner during the years 1915 and 1916, as provided in the court's order: (Reading).

MR. A. C. HATCH: We have no objection to the payment being made.

MR. McDONALD: I will say so far as my clients are concerned, I do not think there is any objection.

MR. WILLIS: At this time I would object to any charge so far as my clients are concerned, without investigating the matter further, for the reason it would appear from the reading of that particularly and also private information that I have, that that was based on information and data that he furnished for the settlement of claims above the Midway Upper dam, and if I find it to be to the contrary, I may withdraw my objections, but at this time I would object to charging my clients with any portion of that sum.

MR. JACOB EVANS: It seems to me this is one system, one lawsuit, and any work that Mr. Wentz did for any of the parties to this lawsuit necessarily benefited the whole.

THE COURT: I think that statement probably is a little broader than you intended to make it, There might be some work for the benefit of one that would not benefit the whole, but any work that has for its object and accomplishment the great saving of time that was accomplished in the stipulation in regard to the Heber Valley certainly was a benefit to all of the parties to this action.

MR. JACOB EVANS: Certainly, there is no doubt of that, and the amount saved would be greatly in excess of that charge.

THE COURT: The bill may be allowed, approved by the court. There seems to be no objection to the bill itself. Judge Willis' objection is to his clients being taxed with any part of it, and the order may be at this time that it be apportioned the same as the costs have been apportioned, that

is, the compensation of the commissioner have been apportioned with leave to Mr. Willis if you find--

MR. WILLIS: I may withdraw my objection later.

THE COURT: You may have leave to modify that by striking out any portion that is taxed to your clients if you find you desire to, and the court will hear you at the time I come back to take evidence, but the order may be now approving it to all the parties, with leave to you to make that motion, if you desire. Now, are you ready to proceed with the matter of defaults?

MR. A. L. BOOTH: I wanted to see Mr. McDonald of this matter before I can tell exactly.

MR. WAHLQUIST: There is one matter, as the court will undoubtedly recall, the counsel representing the Midway Irrigation Company were somewhat taken off of their feet when the court was here before and default was entered, not being as familiar as we ought to have been without pleadings in the case and not having been prepared by the present counsel, and the president of the Irrigation Company instructed Mr. Huffaker and myself to appear for all others who were not represented by counsel at the time, and we did so, and I find this morning one George Shear who was included in the answer filed by Mr. Huffaker and myself has since filed a separate answer, and I would therefore ask permission to strike from the title of our separate answers representing those parties the names of George Shear and Polly Shear and also that part of the paragraph wherein we set out their separate claims so there shall not be a duplication of claims which might tend to confuse the court. They are claiming together ten acres of primary water right through the Midway Irrigation Company.

MR. A. C. HATCH: Have you got that matter straightened out of the James C. Hamilton estate?

MR. WAHLQUIST: As soon as I can get the files. There are several matters there.

MR. A. L. BOOTH: You can aid them, Judge.

MR. WAHLQUIST: There are several matters here where in our haste we did not name the proper parties, and I would like to correct as to that now.

MR. JACOB EVANS: I will suggest something be done in writing about these matters. We cannot tell when they are stated into the record, and know nothing about it, and I think it essential this be in such a way we might take proper defaults against persons who have not answered. Now, if there is some paper that is prepared and served on us we have something to go on, but there is none of us can remember those names probably three minutes after they are stated in the record.

MR. WAHLQUIST: I will concede there is merit in that, your Honor, and will be pleased to prepare a statement in writing, but this is a day for the entering of defaults and appearances, and I would therefore also like the record to show that I have no objection whatever to file written papers hereafter. We state in our answer here we have a duplication Cordelia Wilson, James Wilson, George Wilson-- that is correct-- we appear in the name of James Hamilton administrator of the estate of James B. Hamilton, deceased. That is an error. The administrator of the estate was Martha Hamilton, and the real property of the estate was distributed to certain named heirs conveyed by deed during the lifetime of James B. Hamilton and Martha Hamilton has only a life estate in that, and we will have to correct the-- the evidence will be the proper place, I think, to make that correction. There is no question as to the acreage or right, but only as to the parties that should be named in the decree. That is, as you understand it, isn't it?

MR. A. C. HATCH: I don't know anything about that, all I knew was that James Hamilton was not the administrator.

MR. WAHLQUIST: Martha Hamilton. The appearance is also made in behalf of George A. Wellington who was never served

but his successor in interest and the party J. W. Bates have one acre of water right acquired through the Christian Schoni estate, which we will set out more fully. Marie Joseph Schoni should appear, Christian Schoni having been dead about fifteen years, and the water rights owned by him being owned by different parties. I feel in a measure humiliated, your Honor, to be in this position, but it is a matter I knew nothing of until the court was here on the 13th of December. Mr. Huffaker senior counsel is residing in Salt Lake City.

THE COURT: If the matter can be kept in such situation with the parties charged with checking up those who are in default so that we may take the defaults this will be all right. It makes it difficult for Mr. Booth who seems to have charge of that matter.

MR. A. L. BOOTH: I cannot possibly keep track of all those matters when they come in here without a writing.

THE COURT: These changes, I take it, do not affect particularly the taking of defaults. Last change with reference to administrator. The defaults may proceed just the same.

MR. A. L. BOOTH: Then do I understand the default may be entered against James B. Hamilton and James Hamilton also. They have appeared in the pleadings.

MR. WAHLQUIST: James B. Hamilton appears in the pleadings by his heirs and successors in interest.

MR. A. L. BOOTH: There is a demurrer on file here by Mr. McDonald for James B. Hamilton.

THE COURT: Default may be entered against him.

MR. A. L. BOOTH: Then later James B. Hamilton as administrator of the estate of James Hamilton answered, as I recall.

MR. WAHLQUIST: You may make the default against James B. Hamilton, because his successors in interest are answering on his behalf.

MR. A. L. BOOTH: That is what I want to get to as to whom we may enter default against, that is why I want you to see Mr. McDonald. He claims Mr. Doty, for instance, has answered against the Smith Ditch Company, but I do not see his name.

THE COURT: Possibly you might take your defaults as far as you can.

MR. A. L. BOOTH: I have not prepared a precipe. I think if the court will take a recess for half an hour we can possibly have the matters in shape.

THE COURT: The court will take a recess for a few minutes, and when you have concluded your conference, I will convene immediately.

(RECESS)

MR. A. L. BOOTH; The plaintiff now moves that default of the following persons be entered, they having appeared by demurrer, demurrers having been overruled on the 13th of December, ten days having been given for them to answer and they having failed to answer, and notice having been duly served on their attorneys of the overruling of the demurrer more than ten days ago. W. R. Allen, Lucy Bisel, M. L. Corbett entering by demurrer, but named in the complaint as Bishop Corbett, Owen Ellis, James B. Hamilton, Mary Hunter, Anna Jones, Mims Lark as administrator of the estate of William Larsen, deceased, Timothy Murphy, Julia Murphy, Mrs. Francis Page, Julia Radfield & Sons, E. E. Peterson, Adolphus Sessions.

Now, I might state that one G. N. Doty appeared through Mr. McDonald by a demurrer. Mr. Doty says now that he belongs to a voluntary association known as the Smith Ditch Company, and his name does not appear in that company either by answer or stipulation, and Mr. McDonald informs me that Mr. Doty has understood all along that he was named as one of those, and he

will be here, I think, in a few minutes, so we don't ask that his default be entered.

MR. WAHLQUIST: If the court please, in the case of Julia Murphy, Henry Shields appeared in court at Heber and made her a party to that stipulation.

MR. A. L. BOOTH: I find no answer. Of course, I don't know these people.

THE COURT: Defaults may be entered against all those parties who have not answered at this time.

MR. A. L. BOOTH: Julia Murphy and Timothy appeared by Mr. McDonald in a demurrer.

THE COURT: That would not prevent the court from permitting the parties to make proof if they file an answer, providing they join in the stipulation that has been joined in by all the parties here. It is important that the status of everybody may be fixed today.

MR. MCDONALD: There is one matter I wish to bring up relative to the parties just named. One of the Davises, possibly I think William H. Davis, spoke to me about the Murphy matter, and asked me to make an appearance for them in connection with a number of others for whom I appeared along in the same vicinity on the river. I done so, and later on Mr. Davis, Mr. William H. Davis, also George Davis as the husband at this time, as I understand of Mrs. Murphy, came and spoke to me about the matter. Did she marry Mr. Davis?

MR. WAHLQUIST: I think Judge Hatch got the divorce.

MR. A. C. HATCH: I think they were divorced last week.

MR. MCDONALD: In any event, probably before the divorce was had he told me he was going to have Judge Hatch or Chase Hatch appear and look after their interests in this property, and I told him then so far as I was concerned I would not make any answer or any further appearance in the matter.

MR. A. C. HATCH: Pardon me, Mr. McDonald, Judge Shields appears for Julia Murphy in this case in this court, and he was noticed of his demurrer overruled, and after he received the notice I conferred with him by telephone and sent him a description of the land, and he said he would come in with his answer before today, and it seems that his answer has not yet reached the clerk, and that is the condition as to Julia Davis. Julia Davis has sold the land and is no longer really a party in interest, conveyed the property to a person who lives at Morgan, so Judge Shields informed me, and he would continue it in the name of Murphy, and his answer will probably be here during the day.

MR. MCDONALD It is here.

MR. A. L. BOOTH: Judge Hatch, not knowing of the intricacies of these movements, of course, I could not recognize Julia M. Davis was Julia M. Murphy. There is an answer here for Julia M. Davis.

MR. A. C. HATCH: That is the answer then, she is Julia M. Davis, she was Julia Murphy, and although divorced last week, she still is Julia M. Davis.

MR. MCDONALD: In order that the record may be clear, I would like to have it show I withdraw as attorney for Julia N. Davis or Julia M. Murphy, whichever one the record shows, or both.

MR. A. C. HATCH; Julia Murphy Davis.

THE COURT: Is there anything else?

MR. A. C. HATCH: It appears the clerk did not get the minute entry of the defaults entered the other day, and we would like to privilege of filing a precipe including all those names in which defaults were ordered entered the other day, so that a minute entry may be made, and also a precipe covering the defaults entered today.

THE COURT: That may be done.

MR. A. C. HATCH: And the clerk be instructed to enter

it on the minutes of the court as of this date. That is the former entry as of the date the order was made, and the present entry as of today.

THE COURT: The former order was made the last day the court was here, wasn't it?

MR. A. C. HATCH: I think so.

MR. MCDONALD: There were defaults entered on the first day, and afterwards they were set aside, so that should be covered.

MR. A. C. HATCH: I think, if the court please, the order should be as we asked for and if any have appeared and defaults set aside let them look after the record, and see that the clerk gets the proper entry .

THE COURT: I think the burden should be upon the ones who have made these appearances, because most of them were oral. The order may be made just as stated, and I think it was the 13th, if I remember correctly, the last order of default was made.

MR. WILLIS: It would make some difference, may it please the court, as to when that is, because there were defaults entered in the first instance against clients of mine, and I moved to set them aside, and in the later order they were not included at all, and I do not think-- I am willing to submit a statement who they are, if it is necessary, but I take it that the record shows it is not because they were not included in the second order made.

THE COURT: As I remember it, Judge Willis, the first order was set aside entirely.

MR. WILLIS: That is as I understand it. Then it does not affect my clients.

THE COURT: Are there some other matters before the court adjourns?

MR. SOULE: If the court please, the car was late we took, and got stopped. We owe an apology for not coming on

an earlier car, but I notice some defaults entered here in clients of Mr. Thomas and myself. We desire to amend our answer and appear for Henry Bisel, the amendment has been filed, in place of Louis Bisel. We don't represent him, he is properly defaulted.

MR. A. L. BOOTH: We did not have Henry's default entered. I had his name here as having appeared by demurrer. We served notice on you people that the demurrer had been overruled, and since then I think you have answered for them, at least, you asked to have an answer amended by inserting his name, and I did not take the default.

MR. SOULE: Then I understand there will be no objection to our filing the amendment? Now, in the summons mentioned Mims Lark as the administrator for the estate of William Larsen. In Place of that the party's real name is Mims Lark administrator of the estate of William Lark, instead of William Larsen. I am not familiar with it, but Mr. Thomas told me that correction should be made.

MR. BOOTH: May I make a statement. Messrs. Thomas and Soule appeared by demurrer for Mims Lark administrator of the estate of William Larsen, deceased. Later they answered for Mims Lark administrator of the estate of William Lark, deceased.

MR. SOULE: Then that is all right.

MR. A. L. BOOTH: The default has been made against Mims Lark administrator of the estate of William Larsen, deceased, but not William Lark.

MR. SOULE: You have John Bradshaw?

MR. A. L. BOOTH: No, we have not entered his default, because you served notice John Bradshaw and John D. F. Bradshaw are the same person.

MR. SOULE: Lima Gines is C. L. Gines.

MR. A. L. BOOTH: We did not enter his on that account.

MR. SOULE: Decree should run to C. L. Gines, I understand. We represent S. C. Peterson, his true name is S. A.

Peterson.

MR. A. L. BOOTH: S. E. Peterson entered by demurrer, so we have had default entered against S. E. Peterson, and not S. A. or S. C.

MR. SOULE: Are they both entered in the pleading, I have not had anything to do with it until this morning.

MR. A. L. BOOTH: I cannot answer as to that, only S. E. Peterson's name appears in the demurrer. You answered for S. A. Peterson, as I recall it, or S. C. It is the one who demurred and who did not answer in the same name against whom the default has been entered.

MR. SOULE: There are two estates in the course of administration now. We wanted to appear for Martha McNeil as administrator of the estate of William McNeil, deceased, and Emily Prescott as administrator of the estate of Thomas Prescott, deceased.

MR. A. L. BOOTH: Those are two new defendants you want to have entered?

MR. SOULE: I think they have claimed there, but were represented by the estates instead of by the persons on that default. In the trial during the summer there was no one properly here to represent them, and Mr. Thomas made application to have administrators appointed of these estates so they could sign the stipulation.

MR. A. L. BOOTH: We have Emily Prescott as a defendant, and as administrator, and her default has been entered. I suppose that is individually.

MR. SOULE: Instead of appearing individually in the matter what Mr. Thomas desires is she appear as administratrix of the estate of Thomas Prescott. Is Thomas Prescott there?

MR. A. L. BOOTH: No, Amos Prescott is.

MR. SOULE: And the same with Martha McNeil.

MR. A. L. BOOTH: We don't have any McNeil among these whose defaults have been entered.

MR. A. C. HATCH: Do those appear there at all?

MR. SOULE: If they have not, Mr. Thomas will want to file an answer for this client Martha McNeil as administrator of the estate of William McNeil.

THE COURT: I take it he can be prepared with that amendment and proof necessary under it, at the next session of the court, or serve it before that time, and be prepared to proceed with the proof, because there will only be one session of the court hereafter for the purpose of taking evidence. We will close up the matter of taking evidence at the next sitting. Now, are there any other matters that the court should attend to before adjournment?

MR. WAHLQUIST: I will ask your Honor in the case of the separate parties connected with the Midway Irrigation Company we be permitted to file an amended answer setting out the present owners more fully without in any manner enlarging our claims as to areas or rights.

THE COURT: You may prepare such an amendment, and if there be any objection to it, the objection can be heard when the court comes the next time, otherwise it may be filed. Now, if there are no further matters, the court will adjourn at this time. The court will adjourn the further hearing of this case until Monday, the 8th day of January, 1917.

 12:00 NOON, RECESS TO 10:00 A. M. JANUARY 8, 1917.

MR. JOHN E. BOOTH: If the court please, we have a motion to make this morning, a matter that is not very important to anybody but us. I move to set aside the default that has been heretofore entered in this case against Reed Knudsen, Louis Marriott, Lars Jacobsen, Robert Jacobsen, Lucy Jacobsen, Isaac P. Nelson, Nenjamin H. Knudsen, William D. Lewis and William C. Williams. This relates to about eighty acres of land down on the very lower end of the Provo river, and, as

I understand it, does not interfere with anything of the plaintiff or other people as they take it below everybody else, what is there. They would prefer to have their title quieted in this suit, as they are made parties, so ask permission to file an answer and have the default set aside.

THE COURT: If there is no objection, that may be done. You have your answer prepared?

MR. JOHN E. BOOTH: I have an answer prepared, and if the court is ready, we may just as well proceed.

THE COURT: If Mr. Story has some testimony it might make it a little more orderly for him to proceed first.

MR. MCDONALD: Your Honor Please, while waiting for Mr. Story, at the time we entered into the stipulation in Wasatch county, we overlooked stating the acreage of the Spring Creek Irrigation Company, and Sage Brush Irrigation, and the report may show we have stipulated and agreed that the acreage of the Spring Creek Irrigation Company is seven hundred and twenty, and the acreage of the Sage Brush Irrigation Company five hundred.

THE COURT: Now, I think, Mr. Huffaker, we will take your matter.

MR. HUFFAKER: This evidence is in support of the Van Wagenen claim. This testimony will be a little out of the regular order.

JOHN A. WOOTTEN, called by the defendant Wilford Van Wagenen, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Huffaker.

- Q Is your name John A. Wootten?
A Yes sir.
- Q Where do you reside?
A Silver City at present.
- Q Where did you reside previous to that?
A At Midway, Wasatch county.
- Q You have resided there practically all of your life, have you not?
A. Yes sir.
- Q What is your business?
A My business at present is mining.
- Q You have had experience in farming, have you not?
A Yes sir.
- Q To what extent?
A Off and on biggest part of my life, connected with farming.
- Q At one time you were president of the Midway Irrigation Company?
A. Yessir.
- Q Are you acquainted with the farm lands of Wilford Van Wagenen?
A I think so.
- Q And particularly that portion that is irrigated from the Deer Creek?
A. Yes sir.
- Q Just state where that is located with reference to the Town of Midway?
A About a mile and a half-- about two miles southwest from Midway.

- Q And do you know from what source it is irrigated?
- A Yes sir.
- Q Whereabouts?
- A Part of it from Deer Creek.
- Q I had reference just to that portion that is irrigated from Deer Creek. A. Yes sir.
- Q Are you familiar with the canal bringing the water from Deer Creek?
- A Well, somewhat, not entirely.
- Q Do you know where it heads?
- A Yes sir.
- Q Just state about where it is with reference to the town of Midway, or the farm?
- A It is situated about, as near as I can guess, never measured it, about four miles little south of west of the town of Midway.
- Q And the source of the canal would be about four miles west of the town of Midway, would it?
- A The intake?
- Q Yes. A. Yes sir.
- Q And over a range of mountains? A. Yessir.
- Q Now, what elevation does that canal reach when it gets to the top of the mountain, approximately?
- A Approximately seven or eight thousand feet. I could not--
- Q And then it drops down onto the farm land?
- A Yes sir.
- Q What is the character of the country that this canal runs through?
- A Very steep side hill mountain, and considerable brush, oak brush especially, and ledges of rock.
- Q Great number of ledges in there, are there?
- A Yes sir, quite a lot of them.
- Q Is it such it could be worked, canal could have been put in there by teams? A. No sir.

MR. JACOB EVANS: I object to that as immaterial.

MR. HUFFAKER: It will be material in a few minutes.

We are going to show the appropriation and showing a reasonable

time.

Q I call your attention to proposed Exhibit 159, and ask you to state if you know what that is?

A Yes sir, I do.

Q You may state what it is?

A Filing that was made--

MR. JACOB EVANS: Wait, the paper will show itself.

Q I will withdraw that. Did you see this notice, or a copy of it posted near the intake of that canal on or about the year 1897?

A. Yes sir.

Q And was it posted there about the time the construction of that canal was commenced?

A. Yes sir.

Q Are you a son of Attewall Wootten, whose name appears on this exhibit?

A. Yes sir.

Q And did you do any construction work on that canal?

A Yes sir.

Q Do you know when the construction work was commenced?

A As near as my memory serves me in the spring of 1897, early part of the season or summer of that year.

Q Do you recollect when Mr. Van Wageningen took over the construction of this canal?

MR. A. C. HATCH: Just a moment, we object to that as being wholly immaterial, irrelevant and incompetent.

MR. HUFFAKER: I am just asking to fix the time.

MR. A. C. HATCH: Of course, that is why we are objecting to it, until Mr. Van Wageningen is shown to be in some way connected, we object to it as being immaterial and irrelevant.

MR. HUFFAKER: I will withdraw that.

THE COURT: I take it from the evidence being offered and objections made that the regularity and validity of the alleged appropriation is in controversy in the case, denied, is it?

MR. A. C. HATCH: We deny Van Wageningen is the appropriator or he is the successor of anybody who appropriated.

MR. HUFFAKER: I stated in the beginning the evidence would be a little out of order, because I expect Mr. Wootten to take the next train.

MR. A. C. HATCH: We do not expect to let anybody come in that is out of order by reason of that.

MR. HUFFAKER: I will connect it up.

MR. A. C. HATCH: I suggest it be connected up.

THE COURT: I take it this would not need to be connected up. I take it it is merely to show the diligence used in the attempt to appropriate and if Mr. Van Wagenen did part of the work it is showing when he commenced to work. The fact he constructed a portion of this canal would not give him a right, unless he acquired some rights some other way. He may have been employed by Mr. Van Wagenen, person who made the appropriation to proceed.

MR. A. C. HATCH: That is our objection, it is wholly immaterial. If he was working for Wootten it would be wholly immaterial when he first was connected with the construction of this canal, wholly immaterial.

THE COURT: I think not, Judge Hatch, I think it will be material, the date, because if this matter is denied the burden rests upon them to show they did move with reasonable diligence and proceed to construction. Objection may be overruled.

MR. A. C. HATCH: Note our exception.

Q Just state, if you know, when Mr. Van Wagenen began the construction?

A I do not.

Q You say they began the construction in the spring of 1897?

MR. A. C. HATCH: Who?

MR. HUFFAKER: His father.

A Early part of the summer.

Q Was it about the time this notice was posted there?

A Yes sir, as near as I can remember.

Q This bears date of 7th day of June, 1897?

A Yes sir.

Q Would that be in your judgment about the time?

A Yes sir, near as my memory serves me that is right.

Q Then how long, to your knowledge, was the work continued?

A I am not positive as to the day, but as near as my memory serves me until about 1902.

Q Do you know whether it was continued up until the time that Mr. Van Wageningen began the construction, or completion of it?

A Now, I am not positive, no.

Q But you do remember up until about 1902?

A Yes sir.

Q And state just about the amount of work that was done, if it was worked on each year and was prosecuted diligently?

A That would be hard to estimate.

MR. JACOB EVANS: I object to his estimating it, I submit he ought to state what was done and the court will determine whether it was diligent.

THE COURT: The part with reference to whether it was done with diligence may go out, but he may estimate from his work.

Q State what was done?

A Well, all the time that could be spared by the parties working on the ditch and attending to their necessary work on the farms was done each season?

Q And you worked on it?

A Yes sir.

Q Each season?

A I didn't personally work each season.

Q Do you know that work was done there each season?

A Yes sir.

Q And how accessible is it for teams and wagon and so forth, and getting supplies up there?

A Well, usually late in the spring of the year on account of the immense amount of snow that falls there, usually late in the season before you could get in there with teams.

Q I believe you stated all the work had to be done by hand?

MR. A. C. HATCH: He didn't say that.

MR. HUFFAKER: I understood him.

A I didn't say that.

Q What would you say as to that?

A All the work that was done to my knowledge there by Wootten and Smith, that filing, was done by hand.

Q Could you use teams on that sidehill where the ditch was constructed?

A Not as far as we went.

Q Do you know the full course of the ditch until it reaches the ridge?

A Pretty much.

Q Is there any place along the whole length of it there that teams could be used?

A Along the latter part there might be a little strip there.

Q It would be very small?

A Yes.

Q Does the snow get deep in there?

A Quite deep.

Q The notice here, Exhibit 159, has also the name of B. M. Smith on it, do you know whether or not he conveyed his interest to your father?

A Whether Smith did or not?

Q Or whether your father conveyed his interest to B. M. Smith in it?

MR. A. C. HATCH: Now, if the court please, we object to that at this time as not being the best evidence.

MR. HUFFAKER: It is the only evidence we have got. There is no written agreement, we will withdraw the question.

THE COURT: This name given, is that the name of your father?

A Yes sir.

THE COURT: What is the first name?

A Attewall.

Q Do you know whether or not your father Attewall Wootten and B. M. Smith, whose name also appears on here, were partners in the construction of this canal?

A Yes sir.

MR. HUFFAKER: At this time, if the court please, we offer in evidence exhibit 159.

THE COURT: Is there any objection to this exhibit?

MR. THURMAN: No, subject to being connected ~~ks~~ all.

THE COURT: It may be received then.

Q Do you know, Mr. Wootten, whether or not a copy of this notice was posted at the post office at Midway, along about that time?

A I could not say.

Q You don't know?

A No, I don't know, might have been, I couldn't say.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q You say that your father and Mr. Smith were partners?

A Yes sir.

Q What were they partners in?

A Construction of a ditch, as that notice states.

Q Do you understand the difference between partners and tenants in common?

A There ~~may~~ be a difference. As I understood the question I answered it.

Q Each of them would own a certain interest in the ditch when it was completed, is that it?

A Equal interest.

Q And each would do half of the work?

A Yes sir.

Q And each would do his own work, would he not?

A Yes sir.

Q Or pay for the doing of his own work?

A Yes sir.

Q They had nothing in common as between them in the doing of the work or in the payment for the work, had they?

A Nothing.

Q So that they were building the ditch together, and would own each an interest in it when it was completed?

A Yes sir.

Q The interests would not be-- that is they would be separate individual interests as to each, Smith and your father?

A Yes sir.

Q Your father would own his half, and Smith would own his half?

A Undivided half I think.

Q It would be an undivided half?

A Yes sir.

Q They had no partnership agreement of any kind you know of, had they, other than they would build the ditch, and each have half the water.

A Yes sir.

Q And each pay half for the keeping up of the ditch?

A Yes sir.

Q You don't know when the work ceased by your father and Smith there?

A I know when it ceased by my father, but not by Smith, I could not say the date exactly, I know about the time, I know it happened.

Q About 1902?

A My father, yes sir.

Q You don't know whether Smith ever worked there afterwards or not?

A Only as one neighbor knows about another neighbor's business, I was not on the ground and saw him do the work, but he continued to work after that.

Q Did ^{you} / ever see Smith work there at all at any time?

A Yes sir.

Q When?

A In the spring of 1897.

Q And that is the only time you ever saw him?

A That is the only time I worked on the ditch and Smith was with me.

Q What Smith?

A B. M. Smith and his son Charles, Charles W.

Q How long did you work there?

A About two weeks I worked on the ditch.

Q How long did they work there?

A At that time?

Q Yes, were they all the time you were there?

A Yes, they were there all the time I was there.

Q And came away when you di?

A At that time, yes sir.

Q Was that all the work that was done during that year, 1897?

A No.

Q Were you back there again that year?

A No sir.

Q Were you ever back there again on the ditch yourself?

A Not to work on that ditch.

Q Were you ever over across the ditch?

A Yes sir.

Q Saw that work had been done?

A Yes sir.

Q But you have no personal knowledge of anyone actually working on that ditch thereafter?

A Only as I know of my father going to the ditch to work.

Q He said he was going? A. That is all.

Q You don't have any personal knowledge of anyone having worked on the ditch after?

A Further than hearsay.

THE COURT: Is your father living?

A No sir.

Q For whom were you working at the time you were there?

A I was working for my father and for myself. I was a silent partner with my father in the ditch.

Q You use that word partner.

A Well, interested with him, as father and son.

Q How old were you at that time?

A Probably about thirty.

Q About thirty? A. Yes sir.

REDIRECT EXAMINATION by Mr. Huffaker.

Q From your observation of the ditch each year, did you not know that work was done on that?

A Yes sir.

Q You would see it each year?

A Well, I could not say each year, but off and on, I was in that country.

Q You had watched the progress of the work?

A Yes sir.

Q You spoke of your father abandoning it to Mr. Smith. When did that take place?

A About--

MR. A. L. BOOTH: Abandoning it, you say?

MR. HUFFAKER: That is the word he used.

A About 1902, as near as I can remember.

Q Then, to your knowledge, didn't Mr. Smith continue the work for sometime after that?

A Well now, as far as one neighbor knows the business of another, not by personally seeing Smith stick a pick in that ground, or a shovel. I know he continued it.

Q By seeing him going and coming?

A Neighboring with him, and knowing their business, as farmers usually do, that is the only way my knowledge is as to that.

Q And both B. M. Smith and your father whose names appear on that notice, are dead, are they not?

A Yes sir.

Q How long have they been dead, if you know?

A Father has been dead four years last November, first of November, and Mr. Smith, I could not say exactly, probably two years,

maybe three. I remember my father because that interested me, and the other has been about two years, or between two and three years, probably, I don't know.

Q And he turned his interest over to Mr. Smith and he continued the construction of the canal?

A Yes sir.

MR. A. L. BOOTH: We object to that as not the best evidence.

MR. A. C. HATCH: We move to strike that out as incompetent.

THE COURT: I am inclined to think it should be stricken out. He has repeatedly said he knew nothing about whether he continued the work except merely as a neighbor, he had heard of it. I understood he didn't see him continue the work at all, said he never saw him strike a pick in it after that time, consequently he is not competent to testify whether he did continue the work.

MR. A. L. BOOTH: This question is whether he turned his interest over.

THE COURT: I am inclined to think that would be a conclusion from something that was done. He may state what was done, if he was present, if anything was done that would constitute a turning over.

MR. A. C. HATCH: Then I understand the answer will be stricken.

THE COURT: Yes, this may go out.

Q You may state what your father did with his interest there, or Mr. Smith's?

A If I can be allowed, I will explain.

Q Go ahead.

A What I mean as to turning the interest over to Mr. Smith.

MR. A. C. HATCH: If the court please, just so I understand, this is an interest in real estate, and that the transfer must be in writing.

MR. HUFFAKER: This is just an interest in the water

right.

MR. A. C. HATCH: No, if the court please, a water right-- we are placed in this position, we are contesting what they will claim they acquired through a person now deceased, and it is probable that we will be barred by reason of being an adverse party under the statute, and therefore we insist they be held strictly to the rule of proof of transfer, and held strictly to that rule by reason of the other rule as to their claim. Now, as shown by the evidence of this witness, both of these original appropriators are dead, and he says he is going to connect Mr. Van Wageningen now with this notice. That is, I understood him to mean he is going to prove the transfer of such rights as Wootten and Smith or Wootten or Smith acquired under that appropriation or notice of appropriation, and by reason of the rule we object, and ask they be held to strict technical legal proof.

THE COURT: I understand you claim to be the owner of this water right, parties you represent?

MR. A. C. HATCH: I claim to be the owner as against Van Wageningen, my clients do.

THE COURT: That is what I mean.

MR. A. C. HATCH: Of a portion, at least, of this water.

MR. HUFFAKER: In connection with that, if the court please, I don't think that the plaintiff in this action can lay any claim to any of this water. It is admitted in the pleadings that their ~~xxx~~ appropriation, if they have any, date from about the year 1909. It is also shown by the pleadings, and I have admitted Mr. Van Wageningen appropriated this water in the year 1904, and their rights, if they have any, come through their application to the State Engineer, and the water being appropriated at that time, I don't think the State Engineer would have any jurisdiction over it at all.

MR. A. C. HATCH: If there was an appropriation, if the court please--

THE COURT: From your statement I fail to see any materiality whatever in any of this evidence you are introducing. I understand you to say you claim now and expect to show Mr. Van Wagener appropriated this in 1904.

MR. HUFFAKER: He completed it. We are going to show title in two ways, first, by an appropriation under the statute in 1897, and then, if necessary by diversion and use in 1903 or '04.

THE COURT: I understood you to say Mr. Van Wagener appropriated it in 1904.

MR. HUFFAKER: Mr. Van Wagener completed the construction of the ditch. He purchased the land from these parties and completed the construction.

THE COURT: I think you mis-spoke yourself that he finished the appropriation.

MR. HUFFAKER: Put it to beneficial use.

THE COURT: It was not an independent appropriation?

MR. HUFFAKER: No, but on the point I have raised, it having been admitted the water was appropriated at the time your rights came, the State Engineer would have no jurisdiction over this water, because it was appropriated.

MR. A. C. HATCH: We do not admit it, we have denied they have ever appropriated any water.

MR. HUFFAKER: We allege this water was appropriated in 1904, and if, my memory serves me right, they admit it.

THE COURT: If that is the case, this evidence is immaterial.

MR. HUFFAKER: I have not the papers here, but that is the fact.

THE COURT: Files are all here.

MR. JACOB EVANS: I think the evidence will show when the counterclaim was filed there was a reply made to it, and subsequently Mr. Huffaker requested leave to amend his counterclaim, which was granted at the last session of the court, and when that was done an additional reply was filed

to that, so the issues are squarely made up on this question, as I understand it.

THE COURT: If you have alleged you appropriated this water in 1904, this evidence is immaterial. You are seeking now to prove an appropriation in '97, and all the evidence introduced so far is in support of that.

MR. HUFFAKER: No, the water was in appropriation at that time. It was not unappropriated water. The water he was using was not unappropriated water when their rights attached if they had any.

THE COURT: That is as I understand you, but you state your pleadings show it was in 1904.

MR. HUFFAKER: No, that it was not unappropriated water at that time. That is, in 1909, and for that reason we claim that the plaintiff would not be concerned.

THE COURT: Probably we had better see the pleadings. If that is the only allegation you have made, probably you have not made ^{an} allegation of sufficient facts to entitle you to make this proof.

MR. HUFFAKER: Yes, we allege all this.

MR. A. C. HATCH: Where are your pleadings?

THE COURT: The court will take a recess until tomorrow morning at ten o'clock. It is after time to adjourn now.

MR. HUFFAKER: If your Honor please, if they could finish their cross examination of Mr. Wootten so that he could go back, it would be a big accommodation to him and to us.

THE COURT: The court is willing to wait.

MR. THURMAN: The best we can do on that would be to say that we may be able to stipulate tonight the balance of his testimony, or something of that kind.

THE COURT: I understood Mr. Wootten to say he had no information whatever as to a part of your question, and the

other would be clearly a conclusion.

MR. HUFFAKER: We will try to make arrangements to keep him over.

5:00 P.M., RECESS TO 10:00 A.M., JANUARY 9, 1917.

MR. JACOB EVANS: I will suggest at the adjournment last evening of the court, we thought it would be advisable to find out about the counterclaims.

MR. WAHLQUIST: The court asked counsel to familiarize themselves with the pleadings and state the issues.

THE COURT: You may do so.

MR. JACOB EVANS: I have them here if you care for them.

THE COURT: I do not think it is necessary to have them read, if the substance is stated.

MR. WAHLQUIST: The counterclaim and answer as it was originally filed in pouch 2, page 148 was not prepared by either Mr. Huffaker or myself, but the defendant there sets up as his right that in 1904, he diverted and began to use the waters of Deer Creek on his land in Wasatch county conveying it through a canal some three miles in length from Deer Creek, and that he has continued uninterruptedly from then to the time of the filing of the complaint during the irrigation season to use the waters of Deer Creek to the capacity of his canal in flood water season, which would be about nine cubic feet, and in low water season four cubic feet, and upon that he based his right and contention to the use of the water. Then, by an amendment that was made, your Honor will recall, either the 13th or the 14th of December by the permission of the court in the nature of interlineation as paragraph 1-1/2, he sets up that in the year '97, the predecessor in interest of the said Wilford Van Wageningen entered upon the banks of the said Deer Creek and began the construction of a canal to divert the water of said Deer Creek, and at the time of commencing such

construction the said predecessors duly filed notice of their intention to appropriate sufficient water from said Deer Creek to irrigate two hundred acres, and duly posted a copy of said notice at the point of diversion, and one at the nearest post office. That the said canal was completed in a reasonable time, and was diligently prosecuted to completion after the beginning of such construction work, and the waters of said Deer Creek applied to a beneficial purpose; and to that the plaintiff has filed a reply, which is page 648 in pouch 6 of the files.

MR. A. C. HATCH: To both the original and amendment.

MR. WAHLQUIST: Wherein they deny specifically any of the acts of the predecessors in interest in 1897, and subsequently, as alleged in ^{paragraph} ~~xxxxxx~~ one and a half of the complaint. Now, I am not going to deny counsel's allegation that he has filed reply to the original one. All that I can say is that I have gone through the clerk's files, page by page, and failed to find it, and there has been no copy served on either Mr. Huffaker nor myself, but for all that, I can see it may be perfectly true as counsel says, he has filed a reply, but whether he has or not, under the ruling that was made at the beginning of the trial, I think the allegations stand denied, and it is our duty to prove them as they stand, even should there be another denial filed. If there was any admission in it they would probably be bound by it, but as to our proof, ~~su~~ I do not think it precludes our necessity.

THE COURT: Do you allege the transfer from the original appropriator to Mr. Van Wagenen. I did not hear any such--

MR. WAHLQUIST: That amendment does not so allege, your Honor.

MR. THURMAN: Except by inference. It says predecessors.

THE COURT: That is hardly an allegation.

MR. WAHLQUIST: That is a question, and if the court shall hold that is not sufficient, then I think it is sufficient to admit our proof, and later we could be permitted to amend the complaint by an allegation to cover the proof, this being

an equity case.

THE COURT: Yes, if your allegation is sufficient allegation of title by adverse use, it would be probably admissible as tending to show under a color of right you have claimed to use. You may proceed with your examination of Mr. Wootten.

MR. JACOB EVANS: Just before proceeding call your Honor's attention to the note in paragraph 2 of their original answer, and counterclaim. They set up specifically William Van Wagoner entered upon the banks of the creek in 1904 and made an appropriation, and in his own right. Now, the amendment is to the effect that in '97 the predecessors in interest of William VanWagoner entered and so forth. Now both of these allegations stand in this complaint, and I should like to know now which they rely upon, whether they rely upon the amendment or upon the original answer.

MR. HUFFAKER: If the court please, as I stated yesterday, we rely upon both of them. We can put up as many defenses as we have.

THE COURT: That is a complete answer to your question. Now you may proceed.

MR. A. C. HATCH: There was an objection last night.

MR. HUFFAKER: I wanted an exception to that last ruling.

THE COURT: I did not make any ruling. I think you withdrew your question, at least, I suggested an unanswered question, and you withdrew it, I think.

MR. HUFFAKER: Let us have the last question read.

(Question read)

THE COURT: I sustained an objection to that, being ~~xxx~~ incompetent.

MR. HUFFAKER: Note an exception.

THE COURT: In view of the statement previously made by Mr. Wootten that he had not seen Mr. Van Wagener prosecuting

any of the work after that time.

MR. HUFFAKER: He testified, as I understand, he had not seen him actually working, but he had been there occasionally and seen that the work had been done.

THE COURT: Yes, you are asking now who did it, and he has stated he had no information on that subject.

MR. HUFFAKER: I will ask another question.

REDIRECT EXAMINATION by Mr. Huffaker continued.

Q Do you know who was working on that canal, Mr. Wootten?

A At what time?

Q Well, just state when the work was first commenced according to your knowledge?

MR. A. C. HATCH: He has been into that, if the court please, fully.

Q I think your testimony was from 1897 up until 1902?

A Those dates.

MR. A. C. HATCH: If the court please, that was all gone over.

THE COURT: That is my recollection, that he covered those dates.

MR. HUFFAKER: That may be.

Q What occasion, Mr. Wootten, did you have for observing the work on that canal?

A Crossing of the canal and going to Deer Creek.

Q What occasion did you have for going over to Deer Creek?

A Looking after cattle.

Q You were ranging cattle in there at the time?

A Yes sir.

Q And that covered ^{practically} all the time from the beginning of the construction up until 1902?

A Yes.

Q And later than that?

A I could say in 1903, I am not positive any later.

Q I am not just clear, Mr. Wootten on your testimony as to you testifying as to your father's abandoning work and Mr. Smith continuing, just state what happened?

MR. A. C. HATCH: If the court please, we object to that as assuming that there was an abandonment and a continuation.

THE COURT: No, I don't think it assumes that, Judge Hatch. The question may be read, I think there is no assumption those matters occurred at all.

(Question read)

MR. A. C. HATCH: We object to it as to the abandonment. If he did so testify it should have been stricken at the time.

THE COURT: No motion is made to strike it. He is not asked to testify as to that matter now, he is merely asked now to state what occurred, and I think it is proper for him to state what occurred, if he knows of his own knowledge.

A My father went to Europe and he could not--

MR. JACOB EVANS: We object to that, want to know what occurred up there on the ditch.

MR. HUFFAKER: He is coming to that if you will let the witness alone.

A Shall I answer as I started?

THE COURT: You need not state what he could or could not do, but state what he did do.

A He abandoned the ditch.

MR. A. C. HATCH: We move to strike that out.

THE COURT: I think the record would be a little more complete and orderly if he might finish the sentence, and then I can strike it all out.

A And notified Smith he would do no more on the ditch, that he could go ahead, if he saw fit.

THE COURT: Now, your motion may be made.

MR. A. C. HATCH: We move to strike it out as an assumption on his part.

THE COURT: That may go out.

Q Do you know whether or not Smith continued the work after that?

A Only as I testified yesterday. I didn't actually see him using pick and shovel on the ditch, but know as one neighbor knows the business of another that he did prosecute the work.

MR. A. C. HATCH: We move to strike that out.

THE COURT: That may go out. Well, the motion is denied if it goes to the entire answer.

MR. A. C. HATCH: That is to the latter part of the answer, that he knows as one neighbor knows another that he actually did the work.

THE COURT: That may go out.

MR. RUFFAKER: I think he has testified to that anyway.

Q Mr. Wootten, do you know whether or not that water sinks shortly after it passes the point of diversion in that ditch during low water period?

A Yes sir, I know.

Q It disappears entirely?

A It does.

Q So that during low water period if the water was permitted to continue past the point of diversion of Mr. Van Wagenen's ditch, it would all disappear and leave the main channel?

A Yes sir.

RECROSS EXAMINATION by Mr. A. C. Hatch.

Q Do you know where it comes up again, how far below?

A I could not say whether it comes up again or not.

Q You know though that just a little way below there is a large stream coming out of the same canyon and continues on down?

A Yes sir.

Q Do you not? A. Yes sir.

Q What is called the falls? A. Yes sir.

Q How far below the point of Mr. Van Wagenen's canal is this

falls?

A I should judge it is two miles.

Q Two miles below?

A I should judge so.

Q How far below the point where the water entirely disappears in the bed of the creek during the low water season?

A It is probably a mile, as near as my judgment would say.

Q What is the formation, if you know, in the bed of the creek, Deer Creek, at the point where the water sinks?

A Well, as near as you could tell, on the surface it is kind of a gravelly nature.

Q Loose gravel, isn't it?

A Yes, pretty much.

Q And at the point where the falls is it is bedrock formation, where the water appears again?

A There are ledges there as I remember.

Q At the surface? A. Yes.

Q And in the bed of the creek? A. Yes.

WILFORD VAN WAGENEN, called in his own behalf, being duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Wahlquist.

Q Where do you reside?

A Midway, Wasatch county.

Q How long have you resided there?

A About fifty years.

Q What is your occupation or business?

A Farming, cattle raising, merchandising.

Q Have you had any official position in any of the irrigation companies around Midway?

A I have been president of the Midway Irrigation Company for a number of years, off and on.

Q Covering what period?

A Well, I could not recall the dates, I am president of the Midway Irrigation Company now.

Q Have you any other official position at the present time?

A I am county commissioner of Wasatch county, president of the Midway Town Board.

Q How long have you been engaged in farming?

A Between twenty-five and thirty years.

Q All your farming been done in the vicinity of Midway?

A Yes sir.

Q How many ac-res are you farming at the present time?

A Three hundred and seventy-four acres.

Q Is all of that land that is irrigated?

MR. A. C. HATCH: Just a moment, we object to the question as being immaterial, irrelevant, and incompetent to the issues in this case.

THE COURT: What do you claim for it?

MR. WAHLQUIST: As the pleadings now stand it would be immaterial, but we have been for weeks on a compromise on the acreage as a matter in dispute between the parties.

THE COURT: As I understand the pleadings the extent or number of acres of his farming operations are not in dispute at all, or involved in this, because only that part that he irrigates from this Deer Creek would be involved.

MR. WAHLQUIST: Your Honor is correct so far as the pleadings go.

THE COURT: So far as I can imagine and controversy. If he had some land over on the other side of the valley it would not --

MR. A. C. HATCH: Only the lands that are owned by him are involved, as I understand. He might be farming ten thousand acres and not own it.

THE COURT: Yes, I think it is immaterial. You should confine it to the land owned by him and irrigated under this system.

Q Are you the owner of these three hundred and seventy-four acres

that you say you are farming at Midway?

A Yes sir.

Q And from what sources do you derive water for your farming?

A I get one hundred and eighteen acres through the Midway Irrigation Sompany's system, and two hundred and fifty-six from Deer Creek.

Q How long have you been diverting and using water from Deer Creek upon these two hundred and fifty-six acres?

A Since 1904 and '05. I was not appropriating quite all in 1904.

Q And you say prior to 1904, is that right?

A No, I say from 1904 up until the present time.

Q How much did you appropriate and use in 1904?

A Well, practically all of it in 1904. There are some few pieces of ground, small pieces that was broke up late in the fall, that was irrigated in 1905.

Q How much water have you used for irrigating all this land from Deer Creek?

A That varies from about three and a half to four second feet during the low water period, and from about seven to nine during the high.

Q And from what cause has the amount used in the low-- in the latter part of the season been so low, why have you only used three and a half to four second feet?

A That is all there is there.

MR. JACOB EVANS: Object to that as immaterial.

THE COURT: I understand it is merely an effort to prove the quantity of water flowing in the stream at that time, that would be material of course.

Q Has that amount of water been sufficient for your need in irrigating this land? A. No sir.

Q Have you applied it economically?

A Yes sir.

Q With a view of getting the most use out of the amount of water available; I say you have applied it with a view of getting

the most use out of the amount of water available?

A Yes sir.

Q Mr. Van Wagenen, now I will ask you to state how you first acquired the right to the use of any of the Deer Creek water?

A From B. M. Smith.

Q Is that the B. M. Smith that is one of the appropriators under the notice offered in evidence yesterday, Exhibit 159?

A Yes sir.

Q Were you acquainted with B. M. Smith in '97?

A Yes sir.

Q I will ask you to state if you know what B. M. Smith and his associates did in the way of making an appropriation in 1907--1897?

A They filed--

MR. A. C. HATCH: Just a moment, if the court please, we object to the question for the reason that it is not the best evidence.

MR. WAHLQUIST: If he knows, I think it is.

THE COURT: I am unable to see in what respect.

MR. A. C. HATCH: The law requires certain things be done by way of notice, and notice is in evidence. Now it can add nothing to that. Now, if the question is what Smith did by way of diverting water under that notice--

THE COURT: I take it the acts of Smith and his associates Mr. Wootten, in furtherance of this attempt to appropriate is a part of their appropriation, and this question, as I understood it was as to what Mr. Van Wagenen knew of their having done, what acts they did. If he was present and saw this notice posted, and if he was present and saw them start to take out the canal, I think it is part of their appropriation, and I think it is included in the question. Of course, Mr. Van Wagenen would not be permitted to testify to these matters about which he knows nothing, nor as to the contents of any written instrument. Mr. Van Wagenen, you may answer the question.

MR. WAHLQUIST: Read it first, to make it clear.

(Question read)

A I saw them working on the ditch.

Q Were you in Deer Creek near the point of diversion in 1897?

A Yes sir.

Q I will ask you whether or not you saw a notice of appropriation posted anywheres near the point of diversion?

A No sir.

Q Did you see a notice of appropriation posted anywhere else?

A Yes sir.

Q Where?

A At the post office in Midway.

Q Is that the nearest post office to the point of diversion so far as you know? A. Yes sir.

Q Calling your attention to Exhibit 159, I will ask you to state whether or not the notice you saw posted in the post office was similar notice to that one? A. Yes sir.

Q Do you know the handwriting on that notice, if you don't, why, say so.

A No sir.

Q Calling your attention to defendant's Exhibit 160, which purports to be a certified copy of certain records of the office of the County Recorder of Wasatch county, I will ask you to state if you have seen that before?

A Yes sir.

Q And when, approximately?

A Sometime latter part of December, last year.

Q Did you make a request upon the county recorder for such an instrument? A. Yes sir.

Q And this was the instrument that was given you?

A Yes sir.

MR. WAHLQUIST: We offer in evidence defendant's Exhibit 160, and ask to read it into the record.

MR. A. C. HATCH: Is this a certified copy of Exhibit 156.

MR. WAHLQUIST: Certified copy of the record of Exhibit 159.

MR. A. C. HATCH: It is offered for the purpose of showing it was filed with the recorder?

MR. A. J. EVANS: The record shows that.

THE COURT: Is there any objection to this?

MR. A. C. HATCH: Except it is burdening the record.

THE COURT: If there is any objection to it--

MR. A. C. HATCH: Object to it.

THE COURT: The objection is sustained.

MR. WAHLQUIST: Upon the ground that it is unnecessarily burdening the record?

THE COURT: Not only that, but it is incompetent as it now stands, and is unnecessarily encumbering the record as well. You have not made the proof which would entitle you to its being admitted, and even if you have, I see no object in introducing a copy of the original which you have now in the record.

MR. WAHLQUIST: Then I will ask the court's permission to read the original into the record.

THE COURT: I will not take the time now. It is admitted in its entirety, including the endorsements on it. Q Calling your attention to defendant's Exhibit 161, which purports to be a deed from Mark A. Smith to David L. Wagenen, I will ask you if that has been in your possession for any length of time?

MR. A. C. HATCH: Object to that, if the court please, as being immaterial.

THE COURT: I see no materiality in it. If you have the deed just offer it, unless there is some question as to the genuineness of it.

MR. WAHLQUIST: I offer that, the defendant's Exhibit 161, which purports to be a deed from Mark A. Smith and his wife to David L. Van Wagenen of one hundred and sixty acres

of land in Section 9, Township 4 South, Range 4 East, Salt Lake Meridian, with all water rights thereunto belonging, or in anywise appertaining, and all and singular the tenements and hereditaments appertaining thereto.

THE COURT: Is there any objection to this Exhibit?

MR. A. C. HATCH: Yes, your Honor, being incompetent, irrelevant and immaterial.

THE COURT: In what respect incompetent?

MR. A. C. HATCH: It does not purport to show anything connected with the B. M. Smith, who located this water right, so far as the evidence now stands, has no relevancy whatever to this case.

MR. WAHLQUIST: Before the court rules we cannot very well prove a chain of title by one instrument. There will be other instruments to connect it with this party D. L. Van Wagenen.

THE COURT: The objection is this is from a grantor who is now shown to have any connection whatever with this matter.

MR. A. C. HATCH: That is the objection. Doesn't show any relation to the locators of the water.

MR. WAHLQUIST: Just a question-- I will withdraw it.

Q Do you know who Mark A. Smith was?

A Yes sir.

Q Do you know who B. M. Smith was?

A Yes sir.

Q Is there any identify between the Mark A. Smith named in this deed and B. M. Smith?

A Same fellow.

Q How do you account for the two names?

A There is a discrepancy in the deed, I think I have another deed correcting that. I think you have it there.

MR. WAHLQUIST: Is there any dispute as to B. M. Smith and Mark A. Smith being the same party?

MR. A. C. HATCH: There certainly is. They are not the same party, that is our contention, and the B. M. Smith never owned the land.

THE COURT: B. N. is the name.

MR. A. C. HATCH: B. M. never owned the land that was conveyed at the time of the conveyance which you offer as Exhibit 161.

MR. WAHLQUIST: That would go to the weight of the evidence, not to the admissibility. It is an instrument under seal.

MR. A. C. HATCH: But it cannot deny really his title shown by the deed.

THE COURT: Now, if you will offer at this time the instrument passing or showing your chain of title, the court will admit it, and will strike it out if you do not connect it with the original appropriators of this water, or in some way connect the water as a water right appurtenant to this land. If you will have them marked and offer them.

MR. A. C. HATCH: Of course, if the court please, we take an exception to the admission at all for any purpose.

THE COURT: You may have an exception. It will not be considered unless it is connected in some way with this alleged water right.

MR. WAHLQUIST: Now, if the court please, we offer together as constituting one chain of title, the defendant's Exhibit 161, purporting to be a deed from Mark A. Smith and wife to David L. Van Wagenen, dated December 2, 1895, and recorded at page 67 in Book "S" of the records of Wasatch county, conveying unto the-- signature of the grantor appears as M. A. Smith and Margaret Smith, and conveying all the southwest quarter of Section 9, purporting to convey all of the southwest quarter of Section 9, in Township 4 South, Range 4 East, Salt Lake Meridian, containing 160 acres, together with all water rights thereunto belonging or in any way appertaining,

also all and singular the hereditaments and appurtenances.

Then we offer defendant's Exhibit 162, purporting to be a deed from David L. Van Wagenen and Avis M. Van Wagenen to Wilford Van Wagenen, dated September 13, 1902, for thirty acres of land, situated in Section 9, southwest quarter of Section 9, Township 4 South, Range 4 East, Salt Lake Meridian.

And then we offer in connection therewith defendant's Exhibit 163, which purports to be a correction deed, wherein David L. ^{Van}Wagenen and Avis Van Wagenen convey and warrant to Wilford Van Wagenen certain lands described in the deed, and which states it to be a deed given in lieu of and for the purpose of correcting a deed from said David L. Van Wagenen and Avis Van Wagenen, his wife to the said Wilford Van Wagenen, wherein the land is erroneously described, and a quit claim from Wilford Van Wagenen to David L., for the lands upon which the cloud was cast by reason of the erroneous description of former deed dated June 15, 1907, and recorded in Book 7 of Deeds page 265 of the records of Wasatch county.

MR. A. C. HATCH: We object to the offer for the reason that it appears that it is an attempt to connect an appropriation of water made by B. M. Smith for the irrigation of these lands made in 1907, or 1897, according to the notice, two years after the deeds show any interest that he, Smith, assuming M. A. Smith and B. A. Smith are the same person, had ceased to own the land. They are immaterial, irrelevant and incompetent. At that time he could appropriate the water to apply to his own use, and two years after the date of the first of these deeds, December 2nd, 1895, is the date of the alleged appropriation, and ten years after the last of the deeds and five years after the second deed the one that it is alleged to be incorrect, I presume.

THE COURT: The objection will be overruled. The deeds will not be considered for the purpose suggested by you, Judge Hatch, unless some evidence connecting them with

the transaction is hereafter introduced, but I take it they would be admissible and competent evidence of the ownership of land at this time upon which it is claimed this water is used by the plaintiff Mr. Van Wagenen.

Q Calling your attention to the deed from Mark Smith to D. L. Van Wagenen, I will ask you to state if you know the nature of the transaction wherein that deed was given?

MR. THURMAN: What deed do you have reference to?

MR. WAHLQUIST: The first one, 1895.

MR. JACOB EVANS: Object to it as immaterial.

THE COURT: Objection is sustained.

Q Now, were you familiar with the lands owned by Mark Smith in 1895?

A. No sir.

MR. A. C. HATCH: Object to that question, if the court please, as being irrelevant.

THE COURT: He says he was not.

Q Do you know of your own knowledge whether or not the possession of the land described in the deed from Mark Smith to David L. Van Wagenen was ever delivered over to D. L. Van Wagenen?

A No sir, never delivered over.

MR. A. C. HATCH: Object to that, and move to strike the answer out.

THE COURT: Answer may go out.

Q How long did Mark Smith live after 1895, if you know?

A No, I couldn't tell you.

Q Approximately, was he alive in 1902?

A He was alive in 1910 or '11.

MR. A. C. HATCH: We move at this time to strike out the question, strike out the answer, as being immaterial and irrelevant.

THE COURT: Motion is denied.

MR. A. C. HATCH: The reason is that Mark Smith is not shown to have any relation whatever with this transaction.

MR. WAHLQUIST: It is shown by this witness that

Mark and B. M. Smith --

MR. A. C. HATCH: There is a Mark A. Smith and B. M. Smith. Mark Smith may and may not be the same person.

THE COURT: Did you mean Mark A. Smith?

MR. WAHLQUIST: Yes, Mark A. Smith.

THE COURT: You may correct your answer, if there is a Mark Smith and Mark A. Smith.

THE WITNESS: Mark Smith is a different person. Mark A. Smith is known as B. M. Smith.

THE COURT: This may all go out then.

MR. A. C. HATCH: Now, if the court please, just there. I understood the witness to testify that Mark A. Smith and B. M. Smith were the same person.

THE WITNESS: Mark Smith.

MR. A. C. HATCH: Now, he says Mark Smith and B.M. Smith are the same persons. We now, at this time, move to strike out the Exhibits 161, 162 and 163, for the reason that the Mark Smith the deed recites M. A. Smith or Mark A. Smith, and they are not shown to be the same person as the B. M. Smith from whom the witness is attempting to show he deraigned title in 1897 to this water.

THE COURT: Before I rule upon that objection, before I strike it out, I will permit them to ask some further questions. The court wants to know a little more about the identity of these several parties. I don't know I understand it exactly, and I will ask the witness a few questions. Mr. Van Wagenen, was there two persons, one Mark A. Smith and the other Mark Smith?

A Mark A. Smith was his son, son of B. M. Smith.

THE COURT: B. M. Smith was Mark Smith?

A Mark Smith.

THE COURT: And Mark A was not B. M. Smith?

A His son.

MR. A. C. HATCH: The record, if the court please,

as I understood it shows that the witness had testified that M. A. Smith, Mark A. Smith and B. M. Smith were the same persons.

THE WITNESS: No, Mark Smith.

MR. A. C. HATCH: And the Exhibit is conveyance from Mark A. Smith to D. L. Van Wagenen.

THE COURT: These exhibits may remain in at this time for the same purpose that the court admitted them sometime ago, merely for the purpose of permitting the party to connect them, and connect up his title. If there are missing links in the chain, of course, it will not be complete unless those links are shown.

THE WITNESS: I have other evidence in relation to the transaction.

MR. WAHLQUIST: We reserve the right to introduce further deeds to show the relation of B. M. to Mark.

MR. HUFFAKER: There is another deed in existence, and I think we can get it. We offer purely for the purpose of showing title in this defendant to the lands that he irrigates with the water from Deer Creek, Exhibit 164, a deed from Hyrum J. Denis to Wilford Van Wagenen, dated April 17, 1905, for one hundred and eighteen acres, situated in Section 9, Township 4 South, Range 4 East, Salt Lake Meridian.

THE COURT: Mr. Wahlquist, just for the information of the court, so I won't become confused, Mr. Van Wagenen stated he irrigated one hundred and eighteen acres from the Midway Irrigation ditch. This is a deed to one hundred and eighteen acres, is this different from that one hundred and eighteen that he irrigates?

MR. WAHLQUIST: The deed itself will show.

THE WITNESS: No part of it.

THE COURT: Very well, go on.

MR. HUFFAKER: We also offer for the purpose of showing title in this defendant to lands irrigated from Deer Creek,

deed from Orson Matthews, Exhibit 165, to twenty acres of land situated in Section 9, Township 4 South, Range 4 East, Salt Lake Meridian, deed to Wilford Van Wagenen, dated November 20, 1905, and recorded.

MR. A. C. HATCH: We object to it as being immaterial irrelevant and incompetent at the present time.

THE COURT: Objection will be overruled, just as the other was.

MR. A. C. HATCH: For the further reason, if the court please, the deed does not show any evidence of ownership in any party. They are going to deraign their title, they must go back to the United States. That has not been required in any instance. If he would simply testify he was the owner of the land and where it is situated, I think that would cover the rule.

THE COURT: I think so.

MR. A. C. HATCH: Without the introduction of all these papers, but if he is going into the deraignment of the title, we insist he go back to the beginning.

THE COURT: The court will not consider it, of course, unless the chain is complete.

MR. WAHLQUIST: I understand it was stipulated at the very commencement of the trial there would be no question raised as to the perfectness of a chain of title by mesne conveyances except sufficient to prove the present ownership of the lands in question, and for which water was claimed. That as I recall it, went into the record.

THE COURT: I did not so understand it. That May have been the substance of it. My understanding was the stipulation was to the effect parties might prove ownership by merely testifying to the fact they were the owners of the land without requiring them to deraign title at all, unless they were notified that their title would be questioned. That is the substance of it, as I remember it.

MR. A. C. HATCH: We question the number of acres of land that he owns, number of acres of land that he has irrigated, and have raised those questions. We question the area that he has irrigated from Deer Creek, and also the area that he has irrigated from Midway Irrigation.

THE COURT: That being the situation, these deeds, I think are admissible for a x different purpose from that stated by you. They are admitted for the purpose of definitely fixing, and so far as they may fix the number of ~~the~~ acres of the ownership rather than to prove the title, because under the stipulation you are not required to deraign the title, because under the stipulation you are not required to deraign the title, but the transfer to the claimant by deed would, of course be evidence tending to fix definitely the number of acres of the ownership, and under the stipulation probably you would not need to go any further. For that purpose it may be admitted.

MR. A. C. HATCH: We do not so much dispute the ownership of the land as the number of acres cultivated and irrigated.

THE COURT: Let me ask you, Judge, you say you don't so much dispute the number of acres of the ownership as you do the number of acres irrigated. Do you dispute at all the number of acres of ownership? If you do not dispute it the court will not permit this to be introduced.

MR. A. C. HATCH: We will admit he is the owner of several thousand acres of land.

MR. WAHLQUIST: In Section 9?

MR. A. C. HATCH: No, not in Section 9, because Section 9 does not contain so much, but our contention is these lands are not irrigated from those sources.

THE COURT: Of course, these deeds would be no evidence whatever of any irrigation, would not be received by the court as even tending to show the land was irrigated,

because the transfer might as well be made of desert land which was not susceptible of irrigation as of irrigated land, but if you dispute the ownership of this land, that is the acreage of the land that he claims to irrigate, these will be admissible. If you do not dispute the ownership of the number of acres of this land, why then the court will not permit this to be introduced to encumber the record, but it is not received as any evidence, and would not be any evidence of irrigation, of course.

MR. A. C. HATCH: This locates the land he claims he irrigates from these sources.

THE COURT: That is all.

MR. A. C. HATCH: Very well.

- Q In Exhibit 164 there is also conveyed thirty-five shares of the capital stock of the Midway Irrigation Company, a corporation. Is that now used, and has it been used upon the lands described in this deed since the year 1905, or have you transferred and used that on other lands?
- A Used it on other lands.
- Q And what water are you using on the lands described in this deed, Exhibit 164?
- A Deer Creek water.
- Q Upon the entire 118 acres? described in this deed the Dennis tract. I say are you using Deer Creek water upon the entire one hundred and eighteen acres?
- A Yes sir.
- Q In the deed marked as Exhibit 165 there is conveyed fifteen shares of Midway Irrigation Company, where is the water represented by those shares now used, and where have they been used since 1905?
- A On other lands.
- Q What amount of this twenty acre tract from Matthews described in Exhibit 165 is irrigated from Deer Creek, if any?
- A All of it.
- Q How long has it been irrigated from Deer Creek?

A Since 1904.

Q Did you begin irrigating it prior to the date of the deed, did you?
A. Yes sir.

Q You had actually purchased and come into possession of it before the date of the deed, is that correct?

MR. A. C. HATCH: Just a moment.

MR. WAHLQUIST: I will withdraw it, it is a leading question.

MR. A. C. HATCH: Not a leading question, it is the testimony of the attorney.

Q If you irrigated it prior to 1905, the date of the deed, I will ask you to state how you came to do so?

A This was not irrigated until 1905, that is when I purchased the ground from Matthews. This is a part of that that was not irrigated until 1905.

Q When did you first commence work on the ditch? conveying water from Deer Creek yourself?

A 1903, the latter part of the season.

Q And when did you complete the ditch conveying water from Deer Creek?

A I had it completed in 1904 and enlarged in 1905.

Q What was the size of it in 1904?

A About two feet in the bottom.

Q Have you a judgment as to the amount of water that you conveyed through it in 1904?

A About four second feet. That is, four second feet in the upper end. It did not reach through on account of being broken up, the country through which it passed.

Q What formation is it, of ground?

A Mostly all rock.

Q Do you know the total cost of the construction of the ditch?

A Approximately.

Q What is it?

A Neighborhood of four thousand dollars.

Q Does that include the value of the labor that had been performed by your predecessors, or just what you yourself?

A What I myself done.

Q Can you make an estimate of the amount of work-- I will withdraw that-- were you familiar with the ditch during the period B. M. Smith and his associate Mr. Wootten were working on it; I say were you familiar with the ditch during that time?

A No sir.

Q Ever see it at all.

A I saw them working on it.

Q You saw them working there?

A I saw them working on the ditch.

Q When, what year?

A From along 1907 to 1902, or 1897 to 1902.

Q What occasion did you have to see them working there?

A I run cattle right close to where they were working.

Q Did you see them working there during every season during that period? A. Yes sir.

Q There was no season but what there was work being done on that ditch by one of those parties, or both of them?

A No sir.

Q Now, you in your pleading, speak of your successors in interest, who ~~xxx~~ of those parties, if either were your-- are your predecessors in interest-- which of the parties, B. M. Smith, Attewall Wootten, or both?

A B. M. Smith.

MR. A. C. HATCH: Just a moment, if the court please. That is assuming the witness can give a conclusion of law.

THE COURT: The objection made as to his competency may be sustained, That is a question of law, Mr. Wahlquist.

Q What was the nature of the land in the Heber Valley upon which the water was applied before you applied the water upon it? That is, those parts that were not already covered by other water right?

A It was practically mountain soil, black loam with clay sub-soil.

Q What was growing there prior to the application of the water?

A Sage brush.

Q What is the condition now?

A It is in grain and alfalfa and pasture.

Q Has the application of water rendered it more valuable?

A Yes sir.

Q What will be the result if the water should be taken away and not be permitted to use it there again?

A I couldn't tell you, be practically worthless, I think; practically the same as range land adjoining.

Q You mean it would go back to its native state unless water was applied to it for the irrigation of crops?

A Yes, I think so.

Q Have you any other sources from which to get water?

A No sir.

Q Has anyone during all these years disputed your right to the use of the Deer Creek water? A. No sir.

Q Have you had any conversation with any of the plaintiffs in this action during the period that you have been using it, relative to your use of the water?

A Oh, occasionally.

Q Have they ever sent anyone up to tear your dam out and take it from you?

A Not that I know of.

Q You have used it uninterruptedly since the commencement of this action? A. Yes sir.

Q And since 1905, prior to the commencement of this action?

A Yes sir.

Q Did Attewall Wootten or B. M. Smith, or either of them ever dispute your right to the use of the water through the canal?

A No sir.

MR. A. C. HATCH: Just a moment, if the court please.

We move to strike his answer out.

THE COURT: It may go out until your objection is made.

MR. A. C. HATCH: Dispute his use of the water to the land. According to the record here and testimony already in, neither of them ever did anything upon the ditch after 1905. That is the record. Immaterial whether they disputed or did not dispute. Either Wootten or Smith-- they quit in 1902, and it is immaterial. Neither of them are here claiming.

THE COURT: I understand this is evidence in support of the claim he has a title by adverse use.

MR. A. C. HATCH: We think it would be immaterial as to Smith and Wootten.

THE COURT: The evidence discloses the fact the water was attempted, at least, to be appropriated by Smith and Wootten, conveyed into a canal which they had constructed, and which this claimant took possession of, and this is evidence now of the uninterrupted use without any objection upon the part of those persons who have been shown to have constructed the canal and taken the water into it under an attempted appropriation.

MR. A. C. HATCH: The objection is it is not shown they ever had any water appropriated, either Wootten or Smith.

THE COURT: There was an attempted appropriation, I take it.

MR. A. C. HATCH: Filing of notice and start work on the ditch.

THE COURT: If I recollect correctly, Mr. John A Wootten testified they used the water upon the land. Yes, Mr. John A. Wootten testified it was used by his father.

MR. A. C. HATCH: Then we object upon the further ground that if he relies upon when he commenced to work upon the ditch for his right as against Wootten and Smith, he then has no claim whatever, because the only way he could acquire any right to that water if Smith & Wootten did not use it was in the regular manner provided by the statute, applica-

tion to the State Engineer to appropriate in 1904.

THE COURT: Objection is overruled, I think your objection goes more to the weight of the evidence and to the effect of the general situation as established by all the evidence than as to the admissibility of it.

MR. A. C. HATCH: Take an exception.

MR. THURMAN: Will the court permit me to make one further suggestion on the point?

THE COURT: Certainly.

MR. THURMAN: There would be no adverse use begin until he began to use the water. Of course, within three years after that, if I remember right, we made our application. There could not possibly be any adverse use arise in that case.

THE COURT: He may have used it adversely to you for seven years, I don't know, I don't know what his evidence is going to show, but that would not go to the admissibility, I take it, Judge Thurman, of the evidence, might go to the effect of it finally, as to the legal situation, as disclosed by all the facts.

MR. A. C. HATCH: Note our exception.

THE COURT: This question now is directed to the objections, if there were any objections, made by either Mr. Smith or Mr. Wootten, and you may answer the question. You may have your exception.

A No objections.

Q "Were any objections made by either Mr. Smith or Mr. Wootten to you to your use of the ditch before ~~xxxx~~ completing the construction and enlarging of it? A. No sir.

MR. A. C. HATCH: Just a moment, we object to that question upon the ground it is immaterial and irrelevant.

The water is the matter in question here, we are not disputing ownership of the ditch.

THE COURT: Objection is overruled.

MR. A. C. HATCH: Take an exception.

MR. A. L. BOOTH: I want to interpose this further objection, that the testimony discloses both these people are dead. This man claims to be a successor, and his mouth is closed.

MR. A. C. HATCH: Does not claim by adverse user as against the original appropriator.

THE COURT: I don't think, Mr. Booth, this case is one that comes within that section, who defends as executor or heir or administrator of the estate of these parties.

MR. A. L. BOOTH: Mr. Van Wagenen says he is the successor.

THE COURT: Yes, but they are not opposed to him in the case.

MR. A. L. BOOTH: My recollection is that a successor in interest cannot testify to anything the knowledge of which was equally--

THE COURT: That is not our statute. It says in any action in which the administrator or executor or heir or successor in interest of the party ~~sues~~ or defends. Now, the adverse party must be the estate, of course, and I don't understand this estate, anyone representing the estate, is in here opposing the claim of Mr. Van Wagenen. Unless they are then the section does not apply at all.

MR. A. C. HATCH: The view I took of the matter was this. He is here claiming under his pleadings, appropriation by himself, then as the successor of these parties. He nowhere claims an adverse use as to anybody particularly. He does not claim an adverse use to his predecessors.

THE COURT: I see the point. There is great force in it and you are saving the record with reference to it, and the court when it comes to considering the matter will determine just what rights Mr. VanWagenen may be entitled to under all the evidence. The question was answered.

Q Are you familiar with the stream in Dry Creek?

A Yes sir.

Q What is the condition in normal flow when the water is not diverted into your ditch with reference to its permanency in the channel?

A It usually seeps below the point.

Q About how far below your point of diversion?

A About a mile.

Q Are you familiar with the spring at what is called the falls in Deer Creek?

A Yes sir.

Q Were you familiar with that spring prior to the time you began diverting water through that ditch?

A Yes sir.

Q Can you say whether or not there is an appreciable difference in the volume of water arising in that spring since you began diverting water? A. No.

Q Now, you are saying no. That may mean you cannot say.

A I say I cannot tell, of course, as to that question. Paid no attention much to it.

Q Are you sufficiently familiar that if there was any appreciable depreciation in the volume of water at the spring anywhere equal to the amount that you are diverting through your canal, that you would notice it?

A It is merely a guess, I could not tell you the amount.

Q How are your lands situated, the lands upon which you are using this Deer Creek water, situated with reference to the drainage toward the Provo river?

A They drain toward it.

MR. A. C. HATCH: Object to that as being immaterial.

THE COURT: I see no materiality in it.

MR. A. C. HATCH: Move to strike out the answer.

MR. WAHLQUIST: I think it is quite material in this matter. There is one contention in the stipulation, water should not be taken anywhere out of the drainage system of the Provo river.

THE COURT: If it is for that purpose then the answer

may remain in. He may answer the question.

MR. A. C. HATCH: Note our exception. If he has a right to the use of this water as he claims, it is immaterial where the drainage is.

THE COURT: Yes, it is possibly so, but we have so much immaterial evidence in these cases we cannot weed it all out. The court has examined this entire valley, and the court will take notice from the examination the court has made this in in the drainage of this system.

MR. A. C. HATCH: We move at this time, if the court please, to strike all of the evidence of the witness relating to the water, for the reason that he has not shown an appropriation by himself, and he has shown no connection whatever as between himself and anyone as predecessor in interest to this water; the reason being that in order to appropriate water to himself, he must, before he can acquire any right to the water under our constitution, and under the laws of the state at the time, 1904, when he claims first to have applied the water honor any work toward making that appropriation, the law requires the only way one can acquire the right to the use of water in this state was by making an application and then diligently prosecuting the work. That was the law in 1903, year prior to the time that he claims to have done anything, and he has shown no connection whatever as between himself and either Wootten or E. M. Smith to their rights under application.

MR. WAHLQUIST: We have reserved the right--

THE COURT: Just a moment, I do not care to hear from you. The motion is denied. If the court struck out this evidence then the evidence of the transfer from Mr. Smith and Mr. Wootten was introduced and he would have to go on the stand to put on the same evidence again. The court would not strike it out merely because it is not complete. There is no appropriation by Mr. Van Wagenen of any water yet, but there

may be evidence following this of the transfer of Mr. Smith and Mr. Wootten or parties to whom they transferred, so this evidence would then be quite important. The motion to strike is denied.

MR. A. C. HATCH: Will the court permit us to reserve our cross examination until this evening?

THE COURT: Yes, you may have the privilege of recalling Mr. Van Wagenen any time before the case is closed, for the purpose of cross examination.

MR. A. C. HATCH: In case we deem it necessary.

THE COURT: Yes.

MR. A. C. HATCH: Did your Honor state that John A Wootten testified that Smith and his father used the water?

THE COURT: Judge Hatch, I understood it his father irrigated this land.

MR. A. C. HATCH: No, I think if there was any question about it, I would like to have the witness recalled, if he is here to set the court right in the matter.

THE COURT: Mr. Wootten may be recalled, that is the quickest way, and ask him.

MR. A. C. HATCH: My recollection is he testified his father had abandoned the ditch.

THE COURT: Before they used it at all.

MR. A. C. HATCH: Before they used it at all.

THE COURT: Possibly I may be mistaken, or it is that the land was irrigated from Deer Creek before. It may have been someone else.

MR. A. C. HATCH: Mr. Wootten, did your father ever--

MR. WAHLQUIST: I object to that, let him be recalled to the stand if he is to be questioned.

MR. A. C. HATCH: Come forward, Mr. Wootten.

JOHN A. WOOTTEN, recalled.

CROSS EXAMINATION by Mr. A. C. Hatch.

- Q Did you in your testimony say your father had ever used the waters of Deer Creek for the irrigation of any of the lands in the Midway slope? A. No sir.
- Q The ditch was never completed while your father and Smith were working on it, so far as you know?
- A No.

REDIRECT EXAMINATION by Mr. Wahlquist.

- Q To what extent was it completed while your father was a party to the working?

MR. A. C. HATCH: If the court please, that is immaterial at this state of the proceedings.

THE COURT: Objection is overruled, he may state it.

- A Now, I never made any measurements, it would not be over one-fourth, anyway, of the ditch.
- Q And Smith continued after your father ceased working on it?
- A As testified.

THE COURT: Mr. Wahlquist, Mr. Wootten has testified he didn't know anything about that.

MR. THURMAN: Only as one neighbor knows.

THE COURT: Just merely that.

MR. WAHLQUIST: Except he knew from observation work had been done by someone. That is all.

MR. HUFFAKER: There have been some stipulations filed, but I am of the opinion that that would not be binding upon the parties, not a party to the stipulation, and for that reason we would like to introduce a little testimony and make a prima facie case in regard to the stipulations in the Midway Irrigation Company.

MR. A. C. HATCH: Do you rest in the Van Wagenen case?

MR. WAHLQUIST: We reserve the right to file that

deed. Mr. Wagenen has brought the wrong deed down, through an inadvertence.

MR. A. C. HATCH: File what deed?

MR. WAHLQUIST: Deed from B. M. Smith to Mark Smith, missing deed in the link of title.

MR. A. C. HATCH: If the court please, that may be, and I do not question counsel's good faith, but Mark A. Smith was the patentee of this one hundred and sixty tract of land.

MR. HUFFAKER: I have only the statement of Mr. Van Wagenen, and he says he thinks he has it.

MR. THURMAN: If anything is relevant, it would be the deed for the water right under that ditch, instead of land.

MR. HUFFAKER: I think they both go together, included in the same document, water right and land. I will call Mr. Van Wagenen for a few minutes on the Midway Irrigation Company.

THE COURT: The court wants to finish this matter. Are you through with this case?

MR. HUFFAKER: With the exception of that document.

THE COURT: Then I will permit you to put that in later. Now, do you desire to ~~put~~ introduce any evidence in reference to this matter at this time?

MR. A. C. HATCH: Until we know they claim something, and how they claim it, we cannot. That is the reason we insist at this time they finish their case, or tell us what they will introduce further definitely. If they have deeds, they know what those deeds are.

THE COURT: I understand the statement of Mr. Huffaker is they do not know exactly what they are, and want to bring them down. I will permit them to bring them down. You can get them tomorrow?

MR. VAN WAGENEN: I think I can get them.

THE COURT: If you are through with this matter, it may be we will finish the matter.

MR. VAN WAGENEN: I have them in my safe, and there is no one there that knows the combination of the safe.

THE COURT: The court will not prolong the hearing for you to get the deeds here, If you get the deeds before we close this hearing, the court will permit you to present them. Unless you do, the court will not prolong the hearing.

MR..A. C. HATCH: Certified copies of the deeds can be had without any question, if they are of record.

MR. HUFFAKER: I think we can wire up for an abstract of title.

MR. WANLQUIST: In that event unless we can get it so party can go on today, the train will be five o'clock tomorrow.

THE COURT: We may not finish by that time, if you do not finish you may present them.

MR. A. C. HATCH: That being the case, I would like to confer with my associates whether we will introduce any evidence at all. I think we have transcript of all the record, all that went of record a little while ago.

MR. WILLIS: There are some stipulations that, with the consent of counsel, we might introduce at this time, if the court will permit.

THE COURT: Have they been signed. They may be filed with the clerk, that is all you need to do with them.

MR. WILLIS: I think they should be introduced in evidence.

THE COURT: Very well, you may introduce them.

MR. WILLIS: And I think they should be marked as exhibits.

MR. A. C. HATCH: Is Hyrum Winterton included in your stipulation?

MR. WILLIS: There are six or seven stipulations here, Judge, and he is included in two of them, I think, and you can raise your objections when they are introduced as to that part of it.

MR. WAHLQUIST: The plaintiff being a party to the stipulation, how can they object to it?

MR. WILLIS: I don't know who is raising objections, Mr. Wahlquist. That will be shown later.

JOSEPH R. MURDOCK recalled, testifies as follows:

DIRECT EXAMINATION by Mr. Willis.

Q What is your name, please?

A Joseph R. Murdock.

Q Where do you reside?

A At Heber City, In Provo.

Q I show you defendant's Exhibit 166, and ask you to state what that is.

THE COURT: What is the object of this?

MR. WILLIS: It is a stipulation I want to get in.

THE COURT: Does anyone question the signature?

MR. WILLIS: I don't know.

THE COURT: You may offer them and if anyone does, they may be made known. I do not think Mr. Murdock would be competent to testify what they are.

MR. WILLIS: For the purpose of identification. Very well, if the court takes that view, unless they are questioned.

THE COURT: You may offer them and identify them by the description contained in your offer, I donot think you need any witness.

MR. WILLIS: We offer in evidence then defendant's Exhibit 166.

THE COURT: It may be received, if there is no objection.

MR. A. C. HATCH: Does that contain the name--

MR. WILLIS: That is a stipulation between the

Provo Reservoir Company and Joseph R. Murdock, as to fifty second feet of water for power and mill purposes from the Provo river.

MR. A. C. HATCH: No objection to that.

MR. WILLIS: We offer at this time plaintiff's Exhibit No. 167, which is a stipulation between the plaintiff and the Charleston Irrigation Company as to the lands and water rights under its lower canal.

MR. A. C. HATCH: That is all right.

THE COURT: It may be received.

MR. WILLIS: We offer at this time defendant's Exhibit 168, which is a stipulation between the Provo Reservoir Company, plaintiff, and between certain defendants using water under the Island ditch.

MR. A. C. HATCH: No objection.

MR. WILLIS: We offer in evidence a stipulation between the Provo Reservoir Company, plaintiff, and certain defendants filed in this action November 17, 1916, the defendants named here are Fred Ramund, Joseph R. Begland, Ulrey R. Begland Estate, Chris, Mitchell, Felix Martin, John Buhler, J. R. Nelson, Jesse Nelson, Jr., George Nelson, Alfred Alder, W. W. Alder, James T. Alder, William H. Winterton, Estate of Mrs. E. L. Hanks, deceased, E. L. Brown, Allen C. Wright, Estate of D. S. Huffaker, deceased, John B. Fowers, William Winterton, George H. Edwards, Joseph S. Wright, Hyrum Winterton, Thomas Winterton, W. D. Wright, Estate of John Fowers, deceased, P. W. Edwards, George R. Carlile, William N. Casper, James Casper, J. M. Casper, J. M. Ritchie, William Daybell, and nine heirs of William Averett, deceased, Alonzo Hickman, Elisha Webster, Emma Wherritt and Joseph Hatch.

MR. WAHLQUIST: Do any of those water rights involved in that situation, any of that water come through the Midway canal at the upper dam or Island ditch?

MR. WILLIS: No.

THE COURT: It may be received.

MR. WILLIS: Now offer as an exhibit in evidence a stipulation between the plaintiff, Provo Reservoir Company and John M. Ritchie, Henry F. Watson and George H. Edwards as to the rights of the water of the Daybell springs.

MR. A. C. HATCH: No objection.

MR. WILLIS: Offer in evidence at this time a stipulation between the Provo Reservoir Company and Hyrum S. Winterton and William L. Van Wagoner and John Van Wagoner, Jr., filed in this court November 17, 1916.

MR. WAHLQUIST: Does that include any of the water claimed by any of the parties named through the Midway ~~xxx~~ Upper canal or Island Ditch?

MR. WILLIS: No, it is waters rising on Snake Creek, on what is termed the B. M. Smith, now owned by George Price.

MR. A. C. HATCH: We would ask at this time that the stipulation as to Hyrum Winterton be withdrawn, for the reason that as to his lands the acreage irrigated and the stipulation itself was obtained by misrepresentation on his part as to the acreage that he had irrigated from the particular source; as to the others, that it may remain, as far as we are concerned.

THE COURT: Who represents Mr. Winterton?

MR. A. C. HATCH: Mr. Willis.

MR. WILLIS: Mr. Cluff. My agreement was completed when I got that stipulation and filed it. As to the contest, as I understand it, Mr. Winterton has employed Harvey Cluff to look after the contest.

THE COURT: The court will not set aside a stipulation that has been entered into without Mr. Winterton's representative being here to resist it, of course.

MR. A. C. HATCH: It is now offered, and we object to its being received as binding upon us at ~~xx~~ this time, for the reason stated.

THE COURT: The reception of it may be deferred until that question is determined, of course. If you have entered into a binding stipulation, you will have to abide by it unless you show your entering into it was obtained fraudulently.

MR. A. E. HATCH: That is what we claim.

THE COURT: The reception of it may be deferred until Mr. Cluff can be here.

MR. WAHLQUIST: With reference to the defendants Gotlieb Buhler and others, your Honor will remember that on the 29th I asked and was granted privilege of filing an amended answer setting out more accurately the present owners of some rights involved there. It was one that was prepared rather hurriedly, and I now ask leave to file that amended answer and serve copies.

THE COURT: That may be done.

MR. WILLIS: There is one thing further, your Honor. I ask these exhibits that have been offered may be considered as having been read into the record.

THE COURT: What have we next?

MR. CHASE HATCH: I am ready to proceed with some of the Midway claimants.

THE COURT: Very well.

JOHN M. HUBER, called in his own behalf, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Chase Hatch.

Q What is your name?

A John M. Huber.

Q Where do you reside?

A Midway, Wasatch county.

Q Were you acquainted with John Huber, who was made a party to this suit?

A Yes sir.

Q He was your father, was he not? A. Yes sir.

Q Is he now deceased? A. Yes sir.

Q When did he die?

A About two years ago, 16th of November two years.

Q After the commencement of this action?

A Yes sir.

Q And has his estate been probated, or is it being probated?

A It is being probated at this time.

Q And you are the administrator? A. Yes sir.

Q Qualified and are acting? A. Yes sir.

Q How much real property was there belonging to the estate of John Huber, deceased, that is irrigated from waters of Snake creek in Wasatch county, Utah?

A There is about sixty-eight acres altogether, that is, some in the Midway Irrigation Company and some outside.

Q How much outside of the company?

A Forty-four acres.

Q Where do the waters for this forty-four acres come from?

- A They come from Snake creek.
- Q How long have they been used upon this land?
- A I think they have been used since 1865, I think.
- Q How much of the forty-four acres is actually under cultivation?
- A All of it.
- Q Who has constructed the ditches and constructed and owns the ditch through which this water is diverted?
- A My father and others constructed the ditches and they belong to the Hubers, separate ditch,--
- Q In addition to this forty-four acres are there any lands not watered by waters of the irrigation company upon which you use any high water?
- A Yes sir.
- Q How many acres?
- A There is about fifteen acres, I guess.
- Q Where do those waters come from?
- A They come from Pine creek.
- Q Pine creek is a tributary to Snake creek, is it not?
- A Yes sir.
- Q And during what portion of the year do you use waters from Pine creek?
- A While the water is high.
- Q How many times do you irrigate this fifteen acres?
- A Well, sometimes about twice a year.
- Q Do you ever irrigate them more than twice?
- A I don't know, I don't think so.
- Q Do you always irrigate it twice?
- A Most generally.
- THE COURT: Mr. Huber, the fifteen acres you are now speaking of is in addition to the forty-four?
- A Yes sir.
- Q The waters you use of Pine creek, did they ordinarily reach Snake creek before you commenced to use them?
- A Yes sir.
- Q The full amount would reach Snake creek, that is, on the

surface? A. Yes sir.

Q And how many years have you been using these waters of Pine creek?

A Well, I think we have been using them for about twelve or fourteen years.

Q Now, do you use more water upon the forty-four acres during the high water season than you do during the low water season?

A Yes sir.

Q Has that been the custom during all the time you have used these waters? A. Yes sir.

Q And as to your high water rights, what is your desire as to how they should be appropriated or applied?

A Well, we apply them with the Midway Irrigation Company, same as those of the Midway Irrigation Company when their water is low, when the water is low there we stop irrigating as soon as they do on the high water.

Q Would you like then to be placed in the same condition as the other irrigators with reference to the high water in that vicinity? A. Yes sir.

Q And would you be willing to sign the stipulation as to the use of high waters that has been signed by most of these parties? A. Yes sir.

Q Are you familiar with the lands of Nephi and Joseph E. Huber in that vicinity? A. Yes sir.

Q Do you know how many acres of land they irrigate from the waters of Snake creek?

A They irrigate about twenty-six acres, then they have got about thirty-three shares in the Midway Irrigation Company.

Q Is that in addition to the twenty-six acres?

A Yes sir.

Q From where are the waters for the twenty-six acres taken?

A They are taken from Snake creek.

Q Do you know how many years the waters on this twenty-six acres have been used?

A I think they have been used about from twenty-five to thirty years.

Q And what portion of the twenty-six acres is under cultivation?

A Well, all of it, of the twenty-six acres.

Q What is the nature of the soil?

A Oh, It is -- part of it is gravelly, part of the land is gravelly and part of it is clay soil.

Q Is it similar or not to the other lands in that vicinity covered by waters derived through the Midway Irrigation Company?

A It is about the same.

MR. A. C. HATCH: I understand this water is all included in the -- this land is all included in the area ~~six~~ covered by the stipulation with the Midway Irrigation Company.

MR. CHASE HATCH: I don't know.

MR. WAHLQUIST: There is a dispute as to the acreage that I was just going to cross examine upon. Now, the Midway Irrigation Company does not concede Joseph E and Nephi Huber own twenty-six acres outside of the company.

CROSS EXAMINATION by Mr. Wahlquist.

Q Mr. Huber, you say that this twenty-six acres irrigated by Nephi and Joseph E. Huber outside of the company have been irrigated for twenty-five years or more?

A Yes sir.

Q Has that irrigation been done by Nephi and Joseph E. Huber?

A Yes sir.

Q During all of that time?

A No, not through all that time.

Q Who irrigated this, or owned this twenty-six acres prior to the Huber boys?

A Robert Krebs, I believe.

Q Do you know when they succeeded to Robert Krebs' interest?

A No, I don't just exactly know.

Q Do you of your own knowledge know whether or not tickets have

been issued to Nephi and Joseph Huber for the use of water upon this land outside of the company?

MR. CHASE HATCH: If the court please, object to that as immaterial and irrelevant, not cross examination.

THE COURT: What is the object of it, tickets by whom?

MR. WAHLQUIST: By the Midway Irrigation Company. I will withdraw that and ask another question.

Q The water used by the parties owning stock outside of the Midway Irrigation Company is distributed to them by the Midway Irrigation Company, is it not?

A Yes sir.

THE COURT: I don't know that I understand the question, and not understanding the question, I would not understand the answer. You asked now as to the situation of parties owning stock outside of the company.

MR. WAHLQUIST: Yes sir, that would include John M. Huber and Nephi and Joseph E. Huber.

THE COURT: I don't understand what you mean by stock outside of the corporation.

MR. WAHLQUIST: Having water rights, but do not own stock in the corporation.

Q And tickets are issued to you for your forty-four acres that you own outside of the company and not represented by stock?

A Yes sir.

Q And tickets--

MR. A. C. HATCH: Just a moment, I don't understand-- the forty-four acres-- I understand he is administrator.

MR. WAHLQUIST: Yes, he is administrator.

MR. A. C. HATCH: You mention him individually as being the owner of land. It confuses me when you put the questions that way, and also will be a confusing record.

THE COURT: I didn't understand Mr. John M. owned any land aside from the estate.

MR. A. C. HATCH: Witness has so stated, but I don't

know myself. The counsel in his question has so stated.

MR. WAHLQUIST: He has stated he is the administrator of the estate of John Huber, deceased, and that this forty four acres of land owned by the estate outside of the company, but as administrator I assume the ticket would be issued to him.

THE COURT: I understand.

Q Do you know whether or not tickets were issued to Nephi and Joseph E. Huber for their water rights outside of the company during these years they have owned the lands and water rights?

A Yes sir.

MR. CHASE HATCH: We object to this as immaterial and irrelevant, not cross examination.

THE COURT: I am inclined to think it is proper cross examination if it is material.

MR. CHASE HATCH: If there is any materiality in it. If counsel is claiming any right we think he should set it up while our counterclaim is being denied, if he is claiming anything against us, we think it should be set up, that we may have an opportunity to meet it, otherwise this examination is immaterial.

THE COURT: Mr. Wahlquist, if you will indicate what you claim in relation to this, do you claim they are not entitled to water outside of the company?

MR. WAHLQUIST: The Midway Irrigation Company hold they own only twenty-three acres of water right outside of the Midway Irrigation Company, whereas, this witness has testified to twenty-six acres by Nephi and Joseph E. Huber .

THE COURT: You claim twenty-three?

MR. WAHLQUIST: Only twenty-three,

THE COURT: I take it the object is to show some acquiescence in the number of twenty-three by accepting tickets for that amount.

MR. WAHLQUIST: Yes.

THE COURT: You may show it.

MR. WAHLQUIST: Read the last question, Mr. Reporter.

(Question read)

Q Do you know for what number of acres water tickets were issued to Nephi and Joseph E. Huber?

A No, I don't. I couldn't say how many acres, how many was issued to them.

Q Will you say that they received tickets for more than twenty-three acres of water right outside of the company?

A I couldn't say anything about that, I couldn't say how many they received at all.

NEPHI HUBER, called in his own behalf, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Chase Hatch.

Q State your name, place of residence and occupation?

A Nephi Huber, my residence Midway, Wasatch county, and my occupation is principally farming.

Q Are you acquainted with Joseph E. Huber?

A Yes sir.

Q Are you and Joseph E. Huber tenants in common of certain lands in Wasatch county? A. Yes sir.

Q How many acres do you own of lands watered from waters of Snake creek and not covered by stock in the Midway Irrigation Company?

A There is twenty-six acres that we water, have low water right to, or water right the entire season, and there are a number of acres of land we have turned the water on in the spring of the year when there was plenty of water.

Q How many acres?

A Oh, they would be probably fourteen or fifteen.

Q Now, for how long have you owned this twenty-six acres?

A We have owned this twenty-six acres since 1905.

Q From whom did you purchase it?

A From Robert Krebs.

Q Did you purchase water right with the land?

A Yes sir.

Q What portion of the twenty-six acres have you irrigated with waters of Snake Creek since you purchased it?

A We have watered all of it.

Q During each and every year? A. Yes sir.

Q Who has performed the actual work of irrigating, have you assisted?

A I have irrigated it sometimes, and part of the time my brother Joseph irrigated it.

Q Were you acquainted with this land before you purchased it?

A Yes sir.

Q For how long a time?

A Why, as long as I can remember, thirty or thirty-five years, thirty years anyhow, since I was big enough to remember.

Q And for how long a time has the twenty-six acres been under cultivation?

A There is twenty of it has been under cultivation as long as I can remember, and the other six was put under cultivation at the completion of what we call the upper Huber ditch, that was prior-- well, about between 1885 and '8 or '98, completed the ditch, has the water out before '88.

Q Do you know whether or not the entire twenty six acres has been irrigated each year since that time?

A Well, I am positive it has been irrigated during this time, but there is one or two years I was not about the place, and I couldn't say who did the irrigating.

Q What is the nature of the crops that have been grown on there last twenty years?

A Well, there has been any kind of farm products, potatoes, hay and grain.

MR. WAHLQUIST: Mr. Hatch, does that question relate to the six acres or twenty acres?

MR. CHASE HATCH: The twenty-six acres.

MR. WAHLQUIST: The six acres he has testified have not been under irrigation so long.

THE WITNESS: In '88, the ditch was completed before '88.

MR. WAHLQUIST: Beg pardon.

Q Did you answer the last question?

A I think I did.

Q Now, as to the other fourteen or fifteen acres, how often have you applied high water to that in the spring?

A Well, about once. That is only when we have a flood.

Q Once during each spring, or one spring?

A Once during each spring.

Q For how long a period of years?

A That has been since we owned the lands.

Q Do you know anything about whether or not it was irrigated during the high water before you owned it?

A I do not.

THE COURT: I am not certain I got the year you purchased it, 1905, was it?

A 1905.

MR. THURMAN: I got that 1895, I was wrong?

A It was 1905.

Q From whom did you purchase this twenty-six acres?

MR. WAHLQUIST: He has answered that. From Robert Krebs.

Q Now, as to the use of the low water upon this tract, can a continuous stream of sufficient water to irrigate it be used to advantage or not?

A No, I don't think it can.

Q How have you been using the water?

A We have been using it on intervals of between about eighteen days, every eighteen days. Sometimes goes a little longer than that, maybe twenty.

Q And using a larger stream during that interval and then not

using any until the next turn.

A Yes sir.

Q And can the land be properly and economically irrigated for the benefit of crops in any other manner?

A Well, I don't think it can, not economically, for economy with water and also doing justice to the land.

Q As to your high water right, state whether or not you desire to be placed upon an equal footing with other claimants and users in that vicinity?

A We are willing to be placed on the same footing that anyone else is placed on.

Q And would be willing to enter into the stipulation already signed between the parties in that vicinity, if the other parties are willing? A. Yes sir.

Q Are you familiar with the lands belonging to the estate of John Huber, deceased? A. Yes sir.

Q How many acres of those lands are watered from waters of Snake Creek, and not covered by stock in the Midway Irrigation Company?

A We water forty-four.

Q Do you know whether or not the estate of John Huber, deceased, uses any other waters in that vicinity in addition to the forty-four acres?

A They use the water that they derive from the stock in the irrigation company.

Q I mean outside of the irrigation company?

A Yes, they have used some flood water in the early season of the year.

Q How much stock is there belonging to the-- stock of the irrigation company belonging to the estate of John Huber, deceased, do you know?

A I think there is twenty-four.

MR. THURMAN: That is not used for irrigating this land.

A No, not the same land.

CROSS EXAMINATION by Mr. Wahlquist.

- Q What class of crops, if any, are grown on the fifteen acres you say you irrigate with high water?
- A There is not much of anything outside of using it for pasture corral.
- Q Is not plowed or cultivated ground at all?
- A No sir.
- Q And is that true with reference to the fifteen acres that you testified to as belonging to the John Huber estate that is irrigated with high water?
- A There is about three acres of that, of the John Huber estate that has been plowed and cultivated and crops on it every year now, but the balance is merely pasture ground.
- Q And that irrigation, if done, is done early in the season, before there is any attempt at regulating the use of the water by the Midway Irrigation Company, is it not?
- A Yes, as a rule that is the case every year.
- Q And after the Midway Irrigation Company takes charge of the water and distributes it to the people entitled, then you don't claim you continue to use water on this surplus fifteen acres?
- A No, we have not been using it.
- Q Now, the water right claimed by you for the Krebs land is also distributed to you under the control of the Midway Irrigation Company, is it not?
- A That has been the practise in the latter part of the year.
- Q Well, ever since you have owned the land it has been the practise, hasn't it, that is distributed under the direction of the Midway Irrigation Company?
- A On the latter end of the year, latter part of the season.
- Q Whenever there ceases to be a surplus of water then they distribute it to you?
- A Yes.
- Q And what is the manner of distribution, is it by ticket?
- A Yes, generally give a ticket.

Q And does the ticket indicate the number of acres for which it is issued?

A As a rule it does, I think it does every time.

Q Do you now recall the number of acres for which tickets have been issued to you for this Krebs right since 1905?

A I think if you will allow me to explain.

Q You can answer my question, then your counsel will give you an answer to explain.

A I don't fully remember how many acres have been distributed to us personally.

Q You remember last year?

A I don't.

Q Will you say that at any time the Midway Irrigation Company has ever distributed to you and Joseph E. Huber more than twenty-three acres of water right for the Krebs land?

A I think so.

Q What year?

A 1905.

Q And that is the only year?

A I don't remember any other.

Q And wasn't there in 1905 a suit pending in the District Court of Wasatch County between Robert Krebs and his father, involving the title to a portion of the land and water right belonging to Robert Krebs?

A I think there was a suit pending, yes. I am not sufficiently familiar with the particulars of it--

Q And after that time you don't know that you have ever received a ticket for more than twenty-three acres of water outside of the company, do you?

A I don't remember, there may have been tickets given for more, but I don't remember.

Q Do you know last year what the number of acres was that was given you?

A I don't remember that, I will have to look at the ticket or

the stub.

REDIRECT EXAMINATION by Mr. Chase Hatch.

Q Do you know whether or not a suit pending, to which you have testified involved any of the land or water right of Robert Krebs which you purchased?

A I don't think it involved any of the land or water right we purchased.

Q Do you know whether or not it was pending at the time you made the purchase?

A I don't think it was at the time we made the purchase, it may have been. There may have been talk of a suit, but if there was a complaint issued, I don't remember.

Q Were you or Joseph E. Huber ever in any manner served with any summons or any process in that suit?

A No sir.

Q The issuing of tickets and distributing of water by the Midway Irrigation Company, how has that been done, by what authority?

A Well, as I understand it for me personally or for my brother they have never received any written authority that I know of, and I think the old water users made arrangements or agreements from time to time to convey that water-- they made agreements from time to time to pay a certain tax for the distribution of that water.

Q What, if anything, have you done with reference to agreeing to pay or requested them to distribute the water?

A I have not--

Q Either verbally--

A I have not requested them at any time to distribute me water on my water right.

Q Have you agreed to pay for services in that connection?

A Well, we went through the routine of custom, we paid for it.

Q And was the question discussed between your self and members of the company, your brother and members of the company, at any time, or divers times, or at all, that you know?

A Well, I think it has been discussed merely from year to year, but we have never reached any definite head to it, or any definite position.

Q Now, with regard to the twenty- six acres which you purchased from Krebs, what would you say as to whether or not you have had sufficient water to irrigate all of that twenty-six acres during the time that tickets were issued to you?

A Yes, we have watered the twenty-six acres every year. We have never neglected watering the twenty-six acres.

Q Can you say how the water you have used during the past five years on the twenty-six acres compares in volume with that which you used in 1905, the year you say there was a ticket for twenty-six acres. Has the water been more or less since 1905, or approximately the same?

A Oh, we have used about the same amount of water. In fact, our aim is to water the land, and water it judicially.

Q You have had sufficient water to irrigate the full amount each year?

A. Yes sir.

RECROSS EXAMINATION by Mr. Wahlquist.

Q What is the fact, Mr. Huber, as to the water for these twenty six acres and water for which you own stock in the company being conveyed through the same ditch, is that right?

A Yes, we have conveyed some of the stock-- we bought some stock at the same time we bought the water right from Mr. Krebs, and we have some of that through the same ditches that we ~~XXXX~~ have the water right.

Q And divert it from the main ditch onto your lands? Through the same headgate that you divert the water right for the twenty-six acres that is not represented by stock?

A Yes.

Q Isn't it also true that if it is necessary to mature your crops on this twenty-six acre tract that you will use all the water represented by stock when you have sufficient and judge that it will be better and more profitable to use it there

than elsewhere? A. No.

Q You are certain of that?

A We also have some land that we bought from Robert Krebs that we float this stock on besides the twenty-six acres.

Q The stock that you bought from him?

A The stock that is in the Midway Irrigation Company is floated on land that has been cultivated and is cultivated now, that does not belong to the twenty-six acre tract.

Q In other words you bought a larger tract than twenty-six acres from Robert Krebs? A. Yes sir.

Q And you acquired from him some capital stock in the Midway Irrigation Company? A. Yes sir.

Q And some water stock, water right, not represented by capital stock? A. Yes sir.

Q You say you don't know any of the land you bought from him was involved in this suit. I will read you this description, and see if you can tell whether or not it was Huber lands, described as follows: Beginning at the northwest corner of the southeast quarter of Section 21, Township 3 South, Range 4 East, Salt Lake Meridian, running thence east eight chains, thence south 18.45, thence west 4.75, thence following by said creek the general course was north 65.15 west a distance of 7.15 chains to the west boundary line of the southeast quarter of said section 21, thence north 1.50 chains to the place of beginning, area 2.28 acres. Is that in your judgment, any of the land included in the land you purchased from Krebs? A. Yes sir.

MR. CHASE HATCH: We object to the question as being immaterial, irrelevant and incompetent. If they expect to bind this defendant by any action in that suit, it must be shown that he was at least served with some process, or copy of the judgment, or in some manner officially connected with it.

MR. WAHLQUIST: If this suit was in the court at the time he made the purchase, he would not need to be served with

any summons. He took it as a party to the suit.

Q Was there any part of the land you got--

MR. CHASE HATCH: Just a minute, I was not through with my objection. We object further that it is not cross examination. I did ask the witness if he was served with process on redirect by reason of the questions pertaining to the suit on the cross examination, but we insist this line of questioning is immaterial and irrelevant.

THE COURT: No, I think it is proper cross examination. I do not know what it is expected it will lead to, but Mr. Huber has testified that they purchased twenty-six acres from Mr. Krebs, and got a water right with it.

MR. WAHLQUIST: And he also testified he did not believe it was included in the land in the suit.

THE COURT: I was about to explain why I was overruling the objection-- and that they had had and used water upon it all the time. Now, on cross examination I think it is proper to ask him if a part of this land was not involved in the litigation, and as a result of that the water right was cut down?

MR. CHASE HATCH: Are you contesting the right to the acres purchased?

MR. WAHLQUIST: No.

THE COURT: I don't understand the title to land is involved, except in so far as it may throw light on the water right that was acquired and used since. I think it is proper cross examination.

MR. CHASE:HATCH: Give an exception.

Q Do you know whether or not the land you purchased from Robert Krebs included any land in Section 27, 3 South, 4 East?

A I don't think it included any in Section 27.

Q You are familiar with those lands there by sections and so on?

A Pretty well, so.

Q Do you know whether it included a part, tract of land that has

always been known as the Krebs homestead in the south half of the northeast quarter of Section 21, 3 South, 4 East?

A I think that is a part, the homestead that we purchased.

Q That would be included in it?

A That is included in the purchase we made from Robert Krebs.

Q Now, going back again, you said in answer to counsel, we never neglected watering this twenty-six acres. Have you always kept in mind that there was a question about your right to the water to this particular twenty-six acres and therefore took special pains to make the water that was distributed to you by the Midway Irrigation Company as appurtenant to the Krebs land cover this twenty-six acres each and every irrigation?

MR. CHASE HATCH: If the court please, we object to that as incompetent, irrelevant and immaterial.

THE COURT: The objection is overruled.

MR. CHASE HATCH: Exception.

A We had no object, as far as the irrigation is concerned in covering that twenty-six acres with the water. Our object was to water the land and raise the crops.

Q And if it was necessary in order to water the land and raise the crops you would apply some of the water distributed to you for capital stock onto it to complete an irrigation, would you not?

A No sir.

Q How could you tell which was which?

A Well, we could not exactly tell by the quantity of water that was flowing through the ditch.

Q Did you always carry your ticket with you and see when the time of the Krebs run off, and shut it off, whether it was half way through the patch or not, in order to not put any stock water on that tract, or would you continue to finish the tract?

A We would continue until we got the ~~xxxxxx~~ land watered, irrespective of ticket or Midway Irrigation Company.

REDIRECT EXAMINATION by Chase Hatch.

Q Did you have any more acres of water right in the company ~~than~~ and out of the company than you had cultivated land?

A No sir.

Q You say you always finished until you got the entire tract watered, irrespective of water ticket, is that what your last answer was?

A Yes sir, we never failed to water our land.

RECROSS EXAMINATION by Mr. Wahlquist.

Q What if your ticket run out before you had watered your entire farm?

A Well, we watered the land until we got through.

Q That is, you watered these twenty-six acres?

A Yes sir.

Q There would be some other piece of land probably not watered?

A We generally got through with watering our land.

Q Isn't it a fact, Mr. Huber, that in the latter part of the season when the water is scarce, not only you, but everybody else have to omit some tracts in order to properly irrigate other tracts and mature the crops?

A Well, that is possibly the case in some cases, but we never have as much trouble in the low part of the season in getting over our ground as we do in the early part of the season. That is, I say in July, through the month of July is our hardest turn of watering.

Q Then you have trouble getting over all your lands?

A We do for one reason.

REDIRECT EXAMINATION by Mr. Chase Hatch.

Q What is that reason?

A The reason is we are left to the last on the line of tickets, and sometimes it goes too long before we can get our water on our grain, and our grain is on the sidehill, great deal

of it, and it is difficult, and take a whole lot of time and patience and work to water that ground on the side of the mountain, side of the hill.

Q Has there ever been a time during the ordinary irrigation season that you have not had with your stock in the company and your water right out of the company sufficient water to irrigate your cultivated lands?

A I don't think there has ever been a time we have not had enough water to water our land.

RE-CROSS EXAMINATION by Mr. Wahlquist.

Q Did you ever have all you wanted?

A Oh yes, we have had plenty.

Q At all the times, always had all you wanted?

A Oh, I think so.

Q Never suffered?

A I don't think we ever suffered for what water we needed. When we got through with it, we stopped it off.

MR. CHASE HATCH: I have one other little case will take just a few minutes.

MR. WAHLQUIST: We wish to introduce some rebuttal testimony against this claim.

THE COURT: Probably better to put it in now.

BENJAMIN HAIR, called by the defendant Midway Irrigation Company, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Wahlquist.

Q State your name?

A Benjamin Hair.

Q Where do you reside, or where have you been residing for the last six or eight years?

A Midway, Wasatch county.

Q Have you had any official connection with the Midway Irrigation Company? A. Yes sir.

Q What?

A I have been watermaster last few years.

Q Do you know who distributes, that is, who issues the tickets to the parties to whom the Midway Irrigation Company distributes water? A. Yes sir.

Q Who does?

A I have been distributing them myself.

Q As watermaster? A. Yes sir.

Q You acquainted with Nephi and Joseph Huber?

A Yes sir.

Q Are you acquainted with their-- that part of their farms known as the Krebs land?

A Not exactly, I don't know just where it is.

Q Are you acquainted with the water right not represented by stock in the Midway Irrigation Company that they own appurtenant to the Krebs land?

A I am acquainted with all the land that they do water. They just tell me what ditches they want the water on, and I issue the tickets wherever they want the water.

Q How many years have you issued tickets for the Midway Irrigation Company to the parties to whom they distribute the water?

A This last two years, and in 1910.

Q 1910 and '15 and '16? A. Yes sir.

Q Do you know for how many acres of water right you issued tickets to Nephi and Joseph E. Huber during the year 1911?

MR. CHASE HATCH: We object to that as not the best evidence.

MR. WAHLQUIST: I don't know what would be better. Have you the ticket to produce?

MR. CHASE HATCH: No sir.

MR. WAHLQUIST: If you have, of course, we will use that.

MR. CHASE HATCH: Nor the stub of the ticket either.

THE COURT: You are not asked about the stub, You may show what became of it.

Q Did you issue a ticket to Nephi and Joseph E. Huber in the year 1910, for their water right outside of the company?

A Yes sir.

Q What did you do with the ticket?

A I delivered it to the Huber place, sometimes they were there. Of course, there were three of the boys, generally left it at their home and they used the water.

Q Do you now recall the number of acres for which that ticket was issued?

A If you will tell me the date--

MR. CHASE HATCH: At this time I object to it.

THE COURT: I think the objection should be sustained. You have not made any effort to get the ticket; you have located where it is, but have not made any effort to get it.

Q Do the Huber boys, or did ~~the~~ Nephi and Joseph E. Huber, during the year 1910 draw water not represented by the capital stock of the Midway Irrigation Company through more than one ditch?

A. Yes sir.

Q How many ditches did they draw water through not represented by stock in the company?

MR. CHASE HATCH: We object to that as immaterial.

THE COURT: Objection is overruled, it seems to be preliminary. He is seeking to identify and locate the distribution of water to this particular land.

Q Answer the question.

A I don't know just exactly. The stock out of the company and in the company is all one with me. I just issue the tickets as they need the water on certain ditches. Whether they use it all on one ditch outside of the company, or in the company, I don't know. There are certain ditches-- they have five ditches they use the water through, and they tell me the amount of shares they want on those ditches, and I give

them the stock on those ditches way they want it.

Q Is the number of acres not represented by stock counted the same as shares in the company, in making up tickets?

A No sir.

Q How are they counted?

A I don't know just how they are counted. Of course, I have never had any complaints in the last few years. Generally give me a list of the stock and ditches they want the stock on.

Q You evidently don't understand my question. I say, they ask you, they say how many shares they want on each ditch. I asked you if the acres of water right outside of the company is rated the same as the shares inside of the company in the making of tickets? A. Yes sir.

Q Upon what basis are they treated, as share equivalent to an acre, or otherwise?

A I couldn't say as to that.

Q Assuming that a person has five acre water right not included in the company, how many shares would you issue him in tickets?

A Give him five shares.

Q Then you consider an acre outside of the company equivalent to a share in the company?

A Yes sir.

Q Do you know what the aggregate amount of the rights of Nephi and Joseph Huber is, both in and out of the company?

A I couldn't say now.

Q Was that information furnished you by anyone before you made up your ticket? A. No sir.

Q Then how would you know how to make up your tickets?

A Well, of course, Huber, the estate is all included in my--

Q We are not asking about Huber estate, only asking-- do they get all the water together, Huber estate and Nephi and Joseph Huber? A. Yes sir.

Q Do you know what the total amount of shares of all of them is?

A I couldn't say just now.

MR. WAHLQUIST: We will ask your Honor we may let this witness step aside and put the secretary on to show that.

THE COURT: Any cross examination of this witness before he retires?

MR. CHASE HATCH: Nosir, not yet.

WILLIAM W. WILSON, called by the defendant Midway Irrigation Company, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Wahlquist.

Q State your name?

A William W. Wilson.

Q Where do you reside?

A Midway.

Q Have you any official connection with the Midway Irrigation Company? A. Yes sir.

Q What is it?

A Secretary of the company.

Q For how long have you been secretary?

A About three and a half years.

Q Have you the-- any books showing the number of -- amount of stock owned by the various stockholders?

A Yes sir.

Q Have you that book with you?

A Yes sir.

Q You may produce it?

A Want the one out of the corporated--

Q One for the company first. I will ask you if, by referring to the book you can state the number of shares of capital stock owned by the John Huber estate?

A Yes sir.

MR. CHASE HATCH: Object to it as immaterial.

THE COURT: Objection is sustained.

Q I will ask you if you can state the amount of stock owned by Nephi and Joseph E. Huber?

A Yes.

MR. CHASE HATCH: Object to it as immaterial.

THE COURT: I see no materiality in it.

MR. WAHLQUIST: Except that the watermaster has testified he groups it all and issues tickets for the whole--

THE COURT: Objection is sustained, I see no materiality in it.

Q Have you a book showing the rights that are recognized by the Midway Irrigation Company in Snake Creek and its tributaries not represented by capital stock in the company?

A Well, I have one, but it contains all the stock out of the company, unincorporated water right, whether Snake Creek or not.

Q All the stock that is recognized by the Midway Irrigation Company?

A. Yes sir.

Q That is controlled and distributed by the Midway Irrigation Company?

A. Yes sir.

Q I wish you would produce that, I wish you would refer to that and say how many acres of water right not represented by stock in the company that is belonging to Nephi and Joseph Huber?

MR. CHASE HATCH: Object to it as incompetent.

THE COURT: Objection is sustained.

Q Do you know whether Nephi and Joseph E. Huber own any water stock that is distributed by the company not represented by stock in the corporation?

A. Yes sir.

Q Do you know how much?

A. Yes sir.

MR. CHASE HATCH: Object to it as incompetent. I withdraw the objection as to how much.

Q How many acres do they own?

MR. CHASE HATCH: Object to it as incompetent.

THE COURT: The objection is sustained.

Q Do you know how much water has been distributed to them through the company for what number of acres water has been distributed to them by the company during the two years that you have been watermaster?

A Yes sir, I know what taxes they pay, how many shares they pay taxes on, assessments rather?

THE COURT: Let me understand, was Mr. Wilson watermaster?

MR. WAHLQUIST: He has been secretary of the company.

THE COURT: You asked him during the two years he was watermaster.

MR. WAHLQUIST: I want to correct that, secretary.

Q How many?

MR. CHASE HATCH: Object to it as incompetent.

THE COURT: Objection is overruled. That is payment made to you, was it?

A No, I give them credit for it. It was paid the treasurer. I give them credit. I put the assessment on then give them credit when it was paid, so many shares.

MR. CHASE HATCH: I understood the question was how many shares has been distributed. The answer was he knew how many they had paid assessment on.

THE COURT: He said he knew what they had paid assessment on and I overruled the objection, because I understood he knew, but I think from his answer now he doesn't know. You may find out what he knows about it, whether he does know. If he was not present when it was paid he cannot know, of course.

Q You may state what you do in the way of--

THE COURT: You withdraw this, do you?

MR. WAHLQUIST: I am trying to frame it in a way to get the information out.

THE COURT: Just ask him if he was there and saw the payment made. If he was he can tell what occurred. If he was not, he cannot, of course.

Q Were you present when the assessment was paid?

A No, not much, sometimes I was there, sometimes I was not.

I don't think this particular case I was.

Q Did you issue an assessment notice to them for the land assessment was due upon?

A Yes, I sent them the notice of their assessment.

Q For how many acres did you send them a notice of their assessment?

MR. CHASE HATCH: If the court please, object to that as being incompetent unless it is shown some method by which they could be bound by that notice.

THE COURT: I assume the notice was in writing, if it was, the notice would be the best evidence of its contents.

Q Did you send them a written notice?

A A printed notice.

Q How was it, on a slip or postal card?

A Postal card.

Q Who did you address it to?

A I addressed it to Nephi and Joseph Huber, I suppose.

Q Was it deposited in the post office?

A Yes sir.

Q By yourself? A. Yes sir.

Q Have you the notice?

MR. CHASE HATCH: We have the notice here, yes.

THE WITNESS: Those notices are just for those in the company.

Q Did you send any different notices to those owning water right that was not represented by stock in the company?

A No sir.

Q You mean you sent the same notice to all?

A To all, yes, there was an understanding about outside of the company.

MR. CHASE HATCH: Move to strike the last.

THE COURT: I don't understand. I possibly didn't understand just what Mr. Wilson said. I thought I first understood you to say you sent no notices to those outside of the company?

A No, I didn't say that.

THE COURT: You do send them a notice just the same?

A Just the same.

Q That is send them the notice on the same form?

A Yes, that their assessment is due.

Q Where a person owns stock both in and out of the company, do you send them two notices, or send them upon the same form a notice of all their --

A Just the one form.

Q In sending out the notices do you notify the parties the amount that they are being assessed upon, and the amount that is due?

A No sir, I have not.

Q Just simply a notice of the fact of their assessment being due?

A Yes, so much a share and the time it is due.

Q Do you furnish as secretary of the Midway Irrigation Company, do you furnish the watermaster with a list of the owners of stock? A. Yes sir.

Q And the owners of water rights outside of the company from which he makes up his tickets?

A Yes sir.

Q Did you furnish the watermaster with such a list in the year 1914 and '15?

A Yes sir, I think so, whenever they ask for it, I do, and I furnished the present watermaster I know with a list.

Q Do you include all that they hold, both stock and water rights outside? A. Yes sir.

Q How do you designate it, separately?

A I just give a list of each, and state which it is.

CROSS EXAMINATION by Mr. Chase Hatch.

Q Mr. Wilson, I hand you Exhibit 170, ask you if that is one of the notices you have just testified to?

A Yes sir.

Q And you addressed it to Joseph-- to Nephi and Joseph Huber?

A Yes sir.

Q And this is the notice you testified to for 1916?

A Yes sir.

Q Was any of the pencil writing on that when you mailed it ?

A No sir. ,

MR. CHASE HATCH: We offer Exhibit 170, your Honor, all except the pencil writing.

MR. WAHLQUIST: We object to it as irrelevant and immaterial, and not having any bearing upon the issues of the case.

THE COURT: I think it is proper cross examination of the witness's testimony in which he stated he sent notices to all. Objection is overruled, and you may have an exception if you desire.

BENJAMIN HAIR recalled.

DIRECT EXAMINATION by Mr. Wahlquist.

Q Calling your attention to the year 1916, were you watermaster that year? A. Yes sir.

Q Did you receive from the secretary of the Midway Irrigation Company a list of stockholders and persons owning water rights not represented by stock? A. Yes sir.

Q Did you issue tickets accordingly?

A Yes sir.

Q Did that list show the amount of stock, amount of water right outside of the company owned by Joseph E and Nephi Huber? A. Yes sir.

Q Did you issue tickets to them according to that list?

A Yes sir.

Q For that stock? A. Yes sir.

Q Did you deliver a ticket to them?

A Yes sir.

Q Did the ticket show the stock outside of the company distributed to them in more than one ditch for the year 1916?

A Yes sir, as far as I know.

Q You say you made the tickets, then don't you know?

A I don't understand your question.

MR. WAHLQUIST: Have you your last year's tickets, Mr. Huber?

MR. HUBER: I don't know whether I have or not.

MR. WAHLQUIST: We would like to have them before we close our testimony.

THE COURT: You can make a demand for them, and if you do not get them, you can prove it some other way.

MR. WAHLQUIST: We will ask you to produce them before we close.

MR. CHASE HATCH: We will try to get them.

MR. WAHLQUIST: Then we will excuse Mr. Hair.

THE COURT: If they have not got them you may proceed now, you don't need to wait, if they haven't the tickets, why, you may proceed in some other way.

MR. CHASE HATCH: We object to proving it in another way, because no demand was ever made until this time, no notice served upon us, in answer to our counterclaim showing there would be a contest.

THE COURT: I do not think it is of enough importance to make much delay about.

MR. CHASE HATCH: We do not care for the delay, just want an objection in the record.

THE COURT: I will give them until tomorrow to get them.

MR. CHASE HATCH: We cannot get them tomorrow, could

not possibly get them to town before four thirty, and we would prefer they go ahead and let us save our record and not prolong the hearing.

THE COURT: I understand your objection is you are not given time to get them, is that your objection?

MR. CHASE HATCH: We shall enter our objection as they proceed with the evidence.

MR. WAHLQUIST: What was the last question, Mr. Reporter?

(question read)

MR. CHASE HATCH: May I ask the witness a question along this line?

MR. WAHLQUIST: Yes.

CROSS EXAMINATION by Mr. Chase Hatch.

Q In making out water tickets, do you keep a stub or duplicate of the ticket issued?

A Yes sir, usually.

Q Did you for 1916?

A I think so.

Q Does that stub show all the information that is upon the ticket or not?

A I didn't catch it.

Q Does the stub set forth what is on the ticket, all of it?

A Exactly.

Q And what became of that stub?

A I guess I have it at home.

MR. CHASE HATCH: That is all.

MR. WAHLQUIST: Where is your home?

A Midway.

MR. WAHLQUIST: We are in the same boat, your Honor, it would take as long to get the stub as it would to get the original ticket.

THE COURT: You may proceed, Mr. Wahlquist.

DIRECT EXAMINATION by Mr. Wahlquist continued.

Q Do you know, Mr. Hair, how many acres of water right outside of the company you issued tickets for to Nephi and Joseph E. Huber in 1916?

A If my memory serves me right, I think it is twenty-three.

MR. CHASE HATCH: If the court please, we move to strike that out.

THE COURT: That may go out, not being responsive at all. Listen to the question, and answer yes or no. You are not asked how many shares. Read the question.

(Question read)

Q You can answer that yes or no.

THE COURT: The question is whether you know now, whether you have a distinct recollection?

A No.

THE COURT: You don't know.

MR. WAHLQUIST: You may cross examine.

CROSS EXAMINATION by Mr. Chase Hatch.

Q I understand you to say you distributed the water in 1915 to Nephi and Joseph Huber? A. Yes sir.

Q How many times did you distribute the water to them?

A Every time their turn come.

Q How many times did the turn come?

A About latter part of the season, I think it is every three days.

Q And how many ditches did you distribute it in?

A I think it is five ditches.

Q Well, do you know? A. Yes sir.

Q How much in each ditch?

A Want me to give it in rotation?

Q If you know? I will change the question. How much water did you distribute to them at each turn?

A In each ditch, you mean?

Q No, altogether for each irrigation turn how much water did you

distribute to them?

A I don't quite catch your question.

Q Do you know how many second feet of water they used each irrigation?

A No sir, I don't.

Q Did you turn the water in each time?

A Most all of the ditches, except one of them.

Q Except one, who turned it in that?

A They turned it in themselves.

Q Were you present? A. No sir.

Q Do you know how often they turned it in?

A Yes, when their ticket called for it.

Q Were you there all the time?

A I was there immediately after they turned it in.

Q Were you there before they turned it on ?

A I had to be there to turn off one stream, and they took the other.

Q But they turned it on in one of the ditches practically all of the time, do you mean?

A Pretty much all the time.

Q Did they turn on any other ditches any time?

A In the spring they turned that on too.

Q Who turned the water off when their turn was through?

A Myself.

Q In each instance? A. Yes sir.

Q From all ditches? A. Yes sir.

Q Did you ever keep any measurements of the amount of water used?

A I have one.

Q You are sure as to you turning their water off from all the ditches all the time?

A Turned it off when their time was up.

Q Didn't any of them ever turn it off when they were through irrigating?

- A I would be right there, and if it was not turned off--
- Q Answer the question, didn't either of the Hubers turn it off when they were through irrigating?
- A I don't remember.
- Q Simply judged they never turned it off?
- A Well, I can say now they didn't.
- Q They didn't? A. No sir.
- Q Never?
- A Now six ditches. I commence thinking there is another ditch, of course,--
- Q I am talking of the water of Nephi and Joseph E. Huber?
- A Snake Creek, this has reference to just Snake creek or also Pine creek?
- Q Just Snake creek, they don't claim any water in Pine creek, I understand?
- A I turned it off.
- Q But they turned it on in one ditch?
- A Two ditches.
- Q And did you measure the water that you distributed to them?
- A No sir.
- Q Do you know whether or not they measured the water when they turned it in?
- A There is one place they can measure it, that is one place in the Huber ditch.
- Q I say do you know whether they measured the amount they turned in in the one or two ditches they turned it in?
- A I couldn't say.
- Q So you could not say the number of second feet they used during each irrigation?
- A I have been down to the weir when it has been turned in and commissioner give us a mark there on the Huber ditch.
- Q I am asking you if you know the amount they used each irrigation?

MR. WAHLQUIST: I object as not proper cross examination. We never asked anything as to the amount of

water on direct at all.

MR. CHASE HATCH: He is distributing water, and want to find out what was done.

MR. WAHLQUIST: Distributing by decree.

THE COURT: I am inclined to think it is not cross examination. Number of questions were asked of the witness to qualify him to testify what water was turned, and he finally said he didn't know, and give no evidence as to the quantity of water, number of shares, or any other way.

MR. CHASE HATCH: Your Honor, we move to strike all testimony relative to the distribution by ticket for the reason it is incompetent, there being nothing to connect these defendants with it, or show any right of the company.

THE COURT: Your motion will be denied with reference to that, because if the ticket should be produced or secondary evidence introduced as to the contents of the ticket and shown they were delivered to this defendant and contents of the ticket would be evidence admissible in this case, then show the acceptance by them of the ticket and water under it of that quantity, I will not strike it unless they fail to make any showing. Of course, unless they show the contents of the ticket it makes no difference whether it is in or out.

MR. CHASE HATCH: Exception. That is all.

MR. WAHLQUIST: We hardly understand the position the court takes with reference to the ticket. We did not go into the contents of it.

THE COURT: Haven't yet, and unless you do this may be stricken out. Doesn't make any difference whether the evidence remains in or not unless you show the contents.

REDIRECT EXAMINATION by Mr. Wahlquist.

Q What was the nature of the tickets that you issued for the distribution of water to Nephi and Joseph E. Huber?

A Give the date on the ticket and when the turn come.

Q Did it state, each ticket state from what ditch they were

used? A. Yes sir.

Q Were the ditches named on the ticket?

A Yes sir.

Q And were any of those ditches or tickets where there was more than one stream in the ditch at the time?

MR. CHASE HATCH: If the court please, object to all this on the ground it is not the best evidence.

THE COURT: Objection will be sustained until you have time to produce them, they have been delivered to you. If you desire you may have time to produce them. If you do not produce them, then, of course, you may prove by the witness what the contents were. Objection is sustained at the present time until they have an opportunity to produce them.

MR. WAHLQUIST: I so understood to be the ruling of the court sometime ago. Then they insisted we go on, they could not produce them.

THE COURT: I didn't so understand it.

MR. CHASE HATCH: I say we cannot produce the tickets, this duplicate, it is in their possession.

THE COURT: No, the duplicate was never in your possession, and that being the case, the contents of the duplicate would be immaterial. He may show if he recollects the contents of the paper delivered to you, that is the one question at all.

MR. CHASE HATCH: WE DO NOT OBJECT TO THAT If they confine themselves to the tickets and what they contain. Our objection is under the ruling of the court that the question should be specific in order to be competent and * material.

THE COURT: Do I understand you waive the time to produce the ticket ?

MR. CHASE HATCH: Yes.

THE COURT: Then the objection is overruled, and he may state if he remembers what the contents of the ticket was.

MR. WAHLQUIST: Read the last question.

(Question read)

- A There was one ditch had part of another stream in.
- Q Then did the ticket indicate to Joseph and Nephi Huber the proportion of water they were to take out of that stream?
- A Not the proportion.
- Q What did the ticket indicate to them?
- A They understood what portion they were to take out.
- Q That may go out what they understood. What did the ticket tell them, did it call for a definite number of shares out of the stream?
- A Yes sir.
- Q In this particular ditch how many shares did it tell them?
- A They had twenty shares in this ditch.
- Q What was the name of that particular ditch?
- A The ditch was the West Bench or Gerber ditch.

THE COURT: Does that mean twenty shares of water right outside of the company, not represented by stock?

- A I couldn't tell you that.
- Q Is was that part-- twenty of the aggregate number of both shares and acres they were entitled to?
- A Yes sir.
- Q And twenty units of that aggregate was represented in this particular ditch?
- A Yes sir.

MR. CHASE HATCH: Object to this question as leading.

MR. WAHLQUIST: That is leading, it was simply to find out.

- Q Do you know the number of acres outside of the company for which you issued tickets to Nephi and Joseph E. Huber in 1916?
- A Yes sir.
- Q The aggregate number?
- A Yes sir.
- Q How much?
- A Twenty-three.

Q Do you know the number of shares in the company for which you issued tickets to Nephi and Joseph E. Huber in 1916?

A Yes sir.

Q How many?

A Thirty-two.

Q Did each ticket state the number-- in issuing the tickets did you use any distinction as to designating what was shares inside and what was shares outside of the company?

A No sir.

Q Did each ticket that you issued state the number of shares or acres that it represented in that particular ditch?

A Yes sir.

Q Would it state-- what else would it state on the ticket?

A Time to take the water and time to turn it off and the hour.

Q And would it state whether it would take all the water in the ditch or a portion of the water that was in the ditch?

A No sir, they understood that.

MR. CHASE HATCH: If the court please, we move to strike the latter part.

THE COURT: That may go out, the answer is complete with that out.

MR. WAHLQUIST: It should go out, it is not responsive.

Q Were the tickets issued to them ~~in~~ on ditches where there was more than one stream of water in the ditch?

A One ditch.

Q In one ditch, and in that one instance did the ticket indicate what portion of the stream they were to have?

A No sir.

Q Then what means were taken to see that they only got their just proportion out of the stream?

A I was there to tell them.

Q You would be there and turn it to them?

A No sir, they turned it, and if they took more than their portion, I would have to see it they only took their share.

Q Did you inform them orally as to the amount?

A They understood that there was an understanding.

Q You had told them, had you, orally?

A Yes sir.

Q By word of mouth? A. Yes sir.

Q Did you go and see if they took more or less than their share? A. Yes sir.

Q If they took more or less, if they took more than their share, you would turn some off of them?

A Yes sir.

MR. CHASE HATCH: We object to the leading questions continuously.

MR. WAHLQUIST: It may go out.

Q Was that similar to the procedure in 1915?

A Yes sir.

Q Was it similar to the procedure in 1910, when you were secretary? A. Yes sir.

MR. CHASE HATCH: Secretary?

MR. WAHLQUIST: Watermaster, excuse me. Cross examine.

CROSS EXAMINATION by Mr. Chase Hatch:

Q How did you determine how much was their portion in this ditch that the water was divided?

MR. WAHLQUIST: Object to that as irrelevant and immaterial.

THE COURT: Objection is overruled.

A Well, the party below would complain of not having their share of water, and I would go to the Hubers and tell them they had more than their share. They would tell me to go and divide it, and I did it.

Q How often was that the case?

A Quite often.

Q Did you divide it when the party below did not complain?

A When I was there and saw they didn't have their share.

Q How did you determine what was their share?

A I had my marks.

Q How did you make those marks?

A I made it on the weir.

Q How much water was their share?

A We had a weir below. Hober's run about six and a half second feet, then I corresponded their mark to the bottom of the weir and put a nail in there, figuring on half a stream.

Q One half of the stream?

A They should have half the stream, Huber's should, and if you will understand me the stream just below Huber's and just above the weir, and, of course, some water has to pass their dam to make sufficient with this Gerber spring to make the other stream below, and I divided the stream below on the weir, and when it was not up to this nail I knew Huber's had more than they wanted.

Q Do you know how much water Huber had?

A In this particular ditch?

MR. WAHLQUIST: Object to that, we are not dealing in second feet, we are dealing in acres.

THE COURT: Objection overruled. You have put this man on ~~xxx~~ as watermaster, who has been dividing water.

MR. WAHLQUIST: Not by second feet, only by time.

THE COURT: I understand that, but it is as to his knowledge of water. When he said they had too much he went and took it out, I think it is proper to find out what he knows about what constitutes too much.

A I should judge little better than three second feet over the weir, way I have the marks on the weir.

Q Which ditch was this you divided the waters?

A This was the Gerber spring, they call it the west ditch.

Q Now, did Nephi and Joseph E. Huber irrigate any land under that ditch?

A Yes sir.

Q You are positive of that?

A They irrigate it, I know.

Q Any of their own land?

A I don't know whether it is their land or not, they irrigate the lands.

Q Do you know which ditch they irrigate the lands purchased from Robert Krebs under?

A They irrigate some under this ditch and some under the Mound ditch.

Q Do you know whether the portion they irrigate under this ditch is irrigated on the stock in the company or on their water right outside of the company?

A I couldn't say as to that.

Q You are positive they irrigate some of the Krebs land under the Gerber ditch?

A I am particularly positive.

Q Well now, what is the name of the ditch that you testified to they took the water out, that is, besides the Spring ditch?

A Huber ditch.

THE COURT: Let me understand that, when you said you turned twenty-three shares to them was it in the Huber ditch or Gerber ditch?

A Twenty shares in the Gerber ditch.

MR. CHASE HATCH: Just a moment. I think the court-- he said he turned twenty-three shares of water outside of the company.

THE COURT: That is what I thought.

MR. WAHLQUIST: In an aggregate, but did not say what ditch.

THE COURT: I was asking what ditch he turned it in.

MR. CHASE HATCH: I thought the court didn't understand.

THE COURT: I am glad you spoke of it, I understood him he issued tickets and turned them water for twenty-three shares.

MR. WAHLQUIST: And thirty-two of stock.

THE COURT: This went in several ditches,

A Yes.

THE COURT: You may proceed.

Q Did I understand you to say you knew where the Krebs land was belonging to Hubers?

A Not definite, I couldn't say for all of it.

Q Are you sure as to any part of it?

A Yes sir.

Q Then do you know how much of the Krebs land Nephi and Joseph E. Huber waters from the Gerber ditch?

A I could not say exactly.

Q Do you know what other ditch they water the Krebs land through?

A Water some through the Mound.

Q And that is the ditch that you said they turned the water in theirselves?

A. No sir.

Q Which one was it?

A Huber ditch.

Q With reference to the Krebs land, do you know whether they watered any of it through the Huber ditch or not?

A I think not.

Q If you don't know the location of the Krebs land definitely, how can you tell whether they do or not?

A They ask for the shares of water to use there, and I give it to them.

Q Who asks for the shares in the Gerber ditch?

A I suppose the ones that were irrigating.

Q Do you know who asks?

A No sir, I don't.

Q Then why do you say they ask for the water in that ditch?

A Just ask for it, they ain't satisfied with the waters.

Q Who asks for it?

A Of course, I have my runs from years previous, I got my runs from Charlie Bronson.

Q During the year 1915 was Joseph Huber and Nephi Huber satisfied with the way you distributed the water, do you know?

A Seemed to be.

Q Didn't Joseph E. Huber refuse for a time, at least, to accept your ticket at all during 1915?

A He just refused and I took the president up and he was glad to take the ticket after that, said he was going to use the water whenever he wanted to.

Q He said he was going to use the water whenever he wanted to?

A I told him he couldn't do that because we couldn't regulate the water on that basis.

Q Didn't he say he would use the water when he needed it instead of when he wanted to?

A Said he would use the water whenever he wanted to.

Q In those words, or are those the substance?

A Those are the words.

Q Exact words? A. Yes sir.

Q What else was said at that time?

A I don't just remember.

Q Can you give us the exact words you used at that time?

MR. WAHLQUIST: WE OBJECT, your Honor, that is not proper cross examination.

THE COURT: Yes, I am inclined to think it is, I think the effect of your evidence was, at least, the object of it was to show the parties had acquiesced in an arrangement whereby twenty-three acres was designated as the amount. Any conversation which may have been had in the course of this administration is proper.

A I told him as watermaster I had to have some regulation, I could not have people just using the water as they wanted to. He got rather warm about it, and I told him I thought we could regulate it all right, but I would see the president about it, so I went down and got the president and brought him up.

Q You are not attempting to give the exact language, are you?

A Yes sir, that is about the language used.

Q You didn't say it to him just like you said it to me, did you?

A Must about the same.

Q I asked you if you could give the exact language, you attempted to give the exact language of his statement, and I was just seeing if you could give other exact language. What time of year was this?

A I could not say. The forepart of the irrigation season.

Q And how had the water been divided between the several ditches at that time?

A How had it been divided?

Q Yes, in 1915 how many acres were in the Gerber ditch?

A Same as 1916.

Q How many were in the Huber ditch?

A I don't just remember the exact number in the Huber ditch, but I think it is forty-three.

Q And twenty in the Gerber ditch?

A And twenty in the Gerber ditch.

Q How many in the Mound ditch?

A Seven.

Q Were there any other ditches?

A Yes sir, there was Springer's spring.

Q How many acres under that ditch?

A I think there is twenty-four, if my memory serves me right.

Q Then you have a whole lot more water ~~is~~ distributed below the Nephi and Joseph Huber?

A I have the old gentleman's.

Q I am only asking you as to Nephi and Joseph E. Huber?

MR. WAHLQUIST: May I ask a question, your Honor?

THE COURT: Yes.

MR. WAHLQUIST: Was Joseph E. and Nephi Huber farming the land of the John Huber estate? and using all the water together during those years?

A The entire land.

MR. WAHLQUIST: And was any attempt made to keep the Huber lands, the John Huber estate lands and water rights separate and distinct from the Nephi Huber and Joseph E. Huber

land and water right?

A Of course the secretary give me a list.

MR. WAHLQUIST: Was there any attempt made by you or by them to keep the waters from the two farms separate?

A No sir.

MR. CHASE HATCH: Then we move to strike all this testimony as being irrelevant and immaterial for the purpose it is offered.

MR. WAHLQUIST: That is all you have got out on cross examination?

MR. CHASE HATCH: All this witness' testimony relative to this distribution under these tickets.

THE COURT: I don't understate that the witness has said that his testimony related to the water delivered to the estate there as well as these others. He merely says now he did deliver to them all the water that was to go to the estate land.

MR. CHASE HATCH: When I asked him if he had distributed more than belonged to this he said yes.

THE COURT: I understood he gave the twenty-six acres twenty-four, seven and three, included all the lands. Of course those statements the court will not consider as applying to these two defendants.

MR. A. C. HATCH: What were those figures of the land?

MR. CHASE HATCH: Forty-three, twenty-seven and twenty-four.

THE COURT: No, seven and twenty-four I have it.

MR. CHASE HATCH: Forty-three, seven and twenty-four.

THE COURT: That is right.

MR. CHASE HATCH: My objection is this, they are attempting to limit our ownership by showing, attempting to show an acquiescence in tickets in which they are mingling other interests and they are not segregating them so that we can tell whether they are claiming against Nephi and Joseph

E. Huber, or how they are claiming.

THE COURT: I do not think all the evidence given by this witness should be stricken out. I think some of it applies to these particular defendants, and your motion is to strike all the evidence in relation to it. I think your motion must be denied, because there is some evidence that applies directly to these two defendants, Nephi and Joseph.

MR. CHASE HATCH: I will proceed with another question or two.

Q Why did you issue tickets for twenty-three acres water right outside of the company to Hoseph E. and Nephi Huber?

A Well, they were running the farm, of course, and I issued the water stock as they have wanted it on the several ditches.

Q Did they ask for twenty-three acres, or only twenty-three acres.

A They never ask for any at all. I gave it to them.

Q Did they ever demand more or claim more than twenty-three acres out of the company to you?

A No sir.

Q Neither of them. Did neither of them claim they were entitled to more than twenty-three acres outside of the company, to you?

A I don't remember. I heard a complaint of it, but whether they complained to me or not, I couldn't say.

Q Do you know they didn't complain to you?

A They complained to me about water rights there, not having sufficient water.

MR. WAHLQUIST: I move that be stricken out as not responsive to the question.

THE COURT: Motion is denied.

Q Can you say they never claimed more than twenty-three acres of water right outside of the company?

MR. WAHLQUIST: To him?

Q To you?

A My memory don't serve me they have ever complained to me.

Q I didn't catch that answer.

A My memory doesn't serve me that way, they complained of having more water. If they had, they would have been after it.

Q What was the complaint of Joseph E. Huber at the time in 1915 that you have testified to?

A He thought he had a better right than anyone else. He was at the head of the creek.

MR. CHASE HATCH: Move to strike the answer.

MR. WAHLQUIST: We resist.

MR. CHASE HATCH: Not responsive.

THE COURT: The answer, if I understood it right, must go out. Read it.

(Answer read)

THE COURT: That may go out. I don't take it this witness can tell the thought.

MR. WAHLQUIST: Unless that is what he said.

WITNESS: That is what he said.

THE COURT: I didn't so understand it. I understood this witness to say that he thought.

MR. WAHLQUIST: Huber's statement was he thought?

THE COURT: That may remain in.

Q What did Joseph E. Huber say at that time?

A I gave it to you in substance.

Q Very well.

A His stock was out of the company. He thought stock outside of the company was better right than stock in the company, and thought he had an older right than some of the others.

MR. THURMAN: Did you say older right, or old and right?

A Older right.

Q Was this conversation when Joseph E. Huber was through watering, or when you were turning the water in, or when?

A I think I was going up to deliver tickets then.

Q Do you know whether or not he was irrigating at the time?

A No sir, I don't know whether he was irrigating or not, I went

to his home, he wasn't there, so I came down and went up on the land where he was at.

Q You say you based the acres or shares you put on each ticket on information received from the Secretary of the company?

A No sir.

Q What did you base it on?

A I didn't get your question.

Q Read the question.

(question read)

A I received it on the basis of the secretary, sure.

MR. WAHLQUIST: Your answer then should have been yes sir.

A Yes sir.

Q How, you say it was the Huber ditch they turned the water in themselves? A. Yes sir.

Q And that you were present every time when they turned it in?

A About.

Q Did you have an assistant in your work?

A No sir.

Q What was your custom with reference to the people generally turning the water into their ditches, did you turn all of it in for them? A. No sir.

MR. JACOB EVANS: Object to that as immaterial and incompetent.

THE COURT: Objection is sustained. I do not think it is material what was done with the others.

MR. CHASE HATCH: Test his credibility; a man saying he was there practically every time.

MR. JACOB EVANS: There is nothing but three acres of land involved in this matter, and we have taken up nearly half a day of the court's time. I don't see any real necessity of prolonging this thing longer. If there is some object or motive, or something to be gained by proceeding with this, it would be a different proposition, but there are many

people here want to introduce their testimony and want to get through, and I think there should be some limit when there is only three acres involved. If we took the same amount of time for all the acres involved in this controversy, we will be here four or five years.

THE COURT: That may be true, but three acres may be just as important to a small holder as a larger quantity.

MR. JACOB EVANS: That is true, but we know what their contention is. It has all been gone into thoroughly.

THE COURT: I take it counsel will proceed as rapidly as they can.

MR. CHASE HATCH: We are ready to stop now. I think the question has been threshed out sufficiently that the court has an idea.

A. C. HATCH: called by the defendant Midway Irrigation Company, testifies as follows:

DIRECT EXAMINATION by Mr. Wahlquist.

Q Your name?

A Abram Chase Hatch.

Q Where do you reside?

A Heber City, Utah.

Q Your profession?

A Lawyer and farmer and merchant.

Q Were you counsel for one of the parties in a suit entitled John Krebs plaintiff, against Robert Krebs defendant, that was tried in the District Court of Wasatch County in 1905?

A I don't remember the year, I was counsel for John Krebs in a case in Wasatch county against Robert Krebs.

Q I will ask you to look at these findings and see if you can refresh your memory ~~on~~ from them?

MR. CHASE HATCH: Let me understand, does the Midway

Irrigation Company claim these three shares of water as against us?

MR. WAHLQUIST: The Midway Irrigation Company claims that you have only the twenty-three shares.

MR. CHASE HATCH: Do they claim the three shares that are in dispute?

MR. WAHLQUIST: No, Gotlieb Buhler claims to have acquired three shares from the water rights that belonged to Robert Krebs by virtue of the decree in this action where a deed of conveyance from John Krebs to Robert Krebs was set aside for the land and appurtenant water right.

MR. CHASE HATCH: We do not dispute Buhler's claim to three shares of water.

THE COURT: Is Mr. Buhler a party to this suit?

MR. WAHLQUIST: Yes.

THE COURT: Has he made his proof?

MR. WAHLQUIST: No, he has not made his proof yet. You say you don't dispute the claim of Buhler getting three shares from Robert Krebs?

MR. CHASE HATCH: No, we say we have water in addition to any claim of Robert Buhler. The water we have transferred to us with our land was different water from that that Buhler claimed.

MR. WAHLQUIST: Then I take it we will not need this testimony.

WILLIAM W. WILSON, recalled.

DIRECT EXAMINATION by Mr. Wahlquist.

Q You are the secretary of the Midway Irrigation Company?

A Yes sir.

Q And have charge of the books of the company?

A Yes sir.

Q Do you know who was the first secretary of the company upon

its organization? A. Yes sir.

A Attewall Wootten, Sr.

Q Do you know who succeeded him?

A No sir, I don't.

Q Do you know whether or not--

A I withdraw my answer, I think, I would not be positive, I think he was the first president and Alva J. Alexander was the first secretary.

Q Do you know whether or not at one time John Huber was secretary to the company? A. Yes sir.

Q Were you familiar with the handwriting of John Huber?

A Yes sir.

Q I will ask you to look at page 66 of this book which is marked as Exhibit 171, and say whether or not you know whose handwriting that is?

A Yes sir.

Q Whose?

A John Huber's.

Q And what is that page and the page opposite?

A 66 and 67.

Q I say what is the items there, what does it purport to be?

A It is the recorded right of Nephi and Joseph Huber for their water right outside of the company.

MR. WAHLQUIST: We offer Exhibit 171, the writing on the two pages.

MR. CHASE HATCH: Object to this, your Honor, as incompetent for any purpose against these defendants.

THE COURT: Objection is sustained.

MR. WAHLQUIST: That is all the rebuttal, your Honor.

NEPHEI HUBER, Recalled

DIRECT EXAMINATION by Mr. Chase Hatch.

Q From what ditch do you irrigate the twenty-six acres of land you testified to as being purchased from Robert Krebs, the water right that is represented by stock in the irrigation company?

A We water all of that land except three acres, which we water out of the Mound ditch. The rest of it, the other twenty-three acres, we water out of the two Huber ditches, that is, the Springer spring ditch some call it, but we call them just the Huber ditch.

Q And the Gerber ditch the same as either one of those?

A No sir.

Q Then none of that twenty-six acres is watered out of the Gerber ditch?

A None whatever.

Q And with reference to the turning of the water in and out of that ditch, who has done that when you irrigated this twenty-six acres of land?

A Sometimes I do the irrigating. In the last year or two my brother Joe and brother John have been doing the irrigating principally. Last year or two I have not turned any in of the water, but previous to that I turned it in a number of times. I cannot recall the dates-- and stopped it off.

CROSS EXAMINATION by Mr. Wahlquist.

Q What ditch are the three acres irrigated out of?

A That is irrigated out of the Mound ditch.

Q Then are we to understand that the twenty-six acres that you claim to irrigated with the Krebs water right are not contiguous, do not constitute one tract?

A Of the land, no sir, they do not constitute one tract, it is in three different deeds.

Q I am not asking you about deeds. It is the tract, may be a number of deeds.

A It is in two tracts.

Q There is twenty-three acres in the one tract and three acres separate in another place?

A No sir, there is seventeen in one tract, and the other tract constitutes the old Rob Krebs homestead, and two acres of land that he received, two and a fraction, that he bought of John Huber, which joins the seventy-three acre tract which is a homestead of seventy-four acres and the two acres join, and they are connected together.

Q But neither one of those, neither the Huber land nor the Krebs Homestead land is under the Mound ditch?

A No.

Q And the three acres that are under the Mound ditch is no part of the land you acquired from Krebs?

A Yes sir, it is.

Q From Robert Krebs?

A From Robert Krebs.

Q But not contiguous to the others?

A Not mingled with the homestead.

Q And does not constitute the one tract?

A The three acres that we water under the Mound ditch is a part of the seventeen acre tract, if you understand me right, the creel cuts the land in two.

Q Snake creek ?

A Yes, and three acres of it is on the west side of the creek, which we water out of the Mound ditch. The balance of it is on the north side of the creek, northeast side of the creek, and that we water out of the Huber ditch.

MR. CHASE HATCH: That is all.

MR. CHASE HATCH: I would like to call Mr. George Schear on another little matter.

THE COURT: Very well, what claim is this?

MR. CHASE HATCH: George Schear.

GEORGE SCHEAR, called in his own behalf, being duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Chase Hatch.

Q State your name?

A George Schear.

Q Place of residence?

A Midway, Wasatch county.

Q Occupation?

A Farmer.

Q Are you the owner of any real estate in Wasatch county?

A Yes sir.

Q How many acres?

A Twenty.

Q Do you know what section and township?

A Section 22.

Q Township 3 South Range 4 East, Salt Lake Meridian?

A Yes sir.

Q What, if any, water right have you for that land?

A I have ten shares of stock.

Q Stock or water right?

A Water right.

Q And for how long a time has that been, that ten acres of water been used upon the land you own?

A As long as I can remember. That is about twenty-five years.

Q From whom did you get the land?

A From my father.

Q From your father's estate?

A Father's estate.

Q And was there originally more water than the land?

A No sir.

Q And besides the ten acres that you have applicable to the ten acres of water right applicable to the ten acres of land, do you use any other water during a portion of the year?

A Yes sir.

Q What is that?

A The high water of Pine Creek.

Q And how many times during each season do you irrigate with this high water?

A I most generally take it when the high water comes on, and keep it until it goes off.

Q And what is the nature of the crops you raise?

A Hay, some grain.

MR. THURMAN: Is that the high water, or all of it?

MR. CHASE HATCH: All of it.

Q About when do you last use the high water in irrigating that tract?

A Oh, as near as I can tell sometime about along about the first of July.

Q And do you use sufficient of the high water to thoroughly irrigate your land while the high water is on?

A Yes sir.

Q The full twenty acres?

A Yes sir.

Q The ten acres of regular water right is what was formerly a part of the water right of Alice Schear?

A Yes sir.

MR. THURMAN: If the court please, I would like to put in two exhibits for defendants I represent up in Wasatch county at this time. Exhibit 172, purports to be a notice filed by the Timpanogas Irrigation Company, defendant here, for 65 cubic feet of water per second of the waters of Provo river. It is dated 15th day of May, 1897, recorded May 15, 1897. This is a certified copy of the record. In connection with this, I will say that while the notice calls for that, we are bound by our stipulation made up in Wasatch county. I put this in as the initiation of the appropriation, because

the stipulation has not thus far been agreed to by all parties, and I am making proof.

THE COURT: It may be received, if there is no objection.

MR. WAHLQUIST: Mr. Thurman, were you going to offer that voluminous stipulation?

MR. THURMAN: No, I was going to speak of it. The exhibit 173 purports to be a notice given by the Extension Irrigation Company, defendant I represent in Wasatch county for 20 cubic feet per second of water of Provo river, dated September 1897, and recorded by the recorder, and the exhibit is a certified copy of the record.

THE COURT: It may also be received, if there is no objection.

MR. THURMAN: Now, in relation to the stipulation made in Wasatch county, I desire to say this, that since that stipulation was made by and among the water users in Wasatch county, there are some little questions raised against an additional right allowed in the stipulation to the Timpanogas Irrigation Company, and the Timpanogas Irrigation Company as to that right which was for a thousand acres put in as the 14th Class concede that may be dropped to the 16th Class. Matter in which nobody is injured, will be injured by it, but the Timpanogas Company, and therefore we assume it will be satisfactory as far as that feature is concerned.

I would like the record to show that later on we hope to ~~xxxxxx~~ be able to have stipulation formally signed as to the parties down below here who have not entered into that stipulation. That is a matter that will have to be taken care of in some way or other later. I believe that-- have you had any talk about it?

MR. RAY: Yes, I have been discussing the matter with Mr. Murdock and Mr. Wentz, and the city attorney of Provo

City has asked Mr. Thomas be here tomorrow in order that we may find whether Provo city will sign it. It is necessary they all do to make it effectual.

MR. THURMAN: Either sign it or appear in open court.

MR. WAHLQUIST: There were a number of parties owning separate interests that were included in that stipulation, and some named as parties, to whom Midway Irrigation Company distributes water, and, under the ruling of the court on December 27th, it becomes necessary their separate rights be proven. We would like to introduce formal, prima facie proof covering those rights.

THE COURT: They are not stockholders in the company?

MR. WAHLQUIST: They are not stockholders in the company. We can do so in a few minutes.

MR. A. C. HATCH: I understand it does not increase the aggregate number of acres claimed under the stipulation?

MR. WAHLQUIST: That is my understanding of it.

MR. A. C. HATCH: Don't intend to offer any evidence increasing that aggregate acreage?

MR. WAHLQUIST: That is my understanding, because the total aggregate then does not exceed what we have stipulated upon. It is simply to show-- the judge intimated he would not be able to show who were the owners of those water rights unless it was proven and pleaded in some form.

THE COURT: Or stipulated.

MR. A. C. HATCH: My object in asking the question was this. When we come to check up it may be the proof shows an aggregate of more acres than there are on the Midway side of the Provo river, and we have stipulated and agreed as to the acreage they have, and if he can make proof of it, if it shall be necessary, to the exact number of acres, we did not want to go into that, and I understand that any acreage that has been proven by Mr. Schear and by Mr. Huber and Huber estate, they are all included within that acreage in the stipulation.

MR. WAHLQUIST: That is my understanding.

THE COURT: Aggregate of the acreage under the Midway Irrigation Company's ditch.

MR. A. C. HATCH: Ditches and the creek called Snake creek.

THE COURT: And its tributaries.

MR. A. C. HATCH: Yes, and all the tributaries.

THE COURT: There was Pine creek.

MR. WAHLQUIST: We can get it in with a little proof, so that there is nothing to base a finding through the Midway Irrigation Company's canal these parties are served. That is the object of it.

MR. THURMAN: I understand you are bringing this within the stipulation?

MR. WAHLQUIST: Only as to the separate interests.

WILLIAM W. WILSON, Recalled, testifies as follows:

DIRECT EXAMINATION by Mr. Wahlquist.

Q Your name is William W. Wilson?

A Yes sir.

Q You are a resident of Midway?

A Yes sir.

Q How long have you resided there?

A Twenty-five or thirty years.

Q Are you acquaint^{ed} with all the parties that receive water from the Midway Irrigation Company who are not stockholders in the company?

A. Yes sir.

Q Have you means of determining the amount of acres owned by each of those parties?

A. Yes sir.

Q I wish you would refer to that and state the amount of water owned not included by stock in the company, by John U. Buhler?

A Six shares.

- A Six shares.
- Q How many?
- A Six.
- Q Acres? A. Yes.
- Q And Gotlieb Buhler, how many acres?
- A He has five.
- Q Does that include the three acres acquired from the Krebs estate? A. Yes sir.
- Q J. Brigham Wilson ?
- A One.
- Q Where did he acquire that from, if you know?
- A Henry T. Coleman.
- Q Andreas Bergener?
- A I would not be positive, I will have to look him up. He has one.
- Q And orson P. Matthews?
- A He has five.
- A Frederick Farrer.
- A He had five.
- Q Henry Watkins?
- A He has nine.
- Q Davis McGimpsey?
- A Nineteen.
- Q Felix Martin?
- A I believe he has fourteen, I will look him up-- fourteen.
- Q Jacob Kummer?
- A The next is Gibson.
- Q Wait a minute, how many has Jacob Kummer?
- A He has five.
- Q William Bonner?
- A He has one.
- Q Outside of the company? A. Yes sir.
- Q And not included in his acreage under the Island ditch?
- A I think not. I don't think he uses it there, of course, I could not tell those things positive. The water master could tell

those things better, I simply handle the list, and not acquainted where they use them much.

Q Thomas Monks?

A Has eleven.

Q Henry Zinger outside of his Island ditch interest?

A I cannot tell you that. I can tell you what he has--

Q Has he one acre outside of his Island ditch interest?

A He has four shares.

Q Where did he get his one acre?

A That was unincorporated stock this date, in 1906. Then he got the other from Mary Abegglen.

Q We are not concerned with that. I move that last part be stricken out, because that is covered by another stipulation in the Island ditch. As to lands there only one acre is what we are claiming through the Midway.

THE COURT: That may go out.

Q Mary Schoni and Joseph Schoni together?

A They have four.

Q Acres? A. Yes sir.

Q Cordelia Wilson, George J. Wilson, and James T. Wilson, as successors of the estate of George Wilson?

A Fifty-seven.

Q David A. Gibson?

A I think he had eleven, I will look for sure. He has seven.

Q Frederick Remund?

A He has five, Frederick Remund, Sr.

Q William L. Van Wagoner, outside of the company?

A He has one.

Q John U. Probst?

A I think it is two, I won't be sure, I will look it up, Two shares.

Q Harold Schear and Emily Carmack together?

A They have twelve.

MR. WAHNDQUIST: I ask leave to amend the complaint filed. It states ten together. I was under the impression

George Schear had the twelve.

THE COURT: That may be done.

Q George A. Huntington?

A He has one, I think.

Q Anna Luncford?

A She has one.

Q Who was she formerly?

A Mrs. Anna Smith, Mrs. Stephen Smith.

Q Widow of Stephen H. Smith? A. Yes sir.

Q The heirs of James B. Hamilton?

A Seventy-four.

Q What part of that is in the Island ditch?

A Now, I would not be positive.

MR. WAHLQUIST: Well, we will stipulate that he has thirty-three in the Island ditch, and we are setting up in our complaint, he has forty-one inclusive of the Island ditch, that is all we are claiming here, is forty-one.

Q All of those parties are recognized by the Midway Irrigation Company, are they?

A Yes sir.

Q And the water is distributed to them under the direction of the commissioner of the Midway Irrigation Company?

A Yes sir.

MR. WAHLQUIST: That is all.

MR. MCDONALD: If the court please, there is one defendant Levi North, who has succeeded to all the rights of Ed Dillon and the rights of Ed Dillon are fixed in what is known as the Fulton decree in Wasatch county, and stipulation so far as it is concerned in Wasatch county, determines the place it shall occupy; that is the rights are fixed in the stipulation, or recognized in the Fulton decree. I have been trying for couple of days to get Mr. North, and cannot

make any connection with him, and would like to inquire if there is any objection to his succeeding to the rights of Mr. Ed Dillon, as named in the Fulton decree. That is he claims nothing except as in the decree.

MR. A. C. HATCH: I would not want to consent that he be given water equal to the amount decreed to Ed Dillon without some proof, not knowing anything whatever about it.

MR. MCDONALD: All I know about it is his statement and sworn answer.

MR. A. C. HATCH: If you have anything to show as proof, we do not object, but not having any knowledge, we do not want to stipulate on the acreage.

MR. MCDONALD: We simply ask he take Ed Dillon's water right, this decree show he shall have whatever is decreed to Dillon.

THE COURT: Have you proof of the transfer by Dillon to him?

MR. A. C. HATCH: North is not a party to this suit at this time.

MR. A. L. BOOTH: He has made his appearance.

MR. MCDONALD: Yes, he was served and made an appearance.

THE COURT: Before this matter is closed up, if you can get the transfer or copy of it showing the transfer of the land.

MR. A. L. BOOTH: Mr. North is shown to have filed an answer but was not served with summons.

MR. A. C. HATCH: Record does not show he was a party at that time. So far as I have information, there is no stipulation pertaining to him, but, of course, I have not checked up that Wasatch stipulation.

MR. MCDONALD: I will do the best I can, your Honor.

THE COURT: Do not overlook it, because the court will not remember it, You will have to bear it in mind.

MR. A. C. HATCH: If the court please, one Wilbur Wright was a defendant and was here and gave evidence as to certain claims that he had, but in addition to the McAfee spring and he gave no testimony whatever as to the use of the McAfee spring, other than that he was decreed the use of the McAfee spring. That is, he was the successor to the Wright estate. There was no proof offered as to his use of the water since he acquired it in any way, and we do not understand that the stipulation or any stipulation covers or gives to any of them any water that has not been continuously used even though it was decreed to them since the decree was entered, and we would call the court's attention at this time that we expect to offer proof that the water of the McAfee spring has not been used by Wilbur Wright upon any lands owned by him or upon any lands owned by others so as to retain the right under the decree awarded.

THE COURT: Expect to show an abandonment of the water?

MR. A. C. HATCH: Abandonment. Well, he has used a portion of the water only. There is probably two or three second feet there and only about twenty acres of land been irrigated.

THE COURT: Who represents Mr. Wright?

MR. A. C. HATCH: He appeared and made proof in the case.

THE COURT: ^{ever} Who/represents Mr. Wright will take notice.

MR. A. C. HATCH: Mr. Willis represented him.

THE COURT: Take notice you expect to introduce such proof and be prepared to meet it.

MR. A. C. HATCH: Mr. Willis claims he represents Mr. Wright no further, although he appeared for him in the case.

THE COURT: He has not withdrawn?

MR. A. C. HATCH: He has not formally withdrawn.

THE COURT: Then he is attorney of record.

MR. CLUFF: I understand from Mr. Hyrum Winterton

stipulation entered into, it was introduced this morning, and some objection made to it. I would like to know what the status of that is, if Mr. Winterton has to make proof of his claim? The stipulation, I understand, has been entered into and signed, and Mr. Winterton is ready to stand on it.

THE COURT: The statement was made, that is, the objection was made it was found the stipulation was entered into under a misapprehension, and caused by some misrepresentation.

MR. A. C. HATCH: Misrepresentation as to the acres of the land that was irrigated from the source stipulated. That the stipulation was signed under a misapprehension and misrepresentation of what the facts are, as we have since learned, or think we have learned, and so that we object to its being at this time accepted as a stipulation, and for that reason except Mr. Winterton. Now, we are willing it should stand as between the defendant William L. Van Wagoner and the plaintiff, but not as between the plaintiff and Mr. Winterton.

MR. CLUFF: There is just a dispute as to the acreage?

MR. A. C. HATCH: Dispute as to the acreage that has been used from this source, that the water never was applied and his proportion of the acreage, the water from this particular source was never applied upon.

MR. CLUFF: I would like to know just what attitude the court will take in this matter. Does that throw the burden on us?

THE COURT: No, I think the burden is on the other side. That is the view I have of it. Stipulation has been entered into, which, it is admitted, was entered into. Now, the plaintiff, as I understand, desires to be relieved from the stipulation on the ground they were misled by it. I take it they should make prima facie showing they were misled, and make showing what the acreage is. How much difference is there

in the acreage you claim, Judge Hatch, from that that was stipulated?

MR. A. C. HATCH: Ten acres.

THE COURT: Possibly you and Mr. Cluff might be able to agree on it. We cannot proceed with it tonight.

MR. A. C. HATCH: We can take that matter up day after tomorrow.

MR. CLUFF: Couldn't you take it up first thing tomorrow?

MR. A. C. HATCH: No, our witness is not here.

MR. RAY: Will Mr. Tanner be here tomorrow, Judge Hatch?

MR. A. C. HATCH: He will be here anytime he is wanted.

MR. RAY: There was a matter left open.

THE COURT: Esthna Tanner, yes. What further matters are there to come before the court now?

MR. A. C. HATCH: There is the finishing of the Van Wagenen matter, if he produces any evidence. We then have rebuttal.

THE COURT: Then you have some general rebuttal?

MR. A. C. HATCH: We have our general rebuttal to go into.

THE COURT: When will your witness be available, Judge Hatch, as to the measurement of this Winterton land?

MR. A. C. HATCH: Day after tomorrow. We do not object to the acres of land that he owns, but as to the number of acres that he irrigated from this source.

THE COURT: That is what I had reference to. We may go on then day after tomorrow, probably in the morning, can you be ready at that time, Mr. Cluff?

MR. CLUFF: As far as I know. Like very much to have it taken up tomorrow.

THE COURT: If the witness could be here, the

court would be glad to accommodate you.

MR. JACOB EVANS: I would like very much to call Mr. Wentz in the morning, and have him testify in regard to the 1916 report. I think it is important to get that before the court in the form of evidence.

MR. THURMAN: Do you represent Mr. Corfman in that Esthma Tanner matter, Mr. Ray?

MR. RAY: I don't represent Mr. Corfman at all.

MR. THURMAN: I mean take his place?

MR. RAY: Yes, he is not going to be here.

5:10 P.M., RECESS TO 10:00 A.M., JANUARY 10, 1917.

MR. WILLIS: If the court please, yesterday evening the question of some lands owned by W. D. Wright came up. I wanted to know what was done, or what record was made on that. I will state I was attorney for Mr. Wright as to a part of his lands only, but, I might, for his benefit, report to him by phone of the action taken, what record was made.

THE COURT: I don't recall now what record was made in reference to that.

MR. A. C. HATCH: If the court please, Wilford Wright was here and testified as to his use of the waters of the Provo river in part. There was no measurement made of any claim, of any claim he has upon the McAfee spring, and I called attention yesterday that we would contest his right to the use of the McAfee spring. He has about a hundred acres, and only thirty acres of his land irrigated there by those springs, and the Chidester decree, I think it is, awarded to the Wright estate all of that water. We claim it has not been used and never has been used, and we have noticed that we will contest that right. If he wants to defend and rights he has there, he must be here.

MR. WILLIS: I have no interest in it, but I will inform him and tell him the situation under the circumstances.

MR. THURMAN: I wish to recall Mr. Tanner just for a question.

MR. RAY: I am going to introduce some other witnesses on that.

MR. THURMAN: It is on redirect.

MR. A. C. HATCH: If the court please, there was another matter I would like to take up while nothing is doing. Judge King, when he was here representing the interests of the Pioneer Ditch Company, J. R. Allen, J. W. Allen, D. W. Allen and others, who take water just at the head of Provo canyon, made a statement which had been stipulated and so on in regard to the acreage of the lands irrigated there. I

presumed at the time that he was going to offer some stipulation, something that was signed, and I made inquiry later in regard to whether or not my client had stipulated with Judge King as he stated, and he said no, there had been no stipulation, that there was no definite understanding between them at any time as to the matter, and we are going to rebut the testimony both as to the Judge's statement and as to the claim that they make.

MR. WILLIS: Your Honor, it would appear ~~by what~~ from what I learned by inquiry that Wilford D. Wright was never summoned in this action, but he did appear and answered as to a portion of his land, and I am told by parties that Judge King told him that he was not before the court, and no action could be taken in regard to the part of the land that he did not come in and answer for, is the reason why he is not here. If the court would indicate its position on that, I would like to report to him.

MR. A. C. HATCH: Set down for hearing tomorrow.

MR. WILLIS: I understand Judge King afterwards made a statement when he so advised Mr. Wright that he did not know he had appeared as to a part of his land.

THE COURT: If he appeared in the action he is before the court for all purposes.

MR. WILLIS: Yes, I take it that is the case, and if your Honor holds that way, I would like to so state to him.

THE COURT: You may state that to him. If he has appeared in this action, that makes him a defendant.

MR. A. C. HATCH: Mr. Wagoner is here now to take up the matter of the stipulation with Hyrum Winterton.

MR. CLUFF: We would like to finish that this evening.

THE COURT: The Winterton matter?

MR. CLUFF: Yes.

THE COURT: Very well.

JOSEPH R. MURDOCK Recalled by the plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. A. C. Hatch.

Q Mr. Murdock, you have testified heretofore in the case several times? A. Yes sir.

Q As president of the plaintiff, Provo Reservoir Company, you entered into-- for the plaintiff, you entered into -- for the plaintiff you entered into a written stipulation with William L. Van Wagoner and Hyrum S. Winterton?

A Yes sir.

Q Which stipulation was filed in this case?

A Yes sir.

Q And have you since learned anything with relation to the areas of land not being as you were informed they were that were irrigated from the source upon which the stipulation was based? A. Yes sir.

Q You may state what that was?

A The stipulation was based upon William Winterton owning twenty and a half acres of land.

MR. A. L. BOOTH: Hyrum Winterton, you mean?

A Hyrum Winterton.

Q Hyrum S. Winterton?

A Hyrum S. Winterton. And on the Van Wagoner Brothers, William L. and John Van Wagoner, owning nine and a fraction acres of land. After that stipulation was entered into, I learned

that Van Wagoner Brothers had only sold Winterton a half interest in a certain spring which rises probably half a mile above the land in the bed of Snake Creek, which flows usually about half a second foot during the low water period and is increased and augmented at times through irrigation water flowing into it, swelling it up to a second foot, sometimes more as the seepage from above may continue. At the time I entered into this stipulation, I supposed William Winterton or Hyrum Winterton owned two-thirds of that water, and that ~~that~~ the other party owned one-third of it, and I have since learned that the Van Wagoner Brothers own half of it and that Winterton owns a half of it.

Q So that the stipulation was made with them under a mistake of the facts?

A Yes, I would say it was.

Q On your part?

A It was mistaken on my part and misunderstood. That is, I misunderstood the facts.

Q Now, how much do you know of your own knowledge how much land has been irrigated by Mr. Winterton from this source prior to his purchase from Van Wagoner?

A Not any. Mr. Winterton never used any of the water from those springs until he purchased it from Mr. Van Wagoner.

Q And when the water was not used by Mr. Van Wagoner where did it go to?

A It continued over the spill and down into Spring creek and into Provo river.

Q Do you know as a fact whether or not Mr. Winterton is the owner of more than the ten acres of land in that vicinity?

MR. CLUFF: I object, if the court please, the contest here is that this stipulation was procured by misrepresentation. I think this is immaterial and incompetent whether or not Mr. Winterton used any false or fraudulent representation securing this stipulation.

MR. A. C. HATCH: A mistake of facts is what I have

it on.

THE COURT: Mistake on Mr. Murdock's part?

MR. A. C. HATCH: Yes.

THE COURT: Misapprehension of the situation. Your objection is this does not go to that?

MR. CLUFF: Yes.

THE COURT: Objection is overruled if that is the ground of it.

A I don't understand your question.

Q The question was as to your knowledge of ownership of land by Mr. Winterton that could be irrigated from this?

A That can be, or is now?

Q That could be irrigated from it?

A From the plats in the recorder's office, or from the certified copy and maps, I find that something more than twenty acres could be irrigated by Mr. Winterton from this spring.

Q And do you know from what source this land of Mr. Winterton was irrigated prior to his purchase of the interest in the spring from Van Wagoner? A. Yes sir.

Q From what source was this twenty acres of land, Winterton land, irrigated?

A It was irrigated by water obtained through the ownership of shares in the Midway Irrigation Company.

Q And you knew that at the time you made the stipulation with Mr. Winterton?

A I knew it had been irrigated from that other source from the Midway Irrigation Company source.

CROSS EXAMINATION by Mr. Cluff.

Q Did Mr. Winterton inform you as to the water that he expected to use on the twenty acres?

A Yes sir.

Q And it was from this particular spring, or the seepage water in Snake creek?

A Yes sir.

Q And he told you that he had disposed of his shares in the Midway Irrigation Company?

A Yes, he told me that.

Q And you understood and knew at the time that he was to water from the seepage or spring water the twenty acres of land?

A I supposed he would water what he could from that source.

REDIRECT EXAMINATION by Mr. A. C. Hatch .

Q You understood also that he was the owner by purchase of a prior right of Van Wagoner to two-thirds from that source?

A That was the understanding I had from Mr. Winterton's explanation that he owned two-thirds of that spring water.

RECROSS EXAMINATION by Mr. Cluff.

Q What did Mr. Winterton say to you about that?

A Why, he gave me a contract which he had prepared representing this fact.

REDIRECT EXAMINATION by Mr. A. C. Hatch.

Q Now, there is one other question before you proceed. Do you know whether or not any ~~portion~~ portion of the twenty acre Winterton tract, or such land as he had had theretofore been irrigated from this spring?

A It had not until he purchased, or until recent years, probably the last three, four or five years.

RECROSS EXAMINATION by Mr. Cluff.

Q What did Mr. Winterton say to you when he represented to you that he owned the two-thirds?

A I could not tell you all that he said.

Q You understood that prior to his purchase of the Van Wagoner interest Van Wagoners owned all the waters that were there in that Snake creek at that point?

A No, I understand that because there was more water than the

Van Wagoners could use at times there was two second feet and three second feet and Van Wagoners only had between fifteen and twenty acres they could water.

Q And the balance of the water, where did it go?

A Went over their spillway down into Provo river.

Q You are familiar with the twenty acres owned by Mr. Winterton, are you?

A Yes sir, I owned half of it one time.

Q Is there any portion of it that was formerly irrigated by subirrigation, by a slough?

A There is a slough runs through it now. It is practically all meadow land, both pieces may have been into grain some-time, but it is practically all suitable for meadow land. There was a slough running through it, which did not require irrigation.

Q Do you know whether or not that slough has been drained?

A I do not, not sufficiently to even require irrigation in the slough.

Q What will be the result on the land adjacent to the slough since the drainage?

A It would require irrigation.

Q And prior it did not, before this drainage it did not require it?

A Yes, it required irrigation before.

Q So that the drainage has not, in your judgment, lessened the necessity for irrigation there?

A I would not say that at all. It was too wet before, However, seasons vary there. Some seasons we have a very wet season, sometimes very dry, there may have been a season it required irrigation. There might be a time in the fall of the year or latter part of the season, when it would require irrigation.

Q You say Mr. Winterton represented to you he was getting, or did own two-thirds of the water that was there?

A He presented this stipulation which reads that, but I didn't go into it very much further with him. He had in connection with those stipulations for about ten other pieces, and I did not go into details with him on this.

Q You knew he owned the twenty acres and more ?

A Yes, I knew he had owned more than twenty acres there.

Q And knew he had disposed of his interest in the Midway Irrigation Company too?

A Yes, I knew that.

JOHN VAN WAGONER, called by the plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. A. C. Hatch.

Q What is your full name?

A John Van Wagoner.

Q Where do you reside?

A Midway, Wasatch county.

Q Are you acquainted with Hyrum S. Winterton?

A Yes sir.

Q I will ask you if you had any dealing with him whereby you disposed of water or water right from a certain spring or seepage of Snake creek? A. Yes sir.

Q Where is the spring situated, the ditch leading from Spring creek diverting the water?

A The spring, you say?

Q Yes.

A Or the ditch?

Q The head of the ditch diverting water from Snake creek?

A The head of the ditch is on Snake creek, where the bridge crosses going to Charleston, just below the bridge.

Q Bridge on the county road?

A On the county road.

Q I will ask you whether or not there is any dam, concrete, or otherwise, to indicate the turning point of the water from the creek?

A There is a concrete dam.

Q Is there any concrete dam in that immediate vicinity in Snake creek?
A. No sir.

Q What proportion of the water that you had formerly used from that source did you dispose of to Mr. Winterton?

A A half interest.

MR. CLUFF: Object to it as not the best evidence.

MR. A. C. HATCH: Have you the deed?

MR. CLUFF: I guess there wasn't any deed, Judge.

Q Was there any written conveyance made by you to Winterton, or by anyone on your behalf?

A I could not say as to that. We had a deal with Van Wagoner Brothers and Myrum S. Winterton. My brother transacted the business, and if there was any paper drawn up, I am unaware of it any more than we received so much stock in the Midway Irrigation Company for a half interest in that seepage water that accumulates along the creek below the lower dams of the Midway Irrigation Company, which was used upon the land.

Q How many acres of land had you and your brother irrigated from this source prior to your sale to Winterton?

A There had been in the neighborhood of twenty acres, I believe, never have measured it, just a guess.

Q Would it exceed twenty acres, or less than twenty acres?

A I could not say definitely.

Q You could say within an acre, could you not?

A Somewheres near that, I should judge.

Q That is all you ever irrigated from this source?

A Yes sir.

Q And when was this transfer made, or sale?

A I believe it was in the year about 1911, somewheres near that.

Q Did you convey any lands to Winterton at this time, you and

your brothers?

A I am not prepared to say whether it is this particular time or not. We sold them some land.

Q Some of these lands that were irrigated from this source?

A No, not this particular time. It was on the opposite side of the creek.

Q Not irrigated from this particular ditch?

A No sir.

Q Or source of water?

A Not at that particular time. We sold just recently a portion of land that was owned by the Provo Valley Trout Company, below the stream.

Q I am asking you whether or not the land that you sold to him was irrigated from this source from the ditch?

A No sir.

Q Or from Snake creek at this point? A. No sir.

Q From what source is that land irrigated?

A I don't know it was irrigated or not. If it was, it was through a ditch that came from the Midway Irrigation Company.

Q I will ask you if you are still using any portion, or irrigating any land from this ditch?

A Yes sir.

Q How much?

A I haven't measured it, it is another guess, neighborhood of ten acres, I should judge.

Q It would not exceed ten acres?

A I think not.

Q What has been your occupation during your life?

A Forepart of my life I was a brick maker, later in life we entered into business, mercantile business, butcher business, and farming some.

Q I will ask you whether or not you have been on the farm, or about the farms during all your life? In a farming community?

A Been in a farming community all my life.

Q You have seen many five and ten acre tracts of land, haven't

you?

A Quite a number.

Q Now, from what source do you irrigate the other half or other part of the twenty acres that you formerly irrigated from this?

A From the Midway Irrigation Company ditch that comes out of the Snake, about a mile, I should judge, or such a matter up the creek from where it formerly came out.

Q Is your right to that water represented by stock in the company?

A. Yes sir.

Q From whom did you obtain the stock?

A We obtained the stock from the parties that we bought the farm from. What they owned.

Q Didn't get any of it from Mr. Winterton?

A Got about thirteen shares, I believe, at this time, from Winterton, exchanged our interest in this water to Mr. Winterton for stock in the company.

Q The purchase price you received from Winterton was stock in the Midway Irrigation Company ?

A Yes sir.

CROSS EXAMINATION by Mr. Cluff.

Q Mr. Van Wagoner, you say you have a cement concrete dam at that point where you divert the water from Snake Creek?

A Yes sir.

Q That is below the last tight dam on Snake Creek, is it?

A Yes sir.

Q The water then that you accumulate and divert at that point is some water that raises in Snake Creek?

A Yes sir.

Q Seepage water?

A Seepage water.

Q Have you any idea as to the amount of water that is diverted at that point?

A Not definitely, I don't know exactly.

Q You have a tight concrete dam?

A We have a tight concrete dam, that is, it is made so that we can shut off all the water.

Q And after the high water season is over, so that the dam above you is tight, you have been taking all the water that accumulated below the dam, haven't you, down to your dam?

A Yes sir.

Q And using all of that water?

A Yes sir.

Q Turning it all onto your twenty acres of land?

A Well, on the half of it, not the ten acres, we have been using it since we made the--

Q Prior to that time you used it on the whole twenty?

A It was used.

Q You say you diverted at that point all the water that accumulated in the ditch to that point?

A During the dry months in the season.

Q And it is the half interest in that water that accumulated there that you transferred to Mr. Winterton, that is correct, is it? A. Yes sir.

Q You haven't any judgment as to the amount of water?

A Not exactly, I don't know the amount, I never measured it, not haven't been there when they measured it.

Q Does it vary from half a second foot to more?

A Yes sir.

Q Have you any idea as to the maximum amount that would be there?

A No, I am not prepared to say.

Q Sometimes gets as low as half a second foot?

A Well, I am not prepared to say.

Q You could not say that. Now, Mr. Winterton's land lies immediately south of your's, doesn't it?

A Yes sir.

Q And the drainage from your twenty acres, ten acres, would flow on down to his land, wouldn't it?

A Undoubtedly would.

Q Is it a fact just at the south boundary of your land there is a sort of swale or slough that accumulated water?

A At the south of our land?

Q Yes, on Mr. Winterton's land?

A There is a slough on Mr. Winterton's land.

Q At that point?

A Just below where we are.

Q Well, now, was that a slough or just a depression in the soil there where water would naturally accumulate?

A Well, I don't know whether it is a slough or not. I know I have been through there, there was water in there, in the slough.

Q And the water from your land has come down into that slough on Mr. Winterton's land, hasn't it?

A Undoubtedly go that way.

Q So that a portion of Mr. Winterton's twenty acres of land has been irrigated in that way, even prior to the time that he bought the half interest?

A What seepage water that would go through, likely.

Q Now, you folks signed this stipulation that has been filed in the court here with reference to that water, didn't you?

A I think so.

Q And that calls for nine and a half acres for you and twenty and a half acres for Mr. Winterton?

A I don't know the amount, I didn't sign the stipulation, I expect it was signed by my brother.

Q You knew of it? A. Yes sir.

Q And so far as you were concerned, there is no objection whatever on your part to that stipulation?

A As far as I know.

Q The amount of water that accumulates at that point you claimed all of it prior to selling half interest to Winterton?

A Yes sir.

Q And whether that would water one acre or fifty acres, it was

your water?

A That is the claim we hold.

Q And you claim, or you and Mr. Winterton now claim all as you claimed it formerly? A. Yes sir.

Q And there is no dispute between you and Mr. Winterton as to the division of the amount of water there, is there?

A No sir.

MR. A. C. HATCH: I will ask the stipulation-- call the court's attention to it, it is not signed by either him or his brother. It is the stipulation between the plaintiff and Mr. Winterton.

REDIRECT EXAMINATION by Mr. A. C. Hatch.

Q You know nothing about the signing of any stipulation, do you? A. No sir.

Q Now, a part of the lands that you irrigated from this source were on the north side of Snake Creek, weren't they?

A Yes sir.

Q Could the drainage, or any part of the drainage from those lands reach Winterton's land, or would it reach Spring Creek before Snake Creek, and flow into the Provo river?

A It would run into Snake creek and flow into Provo river on the north side.

Q Wasn't the, and isn't the slope of your land on the south side of Snake creek also toward Snake creek and spring creek.

A The slope is more towards the creek.

Q So that any water that runs off your land would run into Snake creek, or Spring creek, wouldn't they?

A Some would run into Spring creek and some into Snake creek.

Q Then what portion, if any, would reach Winterton's land?

A There is quite a little portion of it. It slopes to the south and east. It bothered him so much we had to dig a ditch, or they did. They asked consent to put a ditch along the fence to prevent it running on them. There was periods of time they didn't want the water in there, and we were irrigating

and it went off into Spring creek.

Q About how much of their land did this water ever cover?

A I am not prepared to say.

Q Would it exceed two or three acres would be affected at all by your waste water?

A I don't know how far down it would go on their land. It would run down a ways and off into Spring creek again, but how far, I am not prepared to say.

Q It would be a triangular piece of their land in any event that would be covered? A. Yes sir.

Q Except there were ditches made to carry it on through there to the ground?

A I don't know it would reach their ditch. They have a ditch on the high part of their land that goes down through, and, I believe this comes in below and runs off towards Spring creek.

Q And their land where this would run off was wet, swampy land before, was it not?

A I am not prepared to say whether it was very swampy, unless it be near the creek. I don't believe it was up above where it run off from us, higher up, I don't believe it was very swampy in there.

Q What portion of your land did you irrigate from this source, situated on the north side of Snake Creek?

A What proportion?

Q Yes.

A I should judge about half.

Q And you would be using the water on that portion what part of the time?

A Yes sir.

Q What portion of the time?

A I am not prepared to say, just turned it out and irrigate it and then turned it out the other way and irrigate it.

Q But you never paid much attention to it when you were irrigating, did you?

A Not particularly, when we were through we would go and look at

it and when it was through we would change it, change it about so often when we felt it needed it.

Q About how often would you change it?

A I don't know exactly.

Q Now, there were times when there was quite a flood of water came down to your dam, wasn't there?

A Yes sir.

Q And overflowed, and over the spillway?

A Those irrigating immediately above us, when they were irrigating it ran into the creek, and increased the stream and caused some trouble different times prior to this cement being in, there was a permanent dam being held in there, and that is when it gave most trouble. After we got the cement dam in there we could remove the board and let it go over.

Q You did that quite often?

A Yes sir, whenever there was too much water, flow of water, we removed the board and it could go over.

Q What do you mean by too much flow?

A Question again.

Q What do you mean by too much flow of water?

A Whenever there is too much water ran in give us more than we needed in the ditch, removed the board.

Q And Winterton complained the waste water ran into his land?

A There was a period of time water run in on them and they did not want it, and asked to have the ditch so that they could prevent it going in on their land.

Q I will ask you if you had a conversation with Mr. Murdock recently in regard to your sale of the water to Winterton?

A Yes sir.

Q And what it was you told him with regard to selling that?

MR. CLUFF: Object to it as incompetent.

THE COURT: Objection is sustained. You are not seeking to impeach your witness, are you?

MR. A. C. HATCH: No, if the court please, simply to corroborate Murdock as to how he obtained his information

as to the mistake.

THE COURT: Objection is sustained.

MR. A. C. HATCH: Note our exception. I think that is all.

RE-CROSS EXAMINATION By Mr. Cluff.

Q Just a moment. The ditch that you speak of that Mr. Winterton dug used as a sort of drain ditch, is it?

A Yes sir.

Q Where does the water from that drain ditch go?

A It empties into Spring creek, flows into Provo river.

Q Does Mr. Winterton-- you are acquainted with his farm there, are you?

A In a way.

Q The twenty acres he has, or more, just south of your place?

A Yes sir.

Q And have known it for a good many years?

A Yes sir.

Q And the irrigation of it?

A I never have irrigated it any.

Q You have seen it irrigated?

A I have seen them irrigate it.

Q And know it has always been irrigated?

A Part of it, yes sir.

Q Any part of it that was not?

A None that I know of, I have not been over it, but none I know they have not irrigated.

Q There was some part of it that was irrigated from drainage from your land?

A There was a slough on Winterton's land.

Q You know of another slough towards the south and west of his land?

MR. A. C. HATCH: If the court please, this is not cross examination, and object to it for that reason.

THE COURT: What is the object?

MR. CLUFF: I withdraw that question.

Q Do you know that Mr. Winterton now irrigates the same land from the water he received from you that he used to irrigate from the water he received from his shares in the irrigation company?

A. Yes sir.

Q And do you know that this drain that you speak of was made by Mr. Winterton after he purchased the interest from you?

A Yes sir.

REDIRECT EXAMINATION by Mr. Hatch.

Q Now, just one question; where is that drain?

A It is in our field just on the north side of the fence that the lane goes into Spring creek on the south end of our field.

Q About how far east of the county road?

A Why, it connects on, I think to the ditch that goes into the Winterton Brothers land. They asked permission to take--

Q Just a moment, you didn't understand my question. Does it connect with the county road?

A No sir.

Q Drain ditch you speak of? A. No sir.

Q How far is it east of the county road?

A Oh, I should judge maybe--

Q Beginning of that drain ditch?

A Must be four or five rods.

Q And then it runs east to Spring creek?

A Yes sir.

Q And drains into Spring creek?

A Yes sir.

Q It is on your land, you say? A. Yes sir.

Q Not upon the Winterton land? A. No sir.

Q How deep a ditch is it?

A Well, I don't know. It carries nice stream of water.

Q Oh no, the depth of the ditch, you said it was a drain ditch?

A It may be eight or ten inches, I never measured it.

Q Just as a ditch made not to irrigate the land, but to carry

off the surface water?

A Carry off the surface water.

Q Do you know of any other ditch that has been designated by Mr. Winterton as a drain ditch to drain the water out of the land; that is what you were asked, as I understood?

A I don't get the question now.

Q You understand that people sometimes dig what are called drain ditches to drain the water off boggy land, don't you?

A Yes sir.

Q I ask you if you know of Mr. Winterton ever having dug any such drain ditch upon his land?

MR. CLUFF: I object to it as not redirect, and object to counsel crossexamining his own witness.

MR. A. C. HATCH: If the court please, he answered Mr. Cluff that Mr. Winterton had dug drain ditches.

THE COURT: No, I think you misunderstood him; he stated when they were irrigating their land the overflow had run onto Mr. Winterton's land, and he did not want it, so he asked permission to dig a ditch that would take off this surface flow.

MR. A. C. HATCH: That is true. I also understood him to answer Mr. Cluff Mr. Winterton had since dug drain ditches to drain the land.

THE COURT: Do you so understand it?

MR. CLUFF: No.

MR. A. C. HATCH: Then I withdraw the question.

Q There is one other question. You say ^{that} Mr. Winterton irrigates the same land with this water that he purchased from you, that he formerly irrigated with his water from the Midway Irrigation Company?

A Yes sir.

Q Do you know whether he irrigates the same quantity or double the quantity with this water that he purchased from you that he formerly irrigated from the Midway Irrigation Company.

A I am unprepared to say.

5:25 P.M., RECESS TO 10:00 A.M., JANUARY 11, 1917.

MR. A. C. HATCH: I wanted to put Murdock on for a question, but he is not here. I guess we rest.

MR. CLUFF: Then, if the court please, we ask that the stipulation as offered be accepted in this case as defining the rights of these parties. I take it that there has not been anything shown to the court to warrant the court in finding that there was any false representation or fraud, or anything on the part of the defendant Mr. Winterton in these claims, and from the evidence it would seem that the stipulation is proper and ought to be accepted as settling the rights of these parties.

MR. A. C. HATCH: If the court please, as to that the stipulation provides for the irrigation of thirty acres. Now, the testimony is clear and conclusive that about thirty acres is all that was ever irrigated by the waters claimed by these two parties, Van Wagoner and Winterton; such ~~xx~~ of the water ~~that~~ as formerly found its way onto the Winterton land, the testimony shows he complained of, and twenty acres is all the land Van Wagoner ever had and irrigated, and when the water went off their land it went back into the creek and ~~such~~ as went upon the Winterton land other than the twenty acres, the ditch was made by Winterton at his request to convey it into the creek, so that it would not reach his land. It is simply a question of ten acres additional water right charged upon the--

THE COURT: Let me make a suggestion, Judge. I am disposed to permit the parties to resist every stipulation where they say they signed under a misapprehension, and the evidence is now before the court, and when the case is submitted, I will determine what the rights should be. The evidence, as I understand it, is now all in. When you come to argue the case you may bear it in mind, if you care to,

and argue what you claim from this evidence, but the stipulation, the party will be permitted to recede from a stipulation they claim they entered into under a misapprehension, and your evidence, I understand, is all in.

MR. CLUFF: No, the defendant's evidence is not in. We have not put in any evidence. We expect to offer evidence

THE COURT: If you offer any evidence, the court will expect you not to repeat what you put in.

MR. CLUFF: What was put in was by the plaintiff.

THE COURT: You may proceed with your evidence.

MR. SHIELDS: Your Honor please, I have two witnesses in this case, and I will ask leave to put them in by two o'clock, when we convene after dinner.

THE COURT: We will do the best we can.

MR. CLUFF: If the court please, in view of the fact that the stipulation that was entered into has not been accepted here, we ask at this time leave to amend our answer in this matter, wherein we claim or set out a claim for twenty and a half acres, we ask to amend the answer that it may read twenty-five and a half acres. I think the proof will go to the twenty-five and a half acres instead of twenty.

THE COURT: You may make the amendment.

MR. A. C. HATCH: I will ask that the amendment be written out and attached to the files, and we be served with a copy.

THE COURT: Yes, that may be done.

HYRUM S. WINTERTON, called in his own behalf, being duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Cluff.

Q Your name is Hyrum Winterton?

A My name is Hyrum S. Winterton.

Q Reside in Wasatch county? A. Yes.

Q Mr. Winterton, you are the owner of certain lands in Wasatch County that are irrigated from waters rising in Snake Creek, are you? A. Yes.

Q Mr. Winterton, I call your attention to paper marked Exhibit 176, I will ask you to state whether or not that represents a rough sketch as you have drawn it, illustrating the land that you own?

A It does.

Q In this particular tract of land that is in controversy now, how many acres do you own there?

A I own about twenty-six and one-half acres, on the west side of Spring creek, as near as I can estimate.

Q Twenty-six and a half acres? A. Yes.

Q Do you remember the section that is in?

A In Section 11, Township 4 South, Range 4 East, Salt Lake Meridian?

Q From what source have you irrigated this twenty-six and a half acres in the past?

A I have irrigated it from several sources.

Q I will ask you to-- call your attention to the exhibit on the board, explain to the court the manner in which you have irrigated this land in the past, and the sources from which you have irrigated it?

A This condition of the irrigation system of this land at the time I first became acquainted with it, the main, or one of the main sources of supply was through a ditch down-- which is controlled by the Midway Irrigation Company. It heads in Snake creek, up near the old home of David Huffaker. The water was conveyed down through this ditch and across the county road between Charleston and Midway at a point about eight rods north of the northwest corner of my land. This water was used to irrigate the high land down to the center of this central part of this tract of land, and also it extended, the ditch extended --

MR. A. C. HATCH: Just a moment, if the court please.

I don't understand that the Midway Irrigation Company interests has anything to do with this land now.

MR. CLUFF: Not now, no.

MR. A. C. HATCH: Then, I can understand no purpose in going back to the original irrigating of this land from stock in the Midway Irrigation Company. It is taking up the time of the court and no purpose.

MR. CLUFF: I think we can cut that short.

Q Now, aside from the particular portion of that tract of land that you water from the Midway Irrigation Company water, what portion of the land was watered from any other source?

A Part of this piece of land--

Q That would be the northeast portion?

A The northeast portion of this land was watered through overflows and sub irrigation from this source. Coming down to the land which was formerly held by Joseph E. Nelson, or owned by Joseph E. Nelson--

Q Who owns it now?

A William L. and John Van Wagoner. The general course of this water when undisturbed, was in this direction.

Q That would be southeast?

A Southeast; and it would strike my land approximately five rods east of where the ditch crosses this road, or this line between their land and mine, and it flowed in this direction.

Q Now, Mr. Winterton, about how many acres on that corner of your tract of land were irrigated always by this subirrigation, or overflow from the Van Wagoner land you speak of?

A I would say approximately six acres.

Q Now, is there any portion of your tract of land that would subirrigated from any other source?

A On the south-- on the west side of this tract of land this was watered through overflow and subirrigation from this water which was spring and seepage and waste water from lands above.

Q Did that accumulate in a sort of slough?

A. Yes.

Q Next to your land and on your land?

A Above my land. Did not accumulate on my land, above my land, and after it crossed this county road approximately twenty rods south of the northwest corner of my land it would flow in the direction-- about the course this line indicates.

Q That would be a southeast direction?

A Yes sir.

Q Across the southwest corner of your tract?

A I would say through the western part. We have not got into the southwest.

Q About how many acres--

A This corner down here.

Q About how many acres were formerly irrigated by reason of the sub irrigation there from that slough you speak of?

MR. A. C. HATCH: We will admit all the land he owns there was irrigated by sub-irrigation from above, and is still so irrigated. The turning of the water upon the surface is what we are contending for.

MR. CLUFF: I understand, Judge, I am just wanting to show-- we will show what he has done there.

Q Now, have you changed your system of irrigation there?

A Yes.

Q And in what manner?

A I have helped the Wasatch county to cut a drain right down the Midway road.

Q That would be the west side of your land?

A West side of my land, to take the water from my land, take the water from this land.

Q So as to stop the sub-irrigation and divert that water, and where did it go from that drain?

A This water goes now immediately into the river, and unless it is measured or used by the people who own this Midway Charleston Spring Creek ditch.

Q It is then accumulated in a drain there and turned into and forms part of the Provo river system?

A Yes.

Q What was your object in draining that land?

A My object in draining the land was to make the irrigation system a more-- to make the system of irrigation better, to make the land more productive, the sub-irrigation system of irrigation on this particular kind of land is not profitable.

Q Why?

A Because it causes, apparently causes mineral to raise, what we call mineral. Some people call it saleratus. It is a white substance.

Q I understand then you have drained that so as to stop the sub-irrigation and turn the drain water into Provo river system, and claim from the seepage above water to flood the land?

A Yes.

Q Instead of sub-irrigating it?

A The land requires the water to be flooded over it.

Q Now, Mr. Winterton, you say you formerly owned water in the Midway Irrigation Company? A. Yes.

Q You have changed or sold that water, and exchanged it for a right to the use of the water that comes from seepage in Snake creek? A. Yes.

Q How long have you been using the seepage water from Snake Creek?

A Since 1911.

Q Since that time have you dug this drain that you speak of?

A Yes.

Q And turned the water that formerly sub-irrigated your land into the river? A. Yes.

MR. A. C. HATCH: Just a moment. I did not understand that he turned it into the river, Mr. Cluff, from his testimony; he turned it into the ditch whereby other people got it and used it.

THE COURT: The evidence, I understood, was it runs into the river unless intercepted by the Midway-Charleston ditch. That was the statement you made, wasn't it?

A. Yes.

Q Now, I will ask you to state if you have since 1911 been using of the seepage water that is caught in Snake creek sufficient water to water this twenty-five and a half acres?

A Yes.

Q And you have been doing that all times since 1911?

A Yes.

Q Prior to that time, I understand you the portion of your land there that was not watered from the Midway Irrigation Company was sub-irrigated? A. Yes.

Q And you have drained your land turning the water into the system and caught the seepage water above to flood it instead of subirrigation? A. Yes.

Q And that is the reason you are claiming from this seepage water in Snake creek sufficient to irrigate twenty-five and a half acres? A. Yes.

Q You have been doing that ever since 1911?

A Yes.

Q And have you any judgment as to the amount of water you have accumulated by reason of the drain ditch there that has been accumulated and turned into or toward the Provo river system?

A I would approximate it from between one and five second feet of water.

THE COURT: That is in the drain?

A That is in the drain.

Q And before this drain was cut that water simply soaked over in your land?

A Before the drain was cut that all went on my land.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q How long has that county road been in existence between Midway and Charleston?

A I would say approximately, to my best judgment, about thirty years.

Q And when it was first constructed ditches were dug on both sides of it for its entire length, weren't they?

A No sir.

- Q Are you certain of that? A. Yes sir.
- Q Particularly through this boggy meadow land, between the Nelson home and the Provo river would you say there weren't ditches on each side of that road when the road was first constructed?
- A There wasn't ditches that conveyed this water directly down the road.
- Q It conveyed all the water that was on the surface down each side of the road, the ditches, when the road was first constructed, didn't it?
- A No sir.
- Q Then did the water run across the road and continue across for the entire length on the surface?
- A I don't understand the question.
- Q The water, you say, runs to the southeast, and the water which sub-irrigated your land came from the northwest, is that right?
- A It came from the-- watered that particular part of the land?
- Q Yes. A. Yes.
- Q In order to get to your land it had to cross the county road?
- A It did.
- Q Or go under the county road?
- A It did.
- Q You say the road had existed there for thirty years?
- A Yes.
- Q It was a boggy, wet section of country, wasn't it?
- A Yes sir.
- Q And much of it required drainage in order to get over it to mow the hay, didn't it?
- A Yes.
- Q Even that where the road was finally built, and much of your land was of that condition, wasn't it?
- A Yes.
- Q Had to be drained in order to get over it, either cut or haul the hay, that is right, isn't it?
- A There is a little point in the Midway road.
- Q I am speaking of your land, I say much of your land was of

that quality it had to be drained in order to get over it to either cut or haul the hay, was it not?

A Some of it.

Q And you now claim the right by reason of having drained your land to take water from the creek and irrigate it on the surface?

A Yes.

Q How much of this drain ditch did you dig?

A I cannot say exactly.

Q What would prevent your taking the water that you drained from the upper part of your land and applying it on the surface on the lower part of your land from your drain ditch?

A Ask me the question again, please.

Q Read it please.

(Question read)

A What would prevent me?

Q Yes.

A Under the present condition, the road being graded up as high as it is, it would prevent me from getting the water across that road unless I rebuilt or put another culvert in there to take that water again through the road and on to my land, as formerly run.

Q The water now would not reach your land to subirrigate it, would it, from the northwest?

A I wouldn't say that none would, but I would say not near the amount as did before.

Q Now, you helped to dig this ditch, you say along the line of your land?

A. Yes.

Q On both sides of the road did you dig, or just one side?

A I cannot say.

Q There is a ditch on both sides of the county road now, isn't there?

A. Yes.

Q And the road is graded?

A. Yes.

Q And it has been graded in part for twenty years, hasn't it?

A In part.

Q And particularly along the line of your land it has been graded

for twenty years, hasn't it?

A In part.

Q And a ditch on each side of it?

A No.

Q You say you have twenty-six and a half acres you think west of Spring creek?

A Approximately that much.

Q You never did measure it, did you?

A All except five and a half acres. All except --- I will state this way, all except the piece we bought from William L. and John Van Wagoner.

Q Your deed describes that tract, does it?

A The twenty and one-half acres.

Q No, describes the tract you got from them?

A Yes.

Q You bought ten acres from them, did you not?

A From who?

Q From William L. and John Van Wagoner you purchased ten acres?

A Altogether, you mean?

Q Yes.

A I purchased more.

Q How much did you purchase from them?

A Approximately sixteen acres.

Q Approximately sixteen?

A The deed calls for, as near as I can understand, sixteen acres, that is what I paid them for.

Q How much of it is on the west side of the creek?

A About, approximately six acres.

Q And you bought from them a half interest in this ditch and dam and use of water they had formerly used from Snake creek?

A I bought from them one-half of the water they used at that dam.

Q One-half of their right to the use of water at that dam?

A It was understood-- let me explain. It was understood between them and me at that time--

Q Just a moment, you may state what they said to you, if you wish, in regard to it, and what you said to them, but I object to your stating what was understood.

A What was your question?

Q You asked to explain, and I told you to proceed and explain?

A They told me they claimed all that water, all that seepage and spring water, and they would sell me one half of their claim for the thirteen shares of the capital stock of the Midway Irrigation Company, provided that I would help, or pay one-half of the expense in rebuilding the dam.

Q What dam?

A The dam where we take our water out.

Q The concrete dam?

A The concrete dam.

Q Did the dam require rebuilding?

A Yes.

Q What was the matter of it, what was wrong with that dam?

A The dam that had been placed in the creek before had not been built strong enough and the water went under it and washed under the dam, and washed the soil away, and made quite a large excavation.

Q It required a new dam?

A It required a new dam.

Q Now then, half of the interest they have there was all that you acquired from them?

A That is all I acquired from them.

Q And you know they have irrigated only approximately twenty acres of the land they had they could irrigate from that dam, wasn't it?

A I don't know how much they could.

Q And such water as came from that dam to your land while they used ~~it~~ it was an injury to you instead of a benefit, wasn't it?

A At what time?

Q Prior to the time you say you dug your drain ditch?

A It was not an injury until-- under the system, old system of irrigation.

Q It was an injury under the old system?

A It was not.

Q Then why did you dig a drain ditch to prevent it coming upon your land, at the north end of your land?

A Because I wished to improve the system of irrigation.

Q Then how deep was this ditch that you dug at the north end of your land?

A Approximately eighteen inches,

Q Eighteen inches deep?

A Eighteen inches deep to two feet.

Q Going down to the clay?

A Well, I don't just remember whether it went down to clay or not.

Q The purpose was to shut off the sub-irrigation, wasn't it?

A The purpose was to save the-- the main purpose was to save the road.

Q Pardon me.

A And take--

Q Pardon me, I am speaking of a ditch in the north end of your land.

A The purpose was to save the road, so the water would not cross at that particular point.

Q The particular point was excepting two or three rods to the west, the entire width of the north side of your land, wasn't it; the drain ditch enters a rod or two from the county road and ran east to Spring creek, didn't it?

A I believe I said about five rods west of the ditch, my irrigation ditch.

Q I am speaking of the county road?

A I don't understand.

Q The county road, your drain ditch between you and VanWagoner starting on the west commenced about three or four rods from the county road line, didn't it?

- A Mean the one that runs east?
- Q One that runs east, yes.
- A No.
- Q How far east of the county road is the west end of that drain ditch?
- A I don't understand the question.
- Q How far east of the county road is the west end of your drain ditch, drain ditch to the north of your land, and draining water from Van Wagoner's land into Snake Creek or Spring Creek?
- A About ten rods.
- Q And from that point it is eighteen inches deep and conveys all the water both surface and sub-irrigation, into Spring creek, does it not?
- A I would not say that it carries all the sub-irrigation.
- Q But it takes down to eighteen inches, or down to the clay, doesn't it?
- A That water can raise above that. As the ground is lower that water can raise above that eighteen inch level.
- Q More than fill the ditch?
- A To more than fill the ditch?
- Q Yes.
- A I didn't think so.
- Q The water in the ditch, in the drain ditch, would have to be-- if the ditch is only eighteen inches deep, would have to more than fill the ditch in order to get above the top of the ditch, wouldn't it?
- A I wouldn't say so.
- Q Let me go to the map here, your land-- where is your land, land marked on this plat "Alexander", is that your land?
- A This--
- Q Wait, answer my question. The square here representing land I presume marked "Alexander" on it?
- A Yes.
- Q Is that your tract?

A That is my land.

Q And the two lines at the north side of that tract represents a roadway? A. Yes.

Q And you had a drain ditch north of that roadway?

A I have a drain ditch north of the roadway at the present time.

Q And that is the ditch you built to prevent the water from the tract of land to the north from running upon your tract, is it? A. Yes.

Q That ditch commenced five rods or ten rods east of the county road?

A Approximately ten rods.

Q And ran east along the line of your road, north line of your roadway to Spring creek? A. Yes.

Q And it was eighteen inches deep, you can answer that?

A Approximately eighteen inches.

Q Now, the two lines on the left of this exhibit indicate the county road, do they not? A. Yes.

Q And there is a ditch along the entire length of your land on each side of this county road, is there not?

A There is.

Q How deep is that ditch, how deep are those ditches above?

A About two to two and onehalf feet.

Q Now, the drain ditch is from the northwest to the southeast, the ditch on the west side of the road is the drain ditch, isn't it? A. Yes.

Q And the ditch on the east side of the road is a drain ditch?

A Yes.

Q The ditch on the west side is a ditch that has been there for years, and has been used as an irrigating ditch by people with land to the south and southwest of your land, to the southwest of your land, and on the west side of the county road, isn't it?

A No.

Q Don't the people between that point and the river west of the road use that for an irrigating ditch today?

A No.

Q None of them? A. No.

Q Now, who uses the ditch on the east side of the road for an irrigating ditch, if anyone?

A No one.

Q So that if there is any water in that ditch, or either of those ditches, it will continue on to the Provo river?

A Yes.

Q During the entire season? A. Yes.

Q Now, do you remember a ditch below Spring creek just north of the road leading west to Tates, the only road leading west from this county road, do you remember a ditch crossing that road with a box wooden culvert in it?

A Crossing the county road?

Q Yes. A. No.

Q Do you know of any ditch crossing that road between Snake creek and the Provo river? A. Yes.

Q Where is that, the one you remember?

A The one I remember is the one that was put in at this particular point.

Q What point?

A About twenty rods south of the northwest corner of my land.

Q Who used that ditch, if anyone?

A I did.

Q What did you use it for?

A To irrigate and sub irrigate this land.

Q You say you guess it did?

A It run there without any disturbing until I disturbed it.

Q Why did you disturb it, to turn the water in your land?

A I disturbed it because I had too much water at that point.

Q Too much sub irrigation, that is right, isn't it?

A Too much sub irrigation, and too much overflow.

Q And too much overflow? A. Yes.

Q How much of this land of your's until it was grained, required irrigation at all, how much of this twenty-six acres, surface irrigation?

A It all required surface irrigation.

Q In order to produce crops?

A In order to produce good crops.

Q It all required surface irrigation? A. Yes.

Q What time in the year?

A During the time the crop is growing.

Q Did that portion that was down in the slough where the running water was, require additional surface irrigation?

A It did not require additional surface irrigation.

Q And how much of it had water upon it covering it without having been turned upon it, or put upon it prior to the time you drained it, natural water at the surface of the land?

A I can't tell.

Q Two-thirds of it?

A There was a question involved there, I don't believe I can answer.

Q What is it?

A I take it that if land is irrigated by subirrigation the water is there. The water may be there at the top, if it raises.

Q That is what I am asking you, how much of it was watered at the top of the land from subirrigation, prior to your draining it?

A It all had water at the top of the land.

Q Without having it turned upon it?

A In other words, it had the moisture there.

Q Without having any water turned upon it?

A No.

Q By artificial means, I mean; turned upon it by artificial means? A. No.

Q Did you have any ditch whatever leading to this land to convey water to it for irrigation purposes prior to the time you drained it?

A The drained land, do you mean?

Q The tract of land that we are now having under discussion, did you have any irrigation ditch leading to it that was used by you for the purpose of irrigating it?

A I would like to explain.

Q You can answer that question yes or no.

A At the time that I drained--

Q Before you drained it? A. No.

Q So that until you drained the land it never was irrigated from any water that you had diverted from any source and turned upon it, or any other person, prior to you, so far as you know?

A There is some of the land that I had never turned water upon prior to the time that I made the drain.

Q How much of it?

A I cannot tell.

Q Two-thirds of it? A. No.

Q Half of it?

A I can't tell that, I haven't measured it.

Q Now, you have this tract of land marked off in two parcels with a line drawn through between, one is marked Alexander, the other is marked Margaret Noakes. When did you purchase the land from Alexander?

A I purchased it in 1911.

Q And when did you purchase the land from Margaret Noakes?

A The same year, I think, 1910, I will say.

Q So that your ownership of this land was not acquired until 1910, any portion of it?

A On the lower piece, yes.

Q And your predecessors in interest, or the people from whom you purchased it, had a different system of irrigation, from that which you now have? A. Yes.

Q And you think that their system wasn't good?

A No.

Q Now, do you know that they ever surface irrigated any portion of that land?

A I know they surface irrigated some of that land.

Q How much of it and what portions, point it out?

A According to my knowledge about six acres of this particular piece of the Margaret Noakes land was irrigated by surface

irrigation.

Q Now, how much of the Alexander tract was irrigated by surface irrigation, if any, that you know?

A About six acres.

Q So that prior to the time you acquired the title to the land twelve acres is all that was ever surface irrigated, is that right?

A I would say in addition to the six acres there was some surface irrigated here on the east.

Q That is on the east side of the creek?

A No, west side of the creek.

Q Why didn't you include that in the six acres when I asked you as to the Alexander land?

A I had in mind the amount that was irrigated from the Midway Irrigation system.

Q And the three acres that was irrigated on the east of the Alexander tract was the overflow from the Van Wagoner waste water, wasn't it? A. Yes.

Q It was not irrigated by the owners of the land?

A Yes.

Q It was?

A Yes, and by the sons of the owner of the land.

Q That is from the waste water of the Van Wagoners?

A Yes.

Q Who owned the land at that time?

A Will Winterton.

Q The Alexander tract? A. Yes.

Q That would be three acres on the northeast corner?

A Yes.

Q How long ago did William Winterton own it, when did his ownership cease?

A His ownership ceased, as near as I can remember, about the year 1908 or '09.

Q Isn't there a ditch coming down from the east here from Spring creek or Snake creek and crossing between the-- crossing at

the lower end of the Noakes tract?

A Near the lower end.

Q Called the Midway-Charleston ditch? A. Yes.

Q Now, that ditch crosses the county road, does it not?

A Yes.

Q Near the south end of your land? A. Yes.

Q So that there is an irrigating ditch then used by people below into which the water-- any drain water that comes from your drain ditch along the county road, finds its way?

A It finds its way running to the west.

Q Yes, and doesn't go into the Provo river directly, it is intercepted by your ditch, isn't it?

A Not always.

Q Well, whenever those people below are irrigating?

A Yes.

Q It is intercepted by that ditch? A. Yes.

Q And I understood you to say there was no ditch, irrigating ditch, crossing the county road between Snake creek and the Provo river?

A I said there was none where the water run to the east.

Q But there is one that crosses and runs to the west?

A Yes.

Q And irrigates how many acres of land down in there?

A Approximately one hundred and twenty acres.

Q How do you get water across that ditch to irrigate the south end of your Noakes tract?

A To irrigate this?

Q Yes.

A I irrigate this from this Midway-Spring creek ditch.

Q From stock in the company?

A No, it is not a company ditch.

Q So that a portion of the six acres of the Noakes tract that was ~~xxxx~~ formerly irrigated was irrigated and is still irrigated from a wholly different source than from Snake Creek, isn't it?

A No.

- Q The ditch coming from Snake creek, doesn't it, from which you irrigate, that Midway-Charleston ditch, it heads at Spring creek, doesn't it? A. Yes.
- Q So that a portion of this land that was formerly irrigated in the Noakes tract was then and is now irrigated from Spring creek?
- A Not all the land in question.
- Q I asked you as to the Noakes tract, how many acres had formerly been irrigated, and you said about six acres surface irrigated. Now, I say a portion of that is now and was irrigated from Spring creek, isn't that true?
- A I would like to explain.
- Q Well, explain.
- A In the Noakes piece there was altogether twelve and one-half acres of land. In addition to that formerly there was about two or three acres more which he sold to the fish company, making approximately fifteen acres of land in here, piece of land that she formerly owned there.
- Q Is that land represented on your map? A. Yes.
- Q As owned by you? A. Yes.
- Q All right, go on.
- A In this twenty-five and one-half acres there is eleven and one-fourth acres of the A. J. Alexander land which was formerly owned by my father. There is nine acres of the Margaret P. Noakes land, and five and one half, or three-fourths acres, approximately, in the fish company land formerly held by Joseph Wright and Margaret P. Noakes. This land, this Noakes land, was formerly irrigated by Mr. Noakes from the Midway Irrigation Company system, about three acres of this land, and the balance of the water was used on this other part in the northeast part of her field.
- Q You say there is from a second foot to five second feet in this drain ditch to the west of your land?
- A Yes.
- Q When is there a second foot?

A Whenever there is irrigation above.

Q And when is there five second feet?

A During the early part of the season, when the water is more plentiful.

Q At that time every ditch and slough in that section is full of water, isn't it?

A Not always.

Q Sir?

A Not always.

Q Well, up until what we term low water begins?

A No.

Q That is true, isn't it? A. No.

Q When are they full, if at all?

A Full when the water is to the top of the ditch.

Q That is correct, but I mean as to the season of the year, you understood me, didn't you?

A I am not always there so I can tell.

Q You never saw them full?

A I have seen them full.

Q Sir?

A I have seen some of them full.

Q And overflowing?

A Some of them, yes.

Q Covering all over the county road, until they put the last grading on it? A. No.

Q Do you know whether there was any water right or stock in the company transferred from Noakes to the fish company when he sold that land on the east there to the fish company?

A I do not know that there was.

Q Do you know that he reserved his water right, don't you?

A I think he did.

Q And you never got any with it when you bought it, did you?

A All her water was sold to me.

Q You didn't get any water right for this land that you speak of over to the east there when you purchased it, did you?

- A I purchased the water before I purchased the land.
- Q Then the fish company held the land and you held the water stock? A. Yes.
- Q And you sold the water stock to Van Wagoner?
- A I traded.
- Q Traded it to Van Wagoner? A. Yes.
- Q Did you sell it to the fish company?
- A Sell what?
- Q Any land to the fish company, you or your father ?
- A I did not.

REDIRECT EXAMINATION by Mr. Cluff.

- Q Mr. Winterton, the water that is collected in this drain on the west of your land--
- MR. A. C. HATCH: West.
- Q West, beg your pardon, is intercepted by a canal that goes around there to water approximately one hundred and twenty acres of land?
- A Yes.
- Q Is that water measured off to them as part of their water from the Provo river system?
- A I believe it is.
- Q You own some land below this twenty-five and a half acres that you speak of, and adjoining that? A. Yes.
- Q And you water some of that land from the Spring creek?
- A Yes.
- Q There is no part of the forty-five and a half acres you are speaking of here you claim any water for other than from the Snake creek dam-- you speak of here, the twenty-five and a half acres is watered wholly from the seepage in the Snake creek?
- A Yes.
- Q And no portion of that you water from Spring creek?
- A I do not.

RECROSS EXAMINATION by Mr. A. C. Hatch:

- Q Just a moment. Which of those ditches running down the side of the county road carries the greater quantity of the water?
- A Which of those ditches?
- Q One next to your land or one on the opposite side of the street?
- A I would say it all goes at the present time, down the west drain.
- Q You don't intend the court to understand that this five second feet of water was drainage from your land?
- A No, it went over my land.
- Q Went under your land?
- A Went over and through my land and through the lands below, and made much of the land below swampy.
- Q And the lands above?
- A I don't know.
- Q Isn't it true, I am asking you?
- A I take it that wherever the water is and spreads out it will cause,-- the water will soak through and cause lands to become damper. That is a chance.

MORONI WINTERTON, called by the defendant Hyrum S. Winterton, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Cluff:

- Q What is your name?
- A Moroni Winterton.
- Q Where do you reside?
- A Charleston.
- Q Wasatch county?
- A Wasatch county.
- Q Are you acquainted with the twenty-five and a half acre tract of land that is being discussed at this time in this case?
- A Yes.
- Q Owned by Hyrum S. Winterton? A. Yes.

Q How long have you known that land?

A I have known the land for-- I don't know how many years, I was raised there by it and been acquainted with it. Part of that land I have been acquainted with, for, I will say, twenty years.

Q Do you know the manner in which it has been irrigated in the past?

A. Yes sir.

Q Do you know that requires irrigation to produce crops?

A Yes sir.

Q What sort of crops are raised on it?

A Hay?

Q Hay principally?

A Hay principally. Has been grain raised on it, has been some sugar beets raised on it.

Q Will you state to the court about what portion, if you know, of the twenty-five and a half acres was formerly irrigated by surface irrigation?

A I would have to just approximate it, I have never made any measurement of it, but I would say probably-- well, neighborhood of fifteen acres.

Q How was the balance of it irrigated?

A By sub-irrigation and flooding together.

Q Since your brother-- Hyrum S. Winterton is your brother, is he?

A Yes.

Q Since he became the possessor of that land, what has he done to change the system of irrigation there?

A He has-- want me to go through--

Q Yes, if you can point out on the map there?

A I will say he has exchanged, according to the information that is generally understood, and what I understand, exchanged the stock which he held in the Midway Irrigation Company for stock, or for interest in the Snake creek seepage water which was owned by Van Wagoner brothers, and has also dug drain ditches, helped to dig them, to prevent seepage and sub-irrigation, and has--

Q Where has he dug those ditches?

- A He dug one ditch on the north side of his line, or the south side of the Van Wagoner brothers land.
- Q And the water that was accumulated in that ditch where was it diverted to?
- A It was diverted into Spring Creek creek.
- Q Which is part of Provo river system?
- A Which is part of Provo river system.
- Q That water formerly sub-irrigated and flooded a portion of his land?
- A. Yes sir.
- Q What other portion of the land was sub-irrigated?
- A This portion, this little slough which comes down formerly to the Wooten ground, crosses the county road between Charleston and the bridge through a culvert which was made under the road, and waters flooding over his ground.
- Q What would be the southwest portion?
- A That would be the southwest portion of that land.
- Q What has he done there with reference to digging drains?
- A He has assisted Wasatch county in the digging of drains, dug two drains, one on each side of the road, and he assisted the county by furnishing men to help them to dig that, paid the men, I don't know how many, or anything of that part, how many he hired.
- Q We don't care for that. Do you know about how much water was accumulated in those drain ditches on the west side of his land?
- A I would say there is always from one to four or five second feet.
- Q Where does that water go to?
- A When the drain was dug they dug the drain direct to the river, and some of the time it is intercepted by the canal which crosses at this point, in irrigation season, and the drain goes direct to the river.
- Q Either direct into Provo river?
- A Either direct into Provo river or into this canal.
- Q Which takes it s water from Provo river?
- A Yes sir.

THE COURT: How far is it to the river from this land?

A From this point to the river is about, I will say, two-fifths of a mile.

Q Now, after that drain was dug, what was the condition of the land that was formerly flooded by the water that went into that drain?

A The land through here that was formerly flooded was swampy.

Q That was before the drain?

A That was before the drain.

Q After the drain?

A It has dried up.

Q So that requires surface irrigation?

A That requires surface irrigation.

Q From what source does your brother surface irrigate it now?

A He surface irrigates it from this point from the dam, bringing the water down the Midway road to the old ditch which formerly was used, taking it over there.

Q Where does that water come from?

A Comes from seepage water and springs which raises short distance up above the county road.

Q In the Snake creek?

A In the Snake creek.

Q Is there above that point a tight dam in Snake creek during irrigation season? A. Yes sir.

Q So that Snake Creek is diverted entirely away?

A Yes sir.

Q And the only water they accumulate or catch there is seepage--

A Flood waters from the lands.

Q And it is necessary now, you say, to flood these lands that were formerly sub-irrigated?

A Yes sir.

Q In order to raise crops? A. Yes sir.

CROSS EXAMINATION by Mr. A. C. Hatch:

Q The tight dam in Snake creek you state is during the irrigation season, you don't mean by that that there is a tight dam in

Snake Creek at this point above your brother's point of diversion during the entire irrigation season, do you?

A I mean, if I understand your question, there is a tight dam above this dam where all the water is taken out which goes down Snake creek.

Q You stated so, but is that dam there during the entire season, tight dam? A. Yes sir.

Q Put in in the spring when the irrigation begins?

A I don't know when it is put in.

Q And diverts all the water?

A I don't know--

Q Wait until I ask the question, and diverts all the water in Snake creek during the entire irrigation season, is that what you mean?

A I mean that, yes sir.

Q So that at no time was there any water in Snake creek below that dam to which you refer other than seepage and springs?

A Well, excepting-- I won't say any high water, there may be high water in high water season, I don't know, I won't say.

Q You don't know anything at all about the dam up there, do you?

A Yes sir.

Q Have you ever seen it?

A Yes sir, you mean the--

Q The dam in Snake creek, tight dam to which you refer, have you ever seen that dam? A. Yes sir.

Q When?

A I saw it when I went up there several years ago, when I used to irrigate, there was a dam up at what was known as the Huffaker place.

Q You saw it once?

A I saw it great many times.

Q How many years ago?

A Well, it was-- I won't say that.

Q When was the last time you ever saw it?

A I don't know that.

Q Was it prior to 1911?

A Yes sir.

Q Was it prior to 1905 when you last saw that dam to which you testified?

A I won't say as to that.

Q And since you saw it there you don't know anything about it of your own knowledge?

A No sir.

Q Whether there has been a tight dam in Snake creek since your brother owned this land or not? A. No sir.

Q Do you know where this one to four or five second feet of water comes from that goes down the drain ditch to which you referred?

A It raises in springs.

Q Just a moment, I am asking now for your knowledge, what you observed yourself and seen?

A I don't know where it comes from, only I know it comes.

Q And there is water in that ditch?

A Yes sir.

Q You don't know whether it is water distributed by the Midway Irrigation Company to stockholders through the Huffaker ditch, or whether it is spring water, do you?

A No sir.

Q Now, did you ever see in that drain ditch yourself to exceed one second foot of water?

A I have never measured it.

Q I am asking you?

A I would like to explain from the judgment I have of water that I would estimate and know that there is more than one second foot.

Q You know that the ditch wouldn't carry five second feet of water, don't you? A. No sir.

Q If it were full to overflowing?

A No sir, I don't know that.

Q Isn't that your best judgment?

A No sir.

Q That it would not?

A You mean the ditch that goes down by the side of the Midway road, the drain ditch?

Q Yes, on the west side.

A I know that would carry more than five second feet.

Q This year?

A It would carry it any year since the drain.

Q Sir?

A It would carry more than that any time.

Q Since the ditch was first made?

A Since the drain ditch was first made, yes sir.

Q I am asking you since the ditch itself was first made. You qualify it by saying drain ditch. Do you mean since the ditch itself was first built there?

A I mean--

Q Or since your brother and the county combined dug the ditch?

A Since the county and my brother combined.

Q When did they combine to do that, the last year?

A They combined, I think, I don't know the year, probably two or probably three years, I don't know, I never kept track of the date.

Q It is not over three years ago, is it?

A I don't know.

Q That your brother and the county cleaned the ditch out, isn't that what they did?

A I think that is a matter of record.

Q They cleaned it out, didn't they?

A No sir.

Q Ditch that was already there?

A No sir, they dug the ditch through, that ditch you have reference to.

Q In a new place?

A There was no ditch there when they dug it.

Q Do you mean to say there has not been a ditch down each side of that road for twenty years?

A I mean at the point you have in mind there was no sign of a ditch there when they dug it.

Q How do you know what point I have in mind?

A You have in mind, I take it, the point from where this slough comes, or where this spring water or drainage.

Q Pardon me, I have in mind from Snake creek to the Provo river, both sides of that county road, so that you won't be misled by what you think I think. Will you say there has not been a ditch down each side of that county road from Snake creek down to the Provo river for twenty years?

A I will say there has not.

J. C. PYPHER, called by the defendant Hyrum S. Winterton, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Cluff.

Q Where do you reside?

A Midway, Wasatch county.

Q Acquainted with Hyrum S. Winterton?

A Yes sir.

Q Are you acquainted with the tract of land that he owns near the county road running between Wasatch and-- Midway and Charleston? A. Yes sir.

Q North of Provo river? A. Yes sir.

Q The particular twenty-five and a half acres that is being spoken of at this time in this case?

A Yes sir.

Q How long have you known that tract of land?

A About twenty-five years.

Q Have you known the manner in which it has been irrigated in the past? A. Yes sir.

Q Does it produce crops? A. Yes sir.

Q What kind?

A Hay principally at the present time.

Q Do you know the southwest portion of that land as to how it has been irrigated, and was irrigated in the past?

A Yes sir.

Q How?

A Why, from observation, by sub-irrigation.

Q Do you know whether or not there has been a drain dug on the west side of the tract of land leading south towards Provo river?

A. Yes sir.

Q When was that, do you know?

A I would not say, I think it was in '13 or '14, as near as my memory serves me.

Q Did you observe the effect that drain had upon the land owned by Mr. Winterton?

A I have.

Q What?

A It has drained it off considerably, it is drier, it is not so wet.

Q. Makes it necessary to surface irrigate that ground that was formerly sub-irrigated?

A In order to produce crops it should have surface water.

Q Have you a judgment as to about how many acres of land was formerly sub-irrigated prior to the digging of that drain?

A Well, I wouldn't say, I couldn't say definitely.

Q Do you know where and from what source Mr. Winterton obtains his water now to irrigate that twenty-five and a half acres?

A Yes sir.

Q From what source?

A Spring creek seepage water.

Q Do you know how long he has been using that to irrigate this twenty-five and a half acres?

A I could not say definitely.

Q Do you know that it is necessary to surface irrigate the twenty-five and a half acres now?

A Yes sir.

Q In order to produce crops?

- A Produce better crops.
- Q For how long have you known that particular tract of land?
- A Twenty-five years.
- Q Has it been producing crops during that period?
- A Yes sir.
- Q All of it? A. Yes sir.
- Q The land that was formerly subirrigated before these drains were dug produced well? A. Yes sir.
- Q And now in order to produce it is necessary to surface irrigate it?
- A Get better results.
- Q Have you observed any difference in the crop production by reason of the surface irrigation since the sub-irrigation was done away with? A. Yes sir.
- Q What is it?
- A Why, grows more prolific, heavier crops and grasses from surface irrigation is growing than done previously.
- Q Have you a judgment as to the amount of water that has been collected in the drain on the west side of the tract of land that formerly went on to the land that is now collected, and turned into Provo river system?
- A Just from observation.
- Q About how much would you say?
- A I would judge it varied from one to four or fivesecond feet.
- Q And before this drain that you speak of was dug that water flooded over and spread out on Winterton's land?
- A Yes sir.
- Q Have you noticed any drain on the north side of Mr. Winterton's land? A. Yes sir.
- Q Between his and the Van Wagoner tract?
- A Yes sir.
- Q Where does the water that is accumulated in that drain go to?
- A Goes to Spring Creek, tributary to Provo river.
- Q Before that drain was dug, water that was there, where did it go?

A It went on the east portion of the Alexander tract.

Q And that was watered by flooding and sub-irrigation?

A Yes sir.

Q Prior to the digging of that drain? A. Yes sir.

Q Now, it is necessary to surface irrigate that tract?

A Yes sir.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q Do you know how many times in the season it was watered from surface irrigation and flood water before it was-- the drain was dug on the north?

A I wouldn't say, Judge Hatch.

Q Might have been one and might have been twenty-five times?

A Yes sir.

Q So far as you know? A. Yes sir.

Q And might not have been at all, isn't that true, in some seasons?

A I believe it has been irrigated every season.

Q Did you ever see any drain, any water in that drain ditch on the north except when Van Wagoners were irrigating the land above? A. No sir.

Q Doesn't drain any water from the land itself into the ditch?

A No sir.

Q Only such as surface water drain into it?

A I would judge so.

Q Now, do you know the purpose of the digging of that drain ditch on the north?

A What is the question?

Q The purpose of digging that drain ditch on the north?

A Well, just from observation I would judge it was put there to catch surplus overflow.

Q To keep the water from flooding onto the Winterton land?

A When they didn't need it, I would judge,

Q Is there any dam in to divert and use it, ever see a dam in it?

A well, I don't know that I did. I never took close observation of it, not being interested.

- Q Did you ever see five second feet of water in the drain ditch from the west of Winterton's land?
- A Well, as I said before, it is just from observation, I couldn't swear there was five or four, or any other amount.
- Q You saw water--
- A I saw variation in the ditch.
- Q What time of year would you see the most water there?
- A Well, I would say it would be in the high water season.
- Q When there was flood water and excess water in Snake creek, wouldn't it be?
- A Well, it would be when they were irrigating more extensively above.
- Q You say the crops have been better since 1913 than they were before upon this tract of land?
- A Well, where they have surface irrigated I would say yes.
- Q Have they surface irrigated all of it or only part of it?
- A That I couldn't say.
- Q Then how can you say the crop is better where it is surface irrigated?
- A I can see a difference in the crop, I have irrigated the land myself.
- Q Since 1913? A. No sir.
- Q But since 1913 there is a better crop there, than when you irrigated it, is that right? A. Yes sir.
- Q You surface irrigated it, didn't you?
- A Portion of it.
- Q How much of it?
- A I would not say, it was a number of years ago, I was just hired one day to go and irrigate, exchange labor.
- Q Go and turn the water?
- A Go and care for the water and get it over the land.
- Q Where did the water come from you used that time you irrigated it?
- A At that time it was used through the ditch controlled by the Midway Irrigation Company.

Q What was called the Huffaker ditch?

A Well, I always understood it to be the Smith branch.

Q Comes out up by Huffaker's? A. Yes sir, same point of diversion.

Q And when was that?

A I would not say, it was a number of years ago.

CROSS EXAMINATION by Mr. Wahlquist.

Q The ditch through which you irrigated there, would that be the ditch Mr. Hyrum Winterton testified to as crossing the county road south of the present cement dam through which he conveyed the water onto the land before making the trade with the Midway Irrigation Company?

A Yes sir.

MR. CLUFF: I think that is all, if the court please. We desire to offer Exhibit 176.

THE COURT: It may be received for the purpose of illustration. Do you desire to introduce any rebuttal?

MR. A. C. HATCH: Yes, we want to offer some rebuttal.

JOSEPH R. MURDOCK recalled by the plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. A. C. Hatch.

Q Were you ever county commissioner of Wasatch county?

A Yes sir.

Q When?

A Prior to 1906-- 1896, I would say.

Q Do you remember, or have any knowledge of the time when the road was laid out between Midway, county road between Midway and Charleston?

A I had it under my charge when it was located and built.

Q About when was that?

- A I cannot remember how many years prior to that, but it was before statehood.
- Q And I will ask you to state whether or not there were ditches built along each side of that road through the meadow land between Snake creek and Provo river at the time the road was laid out?
- A Ditches were built on both sides of the road wherever the water entered the road at all. The water all came from the west side and went southeasterly to the river, and wherever there was any water that would in any way interfere with traffic drain ditches were made to convey it down sometimes on both sides and sometimes on one side of the road all the way along from the Spring creek branch down to the river.
- Q How deep were those ditches?
- A Oh, from-- I would say from a foot and a half to two feet and a half deep.
- Q And have you had occasion to travel that road since?
- A Very frequently.
- Q About how often?
- A Oh, I would say almost monthly. One season we had a dam in the Snake creek at the Snake creek bridge, and turned water over it, and that I visited almost weekly.
- Q Is that dam to which you refer the dam by which Van Wagoner diverted his water from Snake creek?
- A It is same dam.
- Q Who built that dam?
- A Van Wagoner and Winterton, I understood, I don't know only from what they say.
- Q Concrete dam? A. Yes.
- Q Where was your dam?
- A We took the water at that-- we turned the water from that dam and let it go down into the river.
- Q Made measurements at that dam?
- A Yes, and--
- Q What year was that?

A I think that was in 1914, if I remember correctly, it might have been 1913, I am not certain as to the year.

Q Now, during the years since the county road was established, I will ask you in regard to the ditches along the side, have they been kept?

A Yes sir, I have observed that whenever the ditches began to fill up that they have been cleaned out and kept open?

Q Recently, if you know, state whether or not they have been grading that road?

A Yes, they have been grading it, the road has been graded up. That was not done in the beginning, the road was not graded, the road in the beginning was made by the construction of the ditches alone without grading.

Q So that those drain ditches or the road have been there since the road was established? A. Yes.

Q Can you state approximately the time when that road was first opened and made a county road, and the ditches along its side were first built?

A I would say about 1890, but I am not certain as to a year or two.

Q Do you know the location of the Winterton twenty-six acres, he has testified to?

A Very well. I owned half of it at one time.

Q Can you say whether or not the ditch along the county road was built for the entire length of that tract of land on both sides of the road?

A It was, and delivered water into the river until what is known as the Midway Irrigation Company's ditch was built.

Q What ditch is that, one leading from Spring creek through the Noakes tract, shown on the exhibit?

A Yes sir.

Q When was that built?

A That was built shortly after the road was opened.

Q Took water out of Spring creek and conveyed it south and south west and across the county road? A. Yes sir.

- Q To irrigate approximately how many acres of land?
- A I would say from a hundred to one hundred and fifty acres.
- Q So that the Winterton land was drained so far as an eighteen inch to two and a half foot ditch would drain it, as long ago as 1890?
- A. Yes sir.
- Q Do you know from what source this land was irrigated, if at all, before that?
- A I know the source on account of being the owner of half of the land, or a little over. It was irrigated from the Midway Irrigation Company water.
- Q Through what ditch?
- A Through what is known as the Smith branch, I think, of the Eppison ditch.
- Q How much of this twenty-six acres was irrigated?
- A As near as I can remember about sixteen acres of it-- was it twenty-six acres?
- Q There is a three acres tract there testified to by Mr. Winterton, as the fish company land, do you know where that was irrigated from?
- A Yes, it was irrigated before the fish company bought it, of which company I was president, some ten years or twelve years ago. It was irrigated from the Midway Irrigation Company.
- Q That is by representation of the stock?
- A Yes sir.
- Q Was there any transfer made of that stock to the fish company when it purchased the land?
- A There was not.
- Q So that while the fish company owned it it was not irrigated?
- A Was not irrigated only by subirrigation, which produced a small crop of grain, but the soil was not the best, little mineralized, it did not grow very big.
- Q Do you know how many acres Van Wagoner has irrigated from the source which Mr. Winterton now claims to irrigate prior to the sale of the land to Winterton?

MR. CLUFF: Object to it as not rebuttal, having

having been gone into by this witness yesterday.

MR. A. C. HATCH: I think he is right.

Q Do you know how many acres, or whether or not any portion of the land now owned by Winterton was irrigated from the Van Wagoner ditch? A. Yes.

Q Which diverts water from the concrete dam?

A Yes, I know that none of it was irrigated until recent years, probably three to five years, I could not say exactly.

Q Do you know whether any portion of it was surface irrigated by the waste water from Van Wagoner's land?

A I know it was not irrigated intentionally.

MR. CLUFF: I object to that, move it be stricken out.

MR. A. C. HATCH: Just a moment, it may go out.

Q I ask if you know whether any of it was irrigated?

A Well, I don't know, only I do know that the water from part of the land belonging to Van Wagoners would run to the southwest, and cut out the road, but I never knew any of it was ever irrigated.

Q Run to the southwest?

A Yes, from the Van Wagoner land, which he irrigated from Spring creek, the drainage would run to the southwest.

Q Just a moment now. Read his last statement, Mr. Reporter, and listen to it now.

(Answer read)

Q We are not asking about any water or land that is irrigated from Spring creek. It is Snake creek we are talking about, and the ditch that diverts water from Snake creek at the concrete dam?

A That never was conveyed over on to the Van Wagoner land, that ditch was not. If any water reached there it was water where they were irrigating down towards the southwest corner of the Van Wagoner land. The refuse or the overflow from a few acres there would run into the road and wash the road out.

Q I don't understand you yet, I understood from the testimony of Van Wagoner and from your testimony of yourself yesterday

that that ditch and dam was for the purpose of irrigating some of the lands belonging to Van Wagoner and that he irrigated twenty acres from water diverted through ditches at that concrete dam, am I right?

A Yes sir.

Q Now, you say that that ditch never reached any water or any land owned by Van Wagoner?

MR. CLUFF: If the court please, I object to this as not rebuttal, whole matter was gone into yesterday.

MR. A. C. HATCH: I don't ask-- I am asking as to Winterton land that was irrigated from this.

MR. CLUFF: I know, but you asked as to that yesterday from this same witness.

MR. A. C. HATCH: The Winterton land, in cross examination you brought that out. I asked him as to the land irrigated ~~xxxx~~ by Van Wagoner and owned by Van Wagoner. In cross examination you brought out from Van Wagoner some of this waste water from his land run across the Winterton land, and it is to fix how much, if any, was so irrigated, is what I am asking the question for.

THE COURT: He may answer it.

A From this map I think I can probably explain it. This map shows the south line of the Van Wagoner land. That ditch only extended about to this point.

Q What point?

A To about the south side of the Van Wagoner land, and never was extended over, nor intended or used to water any of this land before the Winterton people purchased it.

Q Any water on which land?

A Any water from the Spring creek, any water from those springs never reached-- that is, it never was used for irrigation upon this land.

Q Now, Mr. Murdock, this land means nothing in the record.

A Well, none of this, none of the water from this spring was used as an irrigation water by the lands ~~used~~ owned by the

successors of Winterton, never was applied upon it.

Q The predecessors of Winterton?

A Yes sir.

Q What I am asking you about is when the water was used by Van Wagoners upon the land they irrigated south and west of Snake Creek, would any of that water find its way upon the lands now owned by Wintertog?

A I would not say that.

Q Other than lands purchased from Van Wagoner?

A I would say not any way that would be a benefit to them, hence the necessity of constructing this little ditch was to protect the road.

Q That little ditch here, you mean the drain ditch to the north of the Winterton land?

A. Yes, it was dug to protect the road. I have passed there many times when the road was almost impassable to go down to the fish hatchery ground, it was never intended, or appeared to be in anywise used as an irrigation.

CROSS EXAMINATION by Mr. Cluff.

Q The road, you say, was almost impassable?

A Yes, at times.

Q Due to dampness and wetness?

A Yes, in this quarter in the southwest corner.

Q And that same condition extended on to the Winterton land by reason of the water that accumulated there, didn't it?

A I wouldn't say that, I think it run down the road.

Q Just that one streak along the road?

A Yes, it run into the road. There was a gutter in the road foot or foot and a half deep where it washed or cut down.

Q Was that gutter always there?

A In the road?

Q Yes.

A No, not before the road was there. I think the traveling in soft ground made a gutter, and then the seepage from this piece--

not all of this piece, but simply on this corner, running into it, made it softer.

Q When did that occur?

A I think that existed before Winterton had it, if anything, while they were still irrigating this land with Snake Creek water.

Q You say there was no portion of this land the fish company formerly owned that was irrigated during the time the fish company owned it?

A No, we had no stock to irrigate with.

Q Don't you know Mr. Winterton himself raised crops on that land?

A While we owned it, we didn't rent him any water.

Q Don't you know that he irrigated the crops there and raised crops on it?

A After he bought it from us?

Q No, before?

A He may have done it before, but never sold us any water. When we bought it we sold it for, I think, six or eight years.

Q Now, Mr. Murdock, coming back to this road that you say you built in 1890.

A Through here?

Q Yes. A. Yes.

Q County road?

A County road.

Q You say wherever the water from overflowed lands above came and interfered with the road you dug ditches?

A Yes. Pardon me, sometimes we would convey it from oneside of the road to the other through a culvert than dig the ditch on the opposite side of the road, and we made the road passable for wagon haul and traffic the yeararound.

Q In other words, you graded up the road some and dug out of each side to fill up more in the center of the road?

A We graded up in a few places only, just in a few swales and holes.

Q It is this place, few swales and holes where the water interfered with that road, waan't it?

A There was no running water there at the time we built it. It was stagnant and wet. It might have been probably foot or two deep, and maybe rod or two rods wide.

Q And by excavating on each side of the road and fill in for the road you made a sort of channel on each side?

A Yes.

Q That is about the only ditches that was made?

A Wherever was necessary to keep the water from crossing this road from the west to the east we conveyed it all down that road.

Q Wherever the water came into the road you would dig a ditch for a ways, then convey it under the road by culverts?

A Wherever it was practicable.

Q So that those ditches were at intervals along that road?

A Where there was a very little water they were at intervals.

Q Along past the Winterton tract?

MR. A. C. HATCH: Wait, pardon me. I insist he be allowed to finish his answer.

A I saw on the Winterton tract there was so little water we did a little grading. As we got farther down below the Winterton land there was a slough there, which is there today. From there on down our grading was continuous.

Q Along by the Winterton land what little ditches you did dig was just at intervals? A. Yes.

Q And there was a culvert that came through under the county road and brought water toward the Winterton land near the northwest corner of the land, wasn't there?

A We didn't allow any water to run from the road on to the Winterton land. Wherever it came into the road we conveyed it straight down. We did not attempt to swamp the man's land worse than it was.

Q You were protecting the road, you were not protecting the land?

A No, but we didn't presume we had the right to turn the waste water onto the man's already over-watered land.

Q So there was a considerable portion of this Winterton tract that

was already overflowed with water?

A. No sir.

Q And sub-irrigated by seepage?

A. No, I wouldn't say there was considerable quantity; on the upper piece there was two or three acres about two to four rods wide, and about two foot lower than the line east of that where it was too wet already, and appears to be so this year and last year and year before. I doubt very much if he has ever watered it, that particular part of it, even up to this time.

Q You think that particular part of it then has never been irrigated by surface irrigation?

A That would be my judgment, yes.

Q And has never raised any crops?

A No, it raises flags and broad leaf and grass that grows on lower tracts of land.

Q I take it you have been watching this particular tract of land very carefully?

A I have passed it very frequently, and, having owned this lower tract for a number of years.

Q How much of that lower tract when you owned it was flooded?

A There wasn't any of it flooded, it was natural--

Q Boggy?

A No, it wasn't boggy, but was wet land, didn't need irrigation. Probably five or six acres of it didn't need irrigation when I bought it, and when I sold it.

Q Don't you know it to be a fact Mr. Winterton and the county have in the past three or four or five years dug that drain ditch much deeper along the east side of the road there?

A No, they may have made it a little deeper getting dirt to grade the road up, and make it better road in the early spring time.

Q But there has not been anything particularly done to it since the road was built?

A It has been taken care of each year, but I never saw Mr. Winterton on there, didn't know he did, I supposed it was a county road, and the county did it.

Q The culvert that came under the county road you speak of

in the northwest corner of Mr. Winterton's land, isn't it a fact that that was at a low place in the road?

A Yes.

Q And you filled in along there and just south of that and west there was quite a high place, wasn't there?

A I can't remember all the high spots and low spots, possibly there was.

Q And there was never anything done by you to dig down through that high place along the road to divert that water on down, was there?

A I will say this, we did not attempt to flood any man's land, make it any worse than it was. When we built the road, the parties who owned it next that roadway, and we attempted to take care of all the little water there was.

Q And where you graded up or dug culverts under the road and dug along on each side of the road, it was for the particular purpose of protecting the road, realizing the land there was already boggy?

A It was to protect the road in the spots that were wet.

Q You don't know of any water at all leaving that slough that occurred there, and running directly down the side of the road, do you?

A I couldn't say as to that.

Q That is all.

A Only in a general way.

MR. A. C. HATCH: We rest.

12:00 NOON, RECESS TO 2:00 P.M.

JULIA M. DAVIS, called by defendant John E. Berg, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Shields.

Q You are one of the defendants in this action?

A Yes sir.

Q Where did you formerly reside?

A In Park City.

Q Reside in Park City now, where did you formerly reside?

A In Wasatch county.

Q Where?

A Wasatch county.

Q Were you on the Provo river? A. Yes sir.

Q State to the judge if you were the owner heretofore of land on that river?

A Yes sir, I had one hundred and eighty-one acres.

Q How did you acquire title to that?

A My father bought it from Ella and Will Walker, that is husband and wife.

Q I will ask you if that land would raise any crops without water?

A No, it would not.

Q Did you formerly have sufficient water to irrigate that land?

A Yes sir.

Q And culinary purposes and so forth, domestic purposes?

A Yes sir.

Q Do you remember what year your father bought that land?

A Yes sir, it was seventeen years ago.

Q In 1900, was it?

A Yes, in 1900.

MR. SHIELDS: I want to call Judge Hatch's attention to the fact it was in the Fulton decree her father became the owner of that land.

THE COURT: You owned all the one hundred and eighty-one acres?

A Yes sir.

Q Have you disposed of that land?

A Yes sir, to John E. Berg.

Q In October, 1916, you agreed to sell it along about May or June, 1916? A. Yes sir.

Q Now, Mrs. Davis, was the water used continuously during

these different years? A. Yes sir.

Q On the land? A. Yes sir.

Q For irrigation, what crops did you raise?

A Hay and grain.

MR. SHIELDS: I think that is all.

THE COURT: From what source did you get the water and what canal?

A Through the ditches, through one ditch then we had to build dams in the river.

THE COURT: You took it direct from the river?

A Yes sir.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q Your ditch is known as the Walker ditch?

A Yes sir, that is the main ditch.

Q Do you know how many acres were under irrigation all told of the one hundred and eighty-one?

A Yes sir, there was about fifty acres.

Q The land is known and mentioned in the decree-- do you know whether or not it is? A. No sir.

Q The Fulton decree?

A I don't know anything about the Fulton decree.

MR. A. C. HATCH: Do you know, Mr. Shields?

MR. SHIELDS: I do not, Mr. Thomas has the decree. Ella Walker was a second class, or do you remember?

MR. A. C. HATCH: No, I don't know what class.

MR. SHIELDS: According to Mr. Thomas she was in the second class.

MR. A. C. HATCH: Judge Shields, would you be willing to take a decree for the area and class mentioned in the Fulton decree?

MR. SHIELDS: Yes, we are willing to do that.

THE COURT: That can be determined.

MR. A. C. HATCH: Acreage and class in which the lands are placed in the Fulton decree?

MR. SHIELDS: Yes.

MR. A. C. HATCH: We consent to that.

JOHN E. BERG, called in his own behalf, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Shields.

Q You are the successor in interest to Julia M. Davis, are you?

A Yes sir.

Q One hundred and eighty-one acres of land in Wasatch county?

A Yes sir.

Q Of course you know where the land lays, and we have consented the right they have under the Fulton decree for water shall be maintained in this suit?

A. Yes sir.

MR. SHIELDS: If your Honor please, I am asking for affirmative relief in this answer, have the usual allegations, say the defendant has been compelled to pay out more than one hundred dollars and other expenses, for the reason of the wrongful action of the plaintiffs bringing this action, and will be compelled to pay, and so forth.

Q Now, I would like, Mr. Berg, you have paid out a hundred dollars for attorney's fees heretofore?

A Yes sir.

MR. A. C. HATCH: Just a moment, we object to what Berg has paid, he is not a party.

MR. SHIELDS: He has pleaded in the action.

MR. A. C. HATCH: He comes in as an interpleader.

MR. SHIELDS: No, comes in as the real party in interest.

MR. A. L. BOOTH: Was he summoned?

MR. SHIELDS: No.

MR. A. C. HATCH: Julia M. Davis appeared in the action, and up to the present time is the only party we know anything about, as being before the court, and we object

until Mr. Berg is properly made a party to going into any expenses he may have been to.

THE COURT: Mr. Berg has filed an answer as successor?

MR. SHIELDS: Yes, and the said John E. Berg hereby adopts the matters set forth in the answer of Julia M. Davis, as the real party in interest and asks to be substituted.

THE COURT: I think the objection should be overruled.

MR. A. C. HATCH: So do I, under those circumstances.

MR. SHIELDS: He has said he paid that, and I ask your Honor for further attorneys fees in the matter and costs. It will appear in the cost bill I brought the witness from Park City to Provo.

THE COURT: Any other evidence you have on any of these lines you may introduce. Now, the court will not determine it, matter of attachment or apportionment of cost will be a matter to be determined when the case is finally disposed of.

MR. SHIELDS: He has answered he has paid about a hundred dollars attorneys fees so far, and as to the further attorney fees, I will be asked to be sworn myself.

HENRY SHIELDS, called by the defendant John E. Berg, being first duly sworn, testifies as follows:

I am an attorney for the defendant Julia M. Davis, and substitute John E. Berg, and I claim about one hundred and fifty dollars by reason of attorney fee. I put in an answer and appeared in this action.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q Do you claim anything by reason of your being attorney for Julia M. Davis? A. No.

Q It is only be reason of representing Mr. Berg?

A Mr. Berg.

Q Mr. Berg came in and asked to be allowed to appear?

- A Yes sir.
- Q And set up his claim to this court?
- A Yes.
- Q He was never cited?
- A He was never cited.
- Q And Julia Davis answered the summons by disclaiming any interest?
- A Julia Davis don't claim any interest in the property.
- Q But she did have an interest when she was summoned?
- A She never was summoned according to her own statement, I appeared for her.
- Q She appeared and asked to be allowed to plead?
- A Yes.

MR. SHIELDS: That is all.

THE COURT: Then you may proceed, Mr. Soule.

MR. SOULE: The testimony we desire to offer is in reference to the storage and reservoir rights of the defendant Washington Irrigation Company. I will call Mr. Taylor.

GEORGE F. TAYLOR, called by the defendant Washington Irrigation Company, being duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Soule.

- Q You may state your name, residence and occupation?
- A George F. Taylor, I am a civil engineer, reside in East Mill Creek, Salt Lake County.
- Q Have you testified in this case heretofore?
- A Yes sir.
- Q Are you familiar with the Provo River and distribution of its waters?
- A Yes sir, that is the upper part of it, from Heber City up.
- Q What opportunity have you had to become familiar with that part of the Provo River?

A During the season, irrigation season of 1914, I was appointed by Judge Morgan as water commissioner or assistant water commissioner.

Q Serving under whom?

A Under Mr. Demming.

Q That was what year?

A '14, from June 1st until September 15th.

Q I believe you stated you were a civil engineer; what school are you a graduate of?

A I graduated from the Agricultural College of Utah in 1900; from the scientific school at Harvard, 1904.

Q Since that time have you been engaged in the work of civil engineering?

A Yes sir.

- Q And in the office of the State Engineer some of your time?
- A Yes sir, about seven years.
- Q Are you familiar with the Big Elk reservoir?
- A Yes sir.
- Q Claimed by the Washington Irrigation Company, defendant?
- A Yes sir.
- Q You may state where it is located?
- A It is located -- I don't know the Section or township and range, but it is at the head of what they call Boulder Creek right up in the tops of the mountain.
- Q Is Boulder Creek a tributary --
- A To the north fork of Provo, yes sir.
- Q How far from where Boulder Creek empties into Provo River is this reservoir?
- A I don't know only by the time it took us to go over there and return. I would judge -- well, I cannot give a very close estimate of the distance.
- Q Now, have you made a survey of the dam and ground on which the reservoir is located?
- A Yes sir.
- Q What surveying work did you do in connection with this matter?
- A With the reservoir, the only trip I made to the reservoir was for the purpose of making a rating station so that the people would know how much water by reading the gauge that I established to turn out, when given orders to turn so much. That was the only trip I made to the reservoir.
- Q When was that?
- A I believe that was August 4, 1914.
- Q That was while you were commissioner?
- A Yes sir.
- Q At the time was water stored in this reservoir?
- A Yes sir.
- Q And did you turn this water out at that time into Boulder Creek down into Provo River?
- A We turned out a small stream at first, then I took the rating

with a current meter, then increased the flow until we got the maximum flow through the outlet in order to make a rating station.

Q When was that?

A That was on August 4, 1914.

Q When you turned this water out of the reservoir where did it go to?

A It went down through the natural channel.

Q Of what?

A Of what they call the Big Meadow Flat, I believe, and then on down into Boulder Creek and into Provo River.

Q Where it enters Provo River how far is that point from the diverting point of the Washington Irrigation Company where they divert water from Provo River?

A That is probably eight or nine miles. It may be more than that. It is just above the Stewart ranch. I believe it is eight or nine miles.

Q Do you know what the condition of the water right, or water flowing into the canal of the Washington Irrigation Company, was on the 4th of August, when you turned this reservoir water out?

A I believe I can tell by referring to my book with the measurements in. On August 4th, when we made the measurements there was fourteen feet in the Washington Canal. I would state we only let that water run long enough to make the gauging station and then shut it off until the people had no right in the river except that that came from the storage reservoir.

Q In low water season the decreed right of the Washington Irrigation Company runs out, doesn't it? A. Yes sir.

Q It is a late water right and unless they get this storage water they don't get water in the late season of the year for irrigation? A. No sir.

Q What is the purpose of this reservoir water by the irrigation

company?

A To mature the crops after their river water runs out.

THE COURT: You said fourteen feet, fourteen second feet?

A Fourteen second feet, yes sir.

Q That is the amount you turned from the reservoir is it,

A No, that was the amount that was in the Washington Canal on the 4th of August of that year, river water.

Q Now you say at that time you turned out all the water that was in the river?

A Only for three or four hours, long enough to make a rating station and then the gate was closed down at the reservoir to hold the water in the reservoir until they needed it after their river water ran out; and then on the 19th of August, the water was released from the reservoir because they had no water in the river. You see we established the rating station long before they needed the water in order to have it there when necessary to measure the water from the reservoir.

Q Now did you do any surveying in connection with this reservoir right?

A Yes sir.

Q What nature?

A For the purpose of getting their proof of appropriation from the State Engineer's office.

Q What did that proof of survey consist of?

A The law requires they make a survey of the canal showing the natural stream from which it comes for a distance of six hundred feet above the intake and six hundred feet below the intake and then make a survey of the ~~main~~ canal giving course, distance and grade from the intake to the land irrigated and also make a survey showing the location of the land that is irrigated.

Q Did you do that? A. Yes sir.

Q Who made the survey of the reservoir itself and surveying for the dam?

A Mr. Elliott, I believe, was the engineer.

Q Have you with you some of the blue print maps and drawings for the reservoir? A. Yes sir.

Q Diverting works and land? A. Yes sir.

Q Handing you defendant's exhibit 177, I will ask you to state in a general way what it represents?

A It represents the countour map of the reservoir showing the area in acres when the reservoir is full and the capacity of the reservoir when full and the average depth of water in the reservoir when full; also giving the cross section of the dam as completed showing the outlet and the contour of the dam site.

Q And the outlet from the dam?

A It shows the location of the outlet and the cross section.

Q What is the area of this reservoir in acres?

A The area is 45.67 acres.

Q What is the acre feet capacity?

A capacity in acre feet is 871.1.

Q What is the height of the dam?

A The height of the dam is 29 feet above the center of the outlet which is 2.4 feet in diameter. That means that the height of the dam is 30 feet and two inches.

MR. A. C. HATCH: Just a moment, do I understand this is a blue print of the plan of the reservoir? or a blue print of a survey made of the reservoir as completed or what is it?

MR. SOULE: I will ask the engineer to answer the question.

A Mr. Elliott says it is a map, profile and drawing showing works to be constructed and capacity, material used in construction.

MR. A. C. HATCH: When, if the court please, it would be immaterial.

MR. SOULE: It is purely a matter of a picture more than anything else and I will expect to prove the capacity and size in other ways, but I thought it would give the court an idea of the location and work.

THE COURT: Before we proceed with that, let me ask; I understood you to say that the area of the reservoir when full was 45.67 acres?

A Yes sir.

THE COURT: That the depth would be 30 feet at the dam?

A The dam is that high.

THE COURT: And capacity when full is 871.1 acrefeet, is that right?

A Yes sir.

Q What is the length of the dam, I don't see the dimensions given on the length?

THE COURT: I interrupted when some question was raised as to the competency of this paper.

MR. A. C. HATCH: What was the area in acres?

THE COURT: 45.67.

MR. A. C. HATCH: I raised the question whether it was testimony as to the reservoir as it is, but it seems this is only a plan that was adopted for the building of the reservoir.

MR. SOULE: That is true. I will prove the construction of it according to this plan by other witnesses before I offer these exhibits in evidence.

MR. A. C. HATCH: Very well.

Q You have been to the dam and know about its width?

A I was there before it was completed.

Q You know the width at the bottom? A. No sir.

Q Do you know what the dam is constructed of, what material?

A Of rock and earth, what they call rock fill.

Q In 1914, you say you turned the water out on the 19th day of August and turned out how much?

A The company asked me to compute the quantity that would last them for two weeks. I did so, with reference to the depth of water in the reservoir as well as I could and told them fourteen and a half second feet I thought would continue to run for fourteen days.

Q Do you know how long it did run?

A It ran about thirteen days.

Q What was the depth of the water on the dam at that time?

A That I couldn't tell. I placed a nail in a pine tree for future reference but there was nothing to my knowledge to show the contour elevation.

Q You don't know whether it was full at that time or not.

A It was practically full with respect to the dam at that time, but the dam was not complete.

Q And dam was raised higher afterwards, so that then this 14.6 second feet you turned out that ran thirteen days was not the full capacity of the reservoir?

A No sir, not when the dam was finished.

Q Do you know whether the dam has been finished?

A Only by hearsay have never been there since.

Q Handing you defendant's Exhibit 178, state in a general way what it is?

A This is drawings showing the lifting device and gate for the outlet channel, also the outlet channel.

Q And handing you defendants' Exhibit 179, I will ask you to state in a general way what it represents?

A Two maps go with that to make it complete.

Q 179-A and 179-B?

A That shows the contour of the canal, the grade line and the ground line of the canal as it is now, and the course and distance of the canal from the source to the land irrigated.

Q Handing you defendants' Exhibit 180, state in a general way what that is?

A That is a map of the land irrigated by your canal or from that canal.

Q That is from the Washington Irrigation Company's Canal?

A Yes sir.

Q And the same land that is irrigated from this reservoir water of this defendant? A. Yes sir, the reservoir water and

also the river water; shows all the land they irrigate.

Q From that source?

A (No audible response.)

Q I understand you now they divert this reservoir water after it gets into the Provo River from the same point they divert their river water?

A Yes sir, take it through the same canal.

Q At their diversion point they have a dam across the river, have they not?

A They take it from a side stream, and in low water they have a rock and brush dam to divert the water from the main river into the side stream which feeds the canal.

Q You have no interest in this company yourself?

A No sir,

Q You say this reservoir water is absolutely necessary for the Washington Irrigation Company's stockholders' lands to produce crops in the late season? A. Yes sir.

Q Without this their crops would dry up?

A Yes sir.

MR. SOULE: We have your honor, one of the applications of this reservoir-- defendants' reservoir rights -- and I understand we will have to return it to the State Engineer's office. I simply want to offer it and ask the reporter make a copy and return us the original.

Q Handing you application No. 2812 appearing to have been filed in the State Engineer's office of the State of Utah, on April 28, 1916, I will ask you to state whether or not you are familiar with it?

A Yes sir, I am.

Q And this is the second application of this company made during this last season to appropriate additional water for reservoir and storage purposes?

A I understand there is one ahead of this that has been filed there and I believe proof given.

Q This is a second one?

A This is the second one.

MR. SOULE: We will offer in evidence the application number 2812, filed in the office of the State Engineer of the State of Utah, on April 28, 1916. I will ask the Reporter to copy it into the record and return it to the defendant.

THE COURT: I will hardly make that order, but will give you permission to substitute a copy. You may withdraw it and substitute a copy.

THE WITNESS: Mr. Soule, that is for the proof of appropriation, that application, that is made out for.

MR. A. C. HATCH: This is not an application to appropriate water, it is the proof of appropriation.

THE COURT: Proof of compliance.

MR. A. C. HATCH: It is proof offered of appropriation, not an application.

Q Have you got the application?

A No, I think that is the proof for the application you have.

MR. A. C. HATCH: Of course we would object to that because if they have made proof they should have a certificate of proof from the State Engineer's office.

MR. SOULE: I am in error as to that. I have here the original application number 2813 filed in the office of the State Engineer on November 12, 1909, and the other paper is the proof of appropriation on this. I offer it in evidence.

MR. THOMAS: No, that is application number 2813. What we want to do is withdraw this and ask leave to introduce copy of application.

MR. SOULE: We offer that now. (Exhibit 182)

MR. A. C. HATCH: The objection to this is that on the face of it it would not show any right at all for the reason that it recites the application is approved on condition and it is hereby required actual construction work shall begin within six months and be fully completed by April 1, 1913, and the water applied to the beneficial use specified by -- I cannot

read this.

MR. SOULE: We think we can supply that later, your honor.

MR. A. C. HATCH: Then the proof is required to be submitted within a certain time and they ought to have their -- except the time were extended, and it seems the time in which to complete the work was never extended by the application itself, and the court understands the rule, I take it, that when the time is extended it is so written upon the application itself or by letter.

MR. SOULE: We will withdraw the offer at this time and supply it at the next hearing.

MR. A. C. HATCH: I say the proof of the actual appropriation is required to be made within a certain other time and you ought to have at this time the State Engineer's certificate of appropriation which would do away with any necessity for this.

MR. THOMAS: Here is the State Engineer's certificate of appropriation.

THE COURT: That is the proof on which the certificate is issued.

MR. A. C. HATCH: I take it at the next hearing you could produce the certificate and not encumber the record.

MR. SOULE: Yes.

THE COURT: That may be done.

CROSS EXAMINATION by Mr. A. C. Hatch;

Q You made a survey of the lands upon which water was applied by the Washington Irrigation Company/

A Yes sir.

Q And part of the lands embraced within these two thousand acres as shown by Exhibit 180 also derive water from the South Kamas Irrigation Company, do they not? A. Yes sir.

Q So that 180 doesn't show the lands that are irrigated solely

from the Washington Canal?

A No sir.

CROSS EXAMINATION by Mr. McDonald.

Q Mr. Taylor, I want to ask you a question, how far is this reservoir from a tributary of the Provo River which contains water?

A Living water?

Q Yes.

A Well, there was a living stream running past the gauging station where it was established at the time it was established.

Q That is right at the reservoir?

A No, it was about three-quarters of a mile below the reservoir dam where I established the rating station.

Q Then how far is it from the reservoir down to the first point where anybody using water from the river can take out water?

A Stewarts are the first people, I should judge it would be -- oh, twenty miles, probably from the reservoir down.

Q Probably twenty-five?

A Well, I don't know exactly. We were quite a good while, probably three hours going up on horse back.

Q Would it be practicable to put in a measuring device at the Stewart ranch say, so that you could determine the loss of water?

A No sir, because there is a water shed all the way down that increases the flow of Boulder Creek.

Q So that you could not determine then?

A No sir, the only possible way to put the station in is somewhere near the same point we established the station and measure the outflow of the reservoir and the natural flow before the reservoir water is turned in so as to determine.

Q At what point would you do that?

A The best point I could find was where I established the rating station. I placed them -- call it the Big Meadow flat.

Q By that means could you determine the amount of loss?

A No sir.

Q& You could not determine it?

A You could only determine the amount of water you turned from the reservoir and could not determine the loss by seepage.

Q Or loss by any other means? A. No sir.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q You say about twenty miles from Stewart's to this reservoir?

A That would be my estimate.

Q And in what direction from Stewart's ranch is this?

A Well, it must be northeast, more north than east.

Q Wouldn't twenty miles take you clear over and across the Weber River?

A I think not.

Q I mean across the Weber River water shed?

A I think not.

Q Was there any interference between the reservoir and the ~~pass~~ place where the rating station was made by you?

A Was there any interference?

Q Yes, water, or other water?

A There was living streams running, yes sir. I measured that before turning the reservoir water loose.

Q And you could only tell -- you could tell whether or not there was any loss between the reservoir and the rating station, couldn't you?

A Oh, naturally there would be a small loss, but not very much in a short distance like that.

BYRON MITCHELL call by the defendant, Washington Reservoir Company, being duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Soule.

Q You may state your name, residence and occupation?

A Byron Mitchell, Kamas, farmer.

- Q What official position do you hold with the defendant Washington Irrigation Company?
- A President and director.
- Q And have been connected with it in an official capacity how long?
- A For three years constantly. I have off and on since it was organized.
- Q What year did you commence the construction ^{of} the reservoir of your company?
- A 1910, I think.
- Q And did some more work in 1911?
- A Yes sir.
- Q And when did you first take water or store water in your reservoir and divert it to your land?
- A Stored a little year of '12.
- Q And used it?
- A Yes sir.
- Q And in the years '13, '14, '15 and '16, have you stored and used water from that reservoir every year?
- A Yes sir.
- Q Is your reservoir now completed according to the maps and plans Mr. Taylor testified concerning? A. Yes sir.
- Q And do you know how large the acreage is of this reservoir yourself?
- A Nothing more than what we take from the specifications, forty-five acres.
- Q You have been there and know it contains approximately that acreage?
- A I think so.
- Q And what was the expense of constructing this reservoir and dam?
- A By the time we will have paid the interest on the bonded money and bond it will amount to near sixteen thousand.
- Q Sixteen thousand dollars? A. Yes sir.
- Q Why do you store this water, Mr. Mitchell, what is the necessity of it?

A We have a lack of water in the lower season when the river water is gone. We built the reservoir for the purpose of applying this water to our lands when the water has ceased.

Q Your company has, Washington Irrigation Company has a decreed right in the Fulton decree, has it not?

A Yes sir.

Q Do you know which class.

A Fifth class.

Q In the late water season is your canal ever closed down from the river water? A. Yes sir.

Q About what time of year?

A Well, it varies according to the conditions of the river. Some periods 15th of July, some periods it has run until August.

Q Every year you are cut down on your Provo River appropriation?

A Yes sir.

Q And then without this reservoir water your crops would suffer?

A Yes sir.

Q Is all the water this reservoir will hold necessary for the stockholders-- land of the stockholders of the Washington Irrigation Company?

A I think so.

CROSS EXAMINATION by Mr. McDonald.

Q Were you acquainted with this reservoir site before there was any construction work done there?

A I had not visited it personally. We bought a right when we first started of Joseph Ketchum and Asa Duncan, paid two hundred dollars for it.

Q Did you see it before there was any work done?

A Not personally, no sir.

Q You don't know whether there was water there, natural supply of water before any construction work was done?

A Yes, I am positive there was, because it is there now. It has been measured, I think, ninety feet in the deepest place.

- Q Was that water there before you done any work or any changes there? A. Yes sir.
- Q It was a natural reservoir, was it? A. Yes sir.
- Q It was a tributary of the provo River?
- A Yes sir, if there was any outlet to it it would be to the Provo river or Boulder.
- Q How have you been adjusting that as between yourself and the Wasatch County people who use water up there.
- A As we understand it at the season we use it it goes dry. There was no outflow of water to it in September, first visit that was made to the lake, as I understand, by the report, it was perfectly dry, no water coming from the lake at that time. It was in September.
- Q Is there any question between you and the Summit County people and Wasatch County people who use water from the Provo River as to your fight to have all the water from your reservoir during the latter part of the season?
- A Not that I ever heard of.
- Q That is a matter you adjusted among yourselves?
- A I think so.

T. F. WENTZ, recalled.

DIRECT EXAMINATION by Mr. Soule.

- Q Mr. Wentz, you are familiar with the reservoir of the Washington Irrigation company, defendant, are you? A. Yes.
- Q When did you become acquainted with it?
- A In 1915.
- Q What was the occasion of your becoming acquainted with this reservoir at that time?
- A I made a visit to the reservoir in August, 1915, to look over the reservoir and conditions there. I was acquainted with the drawing of water from the reservoir through Mr. Pratt and Mr.

Wright. It was 1915 and 1916.

Q In what capacity did you visit this reservoir this time?

A Out estimated capacity?

Q I say in what capacity did you visit, official of the court?

A Yes sir, as commissioner of the court.

Q Went there as commissioner?

A Yes sir.

Q Did you make any observation or measurements as to the capacity of the reservoir?

A No, only the discharge from the reservoir, that would be merely an estimated capacity.

Q What did you estimate the capacity from that?

A The amount at that we drew in in 1915 was 660 acre feet.

Q And do you know whether the reservoir has been raised, or the dam been raised and reservoir enlarged since then?

A Yes, they were working raising the dam at the time I was there.

Q So that the acre feet you estimated at that time would not be the full capacity at this time?

A No.

Q Do you know under the completed dam what the capacity is?

A No.

Q Could you estimate it from these maps if completed according to the plans ?

A Only what the maps would show themselves. Yes, it could be estimated from the maps.

Q Would you say it would have a capacity as estimated of 871.1 acre feet?

A No, I wouldn't say without going over the data.

Q Do you know the height of the dam?

A Approximately thirty feet.

Q And the length.

A Three hundred feet.

Q And its width?

A Fifteen feet on top.

Q What is it constructed of?

- A It is a rock filled dam, rock, faced on each side with earth filling.
- Q DO you know what the acreage is?
- A Only approximately.
- Q What would you say from your observation what the acreage is?
- A About forty to fifty acres.
- Q And you took some -- you or your associate took some photpgraphs there, did you not? A. Yes.
- Q I will ask you to refer to your photograph record and give us the numbers of the photographs that refer to this reservoir?
- A Have you those numbers?
- Q Yes, number 7 first.
- A Number 7, all of these are in part sixteen of the 1915 report. Number 7 shows the east end of the Big Elk Lake dam and the --
- Q Number 8.
- A Number 8 shows also, shows the Big Elk Lake dam in the top of the photograph.
- Q And number 51?
- A Number 51 is a photo of the Big Elk Lake looking north from the west end of the dam, looking northeast.
- Q Number 52?
- A Number 52 is a picture of the Big Elk Lake dam from the west side.
- Q Number 53?
- A Number 53 is a photo of the meadows just below the dam.
- Q Number 54?
- A And 54 is a photo of the dam in the foreground and looking across the reserfoir to the northwest.
- Q And 55.
- A 55 is a photo of the lower face of the dam withan outflow in the lower left hand corner. Number 56 is a photo of the Big Elk Lake taken from the north side looking across with the dam at the point I mark with an arrow and write the "dam" above it.
- Q Those are the photographs with reference to this reservoir that

are identified in your report of 1915?

A Yes.

Q Have you a report of your visit to and investigation of this reservoir? A. Yes sir.

Q Will you refer to that. The report is very short, and I will ask the indulgence of the court to permit him to read into the record.

MR. A. C. HATCH: Isn't the whole matter in the record now?

MR. SOULE: I don't know.

MR. A. C. HATCH: Introduced in evidence.

THE COURT: Yes, both the pictures and report.

MR. JACOB EVANS: Everything was introduced.

Q The report on this reservoir is given on page 8 of your written report, is it not?

A Page 8, paragraph 24 of part 9 of the 1915 report.

Q Give us the location of this reservoir with reference to Provo River?

A The Big Elk Lake reservoir is situated at the head of Boulder Canyon about five miles west from the Union reservoir six miles above the junction of the Boulder Creek with the North Fork, and fourteen miles above the intake of the Washington Irrigation Company Canal, near the divide between the Provo and Weber water shed.

Q This reservoir has been constructed by simply raising the dam and raising the water level in this lake, is that the system of storage? A. Yes.

Q So that it simply stores the flood waters?

A Yes.

Q What are the sources of supply of water for this reservoir?

A I don't understand.

Q Where does the supply come from?

A In the immediate vicinity of the reservoir.

Q That is from melting snow?

A Yes.

Q And springs there during the winter season?

A Melting snow and high water. There are no springs in this vicinity at all.

Q Does the storing of this water, in your opinion affect the flow of the river in the high water season at the time they store it? A. Yes.

Q To the detriment of other water users?

A No.

Q What would you say as to the result of this storage of water upon the rights of other appropriators and earlier appropriators than the Washington Irrigation Company?

A I don't think it affects them in any detrimental way. It would really be an advantage.

Q Why so, Mr. Wentz?

A The water that is used from this reservoir is used through the Washington Canal, and we derive some return seepage in the month of August and September from this Kamas bench which helps to supplement the water to the users lower on the river.

CROSS EXAMINATION by M^r. A. C. Hatch.

Q You said fourteen miles from the intake of the Washington Canal to the Big Elk reservoir, about? A. Yes.

Q How far is it from the Stewart ranch to the reservoir, about?

A About eleven or twelve miles.

MR. SOULE: We offer in evidence defendants exhibits 177, 178, 179-A, 179-B, 180, 181 and 182, being the plats of the surveys of this reservoir and the lands.

MR. A. C. HATCH: In connection with Exhibit 180, it shows two thousand acres of land there. I understand you don't claim that you irrigated two thousand acres.

MR. SOULE: No.

MR. A. C. HATCH: It shows all the land any part of which is covered by your canal?

MR. SOULE: Yes, we irrigate the same land, same stockholders that have a decreed right, the stockholders have both rights.

MR. A. C. HATCH: Have rights in the South Kamas Canal?

MR. SOULE: They may be the same, some of the same stockholders in both canals, I don't know. Maybe that is true.

MR. A. C. HATCH: To make it clear to the court, they don't claim the two thousand acres of land irrigated as shown by Exhibit 180.

MR. THOMAS: No, your honor, the acreage is all covered in that Heber stipulation. There is no other land claimed.

THE COURT: No additional acreage claimed for this reservoir?

MR. THOMAS: No.

MR. A. C. HATCH: That stipulation has not yet been finally settled upon, and we wish to save that question.

MR. THOMAS: Yes, let it be understood then the Washington Irrigation Company is claiming no additional acreage for irrigation from waters received and stored in this reservoir.

MR. A. C. HATCH: Are you claiming any additional acres from that named in the Fulton decree for the Washington Irrigation Company?

MR. THOMAS: Substantially the same.

GEORGE F. TAYLOR, recalled.

CROSS EXAMINATION by MR. A. C. Hatch.

Q Mr. Taylor, you stated, if I understood you correctly, it was impossible to determine the loss of water by seepage and evaporation or otherwise between the reservoir and the confluence with the first living stream?

- A No, not first living stream, because there is living water right at the reservoir and below, or was when I was there. I said it was impossible to measure it between the north fork of Provo River and the reservoir.
- Q Your rating station is on the north fork of the river?
- A No sir.
- Q Or Boulder Creek?
- A It is right close to the reservoir on Boulder Creek, about half or three-quarters of a mile below the dam.
- Q Then you could determine definitely whether there was any loss between your spillway of your reservoir and Boulder Creek, could you not?
- A By establishing a rating station right at the reservoir we could, but that is quite impossible on account of the conditions of the canyon being very rocky and very poor place for a rating flume. It would practically have to be concreted in the bottom and right from the spillway on down to a level place where it could be measured.
- Q Or else build a level place and measuring gate right at the outlet?
- A Right at the outlet.
- Q That wouldn't cost much, would it?
- A Yes, it would cost, when you have about twenty-three feet head from your outlet, water goes out with a very rapid velocity, and it would take quite an expensive concrete structure to ~~sb~~ bring the water to a point where it could be measured.
- Q But it could be calculated, couldn't it, even under the pressure as it comes through the pipes?
- A Well, if the exact dimension of the outlet and fall are given it probably could be calculated.
- Q It is piped, isn't it?
- A I believe it is a concrete box, rectangular.
- Q At the bottom?
- A Yes, at the outlet.

- Q And it could be determined. You didn't mean it was impossible to determine the loss?
- A No, but I said it was impossible to determine the loss from the reservoir.
- Q Under the conditions that existed at the time --
- A At any time from north fork to the reservoir on account of the inflowing water into the creek, but in that short space between the rating station and the reservoir that can be practically calculated.
- Q Couldn't you determine the inflowing water between the north fork and the point at which your reservoir water enters the Boulder Creek?
- A No sir.
- Q Why?
- A Because the water runs under ground.
- Q Sir?
- A The water naturally finds its way into those low holes and ~~anywhere~~ cannot measure the underground supply, and not over the surface. It is impossible to determine the amount of water flowing in unless you can see it or measure it.
- Q You could measure the surface streams, couldn't you?
- A Where they come in over the ground, yes sir.
- Q Then you could measure the Boulder Creek at its mouth?
- A Yes, and probably have half as much in your surface streams as you have at the mouth.
- Q Then you could measure it at the point above where your reservoir water comes in? A. Yes sir.
- Q Then wouldn't the difference between the water at the point immediately above where your's enters and the measurement at the mouth of the creek where it enters the north fork, with the inflow from the reservoir deducted, give the amount of inflow?
- A Underground inflow?
- Q Of the inflow that goes into it and comes to the surface so that

it can be measured?

A Yes, but that wouldn't tell you anything about the losses of the reservoir water

Q I was asking you about the inflow now, if you could not determine the amount of inflow that came to the surface at the mouth of the creek?

A Yes, you could determine the amount of increase.

Q Then before putting your reservoir water in after having determined the amount of water in the creek, wouldn't the measurement-- couldn't you by measuring at the mouth of Boulder Creek tell whether there was any loss from your reservoir water?

A You could approximate it but couldn't tell the exact amount of losses.

Q Why?

A Because of the increase in the evaporation and seepage areas by the flow being increased, spreading out over the canyon.

Q You could determine the loss or gain in Boulder Creek by reason of the reservoir water, couldn't you?

A Yes sir, if measurements were taken consecutively during a number of days.

Q Then if there was no loss or gain by reason of the reservoir water that is shown by the measurements, would it not determine that there was no loss by reason of the reservoir water?

A Providing all conditions are the same during the different tests.

Q I am speaking only of one test.

A It requires a number of days to make that test, and if there is any change in the atmospheric conditions it makes a change in the evaporation.

Q Couldn't all those measurements be made in one day?

A No sir.

Q Why?

A Because the increased area of the wetted perimeter in the canyon would take more than one day for it to wet it up and

get to its natural flow at the lower end of the canyon.

Q That is the increased are of wetted surface?

A Yes sir.

Q By reason of the inflow?

A From the reservoir.

Q From the reservoir water? A. Yes sir.

Q How long would it be necessary to wait before you made the measurements?

A Experiments I performed in Ogden Valley on a five mile stretch took me about twelve days before the underground waters got down with not exactly the same conditions but nearly, being in a canyon that way, more flat though than poulder Creek is.

CROSS EXAMINATION by Mr. McDonald.

Q If by reason of turning in this extra flow of water from the reservoir there would be an extra surface to cover, then there would be a loss of water, would there not?

A Yes sir.

Q And that amount of loss could be determined after a given number of days, could it?

A With good measuring devices, it could, yes sir. Of course that water would naturally find its way on down, take it probably two or three weeks after being turned in, all of it except what was evaporated.

Q With these exceptions there could be some determination of the amount of the loss? A. Yes sir.

MR. THOMAS: We wish to offer in evidence the certified copy of the Fulton decree that I think was not introduced, and Judge patch called my attention to it. I obtained a certified copy of the decree so that the matter can be before the court. (Exhibit 183)

THE COURT: It may be received.

ERNEST KNIGHT recalled.

DIRECT EXAMINATION by MR. Soule.

Q You are interested in the Washington Irrigation Company?

A Why, not personally.

Q You are acquainted with this reservoir?

A Yes sir.

Q And with Elk Lake?

A Yes sir.

Q As I understand it, there was a body of water in this lake before you started to build your dam? A. Yes sir.

Q Is there any way you have of drawing out any of the water that was in that lake before you started to build the dam?

A Why, there would be a way but it has not been done. Be necessary to tunnel through a solid rock mountain, solid ledge.

Q And this reservoir simply raised the level of the lake?

A Yes sir.

Q And all the water they draw out with their diverting system there is what they store on the top of the lake?

A Yes sir, on top.

Q As the season gets along towards fall, does the water that is left there sink away?

A No sir, it stays there constantly.

Q Does it ever dry up? A. No sir.

Q Then there is always some water in the lake?

A Yes sir.

Q And that condition has not been by building this reservoir -- they have not disturbed that condition at all?

A No sir.

CROSS EXAMINATION by Mr. Thomas.

Q I want to ask a question not really in line with this. Is Shingle Creek anywhere near this lake?

A Yes sir, it is between Woodland and the Big Elk Lake.

Q State of Shingle Creek is one of the tributaries of the Provo River?

A Yes sir, I think it is. That is, formerly it was a tributary.

Q Was it one of the tributaries of this Big Elk Lake?

A No sir.

MR. SOULE: That is all, your Honor.

MR. THOMAS: Now, relative to this stipulation that was entered at Heber and without taking up time of discussing it I do want to call Mr. Knight for a moment. Your Honor will recall at the last hearing taking testimony in December, Mr. Knight, Mr. Adkinson and Mr. Prescott testified to the use of water of those coming under the stipulation, and based upon that and upon the survey of Mr. Taylor and upon the Fulton decree, we prepared a tabulated list of the claims with their acreage and the water which they claim, which data was to be a part of the Heber stipulation. Mr. Knight has called my attention to some errors, and it is to correct those errors I want to examine Mr. Knight.

ERNEST KNIGHT, recalled, testifies as follows:

DIRECT EXAMINATION by Mr. Thomas.

Q Now, Mr. Knight, Heber moon is one of the claimants of water, is he not? A. Yes sir.

Q And in this tabulation which we have prepared we set out he was entitled to 2/15 of a cubic foot of water per second of time from the year '74, from the Provo River for the irrigation of eight acres of land, water to be taken under the first class as divided in the Fulton decree?

A Yes sir.

Q You have called my attention to an error that 2/15 should be

3/7, is that your figure?

A Two-thirds of an acre.

Q Two-thirds of an acre? A. Yes sir.

Q And he is entitled to water only for two-thirds of an acre?

A Yes sir.

Q In the first class? A. Yes sir.

Q And that the tabulation should be corrected to that extent?

A Yes sir, two-thirds of an acre instead of eight.

Q Now, in the case of Riley Fitzgerald where in the tabulation has this phrase, successor to T. P. Potts, is it to be understood that Mr. Potts made a filing upon what was known as Breg Hollow?

A Bridge Hollow, yes sir.

Q And Mr. Riley Fitzgerald was the successor to Mr. Potts filing upon Bridge Hollow? A. Yes sir.

Q And to that extent, Mr.-- strike that out-- Mr. T. P. Potts was not a party to the original Fulton decree?

A He was a party to the original Fulton decree, but Mr. Fitzgerald hasn't that water, he has given to other parties.

Q This water that is referred to here?

A Is not in the Fulton decree.

Q This particular application made by Mr. Potts was not included in the decree?

A No sir, was not.

Q But was water which he had applied to beneficial use prior to the day of the institution of the suit which resulted in the Fulton decree? A. Yes sir.

MR. A. C. HATCH: That confuses the record.

MR. THOMAS: Not in the least.

Q Referring to Rasmus Larson's claim, Rasmus Larson--

MR. A. C. HATCH: Let me call your attention, Mr. Thomas, you say it was water that he claimed prior to the suit, that he was a party to the suit?

MR. THOMAS: We can argue that a little later, let me finish that now, I know there were several other parties,

parties used water that never were a party to the decree.

MR. A. C. HATCH: But Potts was.

THE WITNESS: Might I explain it?

MR. THOMAS: Yes.

A Mr. Potts made this filing on Bridge Hollow, after that he sold the land and water right to other parties before the time of the Fulton decree, and at the time of the Fulton decree he was appropriating water from the Provo river proper, and it was on the water that he appropriated from the Provo river, his decree was issued, not on the water he had made the filings on in Bridge Hollow.

Q And had disposed of prior to the filing of the suit?

A Yes sir.

MR. A. C. HATCH: Now, why is he a successor to T. P. Potts for anything if he had it in his own right at the time of the Fulton decree?

MR. THOMAS: He ought not to be on that statement.

MR. A. C. HATCH: I will say this at this time, neither Bridge Hollow nor Bench creek was considered in the Fulton decree.

THE COURT: Was not regarded as a part?

MR. A. C. HATCH: Not treated as a part of the Provo River, and the parties using from those two sources were not awarded in the Fulton decree.

Q Directing your attention to the claim of Rasmus Larson, he has three and a third cubic feet of water per second from the year 1870 from Provo river for the irrigation of two hundred acres of land, as a successor to Daniel Simpers, all in the first class; you wish to change that to the first class sixty acres and fifth class one hundred and forty acres?

A Yes sir.

Q And Christine Fraughton having 17/60 of a cubic foot of water is entitled to one and three-fourths acres of water under the first class and fifteen and three-fourths acres under the second class?

A. Yes sir.

Q And E. B. Leffler, Jr. is credited with being entitled to 1/40 of a cubic foot of water per second for one and a half acres of the first class. That is already disposed of to William Lewis? A. Yes sir.

Q And William Lewis is mentioned as one of the parties to the suit? A. Yes sir.

Q And this item of Leffler's should be ignored?

A Yes sir, it is already included in that of Mr. Lewis.

Q S. A. Peterson is credited with being entitled to the use of two-thirds of a cubic foot of water for the use of forty acres of land; that should read one-third of a cubic foot, for twenty acres of land? A. Yes sir.

MR. WAHLQUIST: Will the court hear the remainder of the proof in the Van Wagenen claim?

THE COURT: You may proceed.

MR. WAHLQUIST: We had a stipulation here, but one of the counsel has run off with it.

MR. McDONALD: We have Levi North here we can put on in a few minutes.

LEVI M. NORTH; called in his own behalf, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. McDonald.

Q Your name is Levi M. North? A. Yes sir.

Q Do you own the one hundred and sixty acre tract of land that was formerly owned by Ed Dillon in Wasatch county?

A Yes sir.

Q Is it adjacent to the Provo river? A. Yes sir.

Q And this land which you have bought comes from the same Ed. Dillon who is mentioned in the Fulton decree?

A Yes sir.

Q In Wasatch county? A. Yes sir.

Q You may state what, if any land you have put under cultivation, of any of this same tract of land you have put under cultivation since the Fulton decree?

A I have put under cultivation in the last three years twenty five acres.

Q Twenty-five acres? A. Yes sir.

Q And you are willing to accept the provisions of the Fulton decree as to the right fixed up to the time of that decree?

A Yes sir.

Q And then you claim twenty-five acres additional?

A Yes sir.

Q You have broken up in the last three years?

A Yes sir.

Q I suppose that this land you own requires water in order to produce crops? A. Yes sir.

Q Could you produce crops without irrigation?

A No sir.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q Did you have any filing for water for this twenty-five additional acres, filing with the state engineer appropriation of water?

A I have not had a filing, no sir.

Q When did you break the last of the twenty-five acres?

A Year ago last summer.

Q Be two years it has been irrigated?

A Yes sir.

Q The whole of the twenty-five acres?

A Yes sir.

Q Do you remember the acreage or the water that you were allowed under the Fulton decree, Dillon was?

A Thirty-five acres.

Q Now, the twenty-five acres, what time in the season did you apply the water?

A I applied the water during all of the irrigating season until

my crops were matured.

Q What kind of crops?

A Both hay and grain.

Q That is on the twenty-five acres? A. Yes.

Q And on all the other land as well?

A Yes sir.

Q That is all that was cultivated theretofore?

A Yes sir.

MR. MCDONALD: That is all. Your Honor understands the stipulation confirms the decree as to the Dillon right, and whatever is additional.

MR. A. C. HATCH: That is, he would come under the class that his appropriation if he had made one would entitle him to. Of course, we are contending no one can acquire a right except by applying to the state engineer.

THE COURT: I understand your position. Now, you may proceed, Mr. Wahlquist.

MR. WAHLQUIST: In the matter of the Provo Reservoir Company, plaintiff against Wilfred Van Wagenen, we have entered into a stipulation between the plaintiff Wilford Van Wagenen which I offer in evidence.

THE COURT: It may be received.

MR. WAHLQUIST: May I read it into the record, or state the purport of it?

THE COURT: You may state the purport, it will remain as an exhibit.

MR. WAHLQUIST: Wherein we agree that Wilfred Van Wagenen is entitled to the use of two second feet of waters of Deer Creek to be measured at his land in Section 9, Township 4 South, Range 4 East, Salt Lake Meridian, Wasatch county, for the ~~xxx~~ irrigation of one hundred and twenty acres of said land, said right being prior to any right claimed by plaintiff, by virtue of any application for water filed with the State Engineer of the State of Utah, except for storage purposes, and then we stipulate that after that

the plaintiff as against defendant Wilford Van Wageningen shall be entitled to waters at the rate of one second foot for seventy acres for its entire irrigation system, and when there is a surplus above that the defendant Wilford Van Wageningen is entitled to sufficient additional water from Deer Creek to fill his canal to its present full carrying capacity. Now, desire to offer some testimony also.

DAVID L. VAN WAGENEN, called by the defendant Wilford Van Wageningen, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Wahlquist.

Q Where do you reside?

A Provo City.

Q How long have you resided in Provo City?

A Thirteen years.

Q That will be since when?

A 1903.

Q Where did you reside prior to that?

A Midway.

Q What was your occupation while you were residing in Midway?

A Merchandising, stock raising, saw milling.

Q Were you acquainted with B. M. Smith?

A Yes sir.

Q Was he a resident of Midway at the time you were?

A Yes sir.

Q Calling your attention to a deed in evidence as Exhibit 161, which is conveying from Mark E. Smith and wife to David L. Van Wageningen one hundred and sixty acres in Section 9, 4 South, 4 East, Salt Lake Meridian, are you the David L. Van Wageningen named in that deed as grantee?

A Yes sir.

Q I will ask you to state the circumstances of that transaction if you will. That is, as to whom you purchased and what was the nature of the transaction if it was not a bone fida purchase and sale?

A I did not purchase. The deed was given to me, security for money loaned to B. M. Smith.

Q Money was loaned to B. M. Smith? A. Yes.

Q Did you have any dealing with Mark A. Smith at the time?

A No sir.

Q Who was in possession as the owner of the property described in that deed at the time of the transaction, was it B. M. or Mark A?

A Well, I am not sure who was in possession that particular time, because I did not pay any particular attention to the possession of the property, I was only looking after the title in security for my money I loaned.

Q Was the possession of the property ever delivered to you?

A No sir.

Q During the time that you held the legal title to the property who was the equitable owner in possession of the property?

A Why, the one that was in possession during the time I held the deed, B. M. Smith was in possession.

Q B. M. Smith?

A Yes sir.

Q That was the father of Mark A. Smith, was it?

A Yes sir.

Q And was there any agreement between B. M. Smith and you as to how long and why you were to hold the legal title to that property?

A I don't think there was any particular time stated, but there was an agreement, I gave him an agreement when I received my money the deed would be transferred back to him.

Q Reconveyed to him?

A Or to anyone else that he suggested, yes.

Q Was the money for which you held that land in security ever paid to you by B. M. Smith?after you-- were you paid that debt?

A Yes, I think B. M. Smith himself paid me the money.

Q What then was done with reference to reconveying, did you

reconvey to B. M. Smith?

A No sir.

Q Who did you convey to?

A I conveyed to Wilford Van Wagenen on the order of B. M. Smith.

Q B. M. Smith directed you to convey to Wilford Van Wagenen?

A Yes sir.

Q In lieu of the reconveyance to himself?

A Yes sir.

Q So that during the time you held the legal title B. M. Smith held the equitable title?

A Yes sir, during the time I held the title B. M. Smith occupied the land and worked the land, I think nearly all the time, I couldn't say.

Q Farmed and fenced it?

A Yes sir.

Q Was that during the time that he made his filing for water from Deer Creek to apply on that land, in 1897?

A I don't know just when he made his filing, that I don't know, but it was in '95, the record shows, that the deed was made to me. Record shows in '97 the deed was recorded, and just what time he made his filing I don't know as to that.

Q You know he made a water application and started digging a canal with a view of irrigating this very land you held the legal title to?

A Yes, I knew he intended making the canal, and intended making the canal for that particular piece of land.

Q And with your knowledge that whenever he repaid you a certain amount of money you would convey the legal title to him, or to anyone that he in the meantime might dispose of it to?

A Yes sir.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q Did you ever have any directions from Mrs. B. M. Smith or Mrs. Mark A. Smith as to reconveying the land?

A No sir.

Q You understood at the time, did you not, that they had an interest, that is, an equitable interest?

A I understood at the time that Mrs. B. M. Smith had an interest.

Q And you never had any direction from her to convey her interest to anybody? A. No sir.

REDIRECT EXAMINATION by Mr. Wahlquist.

Q Is she now dead? A. Yes sir.

Q Do you know whether or not she died before her husband?

A Yes, I believe she did, that is my memory.

RECROSS EXAMINATION by Mr. A. C. Hatch.

Q Do you know whether she died before you conveyed the interest?

A No, I don't think she did. I conveyed the interest in 1902, I think she died since that time, I am quite sure she did. I know he did and am quite sure she did. He died about six years ago.

Q He died first?

A No, she died first.

MR. WAHLQUIST: Now, that is all, your Honor.

THE COURT: Is there something more now to be presented?

MR. WAHLQUIST: Just a moment. Mr. Hatch, the other day, when Wilford Van Wagenen was on the stand you reserved cross examination until we should undertake to connect up the title.

MR. A. C. HATCH: I do not care to cross examine now. We were contesting his claim then.

THE COURT: It has been stipulated.

MR. WAHLQUIST: Well, I want the record to show he is excused from further attendance.

THE COURT: He may be excused.

MR. A. C. HATCH: We will waive our cross examination.

THE COURT: Are there any further claims or evidence

can be taken this afternoon?

MR. McDONALD: I will say we are still in the same position relative to the stipulation in Wasatch county. Until we get that disposed of, as far as I know, all the attorneys are ready to sign but they have not signed the stipulation.

THE COURT: I understand that stipulation has not been entirely agreed to yet.

MR. MCDONALD: I don't know that anybody is opposed to signing it, but they have not signed it.

MR. JACOB EVANS: Why not appoint some attorney to get the signatures.

MR. MCDONALD: That will be a good idea.

THE COURT: You can determine that before the court returns, the court will return on the 23rd, and expect to finish all unfinished matters, and I would appreciate it if counsel could indicate about what there will be to hear then.

MR. A. C. HATCH: We wish to offer rebuttal as to the soil tests, some twenty or thirty introduced in evidence by Provo City here, and as to Provo city as to that, and some rebuttal as to the Telluride Power Company. We have asked for their power output, and Mr. Story has promised to produce as to certain days they testified to, and we have in addition to that the rebuttal as to the Provo Pressed Brick Company, and the Upper East Union Canal Company. Probably take us with the cross examination two days to complete the rebuttal in those matters. Then we have some tabulations, one or two, to offer for the information of the court.

THE COURT: Now, are there any defendants who have not finished their evidence, which will, I take it, come before you commence on your final rebuttal.

MR. THOMAS: May it please the court, with the assistance of Mr. Davis in checking over the presentation of

data at the close of Provo City's case in chief, I can determine whether we will have any further documentary evidence to introduce. There will be no other further evidence.

MR. WAHLQUIST: In behalf of Jack Bates I offer the certified copy of the Fulton decree of 1894 as the only evidence to prove his claim.

MR. A. C. HATCH: There is one witness here we could use as to one matter.

THE COURT: This afternoon?

MR. A. C. HATCH: Just a few minutes. Mr. Jacobs.

IRWIN JACOBS recalled by the plaintiff, testifies as follows:

DIRECT EXAMINATION By Mr. A. C. Hatch.

Q Are you acquainted with Johanna C. J. Anderson, and with her land situated on Deer Creek in the Provo Canyon?

A Yes.

Q I will ask you if you have made a survey of the lands under cultivation and irrigation?

A Yes, I have.

Q State the number of acres?

A 29.1 acres.

Q What kind of crops are being produced upon that land?

A Some pasture, miscellaneous garden crops, alfalfa.

Q Any grain?

A A little grain, I think.

Q And about how far from the confluence of Deer creek with the Provo river is it to the intake of her ditch or canal by which she irrigates, through which she irrigates this land?

A She irrigates the various tracts through two different ditches. I didn't go to the intake of the ditch, the upper ditch. The lower ditch has its intake, I should judge about a quarter of a mile, between quarter and a half from the confluence of

Deer creek with Provo river.

MR. MCDONALD: How many acres did you say?

A 29.1.

Q Was Mrs. Anderson with you when you measured her land?

A Yes, she was with me and showed me the different tracks that she owned.

CROSS EXAMINATION by Mr. McDonald.

Q You didn't measure all the land she showed you, is that right? It is the land she actually irrigated?

A Yes, I measured all, and really gave her credit for three and a half acres of dry land she didn't irrigate, there wasn't any ditch around.

Q You say the water comes from two ditches?

A Yes.

Q She showed you two ditches?

A She didn't show me any of the ditches, pointed them out to me, I saw the ditches myself.

Q Did she tell you anything about a third or fourth ditch she uses, I understand, in addition to these two-- did she irrigate some from a ditch that is used by Rieske and somebody else, and another from a ditch used by Hoover and somebody else, as I understand it?

MR. JACOB EVANS: I think that is all one and the same ditch, I had a condemnation suit about that.

A All I know about it, there is two ditches there, and might be a third, but I doubt it.

Q In any event, you think you gave all the land that is actually irrigated?

A Yes, I covered a little more, I was careful to get outside of the irrigated track.

 4:40 P.M., RECESS TO 10:00 A.M., JANUARY 23, 1916.

W. S. WILLIS, called by the defendant Emma Kummer Bond, testifies as follows:

My name is William S. Willis. I reside in Wasatch county, and I am an attorney at law. I was acquainted with John Kummer during his lifetime and know that he died prior to the bringing of this action. That his estate is now being probated in this court in Wasatch county. That Emma Kummer Bond is the duly appointed and acting administratrix of the estate. That he is the owner of six acres of land and water right belonging thereto, obtained through the Midway Water Irrigation Company's system, and directly through the Midway town.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q Not represented by stock in the corporation?

A Not represented by stock in the corporation, simply that the Midway Irrigation Company distributes the water.

Q And the six acres of land is included within the area mentioned in the stipulation? A. Yes.

Q Entered into at Heber City?

A Yes sir-- no, it is not. It is included in the stipulation entered into between the Provo Reservoir Company and some sixty odd clients that I represent below the Midway upper dam, and, while the water comes through the Midway Irrigation system and perhaps through Snake Creek, or Provo river, yet it was not included in the stipulation with the Provo Reservoir Company as to the water rights above the Midway dam.

Q No, but it is included in the area covered by the Midway Irrigation Company's Island ditch, or lower canal?

A No, it is not irrigated through the Island ditch, it is irrigated through the ditch that runs through Midway and

down the east side of the lane leading from Midway to Charleston. The land is located just above the fish hatchery, formerly owned by the Wasatch Trout Company, but now, I understand, owned by Van Wagoner.

Q Then how do you exclude it from the area covered by the stipulation entered into in Heber, if it is irrigated from the Midway Irrigation System?

A I could not say whether it is included in the acreage of the Midway Irrigation Company, but it could not be included in any stipulation, because the Midway Irrigation Company is not in any way authorized to represent the Kummer estate. They could not represent water rights that are outside of the stock of their company. The acreage might be included in any acreage that you entered into with the Midway Irrigation Company. Whether that is true or not, I don't know. It might or might not increase the acreage to the extent of the sixty acres, but--

Q How many acres?

A Six acres.

Q You said sixty.

A That is an error, six acres. It could not be represented as to their water right by the Midway Irrigation Company or any stipulation they entered into.

Q There is thirty-five hundred and eighty-five acres exclusive of the Island Ditch area. Now, this land is situated above the Island ditch, isn't it?

A No, as I understand, it is on the bench, it is bench land lying east to the bottom lands irrigated through the Island ditch, but below--

Q Just a moment, do you know?

A As to the points of the compass?

Q Do you know where the Island ditch is?

A Yes.

Q Do you know it does not convey water on to any part of that bench, don't you?

- A Yes, only conveys water on the bottom lands.
- Q Then this land is north and west of the Island ditch?
- A Yes, that is true.
- Q And higher in elevation than the Island ditch?
- A Yes sir.
- Q And is included within the Midway Irrigation system above the Island ditch?
- A Yes, as to distribution only.
- Q Well, this stipulation is for all of the lands irrigated by the Midway through the Midway Irrigation system?
- A I will say, Judge--
- Q And the thirty-five hundred and sixty acres, or thirty-five hundred and eighty-five acres, is all of the land that is irrigated by anybody within that area?
- A I am not familiar with that part of it. If it is included in the area in the stipulation with the Midway Irrigation Company, we do not desire an extra acreage, but we do desire water.
- Q I wish you would find out definitely.
- A Yes, I will.
- Q Because this is a material matter.
- A I will do that. Anything further?
- Q No, I have no doubt about it as far as I am concerned, but I would like the record to show it.

MR. A. C. HATCH: If the court please, we will now take up the rebuttal testimony of Mr. Goddard and Swan, with regard to the character of soil and source from which watered in the area covered by Provo City.

MR. TUCKER: If the court please, Mr. Thomas was present at the presentation of that evidence, and he has asked us to state he could not be here this morning, your Honor knows, and we will object to the introduction of this evidence at this time.

MR. A. C. HATCH: Provo city is represented by counsel .

THE COURT: We are very anxious for something to take up in the absence of those attorneys who could not get here this morning.

MR. TUCKER: I know nothing at all of the evidence that was put in.

MR. A. C. HATCH: Probably be familiar with it as we go through with it.

MR. TUCKER: That would not be sufficient to protect Provo city's interests. Mr. Thomas has asked me to object to the introduction of evidence regarding Provo City.

THE COURT: I am disposed to not force the parties to have the evidence taken then under those circumstances. It seems those parties could not get here. It is a great inconvenience to the rest of us though, have to be here without anything to do, make us a day later, day longer to stay.

MR. A. C. HATCH: Of course, I would not insist upon it. We are ready to proceed, though.

THE COURT: Can you proceed in the matter Mr. Cluff is interested in?

MR. A. C. HATCH: Our parties cannot get here, because they live out here on the bench, and waiting for the interurban. We can take up a matter in regard to the upper East Union, if the attorneys get here.

THE COURT: Possibly we had better adjourn until two o'clock, and in the meantime we can get the parties.

THE COURT: Judge King, are you ready to take up your matter?

MR. KING: Yes, your Honor.

THE COURT: Very well.

MR. KING: May it please your Honor, in this case I did not appear for Mr. Wilford Wright in the beginning, and he has no answer on file now with respect to his interests in this spring. I told Brother Murdock and Mr. Hatch that I would appear for him, so that we could litigate the spring in this lawsuit instead of having a subsequent one, and I ask permission now to amend the answer which I have filed by interlining Mr. Wilford Wright's name as one of the defendants, and as an answer for him and setting up his claim to this spring.

MR. A. C. HATCH: Have you the amendment prepared?

MR. KING: No, but I will hand it to you this afternoon. Mr. Allen claims one-sixth of the spring, the Wright or McAfee spring, and Mr. Wright claims the five-sixths, so that all of the spring is claimed by these two defendants, and Mr. Wright's answer will be a claim for five-sixths of the spring. It will be just a paragraph that I will add to the answer, and that may be deemed denied if you care to deny our claim.

MR. A. C. HATCH: We admit he has an answer.

MR. KING: Whatever denial you desire to make may be stated to the reporter, and it will be satisfactory; so I am offering proof now, your Honor, with respect to ~~another~~ the entire spring, one-sixth claimed by Mr. Allen, five-sixths claimed by Mr. Wilford Wright. The spring is interchangeably known as the Wright spring or McAfee spring.

THE COURT: W. D. Wright?

MR. KING: Wilford Wright, W. D. Wright, Wilford D.

MR. A. C. HATCH: First time I heard it called the Wright spring.

MR. KING: I refer to it in my answer as that, so

that there will be no misunderstanding here, answer will call it the McAfee or Wright spring.

J. W. ALLEN, called by the defendant Wilford D. Wright, being first duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. King:

Q Mr. Allen, you reside in Wasatch county and have for how many years?

A Fifteen years.

Q Are you acquainted with what is known as the McAfee spring?

A Yes sir.

Q For how long have you been acquainted with it?

A Fifteen years.

Q Where does this spring have its source, where does it rise?

A It rises along the county road or the state road now below my house a ways.

Q Is it on land owned by you? A. Yes sir.

Q Does it raise in one spot, or are they a succession of little seeps of springs that make a spring?

A There is one main spring at the head comes out, then it seeps out all along the hill.

Q You have prepared a diagram here, does that substantially represent the location of the spring?

A Yes sir.

MR. KING: I will offer that as an exhibit, ~~the~~ be marked, so that it may give such light as the court may deduce from it.

Q Calling your attention to Exhibit 190, the spring on this exhibit is shown to rise at the point marked spring?

A Yes sir.

Q And which way does it flow?

A Flows in a southwesterly direction.

Q On your land? A. Yes sir.

Q Is there a dam in the spring at any point?

A Yes sir.

Q How far from its source?

A From the head of the spring I would judge it was one hundred and fifty yards.

Q Is that dam on your land? A. Yes sir.

Q Do you take any part of the spring, divert and use any part of the spring? A. Yes sir.

Q For how long have you used any part of the spring?

A Ever since I have been there.

Q From whom did you buy?

A From McAfee.

Q Do you know of your own knowledge whether it was used by him, any part of it, before you got?

A No sir, I don't know.

Q From the land you bought there could you tell whether it had been irrigated?

A Looked as though it had been, yes, ditch was taken out.

Q What part of the spring have you used during the fifteen years you have owned this land?

A I have been using the whole stream one-sixth of the time, two days out of twelve, during the irrigation season.

Q One-sixth of the stream-- all the stream two days out of twelve? A. Yes sir.

Q During the irrigation season you would use it all?

A Yes sir.

Q Day and night? A. Yes sir.

Q For what purpose did you use it?

MR. THURMAN: May I interrupt you, Judge, I would like the reporter to read your statement in the question there. It seems to me like it was a little involved. I understood you to say one-sixth.

MR. KING: Then I withdrew it.

MR. THURMAN: One sixth for two days in twelve?

MR. KING: All of it. I intended to withdraw that

part of my question.

Q At any rate you use all of it two days out of every twelve?

A Yes sir. That is, all the spring, I would say all that rises above the dam where we divert the water.

Q All that rises above the dam. Now, while I am on that point, is there any water rising in the channel below the dam, between that and the creek?

A The river, yes sir.

Q The river, I mean. How far is it from the dam to the river?

A I judge it was about two hundred yards.

Q From your observation what forms the water that rises below the dam, and between that and the river?

A It seems there is water rising in the ground all through there, during the irrigation season, and now even there is water rising there. You might shut the stream off entirely where our dam is, and follow down a ways, and there is water springing in all the way along.

Q Does the water you diverted onto your land seep back into the channel?

A Part of it would, I judge.

Q So that below the dam during the irrigation season, and while you are using the water above, what sized stream rises, measured by the amount that rises above the same?

A I would judge during the irrigation season that there would be almost as much water rising below our dam as there is above it.

Q Is it a tight dam during irrigation season?

A Yes sir.

Q What is the irrigation season?

A Usually from about the first of May, until the first or the middle of October.

Q In this place here? A. Yes sir.

Q With this spring then you fix from the first of May until the middle of October? A. Yes sir.

Q As the irrigation season. Now, during that period then, from

the first of May until the middle of October, you used it during the fifteen years you resided there and owned this land, all of the water for two days out of every twelve?

A Yes sir.

Q Was that necessary for the irrigation of the land upon which you applied it?

A Yes sir.

Q What is the character of the land?

A It is river bottom land, gravelly formation under a sediment that has come with the water in early days, that forms the soil. Some places it is gravel to the top, and some places there is possibly two or three feet of soil.

Q Is it very porous? A. Yes sir.

Q Do you use all the stream on that small tract of land upon which you apply it?

A I back the whole stream up, yes sir.

Q Do you have any difficulty in handling all the stream on that tract of land of yours? A. No sir.

Q How many acres are there upon which you apply it?

A I turn it out on a piece of something like three acres, and the balance of about five acres I irrigate from the water raising, subbing out.

Q It is all irrigated from this?

A Yes.

Q Could you do with any less than all the stream two days out of twelve?

A I have not been able to.

Q Have you economically and properly used it upon this land?

A Yes sir.

Q Why does it require apparently so much?

A The soil seems to be of a nature that when you turn the water out it seeps away so fast it is impossible to flood the land. Only way is to let it run for two or three days, ~~it~~ sub-irrigates it, until the whole soil is full.

Q You employ a system of flooding, do you?

A We try to flood, but it is impossible in that case.

Q What do you do?

A We run ditches.

Q So you employ both methods?

A We run ditches out. I tried to flood it to begin with, but could not do it with the stream we had., and run ditches over the ridge here, and this way and this way, and two or three days it subirrigates until it irrigates the whole piece.

Q Then at first you flood with all the stream for the two days out of twelve to irrigate your five acres?

A I tried to flood it, yes sir.

Q But by the ditch system you have been able to do that?

A Yes sir.

Q Do you use any of it for culinary purposes?

A Yes sir.

Q How much, and how do you use it?

A Just pump up for the barn and house and around the house.

Q During the ten ~~ix~~ days you are not using it for irrigation purposes, do you have any part of it for culinary purposes?

A Yes sir, I pump from the spring whenever I need water for culinary purposes.

Q Each day, I suppose?

A No sir, we usually pump into a cement tank, usually about every four or five days.

Q You have a cement tank at your home, I believe?

A Yes sir.

Q Is this the source of your supply for your home, corrals, and stock and so on? A. Yes sir.

Q Have you any idea what quantity you require for culinary purposes?

A Well, I think about-- it varies different seasons of the year. When we are watering horses in the winter time, and stock, it takes more. I would think about possibly threethousand gallons every five days.

- Q And have you done that ever since you have been there?
- A No sir, I have not pumped the water up until about eight years ago.
- Q Before that how did you get the water?
- A We had a well, didn't use the spring.
- Q So you need it in the wintertime, do you, after the irrigation season is over? A Yes sir.
- Q Now, what became of the water when you were not using it during irrigation season?
- A It went on the Wright property.
- Q Is that the property owned by Wilford D. Wright?
- A Yes sir.
- Q One of the defendants in this case?
- A Yes sir.
- Q How many acres has he?
- A I think he has about twenty five acres.
- Q Is that the land that is shown on this exhibit marked W. D. Wright, twenty-five acres of land between what appears to be two fences? A. Yes sir.
- Q What kind of land is that?
- A Very similar to the land I irrigate.
- Q Requires a great deal of water, does it?
- A Yes sir.
- Q Does the water readily percolate through it, seep back into the river and ditch, rather, or channel, rather?
- A Well, the percolation is more into the river than back into the channel. You notice the channel--
- Q Slopes toward the river, does it?
- A Yes, the spring flows-- his ditch runs out this way, across the land in different directions, and slope of the land is all toward the river down the canyon. The slope would have to go the other way to go into the Spring branch.
- Q Then the water applied upon this land, your opinion, readily finds its way by percolation back into the river?
- A Yes.

Q How long have you been acquainted with the land owned by Mr. Wright?

A Ever since I have been there.

Q When you went there did you observe whether that land bore evidence of having been irrigated and tilled?

A Yes sir.

Q Ditches on it? A. Yes.

Q What is mostly raised on it?

A Mostly hay, hay entirely.

Q Have you been familiar with it ever since you moved there?

A Yes sir, for the last ten years anyway I have been quite familiar with it. Irrigated it part of the season.

Q What do you say as to the necessity of the stream during the two days of the twelve when it was not used upon your land for the irrigation of the lands of Mr. Wright?

A Let me understand your question.

Q Was it necessary to have all that stream ten days out of twelve for the irrigation of this land?

A Yes sir, I think so.

Q How has it been applied, properly and economically or otherwise?

A When I applied it, it was.

Q Have you observed Mr. Wright irrigating it?

A Yes sir.

Q From your observation what do you say as to the method employed by him?

A I think it is the best that could be used in my judgment.

Q About what quantity of water rises above the dam in this ditch?

A What amount of water?

Q Yes.

A I have not made any measurements, I would judge there was between one and two second feet of water.

Q Does this land of Mr. Wright's require irrigation for the same period as your land, say from May 1st to the middle of October?

A Yes sir.

- Q After the hay is cut what is the purpose for irrigating it?
- A For pasture, fall pasture.
- Q Have you used this land, rented it for a number of years for field pasture?
- A Yes sir.
- Q What do you say as to the necessity of irrigating during the period?
- A It is very necessary.
- Q Have you applied the water yourself?
- A Yes sir, last two seasons I have watered entirely after the hay crop was taken off.
- Q Do you say that is necessary for the maturing of your grasses for pasturage? A. Yes sir.
- Q And did it require the quantity of water, to-wit, all of it, ten days out of twelve?
- A Yes sir.
- Q To irrigate it after the hay was cut. Was there a period during hay cutting when you don't use all of this?
- A Yes sir, when Mr. Wright cuts his hay there is a period about two weeks we do not use the water at all, it is turned down the stream.
- Q And it joins with that that raises below the dam?
- A Yes sir.
- Q Do you or Mr. Wright, if you can speak for him, claim any of the water that raises below the dam?
- A No sir, I think not.
- Q You think nearly as much would raise below the dam as above?
- A Yes sir.
- Q Your claim then is for all the stream from May 1st to October 15, and then sufficient, three thousand gallons every five days for culinary purposes for your use?
- A That is what I estimate.
- Q Does Mr. Wright use any of this for culinary purposes?
- A No sir, I don't think so.

CROSS EXAMINATION by Mr. A. C. Hatch.

Q I misunderstood, the water is not diverted from the spring channel at any point below your dam, is it?

A We do not divert it, nobody, I think.

Q No body? A. No sir.

Q You say that there is as much water raises in the channel of the spring below your dam as therewas above?

A I think so in the irrigating season.

Q So that you don't claim any of the water that arises below your dam?

A No sir, never.

Q So that there would be practically three second feet in all of water flowing from the springs and into the spring channel before it reaches the river?

A You mean be three second feet by the time it reached the river if it were all allowed--

Q All the spring water allowed to flow?

MR. KING: You are getting it twice in your question, aren't you?

MR. A. C. HATCH: No, I am not, according to the testimony, his testimony was, if I understood him correctly, there was between one and two second feet above the dam, and that there was about the same quantity arose in the channel of the spring below the dam.

MR. KING: He said part of that went back in and helped to make that second foot, or whatever it is below the dam.

MR. A. C. HATCH: I didn't understand that.

Q Did you say it went in there?

A I said when I was irrigating I thought the water that I was applying to my land would help feed the spring below our dam, but when Mr. Wright was irrigating I don't think that it would, but the irrigating I am doing in my field above the spring would affect the supply of water in the spring channel below our dam.

- Q From sources from the Provo river not from the spring source itself?
- A Yes sir, that would be from Provo river source.
- Q You don't claim any of the water that arises in the spring or in the spring channel below your dam?
- A No sir, I do not.
- Q You say that it requires the entire stream for the proper irrigation of the thirty and a half acres of land which is irrigated by it?
- A Not the whole stream that would accumulate by the time it reached the river.
- Q At your dam? A. Yes sir.
- Q About how far above the division line fence between your land and the Wright land is your dam located?
- A I would judge about five rods.
- Q And then your irrigating ditch bears off to the north?
- A Northwest.
- Q Northwest, and there is a slough immediately to the north? and as the land lies, slope of the land above the ditch leading from your dam for the irrigation of your land, isn't there?
- A That is what we call the spring channel.
- Q The main spring channel runs down below your dam through the Wright land, doesn't it?
- A No sir.
- Q Now, following on down the county road through the Wright land isn't that a swampy tract all the way down?
- A Following down the road?
- Q Yes, to the bridge to the west of the road through the Wright land?
- A There is a swamp when you get down nearly to the lower end of the Wright land.
- Q How much of the Wright twenty-five acres is swamp land?
- A Of the Wilford D. Wright land, I wouldn't judge there was over-- well, there may be a quarter of an acre, but not more.

Q And did you take any water out for irrigation purposes out of this spring channel above your dam that you have just described ?

A No sir.

Q Then how do you irrigate the piece to the north of your ditch?

A To the north?

Q Yes, and to the north of the spring channel?

A Some of it is irrigated when I raise the water up to irrigate the piece south of the spring channel, sub-irrigate, and the balance is irrigated from the river.

Q There is half acre in that tract indicated as irrigated from the spring?

A Half acre?

Q As I understood half an acre?

A There is more than a half acre , I would judge about two acres.

Q That is irrigated from the river, isn't it?

A No sir, it is irrigated from the spring. It sub-irrigates when I raise the water up to water the piece on the south.

Q How high a dam do you have to make there in order to divert the water from the spring?

A When I take the water out I back the water up until it is about three feet high.

Q Dam is about three feet?

A Yes sir.

Q Forms a pond there?

A Yes sir, it backs it up and forms a pond.

Q Mr. Wright uses the same dam to divert his water?

A Yes sir.

Q And raises it up to the same point?

A He doesn't raise it as high as I do.

Q The water comes out from the channel in the same ditch, doesn't it?
A. Yes sir.

Q Why do you raise it high?

A My land is higher than his.

Q Requires --

A I have to raise it higher, because my land is higher, to get

out on my land; I have to raise it about a foot higher than Mr. Wright has to take it on to his.

Q Do you think then the duty of water, actual duty of water on that land, would be one per second foot?

A It would be quite a low duty, where you have to use that sized stream on that kind of land. What I mean require quite a bit of water to irrigate a hundred acres of land with that stream.

Q Do you never apply your river water in connection with this?

A No sir.

Q You could do, if you saw fit, couldn't you?

A Yes sir, I could.

Q Nothing to prevent your increasing your flow in this particular place by adding to it river water?

A Well, the river water can be carried down and emptied into the spring.

Q Sir?

A The river water can be carried down and emptied into the spring drainage, but we don't do it.

Q And take this, all this tract that you have marked here as irrigated from the spring; your ditches from the river run right down to that, don't they?

A No sir.

Q How do you irrigate it then partially with river water?

A My ditches do run as far as I irrigate with the river water, but they don't run on to the land I irrigate with the spring.

Q I misunderstood you then, I understood you to say that the half acre tract lying to the north of the spring channel was partially irrigated from river water, this triangular piece here lying north of the spring channel?

A Here is the spring channel coming down here.

Q North of the dam?

A This is the piece right along in there that I figure subirrigates from the spring when I raise it to irrigate this piece.

Q I understood you to say that it was partially irrigated by subirrigation, and partially irrigated from the river water?

A No sir, I claim the piece of about two acres along near the spring branch is irrigated from sub irrigation, and all this here is irrigated from the ditch that I take out of the river.

MR. KING: When you said here, you mean north of this land you irrigate from the spring, so as to get it in the record?

A Yes sir.

Q Now, it is all one tract of land, this two acres and the balance of your farm? A. Yes sir.

Q On the same general slope with your other land, isn't it? This two acres with your other land?

A Yes sir, on the general slope.

Q And now if you desired to do so with your river water you could add to this spring stream whenever you saw fit, couldn't you, and increase it to six or eight second feet, if you saw fit to do so?

A Well, there is some of my ground that I have a little waste water would drain into the spring branch.

Q Couldn't you add your river water to the spring water and make the stream any size you want it to irrigate it?

A I could by extending a ditch down into the spring.

Q How far would you have to extend that ditch?

MR. KING: I object to this as not proper cross examination, immaterial and irrelevant.

MR. A. C. HATCH: I think it is for the reason he said it was necessary with that size stream. Now, these parties are here claiming, your Honor please, for land adjoining this, the same tract of land, water right from the river, and our contention, of course will be that there is no necessity for using a half second foot of water, or a second foot of water for irrigating when they could by extending the ditch a very short distance, use a stream that would make the irrigation economical, if that is the theory they have, because of the small size stream it is necessary to use a duty of some fifty acres to the second foot, whereas, if it were added to

it would be a sixty acre duty . Of course we claim it is their duty to add to it where they have the water and it is adjoining land that could be applied.

THE COURT: Objection is overruled. I will not pass upon the weight of the evidence at this time.

Q What length of ditch would you have to build in order to get your irrigation water from the Provo river with the Spring branch

A Oh, it would not be more than a hundred yards, I don't think.

Q And you own the land to the north and east and west of the spring branch? A. Yes sir.

Q And it is all under cultivation?

A Yes sir.

Q And irrigated from the waters of the Provo river?

A Yes sir.

Q You say the land is generally damp and wet when you were irrigating your farm to the north?

A Which land do you mean?

Q This land that you irrigate from this spring?

A No sir, I wouldn't say that.

Q I understood you to say that the water oozed up all over during the time that you were irrigating?

A All over the ground?

Q Yes.

A No sir, I don't think I said that.

Q And that the Wright land was about the same as yours as to sub-irrigating?

A Yes sir, I said the Wright land was very similar to mine.

Q Do you know the depth of the black surface soil on your five acres that you irrigate from this spring?

A I have never made any thorough examination.

Q You dug post holes there, haven't you?

A Dug some post holes.

Q Did you ever ~~gixl~~ go down to the gravel in your post holes?

A Yes sir.

Q Whereabouts?

- A I think about every post hole I dug.
- Q How deep do you go?
- A Usually about a foot and a half.
- Q Do you know how it is down on the division line between you and Wright?
- A. Yes sir.
- Q Did you dig post holes there?
- A Yes sir, helped.
- Q And how is the soil there?
- A Well, I don't think it is more than two feet deep at any place, and from that to no soil at all, gravelly part of the land clear on top of the ground.
- Q Sort of river bed?
- A Yes sir.
- Q Now you said that the most of the water applied upon this land runs back into the-- finds its way into the river channel?
- A I think it would, yes sir.
- Q So that the land is situated right on the river bank, practically?
- A Yes sir.
- Q And some of it runs directly off the land into the river channel when you are irrigating, doesn't it?
- A Not when I have irrigated.
- Q Doesn't it when Wrights irrigate?
- A Not when I have irrigated Wright's land, no sir, unless it is on the-- there is a slough in Wright's field, in that slough there is water raises when he is irrigating, and that goes into the river.
- Q That runs off east next to the county road? and goes back into the river down by the river bridge, doesn't it?
- A No sir, there is a slough that heads right about the line between Wilford Wright and myself, runs almost westerly direction right into the river, and when he is irrigating, and while I am irrigating, ^{some} the water will percolate through the soil and raise in this slough, and run off into the river.
- Q Is there any dam in that slough to divert the water out upon the Wright land?

- A Yes sir, at the river bank there is.
- Q And the riverbank is really the highest point on that part of the Wright land, isn't it?
- A The land is higher at the river than it is out from the river a ways.
- Q Even higher than it is over at the road, isn't it?
- A No, I don't think it is, it has very little x fall to the land, it is quite level.
- Q What portion of this land would you say would produce agricultural crops without any irrigation whatever?
- A I would not be prepared to say.

REDIRECT EXAMINATION by Mr. King.

- Q Would you say any would produce crops if there was no irrigation on this land, or on the Wright land?
- A No sir, I don't think it would.
- Q The land that you own to the north of this did you acquire from some person with a water right?
- A Yes sir.
- Q As appurtenant to that land?
- A Yes sir.
- Q Was there any water right?
- A Yes sir.
- Q Wait a minute. Was there any water right on that land to the north of yours that applied to this land irrigated from this spring? A. No sir.
- Q Did you ever irrigate this land, this five acres which you now irrigate from this spring with water from any other source than the spring? A. No sir.
- Q And do you have more than sufficient water for that land that lies to the north acquired from other sources, watered from other sources for the irrigation of other land?
- A No sir.
- Q You need it all there? A. Yes sir.
- Q If you should take part of that water and bring it to this land

you would deprive that land of water?

A Yes sir.

Q Supposing you did do that, bring your water down and mix it with this spring water, what disadvantage would result, if any?

A There is so little fall to that land through that section that carrying our water from the river as it is now down toward the house the water seeps out of the ditch, and raises out in the center of the field, and my main trouble now is to keep from drowning the center of my field by irrigating all the land I have to irrigate, and if I run water along there any more on it it would damage the rest of the field.

Q Then that would be a practical disadvantage?

A Yes sir.

RECROSS EXAMINATION by Mr. A. C. Hatch.

Q This water is all Provo river water, tributary to the Provo river?

MR. KING: That is objected to, it is asking for a conclusion of the witness.

THE COURT: I take it you mean water which would flow into the river if it was not intercepted?

MR. A. C. HATCH: I do not think counsel heard my whole question, or he would not have objected. Read it to him, please.

(Question read)

MR. KING: That is as I understood it, and I object. With the explanation the court made, I think it is proper for the witness to answer.

A The water would all run into the river it is were not taken out and diverted.

REDIRECT EXAMINATION by Mr. King.

Q Does the irrigation of your land and irrigation of the land below the Wright land serve to reservoir the water in the

land so that later on in the season it finds its way, in your opinion, into the river?

A Yes sir.

J. R. ALLEN, recalled by the defendant Wilford Wright, et al, testifies as follows:

DIRECT EXAMINATION by Mr. King.

Q You have been sworn heretofore in this case?

A Yes sir.

Q J. R. Allen? A. Yes sir.

Q Mr. Allen, describe briefly and to the point the land of your brother's five acres irrigated from the McAfee spring, the land of Mr. Wright, character of the land, its topography and spring with reference to the land and method of irrigation. It is a long question, but you have it in mind, and proceed.

A The land belonging to Mr. Allen and Mr. Wright, irrigated from the Wright spring is land that is very flat, that is, there is not much fall in the country one way or the other, and it is up and down, ridges and hollows that the old wash of the river has worn little channels through there, and left high places, where the rock ridges are. It has left high places and worn out the silt in the bottom more, so that it is unlevel that way.

Q It is river bottom land?

A It is river bottom land, yes sir.

Q Made by deposit of gravel?

A Yes sir. The channel where the spring itself runs, an old waste channel of the spring, the Provo river at some time has run over there and flood waters run against the hill then run down this spring channel in high water, The river does that sometimes now in very high water. The channel of the spring and the waste channel of the spring as it reaches the river is some three or four feet lower than the general

topography of the country there. It is cut down. As the water raises from the main spring and small spring near it, it spreads out into quite a wide slough or channel that is maybe neighborhood of three rods wide. When the water is taken out by Mr. Wright, dam put in there and diverted to Mr. Wright it makes a slough there maintained all summer to the neighborhood of three rods wide, and when my brother waters he has to raise the water out of Mr. Wright's ditch, about a foot higher than Mr. Wright raises it. In raising this water to that depth in getting water out on the surface to water something in the neighborhood of three acres it sub-irrigates some two acres or such a matter just above the main channel of the spring to the north of the main channel of the spring. This land is very porous land, it seems it is underlaid with gravel all over there. There seems to be underground water moving all through that country into the main spring channel below where Mr. Wright and my brother put in the dam to divert the water. The water flows altogether down that channel until when you get to the river when they are irrigating I would say there is nearly as much water as they get out on their land, and to try to flood the land, it is impossible. It is a matter they can put a stream of water they have there, say they had something over a second foot, say second and a half of water, that water will run a little ways and soak into the ground, you cannot make it run very far. Simply a matter of running it in ditches and gradually fill up the land. Of course, while the land is filling up there is part of the water going off in underground channels on this gravel into the river and into the main spring channel again.

Q Is there any other better method of irrigating the land than that employed by your brother and Mr. Wright?

A No sir, I don't think so.

Q Do you know whether it is economically used in your observation there?

A I think it is.

Q How long have you been acquainted with the land?

A I have been acquainted with the land past twenty years.

Q Helped irrigating it? A. Yes sir.

Q Seen them irrigate it? A. Yes sir.

Q Does that land require the application of water for raising of crops? A. Yes sir.

Q When do you say the irrigation season would commence?

A I would say it varies, some seasons early as the 15th of April, but usually along the middle of April to the first or middle of October.

Q After the maturing of the hay crop what is the necessity of irrigating further?

A For pasture.

Q Does that make good pasture?

A Good pasture is worth nearly as much as the hay.

Q You have rented it, have you?

A Yes sir, my brother has rented it number of years.

Q It makes good pasture by application of the water?

A Yes sir.

Q You stated to the middle of October it was used for irrigation?

A Yes sir.

Q How many acres has Mr. Wright?

A He has about twenty-five acres.

Q Do you know whether he has irrigated that land during the twenty years you have been ~~am~~ acquainted with it?

A It has been irrigated as long as I have known it, for twenty years, from that spring.

Q What is the effect of turning the water out upon the land, does it fill the land up?

A It does in time.
that

Q That/is retained when it is filled up, does it percolate into the river later on?

A Yes sir, it is percolating in the river all the time as quick

as it fills up I figure that land fills up from the gravel, gradually fills up, and all the time it is filling to the surface, there is water going off into the river. There is water going off into the main spring channel.

Q If there was no irrigation, conceive that to be possible, where this dam is in this channel, spring channel, would there be any water below the dam and in the channel between that and the river?

A If there was no irrigation from the river above?

Q No irrigation on your brother's and Wright's land?

A There might be some water there. I have an idea there would be some water, but not as much as there is.

Q What I am trying to get at is what, in your opinion, causes the flow of the water in the channel below the dam constructed in the channel by your brother and Mr. Wright.

A I think there is water springing up all through that section to about the level of the gravel, running through the gravel, but when irrigation starts there the flow is increased that amount is augmented considerably by the irrigation of Mr. Wright and my brother.

Q So that the more they use then the more flows into the river through percolation? A. Yes sir.

CROSS EXAMINATION by Mr. A. C. Hatch:

Q There is some springs coming out from the mountainside below the dam, isn't there, emptying into this spring channel?

A No springs that you could call defined springs. There is a seep there water gradually accumulates as you go along the channel, but don't see any evidence of live springs or other water boiling up or springing up ~~into~~ the channel.

Q Damp earth with water standing in little pools all the way along?

A There is water running there all the time.

Q On the east side of the spring channel?

A On the east side?

Q Yes.

Q What do you mean, above the dam or below the dam?

Q Below the dam.

A It comes in from both sides on the south and north sides that runs more east, to the southwest, nearly west.

Q What forms the pond, if you know, on the Wright land, or now the-- the Whiting land?

A On the Whiting land?

Q Yes, just below the Wright land?

A Yes sir, over next to Whiting's house.

Q North of Whiting's house?

A Just north.

Q Across the road north?

A There used to be considerable quantity of water run around and dump into what was the pond there. I think that place next to Whiting's house ~~is~~ is nearly as low as the river.

Q As the river bottom?

A Yes, and I think that is simply, the water after it gets so far down under the surface that water is standing all around there. There is a little slough condition in the northeast corner of Wilford Wright's ground, pretty much the same thing, it is a low place.

Q That extends clear across his land, doesn't it?

A There is a low place, this little sloughy condition is at the head of the swale that runs through his land that slough has to fill up quite a bit before the water will run toward the west toward the river.

Q About what is the width of that swale?

A Well, the swale, I would say, what swale there is there would not be more than eight or ten square rods. It would be maybe two-- couple rods wide and maybe five or six rods long that is strictly slough. The other part of the swale will raise crops, raise hay.

Q Do you know whether the land of your brother to the north of

the spring channel was ever surface irrigated, the two acres or two and a half?

A Not during--

Q Exhibit 190, triangular piece lying to the west of the spring channel and west of the dam, and north of the spring channel between the dam and river?

A Yes sir-- no sir.

Q Never was surface irrigated?

A Not as I know of.

Q All the irrigation of that has been the sub-irrigation it got from the water in the pond above the dam?

A It is a matter of raising the water to get it out on the surface, and when you raise the water to get it on the surface of the three acres below, you have of necessity to irrigate that two acres by subbing it. You cannot avoid it, it waters it, and there is no necessity for any other water for it. It is simply a thing you cannot avoid.

Q Now wouldn't the three acres below the channel there also sub-irrigate, same as the two acres above?

A No sir.

Q Why?

A Because there is no slough there to irrigate it. The slough in Mr. Wright's ditch, the slough comes to an abrupt end, and Mr. Wright takes a ditch out there maybe two feet wide or a foot deep, or such a matter. There is a main channel of the spring that turns, one channel goes this way, and waste channel of the spring goes this way. Now the water soaks through on its way into that channel.

Q Pardon me there, the main channel comes this way that runs on south, doesn't it?

A The main channel don't run past the dam south. The main channel does run from the springs down to the dam, and then through the dam and down through the river. That was the main channel. Now, Mr. Wright's predecessor in interest tapped this main channel at the dam and took a ditch to the south.

MR. KING: We offer in evidence, your Honor please, this deed, and call the court's attention to paragraph 5 of what is called the Chidester decree.

MR. A. C. HATCH: That is in evidence.

MR. KING: I want to call the court's attention to it. Joseph R. Murdock, administrator as aforesaid, and for the uses and purposes aforesaid, is the owner and entitled to the use of all the waters of McAfee springs.

MR. A. C. HATCH: We admit that Wilford D. Wright is the successor in interest of Murdock as administrator.

MR. KING: I have a deed here for these twenty-nine acres by decree of the court, in the matter of the estate of William Wright, giving this McAfee spring to this land.

THE COURT: Decree of distribution?

MR. KING: Order confirming sale of real estate. I offer that in evidence.

MR. A. C. HATCH: We think it is immaterial. We admit that Wright is the successor in interest to Murdock under the decree and under the deed to the land.

THE COURT: I take it it is unnecessary to encumber the record.

MR. KING: I understand it then, if I may be pardoned for addressing counsel, you admit that in the Chidester decree the McAfee spring was awarded to Mr. Wright.

MR. A. C. HATCH: William Wright estate.

MR. KING: For this land and subsequently.

MR. A. C. HATCH: Not for that land. It was in connection with other waters that was awarded to the Wright estate, for the irrigation of all the land owned by them.

MR. KING: It was not used upon any other land than this?

MR. A. C. HATCH: I don't know as to that.

MR. KING: Then do you concede that all of this spring, McAfee spring, was sold by Mr. Murdock as administrator,

to Mr. Wright here? Mr. Wilford Wright, and this twenty-nine acres of land?

MR. A. C. HATCH: For the irrigation of the particular tracts of land four or five acres of which are upon the hillside, never was irrigated.

MR. KING: That is thirty acres in all.

MR. A. C. HATCH: Yes, and twenty-five acres is all that was irrigated.

MR. KING: I understand that.

MR. A. C. HATCH: And the whole twenty-five acres is not subject to irrigation, that is, the whole of it, part of it is hill land.

MR. KING: Of course, I don't ask for that concession, I don't admit it.

MR. A. C. HATCH: I concede, and what I offer to admit is that Wilford D. Wright is the successor in interest as to the land of the Wright estate described in Exhibit 190, and claimed to have been irrigated by you, and that he is also the successor in interest of the Wright estate to the waters as decreed by the Chidester decree.

MR. KING: Mr. Murdock, take the stand.

MR. A. C. HATCH: Judge Thurman will state what we will admit, and probably save any further testimony.

MR. THURMAN: We will admit that three acres, admit your use of all the water at the dam where it has been used, providing you consent it may go into the decree that the water shall be used there and in that way.

MR. KING: On these thirty acres of land?

MR. THURMAN: Yes.

MR. KING: And providing we have--

MR. THURMAN: Use it in the way that has been described here.

MR. MCDONALD: Let us see if I understand. You concede we are entitled to use it on these thirty acres, the waters ~~xx~~ that are taken out at that dam from the first of May

to the middle of October.

MR. THURMAN: I do not know about the acres.

MR. A. C. HATCH: I do not understand the water above, that the water has ever been applied on the two acres that are north of the spring channel. It is sub-irrigated it never has been diverted and used upon it as surface irrigation?

MR. THURMAN: That is what Mr. Wright said.

MR. A. C. HATCH: That is what all the witnesses have said, and we will admit the water may be used as it has been used for the irrigation of the lands.

MR. KING: You are willing then that a decree may be entered that we are entitled to use all the water rising above the dam as it has existed all these years, and as to which the witness have testified, upon the thirty acres, to the extent and in the manner that it has been used as testified to by the witnesses, between the first day of May and the 15th day of October, and that in addition we have about three thousand gallons during the entire year for pumping up there?

MR. A. C. HATCH: For the entire year.

MR. KING: Use such as we need for culinary purposes through all seasons of the year. It takes about three thousand gallons during each five days.

MR. THURMAN: And we ask the decree may limit the use and place of use permanently.

MR. KING: Yes, use it upon these thirty acres, I stated that, and that the dam should be maintained at that point. That is satisfactory to Mr. Wright?

MR. WRIGHT: Yes sir.

MR. KING: I will ask leave to withdraw this decree I offered.

THE COURT: It was not received.

MR. A. C. HATCH: Now, as to the land under the Pioneer Ditch, and the Upper and Lower ditch, have you got together on that ?

MR. KING: Mr. Murdock and I have agreed, I will state ~~it~~ now. I have distated a stipulation which we will agree on, I think. I will state it here.

MR. A. C. HATCH: Let us have it written, signed and filed, and then there will be no question about it, save a lot of record.

MR. KING: Now, your Honor please, I ask leave to file an amended answer instead of adding a paragraph, setting up Wilford Wright's rights. I will rewrite the answer, and get at that today.

THE COURT: And serve it upon the parties?

MR. KING: Yes.

THE COURT: To conform to the proof and stipulation?

MR. KING: Yes.

THE COURT: That may be done. You must do it at once.

MR. KING: I cannot do it until tomorrow.

THE COURT: I mean while we are here,

MR. A. C. HATCH: , It should be filed before the evidence is closed in the case.

THE COURT: Yes, ought to be. Now, what is the next matter to be taken up?

MR. RAY: I understood the plaintiff had some further testimony with reference to the Telluride Power Company.

MR. JACOB EVANS: If the court please, at the adjournment of the court here last session, there was a stipulation presented to Mr. Booth, Mr. A. J. Evans and myself by Mr. McDonald. At that time Mr. McDonald stated that the stipulation was prepared by Mr. Thurman, one of the attorneys for the plaintiff in this action, that it was understood that the plaintiff was to sign that stipulation. Upon that statement it was signed by Mr. A. J. Evans, Mr. A. L. Booth and myself. Mr. Thurman had already signed it. It turned out almost immediately afterwards that ^{that} stipulation was a paper to be signed by the parties in the upper valley, and it was inadvertently signed by us, with the statement that Mr.

Thurman had prepared it, and it was all right for us to sign it. I called Mr. McDonald's attention to it almost immediately afterwards, and understood the stipulation would not be presented for signing by the rest of the parties. Judge Hatch had not signed it at all. For the first time I was informed today about noon Mr. McDonald intended to proceed to have that stipulation signed by all the parties to become binding upon us. We have had to call it to the attention of the court. We want it understood now so far as the plaintiff Provo Reservoir is concerned, that the stipulation is signed under a misapprehension of the facts, and that we not propose to be bound by it.

MR. RAY: Which stipulation is that? The main stipulation as to Wasatch county?

MR. THURMAN: Yes, I signed it because I represent Timpanogas Irrigation Company and Wasatch Extension Company. It is the stipulation that was entered into up there.

THE COURT: I understand what it is. What does that mean, gentlemen? It means all those rights must be proven as against the plaintiff. I merely ask because that will affect the time. It will take several weeks' time probably.

MR. THURMAN: I have understood for sometime past that the parties down here, and the plaintiff is one of them, had some proposition which they supposed would be satisfactory, letting that stipulation up there stand as between the parties, but claiming something down here which must be conceded to them.

THE COURT: Can you determine that this evening so that by tomorrowsession we can know what the situation is?

MR. RAY: I understood this stipulation has been repeatedly presented to us by attorneys for the plaintiff, and it was satisfactory to them. I may be mistaken, but that has been my understanding for about sixweeks.

MR. A. C. HATCH: If the court please, the matter was presented by Judge Thurman to me, he as counsel for the

Timpanogas Irrigation Company, one of the parties to the stipulation, and also counsel to the Extension Irrigation Company, and others, and I would not sign it. I said it was a stipulation that had nothing whatever to do with the interests below the Upper Midway dam., and the stipulation so recites, and the signing of it, as I read it and understand it, would make it no more binding upon anyone below the Upper Midway dam than those they had not signed it. The signing of it seemed to me to be farcial in any event, and I so suggested a number of times, and that the signing of it by all the parties would mean nothing.

THE COURT: Do I understand from that Judge Hatch it is your view that the plaintiff has no interest whatever in the matter, or the parties down here?

MR. A. C. HATCH: Section 32 of that reads as follows: "It is understood that the parties to this stipulation are all of the parties diverting the waters of Provo river at and above the Midway Upper dam, and this stipulation is not intended to affect and water right below said dam." Now, with that paragraph in the stipulation itself, I cannot understand what sense there would be to any party signing it who is using water below the Midway dam. Simply confirms that so far as they up there are concerned, they can divide the waters as they have agreed, but they must not by their division affect any water right below that dam.

MR. RAY: Judge Hatch, will you permit a question there. It seems to me that last statement there makes it extremely material to every userx below whether the right fixed by that stipulation shall be agreed to by people using water below the Midway dam.

MR. A. C. HATCH: Now suppose you had signed this stipulation without adding anything to it. You simply reaffirm that it does not affect the water rights of the Provo Bench Canal Company, that the stipulation shall not affect any water rights, but, so far as the people up there are concerned,

and we are fully supplied, we do not care how they divide it among themselves, but as to us, if it interferes with our rights we contest it.

THE COURT: Do you contend it does interfere with your rights?

MR. A. C. HATCH: At certain seasons of the year it will do without question.

THE COURT: That will have to be determined then,

MR. A. C. HATCH: And there are periods of time when the people down here, at least they will testify in 1915 they were without any water for considerable period of time, when the people up there were applying it probably a twenty acre duty. Of course, in the latter part of the season they get a return, but in the forepart of the season they were complaining that their crops were suffering at the time when people up there were flooding the whole territory with water.

MR. RAY: May I be heard just a minute on that. That objection has been raised, and Mr. Wentz testified very early in this trial as to that very situation. This stipulation does provide for very high duties in the county there, in the two counties, and we agreed to it after consultation with Mr. Wentz that in 1915 while we suffered for ten days in May, our later supply which enabled us to live at all was due to the fact they had used water at those duties in those counties. Now, for my client I signed the stipulation that the court might continue here upon the assurance of counsel of the plaintiff that Wasatch County troubles had been settled, and that that matter was ended, and if this stipulation is now to be opened I must now announce I will consider whether or not my signing the stipulation for the judge pro tem to hold week in and week out shall be binding upon my client.

MR. THOMAS: I should like very much to have the plaintiff answer the two questions propounded by the court. It will go to the crux of the situation. The answer to that

will determine the whole question.

MR. A. C. HATCH: I have never understood from this situation, and cannot see how counsel can understand from this stipulation that the water rights as between Utah county and Wasatch county were adjudicated.

MR. RAY: Stipulated.

MR. A. C. HATCH: The stipulation itself absolutely says it does not.

MR. RAY: Your counsel signed it and put it to us to sign it.

MR. A. C. HATCH: I never signed it, and I insisted from the beginning there was no necessity for signing it.

MR. THOMAS: You took part in it?

MR. A. C. HATCH: Where at?

MR. THOMAS: In Heber.

MR. A. C. HATCH: Yes, and I myself put this clause in it, if I remember correctly.

THE COURT: I may be wrong, pardon me for a suggestion, but it seems to me the situation we are in, if Judge Hatch's position is correct, there will be a month or so of trial here.

MR. A. C. HATCH: And I don't remember ever having said to any counsel that the rights of Utah county and the rights of Wasatch county as between each other has been adjudicated.

MR. RAY: Judge Hatch, do you remember in August of this year being in open court when an order was made by this court that the stenographer send copies of that stipulation to every counsel in Utah County, to see whether or not the provisions were satisfactory to them, and that matter need not then be adjudicated in Wasatch county, and I have a letter of transmittal from the stenographer of the stipulation to me made under the order of the court.

MR. A. C. HATCH: It was not made under the order of the court. After the stipulation had been entered into I asked

the stenographer to send four copies of that stipulation to me for the use of our company, and I said to the stenographer I thought every attorney in the case would like to have a copy, and suggested that twenty copies would supply the demand.

MR. RAY: At whose cost?

MR. A. C. HATCH: I will tell you. The stenographer later prepared and mailed to counsel for the several parties, as follows: Charles J. Wahlquist, William S. Willis, Chase Hatch, Jacob Coleman, J. H. McDonald, E. E. Corffman, M. Thomas, Grant G. Bagley, John E. Booth, Harvey Cluff, O. F. Soule, William W. Ray, S. D. Huffaker, Story & Steigmeyer, William H. King and Henry Shields each a copy, and to me four copies, with a bill for the whole of it, \$40.25, as I remember, which I paid, and so far I have received returns from only two of counsel in the case for their copies. Stewart, Stewart & Alexander and Charles J. Wahlquist. I have called attention of counsel two different occasions I was out two dollars apiece. I don't remember having mentioned it to Mr. Ray, but I did to Mr. Thomas, and to divers other counsel in the case, and that is the way the matter stands, and there was no order of court that these copies be sent.

MR. RAY: It was discussed in open court.

MR. A. C. HATCH: And that is the condition as it actually is, and I mailed my personal check to the stenographer for the cost of those copies. Now, I don't remember, I don't know what counsel for the-- I don't remember ever having stated to anyone this water right, as between Utah county and Wasatch and Summit counties was adjudicated and settled. I have thought all along that it would be, and ~~xxxx~~ think yet it may be before the court adjourns tomorrow night, but that it cannot be settled upon the basis of a twenty acre duty to the Wasatch county people while the plaintiff in this case is without water.

THE COURT: Well now, gentlemen, probably you can determine that before we finish tomorrow. Is there any matter we can take up at this time and finish the evidence, and if this is not settled, we will be confronted with the necessity of determining some time when I shall come back and take this matter up and finish it before the summer, if we can., but those matters now that we can take up that there is no prospect of a settlement we might finish, and then you can determine whether this matter is to be settled by this stipulation.

MR. THOMAS: There were two matters I wish to present now, have the presentation first in the morning, with reference to Provo city. I had thought that an offer had been made of two certain sets of minutes. By checking the record the reporter advises me that he has a record of their presentation, but not of the formal offer. I wish to correct that record in that particular.

THE COURT: Do you remember what it was.

MR. THOMAS: , I can get the data exactly by morning, and the pages. Mr. Davis has aided me in getting that.

THE COURT: You can offer that in the morning?

MR. THOMAS: Now, the presentation of other matters pertaining to Summit county may as well be held in abeyance until we determine what the outcome of this stipulation is. I am taken very much by surprise at the attitude of counsel on that matter. I have a matter of Mr. Donnan's that might be presented.

MR. RAY: Like to have that power matter?

MR. A. C. HATCH: We have some other rebuttal.

MR. THURMAN: May I ask a question of Mr. Thomas. Do you understand that your clients down here agree to that stipulation as made in Wasatch county?

MR. THOMAS: Yes, before that stipulation was entered into it was suggested by the president of the plaintiff company that the stipulation could be entered into , in fact, there were

ennumerable conferences had different times, and counsel in Wasatch county and counsel here, including Judge Corfman, Mr. Coleman and myself and Mr. McDonald and interested parties, went over the matter very thoroughly, thrashed the thing out for several days, as a matter of fact, but + was away last hearing here in June prior to the adjournment to meet in Heber. That matter was gone into thoroughly, so that when this stipulation was entered into ~~it~~ and agreed by plaintiff and urged as a settlement of the rights it was accepted in good faith by all counsel, because that matter was made a subject of very serious discussion before the hearing at Heber. I had presented the claims of Mr. Donnan sometime before, and there were several counsel present in court, and agreed by stipulation in open court as to his claims. Question has arisen since whether or not all were present, and I thought it best to have Mr. Donnan put in some formal proof, unless plaintiff wanted to proceed with further rebuttal.

MR. A. C. HATCH: Now, counsel made a statement as to this matter. If the court will permit me just a moment. That this stipulation was entered into in good faith by all the counsel present, and I haven't any doubt of that, I was present at the time that the stipulation was read and entered into and accepted it in good faith, and since the last adjournment of this court I have taken occasion to write to Brother Thomas and asked him to read the stipulation carefully over, that he might know what the stipulation was. Have you read it since?

MR. THOMAS: Not since--

MR. A. C. HATCH: Have you ever read the stipulation since it was made?

MR. THOMAS: Oh yes, I have, and was very much interested in the preparation of it at the time, remember your attitude and attitude of your client.

MR. A. C. HATCH: I cannot understand how any man

who has read it over with the view to understanding it would take the position that counsel takes in this case, particularly if he read paragraph 32.

MR., THOMAS: I read it because of your interest in it, Judge Hatch.

MR. A. C. HATCH: And that specifically provides that this is only a stipulation as between the parties using water above the Midway-- diverting and using water above the Midway dam, that that is as far as it goes, and that it does not affect any water right below. I will read it again. It is understood that the parties to this stipulation are all of the parties diverting the waters of Kovo river at and above the Midway upper dam, and this stipulation is not intended to affect any water right below said dam. I cannot see how counsel could have in any manner been misled so as to misunderstand.

MR. RAY: We might ask Judge Hatch for a little retrospection why he has been presenting it to me for signature through your counsel for weeks if he was not interested in it.

MR. A. C. HATCH: Pardon me, I don't think counsel understands--

THE COURT: Pardon me, Judge Hatch, the court will suggest if you have anything to present ^{we} proceed with it. This matter are not making any headway at all in the discussion of this stipulation at this time. It is not before the court for discussion and there is no question raised upon it. If you have any further rebuttal to put in, you may proceed with it. When the time comes we will discuss this and see if there is anything in it. If no one is bound by it we will proceed to ~~take~~ the evidence and thresh that matter out.

MR. A. C. HATCH: If the court will permit me to ask Mr. Ray which of the counsel for plaintiff--

THE COURT: No, the court will not permit you now, because that is prolonging this discussion, which is not availing anything, and not doing any good. If you have any

evidence on any other matters that can be put in now, we will hear it.

MR. A. C. HATCH: Call Mr. Donnan.