No. 2888 CIVIL.

PROVO RESERVIOR COMPANY

vs

PROVO CITY, et-al

CONTEMPT PROCEEDINGS

EXHIBITS

Filed August 6, 1927

E. B. DASTRUP, CLERK

By Frank [illegible]

Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH.

PROVO RESERVOIR COMPANY, a Corporation, Plaintiff, vs. PROVO CITY, et al, Defendants,	No. 2888 Civil Contempt Proceeding. Copy of the Proceedings in the above entitled Cause, May 7,1919, Found in Vol.X, of Official Transcript of the Evidence given in said Cause, Pages 4310 to 4313 Both Inclusive.

10:15 A.M., Recess to 2:00 P. M.

During the recess of the court the parties dictated to the reporter the following stipulation with request that it be preserved in his notes:

It is agreed between the plaintiff Provo Reservoir Company and defendant, Utah Power & Light Company, that the issues arising upon the amendments to the complaint of the Provo Reservoir Company pertaining to the so-called Blue Cliff right and the answer of the Utah Power & Light Company to the amendment and to the complaint as amended, shall be disposed of as between the plaintiff Provo Reservoir Company and defendant, Utah Power & Light Company by a decision and decree under which the Provo Reservoir Company as successor in interest to the Blue Cliff Canal Company, shall have a primary right to 50 second feet of the waters of Provo River, which shall include Maple Springs, Pony Steele Springs and all other springs originally arising in or discharging their water into the Blue Cliff Canal.

It shall be provided by the decree to be entered herein that the point of diversion of all of said waters

to be at the location of the present Headgate of the present Provo Bench Canal, which is below the tail race of the Utah Power & Light Company present Olmstead hydro electric plant, or at such other point, or points, as will not interfere with the use of the river portion of said 50 second feet by the Utah Power & Light Company through its said Olmstead plant as at present located.

This stipulation includes the rights specified in paragraphs 14 and 24 of the present decision of the court heretofore filed in this cause and said decision shall be modified to conform hereto.

This stipulation is not intended to in any way affect any matters which have been heretofore submitted to and are under advisement by the court as to the quantity of water to which the Utah Power & Light Company shall be entitled.

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THE COURT: There has been handed me a stipulation signed by the parties, which, as I understand it, settles all the controversy relating to the Blue Cliff right, controversy between the Utah Power & Light Company and the plaintiff, Are there any other matters that are to be taken up? This disposes of that part of it.

MR. A.C. HATCH: Disposes of the controversy between the Blue Cliff and Telluride Power Company of plaintiff's right under the Blue Cliff Canal, but all other matters between the two parties litigant have been presented, argued and submitted.

THE COURT: I understand.

MR. A.C. HATCH: There was a request made for a report from the Commissioner as to a curve of the river, cover-

ing a number of years, and we would like to have that presented to the court.

MR. STORY: Is there anything else--

MR. A. C. HATCH: You might be interested in that, the curve of the river, I think that is what they call it.

THE COURT: It is a hydrograph.

MR. A. C. HATCH: Covering the flow of the river from the period of time they have any official record, maximum and minimum flow for a certain number of years, and we ask for that. I don't know whether it has been prepared. If it has we would like to have that introduced as part of this case at this time.

MR. MacLane: We understand this stipulation will be shown as presented and received in open court.

THE COURT: The record may so show.

MR. A.C. HATCH: In regard to the statement made by me at the last session of the court as to the agreement between the plaintiff and Provo Bench Canal Company, Mr. Rawlins was here today representing the firm of Rawlins, Ray & Rawlins, attorneys for the defendant canal company, and the day having been wholly occupied by this matter we could not take that up with him. He said he would prefer Mr. Ray-- consulting with Mr. Ray tonight, and either he or Mr. Ray would be down tomorrow morning, and we will then close with them, as I verily believe, they being the only parties who are protesting against the Blue Cliff award under the tentative finding.

MR. RAWLINS: If the court please, if there are no other matters in which our clients are interested at this time-- it seems this stipulation might be entered into, but

it seems there are other controversies, at least one controversy, that might arise, so in view of the fact that could not possibly be decided tonight, we ask this question go over.

THE COURT: Have you heard anything of the situation of Mr. Ray's family.

MR. RAWLINS: I have not.

THE COURT: So you don't know whether he can come tomorrow?

MR. RAWLINS: I do not.

THE COURT: What is the situation, Mr. Richards, with reference to the city matters?

MR. F.S. RICHARDS: Your Honor please, we have presented some matters to the plaintiffs and they said they would consider the matter, and I am informed they have been so busily engaged in this other consultation it has not yet received attention, and so I think that by morning we will either have agreed upon something or be prepared to offer testimony.

THE COURT: Is there anything further that we can take up this evening? Did Mr. Wentz go for that report?

MR. JACOB EVANS: Just a minute and I will see if I can find him.

MR. JACOB EVANS: If the court please, the amendment was made for the purpose of amending Sections 29A and 29B of the complaint, and the purpose of the amendment is to make the pleadings so that they will support the findings of the court, in other words, to make the pleading conform to the proof. We ask that Sections 29A and 29B of the complaint be stricken, and that the amendment be substituted, the original complaint, and with this amendment be amended to read as follows:

"That as heretofore stated in paragraph 27 thereof the flow of said river varies in volume season by season, and at different times in the same season, and plaintiff alleges upon information and belief, which information is derived from records of the flow of said Provo River for many years past, that the normal flow from said river during the low period of each irrigation season is not less than substantially 305 cubic feet per second."

The evidence in this case which supports that allegation is based upon the hydrographic survey which was made and introduced in evidence. I cannot at this time state the number that was given to this exhibit, but it shows that for a period of some twelve or thirteen years the normal flow of Provo River, that is the low water flow of Provo River has never been less than approximately 305 second feet, and we assume that the court in making its finding as to what constituted primary water, based it finding upon this exhibit which I have referred to, and that was the object of that amendment.

Now I think the balance of the amendment is in effect the same as the original complaint. I will read it and your Honor may compare it.

MR. RAY: I think it is.

MR. JACOB EVANS: That plaintiff is the owner by acquisition and by purchase from prior appropriators thereof of the right to the use of the following quantities of the waters of Provo River, etc. (Reading).

That last paragraph is to cover the finding of the Blue Cliff Canal Company of a primary right.

MR. McCLAIN: And that, Mr. Evans, differs.

MR. JACOB EVANS: That differs from the original complaint. These facts came out during the evidence and made it clear that the volume of water now flowing in Provo River is very much in excess of what it formerly was, in other words, it is adeveloping river, a growing river, because of the irrigation in Wasatch County, and we did not know at the time of the preparation of the complaint just what the facts would show with respect to that matter, and since the facts have been introduced and shows a larger river than had ever existed prior to this time, we thought it proper to ask this amendment be made so that it might conform to the proof in this case, and thereby form a basis for the findings and the decree to be made in conformity with the tentative decision of the court. I don't think there is any question as to the law, being permissible to make your pleadings, to amend your pleadings to conform to the proof. In fact, it is elementary and is usually done as a matter of course. We think this is of vital interest to us, and we respectfully request this amendment be permitted at this time.

MR. RAY: May it please your Honor, we resist the making of the amendment at this time and apropos of Mr. Evans observation that ordinarily the party is permitted to amend

his pleading to conform to the proof, that is a rule of course permissible in many cases, but the stitution here is not one of them which brings the plaintiff within the rule at all. They are asking here for an amendment which is directly contrary to the theory upon which they pleaded their case originally, and upon which they tried their case to this court. If the pleader in an equity case states a set of facts which entitles him to relief other than the relief for which he prays, certainly if it is not an injustice to the opposing party there may be an amendment; but in this case they pled the Blue Cliff right as a secondary right. One of the first things that is done in the case is to put Mr. Wentz upon the stand and intrpduce the survey, what he has found the normal average low water of Provo River to be during a series of years.

(Argument)

Now, we object to the amendment as not being timely, as not being a proper exercise of the discretion of the court, as not supported by the evidence in this case, and that the evidence in this case under the Constitution of the State of Utah shows that the right of the Provo Reservoir Company to the use of the quantity of water awarded by the court had vested prior to the adoption of the Constitution, and that it cannot by any statute be pro rated with a right vesting at a later date.

MR. WEDGWOOD: I don't quite catch--

MR. RAY: Our right was a vested right, General, and I think the mere statement of it ought to make it clear, when the Constitution was adopted, and it was a vested right

to the use of a sufficient quantity of water to irrigate forty-three hundred acres of land. I understand in this case reliance is placed upon the statute which takes the minimum mean flow of the river, not the actual minimum, but it is the average minimum flow, making it 305 second feet; and with that vested it could not be divested by a statute which made use subject to averages. It will be contended in this case if that is done Provo City will have a primary right and somebody else will have a secondary right and Provo Bench will have a right subsequent to somebody else. We are willing to bear the burden of that contention and counsel need not worry about our being secondary to Provo City, because we are satisfied the quantity of water is sufficient at its very minimum flow to satisfy Provo City and our appropriation, and out of the chances which we may take in that respect counsel ought not to be able to extract the right of getting their secondary and later appropriation upon an equal basis with our appropriation.

MR. JACOB EVANS: Isn't it a fact that under this tentative decision you have been awarded primary water largely in excess of that water that was awarded to you under the old decree, and isn't that true of practically all the bench canals?

MR. RAY: I am not able to say whether it is in excess of the quantity of water found in the old decree, and not concerned about that at all. I have never argued the validity of the old decree here. I am perfectly willing the decree of this court put this priorities in this case in the order of the filing and perfection of the water rights.

MR. JACOB EVANS: In other words you want to have

your priority and make it greater than it was in the past.

MR. RAY: Oh no, I don't want to make it any greater than it was in the past, nor any different than it was in the past.

MR. A.C.HATCH: Pardon me, the 4300 acres you are claiming as a vested right, some of it was first irrigated in 1916.

MR. RAY: Oh no, that is a bald statement not supported by any record. It has been irrigated ever since the appropriation was completed in about 1886, or along there, the 4300. acres, and the evidence so shows.

MR. A.C. HATCH: Let me dall your attention to the evidence as to the shares, supposed to irrigate two acres. and some irrigated as high as four acres in a manner with a share. Every acre that has had water upon it under your canal is within the 4300 acres.

MR. RAY: Oh yes.

MR. A.C. HATCH: And there is a difference between two acres to the share and four.

MR. RAY: It is admitted by the plaintiff under their own surveys to be 4,332 acres of land which were irrigated, and to which we had a right of water prior to any of their filings. That is admitted by counsel, there was no controversy upon it, stipulated the acreage which we had, and fact we were entitled to water for it.

MR. McCLAIN: If the court please, the defendant Utah Power & Light Company objects to the allowance of the amendment to the complaint tendered on behalf of the plaintiff Provo Reservir Company, on the ground, first, that the

amendment is not presented in time, that an amendment such as this is should be tendered at the earliest possible time during the progress of the trial when the state of the alleged proof is developed to such an extent as to justify the amendment, so as to give the adverse party opportunity to meet upon the trial the allegations of the complaint as amended.

Second, that the amendment does not conform to any proof in this case, but is in direct contravention of the proof submitted, not only on behalf of all the parties, but specifically on behalf of the plaintiff who tenders the amendment, in that the plaintiff during the course of the trial tendered the decree which is alleged in paragraph 29-D of the complaint that is to be stricken by this proposed amendment and stated expressly in tendering such decree that he relied upon the decree in so far as it fixed the rights of the parties to that decree.

Third, that the amendment interjects an entirely new and different cause of action into the controversy here upon an entirely different class of right than that which was alleged in the complaint, and upon which the trial was had, which cause of action the defendants in this case and particularly the defendant Utah Power & Light Company has had no opportunity whatsoever to meet.

Fourth, that to allow the amendment at this time, and to enter a decree upon the complaint as amended it would deny the defendant, the Utah Power & Light Company, or rather deprive the defendant, Utah Power & Light Company of its property without due process of law in contravention to

the provisions of the Constitution of the State of Utah, and 14th amendment to the Constitution of the United States.

The first essential in law, if I recall correctly, is that the party whose property is -- the right to allege property is brought in controversy shall have notice that his property rights are being attacked, and such notice takes the form under our practise here of an allegation in the complaint, or paper filed. The complaint as filed here alleged as plainly as could be alleged in the English Language, that a right was claimed subordinate to the right of the then Telluride Power Company, the now Utah Power & Light Company, and it is sought not only without proof, but also without notice and any opportunity to the Utah Power & Light Company to be heard, to transmute or transform that right into a right which is equal to, in seasons of low water, and therefore directly an infringement of the right of the Utah Power & Light Company. Such condition, as Mr. Ray suggested, occurred this year, when the flow of the river was less than the primary right of the Utah Power & Light Company as decreed in this court, to say nothing of the right of the Blue Cliff Canal Company; and the effect of the administration of this tentative decision of the court this past summer was to deprive the Utah Power & Light Company of water, the ownership of which was never questioned at all. The foregoing states, I think the objections which we formally make to this amendment. I would like to repeat briefly what I said before when this question was incidently discussed, which perhaps is unnecessary, as the court may recall it, but it is so pertinent to this phase of the

situation it won't take but a minute to recall it to the court's attention. The Chidester decree was rendered in 1907, I think. At that time the Olmstead developments of the Utah Power & Light Company had been completed, and the rights there involved were adjudicated in the decree, whether properly so or not is not before the court at this time, whether it may be at some other time or not. For ten years, or until and including the season of 1917, the watermasters of Provo River distributed the waters of that river as between the defendant Utah Power & Light Company and the plaintiff Provo Reservoir Company on the basis of the Chidester decree. This complaint was filed some three or four years ago alleging a secondary right in behalf of the Provo Reservoir Company in this Blue Cliff right, and during the course of the trial, the defendant, Utah Power & Light Company, relying on such allegation and also knowing what was being done by the watermasters in the distribution of the waters of the river paid no attention to the proof, if any, which was offered in support of the Blue Cliff right, It was not until the season of shortage this year that the officials of the company, the operating officials of the company, or myself, as its consulting attorney, had the slightest idea that the Blue Cliff right had been subject to the adjudication, or adjudicated in a way contradictory to that prescribed in the old decree, and the concrete result of this decision as now rendered and of a decree as it would be rendered, as it would stand were it rendered upon this decision as it now stands, and upon this proposed amended complaint, would be to take from

the Utah Power & Light Company water that it has had with the consent and acquiescence of the party now taking this water, for ten years last past, in a proceeding where we were never given the slightest notice whatsoever that our right to that water was being questioned.

THE COURT: Judge McClain, do you understand that would be so, if the court should conclude to grant the amendment do you understand that would be the result, to preclude you from meeting it.

MR. McCLAIN: Of course, if the court grants it we would apply for leave to amend our answer.

THE COURT: Certainly, it will be granted without any question.

MR. McCLAIN: I have no question but it would be granted and we would have a trial on that question.

THE COURT: That is the reason I asked that question Do you anticipate if the court should grant this amendment the court would cut you off without any permission to be heard at all?

MR. McCLAIN: I certainly do not.

THE COURT: Then your argument would be without any foundation, I mean that part of your argument.

MR. McCLAIN: This amendment has been tendered after the case is closed, and there was no opportunity for us to offer evidence on it, and the first objection was the amendment was not offered in time.

THE COURT: I am not referring to that at all. That is very cogent, and strikes the court as being a very strong argument against this amendment, but I was merely suggest-

ing to your argument your property would be taken without due process of law and without permission to introduce any evidence. I was wondering if you thought the court would take such a position.

MR. McCLAIN: No, I don't think the court would take such a position, I think it would be very unreasonable, but I think in stating my reasons, I think I should state everything to protect myself against such a contingency however remote it should be.

(Argument.)

MR. WEDGEWOOD: If your Honor please, as I listened to the gentlemen, both Mr. Ray and the Power Company's representatives, it seemed to me that they were outside of the issue, and the question asked by the court I think clears it up very materially. A case of this character to my mind, and, I think as shown by the ordinary practise and decisions of the higher courts is a case far separate and apart from the ordinary law case or case pertaining to real property, either in law or in equity, etc.

(Argument.)

MR. RAY: May I ask you a question, that is whether or not it is not admitted that the introduction of the survey, hydrographic survey there was prior to the introduction of testimony as to the Blue Cliff right.

MR. WEDGEWOOD: I would assume if you suggested it that it was.

MR. RAY: And that you pleaded the Chidester decree

setting forth a mean river of three hundred second feet?

MR. WEDGEWOOD: We recited the Chidester decree --

MR. RAY: And claimed under it.

MR. WEDGEWOOD: I don't think the prayer will justify that statement but even if we had --

MR. RAY: I have not finished my question -- and with those facts all before you, is it not a further fact that I and other counsel announced in open court we would not contest the Blue Cliff right because it was a secondary right.

MR. WEDGEWOOD: Even if that was true--

MR. RAY: And we waived our right to put in testimony and you permitted us to.

MR. WEDGEWOOD: Even if that were true, that does not change this situation at all as has been recited by Judge Hatch.

MR. C.C. RICHARDS: May it please the court, I don't want to join in either side of this argument, because, as I understand the position of Provo City we are out of it by our stipulation, but just want to call attention to this fact that by reason of being out of it we do not understand this amendment is going to in anyway undo or impair or prejudice us on the terms of the stipulation. In other words, that so far as the plaintiff is concerned and the defendant Provo City is concerned, that it will be considered as though the amendment as to us had been made prior to the stipulation. The stipulation will be effective and this will not undo it or affect it in any way.

THE COURT: No.

MR. F.S. RICHARDS: We just wanted the record to show so that there would be no misunderstanding about it. Mr. Evans called attention to it at the time.

THE COURT: I will say, gentlemen, ever since this matter has been called to the attention of the court by the objections and subsequent proceedings I felt that the court was a little to blame, possibly for not examining the pleadings. If the court had examined the pleadings and the court's attention been called to what has now been called to the attention of the court again, the fact that the others waived any opposition because it was treated as a second class right, the court would not have felt at liberty to award it as a first class right; but without those matters in mind, the court examined very carefully the evidence to determine the quantity of water that should be reguarded as first class right and I was impelled to the conclusion that there was in the river as first class or primary water sufficient to include all the rights, including the Blue Cliff Canal right. Some matters have occurred since to cause the Court to hesitate a little whether the court came to a correct conclusion in relation to that. I speak now of the experience of the distribution of the water of this year, but however that may be, whether the court reached a correct conclusion or not, it seems to me that the issue in this case ought to be so framed as to include that question, and I think it can only be done by permitting the amendment, and that would of course follow as a matter of course that

the parties interested would be permitted to answer this amendment, answer the complaint as amended, and to introduce such proof as they cared to in opposition to the proof that was introduced upon which the court based the findings that there was in the river at its low stages sufficient primary water to include this right. It has not been suggested to the court by either Mr. Ray or Judge McClain that any situation as so changed that this evidence is not now as available as it would have been then. That would have appealed very strongly to the court if that was shown, and the court would deny the amendment.

MR. A.C. HATCH: I did not understand that remark of the court.

THE COURT: I said it has not been suggested by Judge McClain or Mr. Ray that the situation had so changed that the evidence they would have offered in opposition to the evidence of the plaintiff was not now as available as it was then; If it had been shown that was the case the court would have denied the application as coming too late, but in view of the general situation and the desire of the court to be right upon the final conclusion with reference to this, I will permit the amendment, and give such time as the parties affected by it -- and I think only the two, Provo Bench Canal and Utah Power & Light Company -- give them such time to answer it as they feel they require, and I will fix a time giving them an opportunity to introduce such evidence as they may have in opposition to the evidence upon which the court based the conclusion that the primary

river, the river of primary water had increased and was sufficient to include the Blue Cliff right. Now, I refer to the evidence, and considerable of the evidence, to the effect that the river since-- well, particularly since the 1902 decree, and very largely since the 1907 decree had increased, the mean flow of the river, at the low stages, had increased a hundred second feet. Now, I call the attention of the counsel to these features so that you may know what the court had in mind and what you may direct your evidence to.

MR. RAY: I ask your Honor whether evidence will be received upon the question of the fact that the Blue Cliff Company had never perfected a right to the use of the quantity of water equal to that distributed to it.

THE COURT: What do you mean, 46 second feet?

MR. RAY: Yes, or anything approaching it.

THE COURT: Yes, I think so.

MR. RAY: We will claim the capacity--

THE COURT: I think you are entitled to show any of those matters that are affected by the placing of this right in the first class with you.

MR. McCLAIN: If the court please, so that this may be all before us, we should be permitted, or the plaintiff should be required upon request to recall for cross examination any of the witnesses offered by them in support of their right.

THE COURT: Yes, I think that will be true, those witnesses that testified to any of the situations, there are very few of them.

MR. McCLAIN: On behalf of the Utah Power & Light Company while it is not necessary, we will take a formal

exception to the ruling, and will ask until October first to answer, that is twenty days.

THE COURT: I think that is very reasonable time.

MR. RAY: May the Provo Bench Canal Company have an exception to the ruling of the court, and the Timpanogos Canal Company have an exception to the ruling of the court, and may we have until October first?

MR. McCLAIN: I shall be occupied and Mr. Story will too, probably in connection with a water suit on the Bear River pretty continually during the balance of this month and also during the month of October.

THE COURT: I could not hear it in October. It will be later than October, must necessarily be account of my engagements, and engagements I know of of some of the other counsel.

MR. McCLAIN: We hope very much this case may be disposed of this winter.

THE COURT: It would have been something of a satisfaction to me to say that I would not hear anything further than just close the matter and deny this application because of the hardship it is going to be upon me to find the time to hear it, but I grant it because I think justice requires this matter be gone into again, especially in view of the fact the court came to the conclusion there was that quantity of primary water; and I dislike very much to have to hear it, and I hope that counsel can condense the matter so that

it won't take a great length of time. I will find a time this year, if I possibly can, and dispose of it and get it out of the way before the end of the year, and surely before the winter is over. That disposes of all the matters except the Provo City town lots or acreage, does it? I want to hear and dispose of everything this session except the matter that is included within this amendment, and the issues raised by it, I want to round up everything else that we can.

MR. WEDGEWOOD: I have one matter in my mind, if I can have a chance to talk with Mr. Evans, Judge Hatch, and the others for three or four minutes, I might want to suggest it before Mr. McClain goes.

THE COURT: I will take a recess for five minutes.

(Recess.)

MR. WEDGEWOOD: The point I have had in mind for sometime, and which cropped out in the prior hearing in this way, I think possibly at my intimation to the effect that some of these questions would settle themselves quite readily, or the situation would be very apparent when the court determined the amount of water that the Power Company was entitled to as a matter of right. I think I said at the time I could see how that would affect the question and I believe the court will see now that the quantity of water to which the Power Company is entitled has considerable bearing and influence on the questions which are now before us. They were before us as much heretofore as they are now. They are before us now as a fact, now they come before us in a proper legal way. My associates agree with me that pending the

time of the next session of the court if the court could determine that question, I believe everything is in.

THE COURT: I have the briefs, I haven't had an opportunity to examine them, but the briefs are in.

MR. WEDGEWOOD: There is a datum point to which other things under certain conditions have all got to conform. Of course that question don't change our plans, but at the same time there is a situation there.

THE COURT: Yes, I can understand. It always seemed to me more material to the people below than it was to your people above, that is more effect.

MR. WEDGEWOOD: More material to us than to them by far.

MR. RAY: May it please your Honor, I would like to ask the court to direct the Commissioner to make up an average matural Provo River for all the years of which he has the data. He has made a plat from 1905 to 1916, and we would like to have it carefully worked out for the years 1889 to 1918. I understand from the Commissioner's report for 1915 they have data for all those years and we would like to have that worked out for all those years.

THE COURT: Can you do that, Mr. Wentz?

MR. WENTZ: The only reason I began in 1905 is because that is the present gauging station, Before 1905 the gauging station was down near the Utah Power & Light Company, and the measurements were unreliable, and for that reason I began with 1905 and continued to the present, because those measurements are reliable. I would be glad

to include up to the present time with that, but I don't think it is advisable to base too much reliance on those measurements.

THE COURT: The amount of reliance to be placed on it is a different thing. You have the data from which you can make such curve; although you suggest it is not reliable, you have the data?

MR. WENTZ: Yes.

MR. RAY: We would of course want to examine Mr. Wentz on that and not take his conclusion on that.

MR. WEDGEWOOD: May he make two gaugings in two pieces prior to 1905 in one part and this on the other?

MR. RAY: No, I have no objection to his making one from '89 to 1905 and one from 1905 to 1918, and then a composite one.

MR. WEDGEWOOD: He can do that.

THE COURT: Mr. Wentz, do you understand from this talk what they want?

MR. WENTZ: Yes.

THE COURT: You can have that for us at the time we need it?

MR. WENTZ: Yes.

THE COURT: Can you indicate, Mr. Richards, about what length the evidence is going to take in relation to the city?

MR. C.C.RICHARDS: Unless there is much difficulty on the part of the cross examination, we will get through very quickly. I think this afternoon ought to be sufficient. I will say frankly my idea would be this, to make the direct examination just as brief as possible and leave to the defense

such cross examination as they may desire. They will have all the data before them so they can go into any part or all of it.

12:00 Noon, Recess to 1:30 P. M.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY STATE OF UTAH.

PROVO RESERVOIR COMPANY, a corporation, Plaintiff vs. PROVO CITY, et al, Defendants,	No. 2888 Civil CONTEMPT PROCEEDING Copy of Testimony of Hyrum Heiselt given in behalf of Himself as a Defendant in the above entitled cause, on November 16,1916,P.M. Found in Vol.VI.of the Official Transcript of the Evidence given in said Cause, Pages 2738 to 2741,Both Inclusive.

HYRUM HEISELT, called by the defendant Hyrum Heiselt, first being duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr.John E.Booth.

Q Your name is Hyrum Heiselt? A. Yes Sir.

A Where do you live?

Q Provo Canyon.

Q You have some land in there known as the Heiselt place?

A Yes sir.

Q You know the Steele farm, do you? A. Yes sir.

Q It joins you?

A Yes sir.

Q How long have you been there?

A Been there about thirteen or fourteen years.

Q How long have you known the place.

A That long.

Q Who had it before you?

A My place?

Q Yes.

A Enos Carter.

Q How long have you known of his being there before you got it?

A Why, a good many years, I don't know how long.

Q Been a good while?

A Yes, he was there several years before I got it.

Q There is some springs that arise on your ground?

A Yes sir.

Q And some adjoining you on the Steele place?

A Yes sir.

Q Who else has used that water besides you and the people on the Steele place from those springs?

A Nobody.

Q And have you used it all?

A Yes sir.

Q During the irrigating season?

A Yes sir.

Q And all the time that you have been there?

A Yes sir.

Q And no interference from anybody?

A No sir.

Q What do you use the water for?

A Well, I use it for irrigating and fish pond. After it leaves the fish pond I use it for irrigating my orchard.

Q Mr. Heiselt, I hand you a paper marked Exhibit 134, purporging to be a stipulation between your self and the Provo Reservoir Company, and ask you if that is a stipulation that you and the Reservoir Company entered into?

A Yes sir.

MR. RAY: Judge Booth, does that stipulation in anywise provide for a change of the place of use of this water?

MR. JOHN E.BOOTH: No sir. Then we ask to make this a part of the record, your honor please.

THE COURT: It may be filed.

MR. JOHN E.BOOTH: It is already filed, I believe that is all from this witness.

CROSS EXAMINATION By Mr. Ray.

Q Mr. Heiselt, you have used this water, you say, for thirteen or fourteen years?

A Yes sir.

Q Prior to that Mr. Enos Carter used it?

A Yes sir.

Q You still have the same amount of land?

A Yes sir.

Q Using the same quantity of water ?

A Yes sir.

Q Have you transferred any water last few years?

A Not in those springs.

Q Have you sold any of the water which you formerly used on your place?

A Yes sir, I sold some river water that was decreed to me.

Q You sold some decreed river water?

A Yes sir.

Q Who did you sell it to?

A To Dixon.

Q That was water which you say had been decredd to you?

A Yes sir.

Q Are these springs sufficient for the irrigation of your place?

A They are on that side of the river.

Q Was the water which you sold to Dixon on the same side of the river?

A No sir.

Q What has become of the land which you sold to Dixon?

A Still farm it.

Q What do you raise on it.

A I use river water, what little I have left. I had nine minute feet decreed to me, and I got up against it for money and had to let some of it go.

Q You sold how much to Dixon

A Seven feet, I remember.

Q And you still have two minute feet?

A Yes sir.

Q Do you still use you two minute feet upon it?

A Yes sir.

Q Is that sufficient for its proper irrigation?

A It is, for some crops, what I am using it for now, I am raising corn.

Q What did you have in before?

A Alfalfa.

Q There is not enough for the alfalfa?

A No sir.

Q Did it take five times as much water for alfalfa as for corn?

A I think it does, the way I farm it.

Q When you used that water, that nine minute feet of water on this ground, there was quite a run off, wasn't there?

A I will tell you that water wasn't measured I know of when I was using it. When I was using it there before I sold it was the only ditch taken out and I would go there and take what water I wanted.

Q Did you ever use nine minute feet?

A I don't know how large a stream that would be, I used to fill my ditch whenever I wanted to.

Q You don't know whether it was more or less than nine minute feet?

A No, I couldn't say.

Q When you used whatever right was decreed to you on your alfalfa on that ground all the run-off and seepage was back into the river.

A Yes sir.

Q And land was so situated that water found its way immediately back into the river?

A Yes sir.

MR. JOHN E.BOOTH: That is all of that, your honor please.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH.

PROVO RESERVOIR COMPANY, a Corporation, Plaintiff, vs. PROVO CITY, et al, Defendants,	No. 2888 Civil Contempt Proceeding. Copy of the Proceedings in the above entitled Cause, September 10, 1918, Found in Vol. IX. of Official Transcript of the Evidence given in said Cause, Pages 4181 to 4197, Both Inclusive.

IN THE DISTRICT COURT OF UTAH COUNTY, UTAH.

------oOo------

PROVO RESERVOIR COMPANY, Plaintiff, vs. PROVO CITY, ET AL., Defendants,	September 10, 1918.

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(Testimony as to Timpanogos Irrigation Company, Wasatch County.)

THE COURT: Now, is there some other matter?

MR. A.C.HATCH: I understand Provo City would take up the first thing this morning the proof as to those city lots.

THE COURT: I understood that matter would take more time, anticipated it would take more time than this matter of the amendment, and there are some attorneys who do not desire to stay longer than the presentation of this amendment, the application for the amendment, and it will accomodate them, if that can be taken up first.

MR. McCLAIN: They have two very able counsel here.

This map represents the location of the Provo City water works pipe lines in the vicinity of Spring Dell. Also the location of the Blue Cliff Canal. The map also represents profiles of the ground line of the following laterals.

1. The lateral from the Booth Spring is represented at the upper left hand corner of the map.

In the upper center of the map is represented the profile of the ground line extending from D on the Blue Cliff Canal to the upper man hole on the Provo pipe line lateral at No. 29.

At the upper right of the map is indicated the ground profile of the hill side extending from point J on the Blue Cliffs Canal through points B, C, K and to man hole #36 on the upper east lateral of the pipe line.

All the man holes on the map admitting water are indicated by black dots, and the man holes used as clean outs are indicated by small circles.

There are definite channels or water courses extending from the galleries admitting water into the Provo City pipe line down the hill to the Blue Cliffs Canal. Cross sections of these channels are shown on the upper portion of the map at M, L and K.

A careful inspection of the ground shows that there are no flood water channels or any evidence whatever of water courses on the hill side above the galleries admitting the spring water on the two main laterals at the upper end of the Spring Dell pipe line.

Test pits were dug at points A, B, C, D, E, F, G. and H. These man holes were dug for the purpose of determining the nature of the ground below the surface.

Man hole A is in the Blue Cliffs Canal just below the series of east galleries admitting water from the hill side into the pipe line. From the surface to .8 depth is a sandy loam. .8 to 2.8 feet black loam with a little gravel. 2.8 feet to 4.3 feet gravelly clay very firm at the bottom of the hole. Water encountered 4 feet from surface.

Hole B is located about 10 feet below galleries No. 31 and 32 on the hill side above the Blue Cliffs Canal. From the surface to 2.8 feet deep is a gravelly loam. Water seepage was encountered at 2.8 feet. From 2.8 feet to 4.4 feet firm gravel and clay. At the bottom a hard pan very difficult to pick. At the bottom of the hole water stood 1.6 feet deep before running out through the sub soil. Water was encountered at a depth of 2.8 feet.

Hole C. This hole is located in the old spring channel just below K. From a surface to 2-1/2 feet deep black loam with little gravel. 2-1/2 feet to 4 feet gravelly loam with some sand. Water at 3.2 feet depth. The muddy water caused by working in hole C discolored the water in Gallery No. 32.

Hole D. This hole is located in the Blue Cliff Canal near point at railroad track. From surface to .6 depth black clay loam soil. .6 to 1-1/2 feet gravelly clay gray colored, very firm. 1-1/2 feet to 4.2 feet firm bedded gravelly clay. Water at 2.9 depth, standing 1.3 feet deep in hole. The hill side on the upper bank of the Blue Cliff Canal just above D is a firm white clay mixed with gravel and boulders generally bedded. This clay bank stands nearly vertical.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

PROVO RESERVOIR COMPANY, A Corporation, Plaintiff,	)	No. 2888 Civil
vs.	)	BRIEF ON UNCERTAINTY OF DECREE.
PROVO CITY, ET AL. Defendants,	)	

"A decree should ascertain and fix with definiteness and certainty the rights and liabilities of the respective parties to the cause. If it is uncertain and indefinite in these particulars it is at least erroneous, and may be void. Thus a decree is erroneous it if is inconsistent in its different parts, and it may be void...."

21 C.J. Sec.844, p.658.
Citing Welch v.Louis, 31 Ill.446

"Thus, in a suit to enforce specific performance of a contract in regard to the division of a tract of land between two joint owners, a decree which gave a certain specified portion first to one party and then awarded the same portion to the other party, and made no disposition of the residue of the tract, was declared void for uncertainty. Welch v.Louis, 31 Ill. 446."

"A judgment must be specific and certain, or capable of being made so by proper construction and such as defendant may readily understand and be capable of performing. Where the record entry is wholly uncertain, repugnant or contradictory it is at least erroneous and has been held in many cases to be wholly void.

33 C.J. Sec. 128, p. 1195

"A decree in an action to establish water rights provided that plaintiff was entitled to one-half of the waters of the normal flow of a creek after June 15th of each year, and that defendants were entitled to one-half of the waters of the normal flow of the creek after June 15th of each year, and that the title to each be quieted, and the defendants are entitled to whatever amount of the high and surplus waters of said creek they may desire to use prior to the 15th. day of June of each and every year. Held that, since the decree fixed no time when the normal flow ceased or high waters began, it was not sufficiently definite."

Lost Creek Irr. Co.v.Rex et al (Ut.)
73 Pac. 660.

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Lost Creek Irr. Co.v.Rex et al (Ut.)
73 Pac. 660.

"A judgment must be sufficiently certain to constitute an estoppel between the parties and to be enforced by the court, and a judgment placing a servitude upon defendants' land, which gave plaintiffs the right 'in and to sufficient water for household purposes,' from a spring thereon, but did not state the amount of water plaintiffs would need for household purposes, nor mention the number of stock to be watered, or the number of houses to be supplied, was insufficient."

Powers, et al v. Perry et al. (Cal)
106 Pac. 595

"All judgments must be specific and certain. They must determine the rights recovered or the penalties imposed, and be such as the defendant may readily understand and be capable of performing."

The People ex rel, v. Pirfenbrink,
96 Ill. 69

"(a) Judicial statements of rule- (1) A judgment, to be binding, must be certain and complete in itself, without reference to anything else by which to ascertain its meaning. Dickerson v. Walker, 1 Ala. 48. (2) A judgment, to be valid, must be certain and conclusive as to the subject matter and parties to the action, and must be capable of execution. Alexander v. Leland, 1 Ida. 425. (s) There must be a reasonable certainty in every judgment, that defendant may be able to plead it in bar to any subsequent suit for the same cause of action. Stirling v. Garritee, 18 Mc. 468. (4) A judgment must be so certain that the clerk can issue an execution by inspection of it, without reference to other entries. Boyken v. State, 3 Yerg. (Tenn) 426. Also see supra Sec. 118, text and note 99."

33 C.J. Note 62. p. 1195-6

"A decree so ambiguous in its terms as to be incapable of being rendered certain within the requirements of the law will be set aside for that reason."

22 L.R.A. N.S. (W.V.) 1094

"Decrees awarding a party enough water to irrigate his land or sufficient water for household purposes, or one good irrigation stream of water, have been held defective for uncertainty."

Wiel on Water Rights, Vol.1, Sec.639, 3rd.Ed.

"A judgment defining and determining conflicting claims, rights, and interests of appropriators of water for irrigation purposes must be definite and certain respecting the relief granted.

2. WATERS AND WATER COURSES 152(11)- APPROPRIATION OF WATER- DETERMINATION OF RIGHTS- JUDGMENT.

"A decree adjudging that defendants were the owners by prior appropriation of sufficient water from a stream to fill their ditch of specified dimensions, without specifying the grade or fall of the ditch or the velocity of the water, flowing therein, or even the amount of land irrigated thereby, was void for uncertainty."

Sharp v. Whitmore et al
Same v. Peterson et al, (Utah)
168 Pac. 273.

Hardy v. Beaver Co. Irr. Co. (Utah) 234 Pac .524

"An person interested or affected by a void judgment may attack it collaterally, in a proper case, or in a direct proceeding to have it stricken from the record as a nullity."

5 A.L.R. 284

--"What is collateral attack.
4. A collateral attack is an attempt to impeach a judgment, whether interlocutory or final, in a proceeding not instituted for the purpose of annulling the judgment."

12 A.L.R. 1157 (Mo.)

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~~Wiel on Water Rights, Vol.1, Sec.639, 3rd.Ed.~~

BB-2

No. 2888.

"Proposed Decree"

IN DIST. COURT
UTAH CO., UTAH.
FILED
JAN 26 1921
Clerk
Deputy

MICROFILMED
MAR 1977