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Lake Creek Irrigation Co., a Corporation v. Don Clyde and Kate Clyde, His Wife; Larry F. Clyde and Barbara Clyde, His Wife; Louis A. Kirk and Jane Kirk, His Wife; James F. Clyde and Earlene Clyde, His Wife; Robert Clyde and Lynette Clyde, His Wife : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

LAKE CREEK IRRIGATION CO., a corporation,
Appellant

vs.

DON CLYDE and KATE CLYDE, his wife; LARRY F. CLYDE and BARBARA CLYDE, his wife; LOUIS A. KIRK and JANE KIRK, his wife; JAMES F. CLYDE and EARLENE CLYDE, his wife; ROBERT CLYDE and LYNETTE CLYDE, his wife,
Respondents

Case No. 11148

APPELLANT'S BRIEF

Appeal from the Judgment of the District Court for Wasatch County,

Hon. Joseph E. Nelson, District Judge

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CASES AND AUTHORITIES CITED

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NATURE OF THE CASE

This is an action to quiet the title to certain lands and waters, and to accomplish the incidental voiding of a deed and contract executed by the president acting without the knowledge of the board of directors of a mutual irrigation company.

DISPOSITION IN LOWER COURT

The case was heard by the Wasatch County court without a jury on amended pleadings. The court entered Findings of Fact and Conclusions of Law that admitted no resolution preceded the president of appellant signing the contract and deed, but holding that the board mem-

bers ratified the action of the president. Hence, the contract and the deed were upheld as validly executed by the corporation.

RELIEF SOUGHT ON APPEAL

The appellant seeks reversal of the Findings, Conclusions and the Judgment and, in lieu thereof, a judgment that the deed and contract disposing of the irrigation company's fishing rights, requiring the irrigation company to cause water to flow down the Mills Ditch for the benefit of respondent and defining the terms and conditions of a right-of-way acquisition are void or at least voidable and that the irrigation company has caused them to be voided.

STATEMENT OF THE FACTS

Lake Creek Irrigation Company, plaintiff-appellant, a non-profit, mutual irrigation corporation organized under Utah laws in 1888 (Exhibit 1) and reorganized in 1943 (Exh. 2) with its principal place of business in Wasatch County, owns by decree the flow of Lake Creek east of Heber, Utah and stores its water in Witt Lake and Deer Valley Reservoir for the sole benefit of the shareholders. (Exh. 5), (Tr. 11) "The board of directors shall have the power to make by-laws for the management of said company, the regulation of its officers, the control of its property for the benefit of its stockholders. . . ." (Exh. 2) There are five directors. There are no known by-laws.

As early as 1946 reasons for postponing the opening day of fishing from early June to July 1 were discussed and accomplished as requested by respondents. (Tr. 178)

The minutes of an annual meeting in 1952 show early attempts at cooperation with the respondents. (Exh. 6, p. 56) Board members remember talk of cooperating with Mr. Clyde in the opening date for fishing. (Tr. 70, 22, 101)

In July 1956 appellant had discussions and a verbal agreement with respondent Bob Clyde concerning a right-of-way to be given appellant if the latter would fence "one side of the ditch, and a water trough put in and a bridge across the cement ditch." (Exh. 6, p. 74) Pursuant to said understanding, appellant constructed the cement ditch down the canyon during 1956, 1957. (Tr. 111. p. 77, 78, 79, 80, 82)

Problems came up concerning erosion, and the fencing of the cement ditch, between the appellant and respondents. Respondents claimed the loss of lambs when they were trailing the herd "up the county road and when we came to that bridge where the sheep goes across, a few at a time, they backed up and some of them got out on the Bond land. There was no fence there, there was an old broken down fence that would not hold sheep and it would not have been possible to hold them there." (Tr. 198) "We were moving this herd of sheep up there and they had finished this cement ditch. There was no warning, no sign. We had no information at all regarding it. . . . We found 43 lambs where the cement ditch ran out dead, drowned. . . ." (Tr 187)

Near March 31, 1959 attorney Glen Hatch requested the president and secretary to come to his office regarding an agreement to be signed. Mr. Hatch had repre-

sented appellant irrigation company earlier (Tr. 19, 32) but now represented the respondent Clydes.

On March 31, 1959 the president and secretary, the latter not being a member of the board, (Tr. 82) signed Exhibit 7, the agreement in controversy here. The president testified he did not read the document thoroughly, (Tr. 25) never got a copy thereof, (Tr. 46, 88) and that only parts of the agreement, Exhibit 7, ever came to the attention of the board of directors (Tr. 45, 46) nor was a resolution ever given authorizing him to sign. The attorney for Respondents wrote a letter dated April 6, 1959 to the president of the water company (Exh. 3) requesting him to obtain a resolution of the board of directors authorizing the execution of the documents. This was never done. At no time did the board know its president had signed the deed, Exhibit 8, or the contract, Exhibit 7 (Tr. 88, 48, 49) and six years after signing it, he denied to a stockholder he had executed such a document. (Exh. 6, p. 107)

The president candidly testified he did this contracting and signing "with no authority whatever." (Tr. 48) He said he felt it desirable to disclose to the board of "directors most of the provisions of the contract except fishing rights. . . ." (Tr. 48) "When they found it out they were disturbed." He testified he did not know just how far the agreement went, himself. In this connection, the commitment to pass waters down the Mills Ditch are most interesting! He positively testified that as to the directors knowing of the action: "None of them, to my knowledge, knew about it." (Tr. 49) He

was asked "Did you ever discuss it with any members of your board, the fishing rights or the contract for the fishing rights? and answered, "No, the only thing discussed on the fish with the directors was the opening day." (Tr. 59)

The secretary of appellant at no time read the agreement he signed, Exhibit 7 (Tr. 86) nor did he ever get a copy of it or the deed. (Tr. 85, 87) He thought it concerned fixing the spillway, building a fence, but he had no knowledge the agreement concerned "fishing rights." (Tr. 87) While he might have discussed some elements of the agreement with members of the board, he positively testified an cross examination he did not talk about "the matter of fishing rights" because "the fishing rights were never brought up at that time." (Tr. 94, 45). However, after March 31, 1959, some work was done on fencing.

Many board members and stockholders fished in Witt Lake before and after said agreement and deed were executed. (Tr. 125, 88, 100, 112) Oblivious to the deed, Russell Wall planted 2,000 legal size fish and the appellant paid for them. (Tr. 127) The Witt area was posted with a KEEP OUT, PRIVATE FISH PONDS sign during 1964. (Tr. 126, Exh. 9)

At no time from the date Exhibit 7 was executed until after the suit herein was instituted was an easement tendered appellant as called for in said alleged agreement. (Tr. 200, 203, 204)

At no time did appellant ever turn water into the Mills Ditch for respondent. (Tr. 187) However, respond-

ents physically took water into the Mills Ditch occasionally. (Tr. 201) Respondents were never decreed any water into the Mills Ditch, (Exh. 5) and no right other than as in Exhibit 7 was ever claimed.

In January of 1965, stockholder Wall discovered evidence of the contract and deed, whereupon the subject was discussed at the annual meeting. "Authorization was given to the board to preserve the fishing rights of the company." (Exh. 6, p. 106) That same day, the board of directors heard a report from Wall that pursuant to an assignment from the board in July of 1964 he had undertaken to procure a private pond fishing permit from the Utah Fish and Game department only to learn that one of the defendant-respondents had reported to that department the appellant company had given a deed to the respondents for all fishing. Wall further reported that when apprised of said deed, he had approached appellant's president Richie who said "there was no such deed to his knowledge." Wall went to the court house and "found a Quit Claim Deed to Don Clyde for the title to this property." Thereupon a photo copy of the deed was presented to the board "and the Board indicated that the legality of the deed should be checked since there had been no resolution given for this transaction in the minutes of the company." (Exh. 6, p. 107-108)

A week later the board again met and discussed the lack of authorization for the deed and authorized the employment of counsel to "bring legal action against Don Clyde and to restore these rights to the company." (Exh. 6, p. 109) At a board meeting on July 10, 1965 the president stated that the agreement (Exh. 7) had

been signed "but that it didn't convey his intent in various paragraphs." Further, the minutes record: ". . . the board agreed that it was not in the power of the President to permit the Clydes to draw water from the Deer Valley Reservoir and divert it to the Mills Reservoir. . . . The authority to do this was questioned by the Board inasmuch as all water in this area is covered by decree and is stored in the company reservoirs or private reservoirs who have storage rights or used for irrigation purposes under decree. Paragraph 6 pertaining to fishing rights. President Ritchie again stated that he was not aware that he was conveying the fishing rights to Don Clyde. He explained there had been a problem of regulating the opening of the fishing season with regard to the livestock operations of Don Clyde in the area. He thought all he was conveying was the right to regulate the time of opening of fishing in the area. Directors George Holmes and Kenneth Anderson who had been directors during the period of negotiations in 1959 said they had never had any knowledge that fishing rights had been deeded to Clyde. They also stated that they had not read this agreement nor seen it before." Mr. Wall was instructd again to enter litigation concerning the matter (Exh. 6, p. 110)

A special meeting of the shareholders of appellant was held October 17, 1966 at which time 413 out of 571 shares of primary stock were present and voting. A motion was made that "The board of directors be authorized to take any action necessary, including court action to set aside that certain Quit-Claim Deed dated March 31,

1959 and that certain agreement dated March 31, 1959 giving to the Clyde's the fishing rights in Witts Lake and Deer Valley and other items. . . . The result of the voting was 344 shares in favor of the motion. 69 shares opposed the motion." (Exh. 6, p. 121)

Being thus instructed by the directors as well as the stockholders, this action was duly filed.

With the exception of the contract (Exh 7) and the deed (Exh. 8) appellant corporation had been at all times, managed and still is, by the Board of Directors acting as a board. (Tr. 97, 78, 88, 108, 47, 48, 80)

POINT I

NO MUTUAL IRRIGATION COMPANY CAN TRANSFER PROPERTY WITHOUT THE CONSENT OF TWO-THIRDS OF THE STOCKHOLDERS.

Although the lower court refused to find that the plaintiff is a mutual irrigation company as requested by plaintiff, the record is conclusive on this matter. (Exh. 1, 2, J R 30)

Assuming, which is not the case, that the board of directors of this mutual irrigation company, at a formal director's meeting had passed a resolution authorizing the president and secretary to execute a contract and deed of the corporation conveying real and personal property owned by the mutual irrigation company, such action would be a nullity under Utah law. This court has held that articles of incorporation include by implication within them all applicable statutes of the state existent a the time of the incorporation.

In the case of *Fowler et al v. Provo Bench Canal*

Irrigation Co., 99 Utah 267, 101 P2, 375 the court said:

> "It is well settled that the Articles of Incorporation of a corporation form the basis of a contract among others, between the corporation and its stockholders. It is also well settled that 'the provisions contained in the Constitution and statutes are as much a part of the articles of incorporation as though they were expressly copied therein.' Weede v. Emma Copper Co. 58 Utah 524, 200 P. 517, 519; Salt Lake Automobile Co. v. Keith O'Brien Co., 45 Utah 218, 143 P. 1015; Garey v. St. Joe Mining Co., 32 Utah 497, 91 P. 369, 12 L.R. A., N. S., 554"

At the time of the incorporation of Lake Creek Irrigation Company there was in existence Section 16-6-9 UCA which says:

> "The board of directors, trustees, vestrymen, wardens or other officers provided for in the articles of incorporation shall have the care, custody and control of the corporate property and shall exercise the corporate powers, subject to the provisions of the articles of incorporation and bylaws, and may, unless otherwise provided in the articles of incorporation or bylaws, *upon consent of two-thirds of the members* of the corporation present at a meeting duly called and held, mortgage, encumber, lease ,sell or convey any real or personal property of the corporation, unless such property has been received as a gift or devise for some special purpose ,and, if so received, it shall be used and applied only for such purpose. Unless otherwise provided in the articles of incorporation or bylaws, a meeting for such purpose shall be called, upon not less than fourteen days' notice to be given by publication in some newspaper having general circulation in the place where such corporation has its principal

place of business, or if there is no such newspaper, then by posting on the door of the usual meeting place or places; such notice shall state the time, place and object of the proposed meeting." (Emphasis added)

Under the terms of this highly formal statute it requires a two-thirds vote of the stockholders to authorize a transfer of the property. Interpretation of similar statutes has been before other courts. In the case of *Lacy v. Gunn,* (Calif.) 78 Pac. 30, the court held that it was unlawful for the directors of a mining corporation to dispose of its mining ground unless such acts were ratified by the holders of two-thirds of the capital stock.

In the case of *Fowler v. Great Southern Telephone and Telegraph Company,* (Louisiana) 29 So. 271, headnote 2 of the case states:

> "The measure of power invested in the board of directors of defendant's company is determined by its charter and bylaws and the board's action in excess thereof is not binding upon the corporation."

In the case of *Forbes vs. San Rafael Turnpike Co.* 50 Calif, 340, ...P ....., the statute provided that no conveyance of property could be made without a two-thirds vote of stockholders. In that case a note and mortgage were executed by a majority vote and the court held that the note was valid,

> "but the mortgage stands upon a different footing. It could not originally have been executed, so as to bind the corporation except by a vote of two-thirds in interest of the stockholders and it could not be ratified by less number."

FLETCHER CYCLOPEDIA CORPORATIONS.

permanent edition, Vol. 6A, 1950 rev. vol. page 660 states:

"In some states it is held that where the charter of a corporation or a statute prohibits a conveyance or pledge of its property without the consent of the share holders or of a certain proportion of them, such consent is essential to the validity of a conveyance or pledge. Such provisions do not extend to mere options to sell. On the other hand, it has been held that under a statute permitting a corporation to sell and convey all of its property, with the consent of a specified percentage of shareholders, that shareholders may authorize the granting of an option for the sale of all the property of a corporation. . .

"In other states it is held that the prohibition is intended merely for the benefit of the shareholders, that it does not render a conveyance without their consent void, but merely makes it voidable, and that another cannot attack a conveyance or pledge for want of their consent.

"In some states, by statute, mining corporations cannot dispose of any of their mining ground without a two-thirds vote of the stockholders. A statute providing that mining corporations shall have no power to sell the mining grounds, in whole or in part, without the transfer being approved by two-thirds of the shareholders does not authorize two-thirds of the shareholders of a prosperous corporation to sell all of its property against the protest of any other shareholders"

In the case of *Boston Company vs. Clawson,* 66 Utah 103, 240 P 165, the question arose as to the sale of all of the property of the corporation, and the court in comparing the California statute with the Utah statute said,

"There is a marked distinction between the California statute and the Utah statute (Section 869) relied on by defendant. The California stat-

ute makes the disposition of the property unlawful unless ratified by the stockholders. The Utah statute says it shall not be binding on the corporation. . . ."

This interpretation makes the attempted conveyance in California absolutely void and the attempted conveyance in Utah voidable.

In the instant case the stockholders have rejected the attempted conveyance (Exh. 6, p. 121) and brought this action to quiet their title to all of the corporation assets.

In the case of *Sherman v. Harbin*, Iowa 100 N.W. 629, the court stated,

> "Upon the board of directors was conferred the power to make bylaws for the regulation of the association and the management of its affairs and business, if consistent with the articles of incorporation. While the business of the association was under the management of the board of directors, and the president subject to its control, both were governed by the articles of incorporation and statutes of the state defining and limiting their respective duties and powers. Any act of the president contrary to this, even though directed or acquiesced in by the board of directors constituted a breach of duty, for the board itself was without authority to override or ignore the laws of the state or the articles of incorporation by the members of the association."

In the case of *Laybourne vs. Wrape*, (Colo.) 211 P. 367, a corporation had patents relating to oil processing. The bylaws of the corporation stated that there could be no sale, lease, or disposition of property without the consent in writing of 75% of the stockholders. The board

of directors made a contract conveying certain rights connected with the processing and certain stockholders brought suit against the directors and the third parties to annul the contract. The court held for the stockholders that the contract was void and stated:

> "As to the second point, we think the court was right in holding that the contract was in violation of the bylaw. It is definitely within the terms because it transfers a definite interest in the process, coupled with authority to act. This is not a mere agency, but an irrevocable power if valid. To be valid therefore, the contract required a meeting of the stockholders, and is invalid without it. . . ."

In the case of *Anaconda Copper Min. Co. vs. Heinze* (Mont.) 69 Pac. 909, the question arose as to the authority of a board of directors of a mining company to deal with the property of a corporation and the court said.

> "Under the provisions of law in force at the time these negotiations took place, the board of directors of a mining corporation organized under the laws of this state had no authority to sell, lease, mortgage, or otherwise dispose of its real estate, nor could the board confer such authority upon an agent, whether he was an officer or other person. Sections 492 and 493 of the fifth division of the compiled statutes of 1887 brought forward into Civ. Code No. 1012, 1013 are applicable, and require any such disposition of property to be authorized by consent of stockholders owning at least two-thirds of the shares of the capital stock at a meeting called and conducted as therein directed. Unless these provisions of law are observed, a sale, lease, mortgage or other disposition of the property could not be made. . . .
>
> ". . . But until the necessary authority is ob-

tained by the board of directors neither they nor the president can execute a conveyance, nor can a specific performance by the corporation itself be enforced."

When the contract and deed called for disposition of the property rights of the appellant, the failure of the parties to achieve a two-thirds vote of approval of the stockholders of appellant made the attempted documents a nullity, and the stockholders have directed the bringing of this suit to protect their interests. (Exh. 6, p. 121)

POINT II

EVEN IN BUSINESS CORPORATIONS, THE BOARD OF DIRECTORS MUST FORMALLY APPROVE A CONVEYANCE OF PROPERTY.

The next two points are discussed as if plaintiff-appellant were a business corporation which it is not.

In the case of Lockwitz v. Pine Tree Mining Company, 37 Utah 349, 108 Pac. 1128, the corporation leased its mine with an option to buy, specifying the date by which the option must be exercised; thereafter, the president of the corporation extended the time for exercising the option without authority from the board. Held that the extension of time was a nullity and the court stated:

> "The power of corporate officers or directors to act as the agent of the corporation may be affected in three ways: 1, by the statutes of the state in which the corporation is created; 2, by the articles of incorporation; and 3, by the bylaws of the corporation. If not so regulated, the exercise of the corporate powers are controlled by the common law . . .
>
> "The board of directors to whom the authority to bind the corporation is committed is not the

individual directors scattered here and there, whose assent to a given act may be collected by a diligent canvasser, but it is the board sitting and consulting together in a body. Individual directors, or any number of them less than a quorum, have no authority as directors to bind the corporation. And this is equally the rule, although the director who assumes to do so may own a majority of shares . . .

"*The powers of the corporation under our statute must be exercised by the board of directors when assembled as a body.* The president could not make a binding contract nor modify an existing one unless authorized to do so by such a quorum. . . . The president's individual act was of no binding force or effect upon respondent.

"*When the adoption of any partcular form or mode is necessary, to confer the authority in the first instance, there can be no valid ratification except in the same manner.* Thus, if a corporation can only authorize a particular act or contract by a power under seal, or by formal vote, ratification of such an act or contract must be under seal or by a formal vote, as the case may be." (Emphasis added)

In the case of Copper King vs. Hanson, 52 Utah 605, 176 P. 623, the court stated:

"The president of a corporation ordinarily has only the power of a director or such additional powers as may be directly conferred upon him by the board of directors. (citing cases) While it is true that the president or general manager of a corporation sometimes exercises quite extensive powers in the management of its business, he is nevertheless acting all the time under the express or implied authority of the directors, who are the real managers of the corporation."

In the case of Summit Range and *Livestock Co. vs. Rees*, 1 U. 2nd 195, 265 P. 2d 381, this court held that the corporate powers as outlined in the charter are subject to strict interpretation.

The Utah court has held that whenever a corporation assigns its powers it must do so through its board of directors. See: *Gay vs. Young Men's Consolidated Co-operative Mercantile Institution*, 37 U. 280, 107 P. 237, and *Anderson vs. Grantsville North Willow Irrigation Co.*, 51 U. 137, 169 P. 168, and *Chapman vs. Troy Laundry Co.*, 87 U. 15, 47 P. 2d 1054.

POINT III

EVEN IF PLAINTIFF WERE A BUSINESS CORPORATION, RATIFICATION MUST BE WITH FULL KNOWLEDGE OF THE FACTS.

13 Am. Jur. 930 states:

> "It is a general principle of agency that knowledge on the part of the principal of the material facts of a transaction done on his behalf by an agent without authority is an essential element to a ratification of such transaction, and this is true as to the ratification by a corporation of the unauthorized acts of its officers and agents. Applying this rule, acquiescence, or the receipt or retention of the proceeds of an unauthorized transaction do not amount to ratification if not accompanied by knowledge of the material facts concerning the transaction. As a similar application, ratification by a corporation of a contract made by the president without authority must be made with full knowledge of the terms of the contract."

There is not one scrap of evidence that any of the directors, other than the president, knew that the president was conveying the fishing rights, or water rights.

Director Holmes testified that at no time did he know that the fishing rights or water rights were even attempted to be conveyed. (Tr. 98, 99 and 207)

Director Crook never heard any discussion of conveyance of fishing rights to the Clydes (Tr. 70) and testified that after dispute came up about the lambs no further work was done on the fence. (Tr. 74 and 75) There is no evidence he ever heard mention of a conveyance of water rights.

There is no evidence that vice-president Anderson ever heard of a conveyance of fishing or water rights until he saw the contract in 1965.

Director Bond never went to a claimed meeting at Glen Hatch's office and never heard of a sale of fishing rights. (Tr. 211)

The agreement (Exh. 7) to keep water in the Mills Ditch amounts to a conveyance of the water rights.

In *Grand Valley Irrigation Co. v. Fruita Improvement Co.* (Colo.) 86 Pac. 324 the court stated,

> "It is claimed that the stockholders by their acquiescence have waived or ratified this contract. This could not be done but in the manner provided in the by-law except as to any individual stockholder who *acquiesced with full knowledge*. There is no such showing nor anything approaching it as to majority of the plaintiffs below." (Emphasis added)

Again there is no evidence that any stockholder, other than the president, had any knowledge of the agreement reached between the president and Clydes. While some directors had information about compromising the loss of lambs, erosion and fencing, there is not the slight-

est evidence that any director except the president knew or had reason to know the subject of water moving into the Mills Ditch was involved, nor a deeding of all fishing rights.

In the case *Elggren v. Wooley*, 64 U. 183, 228 P 906 the court in discussing ratification stated:

> "There was no ratification in this case, however, and *none was legally possible* for the reason that the stockholders other than appellants had no knowledge of the agreement between them and the defendant by the terms of which the appellants were to receive the full amount they had paid to the company for their stocks and bonds. If that fact had been known to the stockholders the result might easily have been different. It is elementary however that *no ratification takes place unless all the facts are known to those who have the power to ratify.*" (Emphasis added)

In the case of *Aggeller and Musser Seed Co. v. Blood*, 73 Utah 120, 272 Pac. 933, the Utah court held that in the absence of initial authority given in advance to the president to execute a lease, the lease would be invalid unless the business corporation ratified the president's acts or the president had apparent authority to execute the same and stated,

> "Ratification may be informal. It need not be by formal vote. The assent of a corporation to acts done on its account may be inferred in the same manner that the assent of a natural person may be.
>
> "Acquiescence by silence may amount to ratification as well as affirmative action. Acquiescence may rest on the principle of ratification or upon the principle of estoppel.

"It will be remembered, however, that *acquiescence without knowledge of material facts is not ratification.*" (Emphasis added)

With the exception of President Ritchie, no director knew of any new agreement with the Clydes. They all thought insofar as the fencing was concerned they were performing the agreement set out in the minutes (Exh. 6, p. 74) of July, 1956, and ratification is impossible because of lack of knowledge of the directors.

POINT IV

PLAINTIFF FOR GOOD CAUSE CANCELLED ANY PURPORTED CONTRACT.

Assuming that the contract between the irrigation company and the Clydes was validly executed, (which we deny) the corporation on June 24, 1965 rescinded it by directing lawyers to bring action setting it and the deed aside. (Exh. 6, p. 108)

The contract and deed were executed on or about March 31, 1959. More than six years had elapsed and the Clydes had not performed the contract on their part. They were supposed to execute a deed covering the right of way which they had failed to do. Mr. Clyde's attorney was asked for the deed (Tr. 144 and 209) in 1965. No deed was forthcoming (Tr. 200) and the statute of limitations had run on the contract. This was reasonable grounds for cancelling the contract and asking for return of consideration.

9 Am Jur 373 states,

> "It may be laid down as a general rule that the abandonment or mere failure to perform a contract honestly made, or some or more of its provisions, does not justify the equitable relief of recission or cancellation, except where the facts would defeat an action at law."

The deed has never been delivered to plaintiff. (Tr. 200, 204) After this action was commenced a deed was filed with the clerk of the court (Exh. 14) for delivery to plaintiff, if and when a final conclusion in favor of defendants was entered. No tender of any type to cover plaintiff's costs was made.

POINT V

THE LOWER COURT ERRED IN NOT GRANTING PLAINTIFF'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The lower court erred in not finding that the plaintiff is a non-profit corporation and a mutual irrigation company. (Judg. Role 30) Exhibits 1 and 2 are conclusive on this and there is no contradicting testimony.

Finding of Fact and Conclusion of Law No. 2 are in error. There is no evidence that defendants own any rights in the land or water. Defendants own evidence shows the chain of title to the surrounding land etc. to be in J. W. Clyde, a stranger to the law suit, (Exh. 13) (Tr. 192) and even that deed does not convey grazing rights or watering rights on plaintiff's land and reservoir.

Defendants did not even claim that the president and the secretary of plaintiff had been granted authority to execute Exhibits 7 and 8, but the lower court in its conclusions of law stated,

> "That the officers of the corporation who executed the agreement and quit claim deed had apparent ostensible authority to execute the same for the corporation and the plaintiff corporation is estopped to deny such authority."

This conclusion is contrary to all of the evidence.

All of the evidence was that the management of the corporation was always conducted by the board of directors. (Tr. 48, 78, 80, 88, 97 and 108) Even the defendants recognized that the officers had no apparent or ostensible authority as is shown by Exhibit 12 written by their attorney. Defendants attempted to show apparent authority in the president, (Tr. 47) but got a contrary answer. (Tr. 48) They could not have been misled and there cannot be any estoppel.

Finding of Fact No. 11 is also in error. It states that "There is no evidence that the business of said corporation was ever transacted by other than the president and secretary thereof." The manner in which the appellant corporation conducted its business is shown on the following pages of the minute book, Exhibit 6, pages 72, 73, 74, 77, 78 ,79, 83, 84, 85, 86, 89, 90, 92, etc., and conclusively show that the board of directors ran and controlled the corporation.

POINT VI

THE COURT ERRED IN GRANTING DEFENDANTS AN ATTORNEY FEE.

The court erred in granting defendants an attorney fee in this matter. This fee was granted because plaintiff amended its complaint at the end of its case to conform to the evidence. Rule 15(b) of the rules of civil procedure permit such amendment. The original complaint and the amended complaint were both quiet title actions and the amendment was permissible. We can find nothing that permits the court to assess attorney's fees in such a case. Even the claimed contract does not provide for attorney's fees.

This entire case from the filing of the complaint to this appeal has been whether the defendants have acquired from the plaintiff any rights to water or any rights to fish. The form of procedure has been slightly changed, but the substance is identical.

CONCLUSION

It might be argued that fishing rights are a minor part of the uses of Witt Lake, the primary purpose thereof being for irrigation. For fishing rights to be worth anything, Witt Lake cannot be drained each year, but provision made for a water carry-over in order to sustain fish culture. If rights to fish-culture exist in respondents, then it has taken water from the irrigators to sustain the collateral functions of fishing, and the water users have been damaged.

For respondents to succeed in taking water from Witt Lake into and through the Mills Ditch is the appropriation of property certainly not within the province of the president or secretary alone, nor by the board of directors deliberately acting. Under section 16-6-9 USC it takes a two-thirds vote of the water users, stockholders.

Even in business corporations the president and secretary may not convey without the formal approval of the board of directors and they cannot ratify without full knowledge.

Even if the contract had been valid the corporation legitimately cancelled the same for non-performance by respondents. The statute of limitations had run and appellant could not have been successful in an action

for specific performance.

There was no change in the ultimate questions in the case and defendants should not have been awarded attorney fees.

We request this court to reverse the trial court, and remand the proceedings with directions that the trial court enter its judgment that Exhibits 7 and 8 are null and void.

Respectfully submitted
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