

1968

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 : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. J. Robert Bullock; Attorney for Respondents Lamoreaux & Gibson; Attorneys for Appellant

Recommended Citation

Reply Brief, *Lake Creek Irrigation v. Clyde*, No. 11148 (Utah Supreme Court, 1968).
https://digitalcommons.law.byu.edu/uofu_sc2/78

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

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 REPLY BRIEF

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

Hon. Joseph E. Nelson, District Judge

LAMOREAUX & GIBSON

Attorneys for Appellant

174 East 8th South

Salt Lake City, Utah

FILED

OCT 14 1968

J. ROBERT BULLOCK

Attorney for Respondents

Fidelity Building

43 East 200 North

Provo, Utah

Clk. Supreme Court, Utah

October, 1968

TABLE OF CONTENTS

	Page
STATEMENT OF POINTS:	
1. APPELLANT'S ACTION TO AVOID THE EFFECTS OF EXHIBITS 7 AND 8 WAS NOT BARRED BY THE STATUTE OF LIMITATION.	1
2. APPELLANT RAISED QUESTION OF TWO-THIRDS OF STOCKHOLDERS PRIOR TO APPEAL	2
3. EVIDENCE WAS RECEIVED AS TO WHO WERE THE STOCKHOLDERS AND THAT TWO EXPRESS MEETINGS WERE HELD CONCERNING THE WRONGFUL ACTS OF THE PRESIDENT.	9
4. THE TRIAL COURT ERRED IN DECLARING THAT EXHIBITS 7 AND 8 WERE AND ARE VALIDLY EXECUTED.	10
5. THERE IS NO EVIDENCE RESPONDENTS OWN ANY RIGHTS AROUND WITT LAKE.	23
CONCLUSION	23

CASES CITED

Armstrong v. Ashley, 204 US 272; 51 L.Ed 482; 27 S. Ct. 270	2
Baird v. Upper Canal Irr. Co., 257 P. 1060; 70 U 57	6
Big Cottonwood Tanner Ditch v. Kay, 157 P2 795	6
Burtenshaw v. Bountiful Irr., 90 U 196; 21 P2d 312	6
Fowler v. Provo Bench Canal, 101 P2 375; 99 U. 267	6
Genola Town v. Santaquin City, 80 P2 930; 96 U 88	6
Green Ditch Water v. Monson, 116 P2 847; 100 U 466	6
Hanover Natl. Bank v. American Dry Dock, 43 NE 72	22
Re: Johnson Estate, 64 U 114, 228 P 748	6
Krause v. Marine Trust, 270 P 246	2
McConnell v. Dixon, 233 P2 877	2, 11
Ryan v. Ploth, 140 P2 968	2
Smithfield West Bench Irr. Co. v. Union Central Life, 142 P2 866; 105 U 468	5

STATUTES:

Laws of Utah 1884, p. 78	3
--------------------------------	---

TEXTS:

19 Am. Jur. 2d, p. 591	22
19 Am. Jur. 2d, 660	10
45 Am. Jur. p. 470	1
137 A.L.R. 290	2

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 REPLY BRIEF

Pursuant to the Rules of Civil Procedure, appellant herewith replies to new matters raised in respondents' brief.

POINT I.

APPELLANT'S ACTION TO AVOID THE EFFECTS OF EXHIBITS 7 AND 8 WAS NOT BARRED BY THE STATUTE OF LIMITATION:

Point IV of respondents' brief states that because appellant's action was not commenced for more than four years, the same is barred. In reply, we cite 45 Am. Jur. 470 under section 89:

“Neither the language nor the policy of the registry acts was intended to affect the holders of antecedent rights, but only such persons as are compelled to search the records in order to protect their own interests. Accordingly, *the universal rule is that the record of an instrument is constructive notice to subsequent purchasers and incumbrancers only, and does not affect prior parties. The owner of real estate, it is said, is under no obligation to watch the records to see whether someone who does not own his property has assumed to place a mortgage upon it or convey it by deed to some third person.*” (emphasis added)

The above principles were clearly applied and the doctrines were enunciated in the United States Supreme Court case of *ARMSTRONG v. ASHLEY*, 204 US 272, 51 L.Ed. 482, 27 S.Ct. 270; and in *MC CONNELL v. DIXON*, Wyo., 233 P2 877. Also see annotation in 137 ALR 290. Also see *RYAN v. PLOTH*, 140 P2 968 (Wash.); *KRAUSE v. MARINE TRUST & SAVINGS BANK*, Calif., 1928, 270 P. 246.

POINT II.

APPELLANT RAISED QUESTION OF TWO-THIRDS OF STOCKHOLDERS PRIOR TO APPEAL.

A. A MUTUAL IRRIGATION COMPANY IS A NON-PROFIT CORPORATION. At the bottom of page 14 of respondents' brief they undertake the argument that appellant is a corporation “for pecuniary profit.” There is not a scintilla of evidence thereof. All of the evidence points to the fact that appellant is a non-profit, mutual irrigation corporation and subject to the laws incident thereto.

The principal evidences thereof are the articles of incorporation, first as filed in 1888 under the 1884 laws of Utah (exhibit 1), and the articles as filed in 1942 (Exhibit 2) together with the Minute book (Exhibit 6). There is no other evidence in the record than these three sources, and they are more than adequate to settle the question in terms of a long line of decisions by the Supreme Court of Utah.

The respondents' brief at page 15 argues that "The Articles are in the format of articles of a private corporation for pecuniary profit. . ." This is a clear deception. By referring to the Laws of 1884 cited by appellant, the only statute under which corporations could then be formed was Chapter XLV "Of Private Corporations," under Section 1 thereof: "Hereafter, whenever any number of persons . . . desirous of associating . . . together for establishing and conducting any mining, manufacturing, commercial . . . or the construction of . . . *irrigating ditches* . . . benevolent, charitable or scientific association . . . may, by complying with the provisions of this act, become a body corporate." (Laws of Utah 1884, page 78)

In Section 22 of said act, special provision is made for corporations named in Section 1 of the act which are not concerned with pecuniary profit, but such "*may* incorporate themselves as provided in this act." It does not say "shall." There are no mandatory provisions that distinguish profit from non-profit corporations except in Section 25 where it is made mandatory that a mortgage or sale of the non-profit corporation property be accom-

plished "*by a two-thirds' majority vote of its members. . .*" (emphasis added)

An examination of the original Articles (Exhibit 1), shows that the purpose for which appellant was formed was "To manage, control, regulate and equitably divide and distribute among the stockholders of the corporation according to their respective accrued rights the waters of Lake Creek . . . for irrigating and domestic purposes." (Art. III)

In Article IV, after naming the subscribers: "The capital stock of said corporation consists of the *rights to the use of water* of Lake Creek . . . for domestic and irrigating purposes, and the amount that each party owns in said creek estimated in acres is indicated in the foregoing by the number of shares subscribed, each share representing one acre of water-right. . ." (Emphasis added)

In the Articles as adopted in 1943 (Exhibit 2), reinstating the corporation for lapse of charter, the purposes are not altered except to more completely spell out the manner in which the full use and management of the waters of Lake Creek would be accomplished, one of these being the aspect of storage of water. The corporation was authorized to do all incidental things to accomplish the "irrigation or enjoyment of the lands or property of its stockholders. . ." (Article IV, 4). There is no business contemplated except those incident to the use of the water. Primary and secondary rights of the stockholder-users are carefully spelled out.

Again in Article VIII "the capital stock of this corporation consists of the right to the use of the waters

of Lake Creek . . ." which does not sound like a mercantile corporation engaged in buying, selling ordinary commodities for profit!

In Article IX "The officers and directors of this corporation shall perform the duties of their office *similar to those performed by officers and directors of irrigation corporations similar to this corporation.*" (Emphasis added)

In Article XV "The Board of directors shall have 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,*" provided "that such by-laws and rules are approved by a majority of its stockholders. . ." These provisions clearly make the directors trustees for the benefit of the water-users, and is clearly consonant with the doctrines of this court as laid down in the several opinions in SMITHFIELD WEST BENCH IRR. CO. v. UNION CENTRAL LIFE . . . 1943, 142 P2 866, 105 U. 468, where in the Larson opinion it is stated:

"The waters of a mutual irrigation company belong to the users, the company being merely a distributing and apportioning trustee. . . . The water controlled by it may be used by any shareholders, subject only to the regulation thereof by the company for the benefit of the shareholders so none shall be deprived of his rights by the others. *The company cannot sell any of the water without the consent of the stockholders.* . . . Likewise the company cannot permit the water to be lost by non-use thereof as long as any shareholder desires to and is in a position to use the water. Water undistributed may be used by any stock-

holder in a position to use it. The shareholders are in effect *owners in common* of the waters with certain limitations as between one another governing the use thereof. Each may therefor use any water not being used by any other shareholder, as is the case with other owners in common. . .”

BAIRD v. UPPER CANAL IRR. CO., 257 P. 1060, 70 U. 57

FOWLER v. PROVO BENCH CANAL, 101 P2 375, 99 U. 267, 1940

BIG COTTONWOOD TANNER DITCH v. KAY, 157 P2 795, U. 1945

In GENOLA TOWN v. SANTAQUIN CITY, 80 P2 930, 96 U. 88, this court said:

“Stock in a *mutual company* entails the right to demand such stockholder’s aliquot share of the water in proportion as his stock holding bears to all the stock. Water rights are *pooled* in a mutual company for convenience of operation and more efficient distribution and perhaps for more convenient transfer. *But the stock certificate is not like the stock certificate in a company operated for profit. It is really a certificate showing an undivided part ownership in a certain water supply.* It embraces the right to all for such undivided part according to the method of distribution.” (Emphasis added)

GREEN DITCH WATER CO. v. MONSON, 116 P2 387, 100 U. 466, 1941

BURTENSHAW v. BOUNTIFUL IRR., 90 U. 196, 61 P.2d 312, 1936

Re: JOHNSON ESTATE, 64 U. 114, 228 P. 748, 1924

In GREEN DITCH v. MONSON, *supra*, this court said in a case determining that a mutual irrigation company was not subject to franchise tax:

“If its revenue was confined to money received from its stockholders in proportion to their interest, it could have no profits and it would conduct no business from which the state sought to exact a license tax. . . . From their very nature, mutual irrigation companies differ from other private corporations, and yet they cannot well organize as an eleemosynary entity. It is evident that the legislature in 1909 sought to exempt from the license tax such canal and irrigation companies as confined their activities to providing water for their own memberships, regardless of the general language used in the articles.”

In coming to the above conclusion, the court was impressed with the allegation that the sole source of revenue to the mutual corporation “has been born by *assessments* duly levied against its members . . . that said corporation has been throughout its existence, a non-profit corporation, and that said corporation was not organized for pecuniary profit. . . .”

In terms of the above, let us examine Exhibit 6, the minute book of appellant, dating back to 1934 to the present, as the best evidence of record of just how the company carried on its business.

All income for the company was acquired by assessments, either of money or its equivalent in labor.

The following pages in Exhibit 6, the minute book, are evidence of this: 1, 4, 7, 8, 9, 11, 14, 15, 20, 21, 23, 27, 29, 31, 33, 37, 40, 44, 47, 49, 52, 55, 58, 59, 61, 71, 78, 81, 86, 90, 92, 95, 99, 101, 113, 120 and 123.

In the last entry in Exhibit 6, the minutes record: “President Clyde Ritchie reported of the directors’ meeting held Sat., January 21, 1967, stating that a \$1,000.00

note would come due in July. In this meeting the directors decided that some of them might pay part of their full assessment, to pay the note off without borrowing more money." (P. 123)

The reading of the entire minutes defies any operations of the appellant except as a mutual, non-profit corporation.

The 1884 law under which appellant was organized, and which is quoted on page 15 of respondents' brief, required "a two-thirds majority vote of its members . . ." to sell or mortgage the property. Section 16-6-9 now requires the same two-thirds vote.

Even the preamble to the Agreement (Exhibit 7), prepared by attorney Hatch declared appellant to be "a mutual irrigation corporation."

B. THE TWO-THIRDS VOTE WAS RAISED DURING THE TRIAL:

On page 14 of respondent's brief in the middle paragraph, the respondent falsely states that the issue of the consent of two-thirds of the stockholders was necessary to bind a mutual irrigation company, was first raised in the appellant's brief.

On page 8 of appellant's brief reference is made to "J R 30" meaning the Judgment Roll. Please advert thereto to number 1 of the Motion to Amend Findings, etc. which states: "1. To insert a finding of fact which will read "That Plaintiff is a non-profit corporation and a mutual irrigation company." The corollary of this is found on page 31 of the JR in number 10 as follows: "Insert a Conclusion of Law to read "That the directors of the plaintiff do not have authority to convey the assets

of the corporation but such authority must be granted by a two-thirds vote of the stockholders at a meeting called for such a purpose." After argument before the court, the contentions of appellant were erroneously overruled. (J. R. 40) Clearly the matter was well before the trial court.

POINT III.

EVIDENCE WAS RECEIVED AS TO WHO WERE THE STOCKHOLDERS AND THAT TWO EXPRESS MEETINGS WERE HELD CONCERNING THE WRONGFUL ACTS OF THE PRESIDENT.

On page 14 of respondents' brief in the middle paragraph thereof, it is stated "No evidence was offered as to who the stockholders were or whether or not they ever held a meeting concerning the transfer."

Respondents mislead the court. On page 18 of the transcript, the president identified Exhibit 6 as the minute book. On page 122 the minute book was received in evidence. On page 106 of Exhibit 6 near the bottom the first reference is made to the subject of the litigation; and after said annual meeting of the stockholders, the Board of Directors had an important meeting concerning fishing rights at which it was learned that the president had denied to Russell Wall that he had ever executed a deed!

On page 121 of the minute book, Exhibit 6, the names of stockholders owning 413 shares are set forth, together with the results of a vote taken at a special meeting of the company stockholders for the express purpose of acting on the recommendation of the board

of directors to "set aside that certain Quit Claim Deed dated March 1, 1959 and that certain agreement dated March 1, 1959 giving to the Clydes the fishing rights in Witts Lake and Deer Valley and other items."

POINT IV.

THE TRIAL COURT ERRED IN DECLARING THAT EXHIBITS 7 AND 8 WERE AND ARE VALIDLY EXECUTED:

In point III respondents have treated numerous subjects. We deem it necessary to challenge and reply to certain of them, but only on the theory, which we deny, that the board of directors of a mutual irrigation company could convey assets without consent of the stockholders.

On page 12 of their brief, respondents admit that the directors did not know the terms of the alleged agreement. "*Their professed ignorance* of the acts of its president and secretary in signing an agreement does not relieve the corporation from liability . . ." And again: ". . . their asserted collective failure to inquire . . ." In Finding number 7, reproduced at page 6 of respondents' brief, the court erred in finding that directors Holmes and Anderson "personally participated in performance under *the agreement* and had knowledge that an agreement of settlement of many matters" had been reached, etc. We argue that in law there was no ratification.

A. RATIFICATION: On page 13 of respondents' brief ratification by the board is claimed. Neither the facts nor the law warrant such a conclusion.

By the respondents' citation at 19 Am. Jur. 2, 660 it is mandatory that the corporation "repudiate the trans-

action" after "it has learned of an unauthorized act." Two things are implicit in the cited authority. 1) the corporation must know specifically of the unauthorized act; and 2) it must act to repudiate at once. In this case the board of directors did not know of the unauthorized act; and when the directors learned thereof, they were disturbed. (Tr. 48) They acted at once to repudiate the president's act.

IN *McCONNELL v. DIXON*, Wyo., 233 P2 877, it is stated: "A party alleging, asserting, or relying on a ratification of the unauthorized act of an agent has the burden of proving it." It is respondents who have the burden and they have not sustained it to any degree. In this connection, let it be remembered that in sustaining such burden, the Wyoming case held that it must be proven "that the principal intended to ratify," and "to constitute ratification" the principal "must have *full knowledge* at the time of ratification of all material facts and circumstances relating to the unauthorized act or transaction. Note further what the Wyoming court said under "Ratification":

"The principal, where nothing has occurred to put him on guard, is not bound to distrust his agent; he has the right to assume that the agent will not exceed his authority; — and he is not obliged before accepting the benefits of an unauthorized act, to inquire whether, in performing it, the agent has not in some way violated his trust. Mere careless ignorance or mere negligence in not discovering the departure from authority, where there is nothing to suggest it, is not enough. Neither is the principal to be charged with mere

constructive notice. He is not, for example, obliged to search the public records for evidence of his agent's fault and he is not charged because such records would disclose that the agent was performing unauthorized acts." Furthermore, *acquiescence without knowledge of the material facts is not sufficient. . . . The principal must have full knowledge of the unauthorized act of his agent and an opportunity to repudiate the same before any delay in repudiating the act in question can constitute a ratification thereof.*"

Defendants-respondents have predicated most of their defense of the decision of the lower court on the existence of "an agreement" between the parties that would dispose of all of the controversy. Counsel for the Clyde interests totally ignores the first and more important agreement between the parties and by a practiced obfuscation has undertaken to concentrate all attention on the second so-called agreement, exhibit 7, thus creating the strongest type of ambiguity as to ratification.

It is imperative that the first "agreement" be adverted to; it appears only in the minutes of the plaintiff corporation on page 74 thereof. (Ex. 6) At no time was the existence of said agreement ever disputed. Don Clyde testified there was such an original verbal agreement. (Tr. 198) One of the defendants, Bob Clyde, was present at a board of directors meeting of appellant in 1956 and the "right-of-way discussed. . . . Bob Clyde stated if a fence would be built on one side of the ditch, and a water trough put in and a bridge across the cement ditch, this would be all they would ask for a right-of-way through their ground." At no time do the respondents ever make any denial in this case of that

understanding and agreement. They try to cast all attention to an attempted formalization of that earlier agreement three years later, exhibit 7, which is the one never known of or approved by the board of directors, but of which the unfair, misleading and deceptive language is employed in the brief of respondents to show some form of ratification as follows:

“... at least four of the five directors nevertheless personally participated in performance of obligations under *the agreement* with knowledge that settlement of many matters of controversy with the defendants had been made. They, likewise, knew of the existence of *an agreement of some sort* and that they were performing under an agreement.”

The above quoted language from page 11 of respondents' brief creates a mis-impression. The court must find which agreement the said directors participated in performing. Counsel refers us to the pages of the transcript for the answer, and it is clear that three of the four directors had no knowledge of exhibit 7. They all had full knowledge of the one appearing at page 74 of their minute book, exhibit 6. As we examine their testimony, be it remembered there were five directors constituting the board. Director Bond was never in Glen Hatch's office concerning this business and exhibit 7 never came to his attention. (Tr. 211) The other director was the president, Clyde Ritchie. While he testified he did not read what he signed on exhibit 7, he alone can be charged with knowledge of what it contained. (Tr. 49) Now note what the other three had to say about the two agreements:

HARVEY CROOK, a director, objected on page 74 to the "broad territory" taken in by asking questions about an agreement. He testified he did not "ascertain the exact terms of that agreement." (Tr. 74) He refused to state said agreement was after lambs had been lost. (74)

Crook knew there was some dispute about the loss of lambs but the work that was done was not exclusively done in settlement of such dispute. (Tr. 75) He stated that "There was work done every season up there to some extent." (Tr. 75) After Crook knew there was a problem of the loss of lambs (which would be in 1959) he testified that he did no more work on fencing; after that he moved away, ceased to be a director. (Tr. 76, 77) Director Crook did not ever know that his corporation had paid Glen Hatch for the legal work as claimed in the brief. (Tr. 78) In this connection, let it be remembered Glen Hatch had served as counsel for the irrigation company for "several years" and the board was in the habit of paying Glen Hatch. (Tr. 18, 19) The president was irritated that Glen Hatch now represented the Clydes. (Tr. 134)

On re-direct, Crook clarified, stating he was aware of an agreement "as to certain places on the reservoir that might be washing and that should be taken care of in this matter. . . . I was not aware of any written agreement." (Tr. 80) Maintenance work was constantly going on by the directors and there was "no difference" between such maintenance and the work connected with the so-called agreement. (Tr. 81)

That is the summation of the Harvey Crook testimony. By no stretch of logic or language could this or the lower court enter a finding that such agreement being testified to was anything but the one recorded in the minutes at page 74.

GEORGE HOLMES: This director also did work on the fencing, but "We were putting the fence up for the right-of-way for the ditch." (Tr. 103) Notice how careful he is on page 103-104 of the use of the word "agreement." The fence work he was doing was "to pay for the right-of-way." (Tr. 104) Further, may the court be conscious of how careful the witness is to relate his work to fencing, spillway repair, but it is counsel for the Clydes that twists the inferences beyond the intent of the witness, as shown on page 105. At this time, when he is testifying to work accomplished there was no "dispute about fishing in this period." (Tr. 105) The extent of the talk was to get the date of opening changed. (Tr. 106) This language by George Holmes cannot be twisted into knowledge or ratification of exhibit 7 or the deed.

KENNETH ANDERSON: This director, along with the two just referred to, had never seen the agreement, exhibit 7, until just prior to bringing the law suit (Tr. 110, 69, 71, 98) and there had been no discussion by the board of said agreement. (Tr. 111) There had been discussions concerning fencing, repairs. The ditch was cemented in 1956 and 1957. (Tr. 111) He and his boys had fished for ten years. (Tr. 112)

While he was aware there were problems of sheep being drowned, he stated he was aware that some "under

standing had been reached with the Clydes and Lake Creek . . . concerning those matters which included the fencing of the ditch," but "I didn't know of any agreement." (Tr. 113) While Anderson acknowledged there had been a compromise with the Clydes, the exact terms thereof as argued in the brief were not ever in his mind. (Tr. 116) He participated in the fencing, and knew there were difficulties with the Clydes, but now see the revelatory answer on cross examination by Bullock of this director:

"As I recall, the fence was approved and was done. When we talked with Bob (Clyde) he agreed if we built the fence, he would give us an easement for a right-of-way for the cement ditch.

Q. That is why you were building a fence?

A. That is right." (Tr. 117)

Bullock trapped Anderson into false statement at the top of page 118 which was later clarified on re-direct: "I want to know if you were aware of any agreement in 1959 to do anything? A. No." (Tr. 118) It is clear the verbal agreement he was testifying to was with Bob Clyde and occurred as early as 1956, and is shown at page 74 of the minute book, exhibit 6. (Tr. 119) Appellant's counsel asked Anderson what agreement concerned the work that was being done and the witness shows at page 119 and 120 of the transcript that it was pursuant to the minute at page 74, not to exhibit 7. It was so clear the witness knew of no agreement in 1959 that the court sustained an objection by Bullock on repetition, and there the testimony of the director Anderson closed.

Now as to these three directors, none of whom ever saw or heard of exhibit 7 or 8 until just before the suit, their testimony of *agreement* clearly concerns the one shown at page 78 of their minute book. "Some sort" of agreement, as stated on page 11 of respondents' brief, must never be tortured into exhibit 7, but is clearly referring to page 74 of the minute book and the day-to-day operations of the irrigation system.

In connection with language appearing at page 74 of the minute book "It was stated that a contract had been drawn up and to be signed by the land owners." Exhibit 7 was probably drawn in answer to said minute, but it was done three years later; and by that time, several new ingredients had been grafted into the concept of settlement as conceived by the Clydes and their attorney. There can be no doubt but that later several additional elements than appeared on page 74 of the minutes were in the minds of the Clydes and their attorney, and possibly these entered the mind of the president of the irrigation company, but such elements never came to the attention of directors Cook, Holmes, Anderson nor Boni. As we have argued, there can be no ratification in the absence of full knowledge of the terms and conditions being ratified.

None of these directors had a hint that property of the mutual company was being conveyed. Certainly these directors were doing maintenance work every year, some of which would naturally come up in discussion with their neighbors, the Clydes relative to washing the spill-way, fences and water ways that had been b

fore discussed. It is likely that these three directors believed their president had had minor understandings concerning the day-to-day operations of the reservoir and the cement ditch, but this is a far cry from an agreement to convey and deliver water down the Mills ditch, and to give up the company rights to fishing! These were rights that vested in the members, the water users, and were not subject to conveyance as in a mercantile corporation.

Even the preamble to exhibit 7, the alleged agreement, prepared by defendants' attorney, recites that Lake Creek Irrigation Company is "a mutual irrigation corporation of the State of Utah." The attempted usurpation of power by the president to bind the water users is in language in two places in exhibit 7 that require the diversion of storage water down the Mills Ditch. Paragraph 3 contains this requirement so as "to water their stock (meaning the Clydes) in the area through which the Mills Ditch passes." Then again in paragraph (5), the mutual company covenants with the Clydes "to draw sufficient water from the Deer Valley Reservoir to reach the Mills Reservoir and to conduct the same by ditch to the Mills Reservoir during the high water period in the spring and in the autumn. Note Don Clyde admitting the appellant company at no time ever honored that language in exhibit 7 and had refused to turn waters into the Mills Ditch. (Tr. 196, 187)

The reason for the two-thirds vote being required of non-profit corporations in the Utah statute is here in clear view. Neither the president, nor the directors of a

mutual irrigation company would have the right to convey the waters of the stockholders without the latter's vote. There must be preserved the sanctity of water rights in the water user, as distinguished from the right of a board of directors to do the common, day-to-day maintenance operations to keep the system operating. It would make good law to permit the board to control ordinary maintenance and to make agreements concerning same; but it is another story, and the invasion of vested rights to permit the conveyance of water into the Mills ditch and reservoir, or to deed away the rights of fishing and fish culture, absent the knowledge and vote of the shareholders. The naked act of the president and the secretary who was not even a member of the board, could not accomplish what even the directors would have no authority to accomplish in a mutual irrigation company.

B. REPUDIATION ACCOMPLISHED AT ONCE.

It is clear from the minute book, exhibit 6, that once the mutual company learned of the contract and deed, the board acted quickly to test the same, asking for and receiving a vote of the entire stockholders to repudiate the same.

Let it be remembered that the sole maker of the deed denied he had executed the same when confronted by stockholder Wall just before this action was filed. (Exhibit 6 page 107, Tr. 124) The minutes of a directors' meeting held January 18, 1965 show that "Russell Wall reported to the board on the assignment he had been given in July, 1964 to secure a private pond fishing per-

mit for the Witt Reservoir. He reported he had made application to the . . . Fish & Game Commission for a private pond fishing permit in July and that . . .” in this connection the Fish and Game office had reported that “Bob Clyde had been to their office and indicated that the Clydes had a deed to this property for the fishing rights. Mr. Wall assured Mr. Ware that this was not the case; that he, Mr. Wall, had been authorized by the board of directors . . . to secure the permit, and the Irrigation Co. was the owner of the land and fishing rights. . . . Mr. Wall also stated that . . . he went to President Ritchie and President Ritchie said there was no such deed to his knowledge. Then Mr. Wall reported that he went to the court house to check this and found a quit claim deed to Don Clyde for the title to this property. Mr. Wall presented a photo copy of the deed 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. The meeting was recessed and the Annual Stockholders meeting was held. . .” (Exhibit 6, page 107, 108)

The minutes of the stockholders meeting held on the same day state: “The fishing rights were discussed. Authorization was given to the board to preserve the fishing rights for the company. (Exhibit 6, page 106) The following page references to minute book relate to the board’s actions re. fishing rights. 109, 110, 111, 113, 114, 119. In several of said minutes it appears the board negotiated with the Clydes; but as no compromise could be reached, 344 shares voted at a special stockholders’

meeting (Ex. 6, p. 121) instructing the board to bring court action to set aside the contract and the deed. Only 69 shares voted against.

Let it be well remembered that prior to the time the board of directors knew of the alleged agreement and deed, it had authorized Russell Wall to purchase 2000 fish and plant them in Witt Reservoir, and he did so, purchasing the fish from private sources. (Tr. 128) Also about July 10, 1964 the Witt Lake area was posted to private fishing showing that the company acted at that early date as though no deed had been executed. (Ex. 9, Tr. 126) In this connection, Wall was in the act of applying for a private pond permit when he first learned of the alleged deed to the Clydes. (Tr. 128, 129; Exhibit 6, page 107) Numerous of the shareholders fished on the Witt. (Tr. 125, 88) Director Anderson fished "two years ago" which would be in 1964 or 1965. (Tr. 112) Had they known of the deed or agreement it is not likely they would have so fished.

Also it should be born in mind that the company never put water into the Mills Ditch as per the alleged agreement. Don Clyde testified to this at page 187 and 196 of the transcript.

In these above matters, the mutual irrigation company had acted as though there was no agreement, and when informed, repudiated it quickly.

Thus, in terms of the authority cited in the American Jurisprudence quote on page 13 of respondents' brief, the mutual company repudiated the unauthorized act of its president "within a reasonable time of receiving information of the unauthorized transaction."

C. APPARENT AUTHORITY: The citation on page 12 of respondents' brief of 19 Am. Jur. 2d 591 and the case following are not in point. The appellant corporation at no time held Clyde Ritchie, its president, out to the public or to the respondents as having authority to bind the irrigation company. This is clear from exhibit 12 where attorney Glen Hatch requested specifically the resolution of the board of directors concerning the signing of exhibits 7 and 8. Glen Hatch as attorney earlier for the appellant, and now for the respondents, clearly knew the limitations of the president.

The American Jurisprudence citations in respondents' brief are entirely beside the point. No authority can be inferred in President Ritchie; and in law, the execution of the agreement and deed were never known to the directors until just before the litigation to contest the same was filed. Nothing in the record suggests the corporation or the board of directors had permitted the president to "exercise the whole power of the corporation." Every bit of evidence points to the board making the decisions. (Tr. 48, 78, 80, 97, 108) The minute book is full of proof to this effect. The only time the president was known to act arbitrarily and without consultation with the board is the one being litigated. The following page references to the minute book, exhibit 6, will show how the board functioned historically. 74, 77, 84, 85, 86, 87, 89, 90, 92, 95, 98, 99, 100, 101, 102, 104, 105, 106, to the end.

The cited case of *HANOVER NATIONAL BANK v. AMERICAN DRY DOCK* on page 12 of respondents'