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R. C. Syrett v. Tropic and East Fork Irrigation Company, and John H. Johnson : Petition for Rehearing

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

R. C. SYRETT,

Respondent,

vs.

TROPIC AND EAST FORK
IRRIGATION COMPANY and
JOHN H. JOHNSON,

Appellants.

PETITION FOR REHEARING

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In the Supreme Court of the State of Utah

R. C. SYRETT,

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TROPIC AND EAST FORK
IRRIGATION COMPANY and
JOHN H. JOHNSON,

Appellants.

PETITION FOR REHEARING

Comes now Appellant and respectfully petitions the Court for a rehearing of said cause upon the following grounds:

1. The Court erred in assuming that Article XI, which provides that the waters shall be by the Directors divided "to each person according to his stock as a dividend", includes R. C. Syrett, the Respondent.

2. The Court erred in assuming the purpose clause in the Articles of Incorporation of Appellant

"Read in the light of the obligation of the Corporation to distribute the water therein conducted to its stockholders in proportion to stock ownership, such Article must be held to encompass such function. Appellant does not argue to the contrary. Indeed, in view of the conveyance to the Corporation by

stockholders of water rights in return for stock, and the *uniform conduct of the Corporation in distributing water to them in accordance with such ownership*, no such contention could be sustained.”

3. The Court erred in that part of its Opinion where it is said:

“What Appellant does maintain is that it has no power to deliver water elsewhere than in vicinity of the Town of Tropic; or, in any case, no authority to deliver it to the plateau land upon which plaintiff demands it. This position is clearly not tenable, for if it be conceded that the power to distribute water to stockholders is conferred by the articles, we must conclude that no such limitation is imposed by either of the quoted provisions.”

4. The Court erred in that part of its Opinion wherein it is said:

“And since under Article XI the water is to be divided to each person, without specifying where he is to receive it, it would appear that a stockholder should be entitled to receive his proportionate amount of water at any *reasonable point* along the canal system.”

5. The Court erred in that part of its Opinion where it is said:

“There is substantial testimony on behalf of respondent, R. C. Syrett, that in the past appellant company has conducted itself as having authority to distribute water on the plateau or at any other point along its system. The evidence reveals that on several occasions water was distributed to stockholders on the plateau; that some of its water was sold outright to the Utah Parks Company, a competitor of respondent's in the tourist business at Bryce Canyon; that on one occasion the *company*, through

its president and secretary, wrote to the U. S. Land Office to the effect that 'Not interfering with any right of the company stockholders have and are allowed to draw their water and use the same, upon land settled on the plateau.' Further, 'the company takes the stand that each stockholder may use his water upon any land embraced within any part of the whole system, so long as they do not infringe upon any company right and each bears his equal share of assessment.' "

6. The Court erred in that part of its Opinion wherein it is said:

"While there is conflicting evidence to the effect that the company has in the past considered that it had no authority to distribute water of Tropic Valley, nevertheless we cannot say that the trial court erred in finding that the company did distribute water at various times to stockholders on land located on the plateau."

7. The Court erred in that part of its Opinion wherein it is said:

"Having found the plea of ultra vires not supportable we need not consider whether the facts found are such as to work an estoppel."

POINTS, AUTHORITIES AND REASONS RELIED UPON:

The Constitution of the State of Utah, Article XII, Section 10, provides:

Corporations limited to authorized objects.

"No corporation shall engage in any business other than that expressly authorized in its charter, or articles of incorporation."

Construed in the following cases:

Tracy Loan & Trust Company vs. Merchant's Bank, 50 Utah 196, 167 P. 353.

After quoting the Articles of Incorporation in question, the Court says:

“It is always advisable and in fact necessary, in attempting to determine the powers of a corporation or other body created by law, to examine the fundamental law of the state by virtue of which such bodies exist, and ascertain if possible, the powers intended to be given to and to be exercised by such legal entities. Article XII, Section 10, of the Constitution of this State limits the powers of corporations to the authorized objects expressed either in the object clause or in the positive statute of the State. The language of that Section is: (quoting section of Constitution, aforesaid.)”

In said case the Court further says:

“The court, in an early case under statehood, (*Seely vs. Canal Company*, 27 Utah 179, 75 Pac. 367,) adopted the rule that a corporation in the management of its affairs and conduct of its business, is limited to the purposes provided and enumerated in the object clause of its articles of incorporation. In fact, under the provisions of the Constitution, aforesaid, it would seem that no other rule or construction was permissible in this jurisdiction.”

In *Green vs. Knox*, 71 Utah 217, 263 Pac. 928, the Court says:

“It is insisted in behalf of the bank that the transaction was not a part of, nor incidental to the banking business within the contemplation of the National Banking Act, and that the alleged contract was therefore ultra vires and unenforcible. This apparently was the main ground upon which the

demurrer was sustained. Appellant, however, disputes this, and contends that the contract was not ultra vires and that even if it was the defense is not available to the bank for the reason that the contract was fully executed on his part. It is needless to consider the opinions of other courts upon this subject because the question is not an open one in this state."

Citing: *Tracy Loan & Trust Company vs. Merchant's Bank*, 50 Utah 196, 167 Pac. 353.

Ratification or Assent. 19 C. J. S. 428, paragraph 971,
it is said:

"Although there are decisions to the effect that except where rights of third parties have accrued, an ultra vires transaction may be ratified so as to bind the corporation when it has received and retained the benefits on account thereof, (Note 20, citing Utah,) it is generally held that a transaction beyond the power of the corporation to enter into, that is to say, ultra vires in its strict sense, cannot be ratified, (Note 21) especially where it conflicts with a statutory or constitutional provision. (Note 22) Granted that ratification is possible, there can be no ratification without the consent of all the stockholders; (Note 23) there can be no ratification by the directors. (Note 24)"

Effect of Consent of Stockholders or Members.

In paragraph 936, 19 C. J. S., page 371, it is said:

"Corporate powers cannot be enlarged by the consent or acquiescence of all the stockholders.

The consent or acquiescence of all the stockholders or members can give a corporation no right to engage in acts or transactions foreign to the objects for which it was created, or render such acts or transactions any the less ultra vires. (Note 84)

Therefore, no vote or act of a corporation can enlarge the powers conferred on it by its charter. (Note 85)''

ARGUMENT.

1. That portion of Article XI of the Articles of Incorporation, which provides that the waters shall be by the Directors divided to each person according to his stock as a dividend, *does not include R. C. Syrett*, the Respondent, for the reason that R. C. Syrett was not an incorporator or a party to the Articles of Incorporation, and the incorporators did not have R. C. Syrett in mind. He first came upon the scene about thirty years after the company was incorporated. He paid nothing to the company for his stock. He first bought fifty shares of stock from another stockholder. He paid nothing to the company for said stock, and the company has retained nothing, nor does it hold anything received from Mr. Syrett.

For the reasons stated aforesaid, R. C. Syrett and his asserted right to have water distributed to him on the plateau should not be held to encompass such function on the part of the company, which in substance, has been the continuous argument of the Appellant since the inception of this case, and there has been no uniform conduct of the corporation distributing water to the stockholders which would justify the assumption that it has distributed water to any stockholder or stockholders on

the plateau. It has not done so, and the minutes of the corporation expressly negative the assumption. The only evidence in the case relative to any action on the part of the company in regard to use of water in the Great Basin, is the minute entry dated March 28, 1924, and identified as Defendant's Exhibit J, (Trans. 512) a copy of which is as follows:

"March 28, 1924.

The Board of the East Fork Irrigation Company met at 8 P. M. W. V. Rappley, President.

J. A. Cope asked for the right to take the water out on the mountain for a desert entry. We decided the Board had no right to grant it."

In 18 C. J. S., title Corporations, paragraph 496, at page 1174, it is said:

"A radical and fundamental change in the objects, purposes, or business of the corporation interferes with the contract rights of each stockholder with the corporation and cannot be made without the consent of all stockholders, (Note 94)"

A search of the records will disclose that the corporation ever took any different attitude. The most that can be said is that some of the water "bosses" are alleged to have some unauthorized conversations with Mr. Syrett, and Mr. Syrett's own testimony discloses clearly in his letters to the company, Appellant's Exhibits 1 to 8, that the company refused to distribute water to him on the plateau from the very beginning of his attempts to get it. The fact that the canal broke

on several occasions, and while so broken some persons may have taken the water, should have no binding effects on the company. Likewise, the fact that the President wrote an unauthorized letter to the Government in an effort to assist Mr. Reynolds to perfect a desert entry on the plateau, could have no bearing, binding force or effect on the company, and the testimony shows that the water was not used on the desert entry, in any event to the knowledge of the company or with the consent or acquiescence of the company. And in fact, Johnson's letter was wholly unauthorized by the company and only an illegitimate attempt, as explained in his testimony, to help Reynolds to perfect his desert entry, while the water in truth and in fact, which Reynolds was supposed to have, was all the time used down in the Tropic valley, except on one occasion when a little of it was turned down a swale and got under the fence on Reynold's desert entry.

Why should these matters in any manner accrue to the benefit of Mr. Syrett? He did not rely upon these matters when he purchased these different items of stock, but knew full well and was charged with knowledge on the recording of the Articles of Incorporation that the water was to be used in the Tropic valley and not on the plateau in an entirely different water basin. And the attitude of the corporation in

this respect is entirely consistent with the best interests of the stockholders. Because to divert the water on to a different water shed at a considerable distance away from the water system entails expense and annoyance to the company and deprives it of the water, its carrying capacity in the stream, and the seepage, which is entirely lost to the company and its stockholders when water is diverted on the plateau.

3. For the foregoing reasons therefore, the position of the company is clearly tenable, even if it be conceded that the power to distribute water to stockholders as conferred by the articles of incorporation, to-wit: the phrase in Article XI; "to each person according to his stock as a dividend," it cannot fairly be concluded that this includes Mr. Syrett, for the reason that Mr. Syrett was not an incorporator, was not a party to the contract of incorporation, never paid anything to the corporation for his stock, and was in no way misled by any act or conduct on the part of the corporation, but was at all times fully advised that the corporation would not distribute water on the plateau in the Great Basin water shed.

Therefore, in order to sustain the conclusion that no limitation is imposed by either of the quoted provisions of the articles of incorporation, it must be assumed that Mr. Syrett, by reason of purchasing the

water thirty years after the corporation was organized with full knowledge of the terms of the articles, could thereby impose upon the corporation terms that were never contemplated in the articles of incorporation, and this without any consideration moving to the corporation from Mr. Syrett.

4. For the foregoing reasons, the clause in Article XI, specifying that the waters be divided to each person, without specifying where he is to receive it, should not, as hereinbefore stated, inure to the benefit of Mr. Syrett, under the circumstances and fact in this case. Because if Mr. Syrett is to receive water on the plateau ten miles away from the system of the company, this would not be a *reasonable point*, but it would be a most unreasonable point, for the reason that the point at which he receives it in the Great Basin is on a different water shed from the system of the company, to-wit: on the head waters of the Sevier River in the Great Basin, while the system of the company is over the mountain on the head waters of the Colorado. Therefore, the assumption by the Court that the stockholder should be entitled to receive his proportionate amount of water at any "*reasonable point along the canal system*" is in the opinion of the writer not well taken, because the point in the Great Basin, as stated, is the most unreasonable point along the canal where

water could be diverted, so far as the interest of the company and the stockholders is concerned, and as before stated, all of the stockholders except Mr. Syrett suffer loss of seepage, evaporation, carrying capacity of the stream which would be lent by the waters diverted by Mr. Syrett on the west side of the mountain.

5. It is said in the Opinion of the Court that there is substantial testimony on the part of the respondent, R. C. Syrett, that in the past appellant company has conducted itself as having authority to distribute water on the plateau. Then it says that the evidence reveals that on several occasions water was distributed to stockholders on the plateau. If the evidence is carefully examined it will be discovered that the company never did at any time distribute water to any stockholder or to anyone else on the plateau. There were times when the canal was broken when some residents on the plateau apparently used water when the company and its stockholders could not use it in the basin. These are the only exceptions. These exceptions certainly cannot fairly be charged to the company.

Then the Opinion says that some of the water was sold outright to the Utah Parks Company, a competitor of respondent's in the tourist business at Bryce Canyon. How could this accrue to the benefit of Syrett? Practically all of the stockholders were in favor of

making the sale, but the writer cannot understand how this could have anything to do with the right of Syrett to divert water on the plateau.

It is further said that on one occasion the company, through its president and secretary, wrote to the U. S. Land Office to the effect that not interfering with any right of the company stockholders have and are allowed to draw their water and use the same upon land settled on the plateau. There is nothing to indicate that this letter was authorized by the company, or that the president or the secretary had any authority to write it, or that the company ever took any action upon it, and in truth and in fact, the testimony shows that this was simply an indiscretion on the part of Mr. Johnson, the president, in an effort to assist a man by the name of Reynolds in perfecting a desert entry, and in truth and in fact the water was never used on the desert entry but once, when it only got in on the land a little way. Said water was in truth and in fact used at the time this man, Reynolds, was trying to perfect his desert entry, down in the system in the Tropic valley on other lands and not on Reynolds' land.

In any event, how could this possibly inure to the benefit of Mr. Syrett? He certainly has no right to rely upon any such indiscretion on the part of the presi-

dent, and it in no way affected Mr. Syrett as a shareholder, or otherwise or at all.

6. The Court says that while there is conflicting evidence to the effect that the company has in the past considered that it had no authority to distribute water outside of Tropic valley, nevertheless we cannot say that the trial court erred in finding that the company did distribute water at various times to stockholders on land located on the plateau. There is no testimony that the company ever distributed water to any stockholder on the plateau. Therefore, no such testimony can be found.

Therefore, in view of the fact that there is no testimony whatever in the record that shows that the company ever distributed any water on the plateau to anyone, there should be no difficulty in finding that the trial court erred in finding that the company did distribute water at various times to stockholders on land located on the plateau.

7. Then the Court says: having found the plea of ultra vires not supportable we need not consider whether that facts found are such as to work an estoppel.

In *Lawson v. Woodmen of the World*, 88 Utah 267, 53 Pac. 2d, 432, cited in 19 C. J. S. page 428, paragraph 971, Syllabus 10, it is said:

“Corporation’s validation of ultra vires act will estop corporation and any one else from denying validity of act.”

But in this particular case there is no question of the corporation’s validation of an ultra vires act, and there are no facts in the record in the nature of acts on the part of the corporation or its stockholders that would uphold an estoppel even under the terms of the said case, notwithstanding that the said case appears to be contrary to the weight of authority on the point mentioned.

Mr. Syrett, as before stated, was not a party to the articles of incorporation. He did not come upon the scene until about thirty years after the articles of incorporation had been recorded, and knew full well that the purpose of the company was to distribute the waters in the Tropic valley, and the company never did distribute any water to Mr. Syrett or to anyone on the plateau, because of the fact that such conduct on the part of the company would be a detriment to its stockholders and to the company, and it had no power to do it, as passed upon in the minute heretofore cited, which is the only occasion when the corporation ever passed upon the question of whether it should or would permit persons to divert water on the plateau west of

the divide, ten miles away from the system to which the incorporators had built the canal.

Respectfully submitted,

LEWIS LARSON,

Attorney for Appellant
and Petitioner.

STATE OF UTAH, }
County of Sanpete, } ss.

Lewis Larson hereby certifies that he is the attorney for the Appellant in the above entitled case that in his opinion there is good reason to believe the judgment objected to in the foregoing Petition is erroneous and that the case ought to be re-examined.

LEWIS LARSON,

Attorney for Appellants.