Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (pre-1965)

1953

A. C. Kartchner and Irene B. Kartchner v. Lymon Merrill Horne et al : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 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.
Skeen, Thurman & Worsley; Verl C. Ritchie; Earl D. Tanner; Attorneys for Plaintiffs and Appellants;

Recommended Citation
Reply Brief, *Kartchner v. Horne*, No. 7911 (Utah Supreme Court, 1953).
https://digitalcommons.law.byu.edu/uofu_sc1/1839

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 (pre-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

FILED
MAR 24 1953
Clerk, Supreme Court, Utah

A. C. KARTCHNER and
IRENE B. KARTCHNER,
Plaintiffs and Appellants,

vs.

LYMAN MERRILL HORNE, FREDERICK C. SORENSEN, and CLICQUOT CLUB BOTTLING COMPANY OF SALT LAKE CITY, UTAH, a corporation,
Defendants and Respondents

Case No.
7911

REPLY BRIEF

SKEEN, THURMAN & WORSLEY, VERL C. RITCHIE AND EARL D. TANNER
Attorneys for Plaintiffs and Appellants

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

INDEX

CASES CITED

TEXTS CITED

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT OF THE STATE OF UTAH

A. C. KARTCHNER and
IRENE B. KARTCHNER,
Plaintiffs and Appellants,

vs.

LYMAN MERRILL HORNE, FREDERICK C. SORENSEN, and CLICQUOT CLUB BOTTLING COMPANY OF SALT LAKE CITY, UTAH, a corporation,
Defendants and Respondents

Case No.
7911

REPLY BRIEF

STATEMENT OF FACTS

The issues of fact appear to be squarely drawn by the appellants' brief and respondents' brief. There is little that can be added in this argument save to reaffirm appellants' belief that a careful examination of the record will establish that the statement of facts made in their brief is accurate.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

STATEMENT OF POINTS

I

The issue of the Kartchner stock, if an overissue, is void.

II

The burden of proof is on the defendants to show that there were sufficient shares of stock in the treasury of the defendant corporation to enable that corporation to issue 100,000 shares to the Kartchners.

III

There is no evidence in the record to sustain a finding that Mrs. Kartchner is estopped from questioning the validity of the certificate issued to her.

ARGUMENT

Point I

The issue of the Kartchner stock, if an overissue, is void.

An issue of stock which is beyond the amount authorized in the corporate charter is void. Relative to the question of whether the stock issued to the Kartchners is void or is simply irregular, the Constitution of the State of Utah as cited in appellants' brief clearly states that such an issue is void, and the

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

reason shown by the majority of cases and by all of the textbooks is that the corporation is without power to issue such stock. We must concede that there are states which have provisions whereby an unauthorized overissue can later be validated by complying with certain statutory procedures. Utah is not one of those states.

The rule is correctly stated in the case of *In Re Rombach & Company*, 9 Fed. 2d, 359 (Third Circuit), cited by respondent. There the court says that stock *which the corporation has power to issue*, but issues irregularly, is voidable but not void. That is in line with the general rule. Conversely, stock which the corporation *has no power* to issue is void, not voidable. The principl case is of the latter type. The issue of stock is void, not merely irregular, because it is an issue which it is beyond the power of the corporation to make.

The rule is well stated in *Thompson on Corporations*, 3rd edition, Section 3548, as follows:

> "The rule is well settled that certificates of stock issued in excess of the limit fixed by the corporate charter are void, and the holder of them is entitled to none of the rights and subject to none of the liabilities of the holder of authorized stock. The fact that corporation may be estopped to deny that the holder of overissued stock is a stockholder, will not make him a stockholder. The doctrine approved by the Supreme Court of Wisconsin is

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> that overissued stock, no matter how the overissue is made, represents nothing and is utterly valueless and void and certificates representing such stock are simply so much waste paper and the person holding them is not a stockholder."

Point II

The burden of proof is on the defendants to show that there were sufficient shares of stock in the treasury of the defendant corporation to enable that corporation to issue 100,000 *shares to the Kartchners.*

In their brief, the respondents have repeatedly stated that there is no evidence in the record to clearly show that the title to the stock of Horne and Sorensen had not passed to the corporation. This argument is made as if the burden of proof was on the plaintiffs below. However, that is not the case. The plaintiffs made their case when they showed that all 200,000 shares authorized by the charter had been issued at the time of incorporation and that thereafter the corporation issued a certificate for 100,000 shares to the corporation. The burden then shifted to the defendants to rebut the showing of invalidity by establishing that sufficient stock had been transferred back to the corporation to make the later issue valid.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

This proposition is clearly stated in *Thompson on Corporations*, Section 3557, as follows:

> "The purchaser of overissued stock, or his good faith transferee, may recover his damages in an action against the officers directly responsible for the over-issue, or in a joint action against the officers and the corporation a prima facie case for plaintiff is made by evidence that the certificates of stock which he purchased were issued after all the stock which the company had a lawful right to issue had been taken. The burden is then cast upon the defendants to show definitely that the certificates were genuine, as for example, that they were issued upon the surrender or upon the transfer of genuine stock. This is not done by merely showing that, prior to the time when the plaintiff purchased his stock, there were frequent surrenders or reissues of stock; because it might well be that all such surrenders and reissues were surrenders and reissues of bogus stock. On this question of official liability it has been said:
>
> 'They authenticated them, falsely and fraudulently attested them as genuine. They bore on their face such false attestation, which was equivalent to an assertion on their part to all persons who should purchase, or to whom they should be offered, that they were genuine. In this way they invited confidence and induced trade.* * * *' "

However, as pointed out in appellants' brief, the testimony of the defendants Horne and Sorensen

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

clearly shows that there had been *no stock* transferred back to the corporation by the time the Kartchner stock was issued.

Point III

There is no evidence in the record to sustain a finding that Mrs. Kartchner is estopped from questioning the validity of the certificate issued to her.

Appellants have argued that the Kartchners are estopped from denying the validity of their stock for the reason that they did not raise the question until the corporation went into receivership. There are Utah cases which hold that, where a stockholder has the opportunity of determining that his stock is invalid, he is estopped from asserting its validity after the corporation is bankrupt. These cases, however, are all cases involving an attempt to rescind a contract of purchase of stock, and are distinguishable from the principal case on that basis.

Further, in view of the fact that Sorensen's stock is claimed to have been in the stock book along with the other stock, even had the Kartchners examined the stock book, there would have been nothing which would have enabled them to ascertain that their certificates were an overissue. The record is clear that they commenced suit shortly after they were advised by their attorney that their stock certificate was void.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

However, even if it were true, which is not conceded, that Mr. Kartchner should be estopped by the fact that he knew that there was stock outstanding which had to be returned to the company before his own was issued, and by the fact that later he considered Sorensen as having only a minority interest in the corporation, there is still no evidence in the record that Mrs. Kartchner should be estopped for either of these reasons.

Mrs. Kartchner is not a mere nominal party to this suit, she is a purchaser of the stock who paid one-half of it's cost with her own assets. For this reason, she is entitled to take advantage of the fact that the burden of proving estoppel is on the defendants. This was discussed in the appellants' brief, and the conclusion was there reached that the respondent had utterly failed, so far as Mrs. Kartchner was concerned, to adduce *any evidence* which would warrant a finding that she was estopped to deny the validity of the stock in question. This conclusion is reiterated here solely for the purpose of accent.

CONCLUSION

The appellents respectfully submit that the court must find the certificate issued to them by the respondents, Sorensen and Horne, to have been void and of no force and effect whatsoever, and must find those

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

defendants liable of what Chief Justice Wade so eloquently described as "constructive fraud."

Respectfully submitted,

SKEEN, THURMAN & WORSLEY, VERL C. RITCHIE AND EARL D. TANNER

Attorneys for Plaintiffs and Appellants

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.