

1954

South Cache Water users Association et al v.
Stockholders of the South Cache Water Users
Association et al : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

SOUTH CACHE WATER USERS
ASSOCIATION, a corporation,

Plaintiff,

-vs.-

THE STOCKHOLDERS OF THE
SOUTH CACHE WATER USERS
ASSOCIATION a corporation, and THE
OWNERS AND MORTGAGEES OF
THE LAND WITHIN THE HYRUM
IRRIGATION RECLAMATION
PROJECT,

Defendants,

-vs.-

HYRUM IRRIGATION COMPANY, a
corporation,

Third Party Plaintiff and Appellant

-vs.-

WELLSVILLE-MENDON CONSERVA-
TION DISTRICT, A corporation;
WELLSVILLE CITY IRRIGATION
COMPANY, a corporation; and CACHE
VALLEY DEVELOPMENT COM-
PANY, a corporation,

Third Party Defendants,

Case

No. 8137

RESPONDENT'S BRIEF

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Wellsville-Mendon Conservation District
Wellsville City Irrigation Company
Cache Valley Development Company

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SOUTH CACHE WATER USERS
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Plaintiff,

~vs.~

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Defendants,

Case
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~vs.~

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Third Party Plaintiff and Appellant

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WELLSVILLE-MENDON CONSERVA-
TION DISTRICT, A corporation;
WELLSVILLE CITY IRRIGATION
COMPANY, a corporation; and CACHE
VALLEY DEVELOPMENT COM-
PANY, a corporation,

Third Party Defendants,

RESPONDENT'S BRIEF

This action was instituted by Respondent, South Cache Water Users' Association, in the District Court of the First Judicial District of the State of Utah, as a special proceeding pursuant to Section 73-1-16 to obtain a decree declaring valid an amendatory repayment contract dated May 24, 1950 between the United States

and the South Cache Water Users' Association. The Appellant, Hyrum Irrigation Company, hereinafter referred to as Hyrum, a stockholder of South Cache Water Users' Association, answered the Respondent's petition contending that the execution and delivery of the amendatory repayment contract had not been properly authorized and in the same proceeding counter-claimed alleging that the Association had not been equitably assessing its stock with resultant damage to appellant and asking relief therefor.

The District Court held (a) that the amendatory repayment contract was a valid and binding obligation of the parties thereto, and (b) that the stock of the Association had been properly assessed. The Hyrum Irrigation Company appealed.

STATEMENT OF FACTS

The statement of facts appearing in Appellant's brief is fragmentary and argumentative. It does not recognize that there are two unrelated issues in the case, the first dealing with the validity of the amendatory repayment contract, the primary purpose for which the suit was brought, and the second, dealing with the levying of assessments. There is no statement of facts in appellant's brief with respect to the primary issue in the case.

The following additional statement of facts is deemed necessary.

The South Cache Water Users' Association, herein for convenience referred to as South Cache, was incorporated under the laws of Utah on September 30, 1933, and the issuance of 14,000 shares of stock was authorized. See Exhibit A. At the time of its organization, South Cache had no dams, reservoirs, canals or other irrigation works, water rights or assets of any kind. On October 9, 1933, the Association entered into a contract with the United States of America, by the terms of which the United States agreed to construct the Hyrum Project, consisting of the Hyrum Reservoir, the Wellsville Canal and Pumping Plant, and the Hyrum-Mendon Canal and the Hyrum Feeder Canal. South Cache agreed to pay the cost of constructing the Hyrum Project, not to exceed \$930,000 without interest in 40 equal annual installments. By this contract, the Association in consideration of the payments to be so made was granted by the United States the permanent right to the use of all water to be yielded by the Hyrum Project. The United States made this capital investment for South Cache on the basis that the shares of its stock would be sold to obtain funds with which to make annual installment payments to the United States.

Thereafter, in 1933 and 1934, South Cache entered into contracts for the sale of 11,125 shares of stock of which 3,300 shares were subscribed by the Hyrum Irrigation Company, 1700 shares were subscribed by Wellsville Irrigation Company and 6,125 shares were subs-

cribed by Wellsville-Mendon Conservation District. Each stockholder organization was represented on the Board of Directors of South Cache.

The repayment contract between the United States and South Cache, dated October 9, 1933, as well as all subscription contracts and mortgages to secure these payments including Hyrum's contract, for the purchase of shares of stock in South Cache, were adjudged valid and binding by decree of the District Court of Cache County on April 10, 1943. (R 98)

The District Court in this case refused to review the former decree adjudging the validity of the original repayment contract and the subscription contracts and the question of their validity is not before this Court.

On May 24, 1950 South Cache entered into an amendatory contract with the United States, by the terms of which the time for making payments, without interest, was extended 16 years, and the annual installments were reduced from a maximum payment of \$32,550 to a maximum payment of \$17,240. The total amount payable by South Cache was increased to the extent of approximately \$14,000 to take care of the expenses of making the economic survey which was the basis for the amendatory contract. However, the benefits to all of the Stockholders by reducing the amount of the payments during the life of the contract and extending them over an additional 16 years, not only results in relieving the

stockholders of the duty of raising the increased payment each year but the saving in interest. If they had been required to borrow the money to make these additional payments figured at 4% per annum would amount to the astonishing figure of approximately \$130,000.00 of which approximately one third would have been Hyrum's share.

Congress approved the amendatory repayment contract by the Act of August 5, 1950 (64 Stat. 415), subject to the requirement that South Cache obtain a decree confirming and declaring the amendatory repayment contract valid.

This proceeding, under Section 73-1-16 (formerly Sec. 100-1-17) U.C.A., 1953, was instituted on August 27, 1951, for the sole purpose of having the amendatory repayment contract confirmed and declared valid and binding upon the parties thereto.

The two issues in this case, indicated above, are so unrelated that the case in reality is two cases; one being a suit to determine the validity of the amendatory repayment contract, and the second being a suit to determine whether the calls (assessments) against stockholders of South Cache levied in accordance with terms of the stock subscription agreements to pay the installments due the United States under its repayment contract shall be equal or whether the directors of South Cache are required by its Articles of Incorporation

to levy such calls (assessments) on an unequal basis in order to make them equitable.

In addition to the general facts given above, it is now our purpose to briefly state the material evidence bearing on each of the two issues, under separate headings.

VALIDITY OF AMENDATORY REPAYMENT CONTRACT

The evidence adduced with respect to the validity of the amendatory repayment contract consists of copies of calls of the meetings for authorization of the amendatory repayment contract, minutes of the meeting, and a stipulation. Exhibits 1, 2 and 3 are copies of documents entitled "Call and Waiver of Special Meetings", Exhibit 5 is the minutes of a special meeting of stockholders of the South Cache Water Users' Association held on May 24, 1950, Exhibit 6 is the minutes of the special meeting of the Board of Directors of the South Cache Water Users' Association, and Exhibit 7 is a copy of the minutes of a regular meeting of the Board of Directors of the South Cache Water Users' Association, held November 13, 1951.

The exhibits referred to above regularly show the call of special meetings of stockholders and directors of South Cache. The calls and waivers were signed by official representatives of the stockholders and directors

of South Cache. The minutes of the stockholder's meeting show a resolution authorizing the execution and delivery of the amendatory repayment contract by a vote of 7,825 yeas and 3,300 nays. The minutes of the director's meeting show a vote of 6 yeas and 2 nays on authorization of the contract. In both meetings, Hyrum's representatives voted again authorization of the contract.

It was stipulated at the trial that at the time the contract was authorized, the officers of South Cache had not filed their oaths of office. Prior to a regular meeting of the directors held on November 13, 1951, a quorum of the directors filed their oaths, and on said date the directors voted to approve and ratify the previous action of the board authorizing the contract. (See Exhibit 7). Hyrum has paid installments on the purchase price of this stock to South Cache in each of the years subsequent to the execution of the amendatory repayment contract in the reduced amount pursuant thereto. (R 289-294-5)

ASSESSMENTS OF SOUTH CACHE STOCK

The statement of facts in Appellant's brief respecting assessments consists of excerpts from various documents in evidence and comments and arguments thereon. The Articles of Incorporation, the subscription agreement, and other documents before the court clearly differentiate between two kinds of so-called "assess-

ments''. The first, and the only kind of assessment involved in this case, is technically a "call" for the purpose of paying the purchase price of stock subscribed by Hyrum. The second purpose of assessment is to pay the ordinary administrative expenses of South Cache including expenses of operating project works. No such differentiation is made in appellant's statement of facts respecting the two kinds of assessments.

It is the position of respondent that the subscription contract, Exhibit C, establishes the rights and obligations of Hyrum with respect to calls (assessments) to pay the purchase price of the stock, and is determinative of the case. It requires that Hyrum pay annual installments on the purchase price of its South Cache stock amounting to Hyrum's proportionate share of the payment that South Cache must make to the United States under the repayment contract. The subscription contract, Exhibit C, is of such importance that it is here reproduced for the convenience of the Court.

**SUBSCRIPTION CONTRACT BETWEEN
THE HYRUM IRRIGATION COMPANY AND
THE SOUTH CACHE WATER USERS'
ASSOCIATION**

THIS CONTRACT, Made this 5th day of January, 1934, between the HYRUM IRRIGATION COMPANY, a corporation organized and existing under the laws of the State of Utah with its principal office at Hyrum, Utah, hereinafter referred to as the Company, and the SOUTH CACHE WATER USERS ASSOCIATION, a

corporation organized and existing under the laws of the State of Utah with its principal office at Wellsville, Utah, hereinafter referred to as the Association; WITNESSETH:

2. WHEREAS, the Association was organized, among other things, for the purpose of contracting with the United States for the construction of certain irrigation works in Cache County, Utah, for the storage, diversion and beneficial use of the waters of the Little Bear River and its tributaries for irrigation and other purposes, consisting of a reservoir on the Little Bear River near Hyrum, Utah, known as the Hyrum Reservoir, *and three canals known respectively as the Wellsville Canal (including a pumping plant in connection therewith), the Hyrum-Mendon Canal, and the Hyrum Feeder Canal; and*

3. WHEREAS, the Association has entered into that certain contract with the United States dated October 9, 1933, (hereinafter referred to as the Association-Government contract) for the construction of said Hyrum Reservoir and said three canals (including said pumping plant); and

4. WHEREAS, the United States has acquired for and in connection with said reservoir and said canals certain water and water rights in and from the Little Bear River and its tributaries as represented by the following described water appropriations and filings:

Application No. 10,528, dated No. 20, 1928, for 15,500 acre feet of water to be stored in the Porcupine Reservoir, and 95 second feet of direct flow water to be diverted from the Little Bear River, filed and recorded in the office of the State Engineer of Utah, in Book 1-31 of

Applications to Appropriate Water, on Pages 430 to 432.

Application No. 10,529, dated Nov. 20, 1928, for 20,000 acre feet of water to be stored in the Hyrum Reservoir and 185 second feet of direct flow water to be diverted from the Little Bear, Blacksmith and Logan Rivers, filed and recorded in the Office of the State Engineer of Utah, in Book 1-31 of Applications to Appropriate Water, on Pages 434 to 436.

and may acquire other water and water rights or filings for use in connection with said irrigation works; and

5. WHEREAS, the Company desires to secure a water supply for the use of its stockholders and others through the purchase of shares of stock in the Association and through the construction of said Hyrum Reservoir and said three canals and appurtenant works; and

6. WHEREAS, the construction of said Hyrum Reservoir and said three canals and appurtenant works by the United States depends, among other things, upon the United States being adequately protected, secured and insured in the payment of all sums and charges provided to be paid to the United States by the Association in said Association-Government contract; and

7. WHEREAS, the Company desires to aid in securing the construction of said Hyrum Reservoir and said three canals and appurtenant works by the United States in order that there may be available for its use a water supply as aforesaid; and

8. WHEREAS, the Association will levy assessments upon its stock from time to time for

the purpose of raising funds with which to meet installments due the United States under said Association-Government contract and to raise funds for other expenses and charges of said Association; and

9. *WHEREAS, the Company as a stockholder in the Association will be benefited by the construction of said Hyrum Reservoir and of said three canals and appurtenant works.*

10. NOW, THEREFORE, in consideration of the premises and of the benefits to be derived therefrom the Company agrees to and does hereby subscribe for 3300 shares of stock of the Association and agrees to pay to the Association the full purchase price of said shares of stock and any and all assessments assessed and levied by said Association from time to time against said shares of stock of the Association owned by the Company including such deficiency assessments on account of the anticipated and/or established failure of some shareholder of the Association to pay assessments when due, as may be necessary to enable the Association to pay in full when due the Association's indebtedness to the United States under said Association-Government contract. Assessments levied by the Company hereunder shall conform to the requirements of the Federal reclamation laws now or hereafter enacted.

PURCHASE PRICE OF SHARES OF STOCK

11. The Company shall pay, for the benefit of the United States, as the purchase price of the shares of stock in the Association herein subscribed for, that proportion of the total sums and charges required to be paid by the Association to the United States under said Association-Govern-

ment contract, that the number of shares of Association stock subscribed for by the Company shall bear to the total number of shares of such stock outstanding and assessable at the time the construction of the works described in Article 2 hereof is authorized by the Secretary, unless permitted by the Secretary to use a different number of shares as the basis of computation. In case doubt should arise as to the amount of the purchase price herein assumed by the Company, the matter shall be referred to the Secretary of the Interior (herein referred to as the Secretary) whose finding shall be final and binding on all parties to this agreement. The Company agrees to pay, in addition to said purchase price, the operation and maintenance assessments levied by the Association on company-owned stock in the Association, and should the Company default in the payment of purchase price assessments, and suit or action be necessary to enforce payment thereof, the payment of such operation and maintenance assessments may at the option of the Association be enforced in the same or a similar suit or action.

PAYMENTS TO BE MADE IN FULL

12. The sums or amounts to be paid under this contract (including deficiency assessments as stated in Article 10) as charges due the Association are to be paid by the Company in full without deductions on account of the failure of some of the shareholders of the Company to pay assessments when due, and the Company agrees to levy and collect such deficiency assessments (to cover estimated and/or established deficiencies) as may be necessary to enable the Company to pay such sums or amounts in full when due.

COMPLIANCE WITH RECLAMATION LAW

13. The Company in the distribution of the water supply acquired hereunder shall comply with the provisions of the Act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof or supplementary thereto, particularly those of the Warren Act of February 21, 1911 (36 Stat., 925), and regulations of the United States applicable thereto, and shall not furnish or deliver to any one landowner water in excess of an amount sufficient to irrigate 160 acres of land. The basis, the measure and the limit of the right of the Company to the use of the said water acquired through this subscription for shares of stock of the Association shall rest perpetually in the beneficial application of the same. The Company shall cause said water to be put to beneficial use with due diligence in accordance with the law.

PAYMENT OF OPERATION AND MAINTENANCE CHARGES

14. The Company agrees to pay to the Association such assessments against the shares of stock of the Association owned by it, including deficiency assessments, as may be necessary to pay in full the operation and maintenance expenses incurred by the Association in operating and maintaining the Hyrum Reservoir and appurtenant works used in common by all shareholders of the Association.

COMPANY TO OPERATE AND MAINTAIN CANALS

15. The Company shall arrange to operate and maintain without cost or expense to the Association any and all canals used for the delivery of the Company's water to its shareholders or others supplied by it.

16. It is recognized and understood by the Association and the Company that the only way the company can secure a large part of the water represented by the shares of stock of the Association purchased hereunder, is by making exchanges by which the company will divert the waters of the Little Bear River into its canal at a point upstream from the reservoir, and replace the water so diverted with an equal amount of the company's water from the Hyrum Reservoir, or other source of supply of the company, and the Association hereby consents to the company making such exchanges as are necessary, provided that all exchanging of water by the company will be so done that whenever exchange water is diverted from the Little Bear River above the Hyrum Reservoir, an equal amount of the Company's water will be released from said reservoir in such a manner as to be available for use as power water through the pumping plant, which will be constructed, operated and maintained as a part of the project, to pump water into the Wellsville canal of the project, excepting that each season after 2500 acre feet of water has been so exchanged then the company as against the association may make an additional exchange of water not to exceed three second feet in a manner which will not require an equal amount to pass through said power plant of the project. It is further understood that at such times when the exchanging of water other than said 2500 acre feet of reservoir water and said additional three second feet will not detrimentally effect the operation of the said Wellsville Pumping Plant, the company may make other exchanges which will not require the water replaced in making the exchange in lieu of the water taken above the reservoir, to be passed through the pumping plant. In making any of the

exchanges herein provided for, it is understood that the burden is expressly assumed by the company of securing the consent of the State Water Authorities, and/or of making any other arrangements necessary to permit of said exchanges or any of them being made.

RELATION TO ASSOCIATION-GOVERNMENT CONTRACT

17. It is further understood and agreed that the provisions of the Association-Government contract (a copy of which has been furnished the company), so far as the same may be applicable hereto, shall be deemed to be part of this contract and binding upon the parties hereto.

SUCCESSORS AND ASSIGNS OBLIGATED

18. The provisions of this agreement shall apply to and bind the successors and assigns of the respective parties.

IN WITNESS WHEREOF, the parties have hereto signed their names the day and year first above written.

(SEAL)

Attest: C. C. Petersen

Secretary

HYRUM IRRIGATION COMPANY

By C. J. Christiansen

President

(SEAL)

Attest: Harry C. Parker

Secretary

SOUTH CACHE WATER USERS'
ASSOCIATION

By C. N. Maughan

President

(All italics are added by respondents for this brief)

Hyrum made its subscription agreement (quoted above) over 19 years ago. No objection has been raised by Hyrum as to assessments levied each year pursuant to the subscription agreement until this proceeding. Each year Hyrum has paid its assessment. Hyrum's President said he couldn't remember ever voting against an assessment. (R. 294-5) (R. 289). In fact Hyrum's representatives have been directors of South Cache since its organization, and have actively engaged in the administration of the affairs of South Cache, including the levying of assessments. (R. 291-294) The motion to ask the United States to make the economic survey which preceded the making of the Amendatory Contract, was made by Hyrum's representative on the Board of South Cache (R. 294) and Hyrum has received the benefit of lower assessments and has paid its assessments since 1950. The other stockholders and the United States have relied on Hyrum's subscription agreement and its participation in South Cache as a stockholder.

FINDINGS OF TRIAL COURT

The trial court found, (1) that the execution and delivery of the Amendatory Repayment Contract, dated May 24, 1950, was duly and regularly authorized by the stockholders of South Cache, that Hyrum was estopped from denying that it is a stockholder of South

Cache and that the said contract is a valid and subsisting contract. (R. 98-100) (2) That the decree of April 10, 1943, validating the original repayment contract of 1934, the subscription contracts and mortgages was and is valid and binding (R98), (3) that Hyrum has been assessed and has paid installments on the purchase price of its stock pursuant to Article II of the subscription contract quoted above, for more than 15 years and that such assessments in accordance with the contract are equitable assessments. (R. 100-105)

The court also found that the sum of \$2,584 spent to cement a portion of the Wellsville-Mendon Canal was not part of the construction cost of the project, and has not been included as a part of the obligation to the United States evidenced by the amendatory contract. The court directed that the assessment paid by Hyrum to cover such expenses should be corrected and that Hyrum should be credited with \$766.50 (R. 106) This finding is not involved in the appeal.

The decree states in parts as follows: (R-109)

“That the assessments against the stock of the South Cache Water Users Association for the construction of the Hyrum Irrigation Project including the Hyrum Reservoir, the Hyrum Feeder Canal, Wellsville Canal including Pumping Plant and the Hyrum-Mendon Canal which have been made,

“In proportion to the total sums and charges

required to be paid by the association to the United States under the Association-Government Contract, that the number of shares of the association stock subscribed for by the company shall bear to the total number of shares outstanding and assessable at the time of the construction of the project.”

as levied and collected by the South Cache Water Users Association in the past 17 years have been in accordance with the contractual obligations of the stockholders and were legal and proper calls or assessments against the said shares of stock, and that all future calls or assessments for the purpose of meeting the said construction costs should be made in accordance with the terms of the subscription above set forth.”

POINTS ON APPEAL

Points 1 and 2 of Hyrum’s statement of points on appeal (See page 23 of Appellant’s brief) relate to methods of assessing Hyrum’s stock. Although the assessment question is not the primary question in this case and is not in any sense determinative of the issue to be tried in the special proceeding authorized by Section 73-1-16 U.C.A. 1953 under which the suit was brought, for the convenience of the Court and to conform to the alignment of points set out in Appellant’s brief, the Respondent will discuss these points first under the headings:

1. “The trial court properly held that calls (as-

sessments) should be in accordance with the terms of the stock subscription contract.”

The questions affecting the validity of the amendatory repayment contract (See points 3, 4 and 5 of Appellant’s Brief) will be discussed under the heading:

. ‘The Amendatory Repayment Contract is Valid.’

ARGUMENT

THE TRIAL COURT PROPERLY HELD THAT CALLS (ASSESSMENTS) FOR PAYMENT OF STOCK SUBSCRIPTIONS MUST BE MADE IN ACCORDANCE WITH THE STOCK SUBSCRIPTION CONTRACT

The appellant contends that the court erred (1) in holding that the provisions of the South Cache articles of incorporation requiring an equitable assessments of its stock do not apply to assessments for the purpose of paying construction costs, and (2) that the various contracts documents, including Hyrum subscription contract, its mortgage, and the South Cache articles of incorporation require Hyrum to pay an equal share of all project construction costs. (See appellant’s brief, page 23).

It is respondent’s position, on the other hand, that the parties have, by the express terms of the subscription contract, Exhibit C, set forth in full on pages 8 to 15 of this brief, agreed that calls for the purpose of

paying the purchase price of Hyrum stock in South Cache will be made on a proportionate basis. Hyrum agreed to pay that proportion of the total sums and charges required to be paid by the South Cache to the United States that the number of shares of stock subscribed for by Hyrum shall bear to the total number of shares of stock outstanding and assessable at the time of construction of the Hyrum Project works.

It appears that a good deal of confusion and difficulty in this case has resulted from the loose use of the word "assessment", and the failure, particularly, to distinguish between assessments and calls in considering the language of the articles of incorporation and the subscription contract. It is our position that the parties have made a firm written agreement as to the amount and time of payment of the purchase price of Hyrum's stock in South Cache and that South Cache, in making its annual levy of assessments, must include as an item the amount due on the purchase price of the stock under the subscription contract.

(The terms "call" and "assessment" are frequently used synonymously or interchangeably to denote a demand on a stockholder for a contribution to capital under the terms of the original subscription agreement, although, strictly speaking, an "assessment" is a demand on the stockholders for an amount in excess of the par value of the stock held by them, while a "call" is a demand for the payment of all or a portion of unpaid subscriptions.) (18 C.J.S. 882).

Section 16-4-1, U.C.A. 1953, recognizes the distinction between calls and assessments and codifies an elementary rule of law respecting the powers of boards of directors of corporations as follows:

“The board of directors of any corporation whose stock shall not be full-paid may, for the purpose of paying expense, conducting business or paying debts, levy and collect calls upon the subscribed and unpaid stock thereof in such manner, at such times and in such amounts as may be prescribed in the articles of incorporation *or the subscription agreement* . . . ” (emphasis added).

There is no dispute between the parties hereto as to the annual assessment covering items other than the installment on the purchase price of the stock. It is admitted that as to such items the board of directors has general authority with perhaps some discretion as to what is an equitable basis, but we emphatically insist that the amount to be applied on the purchase price of South Cache stock must be collected strictly in accordance with the subscription contract which provides that it shall be on an proportionate basis, and has been accepted and adhered to by all interested parties for the past 17 years.

Let us examine the articles of incorporation to determine whether they contain any provision respecting the levying and collection of calls. Assessments are mentioned in Articles IX, X, XI, and XV of the articles of incorporation, (Defendant's Exhibit A.) In Articles

IX and X appears the identical language

“The stock of this corporation shall be assessable”.

This is obviously a provision for assessment of all stock of the corporation, whether fully paid or not for all corporate purposes. It is not a provision for a call.

Article XI relates to the sources of corporate revenue and includes an item (b) indicating that one source of revenue is the proceeds from assessments against shares of stock for the numerous purposes therein mentioned. Item (c) provides:

“Assessments against the outstanding shares of stock for the raising of revenues, as aforesaid, shall be equitably, but need not be equally, assessed. This provision for equitable but unequal assessments is to take care of situations where expenditures are made or are necessary for purposes that are of benefit to a part only of the stockholders, or where existing or future contracts with the United States or the laws or regulations of the United States now or hereafter require unequal assessments, or where unequal assessments are required or permitted by the terms or conditions of any contract between the corporation and any stockholder.”

There is nothing in Article XI which indicates that this provision applied to calls as distinguished from other assessments. It was obviously inserted to indicate assessments for all purposes as a source of revenue.

Article XV has to do with stock subscriptions, and

in the main relates to (1) security for payment of stock subscriptions, (2) foreclosure of mortgages or liens given for security of such subscription, and (3) assessments. The part relating to assessments provides:

“At the time such shares of stock are sold to the subscriber therefor, such subscriber shall be required to pay an assessment of Fifty Cents (\$0.50) per share, and annually on or before the first (1st) day of February of each year the board of directors shall prepare a budget covering the estimated cost of operation, maintenance, construction work, payments due on contracts or bonds, and any other expense or costs for the ensuing year and shall apportion the estimate so prepared by an assessment or assessments equitably but not necessarily equally against each share of stock outstanding. Such assessments shall be paid on a date and in a manner provided by the board, but in no event later than the opening of the irrigation season in that year.”

It will be observed that Article XV requires a deposit of 50 cents per share at the time the stock is sold. This is referred to in the articles as an “assessment”. This is very clearly the down payment on an installment contract for the purchase of stock. The article then directs the board of directors to prepare a budget covering the following items of expenses or costs for the ensuing year which are listed and indicated by letter for convenience in this discussion.

- (a) Operation
- (b) Maintenance

- (c) Construction Work
- (d) Payments due on contracts or bonds
- (e) Other costs and expenses

The board is then directed to apportion the estimate so prepared by an assessment or assessments “equitably but not necessarily equal against each share of stock outstanding”.

It is significant that there is no provision in the articles of incorporation which declares that either assessments or calls *shall not be equal*. The board of directors is simply given general authority to levy assessments and calls to pay the corporate obligations. The articles constitute a grant of authority but do not specify in detail as to how assessments shall be made except the general assertion they shall be equitable but need not be equal. The *detail* as to the amount and time of calls upon subscribed stock which is not full-paid (after the initial assessment or deposit of 50c per share) *is not specified*. *This is not surprising. Ordinarily, such matters are covered by the subscription contract.* This was the case here. Article XI of the subscription contract in plain, unequivocal language provides:

“PURCHASE PRICE OF SHARES OF STOCK”

11. The Company shall pay, for the benefit of the United States as the purchase price of the shares of stock in the Association herein subscribed for, that proportion of the total sums

and charges required to be paid by the Association to the United States under said Association-Government contract, that the number of shares of Association stock subscribed for by the Company shall bear to the total number of shares of such stock outstanding and assessable at the time the construction of the works described in Article 2 hereof is authorized by the Secretary.

The "works" referred to in Article 2 are described as follows:

"Certain irrigation works in Cache County, Utah, for the storage, diversion and beneficial use of the waters of the Little Bear River and its tributaries for irrigation and other purposes, consisting of a reservoir on the Little Bear River near Hyrum, Utah, known as the Hyrum Reservoir, and three canals known respectively as the Wellsville Canal (including a pumping plant in connection therewith), the Hyrum-Mendon Canal, and the Hyrum Feeder Canal."

At page 10 of Appellant's brief, attempt is made to dispose of the legal effect of the terms of the subscription contract which fix the items that are to be included in the costs of the original project as above set forth by arguing, that this provision in the contract is for the benefit of the United States, so that the United States would be assured that the construction costs would be paid. We answer that it was not only for the benefit of the United States (payee) but also for the benefit of the other parties to the project (payors). It is just as import for the payors to know what proportion of the project they are obligated to pay as it is for the United States to know from whom it will be

paid. This argument of appellant is wholly without merit. There is nothing inconsistent between the articles of incorporation and the subscription contract. The former, as is customary, contains broad grants of authority to the board of directors, and the latter spells out the amount and time of the annual call against the stock to pay the purchase price thereof.

The articles of incorporation and the subscription contract must be read and construed together. If the documents are so construed, it is clear that items in Articles XV, listed above as (a), (b), (c) and (e), may be paid by equitable assessments which may or may not be equal, but item (d) must be paid by calls made on a proportionate basis because any other basis would violate the express provisions of Article II of the subscription agreement, quoted above.

Hyrum contends that South Cache is required by the general language of the Articles of Incorporation to make calls according to benefits received regardless of the express provisions of the subscription contract requiring calls on a proportionate basis. The law does not support this contention. The rule has been stated as follows:

“A general power in the charter of the corporation to make calls for installments *will not permit the making of calls in violation of the terms of the written contract of subscription.*”
18 C.J.S. 885 (emphasis added)

In the case of *Roberts v. Mobile and Ohio R. R. Co.*, 32 Miss. 373 a charter of the railroad company provided that the company had the right “to call for installments of stock at such times and in such amounts as they might think proper.” A subscription contract contained specific limitations as to the times and amounts of payment. The question was raised as to whether calls could be made without regard to the specific provisions of the subscription contract. The Court held:

“And it is immaterial that the company had the right by their charter to call for installments of stock at such times and in such amounts as they might think proper. They also had the right to make contracts for the payment of stock, subject to conditions as to calls for installments; and if they had not, this contract is without legal authority and invalid which will scarcely be contended for in behalf of the company. *The right to call for payment of installments of stock under the general power of the charter, would give them no power to make such calls at times or for purposes in contravention of their positive agreement entered into between them and subscribers at the time of subscribing, and incorporated into the written contract.*” (emphasis added)

SUBSCRIPTION CONTRACT IS ONE OF A SERIES
OF SIMILAR CONTRACTS EQUALLY RELIED
UPON AND BINDING ON ALL THE STOCK-
HOLDERS TO FINANCE THE HYRUM PROJECT

That the board of directors must levy proportionate

call assessments for the purchase price of the stock, as provided by the subscription contract, is clear for another reason. It is one of a series of such contracts for the financing of the reclamation project. The basic documents consist of the articles of incorporation, the repayment contract with the United States, and the subscription contracts with Hyrum, Wellsville City Irrigation Company and Wellsville-Mendon Conservation District. In the original repayment contract, the South Cache agreed to make an annual payment to the United States amounting to 1/40th of the sum of \$930,000, with the proviso that in case the total cost of the project works was less than \$930,000, the amount to be repaid would be proportionately reduced. This item of cost was considered the construction cost of the project and each stockholder, by its subscription contract, agreed to pay for its stock by paying its proportionate share of that amount each year. Each agreement is just as definite and certain as to the amount and time of payment as words can make it. Each subscriber relied upon each other subscriber when it signed its subscription contract. If the Court were to hold that the board of directors had authority to ignore the subscription contract and reduce the payment to be made by Hyrum it would, by the same token, have to authorize the board to increase the annual call against Wellsville City Irrigation Company and the Wellsville-Mendon Conservation District, the other stockholders, in order to meet the annual payment due the United States. This,

of course, cannot be done. It would in effect require the board to write new contracts for the several contracting parties.

IN VIEW OF THE FIRM AGREEMENT BY HYRUM TO PAY CALLS ON ITS STOCK ON A PROPORTIONATE BASIS IT IS BOUND BY THAT AGREEMENT AND THE CASE SHOULD PROPERLY END THERE. ALL THE PAGES OF RECORD AND ARGUMENT ATTEMPTING TO ESTABLISH THAT THIS IS AN INEQUITABLE CONTRACT BY REASON OF THE RELATIVE COSTS OF DIFFERENT PORTIONS OF THE PROJECT, THE FLOW OF LITTLE BEAR RIVER, AMOUNT OF PROJECT WATER USED BY HYRUM, ETC. BECOME ENTIRELY IMMATERIAL.

However, we believe it our duty to very briefly challenge at least a portion of these arguments.

1. On page 11 of appellant's brief it is stated:

"It is not disputed that the main canals which were constructed *** were not to any extent constructed for the benefit of Hyrum."

This we say is not at all a fact. True Hyrum does not take any water directly out of those canals into its canals for use by its stockholders, but those canals are a necessary part of the project. In order to build a project it must be built for use. The reservoir would never have been built if there were no canals to take

the water after it was stored in the reservoir. It makes no difference whether Hyrum or Wellsville or which stockholders use a direct flow from the reservoir and others get the water by exchange. It takes it all to make the project. The parties understood this when they made the contract fixing what was necessary in the matter of irrigation works to make the project possible. Hyrum cannot be heard to say we do not use your ditches although they are a necessary part of the project.

(2) On page 13 of appellant's brief it is argued that the method of assessment of stock is inequitable because of the use of the direct flow of water during the high water season. This to say the least is a very trivial matter. During the early spring run-off there is water to fill the reservoir and to also fill all the ditches and canals including the Hyrum Canal and all of the parties can use as much of this water as they can use beneficially. If they do not use it then it will run off down to the Bear River and be wasted. The ditches are there, it does no one any harm to use them but counsel says because we had our canal and yours were built in the project you are getting an unfair advantage. This comes to the same place as (1) the canals were a necessary part of the project when it was built and by agreement were made and understood to be such necessary part of the project.

(3) On page 15 Appellant argues "Third Hyrum contends that it is not able to get and does not get its

storage water.” While it is conceded that this is the “least important” contention, on page 17 of the brief Appellant states “Hyrum was sold a bill of goods”. Many pages of record as well as the brief are spent on this item. We are not disposed to spend time on it except to say that this argument is not based upon the fact that Hyrum cannot *get* the waer conracted for but on the proposition that during high water years when the run-off in Little Bear River is sufficient to fill Hyrum’s Canal and at the same time supply the prior appropriators, Wellsville East Field Irrigation Company, then they have no need to exchange water with Wellsville and they get no use out of the storage waters. But the project was not built for high run-off years. In high run-off years there was much less call for storage waters. It is primarilyally useful in years when there is a shortage of natural run-off water. In those years when the natural flow of the stream is below 30 c.f.s. at the Wellsville point of diversion then Hyrum must permit all the water to pass its Avon point of diversion. This is because of the Kimball Decree (Pet. Ex. J) The records of the Water Commissioner all in evidence and summarised in Pet Ex 9 that in every year of drouth between 1937 and 1947 Hyrum received in excess of 3300 acre feet of storage waters and on the average for those 10 years they received 3080 acre feet of storage water by exchange.

For example: Hyrum received the following:

1939	3519 acre feet;
1940	4202 acre feet;
1941	3968 acre feet;
1942	4222 acre feet;

All of the above were by exchange and in addition during those same years Hyrum received 47,40,55 and 69 feet respectively through its Feeder Canal. (Pet Ex 9 R. 308-23)

The argument that the Commissioners reports are erroneous is founded upon the testimony of the witness Gardner (R151-3) At best this testimony is disputed by the commissioners reports and where disputed this court will not overturn the courts finding where there is competent evidence to support the judgment. Besides the commissioners reports are made by competent government agents who are disinterested as to the outcome of this action and are made for the purpose of keeping a complete history and record of the project.

The argument that Hyrum had 3 c.f.s. of equal priority with Wellsville is invalid. This water was for the use of stockholders in the Hyrum Irrigation Company owning lands that are within the Hyrum dam. These lands and the stock in Hyrum Irrigation Company entitled to the use of these waters were all acquired by South Cache and Hyrum can claim no basis in fact for their right to divert water at Avon for these waters that arise below the Avon point of diver-

sion and were formerly used upon the lands now covered by the waters in the dam. (R 254) (R 363)

(4) Just one more. At page 18 it is argued "Hyrum, back over the years was able to maintain a tight dam at Avon." The Kimball Decree entered in February 1922, gave Hyrum a priority after the date of Priority of Wellsville. They could not maintain a tight dam at Avon unless the flow of the Little Bear River reaching the Wellsville Point of diversion was 30 c.f.s. They had lived under that decree from 1922 to 1933 and their rights with respect to a tight dam were well known to them. For them to now argue that they had such a right only serves to establish the inherent weakness in the entire case of appellant. It is an attempt to not only strike down the Kimball Decree but to in effect defraud the other stockholders by repudiating their subscription agreement.

All these matters might have been relevant if the parties were negotiating a new contract, and we must assume they were considered when the contracts in suit were negotiated and executed, but they can have no bearing in this case. Proof that the nature of the right to the use of water to be acquired by Hyrum and the benefits to be received were considered in contract negotiations is found in Article 16 of the Hyrum subscription contract, (Exhibit C) which provides as follows:

"16. It is recognized and understood by the

Association and the company that the only way the company can secure a large part of the water represented by the shares of stock of the Association purchased hereunder, is by making exchanges by which the company will divert the waters of the Little Bear River into its canal at a point upstream from the reservoir, and replace the water so diverted with an equal amount of the company's water from the Hyrum Reservoir, or other source of supply of the company, and the Association hereby consents to the company making such exchanges as are necessary."

This entire paragraph is devoted to the details of such exchanges.

We have no quarrel with the statement of legal principles in the numerous cases cited by appellant respecting equitable assessments, but simply observe that they are not in point. They deal with (1) statutory water assessments to pay the salaries and expenses of water commissioners, (See pp. 37-42 of Appellant's Brief) irrigation district assessments, which are statutory (see cases cited p. 32-36, Appellant's Brief), and (2) statutes containing ambiguous language. These cases, obviously, have no application whatever to a case such as the one before the Court in which the parties have spelled out the method of determining the amount of the annual call by stating that it is a proportionate part of the annual payment due the United States under the repayment contract.

One of Appellant's major points, stated on page

28 of its Brief, is “the provision requiring equitable assessment of stock to pay construction costs are matters of contract and cannot be circumvented by the director”. Our answer to this point can be briefly summarized as follows:

There is nothing in the articles of incorporation forbidding the levying of equal assessments or declaring that equal assessments are not equitable. The subscription contract requires calls for payment of the purchase price of the stock to be on proportionate basis. The subscription contract supplements the articles, and is not inconsistent with them in any particular. To paraphrase appellant’s statement of the point “the provisions of the subscription contract requiring proportionate calls to pay the purchase price are matters of contract and cannot be circumvented by the directors”. We insist that calls must be on a proportionate basis because otherwise the contract would be circumvented.

The validity of the subscription contract was confirmed by the District Court of Cache County on April 10, 1943, in the following language:

“And it is Further Adjudged and Decreed that all acts and proceedings taken for the authorization of said subscription contract and said mortgage are valid and lawful”. (R 98)

It is too late now for appellant to urge that the subscription contract was invalid or inequitable. Those

questions were settled by the court in 1943. If the Court should accede to the demands of Hyrum, it would (1) be rewriting a contract now more than 20 years old and under which contract Hyrum paid its annual calls upon a proportionate basis without objection until the counter-claim was interposed in this suit, and (2) be increasing the amounts the other stockholders in South Cache, are required to pay under their subscription contracts, and (3) probably provoke a series of lawsuits between the remaining stockholders. This could very well ruin the project and many people living under it.

THE AMENDATORY REPAYMENT CONTRACT IS VALID

Appellant's points on appeal, Nos. 3, 4 and 5, will be discussed under this heading.

The amendatory repayment contract of May 24, 1950, which the trial court held valid, legal and binding, is a contract between the South Cache Water Users' Association, a corporation, and the United States of America, and amends the previous repayment contract between these same two parties (Exhibit B). The Hyrum Irrigation Company is not a party to the amendatory contract.

The Articles of Incorporation of South Cache, in Article V, recite the powers of South Cache, as follows: (See Exhibit A)

“And for carrying out the purposes set forth, the corporation shall have the power to incur indebtedness, issue bonds, contract with the United States or other parties for the purchase, acquisition or lease of water, water rights, lands, easements, dams, reservoirs, canals, irrigation works, drainage works, pumping plants, power systems or parts thereof, water works, and other property incidental to the business of the corporation; also to contract with the United States or other parties for the construction of or to construct all such works and to do all other acts and things necessary to carry on the pursuit and business agreed upon; also to mortgage, pledge or otherwise encumber its property, real or personal, to secure the payment of its debts or obligations.”

A reading of these powers clearly shows that South Cache could legally enter into a contract as the 1950 amendatory contract with the United States. Specific power to contract with the United States is given as well as specific power to incur indebtedness.

All shares of stock issued and outstanding and entitled to vote were represented at the stockholders' meeting duly called and held for the purpose of authorizing execution of the amendatory contract in behalf of South Cache. (See Exhibits 1, 2, 3, 5 and 6).

The board of directors of South Cache is given the power to transact the ordinary business of the corporation, including the making and execution of contracts, but cannot make a contract in an amount exceeding

\$10,000.00 without a majority vote of the stockholders. Such a vote was obtained. (See Exhibit 5). The record shows that a meeting of the stockholders of South Cache was duly called and held on the 24th day of May, 1950, at which meeting 7,825 shares of stock voted in favor of making said amendatory contract, and 3,300 shares of stock voted against making said contract out of a total of 11,125 shares entitled to vote at said meeting. (Ex. 5) The record also shows that the execution of the amendatory contract was authorized by the board of directors at a meeting duly called and held on the 24th day of May, 1950, at which meeting 6 directors voted in favor of making said contract and 2 directors voted against making said contract out of a total of 9 directors. It is apparent, therefore, that the trial court properly held that the Association could enter into the amendatory contract with the United States, having followed the requirements of its Articles of Incorporation to authorize its board of directors and its President and Secretary to execute the contract, and that they did execute the 1950 contract pursuant thereto. (Ex. 6)

It was stipulated at the trial that at the time the amendatory contract was executed that the board of directors had not signed their oaths of office (R. 158). Such corporate officers having failed to file oaths may not be "de jure" officers. *Schwab v. Frisco Min. Co.* 21 Utah 258, 60 P. 940. But, their acts as "de facto" officers are valid as to third persons, and in this case,

the United States. The rule is stated in 19 C.J.S. 76:

“The acts of the de facto officers and directors, if otherwise legal, are, as to third persons, valid and binding on the corporation to the same extent as those of de jure officers or directors.”

“A person acting publicly as an officer or director of a corporation is presumed to be rightfully in office so far as the rights of third persons are concerned”. (citing cases).

Their acts will not be set aside, no one appearing to have been misled or injured by such irregularity. And the Supreme Court of Utah has said in *Hatch v. Lucky Bill Min. Co.* 25 Utah 405, 71 P. 865:

“We are of the opinion, and so hold, that the irregularity (failure to file oaths of office) is not of sufficient importance to authorize a court of equity to set aside the proceedings; and especially so when, as in this case, no one appears to have been misled or injured thereby”.

The record shows, and the appellant admits (R. 158) (Pet Ex 7) that all officers of South Cache who executed the 1950 contract have since filed their oaths of office and ratified the 1950 contract, except for Hyrum’s representatives who have refused to do so. Since the directors were at least “de facto” officers of South Cache in their authorization of the amendatory contract, the trial court properly held that the amendatory contract was legally authorized by the board of directors of South Cache. (R. 158)

If the court were to strike down this contract for

the simple reason that the Directors and officers had failed to file their oaths of office nothing would be accomplished because there is nothing to prevent the same officers from at any time entering into an identical contract. Equity ordinarily is not interested in doing a useless thing.

In other words equity looks to the substance of the transaction between the parties and not to matters of form or technicalities *Hansen v. Abraham Irr. Co.* 82 Utah 361 25 P. (2d) page 76.

There are many similar cases adopting this principal under key number equity 56 which are not here listed because of the length of this brief.

Appellant's point on appeal No. 3 (Appellant's Brief, 49, 50) challenges the right of South Cache to make an amendatory contract with the United States which increased the indebtedness of South Cache, but no reference is given to any document which so limited the powers of South Cache. In fact, there are no such limitations, and to the contrary, the powers of South Cache are board as outlined above. The stockholders of South Cache authorized the amendatory contract, and such a contract, being within the express powers of South Cache is binding upon the parties thereto. Appellant's argument that Hyrum did not agree as to the terms means nothing, and does not alter the situation as between South Cache and the United States, the

parties to the amendatory contract. Hyrum was not a party to the contract.

Nevertheless, it may be appropriate to say something about the item of the cost of the economic survey which increased the over-all project costs as reflected in the 1950 amendatory contract. Under the Reclamation Law, a water users' organization cannot be eligible for relief unless the results of an economic survey show that the farmers' ability to pay merits such relief. The decision of South Cache to request the United States to make the study was voted on at regular meetings at which Hyrum was present, and actively participated. (R. 294). After the survey was completed, and the terms of the 1950 contract were submitted to South Cache by the United States, the motion to accept such terms was made by Hyrum's representative on the board of directors of South Cache. (Pet Ex 5). The increased amount of \$14,000 is of little significance when it is realized that the terms of the amendatory contract permitted an extension of time in payment of the total obligation to the United States an additional 16 years and that such extension was granted without interest. Ex. 4) We have before pointed out that the saving of interest far offsets the additional amounts added to the prior contract between the parties.

If this amendatory contract is declared to be void Hyrum will be in no way benefited but they will be required to pay their proportionate part of the con-

struction costs on a 40 year basis rather than a 56 year basis.

All of the elements of an equitable estoppel are present here. Hyrum participated in all of the deliberations relative to this amendatory contract, including the request to the United States to make the economic survey. South Cache and the United States have relied upon Hyrum's representative's participation. The economic survey was made, the contract prepared, authorized and executed by South Cache and the United States, and furthermore it was expressly and specifically authorized by the Congress of the United States, and payments have been made and accepted since 1950. In view of the foregoing, the trial court properly found that Hyrum is estopped to question the validity of the amendatory repayment contract including the additional item of the cost of the economic survey.

Appellant's arguments (See Appellant's Brief, 50, 51) reciting reasons why the lower court should not have ratified the amendatory contract are wholly extraneous to the issues of this case. The motives of Hyrum in this litigation are called into question when it is argued "We feel that the Government has constructed a 'white elephant', and that Congress should give relief to all of the water users, including the other stockholders on this project. As a result of persistent complaints, the Government has sponsored this amendatory contract, but it does not go nearly far enough".

(Appellant's Brief 50). Why should Hyrum argue in this case what Congress should have done, or should not have done? This is not before this Court. Can it be that Hyrum is endeavoring to use this Court to make a record on which to base a further appeal to the Congress.

Reduced to fundamentals, Hyrum asks that the Court make new contracts between South Cache and the United States, as well as new contracts between South Cache and each of its stockholders. That the Court cannot and will not do this has been clearly announced. See *Johnson v. Utah-Idaho Concrete Pipe Company, Utah*....., 223 P. 2d. 418.

Approval of contract:

At pages 54 and 55 of Appellant's brief the approval or ratification of the Amendatory Contract by the stockholders of South Cache is challenged. It is argued (1) that there was no notice of stockholders meeting, (2) that the representative of Hyrum at the meeting was without authority to act (3) that there was no proper notice of a directors meeting.

The stockholders meeting was held upon call and waiver (Pet Ex 1 and 2) This call and waiver was signed by the regular appointed representative of every Stockholder of South Cache and every stockholder was present and represented at the meeting. The Hyrum representative at the meeting voted against the approval

of the contract. Owners of a majority of the stock of South Cache voted in favor of approval of the contract. Counsel does not tell us what additional notice of the meeting he thinks should have been given but no matter what notice could have been given Hyrum could have done no more than be present and vote against the approval of the contract, which they did. The nature or amount of notice therefore becomes immaterial.

A similar complaint about the notice of the directors meeting is answered in the same manner by reference to the minutes of that meeting (Pet Ex 7) and the Utah cases cited at page 54 have no application here.

A resolution passed by the stockholders of Hyrum in 1933 (Exhibit 8) granted wide and express authority, but Hyrum contends this authority is too old. There was no evidence that such authority was ever revoked, in fact, the evidence was that Hyrum always had its agents present and voting at all of South Cache meetings. (R 294). This is purely a question of agency. The President of Hyrum was the agent of Hyrum as far as South Cache was concerned and he was ostensibly regarded as such agent by both South Cache and Hyrum. In *Robinson Reduction Co. v. Johnson*, 10 Colo. App 135, 50 P. 215, the court said:

“If a director or corporate officer is expressly authorized to act for the corporation as its agent

in a particular matter or he is entrusted with the general management of the corporation, or clothed with apparent authority by being permitted to act . . . his acts are binding, not because he is a director or officer, but because of his being expressly or impliedly clothed with authority”.

See also, *Guillaume v. KSD Land Co.*, 48 Ore. 400, 86 P. 883, 88 P. 586.

Hyrum's President was not only the express agent of Hyrum in South Cache, (Rec.) he was also the ostensible agent. Hyrum held him out as its agent, and where a corporation holds out an officer as its agent, such corporation is, of course, bound by his acts. See *Dockstader v. YMCA* (Iowa) 109 N W 906; *Wagner v. St. Peter's Hospital*, 32 Mont. 206, 79 P 1054. South Cache and the United States, in any event, relied and had a right to rely on the authority of the President of Hyrum is bound by its representative's action in representing Hyrum.

SUMMARY

To summarize:

1. There are two unrelated issues involved in this case, one on the validity of the 1950 amendatory repayment contract and the other, whether the respondent has been assessing its stock properly.

2. The trial court properly held that the 1950 amendatory repayment contract was valid.

a. The respondent was clothed with broad contractual powers in its articles of incorporation and specifically had the power to contract with the United States for the purposes expressed in the 1950 amendatory repayment contract.

b. The contract was duly and regularly authorized by the stockholders and directors of the respondent and it was properly executed and delivered.

c. The failure of the members of the board of directors of the respondent to file oaths of office at the time the amendatory contract was executed was not sufficient to defeat the legality of the contract since the directors were at least "defacto" officers of the corporation and as such could bind the corporation; and in any event the amendatory contract was subsequently ratified by the board of directors after oaths of office were filed.

d. Hyrum is estopped to deny the legality of the amendatory contract because of its participation in its execution, the receipt of benefits, and the reliance by the United States, South Cache, and the other stockholders.

THE RESPONDENT HAS BEEN ASSESSING ITS STOCK PROPERLY

a. Calls (assessments) on the purchase price of the stock subscribed made on a proportionate basis as de-

fined in appellants subscription contract with respondent are legal and proper.

b. The articles of incorporation of the respondent permit its board of directors to make assessments which need not be equal, and such power of assessment is a general authority to assess and is not inconsistent with, nor does it invalidate, specific requirements that calls (assessments) on the purchase price of respondents stock be made on a proportionate basis as provided in the subscription contracts.

c. To require respondent to assess its stock to meet payments due the United States under the repayment contract on any other basis than prescribed by the subscription contracts would have the effect of making new contracts for each subscriber, which the court has no authority to do, and such action would provoke endless litigation.

d. There is no inequity in requiring the appellant to pay what it agreed to pay in its subscription contract with respondent.

It is respectfully submitted that the judgment of the trial court should be affirmed.

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