

1954

Jane B. Carter v. George S. Spencer et al : Brief for Appellants

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Carter v. Spencer*, No. 8249 (Utah Supreme Court, 1954).
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In the Supreme Court of the State of Utah

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JANE B. CARTER, also known as
MRS. J. W. CARTER,

Plaintiff and Respondent,

vs.

GEORGE S. SPENCER, GEORGE J.
CANNON, LAURENCE E. ELLI-
SON, JAMES E. ELLISON, MOR-
RIS H. ELLISON, J. WM. KNIGHT,
ELLISON RANCHING COMPA-
NY, a Nevada Corporation,

Defendants and Appellants.

Case No. 8249

FILED
OCT 25 1954
Court, Utah

BRIEF FOR APPELLANTS

J. D. SKEEN

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vs.

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SON, JAMES E. ELLISON, MOR-
RIS H. ELLISON, J. WM. KNIGHT,
ELLISON RANCHING COMPA-
NY, a Nevada Corporation,
Defendants and Appellants.

Case No. 8249

BRIEF FOR APPELLANTS

STATEMENT OF CASE

This suit was instituted in the District Court for Salt Lake County, by plaintiff against the individuals named as Directors of Ellison Ranching Company of Utah, and against the Ellison Ranching Company of Utah and the Ellison Ranch-

ing Company of Nevada for the purpose of securing the following relief:

1. That the transfer of the assets of the Ellison Ranching Company of Utah to the Ellison Ranching Company of Nevada be declared void.

2. That the individual Directors, as defendants, be ordered to reconvey the assets of the Ellison Ranching Company of Utah, theretofore transferred to the Ellison Ranching Company of Nevada, and that the Directors be directed to proceed to liquidate the assets and distribute the proceeds from such liquidation among the stockholders, including the plaintiff, and

3. For judgment against the individual defendants for \$15,700.00, and for costs.

The Ellison Ranching Company of Utah was organized under the laws of the State of Utah in 1910 for the purpose of acquiring ranching property in the State of Nevada and conducting a ranching business (Plaintiff's Exhibit 8). Accordingly, it acquired many ranches and livestock of considerable value in Nevada, and continued business as a Corporation organized under the laws of the State of Utah, qualified to do business in Nevada and Utah.

On the 19th day of May, 1952, the President of the Ranching Company called a meeting of the stockholders, to be held at its office at Layton, Utah on the 29th day of May, 1952, for the purpose of acting upon a resolution for the reorganization of the said Corporation under the laws of the State of Nevada. A copy of the proposed resolution was

attached to the notice. The notice with the resolution was mailed to the plaintiff, Jane B. Carter, and was received by her (Plaintiff's Exhibit 1). She discussed the resolution with her son, James W. Carter. They determined that they had no objection to the passing of the resolution, and she gave her son power of attorney to attend the meeting (Defendants' Exhibit A). The son, James W. Carter, is a graduate of the University of Utah Law School. When the special meeting of the stockholders was called, Carter was elected secretary of the meeting. He wrote up a draft of the minutes of the meeting (see minute book, Plaintiff's Exhibit 8, at page 289; also the Notice of Stockholders' Meeting with the Resolutions attached). (See also draft of minutes written by James W. Carter as secretary of the meeting, Plaintiff's Exhibit 3). There is no conflict in the evidence as to the facts thus stated.

The resolution attached to the notice of the meeting (Plaintiff's Exhibit 1) is as follows:

"BE IT RESOLVED by the stockholders of the Ellison Ranching Company duly assembled in a special meeting that this corporation be reorganized under a plan as follows:

1. That a corporation be organized under the laws of the State of Nevada by stockholders of this corporation; that the name of "Ellison Ranching Company" be adopted and that the Articles of Incorporation of said corporation be in form substantially as the proposed Articles of Incorporation presented with this Resolution.

2. That all of the stock of the stockholders of the Ellison Ranching Company, a corporation, organized under the laws of the State of Utah, be exchanged

share and share alike for the stock of the Ellison Ranching Company, a corporation, organized under the laws of the State of Nevada.

3. That simultaneously with the exchange of said stock, that this corporation transfer to the Ellison Ranching Company, a corporation, organized under the laws of the State of Nevada, all of its real, personal and mixed property of every character and wherever located, in full payment of 7952 shares of the voting capital stock of the par value of \$397,600.00, of the said Ellison Ranching Company, a corporation, of the State of Nevada, subject to the assumption and payment by the said Ellison Ranching Company of the State of Nevada of all of the debts of every character of the Ellison Ranching Company, a corporation of the State of Utah.

4. That the President and Secretary of the Ellison Ranching Company of the State of Utah be, and they are hereby authorized and directed to consummate the reorganization of the Ellison Ranching Company, a corporation of Utah, in the manner herein specified and that all authority necessary to fully consummate said reorganization is hereby conferred upon the said President and Secretary of this corporation.

5. This organization to be effected as at the close of business May 31, 1952."

The following is a copy of the minutes written by James W. Carter, secretary (Plaintiff's Exhibit 3):

Minutes of Special 4 P.M. Stockholders Meeting
Meeting read by Morris Ellison.

Moved Meeting Organization—Laurence Ellison.
Passed No. 1 resolution on motion of Mr. Smoot,
2nd of L. E. Ellison.

No. 2 resolution passed on motion of Mr. Knight,
2nd of Mr. J. Ellison.

No. 3 resolution on Incorporators of new Company
—Articles Discussion on Mr. Burton

New Officers.

Discussion of assessable shares.

On motion of J. E. Ellison to accept Articles and
By-Laws of New Corporation seconded by Mr.
Knight.

Proposed Articles approved by members present.

Mr. Carter present but not voting on this resolu-
tion.

Motion to adjourn Special Meeting by Mr. Smoot.
Copy articles in these minutes.

Make minutes of organization meeting on Board of
Directors.

After the voting, the President announced the vote on
the resolution as carrying unanimously (See Deposition of
Morris H. Ellison, page 26). Subsequently Morris H. Ellison
wrote up the minutes as they appear in Minute Book, Page
289, Plaintiff's Exhibit 8.

After the passing of the resolution attached to the notice
the president presented the proposed Articles of Incorporation
of the Ellison Ranching Company of Nevada to the stock-
holders for approval. Carter's draft of the minutes reads:

"On motion of J. E. Ellison to accept Articles and
By-laws of new Corporation seconded by Mr. Knight,
proposed Articles approved by members present; Mr.
Carter present but not voting on this Resolution."

James W. Carter refrained from voting for the adoption of the Articles.

The stock of both the Ellison Ranching Company of Utah and the Ellison Ranching Company of Nevada was assessable, and there was no substantial difference between the proposed Articles and the Articles of the original Corporation.

After the stockholders' meeting had adjourned, and after the stockholders had separated, James W. Carter approached Morris H. Ellison and expressed dissatisfaction with the management of the corporation, in that a statement that was read at the first meeting disclosed a large amount of liquid assets which Carter thought ought to be distributed as dividends among the stockholders (see testimony of Morris H. Ellison, Tr. 165, and Laurence E. Ellison, Tr. 151). No request was made by Carter for the reconvening of the meeting, and no objection was made by him, except as stated to Morris H. Ellison.

Morris H. Ellison, after the failure of the plaintiff to deliver her stock for transfer, wrote the plaintiff a letter requesting her to send the stock in, and stated that he knew of the objections or the dissatisfaction hereinabove referred to (Deposition of Morris H. Ellison, page 27).

After the meeting of the stockholders on May 29th, the Ellison Ranching Company of Nevada incorporated, and all of its stock, constituting the same shares as were issued by the Ellison Ranching Company of Utah, was issued to the stockholders of the Ellison Ranching Company of Nevada, including the plaintiff, and all the assets of the Ellison Ranch-

ing Company of Utah were transferred to the Ellison Ranching Company of Nevada. No change was made, whatsoever, in the assets, the stock issued, or the manner of conducting business; excepting only the place of incorporation was changed. (See Deposition of Morris H. Ellison). Notice of all of the proceedings leading up to the dissolution of the Ellison Ranching Company of Utah was given to stockholders, including the plaintiff.

The plaintiff in her deposition (p. 3), said, in response to the question:

“Your purpose then in writing this (Exhibit 4) was to get \$300 a share for your stock, and it was not for the purpose of preventing the reincorporation or the merger into the Nevada corporation, was it?”

“I think not.”

She demanded \$300.00 a share for the stock.

No objection was made by plaintiff to the disincorporation of the Utah Corporation, and the decree of the District Court in Davis County, in all respects, was regular and final.

On the 14th day of October, 1953, after the president and secretary of the Ellison Ranching Company of Utah had complied strictly with the directions of the stockholders in the resolution hereinabove quoted, the plaintiff instituted this proceeding, alleging that

“That plaintiff, by and through her duly authorized, constituted, and appointed proxy, at said stockholders’ meeting, objected to said resolutions. That, notwithstanding such objection, the said Board of Directors of Ellison Ranching Company, a Utah Corporation,

did proceed with the organization of the new corporation, did proceed to convey the assets of Ellison Ranching Company, a Utah Corporation, to the said Nevada Corporation, and did proceed to dissolve the Ellison Ranching Company, a Utah Corporation" (Tr. 3).

The facts as above stated are made to appear by resolution hereinabove set out, the minutes of the meeting of the stockholders, the depositions of James W. Carter, Jane B. Carter, and Morris H. Ellison, and the fact as to the voting of said resolution are not in controversy. The trial of the case was begun in the District Court, and evidence pertaining to the meeting, the resolution, minutes, and the depositions were offered and received. Thereupon, a conference was had in the chambers of Judge Ellett, court reconvened, and Judge Ellett made the following statement:

"THE COURT: Now, so that the clients who were not in chambers and who haven't heard the discussion we have been having may understand, this court has not undertaken to dodge its responsibility or to put any thumb screws on counsel. *All I have done is to point out ways that I thought the parties might get together, and I understand that counsel are in agreement now, and I suppose their clients understand—if they don't, we will put it in the record so there can be no misunderstanding about this matter—and I understand now that you gentlemen have agreed upon three appraisers who may determine the fair market value of the assets of this company as of June 2, 1952; that when that ascertainment is made, the court will apply the percentage of stock held by this plaintiff to the total outstanding at that time and award to her that percentage of all assets as found by the three appraisers; that costs of making the appraisement will be assessed by the court when the appraisement has been*

made; that if any money is required to be advanced to these appraisers, it would be advanced by the defendant and credit given to the defendant for that upon any final settlement" (Tr. 188).

It was evident from the depositions and from the remarks of the Judge that an attempt was being made to ascertain the true value of the plaintiff's stock through the appointment of appraisers. After the appraisers were appointed, they were commissioned to appraise property described in the list attached to the commission (Tr. 104).

While the appraisers were presumably attempting to make an appraisal, but before any return whatsoever was made, the plaintiff, by her attorney, served upon the defendants and their counsel a notice of a Motion for Personal Judgment against the defendants for \$13,367.70, with \$1,643.54 interest (Tr. 103).

Because of matters which do not appear altogether on the record, hostilities in the case were intensified by this notice. Thereafter the appraisers filed a report to which they attached an explanatory statement, from which it appears that they did not appraise the property at all, but insofar as the ranches were involved, in some manner not made to appear by their report, they determined that the ranches had a carrying capacity of 7,200 cattle, and that the carrying capacity was worth \$94 a head (Tr. 109). Objections were made to the report which had not been submitted to or approved by the Court, and defendants moved to strike the report of the appraisers, to discharge them, to declare a mistrial, and to refer the case back for reassignment. The Court countered

by taking the matter under advisement, calling for briefs; and to the plaintiff's brief was attached the Findings of Fact and Conclusions of Law (Tr. 245-249).

All of the defendants named in the complaint, including the Ellison Ranching Company of Nevada, were before the Court. The business of the Corporation, as above observed, had in no respect been changed. The plaintiff did not, at the meeting, nor at any subsequent time, vote against the reorganization as disclosed by the record, and did not appear or vote against the dissolution of the Ellison Ranching Company of Utah in proceedings in Davis County. Nothing was done, as will appear from the record, that was not specifically voted for by the plaintiff, excepting only the approval of the form of the Articles of Incorporation of Ellison Ranching Company of Nevada, which she did not vote for, and did not vote against.

STATEMENT OF POINTS

1. THE PLAINTIFF VOTED FOR THE REORGANIZATION OF THE ELLISON RANCHING COMPANY, AND IS THEREBY ESTOPPED FROM ATTACKING ITS VALIDITY.

2. THE DIRECTORS OF THE UTAH CORPORATION ARE NOT LIABLE TO THE PLAINTIFF FOR BREACH OF TRUST OR AT ALL.

3. IF IT IS ASSUMED THAT PLAINTIFF WAS A DISSENTING STOCKHOLDER, SHE IS ENTITLED ONLY TO THE VALUE OF HER STOCK, NOT TO THE SPECU-

LATIVE VALUE OF HER SHARE OF THE ASSETS OBTAINED BY ESTIMATING THE VALUE THEREOF AND DIVIDING THE SAME BY THE NUMBER OF SHARES.

4. THE APPRAISERS APPOINTED PURSUANT TO STIPULATION FAILED TO MAKE A LEGAL APPRAISAL, BUT ON THE CONTRARY, ARRIVED AT A VALUATION OF THE RANCHES BY APPLICATION OF AN UNSOUND FORMULA.

5. THE FEDERAL INCOME TAX ON SALE BY CORPORATION MUST BE DEDUCTED.

ARGUMENT

POINT I

THE PLAINTIFF VOTED FOR THE REORGANIZATION OF THE ELLISON RANCHING COMPANY, AND IS THEREBY ESTOPPED FROM ATTACKING ITS VALIDITY.

(A) Plaintiff's proxy, James W. Carter, admittedly voted for Resolution Number One, reproduced in full on pages 5 and 6 of this brief, which sets out the plan for reorganization, including:

- (1) The organization of the Nevada Corporation.
- (2) The issuance of shares in the Nevada Corporation in exchange for shares in the Utah Corporation.
- (3) The transfer of all of the assets of the Utah

Corporation to the Nevada Corporation, and assumption by the latter of all of the obligations of the former.

- (4) The direction to the President and Secretary to consummate the reorganization under the laws of Nevada.
- (B) The vote of plaintiff's proxy for Resolution Number Two respecting the name of the Nevada Corporation was acquiescence in the reorganization plan.
- (C) Neither the failure to vote for or against the adoption of the form of Articles of Incorporation of the Nevada Corporation, nor the conversation of the proxy with stockholders, nor the correspondence with Morris H. Ellison, can be construed as a repudiation of the plaintiff's vote directing the president and secretary to consummate the reorganization.

We have made a full statement of facts which are either not in controversy, or are established by documentary evidence, in order to demonstrate to the Court that all that has been done in the reorganization or reincorporation of the Ellison Ranching Company was done by authority of the unanimous vote of the stockholders at a meeting regularly called for the purpose of voting upon the resolution set out in the statement. Plaintiff's proxy did not vote to approve the Articles of Incorporation of the Ellison Ranching Company of Nevada. He only refrained from voting for their adoption. Nothing was left open. The proxy took an indifferent attitude toward

the Articles of Incorporation of the Ellison Ranching Company of Nevada, which is clearly shown by his failure to vote, although he was acting secretary of the meeting and was perfectly free to vote as he saw fit. If the plaintiff had had any real objection to the stock being made assessable, her proxy failed to make that known by voting against the Articles. Obviously, there was no prejudice from the adoption of the Articles with the assessable clause in them because the proxy did not take occasion to vote "no," but recorded in the minutes "not voting." With the adoption of the resolution, there remained the filing of the Articles of Incorporation in Nevada, the issuance of its stock in exactly the same number of shares of the same par value as the Utah Corporation. There was simultaneously the matter of executing a Bill of Sale of all of the personal property of the Ellison Ranching Company of Utah to the Ellison Ranching Company of Nevada, and the execution and delivery of Deeds of Conveyance of its real estate. With this done, there remained the matter of payment of current obligations, including taxes to the State of Utah, and the disincorporation of the Ellison Ranching Company of Utah.

As required by statute, the stockholders and the Board of Directors passed resolutions October 31, 1952, directing the disincorporation (Plaintiff's Exhibit 8, page 296). The president and secretary caused a petition to be filed, and the District Court for Davis County, after notice to the stockholders and creditors, and after all other requirements had been met, made and entered a Decree of Dissolution of the Ranching Company. At no time throughout the proceedings

did the plaintiff make any objection. She stood by after her vote was cast by her proxy for the doing of all these things, making no objections, but, on the contrary, acquiescing in all of the proceedings.

The plaintiff, herself, in her deposition, pages 3 and 4, stated that she had no objection to the reorganization, but wanted to sell her stock. Her son's objection made to two stockholders after the stockholders' meeting was that the ranching company was carrying too much in liquid assets which ought to be distributed by way of dividends. He did not, at that time or at all, ask to have the stockholders' meeting reconvened to provide an opportunity to vote against the reorganization for which he had previously voted. His criticism of the management was ineffective for any purpose. Stockholders act in meetings only. If J. B. Carter had any authority as a stockholder, her authority was exactly the same as that of any other stockholder, no greater and no less. There was no power in Morris Ellison, stockholder, or Laurence Ellison, stockholder, to change the vote of the proxy. As president of the Corporation, Morris Ellison could have, at most, reconvened the meeting, had the stockholders not separated, and possibly could have resubmitted the resolution. It was not requested and was not done.

There appears to be little, if any, conflict in the law applicable to these facts, as stated in text books, encyclopedias, and the cases.

In 2 Cook Corporations, 6th Edition, Section 671, pg. 2016, it is said:

"A stockholder who takes part in and assents to the action of a stockholders' meeting which authorizes

a sale of the property to another corporation in exchange for stock of the latter to be issued to stockholders of the former cannot afterwards object thereto, and demand cash, even though his assent was only by refraining from voting against the proposition."

The author cites *Carr v. Rochester, etc. Co.*, 207 Pa. St. 392 (1904), which upon examination the Court will find duly supports the text.

In the case of *Martin et al v. Chute*, 34 Minn. 135, 24 NW 353, the Court said:

"A stockholder not voting cannot get relief from the Courts if he voluntarily refrains from voting, if he had an opportunity and his claim of right to vote was not excluded."

In 1 Thompson on Corporations, Second Edition, Sec. 909, page 1121, the author says:

"A stockholder may bind himself, or he may estop himself from afterwards raising any question as to the validity or legality of the acts of a meeting, either by participation in the meeting itself, or by acquiescence in the result. Generally, if the meeting is duly organized by the participation of all the stockholders, it is then too late to secede."

In *Zabriskie v. Cleveland, Columbus & Cincinnati Railroad Co.*, 64 U. S. 381, 16 L. Ed. 488, the Supreme Court said:

"A court of equity will not hear a stockholder assert that he is not interested in preventing the law of the corporation from being broken, and assumes that none contemplate advantages from an application of the common property that the constitution of the company does not authorize."

In *Dimpfel, et al. v. Ohio & Mississippi Railway Co., et al.*, 110 U. S. 209, 28 L. Edition, pg. 122, the Supreme Court said:

"A stockholder must make a better showing of wrongs which he has suffered, and also of efforts to obtain relief against them, before a court of equity will interfere and set aside the transactions of a railway company or of its directors."

Certainly a stockholder who refuses to vote at a meeting has not done all he could do.

Post v. Beacon etc., 84 Fed. 371.

McCampbell v. Fountainhead, etc., 111 Tenn. 55.

Synnott v. Cumberland etc., 117 Fed. 379.

McGeorge v. Big Stone Gap, 57 Fed. 262. In this case the court commenting said:

"Will they now be permitted in a court of equity to complain of those things which they did, to charge others with wrongdoing when those others have simply done that which they were directed by complainants to do?"

See 15 *Fletcher Cyclopedia on Corporations*, Perm. Ed. Sec. 7161, page 228.

Inasmuch as the plaintiff voted for the reorganization of the Ellison Ranching Company and by such affirmative vote directed the officers of the corporation to do the very thing that was done, we respectfully submit that the plaintiff is thereby estopped from attacking the validity of the course of action taken.

POINT II

THE DIRECTORS OF THE UTAH CORPORATION ARE NOT LIABLE TO THE PLAINTIFF FOR BREACH OF TRUST OR AT ALL.

(A) The reorganization was directed by the stockholders, and the President and Secretary were authorized to consummate it. The Directors were not.

(B) There is no allegation or proof of any wrongful or unauthorized act on the part of the Directors or any of them.

The Court will observe from the resolution under which the reorganization was consummated that:

"All authority necessary to fully consummate said reorganization is hereby conferred upon the said President and Secretary of this Corporation."

Neither the Board of Directors nor the President and Secretary are authorized to proceed with the reorganization except upon vote of the stockholders. At no time throughout the reorganization proceedings were the Board of Directors called upon to act until, acting under the terms of the statute, they passed the Resolution for the disincorporation of the Ellison Ranching Company of Utah. This was months after the property of the Corporation had been transferred to the Ellison Ranching Company of Nevada and the stock distributed among the stockholders, excepting only the plaintiff, who had been repeatedly offered her stock pursuant to the resolution.

The complaint contains no allegation of fraud or other charge as against the Directors, except that they transferred the assets of the Corporation to the Ellison Ranching Company of Nevada. The charge that the Directors transferred the property has no basis in fact. What was done was done by the President and Secretary acting under the resolution of the stockholders (see deeds, Tr. 62, 77, 81, 86, 89 and 91).

In the absence of fraud, the Directors of a corporation, acting under the authority of a resolution of the stockholders, are not liable to a non-consenting stockholder.

15 Fletcher Cyclopedia on Corporations, Perm. Edition, page 248, Sec. 7166.

The rule is well stated in 13 Am. Jurisprudence, Sec. 1225, page 1118, wherein the author says:

"The fact that a consolidation has taken place without the consent of a stockholder does not give the latter any right of action against the persons who were the officers of the corporation at the time such consolidation was effected."

See 89 Am. St. Reports, page 622.

"This was attempted in International G. N. Ry. Co. v. Bremond, 53 Tex. 96, where a non-assenting stockholder sought to hold the directors liable. It was, however, held that no right of action existed against the defendants, the court saying:

'The Consolidation was the act of the stockholders, other than the plaintiff, and was, therefore, an act for which the directors, as such, should not be held responsible. As directors, they were answerable to the corporation for official delinquencies resulting

in damage to the corporate property, *but it is not perceived that the corporation could hold them responsible for a consolidation effected not by them as directors, but effected by the act of the stockholders.*’ ”

Holmes v. Crane, 182 N.Y.S. 270; also 3 Fletcher Cyc. Corp. (1947 Rev), Sec. 1021 at page 527::

“A director is only liable to a corporation or its stockholders for his own acts or omissions, and to render him liable for ultravires acts of a corporation it must be shown and found that he voted therefore, participated therein, connived thereat, or negligently omitted to perform his duty.”

We respectfully submit that to hold Directors liable, it must be alleged and proved that they were not only acting as stockholders, but were guilty of fraud, and in the instant case, this was not claimed or proved.

POINT III

IF IT IS ASSUMED THAT PLAINTIFF WAS A DISSENTING STOCKHOLDER, SHE IS ENTITLED ONLY TO THE VALUE OF HER STOCK, NOT TO THE SPECULATIVE VALUE OF HER SHARE OF THE ASSETS OBTAINED BY ESTIMATING THE VALUE THEREOF AND DIVIDING THE SAME BY THE NUMBER OF SHARES.

POINT IV

THE APPRAISERS APPOINTED PURSUANT TO STIPULATION FAILED TO MAKE A LEGAL APPRAISAL, BUT ON THE CONTRARY, ARRIVED AT A VALUA-

TION OF THE RANCHES BY APPLICATION OF AN UNSOUND FORMULA.

We shall consider Points III and IV together as they are inter-related.

The commission issued by the court to the appraisers directed them to appraise and determine the fair cash value as of June 2, 1952, of the assets transferred by the Ellison Ranching Company of Utah to the Ellison Ranching Company of Nevada, according to the inventory attached to said commission and as the assets were then located (Tr. 104).

The appraisers seem to have completely disregarded not only the commission from the Court, but all common sense, in proceeding to appraise the property of this Corporation. Furthermore, notwithstanding the apparent able assistance that they had, they seemed to be looking for a way out. These ranches covered large areas of land in Nevada which constituted only a part of the desert, except where water is provided for irrigation. In other words, the value of the ranches depends upon irrigation, at least sufficient to provide water and feed for the livestock, not occasionally, but regularly. It is evident the appraisers paid no attention to water and water rights or to the carrying capacity of the ranches, not for one year, or two years, but continuously. They knew, or should have known, of drouths which occurred in the early '30's, and from which the ranches are now suffering, and the resulting necessity of either shipping feed in or shipping the livestock out; or in the alternative, permitting them to perish. But, in some manner, without knowing anything for themselves, they estimated the carrying capacity of the ranches at 7,200 units;

and again, with another leap in the dark, they estimated the value of the units at \$94.00 each. They, of course, could not with equal facility do what the Court directed them to do; that is, appraise the ranches, because evidently they had never seen the ranches, and they did not take the time to look at them, except perhaps two of the three appraisers spent two days in going from Salt Lake to Elko, Humboldt and Landers Counties, observing the land and returning to Salt Lake. They knew nothing about the water conditions, and evidently cared less. It is perfectly obvious that the value of a carrying unit is dependent upon the amount of feed, the certainty of its production, the market for livestock, and other conditions which would make certain that livestock could not only be produced, but could be kept alive and growing. Again, the value of a unit depends upon the market value of the livestock produced. Notwithstanding all these conditions, the attorney for the plaintiff, after consulting with one of the appraisers before an appraisal was made or a report filed, gave notice of a motion for a money judgment against defendants, and the Court entered judgment against the directors. The stipulation provided that:

"The Court will apply the percentage of stock held by this plaintiff to the total outstanding at that time and award to her that percentage of *all assets* as found by the appraisers" (Tr. 188).

An appraisement is defined as follows:

"An appraisement denotes the valuation of goods and chattels or real estate by two persons of suitable qualification, fair, impartial, and disinterested, having

knowledge of the property and with intelligence to ascertain its value after inspection and inquiry." — *Magin v. Miner*, 110 Maryland 299.

Jacobs v. Schmidt, 231 Mich. 200, 203 NW 845.

As is said by the author in 13 Am. Jurisprudence, paragraph 1232, page 1120:

"Precise rules for determining the fair value of stock . . . cannot be laid down; such value must be determined upon consideration of all relevant facts and circumstances affecting the value of the corporate property. It is the value of the stock for sale or its value for investment."

Re Fulton, 257 N. Y. 487, 178 N. E. 766, 79 ALR 608.

See also *Adams et al vs. U. S. Distributing Corp. et al.*, 184 Va. 134, 162 ALR 1227, 34 SE 2d 244.

The motion to set aside the report of the appraisers, to discharge them, to declare a mistrial, and to refer the case for reassignment should have been granted, or the case dismissed on its merits.

POINT V

THE FEDERAL INCOME TAX ON SALE BY CORPORATION MUST BE DEDUCTED.

If, as prayed in the complaint, the purpose is to partially liquidate the Corporation, then federal income taxes must be deducted from the proceeds of the sale of part of the property by the Corporation in addition to the expense of liquidation.

26 U.S.C.A., section 112, page 90, reads as follows:

"Upon the sale or exchange of property, the entire amount of the gain or losse determined under Section 111 shall be recognized except as hereinafter provided in this section."

None of the exceptions are pertinent in this case.

Tazewall Electric Co. v. Trother, 84 Fed. 2d 327.

This case seems to be precisely in point.

See also, Canal Commercial Company et al, v. Commissioner of Internal Revenue, 63 Fed. 2d 619.

See also, Taylor Oil & Gas Company v. Commissioner of Internal Revenue, 47 Fed. 2d 108; Court Holding Co. v. Commissioner, 324 U. S. 331.

CONCLUSION

We respectfully submit that the judgment and decree of the trial court should be reversed with directions to enter judgment in favor of the defendants and against the plaintiff, no cause of action, and for costs.

Respectfully submitted,

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