

1954

# Gloria G. Fenton v. Peery Land and Livestock Co. et al : Brief of Appellant

Utah Supreme Court

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Patrick H. Fenton; Attorney for Appellant;

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## Recommended Citation

Brief of Appellant, *Fenton v. Peery Land & Livestock Co.*, No. 8250 (Utah Supreme Court, 1954).  
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In the  
**Supreme Court of the State of Utah**

GLORIA G. FENTON,

*Plaintiff and Appellant,*

vs.

PEERY LAND AND LIVESTOCK  
CO., a Utah Corporation, JOSEPH I.  
JACOB, I. H. JACOB and WILFORD  
W. GARDNER,

*Defendants and Respondents.*

Civil No.

8250

**APPELLANT'S BRIEF**

**FILED**

OCT 20 1954

PATRICK H. FENTON,  
*Attorney for Appellant.*

Clk, Supreme Court, Utah

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# In the Supreme Court of the State of Utah

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GLORIA G. FENTON,

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*Defendants and Respondents.*

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## APPELLANT'S BRIEF

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### STATEMENT OF FACTS

This case was heard by the District Court of Salt Lake County, Utah, on 10 July, 1954, sitting without a jury. The matter came to issue upon Defendant's Motion for Summary Judgment and upon Plaintiff's Motion for Judgment on the Pleadings.

The litigation was caused by a Special Stockholders meeting held on 1 March, 1954. Notice to said meeting was signed by I. H. Jacob as Vice-President and Director and by Joseph I. Jacob as Secreary and Director, and was dated 4 February, 1954. Said notice among other things recited that the purpose of the meeting was to make the full paid stock of the corporation assessable for such purposes and in such amounts as the directors may provide and determine from time to time and to amend the Articles of Incorporation, Article VII thereof, accordingly.

At said meeting the following stock was represented. There were 100 shares of stock outstanding at that time.

Joseph I. Jacob	17 $\frac{1}{3}$ shares
I. H. Jacob	17 $\frac{1}{3}$ shares
Robert M. Jacob	8 shares
Roy I. Austin	8 shares
Wilford B. Gardner	5 shares
Gloria G. Fenton	5 shares
Tess G. Sorenson	5 shares
Total	65 $\frac{2}{3}$ shares of stock

There was no call for proxies nor was a committee ever appointed to examine proxies and no proxies were ever submitted. However at the time of the voting on the resolution to change the Articles of Incorporation, Joseph I. Jacob voted an 8 vote proxy for Marilyn G. Jacob and an 8 vote proxy for Phyllis J. Austin. The 18 $\frac{1}{2}$  shares of stock owned by W. W. Gardner and Tess B. Gardner were not represented either in person or by proxy.

The following resolution was proposed for Adoption:

BE IT RESOLVED, that Article VII of the Articles of Incorporation of Peery Land and Livestock Company, a Utah corporation, be and is hereby amended to be and read as follows:

## ARTICLE VII

The number and amount of authorized stock and shares of this corporation is One Hundred (100) Shares of stock, without nominal or par value, which shares were all issued and fully paid when the corporation commenced business and are all now issued and outstanding.

The full paid stock and shares of this corporation hereafter shall be assessable for such purposes and in such amounts as the directors may provide and determine from time to time or as is, or may be, provided by law. The holders of full paid stock shall not be personally liable for the payment of any such assessment.

A certificate of the above amendment shall be made by the President or the Vice President, and the Secretary, of this corporation and shall be filed as provided by law.

Prior to the meeting on 1 March, 1954, said Article VII read as follows, to-wit:

## ARTICLE VII

The number and amount of authorized stock and shares of this corporation is one hundred (100) shares of stock, without nominal or par value, and the corporation will commence business with all of said one hundred shares of stock, which have been duly subscribed by and issued to the parties in the amounts hereinafter set opposite their names, to-wit:

J. S. Peery	96 shares
L. D. Peery	1 share
Luacine Peery	1 share
D. A. Skeen	1 share
Anton Strebel	1 share

All of said one hundred shares with which this corporation shall commence business as aforesaid are

fully paid shares, having been fully paid for by the sum of \$100.00 cash to the corporation, and are not liable for any further demand, call or payment, whatsoever. Any and all stock and shares hereafter authorized, created or issued may be issued from time to time for such consideration and upon such terms, and whether for cash, stock or other property, real or personal and may be fixed and determined from time to time by the Board of Directors, and any and all such shares so issued, the full consideration or thing for which has been paid or delivered, shall be deemed and are hereby declared to be fully paid stock and shares.

All shares of this corporation are non-assessable.

The second paragraph of Article X of said Articles of Incorporation reads as follows, to-wit:

“Special meeting of stockholders to amend the Articles of Incorporation, or to remove a director or directors, or for any other purpose or purposes, whatsoever, may be called by the President, Secretary or Treasurer, or either of them, or by a Director, and notice thereof may be given by publication according to law or by mailing to each stockholder at least ten days prior to said meeting at the address of said stockholder last appearing on the books of the corporation, a notice of said meeting, and notice given either by publication or by mailing aforesaid shall be conclusive and binding against all persons, whomsoever.”

At said meeting the Resolution for the adoption of the new ARTICLE VII was called to a vote by the Vice-President, I. H. Jacob. Said vote was as follows:  $50\frac{2}{3}$  votes for the adoption of said resolution, 15 votes against said resolution, and  $34\frac{1}{3}$  votes not voting. Of the  $34\frac{1}{3}$  votes not voting I. H. Jacob purported to vote 16 of said

votes by proxy. However, the minutes of said meeting fail to show any examination or acceptance of said proxy and in fact no action was taken at said meeting in relation to acceptance of said proxy or proxies.

From a judgment that plaintiff's motion for judgment on the pleadings against defendant be overruled and denied and that the motion of defendants, Peery Land and Livestock Company, Joseph I. Jacob and I. H. Jacob, for summary judgment against the plaintiff be sustained and dismissing plaintiff's complaint and giving defendants judgment of no cause of action plaintiff appeals.

## STATEMENT OF POINTS

### Point 1

THAT SAID JUDGMENT IS A VIOLATION OF ARTICLE I, SECTION 10, OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

## ARGUMENT

### Point 1

THAT SAID JUDGMENT IS A VIOLATION OF ARTICLE I, SECTION 10, OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

Paragraph 1 of Article I, Section 10, of the Constitution of the United States of America, reads as follows, to-wit:

No State shall enter into any treaty, alliance, or confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make anything but gold and silver Coin a Tender in Payment



of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Plaintiff contends that the action taken at the special stockholders meeting of Peery Land and Livestock Company held on 1 March, 1954, and upheld by the District Court of Salt Lake County, Utah, is a violation of that portion of paragraph 1, Section 10, Article I of the Constitution of the United States of America, which in effect reads as follows, to-wit:

“No state shall pass any law impairing the Obligation of contracts.”

In the state of Utah it is basic law based upon statutes that non-assessable stock cannot be made assessable except by a 100% vote of the stockholders. This doctrine was first expressed in 2 Compiled Laws 1888 at page 43, Section 2393. However, it was changed somewhat by Revised Statutes of 1898, Section 354. It was carried forward from 1898 in a very similar form to our present statute. The Revised Statutes of 1933, Title 18, Chapter 2, Section 2, under which Peery Land and Livestock Company was organized in 1933, and Utah Code Annotated 1943, Title 18, Chapter 2, Section 2, and Utah Code Annotated 1953, Title 16, Chapter 4, Section 4, are identical and read as follows, to-wit:

#### **16-4-4. Assessments—Only if agreed to.**

The full-paid stock of any corporation organized after March 8, 1894 under the laws of this state shall not be assessable for any purpose whatever, except to such extent and in such manner as may be expressly provided in the articles of incorporation; provided, that, if such stock is made assessable and the manner of levying the assessment is not provided for, it shall be levied in the manner and form hereinafter prescribed.”

This was the statute that was in effect in 1933 when Peery Land and Livestock Company was organized and that has been in effect ever since and up to and including the present date.

The statute concerning amendments to articles of incorporation is Utah Code Annotated 16-2-45. The only major change in this statute since 1907 is that the Laws of 1921 allowed amendments, where same could be made, to be made by a majority instead of a two-thirds majority. The past portion of this section, which is applicable to this case, has read the same with one small variance from 1907, Section 338, 1917, Section 886, 1933, 18-2-44, 1943, 18-2-44 and is as follows, to-wit:

“and provided further, that the personal or individual liability of the holder of full-paid stock for assessments or for the indebtedness or obligations of the corporation shall not be changed without the consent of all the stockholders.”

In the laws of 1907 and 1917 the word “capital” was inserted between the words “full-paid” and “stock.”

There is only one case that has been found that allows amendments to make stock assessable over the objections of a single stockholder. All the rest of the cases stop stock assessment on stock unless in some manner specifically agreed to by all of the stockholders of the corporation.

The case that allows stock to be made assessable over the objection of a single stockholder was the case of Weede vs. Emma Copper Co. cited as 58 Utah 524, 197 Pacific 517. This case was decided in 1921 and attempted to apply the 1921 amendment to Section 886 of the compiled laws of 1917. This case holds that the laws of 1917, Section 886 provides “that the liability of the holders of full paid capital stock for assessments should not be changed without the consent of all the stockholders” and that the laws of 1921 amended same to insert the

words "personal or individual" before the word liability" making the same read "that the personal or individual liability of the holder of full paid" and that this meant that the articles could be changed to make non-assessable stock assessable and that the stock could be sold but that after the stock was sold there could be no personal remedy against the stockholder.

Examination of the statute itself reveals that this case is not a proper interpretation of the statute. Even the laws of 1907 in Section 338 carried the wording "That the personal or individual liability of the holder of full paid capital stock for assessment or for the indebtedness or obligations of the corporation shall not be changed without the consent of all the stockholders." Many of the other cases decided holding such an amendment improper were under this specific statute of 1907 and the only difference between the laws of 1907 and the statutes of 1933, under which Peery Land and Livestock Company was organized, and the statutes of 1943 and 1953 is that in the latter statute the word capital has been omitted and they read full paid stock. Some of the cases decided by the Utah Supreme Court under the laws of 1907 are as follows, to-wit:

Garey vs. St. Joe Mining Company, 32 Utah 267, 91 Pacific 369 was decided in 1907. The question in this case was the identical question as the case at hand. Majority of stockholders wanted to amend the articles of incorporation to change non-assessable stock so that same could be assessable. The minority of stockholders did not want this change and some of the stockholders did not vote. This case held that a statute authorizing majority stockholders to amend the articles of incorporation against the consent of the minority of the stockholders so as to make non-assessable full paid capital stock assessable and subject to sale for such assignment, affects the contractual relations of the stockholders among themselves and is an impairment of the obligation of a contract and

is within the prohibition of the Federal Constitution.

This was under a statute identical with 16-4-4, Utah Code Annotated 1953 except that the former statute required a two thirds majority to amend the articles of incorporation, while the present state requires only a simple majority. This *Garey vs. St. Joe Mining Company* is the principal case in the State of Utah and has been cited repeatedly to the effect that a majority of the stockholders of a corporation may not amend the articles of incorporation against the consent of the minority so as to make non-assessable full paid capital stock assessable.

Further in line in this thought is the case of *Nelson vs. Keith O'Brien Company*, 32 Utah 396, 91 Pacific 30, decided 26 June, 1907 which held that the power of a corporation to levy an assessment on full paid capital stock must be derived from the statute, the articles of incorporation or some other express promise to pay.

It should be noted that in the case of *Peery Land and Livestock Company* there is in no place a promise to pay and the language of the Article VII thereof is expressly otherwise, "all of said one hundred shares with which this corporation shall commence business as aforesaid are fully paid shares, having been fully paid for by the sum of \$100.00 cash to the corporation, and are not liable for any further demand, call or payment, whatsoever." On the contrary in the *Peery* case, instead of an express promise to pay there is an express promise and contract that there shall be no further demand, call or payment whatsoever. With this express statement in the Articles of Incorporation there is no question but that at the time of incorporation of *Peery Land and Livestock Company* the incorporators entered into a contract that the stock was paid for and that the shares of stock would not be liable for any further demand, call or payment whatsoever. Consequently the complained of action of the majority of stockholders in attempting to make the stock

assessable without the express consent of 100 shares of the said stockholders would be a violation of the contract rights of those not joining and would in effect, be against the will of the stockholders by making the fully paid shares liable for further demand, call or payment and would be an express violation of contractual rights of the stockholders not especially joining in, and is in direct violation of Article I, Section 10 of the Constitution of the United States and the claim that same is to be allowed under the provisions of any statute of the State of Utah would be expressly contrary to the Constitution of the United States of America.

The case of Forsyth vs. Selma Mines Company, 58 Utah 142, 197 Pacific 586 upheld this doctrine and held that in the absence of statutory authority or power governed by the articles of incorporation or some other express promise to pay on the part of the stockholders there can be no valid assessment on the fully paid up stock of a private corporation.

In the case of Dotson vs. Hogan, 44 Utah 295, 140 Pacific 128, the court held that all assessments on full paid stock are voluntary and that they can be made only by and with the consent of the stockholders. Such consent can be expressed in the articles of incorporation or otherwise.

It has long been held that fully paid shares of private corporations are regarded as executed contracts between the government and the incorporators and a legislature cannot repeal, amend or alter the contract. This has been upheld in the following cases: Chenango Bridge Company vs. Brinhampton Bridge Company, 70 United States 51, 18 Lawyers edition 137, also in Hawthorne vs. Calef, 69 United States 10, 17 Lawyers edition 776, also in the Trustee of Jefferson College vs. Washington and Jefferson College, 80 United States 190, 20 Lawyers edition 550, Haberlach vs. Tillamook Bank, 134 Oregon 279, 293 Pa-



cific 927, and many other cases have upheld the same doctrine throughout the United States.

The basic law in connection with the question is set forth in 13 American Jurisprudence, Section 317, which is headed "Contracts against Assessment, and reads as follows: "a corporation may contract with its stockholders regarding the amount to be paid for stock and regardless of the rights of creditors to force liability beyond such regulation will be bound by such agreement. An agreement between a corporation and its stockholders expressed in its certificates, that its capital stock shall not be assessed after it is paid in full is a valid contract between the stockholders and the corporation and prevents the levying of an assessment by the corporation on the stock so protected."

It is therefore to be seen where language has been used in the articles of incorporation which expressed much less force and effect than that used in Article VII of the Peery Land and Livestock Company said language has consistently been held to be a contract that cannot be changed without the express consent of all stockholders.

There is only one case found in the state of Utah by counsel, that holds otherwise, which is the case of Weede vs. Copper, 58 Utah 524, 200 Pacific 517, which was decided in 1921, which case held that the intention of Section 876 Compiled Laws of Utah 1917 as amended in 1921, allowed amendment and only prohibited the collection of assessment against the stockholders on a personal or individual basis and was not to prevent amendments or articles of incorporation to provide for the levy of assessment against the stockholder by the stockholder. It is to be noted that the Weede vs. Emma Copper Co., case was brought by a woman who bought stock several years after said articles had been amended and was not a stockholder at the time of the amendment. The stock

purchased by said woman did not vote at the time the stock was amended.

The wording of the articles of incorporation in *Weede vs. Emma Copper Co.* case was that said stock was "fully paid and non-assessable." Contrast this with the wording of Article VII of Peery Land and Livestock Company which read, "All of said one hundred shares with which this corporation shall commence business as aforesaid are fully paid shares having been fully paid for by the sum of \$100.00 cash to the corporation and are not liable for any further demand, call or payment, whatsoever." Even had the said case been good law, the difference in wording of the articles of incorporation is so explicit that the *Weede vs. Emma Copper Co.* case cannot be applied to the case at hand. In addition, Article VII of the Peery Land and Livestock Company ends with this sentence, "All shares of the corporation are non-assessable." This is the usual sentence in the articles of incorporation and when that is compared with the statement that the shares are not liable for any further demand, call or payment, whatsoever, it cannot be said that there was anything less than an express contract among the stockholders that there would be no further demand, call or payment upon the shares of stock as such. When we have this express contract so explicitly set forth, there is no way possible of making these specific shares assessable except by the express consent of each and every stockholder in the corporation which has not been obtained.

During recent years many mining corporations have been formed in the state of Utah and with only a few exceptions their articles of incorporation read that the stock shall be non-assessable. Many of these corporations have been allowed to sell stock to the public and their prospectus reads to the effect that their stock is non-assessable and that if a person purchases same that when it is paid for there can be no further demand or call upon

that person or upon this stock. For the Supreme Court to uphold the doctrine of the Weede vs. Emma Copper Co. case means that if the incorporators hold the majority of the stock of one of these corporations,, that they can sell same on the public market as non-assessable and then simply amend the articles of incorporation and the person who bought same as non-assessable stock must either pay the assessment or forfeit his stock.

There is no other case found by counsel in the state of Utah nor any other jurisdiction, which upholds the Weede vs. Emma Copper Co. doctrine.

### CONCLUSION

Counsel respectfully urges that the court take into consideration the express language of Article VII of the Articles of Incorporation of the Peery Land and Livestock Company. That upon so doing, the wording thereof be given effect to, and that it be declared that the shares of stock of the corporation are not liable for any further demand, call or payment, whatsoever; and that as a matter of contract right the contract limitations of liability as evidenced by said Article VII be given effect to; and that it be declared that said Articles cannot be amended to make the stock assessable without the express consent of one hundred per cent of the stockholders of the corporation; and that the court conclude that the decision of the trial court be reversed; and that the trial court be instructed to issue a restraining order restraining the defendants from taking any action whatsoever, as a result of said alleged stockholders meeting; and that said order further restrain the defendants from treating the stock of Peery Land and Livestock Company as though said stock were assessable.

PATRICK H. FENTON,  
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