

1954

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GLORIA G. FENTON,
Plaintiff and Appellant,

— vs. —

PEERY LAND AND LIVESTOCK
COMPANY, a Utah corporation,
JOSEPH I. JACOB and I. H.
JACOB,
Defendants and Respondents,

WILFORD W. GARDNER,
Defendant.

Civil No.
8250

Respondents' Brief

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WILFORD W. GARDNER,
Defendant.

Civil No.
8250

Respondents' Brief

RESPONDENTS' STATEMENT OF THE CASE

The question presented by this appeal is simply whether a majority of the stockholders of this Utah corporation, incorporated in 1933, could amend its Articles of Incorporation and make its stock assessable as against an existing provision in the Articles which said the stock was non-assessable.

The Articles said that they could be amended in any respect. The governing Utah statute said so, too; and by a majority of the stock.

The case is wholly governed by that landmark decision by this court which settled the law long ago:

Weede vs. Emma Copper Company, 58 Utah 524, 200 P. 517.

Judge Van Cott below followed that decision, as he was bound to do, and entered judgment upholding the amendment. As stated above, *both* the governing statute and the Articles of Incorporation said the Articles could be amended. Here we quote from *Weede vs. Emma Copper Company*, *supra*, on the right to amend:

“The right to make such an amendment or change, however, exists whether the right is merely given in the *statute*, or whether it is expressly written in to the *Articles of Incorporation*.” 200 P. 519.

STATEMENT OF RESPONDENTS' POINTS

- Point 1. The Contract Impairment Clause Of The Federal Constitution Does Not Apply To Judgments By The Courts Nor To Corporate Doings.
- Point 2. The Amendment To The Articles Of Incorporation Was Authorized By (1) Statute, and, (2) The Articles Themselves.
- Point 3. Weede vs. Emma Copper Company (Utah 1921) Governs.
- Point 4. Nelson vs. Keith O'Brien Company (Utah 1907) Fully Supports The Amendment Here.
- Point 5. Other Utah Decisions Support The Amendment Here.
- Point 6. Garey vs. St. Joe Mining Company (Utah 1907) Is Not In Point.
- Point 7. The Amendment Was Carried By A Majority Of The Stock.

ARGUMENT

Point 1.

The Contract Impairment Clause Of The Federal Constitution Does Not Apply To Judgments By The Courts Nor To Corporate Doings.

The rule provides:

“The appellant’s brief shall contain (3) . . . a concise statement of the points upon which the appellant intends to rely for a reversal of the judgment or order of the court below . . .” U.R.C.P. 75 (p) (2).

One — only one — point is set forth in appellant’s brief:

“Point 1. That said judgment is a violation of Article I, §10 of the Constitution of the United States of America.” (Appellant’s Brief, 5.)

The contract clause of the Federal Constitution provides:

“No State . . . shall . . . pass any . . . law impairing the obligation of contracts.” Article I, §10, Constitution of the United States.

This Constitutional provision is addressed to *legislative* action by the States; not decisions by their courts.

“Constitutional Prohibitions Against Impairing The Obligation of Contracts Apply Only To Legislative And Not To Judicial Action.”

“. . . it is now definitely and authoritatively settled that such prohibitions in federal and state constitutions relate to legislative action and not to judicial decisions.” 16 C.J.S. Constitutional Law, §280.

This court long ago recognized the rule in *Fuller-*

Toponce Truck Company vs. Public Service Commission,
99 Utah 28, 96 P. 2d 722, 726:

“It is apparent and has long been held that these sections apply to legislative enactments . . . and not to . . . court decisions.”

Continuing, this court said, quoting 12 Am. Jur.,
Const. Law, §396:

“The prohibition is aimed at the *legislative* power of the state and *not* at the decisions of its courts, the acts of administrative or executive boards or officers, or the doings of corporations or individuals.”

As was said, the only Point set out in appellant’s brief is that the judgment violates the contract clause of the Federal Constitution. But, as shown, it is settled that *judgments* do not come within the prohibition. Only legislative action does.

Appellant’s Point specifies the *judgment* as being the offending item. However, in arguing that Point, she shifts to another as the offender: the *action of the stockholders*. She says:

“Plaintiff contends that the action taken at the special stockholders’ meeting of Peery Land and Livestock Company . . . is a violation 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.” (Appellant’s Brief, 6.)

Her Point stated is addressed to the *judgment*; her

argument, to the *action* of the stockholders. But, the contract clause of the Constitution extends to *neither*.

Referring back to American Jurisprudence quoted by this court in Fuller-Toponce above:

“The prohibition is aimed at the legislative power of the state . . . *not* at the decisions of its courts . . . or the *doings* of corporations or individuals.” *Fuller-Toponce Truck Company vs. Public Service Commission*, 99 Utah 28, 96 P. 2d 722, 726, quoting 12 Am. Jur. Constitutional Law §396.

Appellant's lone point and contention that the judgment (or the stockholders' action — if you choose) violates the Federal Constitution is an utter failure. Hence, the appeal should end right here and the judgment be affirmed.

Point 2.

The Amendment to the Articles of Incorporation Was Authorized By (1) Statute, and (2) The Articles Themselves.

Peery Land and Livestock Company, the Utah corporation herein, was incorporated May 15, 1933. (R. 14.)

Its Articles said the stock was non-assessable. But, they also said:

“Article XIII. These Articles may be amended at any time in any manner or respect conformable to law.” (R. 19, 25.)

March 1, 1954 the Articles of Incorporation were amended at a meeting of stockholders. The amendment made the stock assessable. It was adopted by a *majority* of the stock. The Articles do not prescribe what proportion of the stock shall be required (R. 25), so the statute governs.

The 1917 statute (in force when the Company was incorporated)¹ has not been substantially changed as to corporate amendments. It was carried forward in the 1953 statute (in force when the amendment was made). These statutes are §886 C.L. 1917 and §16-2-45, UCA 1953. Both declare that any corporation may amend its Articles. And this, the statute says, may be done by a *majority* vote where (as in our case) the Articles themselves do not prescribe the required proportion:

¹ The intervening 1933 Compilation did not go into effect until June 26, 1933—some five weeks after our Company was incorporated.

“16-2-45. **Amendments to Articles.** The articles of incorporation of any corporation now existing or that hereafter may be organized under the laws of this state may be amended in any respect conformable to the laws of this state in such manner and by the vote of such proportion of all or any class or classes of stock as the articles of incorporation may provide; and in case the articles of incorporation do not so provide, by a vote representing at least a *majority* in amount of the outstanding stock thereof entitled to vote at a stockholders’ meeting called for that purpose as prescribed in section 16-2-49; . . . 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 of the stockholders.”

We have already seen that the power to amend was in fact *reserved* in the Articles of Incorporation themselves and it was likewise *reserved* by the statute quoted.

Both (1) the statute, and, (2) the Articles themselves said the Articles of Incorporation might be amended. But as to changing the stock from non-assessable to assessable stock, the statute prescribed one condition. It was:

“. . . 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.”

So, at the meeting March 1, 1954, the Articles were amended under the power to do so which was expressly

reserved by both the Articles and the statute. And, as the statute permitted (the Articles not prescribing otherwise), the amendment was adopted by a majority vote. Here is the amendment:

“ RESOLUTION

“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.” (R. 7, 8.)

However, in adopting the amendment, the majority of stockholders carefully observed the condition imposed by the proviso in the governing statute against changing

the *personal* liability of the stockholders for assessments without their consent. The amendment said specifically:

“The holders of full-paid stock shall not be *personally* liable for the payment of any such assessments.” (R. 8.)

So, by the authority reserved both (1) in the Articles of Incorporation, and, (2) in the statute, the amendment was adopted; and, (3) it was lawfully done by a majority,² which the statute prescribes as the requisite proportion of stock when the Articles themselves (as here) do not otherwise provide.

² This was formerly two-thirds. Revised Statutes 1898 §338. It was later changed to a majority. Compiled Laws 1907 §338. 1917 §886.

Point 3.

Weede vs. Emma Copper Company (Utah 1921) Governs.

As already shown, the governing *statutes* in force when our Company was incorporated (1933) and when its Articles were amended (1953) reserved to the stockholders the right to amend by a majority thereof. The *Articles* also reserved that right themselves.

The ruling case on the statute and question is *Weede vs. Emma Copper Company*, Utah, 58 Utah 524, 200 P. 517. It was decided in 1921.

Emma Copper Company was incorporated in 1906.

Its Articles expressly stated (like our own) that the stock was “fully paid and non-assessable.”

In 1909 a majority of the stockholders amended and made the stock assessable. The problem there was like our own:

“... The question presented for decision is whether, in view of the provisions of our Constitution and statutes, the articles of incorporation, in which it is provided that the capital stock is full paid and nonassessable, may be amended by the stockholders owning a *majority* of the stock, so as to make the stock assessable (without the consent of all the stockholders), and in case an assessment is not paid forfeit the stock.” 200 P. 518. (*Italics added.*)

The court quoted the 1917 statute (§886) governing amendments (now §16-2-45) and said:

“To determine that question requires us to con-

sider the proviso found in section 886, which we have hereinbefore set forth. The proviso reads: 'That the *personal or individual* liability of the holder of full-paid capital stock for assessments . . . shall not be changed without the consent of all the stockholders.' " (Italics added.) Id. 519, 520.

Continuing, the opinion points out:

"The qualifying words, 'personal or individual' were inserted into the statute in 1903. Sess. Laws Utah 1903, c. 94, p. 80. . . . As the statute read prior to 1903, no levy for assessments on full-paid stock could be made without the consent of all the stockholders. After the amendment of 1903, however, the liability was restricted to '*personal or individual*' liability. In changing the phraseology of the statute, it must be assumed that it was the intention of the Legislature to change its effect." 2 Lewis, Suth. St. Const. (2d Ed.) §399; *Dahl v. Salt Lake City*, 45 Utah, 544, 147 Pac. 622. (Italics added.) Id. 520.

The court then asks:

" . . . If it was intended to continue in effect the proviso that no levy for assessments could be made unless consented to by all the stockholders, why make the change in the phraseology of the statute by inserting therein the qualifying words '*personal or individual*' preceding the word 'liability'?" (Italics added.) Id. 520.

Then it is explained:

"In making that change the Legislature manifestly intended to change the proviso, so that the liability should thereafter apply only to the *personal or individual* liability, instead, as theretofore, to every possible liability. Where personal or indi-

vidual liability is referred to in connection with the capital stock of corporations and their stockholders, it is generally—indeed, we think universally—understood that personal or individual liability refers to a liability which is *personal*, and which may be enforced by an ordinary action against the individual, in which a judgment may be obtained and satisfied out of any nonexempt property such individual may own. In 3 Bouvier's Law Dictionary, Rawle's Third Revision, p. 2576, in defining personal liability of a stockholder, it is said:

‘Personal Liability. — The statutory liability of stockholders of corporations by which they are held individually liable for the debts of the corporation.’

“To the same effect is Anderson's Law Dictionary, p. 616.” (*Italics added.*) Id. 520.

The court approved the above definitions of personal liability and then said:

“In view that the Legislature deliberately changed the phraseology of the statute by inserting the qualifying words referred to, and in view that the meaning of those words is always understood and applied as relating to the *personal* liability of the stockholders, as contra-distinguished from a mere stock liability, we can see no escape from the conclusion that, under the proviso as it read when the Articles of Incorporation in question in this case were amended, it did *not* require the unanimous consent of the stockholders to authorize the adoption of the amendment, and that the same was legally adopted.” (*Italics added.*) Id. 520.

Addressing itself to the Legislative intent, the opinion continues:

“Moreover, we do not think it was the intention of the Legislature to permit one stockholder, owning a few shares of stock in a corporation, to prevent all the other stockholders from raising funds to pay debts of the corporation or to develop its property. No doubt it was the intention to protect the stockholder against personal liability, but not to enable him to play the ‘dog in the manger’ ”
Id. 521.

The court then pointed out that there are many mining corporations in Utah with undeveloped claims as assets and, with this in mind, one can readily understand why the Legislature permitted the majority of the stock to control in raising funds and for developing properties.

“ . . . If that could not be done, a single stockholder could compel the sale and sacrifice of what might be developed in the future to be a very valuable property, merely because he would not consent to the levying of an assessment. Again, he might either arrest or entirely prevent the development of the mining resources of this state. The Legislature, therefore, could well take the position that a stockholder is sufficiently protected if he is made immune against *personal* liability, while, upon the other hand, the majority’s interests are also recognized by giving them the right to raise the necessary funds by assessing the stock to pay its debts and to develop the mining resources of this state. Such, to our minds, is the manifest intent and purpose of our statute.”
(Italics added.) Id. 521, 522.

Finally, here was the holding of the court in *Weede vs. Emma Copper Company*, *supra*:

“ . . . we think it is clear that it was the intention of the Legislature to authorize a *majority* of the issued and outstanding stock of any corporation to *change* the articles of incorporation so as to make unassessable stock assessable, provided no attempt is made, in making such amendment, to change the *personal or individual* liability of the stockholder.” (Italics added.) Id. 521.

Point 4.**Nelson vs. Keith O'Brien Company (Utah 1907) Fully Supports The Amendment Here.**

We have already seen that in *Weede vs. Emma Copper Company*, 58 Utah 524, 200 P. 517, this court held (in 1921) the reservation in the *statute* of the right to amend authorized a majority to do so and make non-assessable stock assessable so long as the stockholders' "personal or individual liability" was not changed.

Now, we turn to an earlier decision where this court held the reservation in the *Articles* alone authorized the majority to amend and extend the assessment powers of the corporation.

Nelson vs. Keith O'Brien Co., 32 Utah 396,
91 P. 30.

In 1902 Keith O'Brien Company was incorporated under the 1898 statute.

The 1898 statute (§338) then said:

"the liability of the holders of full-paid stock . . ."
could not be changed without consent of all.

The 1903 amendment to the statute (§338) intervened *after* Keith O'Brien Company was incorporated in 1902 and changed the phrase to read:

"The *personal or individual* liability of the holders of full-paid stock . . ."

could not be changed without consent of all. The statute itself then required a two-thirds vote to amend.)

Now, in the Articles of Incorporation, the Keith O'Brien stockholders had expressly *reserved* the right (1) to amend, and (2) to do so by a simple majority:

“... That these articles of incorporation may be amended in any respect at any stockholders' meeting called for that purpose, specifying in the notice of such stockholders' meeting the nature of the amendments: (by) a majority of the outstanding capital stock of said corporation represented at such meeting either personally or by proxy voting for such amendments.” *Nelson vs. Keith O'Brien Co.*, 91 P. 31.

In 1904 pursuant to that power reserved in the Articles of Incorporation, more than a majority (but less than all—1605 out of 2000 shares) amended and *enlarged* the assessment powers of the corporation.

Whether the 1903 change in §338 of the statute would or could authorize the amendment was not decided. Our court placed its decision squarely on the power reserved in the Articles of Incorporation alone; and the amendment was upheld.

“The plaintiff and his assignors subscribed the articles of incorporation. The articles are their contract.” *Id.* 32.

On the effect of the contract created by the Articles of Incorporation, the opinion said:

“It will therefore be observed that the capital stock of the corporation was, for certain purposes and to some extent, made assessable. Such was

the contract of agreement of the incorporators, and to which each subscriber agreed. Now, they further contracted and agreed among themselves that the articles might be amended in any respect, at any stockholders' meeting called for that purpose, by a *majority* of the outstanding capital stock voting for such amendments. By this stipulation the incorporators expressly authorized a majority of the stockholders to amend the articles. They had the undoubted right to make such an agreement." Id. 32. (Italics added.)

The holding of the court was :

" . . . and by virtue of the power conferred by the articles we are of the opinion, and so hold, that the majority of the outstanding capital stock had the right to make such amendment to the articles as was here made." Id. 32.

We see, therefore, by *Nelson vs. Keith O'Brien Company*, supra, this court (in 1907) ruled that a reservation in the *Articles of Incorporation* was in law sufficient to authorize the majority to amend and enlarge the assessment powers. We have also seen earlier in this brief (Point 3) that by *Weede vs. Emma Copper Company*, supra, this court (in 1921) later ruled that the reservation in the *statute* alone (where no reservation was made in the Articles) was likewise sufficient.

In our case, however, both (1) the statute, and, (2) the Articles of Incorporation contained the reservation in favor of the majority and the amendment was valid providing, as it did, that —

"the holders of full-paid stock shall not be *personally* liable for the payment of any such assessment." (R. 8.)

Point 5.**Other Utah Decisions Support The Amendment Here.**

We have just seen that in *Nelson vs. Keith O'Brien Company*, 32 Utah 396, 91 P. 30, this court (in 1907) held the majority stockholders could lawfully amend and *extend* the assessment power of a corporation, basing its holding squarely upon the power being reserved in the *Articles* themselves.

The Keith O'Brien stockholders (less than all) again amended in 1913. *Salt Lake Automobile Company vs. Keith O'Brien Company*, 45 Utah 218, 143 P. 1015. That amendment created a *second* preferred stock and assigned it priority over an existing *first* preferred stock. That amendment was also upheld. The court said:

"The only question to be solved by us is whether, under our Constitution and statutes, a *majority* of the stockholders of a corporation may amend the articles of incorporation to authorize an issue of preferred stock, which shall take precedence in rights over prior issued preferred stock. . .". *Salt Lake Automobile Co. vs. Keith O'Brien Co.*, 143 P. 1016.

Therein the first Keith O'Brien decision was approved thus:

"We have already held that, where the right to amend generally is reserved in the articles of incorporation, such reservation constitutes a binding agreement between all of the stockholders to the effect that the articles may be amended by the number specified therein in any particular

which could have originally been agreed upon and inserted in the articles, although such amendment without such an agreement could not have been made under the statute without the consent of all the stockholders. *Nelson v. Keith O'Brien Co.*, 32 Utah 396, 91 P. 30." *Id.* 1017.

The court explained that the company might borrow money and that obligation would become prior to the existing preferred stock; might even mortgage its property, in which case, the mortgage would be prior. And, although as against other stock, the preferred stockholder is ordinarily entitled to preference—

"He, however, by reason of the right to amend and change the articles of incorporation, takes his stock subject to such right. . . ." *Id.* 1018.

Keetch vs. Cordner, 90 Utah 423, 62 P. 2d 273, (1936) approved and upheld the power of the stockholders (less than all) to amend and lengthen out the corporation's life. By then the power to amend (by less than all the stockholders) was no longer doubted.

"It is not contended that there is any legal objection to amending articles of agreement of a corporation merely because all of the stockholders thereof do *not* consent thereto. If such a claim were made, it could not be successfully maintained." (Italics added.) *Keetch vs. Cordner*, 62 P. 2d 275.

Turning with approval to *Weede vs. Emma Copper Company* heretofore discussed (which had held in 1921

that non-assessable stock could be made assessable by majority amendment) our court said:

“The law which was in existence at the time the articles of agreement were entered into became a part thereof. In legal effect, the signers of the original articles of incorporation agreed that they may thereafter be amended in conformity with law. *Weede v. Emma Copper Co.*, 58 Utah 524, 200 P. 517.” (Italics added.) Id. 275, 276.

The latest decision of this court was, we think, in 1950.

Cowan vs. Salt Lake Hardware Company, 118 Utah 300, 221 P. 2d 625.

The articles contained no power to amend:

“The Articles of Incorporation did *not* contain an express provision authorizing the stockholders to amend these Articles.” *Cowan vs. Salt Lake Hardware Co.*, 221 P. 2d 626. (Italics added.)

Salt Lake Hardware Company was incorporated in 1898. (That was when two-thirds vote of the stock was required to amend. §338). This was later reduced to a *majority*. C. L. 1907, §338. It had common stock. Also *non-callable* preferred.

In 1947, by two-thirds vote of the common stock, the Articles were amended. The amendment made the preferred stock callable whereas, it had been non-callable. This court upheld the amendment. It quoted from *Keetch vs. Cordner*, *supra*:

“ . . . The law which was in existence at the time the articles of agreement were entered into became a part thereof. In legal effect, the signers of the original articles of incorporation *agreed* that they may thereafter be amended in conformity with law.” (*Italics added.*) Id. 627.

As to the absence in the Articles of Incorporation of a reserved power to amend, the opinion said :

“Since §338, R.S.U. 1898, which was in effect when respondent became incorporated, specifically authorizes amendments by two-thirds of the outstanding capital stock in any respect which would conform to the provisions of the law on corporations, the respondent has the right to amend its Articles, if done in conformity with such statute as much as it would had the original Articles specifically provided that amendments might be made.” (*Italics added.*) Id. 627.

On the power to amend, although not expressly reserved in the Articles, Justice Wade concluded :

“When the stockholders bought shares in the corporation, the laws of the state controlled the rights between the stockholders and the corporation just the same as if those laws had been copied in the Articles and their rights were subject to those laws.” Id. 627.

Point 6.**Garey vs. St. Joe Mining Company (Utah 1907) Is Not In Point.**

Appellant sees a parallel in the above case and the one at bar, contending it presented “the identical question as the case at hand.” (Appellant’s Brief, 8.)

But appellant does not see clearly. *Garey vs. St. Joe* was altogether different. 32 Utah 497, 91 P. 369.

St. Joe Mining Company was incorporated in 1897. The 1896 law governed and was carried forward in the 1898 code.

St. Joe’s stock was *non* assessable. And its Articles did *not* reserve the power to amend at all.

The proviso in the statute (§338) then said only that “liability” of the stockholders for assessments could not be changed without consent of all. **The 1903 amendment had not yet been made.**

So, St. Joe Mining Company (1) did *not* reserve the power in its Articles to amend at all, and, (2) the *statute* prohibited the changing of all liability for assessments by less than all of the stock.

Afterward (1903) the proviso in the statute was amended. The qualifying words “personal or individual” were inserted ahead of “liability” and the phrase became and now continues:

“That the *personal or individual* liability of the holder of full-paid stock for assessments . . . shall

not be changed without the consent of all the stockholders." Laws 1903, Ch. 94, P. 80.

St. Joe's stockholders (more than two-thirds but less than all) thought they saw a chance to amend and make the stock assessable. They amended. But this court held their amendment was void.

Remember, *neither* (1) St. Joe's Articles, nor, (2) the governing statute at the time of incorporation in 1897 gave the two-thirds power to amend so as to assess. The power was lacking from the outset. It was only by virtue of the intervening 1903 amendment to the statute that the power was even claimed. This court held, however, that the 1903 amendment alone could not empower existing corporations to amend and make the stock assessable without consent of all where no power to amend was originally reserved in the Articles of Incorporation. As to the statute in force when St. Joe was incorporated, the court said:

"From those provisions it is obvious that unless the stock is made assessable by the articles, or agreement, as it is sometimes called, of incorporation, then it is immune against any assessments. In order, therefore, to levy an assessment, the incorporators, or stockholders, must agree upon this matter specially, since to remain silent is to forbid assessments." *Garey v. St. Joe Mining Company*, 91 P. 379.

But, had the simple power to amend actually been *reserved* in the Articles of Incorporation, the amendment, the court said, would have been valid.

“If the stockholders in the original articles had agreed that they might be changed or amended generally, the case would, no doubt, be different, as pointed out in the case of *Nelson v. Keith O’Brien Co.*, 91 P. 30, for the reason that the stockholders thereby *consented* to amendments of the articles constituting the entire agreement under which the stock was issued to them. But this is not such a case.” (*Italics added.*) Id. 380.

The quoted situation fits our case. Our stockholders *did* agree, for they reserved in their Articles of Incorporation the power to amend “at any time or in any respect conformable to law.” (R. 25.) And, since they did not prescribe the proportion of stock necessary, the statute fixed it for them—a majority. §16-2-45.

Weede vs. Emma Copper Company afterward (1921) explained *Garey vs. St. Joe Mining Company* (1907) thus:

“When the defendant company in the Garey Case was incorporated, and for many years prior thereto, the proviso we have just quoted read as follows:

‘That the liability of the holder of full-paid capital stock for assessments . . . shall not be changed without the consent of all the stockholders.’

“The qualifying words, ‘personal or individual’, were inserted into the statute in 1903. Sess. Laws Utah 1903, c. 94, p. 80. It will be thus seen that the phraseology of the proviso underwent a material change after the defendant in the Garey Case was incorporated. As the statute read prior to 1903, no levy for assessments on full-paid stock could

be made without the consent of all the stockholders. *After* the amendment of 1903, however, the liability was *restricted* to 'personal or individual' liability. In changing the phraseology of the statute, it must be assumed that it was the intention of the Legislature to change its effect. 2 Lewis, Suth. St. Const. (2d Ed.) §399; Dahl v. Salt Lake City, 45 Utah 544, 147 Pac. 622. If it was intended to continue in effect the proviso that no levy for assessments could be made unless consented to by all the stockholders, why make the change in the phraseology of the statute, by inserting therein the qualifying words 'personal or individual' preceding the word 'liability'?" *Weede vs. Emma Copper Co.*, 200 P. 517, 520. (Italics added.)

Garey vs. St. Joe Mining Company stands for this only: that where (1) incorporation occurred *before* the 1903 amendment to the statute, and, (2) no power to amend is reserved in the Articles, they cannot be amended so as to make the stock assessable without consent of all.

Peery Land and Livestock Company, however, was (1) incorporated in 1933 (after the 1903 amendment), and (2) expressly reserved the power of amendment in its Articles of Incorporation.

Forsyth vs. Selma Mines Company, 58 Utah 142, 197 P. 586, cited by appellant, actually supports *our* case. There the Articles of Incorporation provided:

"The common stock of this corporation shall be assessable." 197 P. 587.

The power to assess was not questioned. It was as-

serted only that the levy made by the directors was excessive in law. This court ruled the above quoted power to assess made the power *unlimited* and upheld the assessment.

Dotson vs. Hoggan 44 Utah 295, 140 P. 128, also cited by appellant, is of no help. It stands for this only: that (1) a *creditor* of the corporation cannot sue a stockholder for an assessment due the corporation, and, (2) the stockholder is not *personally* liable for the assessment in any way but only forfeits his stock in case of non-payment.

Point 7.**The Amendment Was Carried By A Majority Of The Stock.**

Appellant's brief contains no Statement of Point concerning this subject and it is, therefore, waived. But, since it is mentioned, we call attention to the matters below.

The total stock of Peery Land and Livestock Company is 100 shares. (Articles of Incorporation R. 22.)

66 $\frac{2}{3}$ Shares voted for the amendment.

15 Shares voted against the amendment.

18 $\frac{1}{3}$ Shares were not present and did not vote.

100 Shares (R. 17.)

This is definitely shown by the Secretary's affidavit (not controverted) supporting our motion for summary judgment. (R. 17.) But, the minutes are not in this record and nowhere does the record disclose who attended the meeting and the number of shares held or voted upon except:

- (1) Appellant admits (R. 8) and the Secretary's affidavit supporting our summary judgment motion shows (R. 17) that appellant actually attended and voted her 5 shares against the amendment.
- (2) 16 shares were voted by proxy for Marilyn G. Jacob and Phyllis J. Austin. (R. 5, 11.)

That is the record. Yet, amazingly, appellant pur-

ports to set forth in her brief (Page 2) (1) how the 100 shares of stock were held, and, (2) how the shares were purported to have been represented at the meeting—all *dehors* and unsupported by the record.

But, her journey *dehors* is harmless. All that she complains of here is that 16 shares voting *for* the amendment were by proxy. And, again *dehors*, charges the proxy was voted by *Joseph I. Jacob* (on Page 2) and by another, *I. H. Jacob* (on Page 4). Which is right? For aught that appears, the proxy might have been voted by appellant herself.

Appellant says, “there was no call for proxies, nor was a committee ever appointed to examine proxies” etc. (Her Brief, 2.) This is not quite accurate, the record being that no committee examined the proxies. However, the point is lost to appellant since it is *not* included in her “Statement of Points upon which she intends to rely for a reversal of the judgment”, as required by Rule 75 (p) (2) (3). See our Point 1 herein.

Good or bad, however, the proxy, it is charged, voted only 16 shares. Were these thrown out, the result would be unchanged—a majority of the 100 shares still voted for the amendment, as this record shows (R. 17):

For the amendment,	66 $\frac{2}{3}$ Shares
Disregard and subtract the proxy vote,	16 Shares
	—
Net majority for the amendment,	50 $\frac{2}{3}$ Shares

This net majority—50 $\frac{2}{3}$ shares— is fully conceded by appellant's brief. (Page 4.)

But the 16 proxy votes were valid nevertheless. On proxy voting, our *Articles of Incorporation* are silent (R. 21-26) and no conditions are attached by the *statute* to proxy voting:

“Such vote may be given in person or by an authorized agent or by proxy.” §16-2-40.

And,

“In the absence of any provision to the contrary, authority to act as agent in voting stock at a corporate meeting may be given by parol . . .”. Fletcher Cyclopedia, Corporations, §2057.

In fact, examination or production of the proxy is not necessary:

“. . . failure of the holder to produce the proxy at the meeting does not destroy his agency.” Id. §2058.

CONCLUSION

The rule of *Nelson vs. Keith O'Brien Company* (1907) and *Weede vs. Emma Copper Company* (1921) is that the majority may amend and make non-assessable stock assessable where either (1) incorporation occurred *after* the 1903 amendment to the statute, or, (2) the Articles of Incorporation *reserve* the right to so amend.

The rule has stood over the years—so long, we submit, that it has become a rule of property. The numerous corporations, stockholders, directors and purchasers who have amended, assessed, sold and purchased stock for non-payment of assessments, relying for their authority and title on the rule of those cases, must now be countless. For this court to decide as appellant asks, would not only overturn this established rule of law but also render void innumerable amendments and assessment sales and nullify the titles of countless purchasers, who, in good faith, purchased shares relying on this rule of property.

Respondents submit:

1. Appellant's sole and only point—Point 1 herein—is a failure. The judgment (or action of the stockholders—whichever) is not within the sweep of the contract clause of the Federal Constitution. The latter enjoins only *legislative* action by the state impairing contracts; not decisions of state courts or doings of corporations or individuals.

2. The amendment to the Articles of Incorporation

of Peery Land and Livestock Company was authorized both by *statute* and the *Articles* themselves. Both reserved the right of the majority to amend. Since the corporation was organized after the 1903 amendment, the change in its Articles of Incorporation making the stock assessable was proper for that change did not attempt to make the stockholders “personally or individually” liable for assessments.

3. The summary judgment sustaining the amendment and dismissing the complaint is correct and must be affirmed, with costs to respondents.

November, 1954.

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