

1961

Sherman B. Hinckley and Bonneville on the Hill Co. v. Robert B. Swaner, Peter B. Swaner et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT

of the
STATE OF UTAH

FILED
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SHERMAN B. HINCKLEY and
BONNEVILLE ON THE HILL
COMPANY,

Appellees,

vs.

ROBERT B. SWANER, PETER
B. SWANER, and NORTH
POINT CONSOLIDATED
IRRIGATION COMPANY,

Appellants.

Supreme Court, Utah

Civil No. 9560

BRIEF OF ROBERT B. SWANER,
AND PETER B. SWANER, APPELLANTS

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BRIEF OF ROBERT B. SWANER,
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STATEMENT OF FACTS

The North Point Consolidated Irrigation Company is a corporation of the State of Utah which distributes waters of the Jordan River through the surplus canal to its stockholders in Salt Lake County.

On or about June 14, 1961, the Appellee, Bonneville On The Hill Company, a substantial stockholder of the North Point Consolidated Irrigation Company filed with the Secretary of the corporation

a call for a special stockholders' meeting to be held at 134 South Main St., Salt Lake City, Utah, on the 5th day of July, 1961, at which time and place the meeting was held. At the meeting the Secretary announced that there were present in person or by proxy, the representatives of 7,910.75 shares of a total of 8,143.5 shares of the outstanding stock of the company, and the president declared that a quorum was present. The following is a list of stockholders represented, either in person or by proxy:

STOCKHOLDER	PROXY	NO. OF SHARES
Bonneville on the Hill Company		3,223.625
Bothwell & Swaner Company	Robert B. Swaner	1,795.6875
F. B. Bothwell	Robert B. Swaner	1,795.6875
Eddie Ernst		8.35
Edward Gilmor	Robert B. Swaner	10.00
Sherman B. Hinckley		21.00
Arza A Hinckley and Rulon T. Hinckley	Edwin Whitney	179.90
George and Clyde S. Hill		105.50
Tom E. Jeremy		216.00
Grace J. Cassaday	Edwin Whitney	216.00
L. J. Lerwill		60.00
A .H. McCallum	Edwin Whitney	140.00
Harold Wallace for Mrs. Ada Nebeker		37.00
Joe Bosone for North Point Fur & Reclamation Co.		25.00
Tom Peck	Edwin Whitney	15.00
Peter B. Swaner		1.00
Robert B. Swaner		1.00
Edwin Whitney		60.00
		<hr/> 7,910.75

The president then stated that the first matter of business to be considered at the meeting was to act upon a proposal that the number of directors of the company be increased from four to five, and a resolution to that effect was presented and seconded. After a discussion a ballot by roll call was conducted and the number of shares voting in favor of the resolution was 4,307.375 shares which was a majority vote of the quorum present or 54.45%. The president then stated that the resolution required two-thirds of the outstanding stock of the company as provided by Article XXVI of the Articles of Incorporation which reads as follows:

“ARTICLE XXVI

Amendments

The Articles of Incorporation of this company may be amended or any of the articles as made and provided may be repealed or new provisions adopted at any regular or special meeting of the stockholders by a vote of two-thirds of the outstanding stock.”

Mr. Edwin Whitney objected and stated that the Articles of Incorporation were not being amended and that the number of the Board of Directors could be determined by a majority vote of the stockholders present as provided by Articles XXI and XXIV which read as follows:

“ARTICLE XXI

Board of Directors

There shall be enacted by ballot by the stockholders of this corporation at each annual stockholders' meeting or at a special meeting called for that purpose, a Board of Directors consisting of not less than four nor more than six, and until otherwise determined by the stockholders, the Board of Directors shall consist of four members.

“ARTICLE XXIV

Stockholders' Meeting

A stockholders' meeting of this corporation shall be held at the company's office at Salt Lake City, Utah, at 2:00 p.m. upon the second Monday in November in each and every year for the purpose of electing a Board of Directors and the transaction of such other business as may be properly brought before such meeting. Special stockholders' meetings may be called by the President or by any three directors or by the stockholders owning at least $\frac{1}{4}$ of issued capital stock.

“At any regular or special stockholders' meeting excepting as hereinafter provided for in this article or in Article XXVI following, a majority of the issued stock must be represented in person or by proxy to constitute a quorum for the transaction of any and all business. A majority of a quorum shall be requisite for the passing, confirming or adopting of any act, motion, or resolution.

“All regular or special stockholders' meetings provided for by these articles and duly

convened may be continued from day to day without notice or adjourn from time to time with notice hereafter provided, or for the want of sufficient representation of stock any such meeting may be adjourned by a majority of the stockholders who are present pursuant to notice or call for such regular or special meeting or any adjournment thereof. Reasonable notice of the time and place of any such adjournment shall be mailed to each and every stockholder."

Following the discussion the president ruled that the proposed resolution required a two-thirds majority of all outstanding stock and that the resolution had failed. Upon refusal of the president to proceed further, the Vice-President called for a nomination of a fifth director, whereupon Mr. L. J. Lerwill nominated Mr. Sherman B. Hinckley as director and the nomination was duly seconded. There being no further nominations a vote was taken by the Secretary. An affirmative vote constituted a majority of the quorum, to-wit: 54.45% in favor. The vote was 4,307.375 shares for Mr. Hinckley and 3,603.375 shares opposed.

Thereafter, the Appellees filed a Motion for Summary Judgment in their favor for relief sought in the Complaint declaring the stockholders of North Point Consolidated Irrigation Company did legally increase the number of the directors of the company from four to five upon affirmative vote of the ma-

jority of the quorum at the special stockholders' meeting held July 5, 1961, and declaring that Sherman B. Hickley was lawfully elected to the office of Director of North Point Consolidated Irrigation Company at said meeting. The motion was heard on Friday, August 5, 1961, before the Honorable A. H. Ellett, and the Court ruled that,

- (1) The stockholders of the North Point Consolidated Irrigation Company did legally increase the number of directors of the company from four to five, upon the affirmative vote of the majority of the quorum at the special stockholders' meeting held July 5, 1961, and
- (2) That Sherman B. Hinckley was lawfully elected to the office of Director of North Point Consolidated Irrigation Company at said meeting.

The Appellants were directed to admit Sherman B. Hinckley to the office of Director of said corporation to enjoy and be subject to all rights, powers, privileges and duties of such office.

STATEMENT OF POINTS

POINT I.

THE STOCKHOLDERS OF NORTH POINT CONSOLIDATED IRRIGATION COMPANY DID NOT LEGALLY INCREASE THE NUMBER OF DIRECTORS OF SAID COMPANY FROM FOUR TO FIVE AT THE SPECIAL STOCKHOLDERS' MEETING HELD ON JULY 5, 1961, UPON A MAJORITY VOTE OF A QUORUM.

POINT II.

SHERMAN B. HINCKLEY WAS NOT LAWFULLY ELECTED A DIRECTOR OF NORTH POINT IRRIGATION COMPANY AT THE SPECIAL STOCKHOLDERS' MEETING HELD ON JULY 5, 1961.

ARGUMENT

POINT I.

THE STOCKHOLDERS OF NORTH POINT CONSOLIDATED IRRIGATION COMPANY DID NOT LEGALLY INCREASE THE NUMBER OF DIRECTORS OF SAID COMPANY FROM FOUR TO FIVE AT THE SPECIAL STOCKHOLDERS' MEETING HELD ON JULY 5, 1961, UPON A MAJORITY VOTE OF A QUORUM.

Article XXVI, Amendments provide:

"The Articles of Incorporation of this company may be amended or any of the articles as made and provided may be repealed or new provisions adopted at any regular or special meeting of the stockholders *by a vote of two-thirds of the outstanding stock.*"

In addition, Article XXI, Board of Directors states:

"There shall be elected by ballot of the stockholders of this corporation at each annual stockholders' meeting or at a special meeting called for that purpose, a Board of Directors consisting of not less than four or more than six, *and until otherwise determined by the stockholders, the Board of Directors shall consist of four members.*

It is Appellant's contention that the change

from four directors is a change of the Articles of Incorporation requiring a vote of two-thirds of the outstanding stock. The language in Article XXI, "and until otherwise determined by the stockholders, the Board of Directors shall consist of four members" fixes the number of directors at four. The language "until otherwise determined by the stockholders" is not determinative since it does not spell out the number of stockholders required to otherwise determine.

The complaint contains a list of stockholders represented either in person or by proxy. From this it can be readily observed that there are two principle owners of this company, the Bothwell-Swaner Co. and F. B. Bothwell who own 44.1% and the Bonneville On The Hill Co. including its three employees own 41.3%. From this it is obvious that the number of directors is very important, and with a Board of four members it would be natural to assume that two directors came from each of the groups.

It can hardly be contended that it was the intention behind the framers of the Articles of Incorporation for either of the two groups by a simple majority to add one more director and thereby obtain the control of the management of the company. This becomes important for many reasons, one of which is that this company has the power to levy assessments upon its members; therefor, a change

in the number of directors is a most important change in the Articles of Incorporation. It is, of course, the obvious strategy of the Bonneville On The Hill group in calling for a special meeting for the purpose of adding another director namely to obtain control of the management of the company by adding another director through a majority vote.

POINT II.

SHERMAN B. HINCKLEY WAS NOT LAWFULLY ELECTED A DIRECTOR OF NORTH POINT IRRIGATION COMPANY AT THE SPECIAL STOCKHOLDERS' MEETING HELD ON JULY 5, 1961.

It is Appellants' contention that since no office was created by majority vote there existed no office to which Mr. Hinckley could be elected, even though directors are elected by a majority vote. Election of Mr. Hinckley to a non-existent office would obviously be a nullity.

CONCLUSION

Appellants request that this Court reverse the ruling of the trial court, and declare the action taken by the corporation upon the deciding vote of Mr. Hinckley to be null and void.

Respectfully submitted,

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