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Salt Lake City, A Municipal Corporation v. State of Utah : Plaintiff and Respondent Salt Lake City's Petition For Rehearing and Supporting Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY, a municipal corporation,

Plaintiff and Respondent

vs.

STATE OF UTAH,

Defendant and Appellant

Case No.
11141

Plaintiff and Respondent Salt Lake City's
Petition for Rehearing and Supporting Brief

Appeal from Declaratory Judgment of the
District Court of Salt Lake County, Utah,
Honorable Leonard W. Elton, Judge.

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IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY, a municipal corporation,

Plaintiff and Respondent

vs.

STATE OF UTAH,

Defendant and Appellant

} Case No.
11141

Plaintiff and Respondent

Salt Lake City's Petition for Rehearing

The respondent Salt Lake City Corporation respectfully petitions this court for rehearing in the above entitled action and alleges that the court in its majority opinion filed on December 3, 1968, erred on the following points:

1. There is no basis in fact for the assumption of this court that the 1890 arrangement to provide free use of city water to the Territory of Utah was a part and parcel of the original capitol-site-package.

2. The majority decision is contrary to the law of the State of Utah as heretofore declared by this court,

and if this court intends to reverse the prior holding of the law it should so state specifically.

WHEREFORE, plaintiff-respondent, Salt Lake City Corporation, prays that this action be reheard by this Honorable Court, and that the foregoing errors of the Court be corrected in the interest of law, public order and justice.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY, a municipal corporation,
Plaintiff and Respondent

vs.

STATE OF UTAH,

Defendant and Appellant

Case No.
11141

Brief in Support of Petition for Rehearing

STATEMENT OF FACTS

In the year 1888 Salt Lake City deeded to the Territory of Utah 19.46 acres of land to be used for the erection and maintenance of Capitol buildings of the Utah Territory or future State of Utah. This same grant provided that in addition to the 19.46 acres actually granted by the deed the City would (at some future date) deed "an additional one-half ($\frac{1}{2}$) interest in 5 acres of land, more or less, as may be necessary suitably situated on

Capitol Hill, for reservoir purposes, the location of said land to be hereafter determined by the Territory and City,” (R. 17).

That same year the territorial Legislature created the Board of Commissioners on Capitol Grounds to take possession of the deeded 19.46 acres and the sum of \$25,000.00 was appropriated and expended to improve and beautify these grounds. (R. 10). Mention was made in this act of the construction of a suitable reservoir “for an adequate storage and supply of water for the said grounds, and for the buildings hereafter to be erected thereon.” (Compiled Laws of Utah 1888, Vol. I, § 1884-5, p. 670.)

In 1890 the Territorial Legislature appropriated the sum of \$10,000.00 to be used: “For the improvement of capitol grounds to be drawn by and expended under the supervision of the Capitol Commission. Provided, that the above amount be expended on condition that Salt Lake City furnish, free of charge, sufficient water for said grounds and for the building proposed to be erected thereon.” (R. 11).

Under threat that the Territory would fail to carry out its agreement to improve and beautify the grounds previously conveyed to the Territory of Utah, the City on May 6, 1890, adopted a resolution that “free use of water be granted to the Commission for the use of the Capitol Grounds and for the use of any building erected thereon — in accordance with the specific understanding

with the City when arrangements were made, to begin work on said grounds." (R. 21). Approximately six weeks later, April 29, 1890, the Board of Commissioners on Capitol Grounds, in a letter addressed to the Honorable Mayor and City Council of Salt Lake City, made reference to the Capitol Hill Reservoir, explaining the arrangement that the territory was to pay one-half the cost of its construction and the city was to pay the other half of such cost. (R. 11.) This same letter made mention of the strings attached to the expending of the \$10,000.00 appropriated in March of 1890, stating that the understanding that the City furnish water without charge for the grounds and any building erected thereon took place when "*arrangements were made to begin the work.*" (R. 12). (Emphasis added.)

Thereafter the city furnished water free of charge to the Territory and the State of Utah. The Utah Constitution was adopted in 1895, containing a clause which expressly prohibits cities and towns from alienating, directly or indirectly, their water rights. In the year 1926 the City entered into a written agreement with the State of Utah to extend the 1890 "grant" of the perpetual free use of water to additional lands to be parked by the State. (R. 22).

ARGUMENT

POINT I.

THERE IS NO BASIS IN FACT FOR THE ASSUMPTION OF THIS COURT THAT THE 1890 ARRANGEMENT TO PROVIDE FREE USE OF CITY WATER TO THE TERRITORY OF UTAH WAS A PART AND PARCEL OF THE ORIGINAL CAPITOL-SITE PACKAGE.

The majority opinion of the court in its decision has erroneously taken out of context a certain phrase found in the 1888 land grant of Salt Lake City to the Territory of Utah, ignoring completely its true meaning when that document is read as a whole. (Second paragraph on page 2 of the green sheet.)

The Court's attention is called to this land grant wherein is found the first reference to a reservoir: "Also an additional one-half interest in five (5) acres of land, more or less, as may be necessary suitably situated on Capitol Hill, for reservoir purposes, the location of said land to be hereafter determined by the Territory and the City, . . ." (R. 17). The latter reference in this deed to a reservoir, which reference the court erroneously isolates and emphasizes by underlying, can only be referring to the reservoir on five (5) additional acres in which the Territory would have a one-half interest as previously defined in the said land grant. This assumption is borne out by the reference to this arrangement as set forth in the letter of April 29, 1890, from George E. Blair, Secretary, Capitol Grounds Commission, as found in paragraph 4 of the Stipulated Facts. (R. 11).

Since this reservoir was to be a joint venture, it does seem most odd that no mention is made prior to April 29, 1890, as to the source of the water with which to fill it. It is of further interest to note that when mention was first made of the water need the reference *was not* "as understood between the parties when the deed of grant was executed and delivered," but, rather, "was specifically understood with the City when arrangements were made to begin the work . . ." What work? The work of parking and landscaping these grounds, which by chronological order had to come after this Capitol-Site in Salt Lake City was a *fait accompli*. Therefore, the conclusion is inescapable that the issue of free city water came up at a later date and was not a part of the consideration for the Capitol-Site in Salt Lake City. To hold otherwise is to ignore the stipulated facts and create a baseless factual fabric in order to justify the conclusion reached by the majority opinion of this court, all for the apparent purpose of slapping the City's wrist for daring to challenge an arrangement which has brought the City alleged benefits, ignoring completely the Pandora's box the Court is opening with regards to water rights of cities and towns in this State.

Certainly, this Court has chronologically juggled the facts as stipulated by the parties in order to find a factual basis for the proposition that the arrangement for free use of city water was a part of the original Capitol-Site Package. There is, in fact, no basis for such an assumption. For the court to say that "the establishing of

the Capitol in Salt Lake City was the result of many conferences of men in positions of responsibility in both the city and the territory," and impliedly and reasonably indicates that the agreement to provide free use of city water was a part of the original consideration running from the city to the territory is playing loosely with the facts. This court cannot find any reference in the history of these transactions between the territory and the city involving the location of the Capitol wherein is mentioned free use of city water until the actual task of landscaping and parking of the Capitol-Site lands was begun by the territory. If, therefore, the agreement to provide free use of water was not a part of the 1888 consideration, on what legal basis does the court hang the consideration to support this 1890 arrangement? There being none, it should fail.

POINT II.

THE MAJORITY DECISION IS CONTRARY TO THE LAWS OF THE STATE OF UTAH AS HERETOFORE DECLARED BY THIS COURT, AND IF THIS COURT INTENDS TO REVERSE THE PRIOR HOLDING OF THE LAW IT SHOULD SO STATE SPECIFICALLY.

Without belaboring the points of law heretofore cited to this Court in the Respondent's Brief, the Court's attention is called to the fact that in the instant case, without so saying, the case of *Hyde Park Town v. Chambers*, 99 Ut. 118 104 P.2d 220, appears to have been overruled.

The only difference in the facts of that case and the instant case is that in the instant case, the consideration, if any there was, which the city denies, ran between a city and the Territory of Utah and later State of Utah, and in the Hyde Park Town case (supra) the consideration for the free use of city water ran between a city and an individual.

If this court feels strongly against Salt Lake City's being a "poor sport", the court should not lose site of the fact that its decision adversely affects the water rights of all the cities of this State and, by chastising Salt Lake City, it is in effect likewise chastising all the other cities in this state, thereby eroding constitutional restraints heretofore deemed essential to their continued existence in this arid land.

The decision rendered by this court has removed municipal water supplies from the sacred trust in which they have heretofore been held by cities of this state, thereby opening the flood-gates for the gradual depletion of cities' water rights. Certainly, it was not the court's intention to strike down the protection afforded the water rights of cities of this state by the Constitution as declared in the case of *Hyde Park Town v. Chambers* (supra). This, however, is the actual result of its decision. If the decision of the instant case is allowed to stand as the law of the State, unless this court desires to distinguish the factual situation where the State is the recipient of free city water as opposed to a situation where an individual or corporate entity is the recipient

of free city water, the water rights of cities of this State are in constant jeopardy.

If the law of this State is that cities operate their water resources in every respect, including the holding and protecting of such resources, in a proprietary capacity, as this Court's opinion has stated, then it logically follows that Article XI, Sec. 6, of the State Constitution means nothing, for if a City desires to attract business and industry, what greater inducement could cities offer to the permanent detriment of the inhabitants therein than to agree to grant free use of city water in perpetuity as consideration for any business or industry locating in that city. Clearly, such business or industry may give economic benefits to the city, but, if this be allowed on the mistaken idea that such a "grant of free use of city's water" does "not dispose of its waterworks, water rights, or water supply," as stated by the majority opinion of this court, how more clearly and definitively could a city indirectly alienate its sources of water supply than by this means. To hold otherwise is to deal with semantics and not realities. If such a gradual dissipation and erosion of the waters of a city were possible under the law, then it is possible for a city to enter into a sufficient number of agreements with entities, such as the State of Utah or private business concerns to grant in perpetuity free use of water, justified by this court's language that the location of such Capitol or business in such city "is a valuable economic asset to the city," and thereafter find that there is no water left for the use of

the inhabitants of the city who were the true owners of such water.

To say that there is no danger of such a contractual commitment by the city fathers of the waters of a city, thereby endangering the water supply, is to beg the question.

If the court opens this flood-gate it cannot be heard to say such a devastating loss won't occur.

Furthermore, the court seems to say that because in 1926 a Board of City Commissioners acknowledged it had a duty to supply the State with free use of its water, the admission of the city stops it from denying the power of such city commission to so acknowledge the duty. Again, this reasoning begs the question of the city's power to "acknowledge" such a "duty." Even though the City Commission had passed a daily resolution, affirming its duty to supply the State of Utah with free use of city water, surely such a daily affirmance could not bind the city if such acknowledgment be contrary to the law, as your respondent contends it is.

CONCLUSION

The majority opinion in this case fails to follow the stipulated facts and is diametrically opposed to the previous decisions of this court and opens up a dangerous precedent for cities of this State with reference to the holding and protection of their water rights. The court

should carefully review these aspects of the case and, hopefully, set it aside in order that a proper decision can be rendered by the Court upon the power of a city of this state to contract with the State or any other entity to grant in perpetuity free use of city water.

Respectfully submitted,

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