

1940

Hyde Park Town v. George Chambers and Tacy Chambers, E. S. Chambers, Bertha Poulsen, David J. Weeks, and Mary Weeks : Reply Brief of Appellant

Utah Supreme Court

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No. 6201

In
The Supreme Court
of the
State of Utah

HYDE PARK TOWN,
a Municipal Corporation,
Plaintiff and Appellant,

vs.

GEORGE CHAMBERS AND
TACY CHAMBERS, His
Wife, E. S. CHAMBERS, a
Single Man, BERTHA POUL-
SEN, as Guardian of ADELL
IDA POULSEN, a Minor,
DAVID J. WEEKS, and
MARY WEEKS, His Wife,
Defendants and Respondents.

Appeal From First Judicial District Court in and
for Cache County
Honorable Lewis Jones, Judge

Appellant's Reply Brief

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and Appellant.

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Appellant's Reply Brief

In entering upon the preparation of a reply brief in this cause, we are impressed with the thought that there is little excuse for any extended elaboration of our contentions, as set forth in the original brief.

We have already given our views as fully and emphasized them as thoroughly as possible; and our

opponents have made their answer thereto. The principal necessity for a reply arises from various statements and conclusions in our opponents' brief which, in our opinion, are not supported by the record.

At the outset, on page one of respondents' brief, it is stated that "It is the contention of the defendants (respondents) that even though there was no express agreement that they should give up their culinary streams as a part of the consideration of the town granting them these taps, that under all the facts and circumstances there was an implied agreement that as a consideration for such taps the plaintiff (appellant) could have any additional water that might be saved from the culinary streams of the defendants." The same argument is advanced elsewhere in their brief (Pages 16, 22-23, 29).

Our opponents make no attempt to point out any testimony in the record to support this bald conclusion. Had there been any basis for the position taken by them, it would have been a simple matter to refer to the testimony on which they relied. We have searched the record, from beginning to end, and now assert without fear of contradiction that there is no testimony tending to prove the existence of any implied agreement.

On page 23 of their brief, we find this further statement: "The fact that on cross examination Mr. Weeks did not expressly mention the giving up of the culinary stream, does not change the fact that he did give up the stream, a fact which is not disputed in this case." Presumably, from this statement, counsel intended to have the Court believe that while there may have been some testimony on cross examination tending to prove that there was no other consideration given for the tap

water, over and above the right of way, there was no such evidence to be found in the direct testimony.

An examination of the record discloses, both on direct and cross examination, very definite testimony to the effect that respondents gave nothing, over and above the right of way, for the tap streams which they received from appellant. Furthermore, it is very clear in the evidence that the predecessor of the respondent Chambers (John P. Toolson) never had or claimed any culinary stream; hence he, at least, could give no such additional consideration to appellant.

MR. WEEKS, on direct examination, testified as follows (Trans. 81; Ab. 31):

“Q. (By MR. HARRIS): All right, can you tell us in substance what the statement was, the proposition was, that you mentioned?

A. Well, they ask if a dribble, they said, would be enough to do us. I said, yes, for culinary purposes.

Q. All right. They asked you if you would be satisfied with a dribble through the pipe line?

A. Yes sir.

Q. *What were you to give them for that?*

A. *I was to give them a right of way.*

Q. *What if anything was said to you, what you were to give?*

A. *They said for the right of way.”*

The foregoing testimony, apparently, was overlooked by respondents.

What the same witness (Weeks) said on cross examination, was equally explicit. We quote (Tr. 115-116; Ab. 36):

“Q. For this tap stream that you received, you gave Hyde Park the right to run this pipe line over your ground?

A. Yes, it was their idea. I ought to have enough good water to drink —

Q. You traded a right of way over your land for this tap; that is correct isn't it?

A. Why, I guess you would call that correct.

Q. Is that what you did?

A. Yes.

Q. You didn't pay them any money for it did you?

A. Pay them any money?

Q. Yes.

A. What do you call land and property?

Q. Just answer my question. You didn't pay any amount of cash did you?

A. No.

Q. For this tap stream they gave you; you gave them a right of way over your land?

A. Yes sir, it was their proposition.

Q. Yes, and that is all you gave them?

A. Well, here —

Q. Just answer that question yes or no.

(Objection).

Q. Is that what you gave, this right of way?

A. Yes, and the damages they damaged. I don't say nothing about the damages, they have damaged me before.

Q. You mean in passing over your land?

A. Yes sir, in digging it up several times.

Q. That is all you gave them?

A. That is all I got.

Q. That is you got the tap stream didn't you, for the time being?

A. Nothing said about the time being.

Q. For a certain time—

A. I gave up the right of way.

Q. Until this spring you got a tap spring?

A. Which spring?

Q. Until the spring of 1939?

A. Yes sir.

Q. That is correct?

A. Yes sir.

Q. And for that you allowed them to pass over your land with their pipe?

A. Ain't that about enough to pass over that."

The record discloses that the respondent Weeks owned the land in 1911 and was a party to the negotiations with appellant. The other respondent, Mr. Chambers, acquired his land subsequent to the 1911 negotiations. His predecessor in interest, John P. Toolson, held the land when appellant constructed its pipe line across what is now the Chambers property.

On the question of the consideration paid for the tap water, Mr. Toolson testified for respondents as follows (Tr. 128; Ab. 37-38):

"Q. Did you have some talk about what

kind of a deal that you would make for the water right?

A. I think I did. We had met in that capacity several times. I don't recall who they were, even.

Q. You don't recall who they were?

A. I have heard, but I don't recall.

Q. All right. Do you recall the substance of what was said about extending that pipe line across this fifty acres of land?

MR. YOUNG: Yes or no.

MR. HARRIS: Q. Do you remember what the substance of it was?

A. Yes.

Q. All right, can you state to the court, in your own language, the substance of what was said about constructing this pipe line?

A. They asked for a right of way —

MR. YOUNG: That is objected to as incompetent, irrelevant and immaterial, a proper foundation not having been laid, not being shown that he talked to any officer of Hyde Park, or any one authorized to make statements and admission on behalf of the town.

MR. HARRIS: We will follow it up by showing that Hyde Park did actually carry out this agreement.

THE COURT: Overruled.

MR. HARRIS: Q. You may state the substance of what was said.

A. Well they came for a right of way across my land, and in the discussion I

asked them for a tap for water. They didn't seem to make much objection. They said most of them wanted money for their right of way. I also asked about a trough. They didn't know about that. We got together on that matter."

QUESTIONS INVOLVED

Under this heading, on page 2 of their brief, counsel state that "The primary question involved is: Did the plaintiff show such facts as to constitute a necessity for this condemnation proceeding?"

We respectfully submit that the so-called primary question constitutes no issue on this appeal. Appellant commenced the action and sought to condemn a right-of-way for its new pipe line over the lands of respondents. Respondents answered, and the court held that appellant already had a right of way, and that no order of condemnation was necessary. In their amended answer and counterclaim, respondents appealed to the court to determine their right to tap water from appellant's pipe line. Appellant joined issue and the case was tried and decided by the trial court on that issue, and on that issue alone. Under the judgment of the court, respondents were held to be entitled to the use of a tap connected with appellant's pipe line, to supply them and their successors in interest with sufficient culinary water for human consumption and for stock watering purposes.

All of the assignments of appellant are directed to this phase of the controversy between the parties. No assignment whatever went to the ruling of the court relating to appellant's right of condemnation. Therefore, this so-called primary

question has no place at all in the case. And particularly is this so in view of the fact that respondents also failed to make any cross-assignment of error in relation thereto.

Where a matter is not challenged, either by an assignment or cross-assignment of error, it is not before the court for review.

Meissner, et al v. Ogden L. & I. Ry. Co.
etal, 65 Utah 1; 233 Pac. 569.

Perrin v. U. P. R. Co., 59 Utah 1; 201 Pac.
405.

Teakle v. R. R., 32 Utah 276; 80 Pac.
402.

ASSIGNMENT NO. 2

In their consideration of Assignment of Error No. 2, respondents, beginning on page 4 of their brief, take the position that the contract between appellant and respondents was valid because appellant owned a surplus of water over and above the needs of its citizens. It is our contention that this matter is wholly immaterial. The contract was not based upon the existence of any surplus. In fact, no mention was made of surplus at any time. Respondents grounded the right to a tap stream on an oral contract entered into by the parties in the year 1911. The record shows that in that year, and for many years immediately subsequent thereto, appellant was constantly short of water, so short in fact that appellant spent money on several occasions in successive years to tap sources of water supply higher up in Birch Creek Canyon than the point of the original intake. Certainly, this is the best kind of proof that there was an actual shortage of water, otherwise, the officers of appellant would never have spent money on such

undertakings. The testimony of all the witnesses bears out fully the existence of such shortage.

Whatever testimony was offered by respondents, tending to prove the possibility of a surplus, pertained entirely to the years since the construction of the last pipe line in about the year 1935. It would seem that the rights of the parties must have been fixed long before this time, and that the court could not make a contract for the parties based upon a surplus, if any such there be, coming into existence some twenty-three or four years after the date of the contract. Especially is this so in the light of the evidence that appellant never did allow respondents to take water out of the new pipe line after it was constructed. The theory of respondents in their cross complaint was certainly not based upon the existence of a surplus in 1911; the theory was based wholly and solely upon rights growing out of an exchange alleged to have been made in that year.

Before concluding our reference to this part of counsel's brief, we wish to point out that Geo. Z. Lamb was not the mayor of the Hyde Park Board in 1911, as contended on page 7 of their brief. Mr. Lamb was a member of the board and watermaster in that year. (Tr. 209; Ab. 58).

ASSIGNMENT NO. 7

Respondents next take up the several matters considered by appellant on the question of the insufficiency of the evidence to support the trial court's finding No. 13, to which appellant's Assignment of Error No. 7 was directed.

We feel that the questions involved were adequately covered in our original brief. There would seem

to be but one matter to which we think the court's attention should be called: On page 13 it is stated that "There is evidence as to the number of cattle that both Weeks and Chambers had on their premises,"

Again, counsel fail to point out any testimony in the record to support their position. Furthermore, it will be noted the assignment of error under consideration was not directed to what the evidence did or did not show, but rather to the failure of the court to make any finding at all as to the number of cattle customarily kept on the premises. Had such a finding been made, then appellant could have determined from the record whether or not there was evidence to support that finding.

We might also point out that at no time during the trial of the case was the slightest attempt made to establish the number of cattle which the predecessor of the respondent, Chambers, maintained on his premises; nor, the number of cattle which that respondent maintained there after he became the owner of the premises.

THE CONTRACT TO DELIVER WATER TO THESE DEFENDANTS WAS VALID AND BINDING.

This phase of the controversy is discussed by respondents, beginning on page 15 of their brief.

It is contended that the oral contract entered into in 1911 for the exchange of a right of way for a tap stream, was not a contract in perpetuity but rather merely an exchange of property or property rights for other property. This seems to be the extent of respondents' argument on this point.

Their claim of a vested interest accruing in 1911 is contrary to the position taken by them

earlier in the brief; also, it is contrary to the position taken by them immediately following, on page 16 of their brief. They state: "It was a mere agreement to supply water out of the excess water owned by the plaintiff."

This latter position is clearly inconsistent with the view that a vested property right was given. The contract upon which respondents based their claim required that appellant keep the pipe line, used to deliver their water, in a good state of repair at all times, and also required that when the same became worn out that it be replaced by appellant. Certainly, one could not say that the rights were determined entirely in 1911 as contended for by respondents on page 15 of their brief.

In our original brief we cited ample authority for our contention that a contract such as respondents claim was entered into by the parties in 1911, could not be a perpetual contract but rather would be a contract terminable at will. Respondents urge that those authorities are not in point. We call the attention of the Court, however, to the fact that the principle decided by those cases was most decidedly in point, that is, that where a city purports to contract in perpetuity, the courts will construe such contract to be terminable at will. Applying such a principle to the case at bar, appellant would have a right to terminate at will the contract contended for by respondent. In the instant case, it is clear that appellant did terminate the contract, if, in fact, any such contract ever existed.

On the question of the statute of frauds constituting a bar to the contract now sought to be enforced, respondents cite Section 33-5-8, Revised Statutes of Utah, 1933, reading as follows:

"Nothing in this chapter contained shall be construed to abridge the powers of

court to compel the specific performance of agreements in case of part performance thereof.''

Two cases are cited bearing upon this same question: *Brinton v. Van Cott*, 8 Ut. 480; 53 P. 218; *Lynch v. Coviglio*, 17 Ut. 106; 35 P. 983.

Respondents are in error in claiming that this section and the cases cited construing the same, apply to contracts not to be performed in one year. As a matter of fact, the doctrine of "part performance" applies only to contracts relating to real estate. See

Williston on Contracts, Section 533.

The two cases cited involve contracts pertaining to real estate and the Utah Court properly applied the doctrine of part performance. But the case at bar must be clearly distinguished from such a doctrine.

While it is clear that respondents could have performed all or part of their agreement within one year, yet appellant could not have done so, for the reason that it, under respondents' contention, was required to deliver water to them for all time. Appellant contends that the statute of frauds applies to such a contract and renders it unenforceable. Mr. Williston, in Section 504 of his work on Contracts, states:

"There are numerous decisions which seem supported by a more reasonable construction of the statute which holds that if after full performance on one side, performance on the other side still cannot take place within a year, the statute is applicable; and any redress which can be obtained for either full or partial perform-

ance must be based on principles of quasi-contract.”

In a note found in

Volume 138, American State Reports,
at page 610,

the same view expressed by Mr. Williston is stated as being the more logical. Each of these references is based on cases cited in connection with the text and is supported by these authorities.

CONSTITUTIONALITY OF THE QUESTION

On page 18 of their brief, respondents cite two Colorado cases and one California case. The principle decided by the cases can be stated tersely as follows: Contracts entered into by a municipality in its proprietary capacity, are not restricted by public policy to the same extent as where the city is acting in its governmental capacity. The cases cited held that in contracting with respect to water supply the city acted in its proprietary capacity, and that it had the same powers in that capacity as an ordinary corporation. They are not in point with the case at bar, for the reason that cities in Utah are expressly restricted, in their power in attempting to sell or exchange water rights or sources of water supply, by the constitutional provision referred to in appellant's original brief. None of the cases cited by respondent makes reference to any statutory or constitutional limitation of powers. Certainly the Utah cases cited on page 19 of respondents' brief do not consider the question involved in the case at bar.

The Ellerbeck case (*Ellerbeck v. Salt Lake City*, 29 Ut. 361; 81 P. 273) merely holds that if a city exchanges its water for other water, or water

rights, the quantities of the water may be different; so long as the water exchanged is of equal *value* the requirements of the constitutional provision are met. To be more exact, Salt Lake City attempted to exchange irrigation water, not fit for culinary use, for a much less quantity of water suitable for culinary purposes, and the Court held that it was immaterial that the quantities were different, if the value to the city was substantially equal.

The case of Salt Lake City v. Salt Lake City Water & Electric Power Company (24 Utah 249; 67 P. 672; 25 Utah 456; 71 P. 1069) has no connection with the case at bar at all. However, this much might be said: Salt Lake City, of course, never had any right to water. It merely had a right to *use* water if it could place it to beneficial use. Beneficial use was the limit of its right and the Court held that any water not placed to beneficial use by the city was public water and was subject to appropriation by any other person.

We find it impossible to see any connection between either of these cases and the case at bar.

On page 21 of their brief, respondents refer to two contracts entered into between Smithfield Irrigation Company and appellant. The first contract is dated July 9, 1912. It provides in effect that appellant would give to the Smithfield Irrigation District, 25 acres of water right from the Logan and Richmond Irrigation District, and that appellant should have the right to divert from Birch Creek certain water for its own purposes. The amount of the water involved is not stated, except that the water delivered by appellant to the irrigation district was to be twice as much as the water diverted by appellant from Birch Creek Canyon. It was further provided that appellant

should pay the assessments levied on the water right which it transferred to the Smithfield Irrigation District. From the acts of the parties, it is a fair inference to say that the Smithfield Irrigation District, which district is now Smithfield Irrigation Company, a corporation, was to be required to deliver to appellant, out of Birch Creek Canyon, at least half as much water as appellant delivered to the irrigation district. It is also a fair inference to say that the parties recognized that the original diversion from Birch Creek Canyon by appellant gave appellant less water than that amount, and, therefore, no opposition was raised to the repeated efforts of appellant to get more water out of Birch Creek Canyon, by extending its diversion point to additional springs located higher up the canyon. This condition seemed to have existed until finally, in 1935, appellant decided to extend its intake to a much larger spring situated in Birch Creek Canyon, which spring is the present intake of appellant's system. In 1935, on the 22nd day of January, the second contract referred to in respondents' brief was entered into between appellant and the Smithfield Irrigation Company. This contract expressly provided that appellant should be entitled to .50 of a second foot of the flow of the waters of this spring, and that all of the flow of the spring above that amount should remain the property of the Smithfield Irrigation Company, and should be allowed to continue to flow down Birch Creek. Thus the parties, by written contract, recognized the right of appellant to continue to take other sources of water supply in sufficient quantity to guarantee the amount contracted to be delivered to appellant, thereby recognizing the same course of conduct as the parties had actually worked under before the execution of this latter contract. A further provision was, that

if, in the future, this source should fail, appellant would be entitled to use other sources of supply to guarantee the quantity of water so granted.

The contract also provided as follows:

“It is further understood and agreed that the party of the second part (appellant) will quit claim to the party of the first part all of its right, title and interest, if any, in the waters of Birch Creek, save and except only, the waters hereinafter referred to.”

Respondents interpret this to mean that appellant quit claimed to the irrigation company waters which it had received from respondents. Certainly the contract does not justify the assumption of respondent in this particular. The contract recited that a dispute had arisen between the parties with respect to the ownership of certain waters in Birch Creek Canyon. This contract was entered into to settle that dispute. The contract further provided that the appellant would pay to the Smithfield Irrigation Company the sum of \$500.00. Counsel say that this was in lieu of the provisions in the old contract that appellant would pay the assessments on the stock transferred to the irrigation company. This assumption may, or may not, be correct. The contract does not state why the \$500.00 was paid, and as far as we know, there is no evidence to justify the assumption of respondents in this respect.

We have referred to these contracts at considerable length to answer the claim that appellant acquired water rights from respondents. The record shows that appellant claims .50 of a second foot of water which it acquired from the Smithfield Irrigation Company. It never claimed any further rights, and it does not now receive any

greater rights. As a matter of fact, it is a fair inference from the record that previous to 1935 the Smithfield Irrigation Company, or its predecessor in interest, the irrigation district, never actually delivered to appellant as much water as it was obligated to deliver by virtue of the contract of 1911.

On page 22, respondents again repeat that they do not claim under any express contract but claim that it was implied from the conduct of the parties that respondents granted to appellant certain waters in Birch Creek. Again, we say, that there is no evidence in the record tending in any degree to prove any such implied agreement between the parties. Certainly, the respondent Chambers, who never had any culinary stream, could not make the slightest pretense to the existence of any such implied agreement. It is true that Mr. Weeks said that he had abandoned his culinary stream after he received the tap water. *But he did not claim that this action was induced by any request or representation of the appellant or any of its officers, and did not show how appellant was or could be benefitted by his abandonment in any amount whatsoever.* Throughout respondents' brief the claim is constantly made that previous to 1911 the respondent Weeks had a steady stream of water which he used for culinary purposes; that he abandoned this water and that appellant was the beneficiary of this abandonment. 'Not only, however, does respondent Weeks fail to show how appellant could possibly have benefitted from this abandonment, but the claim in this regard is inconsistent with other parts of his own testimony. On page 115 of the Transcript, 36 of the Abstract, he testified that he and one Reed, a neighbor, constructed the ditch themselves and later on he gave rights in the ditch to other parties (not to appel-

lant); that as a result of this disposal of his rights he and his grantees were forced to take turns from the ditch from then on. Thus the reason that this respondent does not have a steady stream, at least during the high water season, is apparent: He disposed of so much of his rights in the ditch that his turn came at intervals, too infrequent to meet his requirements. Had he retained all of his original rights he would have been able to make use of his ditch for culinary purposes.

Beginning at page 24 of their brief, respondents discuss three Utah cases, and certain sections of the Utah statute.

Section 15-8-14, R. S. Utah, permits a city to sell its surplus water outside of the city limits. In the Genola case (*Genola v. Santaquin*, 96 Ut. 104; 85 P. (2d) 790) the Court stated that this meant a sale to its ultimate consumers in the same way as it sold water to the citizens of the town; that is to say, if the city *actually had a surplus* it might serve a resident of contiguous territory upon the same terms and conditions as it serves its own citizens. But manifestly it does not mean that a contract such as contended for by the respondents would be authorized under this section of the statute. For further clarification of this view, reference is again made to the language of Mr. Justice Wolfe in the Genola case quoted on page 23 of appellant's original brief.

Of course, the case of *Muir v. Murray City*, 55 Ut. 368; 186 P. 433, the first case discussed under the heading beginning on page 24, has no relationship to the case at bar. It merely held that Murray City could borrow money for the purpose of constructing a power line outside of the city limits.

The two other cases appearing under the same heading (*Ellerbe v. Salt Lake City*, 29 Ut. 361;

81 P. 273; *Brummit v. Water Works Co.*, 33 Ut. 289; 93 P. 829) have already received attention elsewhere in this brief. They in no sense authorize a city to enter into a contract to deliver a definite amount of water in perpetuity. Yet, if effect is to be given to the arguments advanced by our opponents, nothing short of that very thing would be required of appellant.

For the reasons herein set forth, we urge that the case should be remanded to the trial court for further proceedings.

Respectfully submitted,

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and Appellant.

Dated February 9, 1940.