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Clyde B. Freeman v. Centerville City, Golden L. Allen, , and Centerville Planning C , E. Lee Hawkes, Chairman; and Robert B. Hansen, Attorney General, State of Utah : Brief of Respondent Case No. 15904 Robert B. Hansen, Attorney General of the State of Utah

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

* * * * * * * * * * * * * * *

CLYDE B. FREEMAN,

Plaintiff
and Appellant,

-v-

CENTERVILLE CITY,
Golden L. Allen, Mayor; and
CENTERVILLE PLANNING COMMISSION,
E. Lee Hawkes, Chairman; and
ROBERT B. HANSEN,
Attorney General, State of Utah,

Defendants
and Respondents.

* * * * * * * * *

BRIEF OF DEFENDANT,
ROBERT B. HANSEN, ATTORNEY GENERAL

Appeal From the Order
of the Second Judicial
For Davis County
Honorable J. Duffy

* * * * * * *

FILED

SEP 13 1974

Clerk, Supreme Court, Utah

CLYDE B. FREEMAN
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Attorney for himself as
Plaintiff/Appellant

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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CLYDE B. FREEMAN, Plaintiff and Appellant, -v- CENTERVILLE CITY, Golden L. Allen, Mayor; and CENTERVILLE PLANNING COMMISSION, E. Lee Hawkes, Chairman; and ROBERT B. HANSEN Attorney General, State of Utah, Defendants and Respondents.	)	Case No. 15904

* * * * * * * * * * * * * * *

BRIEF OF RESPONDENT
ROBERT B. HANSEN, ATTORNEY GENERAL
OF THE STATE OF UTAH

STATEMENT OF THE NATURE OF CASE

This is an action seeking to have the statute authorizing annexation of appellant's property to Centerville City declared unconstitutional.

DISPOSITION BY THE LOWER COURT

The lower court granted respondent Robert B. Hansen's Motion to Dismiss and held that Section 10-2-401, Utah Code Annotated 1953, as enacted by the Laws of Utah 1977, is constitutional.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower court's order and a determination by this court that the statute authorizing annexation of appellant's property to Centervill City is unconstitutional.

STATEMENT OF FACTS

The facts in this case are not in dispute. Appell agrees that Centerville City has proceeded in accordance wit Section 10-2-401, Utah Code Annotated 1953, as recodified in 1977, to annex his property into the city thereby subject his property to taxation by Centerville City. The constitutionality of said statute is the sole issue involved in this appeal.

ARGUMENT

POINT I

SECTION 10-2-401, UTAH CODE ANNOTATED 1953, AS ENACTED BY THE LAWS OF UTAH 1977, IS CONSTITUTIONAL.

The appellant claims that Section 10-2-401, Utah Code Annotated 1953, as enacted by Chapter 48, Section 2, of the Laws of Utah 1977, deprives him of his property without due process of law by not requiring notice to and an election of the landowners involved in annexation proceedings Said Section 10-2-401, which is very similar to its repealed predecessor Section 10-3-1, provides as follows:

Whenever a majority of the owners of real property and the owners of at least one third in value of the real property, as shown by the last assessment rolls, in territory lying contiguous to the corporate boundaries of any municipality, shall desire to annex such territory to such municipality, they shall cause an accurate plat or map of such territory to be made under the supervision of the municipal engineer or a competent surveyor, and a copy of such plat or map, certified by the engineer or surveyor as the case may be, shall be filed in the office of the recorder of the municipality, together with a written petition signed by a majority of the real property owners and by the owners of not less than one third in value of the real property, as shown by the last assessment roles, of the territory described in the plat or map; and the governing body of the municipality, at a regular meeting shall vote on the question of such annexation. The members of the governing body may by resolution passed by a two-thirds vote, accept the petition for annexation, subject to the terms and conditions as they deem reasonable, and the territory shall then and there be annexed and within the boundaries of the municipality. If the territory is annexed a copy of the duly certified plat or map shall at once be filed in the office of the county recorder, together with a certified copy of the resolution declaring the annexation. The articles of incorporation of the municipality shall be amended to show the new territory annexed to the municipality and a copy of the articles of amendment shall be filed with the secretary of state and county clerk or clerks in the same manner as prescribed in 10-2-108. On filing the maps, plats and articles of amendment, the annexation shall be deemed complete and the territory annexed shall be deemed and held to be part of the annexing municipality, and the inhabitants thereof shall enjoy the privileges of the annexation and be subject to the ordinances, resolutions and regulations of the annexing municipality.

Except for the inclusion of the additional requirement pertaining to one-third of the value of the real property in 1957, the foregoing statute has provided for the initiation of annexation proceedings by a written petition of a majority of the real property owners since 1898.

A general statement of law applicable to the legislative powers pertaining to annexation is set forth in 56 Am. Jur. 2d, Municipal Corporations, §55, with numerous supporting cases, as follows:

> In the absence of constitutional limitations, it is generally considered that the power of a state legislature over the boundaries of the municipalities and counties of the state is absolute and that the legislature has power to extend the boundaries of a municipal corporation, or to authorize an extension of its boundaries, without the consent of the inhabitants of the territory annexed, or the municipality to which it is annexed, or even against their express protest.

To the same effect is Dillon on Municipal Corporations, (5th Edition), §355, page 617.

A more specific statement of the constitutionality of annexation statutes which do not provide for the consent of, and notice to, the inhabitants of annexed areas thereunder is contained in 56 Am. Jur. 2d, Municipal Corporations, §62:

> It is well settled that the legislature may not only originally fix the boundaries or limits of a municipal corporation, but, subject to constitutional restriction, may subsequently annex, or authorize the annexation of, contiguous or other territory without the consent or even against the remonstrance of persons residing therein. Annexation of land by the legislature

without assent of or notice to the inhabitants is not a denial of due process. And it follows that notice by publication does not violate the due process requirements of the federal and state constitutions. Indeed, the state may authorize the extension of the territorial area of a municipal corporation with or without the consent of the citizens or even against their protest, unrestrained by any provision of the Federal Constitution.

But while the legislature has the power to provide for, or authorize, the annexation of territory without the consent of the inhabitants residing therein, it may, and usually does, provide for such consent as a condition of annexation. Inasmuch as the legislature may provide for the annexation of territory to municipal corporations without the consent of the inhabitants of the annexed territory, the inhabitants cannot complain of any limitations upon their ability to express their disapproval if the legislature sees fit to make the statute conditional upon its acceptance by the affected territory. Thus, if the annexation of a small municipal corporation to a large one is made conditional upon its acceptance by a majority of the voters of the two municipal corporations taken together, the citizens of the smaller one cannot complain although their vote is overpowered by that of the larger one; nor is it any ground for objection that the right to vote upon the acceptance of the act is limited to the taxpaying electiors of the territory which it is sought to annex, or, still less, that it is left to those possessing the suffrage at general elections, so that owners of taxable property in the annexed district having no right to vote, such as nonresidents and corporations, have no voice in the matter. And a statute permitting contiguous territory to be brought into a municipality on the vote of the majority of the electors within the municipality only is constitutional. (Emphasis added).

A leading case in support of the foregoing authorities is Hunter v. Pittsburgh, 207 U.S. 161, 52 L. Ed. 151, 28 S. Ct. 40, which involved a Pennsylvania statute permitting the consolidation of a smaller city with a larger city upon

the approval of a majority of the votes cast in both cities at an election called for that purpose, even though a major of the votes in one of the cities opposed it, as occurred in the consolidation of the cities of Pittsburgh and Allegh The United States Supreme Court, in sustaining the constitutionality of the statute, capsulized the holdings of many cited cases as follows:

> ***It would be unnecessary and unprofitable to analyze these decisions or quote from the opinions rendered. We think the following principles have been established by them and have become settled doctrines of this court, to be acted upon wherever they are applicable. Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body

> conforming its action to the state constitution, may do as it will unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.
>
> Applying these principles to the case at bar, it follows irresistibly that this assignment of error (permitting the voters of the larger city to overpower the voters of the smaller city), so far as it relates to the citizens who are plaintiffs in error, must be overruled." (Emphasis added).

For a case supporting Hunter v. Pittsburgh and setting forth several cases in Iowa which have consistently held that failure to provide for any notice and hearing on the question of annexation of territory to a municipality does not deprive owners of their property without due process of law, see City of Cedar Rapids v. Cox, 250 Iowa 457, 93 N.W. 2d 216, appeal dismissed 359 U.S. 498, 3 L.Ed. 2d 976, 79 S. Ct. 1118, in which the Supreme Court of Iowa concluded:

> If, as we have held, extension of municipal boundaries without assent of or any notice to the inhabitants is not a denial of due process, certainly annexation upon published notice does not have that result.

In one of the Iowa cases cited in the Cox case, Wertz v. Ottumwa, 201 Iowa 947, 208 N.W. 511, it was held that a general statute authorizing the council of a city or town by resolution to incorporate into the city or town any adjoining

platted territory did not deprive the owners of the added territory of their property without due process of law, stating their conclusion thusly:

> We think that a failure to provide for a notice and hearing on the question of annexation does not render the statute unconstitutional. The legislature had power to provide by law how municipalities shall be incorporated, and also how their boundaries may be extended. The legislature did not transcend constitutional limitations by the statute in question, in failing to provide that the question of annexation of territory to an existing municipality must be submitted to a vote of the people interested therein. In the absence of constitutional limitations to the contrary, the legislature may by statute provide for the extension of the boundaries of a municipality without the assent of the inhabitants of either the municipality or the territory to be annexed. (Citing cases.)
>
> The statute is not unconstitutional because no notice of the proposed annexation was given to appellants and because the question of annexation was not submitted to a vote of the electors of the annexed territory.

In Lenox Land Co. v. Oakdale, 137 Ky. 484, 125 S.W. 1089, on rehearing 127 S.W. 538, writ of error dismissed 231 U.S. 739, 58 L.Ed. 461, 34 S. Ct. 317, it was held that a statute which provided for the extension of municipal boundaries by an ordinance of the city council did not violate the constitutional provision against taking property without due process of law, or without just compensation, although the notice required by the statute was insufficient to warn persons whose property was annexed. The Court of Appeals of Kentucky stated as follows:

> If the constitutional provision protecting property owners from being deprived of their

> Property without due process of law, or from having their property taken without just compensation, applied to the annexation of territory, the position of counsel for appellants would be well taken. But it has been repeatedly announced, by this court and others, that the question of due process of law or the taking of property without compensation has no application to the annexation of territory to a municipality. The extension or reduction of the boundaries of a city or town is held, without exception, to be purely a political matter, entirely within the power of the legislature of the state to regulate. The established doctrine is that the state legislature has the unlimited right to pass such laws for the annexation of territory to municipal corporations as in its judgment will best accomplish the desired end, and that a different method may be provided for each class. It may, if it chooses, direct that notice shall be given personally to each individual owner of property sought to be annexed, or that notice by publication shall be given, or that notice by posting copies of the ordinance at any place shall be sufficient, or it may provide that no notice at all need be given. In short, the manner of annexation is entirely beyond the power of the courts to control if the provisions of the statute are followed. (Citing cases.)

In City of Tucson v. Garrett, 77 Ariz 73, 267 P. 2d 717, 719, the Supreme Court of Arizona held as follows under an annexation statute substantially similar to that of Utah providing that on presentation of a petition signed by the owners of not less than one-half in value of property in any contiguous territory, the city may by ordinance annex such territory upon filing with the county recorder copies of the ordinance with an accurate map of the territory annexed:

> In analyzing this statute, an enunciation of some of the well-established rules applicable to the addition of territory to municipalities, and the legislative power in connection

> therewith, is appropriate. The extent of the right of municipalities to enlarge their boundaries is dependent entirely on the legislature and its power in that respect is plenary in the absence of constitutional limitations, and there are none affecting the problem herein. The legislature may give to municipalities the power to annex territory upon any condition it chooses to impose, either with or without the wishes of the inhabitants of the territory involved, either with or without notice to anyone, with or without the right of objecting inhabitants to protest.***
> (Emphasis added).

The law in the State of Utah is in accord with the foregoing authorities. In the exhaustive and well-reasoned case of Kimball v. City of Grantsville, 19 U. 368, 57 P. 1, the question presented for determination was whether the legislative acts establishing the boundaries of the city and authorizing municipal taxation thereof were violative of state and federal constitutional provisions in that such statutory enactments authorized taxation, for city purposes, of lands lying outside the platted and improved portion of the city, and used only for agricultural purposes. After reviewing many cases and authorities the court, in unanimously holding that it is the legislature's prerogative not that of the judiciary--to provide for municipal boundaries and the taxation thereof for municipal purposes, quotes from Chief Justice Marshall in the landmark case of McCulloch v. Maryland and then follows at page 5 of the Pacific Reporter:

> ***In Bank v. Billings, 4 Pet. 514, 562, the same eminent jurist observes: "The power of legislation, and consequently of taxation, operates on all the persons and

> property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all for the benefit of all. It resides in the government as part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens; and that protion must be determined by the legislature. This vital power may be abused, but the interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise legislation." Accepting this as sound doctrine, as we safely may, would not the judicial department itself be guilty of transcending its constitutional power were it to inquire into the expediency, wisdom, or justice of the legislation in question in this case? Would not this department likewise transcend its power if it would undertake to inquire into the conditions and facts on which the legislature acted in creating the municipality of Grantsville City, fixing the boundaries, and providing for the raising of revenue to maintain the municipal government and defray its expenses, and then substitute our judgment as to the sufficiency of such conditions and facts to warrant the legislation, which has resulted in the imposition of the tax complained of, for that of the legislature? Yet this is substantially what we are asked to do. This, in itself, would be an abuse, because it would be a usurpation of power by one department of the government which the people absolutely vested in another.

In further elucidating upon the exclusive province of the legislature in matters of municipal expansion and taxation, the Utah Supreme Court quoted with approval from other cases on matters particularly apropos to the present inquiry:

In Kelly v. Pittsburgh, 104 U.S. 78, where the limits of a city were extended so as to include agricultural land, Mr. Justice Miller, delivering the opinion of the court, said: "It is not denied that the legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a state shall be within the limits of a city, and be governed by its authorities and its laws, has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city must be settled is one of the matters within legislative discretion. Whether terri shall be governed for local purposes for a county, a city, or a township organization, is one of the most usual and ordinary subjects state legislation." And, again, he said: "It may be true that he does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. It probably is true, from the evidence found in this record, that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burdens, and fairness in their distribution among those who must bear them? We cannot say judicially that Kelly received no benefit from the city organization." *** So, in Washburn v. City of Oshkosh, 60 Wis. 453, 19 N.W. 364, Mr. Chief Justice Cole said: "It may be unwise, even unjust, to include within the limits of a city or village lands used for agricultural purposes, and impose upon them the additional burdens of such municipalities. But where is the remedy? Certainly not in the courts. Confessedly, the legislature has power, under the constitution, to provide for the organization of cities and incorporated villages, which carrie with it the power to fix the territorial bound aries of such public corporations. If the legislature sees fit to include agricultural lands within its boundaries, what right have the courts to control or review that legislative discretion? Can the courts say to the legislature it must not annex this territory

> or that to the municipality; that it has not ample power to prescribe the extent of the city or village limits? It seems to us a very plain proposition that such matters rest entirely within the discretion and under the control of the legislature." (Emphasis added.)

After recognizing that Article XIII, Section 5, of the Utah Constitution expressly prohibits the legislature from imposing a tax for municipal purposes on property within any city but authorizes it to empower local government to do so, and that under Section 10 of that same Article XIII all property, real and personal, located "within the territorial limits of the authority levying the tax," is subject to taxation for municipal or other reasons, the court concluded:

> ***When, therefore, as in the case at bar, a city has been incorporated, and a local government established, such government is an "authority" to levy a tax. There is no limitation as to the extent of the "territorial limits" of a municipality or taxing district, and therefore, as we have noticed, the fixing of the boundaries of a city or taxing district, and amount of area it shall contain, is wholly a matter of legislative discretion, and the exercise of such discretion is not a subject of judicial investigation or revision. (Emphasis added.)

It should be noted that the court specifically overruled the prior cases of Kaysville City v. Ellison, 18 U. 163, 55 P. 386, and People v. Daniels, 6 U. 282, 22 P. 159, the latter being a territorial case decided before statehood and the adoption of the state constitution in which the court held that the territorial legislature's extension of municipal boundaries may constitute the taking of private property for public use, contrary to the Fifth

Amendment to the United States Constitution, if the extensi is unreasonable and embraces territory used only for agricu tural or horticultural purposes. In this respect, the cour in the Kimball case specifically held that Article I, Secti 22, of the Utah Constitution--"Private property shall not be taken or damaged for public use without just compensation."- is not a limitation on the taxing power of the state but is a limitation on the exercise of the power of eminent domain.

It is thus apparent that the appellant's citation of statutes of sister states, as well as our own territorial laws, only sustains the position of the respondents herein, namely that annexation and the imposition of municipal taxes upon annexed properties is solely a matter of legislative determination which may provide for notice to, and consent of, the inhabitants of the annexed area, the annexing city, or both, but may also authorize such extension without notice to or consent of the inhabitants and even against their express protest, all without contravening state or federal due process requirements. The provisions of the Utah law on municipal annexation fall in the middle area of the foregoing spectrum by requiring the initiation of annexation proceedings, not by the municipality, but by the written petition of a majority of the affected landowners representing at least one-third of the assessed value of the area seeking annexation. The fact that the legislature of some states have chosen different procedures for municip annexations than others is no basis for declaring the law

of one or the other of those states unconstitutional. The legislative enactments of the State of Utah stand on their own merit, not on the collective judgment of another state's lawmakers.

In view of the foregoing, it is submitted that Section 10-2-401, Utah Code Annotated 1953, as enacted in 1977, is constitutionally valid and the order of dismissal of the appellant's complaint by the lower court should be affirmed.

POINT II

THE EXTENSION OF MUNICIPAL BOUNDARIES AND THE IMPOSITION OF MUNICIPAL TAXES UPON ANNEXED PROPERTY IS A LEGISLATIVE MATTER.

The respondent incorporates herein the argument as set forth under POINT I. The Utah legislative enactment under attack by the appellant has not been shown to be violative of either the federal or state constitutions and, therefore, should be upheld.

CONCLUSION

Although one is impressed with the research and energy that has gone into the appellant's efforts to guard against that which he envisions as a threat to his concepts of justice and individualistic well-being, it is most apparent that his resourcefullness and honest endeavor have not supplanted his need of competent legal assistance.

As much as we may agree with appellant's reproach of increasing governmental paternalism as a prelude to dictato ship and slavery at the hands of those who should be servin as watchmen on the towers of western civilization, the eigh year-old statutory procedure for annexation in Utah hardly seems to be the focal point of such an insurrection. Judici intervention into the legislative arena for determining such matters would be far more violative of the principles of government enunciated by our founding fathers. The orde of the lower court should be affirmed and by so doing, Centerville City will be enriched by the inclusion of a true son of liberty in her electorate.

Respectfully submitted,

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CERTIFICATE

I hereby certify that ten copies of the foregoing brief were filed with the Supreme Court of the State of Utah this _____ day of September, 1978.

I further certify that two (2) copies of the foregoing brief were served on each of the following parties and counsel of record, at the respective addresses indicated, by mailing said copies to their offices by first class mail, postage prepaid, this _____ day of September, 1978:

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