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State of Utah v. James L. Hatch and Della L. Hatch : Brief of Amicus Curiae

Utah Supreme Court

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IN THE SUPREME COURT of the STATE OF UTAH FILED

SEP 15 1959

STATE OF UTAH,

Clerk, Supreme Court, Utah

Petitioner,

vs.

Case No.

8937

JAMES L. HATCH and DELLA L.
HATCH,

Respondents.

RESPONDENTS' REPLY TO STATE OF UTAH'S PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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STATEMENT OF POINTS

The State of Utah's Petition for rehearing and re-consideration of this case should be denied for the following reasons:

I.

THE PETITION FAILS TO STATE ANY GROUNDS UPON WHICH A REHEARING COULD PROPERLY BE GRANTED.

II.

A DECISION RENDERED BY FOUR JUDGES IN A CASE HEARD BY A FULL COURT DOES NOT VIOLATE THE UTAH CONSTITUTION WHERE THE OTHER JUDGE DIED AFTER THE HEARING AND BEFORE THE DECISION.

III.

EXCHANGES OF THE KIND INVOLVED HERE LOGICALLY CAN BE MADE EITHER UNDER SECTION 65-1-27 OR SECTION 65-1-70.

IV.

PETITIONER'S COMMENTS AS TO ACTION TAKEN BY 1959 LEGISLATURE ARE MEANINGLESS AND SHOULD BE IGNORED.

ARGUMENT

I.

THE PETITION FAILS TO STATE ANY GROUNDS UPON WHICH A REHEARING COULD PROPERLY BE GRANTED.

The State's brief fails to raise any new points relative to the merits of this case or to cite any significant new authority. It is principally comprised of a re-argument of points and authorities which were thoroughly briefed and argued when the case was first submitted to the Court. From a reading of the majority and dissenting opinions, and from the fact that the Court had the matter under advisement for almost ten months before rendering a decision, it is evident that all these points and arguments were carefully considered. In essence, therefore, the State's position is that the Court nevertheless

reached the wrong conclusion. It now seeks another opportunity to repeat the old arguments and authorities in the hope that the Court will reverse itself. While the reasons for the State's desire for a rehearing are apparent and understandable, it is equally clear that this desire alone, unsupported as it is by anything new, will not justify the granting of a rehearing. In *Ducheneau v. House*, 4 Utah 483, 11 Pac. 618 (1886), the Court in denying a petition for rehearing said:

The Petition for rehearing states no new facts or grounds for a reversal of the judgment of the lower court. It is mainly a re-argument of the case. We have repeatedly called attention to the fact that no rehearing will be granted where nothing new and important is offered for our consideration. We again say that we cannot grant a rehearing unless a strong showing therefor be made. A re-argument, or an argument with the Court upon the points of the decision, with no new light given, is not such a showing.

The fact that the decision was rendered by only four judges, occasioned by the death of Judge Worthen in the interval between the hearing and the decision, does not afford a valid basis for granting a rehearing. See *State v. Sioux Falls Brewing Co.*, 5 S.D. 360, 58 N.W. 928 (1894). There the South Dakota Supreme Court denied a petition for rehearing which was based upon the intervening death of one of the judges who sat at the hearing and said in part:

To recognize the change in personnel of the court as alone sufficient to require a re-argument would lead to the conclusion that intermediate the death

of Judge Bennett and the qualification of Judge Fuller this court could not decide any case, although the surviving judges were agreed as to its decision. There seems to us no good reason for such a conclusion.

The dissent by one of the surviving judges in this case is not a point of distinction from the *Sioux Falls Brewing* case because the surviving judges who joined in the majority opinion would have controlled the decision even had the deceased judge joined in the dissent.

The State's contention that a decision by less than a full Court, absent a stipulation of the parties, violates Article VIII, Section 2, of the Utah Constitution—a contention which does not go to the merits of the case—is discussed below in Point II.

The only other reason given by the State to justify its Petition for rehearing is the following one stated in the conclusion of its brief:

[T]he issues in this case have far reaching significance and importance. At stake is nothing less than the right of the citizens of the State of Utah to a royalty interest in oil and gas and other mineral properties worth many millions of dollars. The chief beneficiaries of such rights are the public schools of the state, in part supported by the revenues from state school sections involved in this dispute.

While the State concedes that “these considerations alone should not * * * be determinative of the outcome of the case” it concludes that “they do constitute good reason why this Court should arrive at a final judgment

only after the most thorough and thoughtful judicial consideration of the issues presented.”

This contention is wholly without merit. There are few cases which have been decided by this Court and which have been as thoroughly briefed and argued. A total of six briefs were filed before the hearing and were available to the Court in reaching its decision. This total included three briefs prepared by the State (Appellant’s brief, Appellant’s reply brief and Appellant’s reply to Amicus Curiae brief) and two briefs Amicus Curiae. At the hearing, oral arguments were made not only by counsel for Respondents and the Appellant, but also by counsel representing the United States as well as Honolulu Oil Corporation and The Superior Oil Company, the two Amicus Curiae. Thereafter, the Court considered the matter for almost ten months before rendering its decision. The lengthy dissenting opinion, which discusses all the issues involved in the case, and the carefully written majority opinion demonstrate that the Court considered the case carefully and in detail.

II.

A DECISION RENDERED BY FOUR JUDGES IN A CASE HEARD BY A FULL COURT DOES NOT VIOLATE THE UTAH CONSTITUTION WHERE THE OTHER JUDGE DIED AFTER THE HEARING AND BEFORE THE DECISION.

In its POINT IV, the State cites Article VIII, Section 2, of the Utah Constitution* for the proposition that a

*“The supreme court shall consist of five judges, which number may be increased or decreased by the legislature, but no alteration or increase shall have the effect of removing a judge from office. A major-

decision by the Utah Supreme Court must be by five judges, and not four judges. It is contended that the provision that "if a justice of the supreme court shall be *disqualified* from sitting in a cause before said court, the remaining judges shall call a district judge to sit with them on the hearing of such cause" makes such an interpretation mandatory, despite additional language in this section to the effect that "[a] majority of the judges constituting the court shall be necessary to form a quorum or render a decision." It is submitted that this construction is unwarranted.

Clearly a decision by a quorum of less than five justices was contemplated. The language of this section must be so interpreted if all of its provisions are to be given effect.

Similar constitutional provisions have been given this interpretation consistently by courts in other jurisdictions. *E.g. Dolley v. Ragon*, 76 Cal. App. 140, 243 Pac. 893 (1926) (A quorum of two on a Supreme Court regularly composed of three justices was permitted to act despite Cal. Const. Art. VI, Section 3: "If a vacancy occur in the office of a justice, the Governor shall appoint

ity of the judges constituting the court shall be necessary to form a quorum or render a decision. If a justice of the supreme court shall be disqualified from sitting in a cause before said court, the remaining judges shall call a district judge to sit with them on the hearing of such cause. Every judge of the supreme court shall be at least thirty years of age, an active member of the bar, in good standing, learned in the law, and a resident of the State of Utah for the five years next preceding his selection. The judge having the shortest term to serve, not holding his office by selection to fill a vacancy before expiration of a regular term, shall be the chief justice, and shall preside at all terms of the Supreme Court, and in case of his absence, the judge, having in like manner, the next shortest term, shall preside in his stead." (As amended November 7, 1944, effective January 1, 1945.)

a person to hold the office until the election and qualification of a justice to fill the vacancy.") Furthermore, this Constitutional provision could not preclude a decision by a mere quorum of the Court in those situations where one judge present at the hearing of the cause does not participate in its decision by reason of his intervening death, because it provides only for the calling of a district judge to "sit" on the "hearing" of the case.

A. *The quorum requirement.*

The Petitioner argues that although the Constitution provides that a mere majority of the Supreme Court justices shall constitute a quorum, it is nevertheless not constitutionally possible for a lesser number than five to render a decision in any cause, except upon stipulation of the parties. It must therefore also be the contention of the Petitioners that absent such a stipulation the powers of a quorum would be limited to routine daily transactions dealing with the administrative functions of the Court. But where the meaning of the word "quorum" has been placed in question, it has not been so interpreted. In *Snider v. Rinehart*, 18 Colo. 18, 31 Pac. 716 (1892) the court was squarely faced with the determination of whether a "quorum" as provided in Colorado Constitution Article VI, Section 5 ("the Supreme Court shall consist of three judges, a majority of whom shall be necessary to form a quorum or pronounce a decision."), would be permitted to decide a case in the absence of one of its members. The word's etymological derivation was considered and it was concluded that it refers to the number of persons who may lawfully act. The court noted that the language of the Colorado Constitution was substantially

similar to the language regulating the United States Supreme Court, which provides that the court shall be composed of nine judges with a quorum of six entitled to act and then said:

Hence, if the construction contended for by appellant be correct, then the United States Supreme Court can never transact any business during a vacancy occasioned by the death or resignation of any one of the nine judges provided for by the act constituting said court. It is a matter of common information that numerous vacancies have occurred in that body during the last quarter of a century, and such vacancies have continued for months at a time, and yet during the period of such vacancies, the court has gone on exercising its full jurisdiction in the decision of pending cases. A vacancy is liable to occur at any time in this court. Such vacancy may continue weeks or even months * * *. The consequences might be very serious if the court were to be held practically disorganized or incapacitated from transacting business during such vacancy. Fortunately, there seems to be no good reason for arriving at such conclusion.

The holding of the Utah court in *Nephi Irrigation Co. v. Jenkins*, 8 Utah 452, 32 Pac. 699 (1893) (discussed below) is consistent with the position adopted in Colorado.

B. *The general effect of death or other disqualification upon the powers of a judicial body to act.*

Petitioners correctly cite *In re Thompson's Estate*, 72 Utah 17, 86, 269 Pac. 103, 128 (1928) for the proposition "that 'disqualification' may include the death of a judge." They then incorrectly, and without citing authorities supporting their contention, assert that such a "disqualifica-

tion" has the effect of incapacitating the court in determining any cause previously heard and yet pending before it. The numerous following cited cases stand in contradiction of Petitioner's contention. No case involving the question has been found which supports Petitioner's contention.

In *Nephi Irrigation Co. v. Jenkins, supra*, in interpreting 25 U.S. St. at Large, p. 203*, it was held that the quorum requirement related only to the number of justices who must be present when action was to be taken and the power of the Court to render a decision was not impaired even though at the time of decision a judge, whose presence was necessary to form a quorum, was disqualified to participate in the decision because he had tried the case below.

In rejecting the contention that the disqualified judge could not be used to form a quorum, and in holding that the two qualified judges could effectively decide the case even though, alone, they would not have comprised a quorum, the Court stated:

[A]ny other construction would render the court powerless to act in many cases brought before it. Under the contention claimed by respondent the sickness or absence of one of the justices would render it impossible to obtain a quorum so as to transact business, although it would be competent for two concurring justices, when three constitute a quorum, to render an opinion. If the disqualified

*"The supreme court consists of a chief justice and three associate justices, any three of whom shall constitute a quorum, but no justice shall act as a member of the supreme court in any action or proceeding brought to such court by writ of error, bill of exception, or appeal from a decision, judgment, or decree rendered by him as a judge of the district court."

justice cannot constitute one of the quorum without acting, the two remaining justices would be powerless to act.

See also *Ets-Hokin v. Appellant Department of Superior Court*, 42 Cal. App. 2d 326, 108 P. 2d 943 (1941) (Only two of three judges heard the cause); *Dolley v. Ragon*, *supra* (cause heard by three judges, one of whom deemed himself disqualified); *Mountain States Tel. & Tel. Co. v. People*, 68 Colo. 487, 190 Pac. 513 (1920); *Snider v. Rinehart*, *supra*, (case decided during vacancy due to resignation of one judge); *Stanton v. Chicago, B. & Q. R. Co.*, 25 Wyo. 138, 167 Pac. 709 (1917); *Gibbs v. Milk Control Board*, 185 Ga. 844, 196 S. E. 296 (1936); *State v. Neu*, 180 La. 545, 157 So. 105 (1934); *Platt v. Shields*, 96 Vt. 257, 119 Atl. 520 (1923); *International & Longshoremen's & Ware. Union v. Ackerman*, 82 F. Supp. 65 (D. Pa. 1949) *reversed on other grounds*, 187 F. 2d 860, *cert den.* 342 U. S. 859; *Eagerton v. Graves*, 252 Ala. 326, 40 So. 2d 417 (1949); *Commonwealth v. Petrillo*, 340 Pa. 33, 16 A. 2d 50 (1940); *Commonwealth v. Gregory*, 146 A. 2d 624 (Penn. 1958). Cf. *Bracey v. Gray*, 71 Cal. App. 2d 206, 162 P. 2d 314 (1945) (district court of appeal which is regularly composed of three members is not illegally constituted if one is disqualified, since only two are necessary to render a decision).

The rule established by these cases permitting a court to act following the disqualification of one of its members, if a quorum is otherwise present (or in the case of *Nephi Irrigation Co. v. Jenkins* where the disqualified member is necessary to form a quorum) is not changed by provisions for the designation of a judge to take the place of one who is incapacitated. *Dolley v. Ragon*; *supra*, *Johnson v.*

Walls, 185 Ga. 177, 194 S. E. 380; *Metropolitan Water Dist. v. Adams*, 19 Cal. 2d 463, 122 P. 2d 257 (1942).

C. The State has impliedly consented to a decision by four judges.

If, despite the clear weight of the above case law to the contrary, it were to be determined that there is some legal merit in the State's present claims, it nevertheless appears that the State would be unable to raise such a contention at this time. The disqualification by death which the State now complains of occurred approximately four months prior to the announcement of the Court's decision. If the State of Utah objected to the remaining members of the Supreme Court deciding the case, it was incumbent that it make its objections known promptly and its silence during the interim can only be construed as an implied consent that the surviving four judges decide. In *Stanton v. Chicago, B. & Q. R. Co.*, 25 Wyo. 138, 167 Pac. 709 (1917) the court was faced with a similar situation. In disposing of a petition for rehearing on the grounds that the cause was heard by only two of three justices, the court observed that it was originally argued before only two justices and that the plaintiff was aware of the illness of the third judge. When the judge died without having opportunity to participate in the court's decision, the court held on the petition for rehearing that the action of the petitioner would preclude him from objecting in view of his knowledge of the situation. Similarly, in this case the State had knowledge of the "disqualification" of one of the Judges long before the Court's decision was announced. Its delay in raising an objection until *after* the opinion had been announced indi-

cates that it objects only to the manner in which the case was resolved, and not to the composition of the court. The State's delay must now preclude it raising this argument merely to obtain a rehearing on the merits.

III.

EXCHANGES OF THE KIND INVOLVED HERE LOGICALLY CAN BE MADE EITHER UNDER SECTION 65-1-27 OR SECTION 65-1-70.

The State's brief, by a rather involved and unconvincing process of reasoning, infers that the Court's conclusion that the State Land Board had authority to make exchanges of the kind involved here was based solely upon § 65-1-14 U. C. A. 1953. This inference was drawn notwithstanding the clear statement of the court that "such authority must be found in §§ 65-1-14, 65-1-27, and 65-1-70 U. C. A. 1953." Having eliminated, to its satisfaction, §§ 65-1-27 and 65-1-70, the State then argues as if no other statute than § 65-1-14 was involved. The State's self interest in this litigation has blinded it to the fact that either § 65-1-27 or § 65-1-70 can be reasonably interpreted as authorizing and permitting these exchanges.

A. The provisions of Section 65-1-27 authorize the State to exchange lands with the United States.

Section 65-1-27 U. C. A. 1953 provides as follows:
Selection of state lands—Relinquishment.—All selections of land shall be made in legal subdivisions according to the United States survey, and when a selection has been made and approved by the board, it shall take such action as may be necessary to secure the approval of the proper officer of the United States and the final transfer to this state of

the lands selected. The board may cancel, relinquish or release the claims of the state to, and may reconvey to the United States, any particular tract of land erroneously listed to the state, or any tract upon which, at the time of selection, a bona fide claim has been initiated by an actual settler.

It is significant that in quoting from § 65-1-27 at page 4 of its brief, the State neglects to quote the first sentence of the section which, in reference to the making of indemnity selections, directs that the State "shall take such action as may be necessary to secure the approval of the proper officers of the United States and the final transfer to this State of the lands selected." This section clearly confers upon the Land Board authority to pass minerals to the United States in selection exchanges of this kind since one of the conditions of making a valid selection under the Federal Statutes is that the State waive all its rights in the land used as base.

As was pointed out in *California v. Desert Water Oil and Irrigation Company*, 243 U. S. 214, 37 S. Ct. 394 (1917) the states had, prior to the decision, consistently made selections under the Federal school indemnity statutes, both in cases where the base land had and had not vested in the state, and the case affirmed this right. Section 65-1-27 was passed by our Legislature in 1899, several years after the Federal Statutes were passed, and at a time when the practice of making indemnity selections had become well established and thereafter selections were made under it both in cases where title to the base land had and had not vested in the State. Under these circumstances, the enactment of the statute of May 12, 1919 (§ 65-1-15, U. C. A. 1953), could not, in the absence of

express language to that effect, be interpreted as preventing selection exchanges under § 65-1-27. The second sentence in § 65-1-27 relating to lands erroneously listed to the State or on which a bona fide claim has been initiated by an actual settler which is referred to by the State is obviously intended to grant additional powers upon the State Land Board. Grammatically, this language is separated from the preceding provision referred to, and is in no way intended to qualify it.

B. *The provisions of Section 65-1-70 authorize the State to exchange lands with the United States.*

Section 65-1-70 U. C. A. 1953 provides as follows:

Exchange of lands between board and proprietors.

—In order to compact, as far as practicable, the land holdings of the state, the board is hereby authorized to exchange any of the land held by the state for other land of equal value within the state, held by other proprietors; and upon request of the board the governor is hereby authorized to execute and deliver the necessary patents to such other proprietors and receive therefrom proper deeds of the land so exchanged; provided, that no exchange shall be made by the land board until the patent for the lands so received in exchange shall have been issued to such proprietors or their grantors.

It is evident that there are two critical prerequisites to the application of this section to the exchange of State lands with the United States: (a) The purpose of the exchange should be to compact State holdings, and (b) the equivalent of the "deed" or "patent" from the United States or its grantees covering the exchanged land selected should be involved. Both of these conditions are apparently satisfied.

Prior to the time of exchange with the United States, the subject land was "hedged in" and isolated within a national forest. This made the land difficult to use and unattractive to prospective purchasers from the State. By entering into the selection exchange involved here, the State was able to acquire other lands so compacted in reference to other lands available for use in the State that they were attractive to prospective purchasers. The chief value to the State of its lands consists in the producing of revenue by the sale or lease thereof. With but rare exceptions, the only utilization of State lands is that made by the State's grantees or lessees. This being true, the fact that the lands acquired by the State under the selection were soon sold does not alter the conclusion that the exchange was made to compact the State's land holdings in the sense above indicated.

There was the equivalent of a "deed" or "patent" covering the Federal government lands involved. Upon and by virtue of approval of the selection, passing of legal title as to the base lands from the State to the United States and as to the selected lands from the United States to the State was accomplished. This was in accordance with applicable Federal legislation. It has been repeatedly held in Interior Department decisions that approval of a selection passes title to the lands "as completely as if transferred by patent." See *Reid v. State of Mississippi*, 30 L. D. 230 (1900). It is thus apparent that at the time of the selection exchange, the government of the United States was the "proprietor" within the contemplation of § 65-1-70 U. C. A. 1953 and that the approval of the selection was the equivalent of a deed or patent.

IV.

PETITIONER'S COMMENTS AS TO ACTION TAKEN BY THE 1959 LEGISLATURE ARE MEANINGLESS AND SHOULD BE IGNORED.

In reference to § 65-1-15 U.C.A. 1953, the Petitioner correctly notes at page 8 of its brief that the 1959 Session of the Utah Legislature re-enacted said § 65-1-15 in Chapter 131, Laws of Utah 1959, adding a provision authorizing the State Land Board to release minerals in the base lands in selection exchanges with the United States. The Petitioner fails to note, however, that in Chapter 132 which follows, the same Legislature on the same day re-enacted said § 65-1-15 a second time, eliminating the proviso. Under these circumstances, the comments of Petitioner as to the significance of what the 1959 Legislature did are meaningless. In any event, it is the province of this Court, not the Legislature, to interpret the meaning of the applicable statutes, and even had the proviso not been eliminated by the second re-enactment, the Court, in interpreting statutory meaning, should attach no significance to a proviso added by the Legislature approximately four months after the case was argued and submitted.

CONCLUSION

For the reasons above stated it is respectfully submitted that the State's Petition for rehearing should be denied.

Respectfully submitted,

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