1968

Cleon B. Cooper, Executrix and First Security Bank of Utah, N.A., Administrator With Will Annexed of the Estate of Joe W. Cooper, Deceased v. Davis C. Holder, Doing Business as Holder Engineering Company, and City of Moab, a Municipal Corporation : Appellant's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

No. 11097

CLEON B. COOPER, Executrix and
FIRST SECURITY BANK OF UTAH, N.A.,
Administrator With Will Annexed of
the Estate of Joe W. Cooper, Deceased
Plaintiff-Respondent

vs.

DAVIS C. HOLDER, doing business as
HOLDER ENGINEERING COMPANY,
CITY OF MOAB, A Municipal Corporation
Defendant-Appellant

APPELLANT'S BRIEF

Appeal from the Judgment of the
Seventh District Court of Grand County
Honorable F. W. Keller, Judge

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TABLE OF CONTENTS

Statement of the Kind of Case 2

Disposition in Lower Court 2

Relief Sought on Appeal 2

Statement of Facts 2-3

Argument 3-16

POINT I.
The Mayor of a third class City in the State of Utah has only the power conferred upon him by statute and cannot act outside that authority in a manner that will create a financial obligation against the City 3

POINT II.
Under the provisions of 10-10-61, Utah Code Annotated, 1953, every contract made on behalf of the City or to which the City is a party as void unless signed by the Recorder 7-8

POINT III.
Compliance with the provisions of 10-7-77, Utah Code Annotated, 1953 is a condition precedent to the maintenance of a claim against the City, failure to comply is sufficient bar and answer to any action or proceeding against the City. 11

Conclusion 17

CASES CITED

City of Oakland v. Key System, 194 P 2d 195; 64 C. A. 2d 427 9

Dynamic Industries Co. v. City of Long Beach, 323 P 2d 768; 159 C. A. 2d 294 8

Hamilton v. Salt Lake City, 106 P 2d 1028, 99 Utah 362 14

Hurley v. Town of Bingham, 228 P 213; 63 Utah 589 13

News Advocate Publ. Co. v. Carbon County, 269 P 129; 72 Utah 88 6

Pardee v. Salt Lake County, 118 P 122; 39 Utah 482 7

TEXTS CITED

Vol. 10, 3d Edition, paragraph 29.05, page 175, McQuillin Municipal Corporations 4

Vol. 10, 3d Edition, paragraph 29.15, page 213, McQuillin Municipal Corporations 4

STATUTES CITED

Section 10-6-3, Utah Code Annotated, 1953 5

Section 10-6-5, Utah Code Annotated, 1953 5

Section 10-6-9, Utah Code Annotated, 1953 5

Section 10-6-24, Utah Code Annotated, 1953 6

Section 10-10-61, Utah Code Annotated, 1953 8

Section 10-7-77, Utah Code Annotated, 1953 11

Section 10-7-78, Utah Code Annotated, 1953 12

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STATEMENT OF THE KIND OF CASE

Claim againt the City of Moab by an Assignee of Davis C. Holder, a former contract engineer for the City of Moab for funds paid by the City to Davis C. Holder.

DISPOSITION IN LOWER COURT

The trial court entered judgment against the City of Moab in the favor of the Plaintiff for funds which had been paid to its former contract engineer at a time when the City Council and City Recorder had no knowledge of an assignment to a Trustee for the benefit of the Plaintiff

RELIEF SOUGHT ON APPEAL

Appellant seeks a complete reversal of the trial court's determination.

STATEMENT OF FACTS

The facts in this case have never been a matter of difference and the case was presented to the Court largely for an interpretation of the law as applied to the facts.

The Mayor of the City of Moab, (K. E. McDougald) on April 14, 1961, without the consent or knowledge of the City Recorder or City Council, signed an acknowledgment (at the request of Davis C. Holder, who was, at the time, a contract engineer for the City of Moab) of an assignment from Holder to a Trustee for the benefit of Plaintiff. The assignment was not known to the City Council or City Recorder until December 1962 after the alleged obligation was created and neither the agreement for th eessignment nor the assignment were ever attested to by the City Recorder as required by law.

No moneys were paid by the City of Moab to Davis C. Holder for services rendered by him on behalf of the City after the City Recorder and Council were notified by representatives of Cleon B. Cooper, Executrix of the Estate of Joseph W. Cooper, of the existence of said assignment in December 1962. After December 1962 all moneys due Davis C. Holder from the City were paid to William E. Foster as Trustee as provided in the assignment.

It is admitted by the City that moneys equal to the amount of the judgment were paid to Davis C. Holder by the City between the date of the assignment and the month of December 1962, at which later date the Recorder and City Council learned of the assignment and the acknowledgment and receipt of same by the Mayor of Moab. The sums so paid to Davis C. Holder between the date of the assignment and December 1962 are the subject matter of this action.

No claim or attempt to satisy the provisions of Section 10-7-77, Utah Code Annotated, 1953, which requires that a claim be presented to the governing body as a condition precedent to maintaining an action against the City, has ever, at any time, been presented to the City Council.

ARGUMENT

POINT I.

The Mayor of a third class City in the State of Utah has only the power conferred upon him by statute and cannot act outside that authority in a manner that will create a financial obligation against the City.

Volume 10 of McQuillin Municipal Corporations 3rd

Edition, page 175, paragraph 29.05 states:

> "Laws provide, in substance, that no county, city, town, village, township, school district or other municipal corporation shall make any contract unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract shall be made upon a consideration wholly to be performed or executed subsequent to the making of the contract. **Restrictions on power to contract are designed to protect the public rather than those who contract with the municipality.**"

Paragraph 29.15, page 213, Volume 10 of McQuillin Municipal Corporations 3rd Edition states:

> "Who may act in behalf of a municipality? The officer, body or board duly authorized must act in behalf of the municipality, otherwise a valid contract cannot be created. Generally the power to make contracts on behalf of a municipality rests in the council, or in case of a county, the board of supervisors, or the county judges, which, however (and this applies to all boards) must act at a legal meeting as a board, since the individual members acting singly have no authority to bind the municipality. It is well settled that the members of a common council, board or committee cannot separately and individually enter into a contract which will bind the municipality but they may act as a body at a regular or special meeting of which such notice shall have been given as required by law. ***__The city manager or mayor has only power to contract as is conferred upon him by statute or the charter of the council,__ although it is usual to require certain contracts to be approved by the mayor, and in such case he must approve the contract or it may be passed over his veto.

The Utah statutes on the subject vest the operation of city government in the Mayor and City Council. Section 10-6-3 Utah Code Annotated, 1953, provides:

"10-6-3. Cities of third class.-The municipal government in cities of the third class is vested in a mayor and city council to be composed of five councilmen, to be elected at large."

Section 10-6-5, Utah Code Annontated, 1953 provides:

"10-6-5. Boards and councils as legislative and governing bodies.-The board of commissioners in cities of the first and second class, the mayor and city council in cities of third class and the board of trustees in towns are and shall be the legislative and governing bodies of such cities and towns, and as such shall have, exercise and discharge all of the rights, powers, privileges and authority conferred by law upon their respective cities, towns or bodies, and shall perform all duties that may be required of them by law."

Section 10-6-9, Utah Code Annotated, 1953, provides:

"10-6-9. Meetings of governing bodies-Procedure. The Board of commissioners, city council and board of trustees shall sit with open doors and keep a journal of their own proceedings. The yeas and nays shall be taken upon the passage of all ordinances **and all propositions to create any liability against the city or town, and** in all other cases at the request of any member, which shall be entered upon the journal of its proceedings. **The concurrence of a majority of the members elected shall be necessary to the passage of any such ordinance or proposition.** Where there are an even number of members the consent or concurrence of one half of the members shall be sufficient to confirm an appointment or concur in the removal of an appointed officer."

Section 10-6-24, Utah Code Annotated, 1953, provides:

> "10-6-24. Powers and duties of mayor.-In cities of the third class the mayor shall preside at all meetings of the city council, but shall not vote except in case of a tie when he shall give the casting vote. He may exercise within the city limits the power to suppress disorder and keep the peace, and may remit fines and forfeitures and release any person imprisoned for violation of any city ordinance, but he shall report any such remission and release with the reasons therefor to the city council at its next session. He shall perform all duties prescribed by law or ordinance and shall see that the laws and ordinances are faithfully executed. He may at any time examine and inspect the books, records and papers of any officer of, or agent employed by the city. He shall from time to time give the council information concernng the affairs of the city, and shall recommend for their consideration such measures as he may deem expedient. He may when necessary call upon every male inhabitant of th city over the age of twenty-one years to aid in enforcing the laws and ordinances and in suppressing riots and other disorderly conduct."

In the case of News Advocate Pub. Co. v... Carbon County, 269 P, 129, 72 Utah 88 the Supreme Court of the State of Utah recognized the general rule of law in the following language:

> "(1) The general principal or rule of law that municipal corporations are not bound by contracts made without authority or in excess of the powers of such corporations is conceded. The rule applicable is stated in 15 C. J. 540 as follows: "A county is not bound by a contract beyond the scope of its powers or foreign to its purposes, or which is outside of the authority of

> the officers making it. In this connection it is the rule that the authority of a county board to make contracts is strictly limited to that conferred, either expressly or impliedly, by statute, regardless of benefit to the county or of value received; and the same is true as to other county officers attempting to contract in behalf of the county. ***All persons dealing with officers or agents of counties are bound to ascertain the limits of their authority or power as fixed by statutory or organic law, and are chargeable with knowledge of such limits. No estoppel can be created by the acts of such agents or officers in excess of their statutory constitutional powers."

In the instant case the Plaintiff is trying to enforce the terms of a contract or bind the City Council to pay moneys twice, once to the contracting engineer who is outside the jurisdiction of this Court and who was paid before the governing body had knowledge of the assignment and again to the negligent Plaintiff, who did not even notify the City Council or the City Recorder of the execution of the assignment until December 1962 after which the City did abide by its terms.

The Supreme Court of the State of Utah in the case of Paradee v. Salt Lake County, 118 P 122, 39 Utah 482 recognizes that "where the power to contract upon the subject matter is withheld from a corporation or where the statute expresses a specific method of making the contract then liability does not arise by implication."

POINT II

Under the provisions of 10-10-61, Utah Code, Annotated, 1953, every contract made on behalf of the City or

to which the City is a party is void unless signed by the City Recorder.

The provision of the statute is written into law for the purpose of insuring that the governing body is aware of contracts which may effect public funds.

> Section 10-10-61. Utah Code Annotated, 1953, provides: "10-10-61: City Recorder, Duties with respect to contracts. He shall countersign all contracts made on behalf of the City, and every contract made on behalf of the city or to which the city is a party shall be void as signed by the recorder. He shall maintain a record of all contracts, properly indexed, which be open to the inspection of all interested persons."

Dynamic Industries Co. v. City of Long Beach, 323 P. 2nd 768, 159 C. A. 2nd 294. In this case there was a requirement of law which provided: ... "The City of Long Beach shall not be and is not bound by any contract except as otherwise provided herein, unless the same is in writing, by order of the City Council, and signed by the City Manager or by some person in behalf of the City authorized to do so by the City Manager, provided, that the approval of the form of the contract by the City Attorney shall be endorsed thereon before the same shall be signed in behalf of the city."

> "(1, 2) The contract whose validity plaintiff seeks to establish was not signed by the city manager, as the charter requires. It could not have been signed since the area to be included was never defined nor approved by the city attorney or the council. It is well settled that when a municipal charter contains an express limitation upon the mode in which the city may contract, the city is bound only by contract executed in

accordance with the charter provisions; in other words, where the statute provides the only mode by which the power to contract shall be exercised, the mode is the measure of the power. Reams v. Cooley, 171 Cal. 150, 152 P. 293; Times Publishing Co. v. Weatherby, 139 Cal. 618, 73 P. 465. The rule applies equally to contracts made by the city in a governmental or a proprietary function. City of Pasadena v. Estrin, 212 Cal. 231, 298 P. 14. When the charter provision has not been complied with, the city may not be held liable in quasi contract, and it will not be estopped to deny the validity of the conract. Reams v. Cooley, supra, 171 Cal. 150, 153, 152 P. 293; Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 353, 291 P. 839, 71 A. L. R. 161.:"

The Utah law in the case before the court requires all contracts made by the City to be attested by the City Recorder or in the alternative declares them to be absolutely void. Surely the legislature of this state in enacting such a limitation on municipalities contemplated the very problem before the court in this case and made such a provision to protect the general public from a single designing mayor who might put personal gain above civic duty.

All persons contracting with a municipal corporation must at their peril, inquire into the statutory power of the corporation or of its officers who make the contract.

City of Oakland v. Key Stystem, 149 P 2d, 195; 64 C. A. 2d 427:

"(8-10) When the grant of a franchise is in excess of powers of the grantor, there is no obligation on its part to restore any real or supposed benefits. It is scarcely necessary to observe that no contract can be

made by a corporation which is prohibited by its charter or by the statute law of the State. And it is general and fundamental principal of law that all persons contracting with a municipal corporation must at their peril inquire into the statutory power of the corporation or of its officers to make the contract; and a contract beyond the scope of the corporate power granted or conferred by the legislature expressly, or by fair implication, is void, although it be under the seal of the corporation."

The statute requiring all municipal corporations contracts to be in writing and attested to by the City Recorder is well conceived and founded on the proposition that some sort of check is necessary to protect the public. If this were not so a conniving mayor or single City Councilman could bankrupt a city by his simple acknowledgment that an assignment had been made between two strangers which act would, if the district court's theory is upheld, obligate the City to pay twice for the same service although there were no compliance with the state laws governing all city contracts and although no notice were given to the duly constituted governing body of the municipality.

The argument of the Plaintiff would relieve the assignor and assignee of any obligation to notify the governing body of the fact that the assignment had been made and relieve them of any obligation to see that the statutory requirements of the Utah law had been complied with and would open the door to unscrupulous combinations of persons who might seek to fleece the unsuspecting taxpayer.

POINT III

Compliance with the provisions of Section 10-7-77 Utah Code Annotated, 1953 is a condition precedent to the maintenance of a claim against the City and failure to comply is sufficient bar and answer to any action or processing against the City.

Section 10-7-77, Utah Code Annotated, 1953, provides:

"10-7-77. Time for presenting-Contents-Condition precedent to action. Every claim against a city or incorporated town for damages or injury, alleged to have been caused by the defective, unsafe, dangerous or obstructed condition of any street, alley, crosswalk, sidewalk, culvert or bridge of such city or town, or from the negligence of the city or town authorities in respect to any such street, alley, crosswalk, sidewalk, culvert or bridge, shall within thirty days after the happening of such injury or damage be presented to the board of commissioners or city council of such board of trustees of such town, in writing, signed by the claimant or by some person authorized to sign the same, and properly verified, stating the particular time at which the injury happened, and designating and describing the particular place in which it occured, and also particularly describing the cause and circumstances of the injury or damages, and stating, if known to clamant, the name of the person, firm or corporation, who created, brought about or maintained the defect, obstruction or condition causing such accident or injury, and the nature and probable extent of such injury, and the amount of damages claimed on account of the same; such notice shall be sufficient in the particulars above specified to enable the officers of such city or town to find the place and cause of such injury from the description thereof given in the notice itself

without extraneous inquiry, and no action shall be maintained against any city or town for damages or injury to person or property, unless it appears that the claim for which the action was brought was presented as aforesaid, and that such governing body did not within ninety days thereafter audit and allow the same. **Every claim, other than claims above mentioned, against any city or town must be presented, properly itemized or described and verified as to correctness by the claimant or his agent, to the governing body within one year after the last item of such account or claim accrued, and if such account or claim is not properly or sufficiently itemized or described or verified, the governing body may require the same to be made more specific as to itemized or description, or to be correted as to the verification thereof."**

Section 10-7-78, Utah Code Annotated, 1953, provides:

"10-7-78. Failure to file, a bar-Amendment of claim. It shall be a sufficient bar and answer to any action or proceeding against a city or town in any court for the collection of any claim mentioned in Section 10-7-77, that such claim had not been presented to the governing body of such city or town in the manner and within the time specified in Section 10-7-77; provided that in case an account or claim, other than a claim made for damages on account of the unsafe, defective, dangerous or obstructed condition of any street, alley, crosswalk, way, sidewalk, culvert or bridge, is required by the governing body to be made more specific as to itemization or description, or to be properly verified, sufficient time shall be allowed the claimant to comply with such requirement."

Section 78-12-30 Utah Code Annotated, 1953, provides:

"78-12-30. Actions on claims against county, city

or town. -Actions on claims against a county, city or incorporated town, which have been rejected by the board of county commissioners, city commissioners, city council or board of trustees, as the case may be, must be commenced within one year after the first rejection thereof by such board of county or city commissioners, city council or board of trustees."

There is absolutly no allegation in Plaintiff's complaint or proof made or any contention on the part of the Plaintiff that she has ever, at any time, undertaken to comply with Section 10-7-77 of the Utah Code Annotated, 1953, but the Plaintiff seems content to rest her entire case on the notice given to the Mayor of Moab, who had no authority to bind the City, and who did not notify the City Council or the City Recorder of the Assignment. This issue was raised by Appellant Defendant in its first lefense and was argued

Compliance with Section 10-7-77, Utah Code Annotated, 1953, has consistently been held by the Utah Supreme Court to a condition precedent to the maintenance of a claim against a City and failure to file such a claim a defense and bar to an action against the city.

Hurley v. Town of Bingham, 63 Utah 589, 228 P. 213.

The court quoted the statutes and stated "The statutes above quoted and previous statutes relating to the same subject have been controlling factors in numerous decisions by the Court. Connor v. Salt Lake City, 28 Utah 249, 78 Pac. 479; Mackey v. Salt Lake City, 29 Utah, 247, 81 Pac. 81, 4 Ann. Cas. 824; Bowman v. Ogden City, 33 Utah 196, 93 Pac 561; Brown v. Salt Lake City, 33 Utah, 222, 93 Pac. 570, 14 L.R.A. (N.S.) 619, 126 Am. St. Rep.

828, 14 Ann. Cas. 1004; Sweet v. Salt Lake City, 43 Utah, 306, 134 Pac. 1167; Dahl v. Salt Lake City, 45 Utah, 544, 147 Pac. 622; Berger v. Salt Lake City. 56 Utah, 403, 191, Pac. 233, 13 A.L.R. 5.***"

The court then quotes from a case where a minor claimed to be exempt from the statute stating: "The language quoted is typical of expressions generally employed by the courts in cases last cited. They not only constitute the overwhelming weight of authority, but, in the opinion of the writer, they are more consonant with reason and the purpose of the statute which peremptorily requires that the claim be presented as therein provided. As frequently suggested in the decisions referred to, there being no exception in the statute itself, it is the duty of the courts to interpret the law as they find it and not resort to judicial legislation, and thereby probably defeat the manifest purpose of the law."

Hamilton v. Salt Lake City, 106 P. 2d 1028, 99 Utah 362.

The court stated:

"(2) Section 15-7-77 is a limitation statute for failure to file a claim in the manner and within the time specified in section 15-7-57." It is a sufficient bar and answer to any action for the collection of any claim under the first part of the statute. Under the second part of the section if the claimant is required by the governing body to be more specific as to itemization or description, or if the claim is not properly verified, sufficient time shall be allowed to comply with such requirements. No provision is made for the governing body to make such a requirement from

a claimant under the first part of the section. See Husband v. Salt Lake City, 92 Utah 449, 69 P. 2d 491, at page 497.

"(3, 4) The right to recover damages is statutory, it can only be availed of when there has been a compliance with the conditions upon which the right is conferred. Hurley v. Town of Bingham, 63 Utah 589, 228 P. 213. Where a right is purely statutory and is granted upon conditions, one who seeks to enforce the right must by allegation and proof bring himself within the conditions. Johnson v. City of Glendale, 12 Cal. App. 2d 389, 55 P. 2d 580."

"***It is the generally accepted rule that a municipality and its officers are without power to waive compliance with the law in such matters. Chapman v. City of Fullerton, 99 Cal. App. 403, 265 P. 1035; Spencer v. City of Calipatria, supra ((Cal. App. 2d 267, 49 P. 2d 320); Touhey v. City of Decatur, supra (175 Ind. 98, 93 N.E. 540, 32 L.R.A., N.S., 350); Dechant v. City of Hays, 112 Kan. 729, 212 P. 682; Berry v. City of Helena, 56 Mont. 122, 182 P. 117. The statute does not authorize a waiver nor does it provide any substitute for a written verified claim. The authorities we have cited quite generally hold that actual knowledge on the part of officers of a municipality of the facts required to be stated in the claim does not dispense with the claim itself.

***The above quoted case states in another portion of the opinion: "The 1931 act requires presentation of a verified claim to the clerk or secretary of the legislative body of the municipality or other governing board within ninety days after the accident has occurred. It states no exceptions, and we are unable to believe that any were intended.

If there were to be exceptions, they should have been stated in the act itself. It is not for the courts to create them. It must be presumed that the Legislature would have made disability an excuse for failure to present a claim had it been intended to grant that privilege. There is nothing novel in this class of legislation. Wherever liability of municipalities for negligence is recognized, general laws, charter provisions, or ordinances will be found imposing conditions upon the assertion of claims for damagee, and many such are discussed in the books which are far more rigorous than our own statute."

CONCLUSION

1. The Mayor could not bind the City of Moab in such a way that it should be required to pay an assignee sums which had been paid to the assignor at a time when the governing body and City Recorder had no knowledge or information that an assignment had been made.

2. The Plaintiff assignee cannot recover on a contract that the legislature has declared void because it was not executed in the manner provided by law.

3. Plaintiff has not alleged or proved facts which entitle her to the relief sought because no claim was ever presented to the City Council as required by statute and failure to file such a claim is by statute made a bar and sufficient defense to the maintenance of this action.