

1960

Trenton Town v. Clarkston Irrigation Co. et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

TRENTON TOWN,
Plaintiff and Respondent,

vs.

CLARKSTON IRRIGATION
COMPANY, et al.,
Defendants and Appellants.

Case No. 9148

APPELLANTS' BRIEF

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Clerk, Supreme Court, Utah

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INDEX

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	1
POINTS RELIED ON	7
ARGUMENT	
(1) Resolution authorizing condemnation proceedings legally insufficient.	8
(2) Town Board in its condemnation proceedings has gone beyond scope of resolution.	12

CASES CITED

Collins v. City of Phoenix, 54 F. (2d) 770	12
C & O Railway v. Mellon, 162 Ky. 738, 172 SW 1067....	13
Decatur v. Barteau, 260 Ill. 612, 103 NE 601	10
Harman v. Arthur, 309 Ill. 95, 140 NE 53	12
Keigley v. Bench, 90 Ut. 569, 63 Pac. (2d) 262	10
Kennahan v. N. Y., 162 App. Div. 364, 147 NYS 835....	10
Town of Tremonton v. Johnson, 49 Ut. 307, 164 Pac. 190	8

TEXTS CITED

62 C.J.S. P. 786, Section 411	10
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STATUTES CITED

UCA 10-7-4 (1953)	8, 9, 11
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APPENDIX

Appendix I. Resolution	15
Appendix II. UCA 10-7-4 (1953)	16

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APPELLANTS' BRIEF

PRELIMINARY STATEMENT

This is an interlocutory appeal from an order of the Honorable Lewis Jones, Judge, District Court of Cache County, Utah, denying defendants' Motion for Summary Judgment. (R. 267, 268)

The basis for the appeal is a defective resolution by the Town of Trenton authorizing condemnation proceedings to acquire water.

STATEMENT OF FACTS

This is an action to condemn certain water of

Big Birch Spring a tributary of Clarkston Creek.
(R. 132)

The particular water plaintiff seeks to acquire
is as follows:

“A. *Water Rights:* During the months commencing April 1st and ending September 30th of each year, all of the flow of water approximating 0.56 cubic feet per second from that certain spring area lying within a radius of 20 feet from a spring area center situated 1146 feet South and 80 feet West from the East Quarter corner of Section 17, Township 14 North, Range 2 West of the Salt Lake Base and Meridian, being in Cache County, Utah, and during the months commencing October 1st and ending March 30th of each year a flow of water equal to .20 cubic feet per second from the water of said spring area hereinabove described, said water being part of Birch Creek, a tributary of Clarkston Creek.” (R. 135)

The action was originally brought against the Clarkston Irrigation Company, a corporation, Newton Water Users Association, a corporation, and Stewart Fish and Game Preserve, a corporation. Subsequent thereto the complaint was amended and Edwin Godfrey and Ivan Thompson, stockholders of the Clarkston Irrigation Company, were made defendants individually and as representatives of a class to which they belong. Likewise, Dave Griffin and Royden Benson were made defendants as individuals and as representatives of a class to which

they belong as stockholders of the Newton Water Users Association; and Nathan Godfrey and Flo Godfrey, his wife, and David Thompson, Willis Thompson and A. A. Butters were made parties defendant. (R. 1, 16, 37)

Subsequently the defendant Clarkston Irrigation Company, a corporation, Edwin Godfrey, Ivan Thompson, Nathan Godfrey, Flo Godfrey, David Thompson, Willis Thompson, and A. A. Butters moved the Court for Summary Judgment on the ground that the resolution authorizing the condemnation proceedings was so indefinite and uncertain that it was fatally defective, as it could not be determined from the resolution the amount of the water the plaintiff was authorized to condemn, the amount of water necessary to meet the needs and requirements of the inhabitants of Trenton Town, and that it did not authorize it to condemn the water that it seeks to acquire by the condemnation proceedings, and that the plaintiff failed to join indispensable parties, namely, the stockholders of the Clarkston Irrigation Company, who were entitled to use the water sought by the condemnation proceedings. The Motion for Summary Judgment was allowed in part and denied in part. The Motion was granted as to the failure of the plaintiff to make the said stockholders parties defendant. However, leave was granted to make such persons parties

defendant and the Motion for Summary Judgment was denied as to the sufficiency of the resolution. Subsequent to the ruling in open court prior to the entry of the written order pertaining to the Motion for Summary Judgment, the plaintiff made the stockholders of the Clarkston Irrigation Company who are entitled to the use of the waters sought to be condemned parties defendant to the action. The Court entered its Order denying defendants' Motion for Summary Judgment on the 7th day of October, 1959. (R. 110, 111, 153, 264)

Subsequent to the above Motion for Summary Judgment and the ruling thereon, the defendant Newton Water Users Association, a corporation, and David Griffin, and Royden Benson, as stockholders and users of the Said Newton Water Users Association, moved the Court to dismiss plaintiff's action as to them on the grounds that the resolution authorizing the condemnation proceedings was defective as to them, as it failed to authorize the institution of the condemnation proceedings against them. The Motion was sustained by the Court and the condemnation proceedings dismissed as to them except that they were retained as party defendants for the purpose of determining the ownership and the right of use of the waters sought to be condemned, as the waters sought to be condemned were being used by the defendant Clarkston Irrigation

Company and its stockholders and the Newton Water Users Association and its stockholders.

Subsequent to the said Motion for Summary Judgment and the oral ruling thereon and the dismissal of the action as to the said Newton Water Users Association and its two named stockholders, the petitioning defendants moved to dismiss the plaintiff's cause of action on the grounds (1) for failure of the plaintiff to prosecute said action to a conclusion; (2) that Newton Water Users Association, a corporation, and all of its stockholders and Newton Town are necessary parties to the action; and (3) that the resolution of the plaintiff under which it is proceeding to condemn the defendants' water is fatally defective for the reason set forth in the defendants' Motion for Summary Judgment heretofore filed, which motion was by reference made a part of the Motion to Dismiss. The Court on the 9th day of October, 1959, entered its Order Denying the Motion to Dismiss on the second and third grounds above named and as to the first reason the Court conditionally denied the motion holding that the plaintiff's complaint would be dismissed provided the plaintiff requested any further continuances. (R. 264, 265, 266)

The resolution of a governing body of Trenton Town, the plaintiff, authorizing the condemnation proceedings set out that they had made a study of

the problems of the Town relating to its water supply and determined the Town need:

“* * * an additional amount of water equal to the volume that would be supplied by the flow of a six inch pipe line;”

and they then resolved:

“* * * that the Board of Trustees of the Town of Trenton acquire from the Clarkston Irrigation Company and the users thereof, by purchase or condemnation, such amount of water as will continuously flow from a six inch pipeline in Birch Creek.”

The resolution was published as required by law. (R. 160, Appendix 1.)

The uncontroverted affidavit in support of the motion for summary judgment by a duly licensed engineer in the State of Utah, set forth:

“That the said resolution is indefinite and uncertain inasmuch as it cannot be determined therefrom the amount of water Trenton Town intends to acquire, or the amount of water the said Town needs to fulfill its culinary and domestic requirements. That in order to determine the amount of water Trenton Town, the plaintiff, needs and intends to acquire for its culinary and domestic purposes, the resolution should have set forth the factors hereinafter mentioned:

“a. The pressure of water at the point of entrance of the water into the six inch pipe line in Birch Creek.

“b. A profile of the proposed pipeline showing the gradient and other hy-

draulic features of the pipeline, and

“c. The composition and kind of pipe to be used in the conveyance of the water.

“That none of the foregoing factors are stated in said resolution. That even in the event the aforementioned factors were stated in the resolution, in general the only persons who could determine the amount of water needed by Trenton Town to fulfill the culinary and domestic water requirements and the amount of water to be acquired are those persons trained in the schools of physics and engineering, and from the aforementioned resolution, even a person trained and educated in the fields of physics and engineering cannot determine what amount of water Trenton Town seeks to acquire or the amount of water Trenton Town requires to fulfill its culinary and domestic needs.” (R. 117, 118, 119.)

STATEMENT OF POINTS

POINT I.

THE RESOLUTION AUTHORIZING THE CONDEMNATION PROCEEDINGS IS LEGALLY INSUFFICIENT IN THAT IT IS SO INDEFINITE AND UNCERTAIN THAT IT CANNOT BE DETERMINED THEREFROM THE AMOUNT OF WATER NECESSARY TO MEET THE PLAINTIFF'S REQUIREMENTS, NOR THE AMOUNT OF WATER AUTHORIZED TO BE CONDEMNED, AND IS THEREFORE VOID AND OF NO EFFECT.

POINT II.

THAT EVEN IF THE RESOLUTION WERE VALID, THE COMPLAINT SHOULD BE DISMISSED, AS THE

TOWN BOARD HAS GONE BEYOND THE SCOPE OF SAID RESOLUTION.

ARGUMENT

POINT I.

THE RESOLUTION AUTHORIZING THE CONDEMNATION PROCEEDINGS IS LEGALLY INSUFFICIENT IN THAT IT IS SO INDEFINITE AND UNCERTAIN THAT IT CANNOT BE DETERMINED THEREFROM THE AMOUNT OF WATER NECESSARY TO MEET THE PLAINTIFF'S REQUIREMENTS, NOR THE AMOUNT OF WATER AUTHORIZED TO BE CONDEMNED, AND IS THEREFORE VOID AND OF NO EFFECT.

The statutes of this State require a municipal corporation to enact an ordinance or resolution prior to acquiring water by purchase, lease or condemnation. UCA 10-7-4 (1953). This Court has determined that the passing of such an ordinance or resolution is jurisdictional. *Town of Tremonton v. Johnson*, 49 Utah 307, 164 P. 190. However, there has been no call, until now, for the Court to determine the requisite sufficiency, under the law, of an ordinance to acquire water. In this appeal, we are attacking the sufficiency of the resolution here in question, on the ground that it is materially lacking in clarity, preciseness and definitive terms, rendering it completely ineffective and without the statutory requirements.

Under the terms of the legislative enactment, a municipal corporation is authorized to acquire

water by purchase, lease or condemnation proceedings upon the passing and publication of a resolution or ordinance, unless precluded by a protest, within a specified time, by one-third of the resident taxpayers. In the event of such a protest, the question is referred for a special election of qualified voters, the majority deciding the validity of the proposed resolution or ordinance. UCA 10-7-4 (1953). See Appendix 2.

In an attempt to comply with the statute, the governing board of the Town of Trenton passed a resolution, which was duly published, announcing that a study of the Town's water needs revealed the necessity of

“an additional amount of water equal to the flow of the 6” pipe line . . .”

stating that the

“ . . . only reasonable available source of such additional culinary water is from Birch Creek . . . ”

and resolving to acquire

“ . . . by purchase or condemnation such amount of water as will continuously flow from a 6” pipe line in Birch Creek.” See Appendix 1.

Although a resolution is less solemn and formal than an ordinance, being an act of a temporary or special nature, rather than one prescribing a permanent rule of government, it must meet in sub-

stance the same requirements. 62 CJS, p. 786, § 411; *Keigley v. Bench*, 90 Utah 569, 63 P. 2d 262. In *Kennahan v. New York*, 162 App. Div. 364, 147 NYS 835, the court outlined and emphasized these requirements holding that an ordinance must be clear, precise, definite and certain in its terms, maintaining that an ordinance vague to the extent that its precise meaning could not be ascertained, is invalid, even though it is constitutional and valid in other respects. Thus, an ordinance must be framed in terms sufficiently clear and definite to show what it intends to require or prohibit, and its terms must be readily understandable by those upon whom it is to operate. Uncertainty in essential parts renders the resolution void. *Decatur v. Barteau*, 260 Ill. 612, 103 NE 601.

The statutes of the State do not designate of what a resolution should consist. However, logic and reason most certainly require a resolution such as is now in question be worded so that it informs the townspeople of the needs of the area, the amount of water necessary to satisfy such needs, the amount of water it intends to acquire, whether it is to be acquired by purchase, lease or condemnation proceedings, and the source or location of the intended supply. To be deficient in any of these respects would deprive the taxpayers of a factual basis upon which to determine whether or not such proceedings

meet with their approval. This is highly important and relevant. For instance, the townspeople may agree that they need an additional 0.25 cubic feet second of water, while they would disagree that they need 3 c.f.s. of water, and protest accordingly; and while they may agree that the town should obligate itself to acquire 0.25 c.f.s. of water, they would protest obligating themselves to pay for 3 c.f.s. of water. Further, they would want to know the water source in order that they might determine whether or not it is palatable and free from contamination.

In these respects, the resolution in question fails, clearly breaching the intent and purpose of the legislative enactment previously cited, UCA 10-7-4. Notwithstanding its language, the resolution does not set forth any description or formula whereby the amount of water needed, or the amount of water intended to be acquired, can be determined. The engineer's affidavit (p. 7, *infra*) itemizes the defects in the resolution, and states the facts necessary, but absent, to compute these amounts. Under his professional analysis, the resolution would have to provide information as to water pressure, profile of the pipeline, and type of pipe before one could determine how much water would flow through a 6" pipe. It is therefore impossible to determine how much water the Town Board is authorized to acquire, and how much the townspeople would be

obligating themselves to pay if they support this resolution. In this respect, the instant situation is analogous to the problem confronting the court in *Harman v. Arthur*, 309 Ill. 95, 140 NE 53, where an ordinance was declared void because from its terms it could not be regarded as sufficiently certain, in that it was "practically impossible" to ascertain with any reasonable degree of certainty, how much the property owners would be specially benefited by the improvement, or how much they would be compelled to pay to complete the work. In *Collins v. City of Phoenix*, 54 F. 2d 770, the court held that the order for the improvement, whether by ordinance or resolution, must be given in clear, direct terms, in the manner prescribed and by the proper municipal authorities; that it *must* be definite, certain and free from ambiguities, and *must* conform, as respects extent and character of the proposed improvements, to the resolution of necessity . . . else it is unauthorized and fails. The clear weight of authority demands that the resolution here in issue be judicially declared void and of no effect.

POINT II.

THAT EVEN IF THE RESOLUTION WERE VALID, THE COMPLAINT SHOULD BE DISMISSED, AS THE TOWN BOARD HAS GONE BEYOND THE SCOPE OF SAID RESOLUTION.

It would go almost without mention that the

Town Board cannot in any manner exceed or go beyond the provisions of its resolution. To allow otherwise would be to circumvent the clear meaning and intend of the statutory provision. In the immediate case, the Board has attempted to act without the scope of the resolution in two instances:

First, the Board is limited by the terms of the resolution as to amount. However, as previously stated there is no possible method for determining what amount the resolution permits. In the complaint, the Board requests judicial approval to acquire a flow of water approximating 0.56 c.f.s. (p. 2, *infra*). This figure is in no way related to the amount of water the resolution authorizes. It may be in excess of what the Board originally intended in its drafting of the ambiguous resolution.

Secondly, the complaint sought to condemn certain water of Big Birch Spring, a tributary of Birch Creek. (R. 132) The resolution limits the source of supply to Birch Creek itself, and does not extend to any of its tributaries. To allow the complaint to succeed, is to go beyond the provisions of the ordinance. To maintain that the description in the resolution includes tributaries of Birch Creek is to hold *contra* to the general rule as announced in *C. & O. Railway Company v. Mellon*, 162 Ky. 738, 172 SW 1067: an ordinance must be sufficiently

certain as to the place or area of its operation so that persons interested in it, or subject to it, will know its provisions.

CONCLUSION

The order of the trial court denying appellant's motion for summary judgment should be reversed, and the trial court directed to enter summary judgment and dismiss plaintiff's complaint for the reasons hereinbefore set forth.

Respectfully submitted,

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Salt Lake City, Utah

Attorney for Appellants

APPENDIX I

RESOLUTION NO. 1

WHEREAS, the Board of Trustees of the Town of Trenton have made a careful study of the problems of the Town relating to its water supply; and

WHEREAS, as the result of such study of the Town Board has found it necessary for the public good of the Town that it acquire by purchase or condemnation an additional amount of water equal to the volume that would be supplied by the flow of a six inch pipe line; and

WHEREAS, the only reasonably available source of such additional culinary water is from Birch Creek, the procurable water of which is the property of the Clarkston Irrigation Company and of the stockholders thereof who are entitled to distributions of water from said Birch Creek;

NOW, THEREFORE, BE IT RESOLVED: That the Board of Trustees of the Town of Trenton acquire from the Clarkston Irrigation Company and the users thereof, by purchase or condemnation, such amount of water as will continually flow from a six inch pipe line in Birch Creek.

BE IT FURTHER RESOLVED, that the Town President be and he is hereby authorized to take all necessary steps to acquire said water either by purchase or condemnation, including, but not limited to, the employment of counsel, engineers and other personnel therefor and the development of recommendations for the financing thereof.

BE IT FURTHER RESOLVED that said acquisition of water by purchase or condemnation remain in abeyance for the period of thirty (30) days following the passage and publication of this reso-

lution in accordance with the requirements of Section 10-7-4 Utah Code Annotated 1953. In the event of protest by resident taxpayers of the Town pursuant to said section of law, this resolution shall take effect subject to a confirming vote in accordance with said statute.

BE IT FURTHER RESOLVED that the Town Clerk shall publish this resolution by posting in three public places within the Town limits in the same manner as is required by law for the publication of ordinances.

Adopted and passed by the Board of Trustees of the Town of Trenton, Cache County, State of Utah, and signed by the President of the Board of Trustees this 26th day of January, 1954.

(Sgd) W. S. HOLT
President of the Board of Trustees
of the Town of Trenton

ATTEST:

(Sgd) DONALD L. ANDREW
Clerk of the Board of Trustees
of the Town of Trenton

APPENDIX II.

10-7-4 U.C.A. 1953

WATER SUPPLY - ACQUISITION -
CONDEMNATION - PROTEST -

SPECIAL ELECTION

The board of commissioners, city council or board of Trustees of any city or town may acquire, purchase or lease all or any part of any water, water-works system, water supply or property connected therewith, and whenever the governing body of a

city or town shall deem it necessary for the public good such city or town may bring condemnation proceedings to acquire the same; provided, that if within thirty days after the passage and publication of a resolution or ordinance for the purchase or lease or condemnation herein provided for one third of the resident taxpayers of the city or town, as shown by the assessment roll, shall protest against the purchase, lease or condemnation proceedings contemplated, such proposed purchase, lease or condemnation shall be referred to a special election, and if confirmed by a majority vote thereat, shall take effect; otherwise it shall be void. In all condemnation proceedings the value of land affected by the taking must be considered in connection with the water or water rights taken for the purpose of supplying the city or town or the inhabitants thereof with water.