

1960

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

Utah Supreme Court

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In the Supreme Court
of the State of Utah

FILED

MAR 29 1960

TRENTON TOWN,
Plaintiff and Respondent,
- vs. -
CLARKSTON IRRIGATION
COMPANY, et al.,
Defendants and Appellants

Clerk, Supreme Court, Utah

Case No. 9148

RESPONDENT'S
BRIEF

Appeal from the District Court of the First
Judicial District of the State of Utah
In and for the County of Cache

LEWIS JONES

Hon. ~~Stewart M. Johnson~~ Judge

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RESPONDENT'S
BRIEF

STATEMENT OF FACTS

The statement of facts as contained in Appellants' Brief on Appeal are, as Respondent views it, substantially correct and for purposes of this Appeal are sufficiently accurate to reflect the material points relating to this Appeal.

STATEMENT OF POINTS

POINT I

THE DISTRICT COURT DID NOT ERR IN DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS ON THE GROUNDS THAT PLAINTIFF'S RESOLUTION UNDER WHICH IT IS PROCEEDING IS FATALLY DEFECTIVE.

POINT 2

THE PLAINTIFF'S COMPLAINT DOES NOT GO BEYOND THE SCOPE OF ITS RESOLUTION.

ARGUMENT

POINT 1

From Respondent's examination of the law, this appears to be a case of first impression as to the details necessary in a resolution or ordinance for the acquisition of water by a municipality pursuant to Section 10-7-4, UCA, (1953). All that the statute seems to require is the passage of a resolution to acquire, purchase or lease all or any part of any water, water-works system, water supply or property connected therewith.

The resolution of the Plaintiff directed and empowered the Town President to take all necessary steps to acquire by purchase or condemnation "such amount of water as will continually flow from a six-inch pipe line in Birch Creek."

An ordinance will not be set aside for uncertainty if it is a compliance, although a loose one, with the requirements of the law, and a resolution is sufficient where it is in substantial conformity with the ordinance authorizing the improvement (63 CJS, Municipal Corporations, Section 1105).

In the case of City of Bartlesville vs. Keeler, 229 Pacific 451 (Okla.), the court said at page 452:

“We hold that where the ordinance as passed by the legislative body of the municipality shows on its face the plain intention to carry out the provisions of the statute relative to the construction of a sewer system for a particular district, although the ordinance is defective in detail, if the same is published as provided by the statute and is sufficient to give the property owners notice that improvements are about to be constructed and will be constructed unless the property owners protest against the same and no protests are filed but the property owners permit the work to proceed, such ordinance is sufficient to give the city authorities jurisdiction to make the contract.”

In the case of *Horejsi vs. City of Holyrood*, 231 P. (2d) 215 (Kan.) at page 218, in construing a section providing for the paving of city streets which required a resolution declaring the contemplated work to be necessary and for publication of the resolution for protests, the Court stated that:

“The failure of the resolution and of the ordinance to specify where the recurbings and reguttering were necessary did not render the proceedings so irregular as to render them subject to an injunction.”

In that case the resolution did not contain information that would advise the taxpayers of the probable cost of the improvement contemplated. Such failure did not render the proceedings bad because the statute did not require such information to be in the resolution.

While in some cases it may be desirable to have a

complete set of plans and specifications of the proposed work incorporated in the resolution, such information is not set forth as a requirement of our statute under consideration; the judicial determination by the engineer for Defendants that the resolution should set forth further facts notwithstanding.

In *Town of Perry vs. Thomas*, 22 Pac. (2d) 343, this Court was called upon to pass on the sufficiency of a Complaint in an action to condemn a strip of land as a public street. There was no description of each piece or parcel of land sought to be taken and the Complaint alleged "that plaintiff is not fully advised concerning the ownership of the fee over which said line extends." The Court stated:

"While there is a great deal of confusion in the cases respecting the matter, we are satisfied that under our statutes the public necessity or expediency for the opening of a street within corporate limits is a question for determination by the governing board of a municipality and that its conclusion in that respect properly expressed by ordinance or resolution is conclusive."

Although the sufficiency of the resolution in this case was not discussed, inferentially the same was found sufficient even though it contained neither specific descriptions of the land sought to be taken nor the ownership of the same.

A reasonable interpretation of Plaintiff's resolution requires the conclusion that Trenton Town Board was

given wide latitude in acquiring water in any amount so long as the same could be made to flow from a six-inch pipe anywhere on Birch Creek, and so long as the amount of water sought to be condemned as set forth in the Complaint will flow through a six-inch pipe the Defendants are in no position to complain. The power granted the Board in the resolution may be broad, but as stated in *Town of Perry vs. Thomas* (Supra):

“Under powers thus delegated to municipal boards the necessity, expediency or propriety . . . is a political question, and in the absence of fraud, bad faith or abuse of discretion the action of such board will not be disturbed by the courts.”

POINT 2

THE PLAINTIFF'S COMPLAINT DOES NOT GO BEYOND THE SCOPE OF ITS RESOLUTION.

The Complaint seeks to condemn water of Big Birch Spring, the tributary of Birch Creek. It appears fundamental that a stream or creek will have a source and such source is part and parcel of the water course. *Wrathall vs. Johnson*, 40 Pac. (2d) 755, at page 765 states as follows:

“A right once established upon a stream or source of supply vests in the owner of such right an interest in the stream to the source.”

CONCLUSION

The order of the trial court denying Appellants' Motion for Summary Judgment should be affirmed.

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Respectfully Submitted,
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