

1961

Utah State Land Board v. Utah State Finance Commission : Brief of Amicus Curiae

Utah Supreme Court

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Recommended Citation

Brief of Amicus Curiae, *Utah State Land Board v. Utah State Finance Commission*, No. 9354 (Utah Supreme Court, 1961).
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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED
JAN 1 - 1961

UTAH STATE LAND BOARD

Appellant

— vs. —

UTAH STATE FINANCE
COMMISSION

Respondent

Clerk Supreme Court, Utah

Case
No. 9354

BRIEF OF AMICUS CURIAE

A. M. FERRO

Amicus

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FACTS

As more fully appears from the briefs of the parties, respondent asserts that the 1959 Utah Legislature, in authorizing Appellant to purchase corporate securities, exceeded its powers as limited by Article VI, Section 31, Constitution of Utah.

This brief is filed, pursuant to permission granted by the Court, to assist the Court in resolving a question which affects other agencies and institutions than the parties. The Utah Education Association, represented by the *amicus*, is particularly concerned that the Court should be fully informed before making a decision which will determine whether the Permanent School Fund may be managed so as to afford a significant contribution to the costs of education in this State or must be committed to the kind of investment which will assure its further attrition in the pattern of the past three decades. It should be a matter of grave concern that the Permanent School Fund of this State, which consisted of some eight million dollars in assets in 1930, consists of only eight million dollars (and a much less valuable eight million dollars) in assets today. In all history, these have been the thirty years of greatest investment opportunity and most consistent and predictable inflationary pressure. During these thirty years, the administrators of every endowment and investment fund of consequence in this country, even where the investment objective is essentially to maintain the integrity of the corpus, have abandoned their traditional reliance on debt securities in order to avoid the corrosive effect of inevitable inflation.

The Court can certainly take notice of the well advertised performances of the country's great institutional funds, many of which have more than doubled in asset value while the Permanent School Fund of this State shrunk in value 50% by conservative estimate.

The concern of the *amicus* here is that the Court should not vitiate the legislative effort to preserve these public funds unless it is wholly convinced that the mind of the constitutional convention was in fact bent upon foreclosing the Legislature from authorizing sound and tested practices of trust administration.

ARGUMENT

SECTION 31, ARTICLE VI, CONSTITUTION OF UTAH, BY PROHIBITING SUBSCRIPTIONS AND THE LENDING OR PUBLIC CREDIT "IN AID OF" CORPORATIONS, DOES NOT PROHIBIT THE PURCHASE OF CORPORATE SECURITIES "IN AID OF" THE STATE.

Provisions relating to State "aid" to corporations appear in the constitutions of many states. In *State of Arizona v. Northwestern Mutual Insurance Company*, 86 Ariz. 50, 34 P. 2d 200, the court noted that constitutional inhibitions of this sort were enacted in 43 states. The ubiquity of the provisions is not surprising to students of mid-nineteenth century history. The Montana Court, commenting upon that state's constitutional provision, said:

"It represents the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities and towns in aid of the construction of railways, canals and other like undertakings during the half century preceding 1880, and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted

to quasi public purposes, but actually engaged in private business.” (Thaanum v. Bynum Irr. Dist., 72 Mont. 221 ; 232 P. 528)

The reports of Utah’s constitutional convention, as appellant points out in its brief, clearly show that the concern of the convention was the avoidance of this same evil, i. e. the appropriation of public funds for internal improvements under such circumstances that the public took the risk and the corporation had the only opportunity for profit.

The kind of investment authorized by the statute here under attack is not remotely similar to the give-away programs of the mid-Nineteenth century. Under Section 65-1-65, only securities of corporations having established dividend and performance records may be purchased. The purchaser does not depend, for security, upon a contemplated installation of problematical value; he relies, rather, upon demonstrable existing values and known revenue potentials. The 1959 Legislature authorized investment in corporate securities not because it saw merit in promoting the interests of railroad, telegraph or other corporations, but because it recognized the need for more fruitful investment of public funds.

It is important that the motivation of the legislature in enacting Section 65-1-65 be recognized and understood, because it is an intention and purpose to aid corporations which invalidates legislature under a constitutional provision such as ours. This conclusion is clearly drawn by the editors of *Corpus Juris Secumdatum*. Discussing pro-

hibitions against lending the state's credit in aid of corporations, they say:

“A limitation on the power of the state or legislature to lend or give the credit of the state does not apply to a loan or gift of the state's credit for state purposes or for the common good, and the aid of state credit may be extended to . . . private or public corporations for public purposes.” (81 C. J. S. 1169)

In *People ex rel Greening v. Green*, 382 Ill. 577, 47 N.E. 2d 465, the court was concerned with a constitutional provision that “the state shall never pay, assume or become responsible for the debts or liabilities of or in any way give, loan or extend its credit to or in aid of any public or other corporation association or individual.” It was there pointed out that even a donation of money to private individuals is valid and not violative of the quoted section so long as the purpose of the expenditure is for public and not private benefit. This point of view was confirmed in *Loomis v. Keehn*, 80 N.E. 2d 368, 400 Ill. 337. (See headnote 12, 80 N.E. 2d 373) The Supreme Court of Tennessee similarly construed a similar section of that state's constitution in *Bedford County Hospital v. Browning*, 225 S.W. 2d 41; 189 Tenn. 227.

The purpose of the Utah legislature in enacting Section 65-1-65 is not stated in the body of the act, but the intent to preserve the value of the permanent school fund, a public purpose beyond question, must be implied from the circumstances. The fund had been steadily de-

preciating for many years, and the yield from its investment was well below reasonable expectancy. As appears from the affidavit attached hereto as Exhibit 1, no argument was made to the legislature in advocacy of this legislation except that liberalized investment power was necessary in order to increase the yield and stability of the funds administered by the State Land Board.

In the face of these indications of proper and constitutional legislative purpose, it would indeed be a departure from precedent for this court to infer an illegal and unconstitutional legislative purpose in order to vitiate legislation enacted by both houses of Utah legislature without a single dissenting vote.

Respectfully submitted,

A. M. FERRO

Amicus

EXHIBIT 1

A F F I D A V I T

STATE OF UTAH)
) SS
COUNTY OF SALT LAKE)

Each of the undersigned on oath deposes and says that he was a member of the Utah State Senate during the 1959 legislative session; that he remembers the discussions in the Senate with reference to the bill which became Section 65-1-65, Utah Code Annotated, including the comments of those who addressed the Senate sitting as a committee of the whole; that he remembers no argument in advocacy of the legislation to the effect that the purchase of corporate securities would benefit corporations but only arguments to the effect that the investment authority sought by the bill would enable the State Land Board more productively to invest the