

1962

Salt Lake City and J. Bracken Lee v. The Metropolitan Water District of Salt Lake City and Salt Lake County : Brief of Defendant and Respondent the Metropolitan Water District of Salt Lake City

Utah Supreme Court

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In the Supreme Court of the State of Utah

SALT LAKE CITY, a municipal
corporation of the State of Utah,
and J. BRACKEN LEE,
Plaintiffs and Appellants,

— vs. —

THE METROPOLITAN WATER
DISTRICT OF SALT LAKE
CITY, a corporation, and
SALT LAKE COUNTY,
Defendants and Respondents

Case No.
9617

ED

1902

UNIVERSITY OF

Supreme Court, Utah

Brief of Defendant and Respondent The Metropolitan Water District of Salt Lake City

JUN 1 1962

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Appeal from the Judgment of the
Third District Court for Salt Lake County

~~For A. H. Ensign, Judge~~

Rex Van COTT, JR.

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SALT LAKE COUNTY,
Defendants and Respondents

Case No.
9617

Brief of Defendant and Respondent The Metropolitan Water District of Salt Lake City

Hereinafter appellant Salt Lake City will be referred to as the City, the respondent The Metropolitan Water District of Salt Lake City as the District, and Salt Lake County as the County.

STATEMENT OF FACTS

Appellants' statement of facts consists of erroneous statements and interpretations of the evidence together with arguments and conclusions of law with which we cannot agree. We therefore modify it as stated below.

On August 7, 1961 the Board of Directors of the District acting pursuant to Section 73-8-36 determined by resolution that the amount of money necessary to be raised by taxation during the fiscal year beginning the 1st day of January, 1961, and ending the 31st day of December, 1961, for all District purposes is the sum of \$639,690.00 and levied a tax against all of the taxable property in the District at a rate of 25c upon each \$100.00 of the assessed valuation of that property. The resolution in accord with the provisions of Section 73-8-37 directed that in lieu of the tax levied the City could pay on or before August 27, 1961, the sum of \$639,690.00 (R. 8). On August 10, the City notified the District that it did not elect to pay the sum stated in lieu of the tax (Ex. 2).

At the time the tax was levied, the District had on hand United States Government securities worth in excess of two million dollars, which were convertible into cash at anytime (Ex. 3, R. 50). It is these securities that are characterized by the plaintiffs as a cash surplus.

The financial statement and supplemental schedules (Ex. 3) prepared by the accountants also indicated that on December 31, 1960, the District had on hand cash in the sum of \$640,437.35. The evidence revealed, however, that the two million dollars in securities had been allocated to a number of projects designed to obtain new supplies of water and to avert a shortage due to existing and anticipated drouth conditions. The cash on hand December 30, 1960, had been used by the District to pay

fixed obligations, before the August, 1961 tax was levied (Ex. 6).

The two million dollar investment is a fund reserved by the District to meet emergencies that arise in the course of performance of the functions for which the District was created (Ex. 6). It was accumulated over a period of years out of profits which the District derived from the sale of water other than that sold to and consumed within the City (R. 47). It had been resorted to from time to time in the past to meet such emergencies (R. 47).

In determining the amount of money necessary to be raised by taxation during the year 1961, the Board took into consideration a number of circumstances. In the first place there was a pressing necessity to increase the delivery capacity of the Deer Creek Aqueduct. The gravity flow rate of 155 c. f. s. had been demonstrated to be insufficient during the peak demands of the hot summer months. If the aqueduct could be converted from gravity to pressure flow, the delivery rate could be greatly increased. To determine whether this conversion was feasible, it was necessary to make pressure tests and hydraulic studies. The estimated cost of the conversion was between three and five hundred thousand dollars. Ten Thousand Dollars was appropriated to make the tests and studies necessary to determine the feasibility of the project. The Board plans to complete this project, if feasible, by resorting to the reserve fund, instead of levying a special tax (Ex. 1).

The existing water storage facilities of the District and the City are inadequate to meet the demands of the rapidly increasing urban population (R. 34). An additional reservoir is needed, not only to meet the ordinary peak water demands, but also to assure an adequate supply for fire protection and preservation of public health (Ex. 1). The District owns fifty acres of land on Wasatch Boulevard which it acquired in 1947 in anticipation of the necessity for such reservoir (R. 40-41). Preliminary tests and engineering studies had to be made to determine the costs and conflicts which might arise out of the establishment of the highway known as the Belt Route. It was expected that the cost of the reservoir would exceed a million two hundred fifty thousand dollars, and again the Board planned to meet this cost from accumulated funds without levying a special tax against the property within the District (Ex. 1).

At the time the resolution was passed, drouth conditions had become acute and if they continued according to the usual pattern, a critical shortage of water was certain to occur in the very near future (Ex. 1, p. 5 and 6). The District had explored a number of possibilities of averting this crisis (Ex. 1, p. 6). Negotiations had been underway to purchase water from farmers, upon the basis of the value of crops lost (Ex. 1, p. 6). Four hundred thousand dollars out of the reserve fund was earmarked to purchase this water (Ex. 6, p. 6).

Additional supplies of water could also be obtained by drilling deep wells. Two hundred thousand dollars

out of the reserve fund was allocated to the drilling and equipping of four deep wells (Ex. 6, p. 6).

Sometime ago, the City had made application to appropriate the spring run-off in Little Cottonwood Creek. It could not complete its application, because of financial inability to construct the necessary diverting and storage facilities. It transferred its application to the District under an agreement whereby the latter would undertake to furnish these facilities (R. 62). The first of these diverting works required was the construction of a reservoir, and a site known as Dimple Dell was under survey by the District. Extensive core drilling had to be done to determine the suitability of this site and an appropriation of \$30,000 out of the reserve fund was made to do this work (Ex. 1).

These proposed expenditures to meet the emergencies confronting the District together with the cost of pressurizing the aqueduct and constructing the Wasatch reservoir would have exhausted the reserve fund. The District, of course, had to meet its fixed obligations and pay its operating expenses. If all of the projected expenditures had been made, the reserve fund and all income including the 1961 tax would have been used up and the District would have only an estimated \$29,000.00 remaining at the end of the year 1962 (Ex. 1).

Appellants' brief emphasizes twice in capital letters the net income from operations shown on page 4 of Exhibit 3. Actually, this item is of little significance when it is considered that the question before the District in

August, 1961 was the amount necessary to be raised by taxation to carry on the operations of the District. In the first place, the Exhibit speaks as of the end of the year 1960, and does not purport to show anything with respect to the financial condition existing at the time the tax was levied. Furthermore, the net income shown on page 4 is simply the difference between the income derived from water sales, aqueduct rentals and water treatment, and the cost of operating the actual physical properties of the District. It does not purport to show the large amounts expended by the District during the year for capital improvements to its properties. A list of these expenditures will be found on page 18 of Exhibit 3. They amount to approximately \$850,000. Neither does it take into account the stock assessments paid amounting to \$277,650, nor the item \$310,000 paid to the Bureau of Reclamation. Finally, it does not include payments made on the bonded indebtedness of the District amounting to \$295,500, nor other items totaling more than \$36,000.

Actually, Exhibit 3 discloses that the revenue or income of the District for 1960, including the 2½ mill tax of more than \$600,000 was not sufficient to pay the cost of carrying on the business of the District. Even if the Directors of the District had no other facts before them than those disclosed in Exhibit 3, they would have been fully justified in determining as they did that it was necessary to levy the 2½ mill tax in August, 1961 in order to carry on the functions of the District.

The only question with which we are now concerned is whether the Board was justified in determining that

it was necessary to levy the tax in August, 1961 in order to carry on the business of the District. The Appellants made no attempt to present any evidence to impeach the Board's determination of the necessity of levying the 1961 case. The evidence is clear that if the Board had not levied the 1961 tax, it would have been compelled to practically exhaust its reserve funds and also curtail its functions to the detriment of the inhabitants of the City.

ARGUMENT

POINT I.

THE TAX LEVIED BY THE DISTRICT IN AUGUST 1961 WAS AND IS A VALID TAX.

The only question involved in this case having any semblance of plausibility is whether the power of the Board of Directors of the District to levy the 1961 tax was affected by reason of the fact that the District had accumulated a fund for the purpose of meeting emergencies likely or certain to arise. Appellants do not maintain that the tax was invalid because of the emergency funds of the District. They skirt that proposition by some objections to the tax which are so obscure and confusing as to obliterate each other.

Under Point I, Appellants state that "the basic question involved is whether or not the City is entitled to have payments for purchases of water from the District applied to the reduction of taxes which would otherwise be levied against the inhabitants or the City." Unless Appellants mean to inquire whether the District is required to carry on its operations solely out of funds derived from

the sale of water to the City, then the "basic question" is a mere jumble of words. The statute expressly confers on the District authority to levy the tax to meet the expenses of its operations, and obviously the income which the District receives from the sale of water must be used for the same purpose. What is accomplished by requiring the District to use one source of income to neutralize another in whole or in part? The "crucial section" of the Act which is said to bring about this absurdity is 73-8-43. This section does not even mention the subject of payments for water sold and delivered. On the contrary, it deals with voluntary payments which it permits the City to make to the District but which the City is under no obligation to make. These permissive payments can be made out of funds not appropriated to any municipal purpose or which have been derived by the City from sales by it of water. If and when such voluntary payments are made by the City, the Section directs they must be treated by the District as payments in advance for water to be delivered to the City in the future or to avoid taxes which would otherwise have to be levied against the property in the District.

It is a matter of common knowledge that the City has never had any funds which have not been appropriated to any municipal purpose and which it could use to pay in advance for water to be furnished by the District in the future. Invariably, the City has to borrow money in anticipation of taxes in order to carry on its functions. It has not at any time ever made any voluntary payments to the District out of unappropriated funds or otherwise.

Although the City does resell at a profit water which it acquires from the District, it has never turned over any of these profits or proceeds of sale to the District. It is, therefore, idle to consider Section 73-8-43. It has no application whatever to payments made by the City to the District in satisfaction of a debt for "goods sold and delivered."

It is extremely significant that for more than twenty-five years the City has made very substantial payments for water each year without ever having so much as intimated to the District that the payments should be credited to any account or applied to any purpose other than the satisfaction of the City's indebtedness.

Under Point II, Appellant says that the District has no power to levy the $2\frac{1}{2}$ mill tax for the purpose of creating a surplus for future operating expenses or to acquire water rights in the future, but that such tax was intended solely for administering the District and operating its properties during 1961. Such a proposition is unsupported by anything in the Metropolitan Water District Act. The 1961 tax was levied to raise revenue to meet the expenses of the District and not for creating a surplus for any purpose. The emergency fund was already in existence and was not augmented in any way by the 1961 tax. As a matter of fact, no part of any prior $2\frac{1}{2}$ mill tax ever went into this fund. It was built up solely from profit derived from the sale of water other than water which ultimately reached the consumer within the City. The water sold by the District to the City for distribution to the inhabitants was sold at less than cost to

the District. The District sells substantial amounts of water to private industry and also transports water for municipalities and others. These sales and services produce considerable revenue. It also sells water to Salt Lake City which the latter resells at a large profit to consumers outside the City. It is from these sources of revenue that the District has built up the reserve fund under consideration.

Appellant's contention that the District cannot use any of the $2\frac{1}{2}$ mill tax revenue in furtherance of projects to acquire water rights, but must submit all such projects to a vote of the inhabitants of the City would be a grievous misfortune to the taxpayer, if it were true. Obviously, the statute requires the District to obtain the approval of voters to such projects only as are to be financed through the issuance of bonds to be paid out of a special levy of taxes for that purpose. It is a tribute to the efficiency of the District that it is able to finance important projects such as the \$8,000,000 water treatment plant without levying any special tax therefor. A moment's reflection by the individual plaintiff should convince him that the contention of the City Attorney on this point is a definite dis-service to him as a taxpayer.

The last point asserted by the Appellants is that the District must use the 1961 tax revenue solely for the purpose of discharging expenses of its operations during that year. If this is the correct meaning of the statute, the District would soon be compelled to cease its operations. The 1961 tax would not be past due until December 1. By the time any substantial amount is received

by the County and turned over to the District, the year 1961 is past and gone. Operating expenses whether those of a public or private corporation must be paid as they are incurred. If such expenses are deferred or ignored, the operator is automatically out of business.

Appellants' interpretation of the statute is highly strained and unrealistic to say the least. Section 73-8-36 directs only that before the 20th of August the Board of Directors shall determine the amount of money necessary to be raised by taxation during the fiscal year beginning the first day of January next preceding, to meet interest and sinking fund requirements on bonded indebtedness and "for all other District purposes." Nowhere in the statute is there any requirement that a tax levied in any one year can be levied solely to meet expenses of operations during that year. All that it specifies is that the Board determine the amount of money necessary to be raised by taxation during that year for interest, sinking fund and "all District purposes."

Admittedly, this Section is rather involved and confusing, but it manifestly was not intended to require the District to carry on its operations by tax anticipation borrowing, or go out of business.

POINT II.

THERE IS NO JUSTICIABLE CONTROVERSY BETWEEN THE DISTRICT AND THE CITY AND ITS APPEAL SHOULD BE DISMISSED.

The individual plaintiff alleged that he owned property in the City, that the District levied the tax against

his property, and that the tax was invalid. He further alleged that he had paid this tax under protest and was entitled to recover it from the County which had collected it for the District. He sought a money judgment against the County and a declaratory judgment against the District.

The City joined in the allegations with respect to the invalidity of the tax. It did not claim that the District or the County had attempted to collect the tax from it or that any of its property had been assessed. It sought only a declaratory judgment.

Inasmuch as this misjoinder of plaintiffs is only a procedural error, it will not be dwelt upon. An orderly presentation of Respondent's case on appeal does, however, require us to separate these strange bedfellows.

The City asserts that the tax is invalid because the District had on hand when the levy was made funds which the City Attorney characterizes as a surplus. It also alleged that the District could not levy taxes in one fiscal year for operational expenses of subsequent fiscal years. Its allegations that Section 73-8-43 requires the District to credit against the tax the purchase price of water received from the City for water sold and delivered has already been shown to be a mere wild pitch.

We submit that the City has no legal capacity to question the validity of the tax and that there is not and cannot be any basis whatever for a controversy between it and the District which a court would have jurisdiction to determine.

The tax which we are now considering is an ad valorem tax. It creates a lien on real property and can be collected only from that source. Neither the City nor the property owner is personally liable for the tax. The only parties affected by the tax and who have any standing in court to question its validity are the owners of the property upon which the tax is levied.

The Declaratory Judgment Act provides, so far as the present case is concerned, that any person whose rights, status or other legal relationships are affected by a statute may have determined any question of construction or validity arising under the statute and obtain a declaration of rights, status or other legal relationships thereunder (Sec. 78-33-2, U. C. A. 1953).

A cursory examination of this Act reveals that it does not create any substantive rights. It is purely remedial in character.

“... The declaratory judgment procedure is strictly remedial. The section does not create substantive rights or duties, but merely affords a new, additional, and cumulative procedural method for their judicial determination. . . .” *State Farm Mutual Automobile Ins. Co. v. Morris*, 173 N.E. 2d 590, 594.

In *Sinclair Refining Company v. Burrows*, 133 F. 2d 536, the Tenth Circuit Court of Appeals said of the Federal Act which does not differ materially from the Utah Act:

“... The declaratory judgment act, 28 U.S.C.A. § 400, created no new substantive rights. It is

procedural in nature, designed to expedite the establishment of rights between parties when an actual justiciable controversy exists between them as distinguished from a hypothetical or abstract question or controversy. The declaratory judgment must establish rights and declare liabilities which as a result thereof may be enforced by the prevailing party against the loser in a subsequent action."

Since the Act is remedial, the party invoking it must have some right or interest in the subject matter which will in the future need protection. If the right or interest has already been invaded a coercive remedy is available and there is no basis to maintain any action for declaratory relief. Furthermore, the rights or interests of the plaintiff must be adverse to those of the defendant. There must be a real controversy as distinguished from a hypothetical dispute or a mere difference of opinion as to the law. In *State v. Dammann*, 220 Wis. 17, 264 N.W. 627, 103 A.L.R. 1089, these requirements are thus summarized:

"(1) There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination."

Professor Borchard in his treatise on Declaratory Judgments says:

“It has already been observed that an action for a declaratory judgment must exhibit all the usual conditions of an ordinary action, except that accomplished physical injury need not necessarily be alleged. It is sufficient if a dispute or controversy as to legal rights is shown, which, in the court’s opinion, requires judicial determination — that is, in which the court is convinced that by adjudication a useful purpose will be served. The requisites of justiciability must be present. Not only must the plaintiff prove his tangible interest in obtaining a judgment, but the action must be adversary in character, that is, there must be a controversy between the plaintiff and a defendant, subject to the court’s jurisdiction, having an interest in opposing his claim. Unless the parties have such conflicting interests, the case is likely to be characterized as one for an advisory opinion, and the controversy as academic, a mere difference of opinion or disagreement not involving their legal relations, and hence not justiciable.”

This Court is already committed to these propositions. See *Gray v. Defa*, 103 Utah 339, 135 P. 2d 251. *Millard County v. Millard County, etc.*, 86 Utah 475, 46 P. 2d 423.

The case made by the City fails completely to present any of these necessary elements of a controversy which a court would have jurisdiction to adjudicate. It has no rights or interests that now need or ever will need protection or adjudication. It is not affected by the tax and is in no way concerned with its enforcement. It has no

property upon which the tax could be levied or assessed. It is neither an inhabitant of the District nor a taxpayer of any kind. It does not and could not have any legal controversy with the District with respect to the statute under which the District levied the tax and is without legal capacity to maintain any proceeding against the District. Its appearance in this action is totally unwarranted.

In *Boeing Airplane Company v. Board of County Commissioners*, 164 Kan. 149, 188 P. 2d 429, 11 A.L.R. 2d 350, the Defense Plant Corporation leased a parcel of land to Boeing Airplane Company. The lease provided that the Lessee should pay all taxes lawfully imposed upon the property. The Defense Plant Corporation transferred the leased premises to the Reconstruction Finance Corporation subject to the lease. The Lessee then brought suit against the Reconstruction Finance Corporation and the County Officials to obtain a judgment declaring that it was not liable for the taxes. The court held that there was no justiciable controversy between the plaintiff and the County Officials for the reason that the taxes were assessed against the land which the plaintiff did not own. It dismissed the appeal on the ground that the court had no jurisdiction of the subject matter of the action. The court said:

“... No actual controversy can exist in this case between the company, which is the lessee of the land, and the county officials. Such officials can look only to the land and therefore can have a controversy in this case only with the owners of the land. The company has only an option to purchase

the real estate, may never exercise it and therefore never own it. It follows that there may never develop an actual controversy between the company and the taxing officials. There must be two sides to any actual controversy. In this case the county officials cannot have an actual controversy with the company because such officials cannot contend that any obligation of any kind or character exists as between them and the company. . . .”

In *Day v. Board of Regents, etc.*, 36 P. 2d 262, the plaintiff “a resident, voter, elector and taxpayer” brought an action to have the Basic Science Law of Arizona declared invalid. This law required all those who practice the art of healing for hire to pass an examination on certain scientific subjects, and to pay a license fee. The complaint did not disclose that the plaintiff had ever practiced or that he ever intended to practice the art of healing for hire, and the court dismissed the action upon the ground “It is the undisputed rule that only those who are affected in some manner by a statute may question its constitutionality.” The Arizona statute relating to declaratory judgments is virtually identical to our own.

Thomas v. Riggs, 175 P. 2d 404, was another action seeking a declaratory judgment to the effect that the Idaho Coin Operated Amusement Device Control Act was unconstitutional and in conflict with the anti-gambling statutes. Plaintiff described himself as a citizen and taxpayer of the State of Idaho, and like many others similarly situated opposed to the violation of the anti-gambling statutes. The court held that he lacked capacity

to sue because he did not and could not assert any rights or interests which were endangered or affected by the Control Act. It said:

“... Appellant, in the case at bar, did not allege what *legal* right he enjoyed, if any, as either a citizen or taxpayer, was ‘threatened or endangered.’ He alleged simply he was a citizen and taxpayer, that he was opposed to gambling, and that the enforcement of the anti-gambling statute against licensed slot machine operators was ‘a matter of grave public concern and moment.’ But, again, appellant did not allege in what respect, if any, the alleged failure to enforce the anti-gambling statutes, against licensed slot machine operators, ‘threatened or endangered’ any *personal, legal* right he possessed.”

Since the City presented no justiciable controversy and did not seek nor was entitled to any coercive relief, the District Court lacked jurisdiction of the subject matter of the action so far as the City was concerned. It necessarily follows that this Court likewise has no jurisdiction of the City’s appeal except to dismiss it.

POINT III.

DECLARATORY RELIEF IS DENIED WHERE AN ADEQUATE LEGAL REMEDY EXISTS OR WHERE BASED UPON CON- TINGENT EVENTS.

The individual plaintiff seeks a declaratory judgment to the effect that the District has no power to levy the 1961 tax because the District had on hand what he designates as a surplus. He also asks the Court to

adjudicate that the District has no right to levy taxes in one fiscal year for the purpose of carrying on operations in a subsequent fiscal year.

The tax assailed by the plaintiff has been levied, assessed, and paid. Plaintiff paid the tax under protest and seeks in this action to recover it from the County. If, for any reason, the tax is invalid, the plaintiff's remedy at law is complete and adequate, and there is no occasion for him to seek the extraordinary remedy of declaratory relief.

It may be conceded that declaratory relief may be granted notwithstanding the existence of a legal or equitable remedy. However, if the legal or equitable remedy is adequate, declaratory relief is superfluous and will be denied. The Declaratory Judgment Act creates a new remedy and was not intended to replace or modify existing remedies. To this effect are numerous authorities, some of which are cited below.

An even more cogent reason for denying the plaintiff a declaratory judgment is that it would be based upon events that may never occur. It is by no means certain that the district will at any future date have on hand the so-called surplus funds. On the contrary it is highly probable that the alleged surplus will be exhausted in carrying out the projects to obtain new supplies of water and to meet emergencies which are almost certain to arise. Neither is it absolutely certain that the district will in the future levy a tax in one year to cover expenses of operation of a subsequent

year. The $2\frac{1}{2}$ mill limited tax is not a permanent tax imposed by statute. It is assessed by the Directors of the District after they have determined the amount of money needed to carry on the operations of the District. Both the amount of and the necessity for the tax are matters contingent upon future events. The uncertainty of their actual occurrence as well as the likelihood of the so-called surplus being spent makes it legally impossible to render a valid declaratory judgment. Such a judgment would constitute a mere legal opinion and not a final or effective determination of any justiciable controversy.

The principle is thus stated in *Miller v. Stolinski*, 32 N.W. 2d 199, 149 Nebr. 679:

“The Declaratory Judgments Act is applicable only where there is a present actual controversy and all interested persons are made parties, and only where justiciable issues are presented. It does not undertake to decide the legal effect of laws upon a state of facts which is future, contingent, or uncertain. . . .”

See also *Wolverine etc. v. Clark*, 270, N.W. 167, 277 Mich. 633; *Heller v. Shapiro*, 242 N.W. 174, 208 Wis. 310; *West v. Wichita*, 234 Pac. 978, 118 Kan. 265.

CONCLUSION

The $2\frac{1}{2}$ mill tax levied by the District in August, 1961, for the purpose of raising revenue to carry on the operations of the District was and is a valid and

subsisting tax, and created a lien upon the taxable property within the territorial limits of the District. The power to levy this tax is expressly conferred upon the District by the Metropolitan Water District Act. This power is not qualified, limited or in any manner affected by the fact that the District had accumulated out of profits from its operation a fund for the purpose of acquiring additional sources of supplies of water without resorting to special taxation, and to meet emergencies which are certain to arise during periods of drouth. The Act contains no provision preventing the District from creating this fund or using it in the manner which the Board of Directors is using and proposes to use it. The creation, management and disposition of this fund is a function of the District not subject to supervision or control by the courts.

The Metropolitan Water District of Salt Lake City is a public corporation, created for the purpose of obtaining additional supplies of water for the benefit primarily of the inhabitants of the District. It is completely independent of the City or any other municipal corporation. "Each such District when so incorporated shall be a separate and independent political corporate entity." (Sec. 73-8-3) Neither the City nor any of its officials has any power or authority whatsoever to supervise, manage, control or direct any of the powers or functions of the District or its Board of Directors. The only relationship between the District and the City is that of buyer and seller of water (Sec. 73-8-18, Subparagraph 1, and Section 73-8-31). The city is in no

manner affected by or concerned with the tax involved in this action. It has no rights or interests under the Metropolitan Water District Act that have been invaded or threatened with invasion by the District. Its interests are neither adverse nor hostile to those of the District. It has no dispute with the District that rises to the dignity of a justiciable controversy and is without legal capacity to maintain the action. Its appeal from the judgment to that effect is frivolous and should be dismissed.

The case for the individual plaintiff is equally without foundation in law or in fact, although admittedly he has legal capacity to sue for recovery of the tax paid under protest. He has neither alleged nor proved any facts which impair the validity of the tax. He is not entitled to any declaratory relief because he does not question the power of the District to levy the tax in the future except under circumstances which may never occur. The judgment rendered against him is correct and should be affirmed.

Respectfully submitted,

Grant H. Bagley, for

VAN COTT, BAGLEY, CORNWALL
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