

1962

State of Utah v. Lake Hills : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Backman, Backman & Clark;

A. Pratt Kesler; Raymond W. Gee; Attorneys for Respondent;

Recommended Citation

Brief of Appellant, *State v. Lake Hills*, No. 9695 (Utah Supreme Court, 1962).

https://digitalcommons.law.byu.edu/uofu_sc1/4083

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH, for and on behalf of
the UTAH STATE SECURITIES COM-
MISSION,

Plaintiff-Respondent,

—vs.—

LAKE HILLS, A Utah corporation,

Defendant-Appellant,

Case
No. 9695

FILED
JUL 20 1962

BRIEF OF APPELLANT

Clerk, Supreme Court, Utah

Appeal from the Judgment of the
Third District Court for Salt Lake County,
Hon. Ray Van Cott, Jr., *Judge,*

BACKMAN, BACKMAN & CLARK,
1111 Deseret Bldg.,
Salt Lake City, Utah,
Attorneys for Appellant,

A. Pratt Kesler, *Attorney General,*
Raymond W. Gee, *Assistant Attorney General,*
State Capitol,
Salt Lake City, Utah,
Attorneys for Respondent,

TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	3
POINT 1. DEFENDANTS’S CLASS “C” DEBENTURE BONDS ARE NOT SECURITIES WITHIN THE MEANING OF THE SECURITIES ACT OF THE STATE OF UTAH	3
POINT 2. EVEN IF DEFENDANT’S CLASS “C” DEBENTURES ARE SECURITIES UNDER TITLE 61, THE SAME ARE EXEMPT UNDER SECTION 61-1-5 (5), UCA 1953.	9
POINT 3. DEFENDANT BEING SUBJECT TO THE PROVISIONS OF CHAPER 11, SESSION LAWS OF UTAH, 1955, IS THEREFORE NOT SUBJECT TO THE PROVISIONS OF THE SECURITIES ACT.	14
CONCLUSION	15

TABLE OF CONTENTS—Continued

CASES

Guaranty Mortgage Co. v. Wilcox, 62 U. 184, 218 P. 133, 30 ALR 1324	9
Memorial Gardens of the Valley v. Love, 5 U2d 270, 300 P. 2d 628	5
Miller v. Stuart, 69 U. 250, 253 P. 900	9
Oil Lease Service, Inc. v. Stephenson, (Cal.) 327 P2d 628	6
People v. Hoser, (Cal.) 206 P2d 882	8
People v. Davenport, (Cal.) 91 P2d 893	8
People v. Gould, (Cal.) 229 P2d 78,	7
Roe v. U.S. 287 F 2d 435	7
Sperry & Hutchinson Co. v. Hudson, (Oregon) 226 P.2d 501	7

TEXTS

Words & Phrases, Vol. 11, page 186	6
--	---

STATUTES

Utah Code Ann. 1953	
Sec. 61-1-4	3
Sec. 51-1-5, (5)	9
Session Laws of Utah, 1955, Ch. 11	14

IN THE SUPREME COURT
of the
STATE OF UTAH

STATE OF UTAH, for and on behalf of
the UTAH STATE SECURITIES COM-
MISSION,

Plaintiff-Respondent,

—vs.—

LAKE HILLS, A Utah corporation,

Defendant-Appellant,

Case
No. 9695

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action instituted by plaintiff-respondent against defendant-appellant seeking an injunction against defendant-appellant to restrain defendant from selling or attempting to sell to the residents of Utah, Lake Hills Class “C”, debentures, and Lake Hills Thrift Plan Certificates of Obligation, Convertible into Class “C” debentures, each of which defendant-appellant contends are not securities within the provisions of the Securities Act and are not required to be registered with the Securities Commission of Utah.

DISPOSITION IN LOWER COURT

The case was submitted to the court on a written stipulation of evidence prior to a trial, and the points of law were argued after which each of the parties moved for Summary Judgment. The court granted plaintiff's motion for Summary Judgment, and denied defendant's motion, and entered a Summary Judgment under which an injunction was issued against defendant's offering each of said plans to the public.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks a reversal of the judgment and judgment in its favor as a matter of law.

STATEMENT OF FACTS

Defendant is a corporation of Utah, having received its charter from the Secretary of State of Utah in 1954 as a non profit corporation under Title 16, Chapter 6, UCA 1953. On May 5th, 1954, defendant dedicated its real properties situated in Salt Lake County, Utah, for cemetery purposes. Defendant is an endowment care cemetery association and subject to the provisions of Chapter XI, Session Laws of Utah, 1955. It is without capital stock and there are no stockholders; no one realizes any profits from the operation of the business of defendant. All of which facts are stipulated to.

ARGUMENT

POINT 1

DEFENDANT'S CLASS "C" DEBENTURE BONDS ARE NOT SECURITIES WITHIN THE MEANING OF THE SECURITIES ACT OF THE STATE OF UTAH.

Section 61-1-4 UCA 1953 is as follows:

“(1) ‘Security’ shall include any note, stock, treasury stock, bond, debenture or evidence of indebtedness; certificate of interest or participation or certificate of interest in a profit-sharing agreement; certificate of, contract for, or any conveyance or other instrument conveying, representing, or purporting to convey or represent, an interest or any right in, to or under any oil, gas or mining lease or permit; collateral trust certificate, preorganization certificate, or preorganization subscription; any transferable share, investment contract, service certificate, burial certificate of burial contract; investment-trust certificates, share or units, or beneficial interest in or title to property, profits or earnings; certificates of membership in, contract or agreement given, made or issued by, any corporation, association or organization wherein a discount, reduction in price or other advantage, privilege or right in or to the purchase of merchandise are held out or agreed to be given or made; and any other instrument commonly known as a security, including any plan or scheme wherein townsite, town lots or acreage, or any other land division in fee or in lease-hold shall be used in connection with the gift or sale of any security as herein defined.”

The class "C" Debenture is as follows:

"No.	LAKE HILLS	Executive Offices
Class C Series 1	CERTIFICATE	10101 South
Dated	FOR	State St.
Legal Holder	6% Interest	Salt Lake County,
	debenture 6%	Utah

DUE TO THE ORDER OF the legal holder hereof, and payable at the time and under the conditions set forth below. This debenture is one of a series of registered 6% per annum interest bearing Bonds of the par value of \$100.00 per unit numbered 1 to 1,000 inclusive, payable with interest at the office of the maker hereof in Salt Lake County, Utah.

Legal Holder

Number of Units

Term of Debenture Maturity Date Interest Payments
LAKE HILLS agrees that the total series of Class C 6% Bonds shall never be in excess of \$3,000,000. That the purposes of the issuance of these bonds shall be for the purchase of real estate, the construction, development, and improvement of the company's Cemetery Park properties. This Bond shall have priority over all other debentures as first claim against the general assets of the Corporation with the exception of the BENEVOLENT and ENDOWMENT FUNDS.

Method of Payment on Retirement

IN WITNESS WHEREOF, LAKE HILLS has caused this debenture to be signed by its Executive Trustee, attested by the signature of its Secretary.

(SEAL)

Attest:

LAKE HILLS

by _____ by _____"

SECRETARY TRUSTEE

EXECUTIVE TRUSTEE

It is apparent from the terms of the Class C debenture that those monies received by defendant upon the issuance of this debenture are the first monies to come in, that is to say, the front money. This money is to be used for the purchase of real estate, the construction, development and improvement of the cemetery park. The holder has first claim against the general assets of the corporation with the exception of the Benevolent and Endowment Funds.

This debenture promises nothing more than to pay 6% interest on the amount represented by the debenture, this together with a return of the monies paid for the debenture, at the date of maturity, nothing more. There is no promise that the holder of the debenture will participate in any earnings or profits of the issuer.

The Class C debenture is not a security of the nature that is dealt with commercially. This court in *Memorial Gardens of the Valley v. Love*, 5 Utah 2d 270, 300 P.2d 628, in construing the Securities Act, speaking through Mr. Justice Crockett said with reference to this act:

“Consideration of the full text of the law in question manifests that it is directed at securities of the nature that are dealt with commercially. The term ‘security’ has been defined generally as: ‘A written assurance for the return of money’. Securities in the *commercial sense* usually signify *the investment of funds with a view to receiving a profit through the efforts of others than the investor for the use of his money.*” (Italics added)

This same construction has been placed on similar statutes by the courts of other jurisdictions.

In *Oil Lease Service, Inc. v. Stephenson*, (Cal.) 327 P.2d 628, a case involving the offering, issuing and dealing in certificates of interest in oil, gas, and mining titles, and while in that case the court held that the plan offered was such that a permit was required, the court said:

“Any certificate of interest or like instrument of conveyance or assignment is within the Securities Act only when it appears directly or inferentially that the buyer contemplates receipt of profits from activities of other persons, such as carrying on a business of drilling an oil well, and the mere conveyance to him of a fractional interest in a piece of land or other type of property is not subject to the state if the buyer must look to the thing bought or his own efforts to produce a profit to himself.”

And the court there further says:

“An ‘investment contract’ as contemplated by the statute respecting permit of the sale of securities is one which contemplates the entrusting of money or other capital to another with the expectation of deriving a profit or income therefrom to be created through the efforts of other persons.”

This was the intention of the Utah Legislature in enacting our Securities Act where the words “bond, debenture or evidence of indebtedness, investment contract, etc.” are used.

In *Words and Phrases, Debenture*, Vol. 11, at page 186 we find the following:

“Stock is distinguished from ‘bonds’ and ordinarily from ‘debentures’ in that it gives right of ownership

in part of assets of corporation and right to interest in any surplus after payment of debt.” citing *Carson v. Duffy-Powers, Inc.*, N.Y. 9 F. Supp. 199, at page 201.

In *People v. Gould*, (Cal.) 229 P.2d 78 it was held:

“The test of whether a contract is ‘security’ within the Corporate Securities Act, so as to require approval thereof by Corporation Commissioner is whether it contemplates sharing in profits.”

This same interpretation was applied in *Roe v. U. S.* 287 F.2d 435 wherein it is said:

“Test is whether an offering of an interest in an enterprise is the sale of a ‘security’ within the Securities Act is whether the scheme involves an investment of money in a common enterprise, with profits to come solely from efforts of others.”

The Oregon Court has placed this same construction on their Blue Sky Law, in *Sperry & Hutchinson Co. v. Hudson*, 226 P.2d 501, known as the S & H Green Trading Stamp case, in the following language:

“The terms ‘evidence of indebtedness’, ‘certificate of interest or participation in any profit-sharing agreement’ and ‘investment contract’ as used in Blue Sky Law refer only to such of those types as are commonly known as ‘securities’, and they contemplate presence of investment process, that is, investment of funds with view of receiving profit through efforts of others than investor.”

In *People v. Hosor*, (Cal.) 206 P.2d 882 based on a Securities Act which provides in section 2 (a) paragraph 7, like Utah's act, that:

"The word 'security' shall include any stock, bond, certificate of interest or participation, certificate of interest in a profit sharing agreement . . ."

it was held:

"Courts charged with determining whether particular instrument is a 'security' within corporate securities act must look through form to substance and determine whether transaction contemplates conduct of an enterprise by person other than investor who is to share in its profits and finally in its proceeds."

The court further said in the *Hosher* case:

"A 'security' within corporate securities act, which requires permit for sale, is an instrument which creates a present right to a present or future participation in either income, profits or assets of a business carried on for profit."

The California courts in *People v. Davenport*, 91 P.2d 893 held that the expectation of payment of interest does not transform a transaction into an "investment contract" within the meaning of the Corporate Securities Act.

It is interesting to note in the *Davenport* case that the court further held:

"Under the Corporate Securities Act, words or phrases of general import such as 'note' and 'evidence of indebtedness' were intended to possess the same

general characteristics as the word ‘security’, but it was not the legislative intent that every note or evidence of indebtedness regardless of its nature and of the circumstances surrounding its execution should be considered as included within the meaning and purpose of the act.”

Our Utah Court has on several occasions applied the rule that the penal nature of the Securities Act requires its provisions to be strictly construed, and that coverage shall not be extended by implication.

Guaranty Mortgage Co. v. Wilcox, 62 U. 184, 218 P. 133, 30 ALR 1324, *Miller v. Stuart*, 69 U. 250, 253 P. 900.

POINT 2

EVEN IF DEFENDANT’S CLASS “C” DEBENTURES ARE SECURITIES UNDER TITLE 61, THE SAME ARE EXEMPT UNDER SECTION 61-1-5(5) UCA 1953.

Section 61-1-5. SECURITIES EXEMPTED FROM CHAPTER — Except as hereinafter otherwise expressly provided, the provisions of this chapter shall not apply to any of the following classes of securities:

- (5) “Any security issued by a corporation organized exclusively for educational, benevolent, fraternal, charitable or reformatory purposes and not for pecuniary profit, no part of the net earnings of which inures to the benefit of any private stockholder or individual.”

It is necessary to finance defendant's business in the same manner as most non-profit corporations are financed, such as Elk's, Eagles, Moose Lodge and similar organizations. Defendant has been issued its charter by the Secretary of State of Utah as a non profit corporation, and the Treasury Department, Internal Revenue Service of the United States has exempted defendant from payment of Income Taxes. This finding and exemption was determined after an examination of the articles of incorporation and by-laws of defendant.

Appellant contends that it comes under the provisions of the above section because the purpose for which it is formed as expressed in its articles of incorporation and in its by-laws qualifies it as such corporation.

The financial structure of defendant is not like that of other cemetery associations. Neither is the way it is operated and administered like others, nor is the perpetuation of its existence or the theory of its interment the same. This New Idea is as necessary as a reformatory, a college, or a benevolent organization, in performing its job in education and kindness. Defendant is authorized to receive gifts which are deductible for income tax purposes. Defendant will be benefactor to many more people than many of the lodges, labor unions, and similar benevolent organizations; this is evident from the purpose clauses of its articles and by-laws.

Under defendant's operation it will be an educational and a benevolent institution. As such it will administer to members and non members alike. It is a religious insti-

tution, it will teach belief in God, and it does much the same work as some penal institutions; these are the major purposes of the New Concept. In years to come, when there are no spaces to be filled, these activities will have become magnified and far reaching in their scope and will become self supporting, this without a burial or interment. It will become a Shrine.

Defendant corporation is founded as a non-profit park, without stockholders, on the New Concept. Income is augmented from many sources other than burial. A large additional income to the Park's maintenance program plus the Endowment Care Fund provides for a much greater future security than most projects of similar plans. Lake Hills as a New Concept Park will have to do with cultural, spiritual, benevolent, service rendering, and educational features than with the burial of the human dead. It will "put the Church back into the Grave Yard."

Lake Hills operation is patterned after Forest Lawn, of Glendale, California. As with Forest Lawn, when this New Idea Park is established, it is expected it will be visited by thousands who do not only come to witness a burial, but come to partake of the spirit and strength which will emanate from the Park itself. This New Idea Park will strive to keep foremost, artistic, educational, benevolent and spiritual features, to promote patriotism, love of country, reverence, honesty, industry, sincerity, to honor traditions, and to uphold the law of the land. It will always be an inspiration and comfort to the living as well as a sacred resting place of beauty for the departed. These and many other enobling ideals in cultural efforts will be unfolded to countless

children who visit the park. It will educate in great thoughts and achievements of man's history and awaken a desire to follow these ideals, to live in the hearts and minds of succeeding generations.

The word of God will be seen on every side, in printing, art, stained glass, in its churches, in bronze, in exhibits, and in voice. Easter services, Memorial Services, symphony concerts, choirs, speeches, drama presentations, training in poise, house management, etiquette, courses in religion, art, etc. will be presented, all of which are educational.

The benevolence idea will express the desire for the well being and comfort of others. Acts of kindness or well doing, liberality, sympathy, corrective training will help neutralize the undesirable or undesired quality or condition which exists in people who come to the Park. Benevolent activity efforts will relate to burial services, flower supplying, funeral expense, perpetuating memorial ideals, last sickness benefits, and others will be added as desired by those availing themselves of the benefits of the park.

The plans for development call for a Lyceum Hall which will have nightly membership courses in varied subjects throughout the year. Literature, art, science, culture, domestic arts, world events, etc., will include some of the courses available.

Its plans also call for the following:

Chapel of Chimes where religious services and study classes will be conducted.

Meditation Hall where people might receive encouragement and a proper attitude in living, in human relation and in the theory of life and its experiences.

Drama Theatre where people may learn the art of acting and speaking.

Rotunda of Fame where the lives of the great may be exemplified in bronze; where the recount of great events are recorded, and where art, science and religion are pictured in a character so that people might understand and know the many varied subjects portrayed.

The "Flower Cove Cafe" and "Reception Center" where wedding parties may be conducted and where courses in cooking, in the times when it is available for such purposes, will be given.

The Chapel of the Angels for weddings and similar services.

The Gallery of Art for art collections and art classes.

Statuary and Hall of Memory for memorial services and other such places as need may dictate will be contained in the park.

Money for all this development is needed and it can only be obtained from those interested in such a place. Donors will receive no monetary benefit but they will receive a spiritual benefit through visiting the park. It offers no investment in the business nor interest in the possibility of greater earnings based upon growth. It will meet and satisfy

the great desires of the cultural minded. It will live because it saves.

POINT 3

DEFENDANT BEING SUBJECT TO THE PROVISIONS OF CHAPTER 11, SESSION LAWS OF UTAH, 1955, IS THEREFORE NOT SUBJECT TO THE PROVISIONS OF THE SECURITIES ACT.

It is stipulated that defendant is an endowment care cemetery association and it is therefore subject to the provisions of Chapter 11, Session Laws of Utah, 1955.

Chapter 11 is an act relating to the Operation of Cemeteries, Mausoleums, and Columbariums in the State of Utah, and provides for the Setting Aside of Funds for the Endowment, Care and Maintenance Thereof; for Regulatory Measures Pertaining to the Control and Investment of said Funds and the Sale of Burial Space therein; Provides for the Supervision Thereof by the Director of Registration, Department of Business Regulation; * * * and for Penalties for Violations of Act.

It is evident that the Legislature in enacting the above law anticipated that funds would be received not only for the endowment, but for the care and maintenance of cemeteries. It further grants power to the Director of Registration to supervise the investment of funds and to control such investment. One department of government having such broad powers, it was not intended that another department of government be clothed with these same powers.

CONCLUSION

This Court having heretofore interpreted the Utah Securities Act and having determined that the same is directed at securities of the nature dealt with commercially and not such as appellant proposes to issue, or should the Court not agree with such contention then the defendant being a non-profit corporation and the securities being exempt under Section 61-1-5(5) UCA 1953 and the defendant having been at all times under the supervision of one agency of the government, defendant's motion for Summary Judgment should have been granted.

Respectfully Submitted

BACKMAN, BACKMAN & CLARK

1111 Deseret Bldg.
Salt Lake City, Utah

Attorneys for Appellant.