4-1-1969

City of Idaho Springs v. Golden Sav. & Loan Ass'n

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No. 23814

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

CITY OF IDAHO SPRINGS, a municipal corporation, Plaintiff in Error, v. GOLDEN SAVINGS AND LOAN ASSOCIATION, a Colorado corporation, et al, Defendants in Error.	Error to the District Court of the County of Clear Creek State of Colorado HONORABLE DANIEL J. SHANNON Judge

BRIEF OF PLAINTIFF IN ERROR

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No. 23814

IN THE
SUPREME COURT
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STATE OF COLORADO

CITY OF IDAHO SPRINGS, a municipal corporation, Plaintiff in Error, v. GOLDEN SAVINGS AND LOAN ASSOCIATION, a Colorado corporation, OVERTURF'S PARK, INC., a Colorado corporation, FRANK OVERTURF, ETHEL M. OVERTURF, BENJAMIN F. TUCKER, as Public Trustee of Clear Creek County, Colorado, JAMES B. RADETSKY, and RAY A. CURRAN, Trustee, and all unknown persons who may claim any interest in the subject matter of this action, Defendants in Error.	Error to the District Court of the County of Clear Creek State of Colorado HONORABLE DANIEL J. SHANNON Judge

BRIEF OF PLAINTIFF IN ERROR

INTRODUCTION

The parties will be referred to as they appeared in the trial court, where the plaintiff in error was plaintiff, and the defendants in error were defendants, or will be referred to by name.

STATEMENT OF THE CASE

This case involves an action by the plaintiff, City of Idaho Springs, to quiet title under Rule 105 of the Colorado Rules of Civil Procedure to property located in the City of Idaho Springs, County of Clear Creek. The action was initiated by the plaintiff by service of a Summons and Complaint upon the defendants, and filing of the same in the Clear Creek County District Court on May 3, 1967, and service by publication upon all unknown defendants. The Complaint asks for adjudication of all the rights of all of the parties and prays that the plaintiff be adjudged the owner of the property in fee

simple (ff. 4-14).

The defendant, Golden Savings and Loan Association, filed its answer, affirmative defenses and counterclaim and a crossclaim on May 25, 1967, denying ownership of the plaintiff and setting forth four defenses: (1) that the Complaint failed to state a claim; (2) that the statute of limitations had run against the plaintiff's claim; (3) that certain restrictions in the deed (hereinafter more fully explained) were void; and (4) that the plaintiff was estopped (ff. 23-34). The counterclaim asked that title be quieted in the defendant, Golden Savings and Loan Association. The crossclaim was against defendant James B. Radetsky, who appeared in the record title as the holder of a $2,000 deed of trust which had not been released of record. Plaintiff denied the counterclaim, and the court entered a default judgment on plaintiff's motion against Overturf's Park, Inc., Frank M. Overturf, Ethel M. Overturf, Benjamin F. Tucker, as Public Trustee of Clear Creek County, and James B. Radetsky (ff. 49-51). Ray A. Curran was dismissed as a defendant in the suit, and the issue was between only the City of Idaho Springs and Golden Savings and Loan Association (ff. 46-48).

Briefly stated, the facts of this case are as follows: The City originally conveyed the property in question to Frank Overturf, retaining a reversionary interest in the property, as set forth in the deed, requiring Mr. Overturf

to use the property as a swimming pool, and upon failure to do so, providing that the title would revert to the City. Mr. Overturf conveyed the property to his corporation, Overturf's Park, Inc., which in turn delivered its deed of trust on the property to Golden Savings and Loan. Default was made by Overturf's Park, Inc., and Golden Savings and Loan foreclosed against the property and acquired title to the same by deed on January 3, 1966. (All conveyances are set forth in plaintiff's Exhibit "A," the Abstract of Title).

The plaintiff filed suit in an attempt to enforce the restriction in the deed and to regain title to the property.

The issues were tried to the Honorable Daniel J. Shannon, Judge of the District Court in and for the County of Clear Creek, State of Colorado, on January 18, 1968, without a jury (ff. 148-280).

On June 6, 1968, the District Court made findings of fact, conclusions of law and direction for entry of judgment, decreeing that title be forever quieted in the defendant Golden Savings and Loan (ff. 76-111). In said decision, the District Court listed the following questions of law as determinative (ff. 88, 89):

1. <u>The type of future interest created by the original conveyance</u>. The court found the future interest to be a possibility of

reverter, and not a right of entry upon condition broken (f. 90).

2. Was the restriction actually breached by the defendant? The court found that failure by the defendant to open the swimming pool during the years 1966 and 1967 did constitute a breach (f. 95).

3. Does the statute of limitations apply? The court found that the statute of limitations, C.R.S. 118-8-4 (1963), does not apply, because the conveyance created a possibility of reverter, to which the statute of limitations did not apply (f. 98).

4. Is the plaintiff estopped from asserting its claim against the defendant? The court answered no (f. 108).

5. Did the plaintiff have the authority under Colorado law to create a valid future interest? The trial court found here that C.R.S. 139-32-2 (1953), re-enacted as C.R.S. 139-32-2 (1963), as interpreted by the case of *Centennial Properties, Inc. v. The City of Littleton,* 154 Colo. 191, 390 P.2d 471 (1964), was controlling. It found that said statute and Colorado Supreme Court case did not permit the creation of a valid future interest by the City (f. 99).

The plaintiff filed its motion for a new trial on July 8, 1968, alleging that the trial court was in error in determining that the *Centennial Properties* case was controlling in

the instant case (ff. 115-118). The motion was denied on August 22, 1968 (f. 120), and the plaintiff has appealed to this court.

For purposes of clarity, following is a chronological summary of the events giving rise to this lawsuit.

CHRONOLOGY OF THE CASE.

On June 23, 1953, the City of Idaho Springs, a non-home rule, second class city, submitted to the electors of that city in the special election, the question of whether or not the City should sell to Frank Overturf a certain parcel of property within the City upon which the City had begun construction of a swimming pool. The property is described in the abstract which has been filed with this Court as an exhibit introduced into evidence in the District Court. The sale to Mr. Overturf was for a consideration of One Dollar ($1.00) and his assumption of outstanding indebtedness against the property of approximately Five Thousand Three Hundred Dollars ($5,300.00). The ballots submitted to the Idaho Springs taxpayers read as follows:

> "Should the City of Idaho Springs sell and convey to Frank Overturf all of the property in question for the sum of One Dollar ($1.00) and other valuable considerations,

> namely payment of the outstanding indebtedness against the swimming pool located on the said above described property, plus amounts necessary to complete that pool ready for operation, provided, however, that the above described real property shall be used perpetually for the purpose of the operation of the swimming pool and in the event that the real property is ever used for any purpose other than the purpose of the operation of a swimming pool, then and in that event the said real property shall revert to the City of Idaho Springs."

The election was in favor of the sale. Mr. Overturf paid the Five Thousand Three Hundred Dollar ($5,300.00) indebtedness against the property, and was issued a warranty deed to the property on January 7, 1955 (plaintiff's Exhibit "A," Entry 6). The deed contained the following language in the recital portion thereof:

> "Provided, however, that the above described real property shall be used perpetually for the purpose of the operation of a swimming pool, and in the event that the said real property is ever used for any purpose other than the purpose of the operation of a swimming pool, then and in

> that event the said real property shall revert to the said City of Idaho Springs."

The granting clause in the deed contained the following language:

> "Provided, however, that the real property described herein, together with the improvements thereon, shall be used perpetually and solely for the purpose of the operation of a swimming pool, which said restrictions shall run with the land hereby conveyed and in the event of any breach thereof, said property shall forthwith revert to the said party of the first part, its successors and assigns."

On August 30, 1956, Frank Overturf conveyed the property to his corporation, Overturf's Park, Inc., a Colorado corporation (Exhibit "A," Entry 7). This corporation, on May 7, 1962, executed a deed of trust in favor of Golden Savings and Loan in the amount of Thirty-seven Thousand Dollars ($37,000.00), later increased to Forty-four Thousand Dollars ($44,000.00) (Exhibit "A," Entries 19 and 21). The property subject to the deed of trust included not only the subject property, but also adjacent property owned by the corporation and upon which a motel had been constructed by Mr. Overturf's corporation. In 1965, Golden Savings and Loan commenced foreclosure proceedings, and acquired title to the property on

January 3, 1966 (Exhibit "A," Entry 30).

Testimony at the trial showed that after completion the swimming pool was operated each year from the latter part of May until the first part of September (ff. 189, 211, 228). Evidence introduced at trial showed that the pool was not opened by Golden Savings and Loan during the summers of 1966 and 1967, and that it is presently closed and in a state of disrepair (ff. 238-246).

SUMMARY OF ARGUMENT

Plaintiff in error seeks reversal of the judgment of the trial court because that court erred in finding that C.R.S. 139-32-2 (1953), and the case of *Centennial Properties, Inc. v. The City of Littleton,* 154 Colo. 191 (1964), prevented the plaintiff, a statutory city, from imposing a valid future interest in its conveyance of the real property in question. We will limit our argument to a contention that the *Centennial* case should be distinguished and limited to its facts, and that C.R.S. 139-32-2 (1953) does not prevent the plaintiff municipal corporation from imposing restrictions in its deeds. Relative thereto, the following four (4) arguments are made to this Court, any one of which, if adopted by this Court, would require reversal of the judgment of the District Court in this case.

I

The *Centennial v. Littleton* case found that the transfer in question in that case was not a deed of conveyance but a *lease*, which was prohibited by C.R.S. 139-32-2 (1963). The case before this Court clearly does not involve a lease, but a valid, effective conveyance by warranty deed. Consequently, the *Centennial v. Littleton* case does not apply to the case at hand.

II

The interpretation of the words "sell and dispose" in C.R.S. 139-32-2 (1963) by the Court in the *Centennial v. Littleton* case does not prevent conveyances subject to restrictions such as the one in question.

III

The *Centennial v. Littleton* case should be limited to its facts, otherwise towns and cities will be unduly limited in their powers to deal with real property owned by them, far beyond the original intent of the legislature.

IV

To uphold the decision of the trial court

will be to subvert the intention of the original parties to the conveyance, to fail to examine the equities of the case, and to fail to follow the public policy of this state.

ARGUMENT

I

THE *CENTENNIAL V. LITTLETON* CASE FOUND THAT THE CONVEYANCE IN QUESTION IN THAT CASE WAS NOT A CONVEYANCE BUT A *LEASE,* WHICH WAS PROHIBITED BY C.R.S. 139-32-2 (1963). THE CASE BEFORE THIS COURT CLEARLY DOES NOT INVOLVE A LEASE, BUT A VALID, EFFECTIVE CONVEYANCE BY WARRANTY DEED. CONSEQUENTLY, THE *CENTENNIAL V. LITTLETON* CASE DOES NOT APPLY TO THE CASE AT HAND.

The *Centennial v. Littleton* case involved a rather unusual set of facts, so unusual in fact, that the Supreme Court in that case made the following statement at the outset:

> "The written instruments which were introduced in evidence give rise to a situation so *bizarre in nature* as to require a rather lengthy and detailed statement of facts." (Italics added) *Centennial v. Littleton, Supra,* at p. 193.

In the *Centennial* case, a city council resolution authorized a sale of city property which was no longer being used for town sewer purposes, and which was not needed for other public purposes. The purchaser in that situation was Centennial Properties, Inc., a private corporation. The terms of the sale were a "down payment" of Twenty Thousand Dollars ($20,000.00), and one percent of the gross annual revenue produced from the property for ninety-nine years. At the end of ninety-nine years, the title was to "revert" to Littleton. It is interesting to note, as did the Supreme Court in that case, that the original intention of the parties at the start of negotiations was to enter into a written *lease* of the premises for a term of ninety-nine years. The city attorney, as well as the attorney for the purchaser, suggested that the city did not have the power to execute a lease on the premises. Consequently, a "warranty deed" form was substituted, providing for an "outright conveyance" of the fee simple, with what was called a "reverter" at the end of ninety-nine years.

The obvious intention behind the use of a warranty deed form was a subterfuge in order to evade the statutory prohibition of a lease by the city, and retain in effect a transfer that amounted to a ninety-nine-year lease with a remainder in the city, exactly as had originally been intended. Centennial then constructed improvements on the premises consisting of a liquor store and a restaurant and

lounge at the cost of over $100,000.00. After Centennial made the percentage of income payments to Littleton from 1952 through 1961, it ceased to make such payments, giving rise to the controversy in that case. Littleton commenced the action, seeking a complete adjudication of the rights of the parties to the real property.

The trial court in that case was not taken in by the "warranty deed," and held that "the legal result of the transactions detailed above was to create a 99-year leasehold estate in Centennial." *Centennial v. Littleton, Supra,* p. 200. The trial court held, however, that it was a valid lease which had been defaulted by Centennial, and decreed that Littleton could foreclose on the property if Centennial did not pay the past due lease payments.

The Colorado Supreme Court agreed with the trial court in that case as to the nature of the estate conveyed, stating as follows at pp. 202-203:

> "It was provided in the 'warranty deed' . . . that the town of Littleton, '. . . hath granted, bargained, sold and conveyed and by these presents doth grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns forever, all the following described lot or parcel of land . . . .' This language amounts to an outright conveyance of

the fee simple title to the lands described. By employing this language, the officers of Littleton were exercising their statutory power 'to sell and dispose of' the land. The 'reverter' clause by which they sought to completely nullify the grant, 'to the party of the second part, his heirs and assigns forever,' was nothing more than a subterfuge by which Littleton in a single instrument sought to 'sell and dispose of' the land in one sentence of the deed, and in another sentence, to re-acquire the title and again become the owner of the property after a 99-year term, and in the interim to give to the grantee in the 'warranty deed' the status of the holder of a *leasehold interest*. This they had no power to do." (Italics added)

"The contention . . . that Littleton did not have the power to lease the property, was sound. The highly unusual and belabored efforts to accomplish a result which was beyond the power of the officers of plaintiff to bring about, was ineffectual to give validity to that portion of the transaction relating to a 'reverter' or the payment of a percentage of gross income from the property after the promissory note

> (which provided for a percentage payment in lieu of interest) was paid in full."

The Court then stated the crux of its decision with the following language:

> "It is . . . 'idle to claim' that towns and cities of first and second class have the power to execute long term leases on the property not needed for municipal purposes, to become a speculator in land values, to become a landlord and finance town expenses from rentals collected from tenants instead of 'selling and disposing of' said property." *Id.* at p. 205.

It is abundantly clear from the above-quoted language of this Court in *Centennial v. Littleton* that its decision was that the parties had entered into a lease agreement. The Court later in its decision finds that leases are prohibited by C.R.S. 139-32-2 (1963), and this will be discussed in this brief at a later time. For the purposes of this argument, it is of vital importance that this salient feature of that case be emphasized, namely, that the instrument constituted a lease and not a conveyance. The fact that the Court in that case used quote marks whenever it referred to the "warranty deed" and to the "reverter" clause clearly demonstrates that the Court used such language only as a convenience and not as

legal words of art.

In the present case, the trial court held that the City of Idaho Springs did make a conveyance by its warranty deed to Frank Overturf, thus passing actual legal title to the property to the grantee. The *Centennial v. Littleton* lease, on the other hand, clearly left legal title in the City, up until the time that this Court decreed the lease arrangement to be illegal. We submit that the basic decision of this Court in the *Centennial v. Littleton* case makes that case inapplicable to the case at hand, because of the basic difference in substance of the instruments of transfer used by the parties. Thus, error was created by the trial court when it stated in its findings that "the mandates contained in [*Centennial v. Littleton*] are controlling here." [Record on error, page 36).

II

THE PLAINTIFF COMPLIED WITH THE REQUIREMENTS OF C.R.S. 139-32-2 (1953) IN SELLING AND DISPOSING OF THE SUBJECT PROPERTY. THIS STATUTE DOES NOT PREVENT RETENTION BY A CITY OF A POSSIBILITY OF REVERTER, AND THE *CENTENNIAL V. LITTLETON* CASE DOES NOT HOLD TO THE CONTRARY.

The trial court held that C.R.S. 139-32-2 (1953) does not permit a municipal corporation to convey land subject to a possibility of reverter.

It found that the *Centennial v. Littleton* case had interpreted the language "sell and dispose" in the statute as preventing retention of a possibility of reverter. It is our contention that the *Centennial v. Littleton* case did not so hold, and that any implication in the case to that effect was mere dictum, and thus should not have been cited as precedent by the trial judge. The statute in question, C.R.S. 139-32-2 (1953), is identical to C.R.S. 139-32-2 (1963) and reads as follows:

> "139-32-2. Power to Sell Public Works -- Real Property.
>
> "(1)(a) The city council of cities and board of trustees of towns shall have the following additional powers:
>
> "(b) To sell and dispose of waterworks, ditches, gas works, electric light works or other public utilities, public buildings, real property used or held for park purposes or any other real estate used or held for any governmental purposes. Before any such sale thereof shall be made the question of said sale and the terms and considerations thereof shall be submitted to and ratified by a majority vote of the qualified electors of such city or town who shall have paid a property tax therein

during the preceding calendar year. The vote shall be by ballot deposited in a separate ballot box at a regular municipal election or at a special election called and held in the manner provided for by law.

"(c) By ordinance, to sell and dispose of any other real estate owned by the municipality upon such terms and conditions as such city council or board of trustees may determine at a regular or special meeting.

"(2) Deeds of conveyance duly executed and acknowledged by the proper officers of such cities or towns and purporting to have been made in pursuance of this section shall be deemed prima facie evidence of due compliance with all the requirements hereof."

It is important that the purpose and policy behind this statute be made abundantly clear. Although there is no written legislative history of this statute, the common law can be cited in explanation of its existence. A general statement of the law concerning power of municipal corporations to alienate their property is found in 38 Am. Jur. §487:

"Although there is some authority to the effect that, at the common law, a municipal corporation, unless restrained by the express terms of its charter or by necessary implication, could dispose of lands and other property in the same manner as private individuals, there is a clear distinction, recognized by practically all authorities, between property purchased and held by municipal corporations for the use of the corporation as an entity and that purchased and held by such corporation for the public use and benefit of its citizens. In other words, its title to and power of disposition of property acquired for strictly corporate uses and purposes are different from its title to and power of disposition of property acquired for and actually dedicated to the public use of its inhabitants. As to the former class, the power of the corporation to dispose of it, unless restrained by charter or statute, is unquestioned. As a general rule, the power of a municipal corporation to convey such property is equal to its power to acquire it. A municipal corporation having absolute title to property without limitation or restriction as to its alienation may dispose of such property at any time before it is dedicated to public use. The rule is different as to property

> held for public use. It is generally held that a municipal corporation has no implied power to sell such property. The principle is that all such property is held by the municipality in trust for the use and benefit of its citizens and is dedicated to the use of the public, and the corporation cannot divest itself of title without special authority from the legislature. It is only when the public use has been abandoned, or the property has become unsuitable or inadequate for the purpose to which it was dedicated, that a power of disposition is recognized in the corporation. Thus, a municipal corporation has no power to sell or convey land dedicated as a park, square, or common. In this connection, the courts limit the private and proprietary powers of a municipality very closely. Thus, public service plants such as waterworks, which for other purposes are held to be maintained by a municipal corporation in its private and proprietary capacity, are sometimes declared to be held in trust for the public so that they cannot be sold by the municipality without express legislative authority."

The express legislative authority in the State of Colorado is C.R.S. 139-32-2 (1963). The statute provides in paragraph (1)(b) that

property held for public or governmental use can be sold only upon vote of the taxpaying electorate of the city. Paragraph (1)(c) provides that all other property, which would be property held by a municipality in its proprietary capacity, can be sold by municipal ordinance, without the requirement of a municipal election. Although there is no finding by the trial court as to the *nature* (proprietary vs. governmental) of the property in question in this case, the sale procedure has not been challenged. Paragraph (b) of the statute says that the "terms and consideration" of the sale shall be submitted to a vote; paragraph (c) says that the city council may sell "upon such terms and conditions" as it may determine. We do not attach any particular significance to this difference in wording in the two sections, but we do attach importance to the fact that such wording is present, as will be set forth hereafter.

The *Centennial v. Littleton* case, as we have previously stated herein, held that the words "sell and dispose" in the statute prevented the City of Littleton from leasing its real property. In the course of that holding, the Court offered in dictum several different definitions of the term "sell and dispose of." We submit that upon close examination and viewed in the light of the holding of the *Centennial* case that a city cannot *lease* its property, the definitions by this Court of the words "sell and dispose of" do not prevent the imposition of a possibility of reverter.

The Court first states on page 203 of that opinion as follows:

> "The only power possessed by Littleton with reference to this property, which admittedly was no longer needed for any public purpose, was the power 'to sell and dispose of' it. The officers of the town were informed by the statute that, '*Deeds of conveyance* duly executed and acknowledged * * *' (Emphasis supplied) by them were prima facie evidence of due compliance with the terms of the statute. Nothing short of a deed of conveyance is a compliance with the statute. The term 'sell and dispose of' as used in this statute means to get rid of, to finish with, to fully relinquish all interest in the property, to transfer and convey the same. *Rider v. Cooney,* 94 Mont. 295, 23 P.2d 261, *The Brazil,* (C.C.A. Ill.) 134 Fed. (2d) 929."

The intent of such language is obviously to hold that a lease is not the type of disposition contemplated by that statute, and that a deed of conveyance should have been given by the City of Littleton. The language of the Court should be and must be interpreted in that light. That the Court's intention was not to give "sell and dispose of" the broad meaning adopted by the trial court can

be discovered by examining the cases which the Supreme Court cited as precedent for its definition. The first is *Rider v. Cooney* which was cited above. This was a 1933 Montana case involving whether or not the State of Montana could lease its lands under a provision in the State Constitution which provided "all lands of the State . . . shall be held in trust for the people; . . . and none of such land, nor any estate or interest therein, shall ever be *disposed of* except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the State." (Italics added). That Court said "dispose of" means "to get rid of, to put out of the way, to finish with, to alienate, to part with," quoting Webster's dictionary. The case then held that the state *could lease* under that provision of the state Constitution. This case was obviously poor precedent for the Colorado Court's definition of "sell and dispose of." Not only did that case not define "sell and dispose of," but it did not use as broad of language as the Colorado Court gave it credit for, and it held the opposite way of the Colorado Supreme Court, holding that a lease under such language was proper. The other case, *The Brazil*, cited above, is even worse precedent. This was a case under maritime law, and the words "dispose of" appeared not in conjunction with the word "sell," but were used instead in a statute concerning "disposition" of a matter in *court*.

That Court stated that "to dispose of" a matter was "to arrange or settle it finally; to adjust, settle and determine a matter." Thus, the first definition of "sell and dispose of" in the *Centennial v. Littleton* case was unnecessarily broad, constituted dictum, and was not backed up with case precedent which even defined the same words in the same context.

The next definition which appeared in the *Centennial v. Littleton* case of "sell and dispose of" came in discussion of the *In Re Hubbel Trust* case cited therein. The Colorado Court, in discussing that case, stated that "the trustees executed a 99-year lease and the question was whether they had 'disposed of' the property contrary to the terms of the trust." The Court said that, " * * * a voluntary parting with anything short of an estate in the land is not a 'disposal' of it." For two reasons such language should not prevent imposition of a possibility of reverter. First of all, the case therein cited obviously involved a lease followed by a remainder and not a fee simple determinable followed by a possibility of reverter. Secondly, an "estate in the land" was parted within the instant case. A fee simple determinable transferred by the City of Idaho Springs is obviously "an estate in the land." "Except for its terminable nature, the fee on limitation is subject, in general, to the rules applying to estates in fee simple absolute." Am. Law Prop. Vol. 1, § 2.6 at p. 100. See also *Restatement of Property*, § 44.

The next definition set forth in the *Centennial v. Littleton* case was as follows:

> "When, as here, the term 'disposed of' is associated in the context with the word 'sell' and those whose duty it is to 'sell and dispose' of property are advised to execute 'deeds of conveyance,' then under the principle contained in the legal expression '*noscitur a sociis*' the meaning of the term 'disposed of' takes on definite limitations from this association . . . . In this context the term 'dispose of' means 'the execution of the deed of conveyance'." (*Supra* at p. 204)

Consequently, "dispose of" means to the Colorado Supreme Court "*the execution of the deed of conveyance*." We submit that this is exactly what was done in the present case. The City of Idaho Springs conveyed the subject property to Frank Overturf by means of a deed of conveyance. It was not a lease in either form or substance. There was no 99-year term in it. It was simply a deed of conveyance, with a contingent future interest in it as an assurance that the property would be used as the people of the City of Idaho Springs wanted the same to be used, and as the purchaser agreed it would be used.

The next definition of the term "disposed of" also appears on page 204 of the *Centennial*

v. Littleton opinion. The court stated as follows:

> "It is true that cases from other jurisdictions have given the term 'disposed of' a broader meaning under the factual situations wholly dissimilar to those present in the instant case. Under varying factual situations the term has been given 'many shades of meaning.' See *Whitfield v. Thompson*, 85 Miss. 749, 38 So. 113. In this jurisdiction, the public policy of this state with regard to the duty of town trustees in connection with property no longer needed for town purposes is substantially the same as the duty of county commissioners with relation to excess county property."

The court then goes on to cite the case of *Farnik v. Board of County Commissioners*, 139 Colo. 481, 341 P.2d 467, quoting from that case as follows:

> "The County has no power to acquire real or personal property as a speculation or an investment, nor does it have the power to retain property lawfully acquired for the use of the county when the use therefor no longer exists. It may acquire and retain such property as it now reasonably needs, or in the foreseeable future

> may reasonably need - no more. Such needed property is exempt from taxation - other not needed property should be on the tax rolls as provided by law."

It is submitted that the City of Idaho Springs not only did not subvert the stated public policy of this state as outlined above by the court in *Centennial v. Littleton* and *Farnik v. Board of County Commissioners*, but instead furthered the public policy by actually conveying the property to Mr. Overturf. Mr. Overturf had title to the property, and was obligated to pay property taxes thereon. This should be contrasted with the lease situation in *Centennial v. Littleton*, wherein as leased land, it was not properly added to the tax rolls.

We submit that the definitions of "sell and dispose of" by the Supreme Court in the *Centennial v. Littleton* case, as outlined above, do not of themselves prevent a municipal corporation from retaining a possibility of reverter in land which it alienates. The definitions as above cited were dictum and, as such, were not necessary in arriving at the basic holding of that case. The trial court committed error in taking such definitions out of context and applying them to the case at hand which did not involve a lease by a municipal corporation.

As stated above, paragraph (1)(b) of

C.R.S. 139-32-2 (1963) refers to "terms and consideration" for a sale, and paragraph (1)(c) refers to "terms and conditions" of a sale. If only an outright conveyance of a fee simple absolute were permitted by the statute, as was held by the trial court in this case, then there is language in the statute which obviously does have meaning, but which is being held judicially superfluous. If the amount of money involved is all which may be considered, then how does one explain the words "terms" and "and conditions" in the statute? They should be given effect, as obviously they mean more than merely how much money is to be received. This is born out by the case of *Missemer v. Hugo,* 89 Colo. 222, 1 P.2d 94 (1931), which case demonstrates that the statute in question does permit other than unconditional conveyances. The *Missemer* case, decided under the almost identical 1927 forerunner to the statute here in question, disqualified a municipal conveyance of an electric plant because the electors were not informed of the *terms* of the sales contract. Those terms required that the grantee, among other things, commence construction within a certain period of time or the property would be returned to the town. This language created a future interest in the municipality in the nature of the right-of-entry for condition broken. The Court held that the statutory requirement of submitting to the voters the "price . . . and other terms thereof" required notice of "those covenants, /as/ . . . controlling terms and conditions of the proposed sale." At no point of the opinion does the

Court even suggest that the conditions requiring construction within two years are void and prohibited by the statute. It is of extreme importance that the *Missemer* case was not even mentioned in the *Centennial v. Littleton* case, much less overruled. The *Missemer* case is much more in point with the case at hand than is the *Centennial v. Littleton* case. *Missemer* involves an outright conveyance subject to certain conditions, as does the instant case, whereas the *Centennial v. Littleton* case involved only a lease.

Consequently, we submit that the trial court erred in its interpretation of the *Centennial v. Littleton* case, as far as the language, "sell and dispose of" is concerned. We submit that such language does not prevent the retention of a possibility of reverter by the City of Idaho Springs.

III

THE *CENTENNIAL V. LITTLETON* CASE SHOULD NOT BE LIMITED TO ITS FACTS, OTHERWISE TOWNS AND CITIES WILL BE UNDULY LIMITED IN THEIR POWERS TO DEAL WITH REAL PROPERTY OWNED BY THEM, FAR BEYOND THE ORIGINAL INTENT OF THE LEGISLATURE.

There are a number of situations involving disposition of real property by towns and cities which would be beneficial to the town

and to its citizens, and are not prevented by any known public policy of this state, yet would not be permitted if the trial court's interpretation of the *Centennial v. Littleton* holding is upheld. For purpose of this argument, it would not make any difference if the land was held for governmental purposes and the sale authorized by an election, or held for private or proprietary uses and the sale authorized by vote of the city council. In either case, there would be no good reason to interpret the statute as being as restrictive as has been held by the trial court in this case. Further, such interpretation would be contrary to the rule of statutory construction that all expressions of legislative intent to confer powers upon a municipality are entitled to a liberal construction. *Bruno v. City of Long Beach,* 21 N.J. 68, 120 A.2d 760 (1956); *Marangi Bros. v. Board of Commissioners,* 33 N.J. Super. 294, 110 A.2d 131 (1954); *Yokley, MUNICIPAL CORPORATIONS,* § 432(d).

One situation which would be made illegal by such a restrictive construction of the statute would be the situation which occurred in the *Missemer* case cited above. There, the sale was made conditional upon the grantee therein making certain improvements within a certain period of time. Should not a municipal corporation be able to protect itself in this manner, particularly when essential and desirable public services vital to the well-being of all of its citizens are to be owned by private persons?

If a city cannot convey property on condition, then it would be illegal for a city to vacate a street and return the land to the abutting landowners but making such vacation subject to utility easements and easements of access by other property owners. And a street vacation should be considered a conveyance, particularly since the fee of such land is vested in the city or town prior to vacation. See C.R.S. 139-1-7 (1963), *Leadville v. Bohn M. Co.*, 37 Colo. 248, 86 P. 1038 (1906).

Another situation that would not be possible under such a restrictive interpretation of the statute would be when a city desires to sell land to a third party and the land was received as a gift or dedication to be used for a particular purpose. It is generally held that when property is dedicated for a public use by a private party for a specific or defined purpose, neither the legislature nor a municipal corporation has any power to authorize the use of the property for any other purpose than the one designated. *Rayor v. Cheyenne*, 63 Wyo. 72, 178 P.2d 115, 117 (1947); *Hyland v. City of Eugene*, 177 Ore. 567, 173 P.2d 464 (1946); *Ash v. City of Omaha*, 41 N.W.2d 386 (1950); *Yokley, MUNICIPAL CORPORATIONS § 398*. Accordingly, a town or city must convey property subject to the same conditions and restrictions under which it was received. Affirmation of the trial court's decision in this case would prohibit such transfers in Colorado and possibly subject both the city and the grantee to divestiture.

The above-cited examples are certainly not the only situations in which cities and their citizens could be harmed by a restrictive interpretation of the statute. They will serve, however, as examples of situations where cities have been and should be allowed to put some conditions on their conveyances.

IV

TO UPHOLD THE DECISION OF THE TRIAL COURT WILL BE TO SUBVERT THE INTENTION OF THE ORIGINAL PARTIES TO THE CONVEYANCE, TO FAIL TO EXAMINE THE EQUITIES OF THE CASE, AND TO FAIL TO FOLLOW THE PUBLIC POLICY OF THIS STATE.

The original purpose of the City of Idaho Springs at the time it started construction on the swimming pool, and at the time it transferred the property to Mr. Overturf on condition that he complete and operate the pool, and at the time it commenced this suit was and is *to provide a swimming pool for its citizens*. Because it did not have sufficient funds to complete the pool, a valuable piece of property was transferred for only a consideration of retirement of $5,300.00 of indebtedness. Frank Overturf agreed to the terms of the sale as did the citizens of Idaho Springs in a special election. The successor to Mr. Overturf, Golden Savings and Loan Association, refuses to operate it as a swimming pool and the city is now compelled to bring this action on behalf of its citizens to regain the swimming pool for its

citizens. What it has done certainly cannot be construed as being against the public policy of the State of Colorado.

There are actually three statements of public policy involved in this case, none of which have been violated by the intentions of the City of Idaho Springs in this case. The first statement of public policy is that a municipal corporation is required by the public policy of this state to completely dispose of properties which it does not need. *Weaver v. Canon Sewer Co.*, 18 Colo. App. 242 (1902); *City of Durango v. Reinsberg*, 16 Colo. 327, 26 P. 820; *Hayward v. Board of Trustees*, 20 Colo. 33, 36 P. 795 (1894); *Farnik v. Board of County Commissioners*, 139 Colo. 481, 341 P.2d 467 (1959). Although the property in question was needed by Idaho Springs, it could not be used for the purposes intended because of a lack of funds. The purpose behind this statement of public policy is to get as much property upon the tax rolls as is possible. The actions by Idaho Springs in this case accomplished exactly that.

The next statement of public policy is found in the following quotations, the first from *McQuillin, MUNICIPAL CORPORATIONS*, and the second is from a recent Colorado case:

> "Unless restricted by law, a municipal corporation may transfer or dedicate property for particular public uses, especially if such

> purposes are calculated to advance the governmental and municipal interests of the locality. And this principle of law is seldom questioned where the purpose of the municipal gift, donation or dedication is clearly recognized as a public purpose for the promotion of the general municipal welfare, as where it is a gift or dedication for street purposes, for schools or educational purposes, or for public hospitals, or for parks, or for uses or purposes of public beneficial effect of which is plain and obvious." *McQuillin, Supra,* § 2840.43.
>
> "Municipal corporations are not limited to providing for the material necessities of their citizens . . . . Generally speaking, anything calculated to promote the education, the recreation or the pleasure of the public is to be included within the legitimate domain of public purposes." *Ginsberg v. City and County of Denver,* 436 P.2d 685 (1968).

The intended beneficial effect of the transfer by the City of Idaho Springs in this case is obvious.

The last statement of public policy applicable in this case came in a statement made by the Court in the *Centennial v. Littleton*

case as follows:

> "Undoubtedly, an incorporated town or city may *acquire and hold* such real and personal property as may be necessary to enable it to carry on its corporate business and exercise its proper municipal functions; but it is idle to claim that a municipal corporation can lawfully engage in the business of buying, selling, or dealing *generally* in real estate, either as principal or broker."
>
> "It is equally 'idle to claim' that towns and cities of the first and second class have the power to execute long term leases on property not needed for municipal purposes, to become a speculator in land values, to become a landlord and finance town expenses from rentals collected from tenants instead of 'selling and disposing of' said property. It is 'idle to claim' that a town has the power, as consideration for such a lease, to demand and receive a percentage share in the income received from the operation of a liquor and restaurant business, or that of a filling station, or any other business which under our system is conducted by private enterprise."

Centennial v. Littleton, Supra, at p. 205.

None of the situations condemned by the Court in the above quotation are found in the present case. The City of Idaho Springs was not speculating in land values, was not becoming a landlord, was not receiving a percentage share of the income of the property, and was not preempting the proper function of private enterprise. In other words, all the circumstances present in the *Centennial v. Littleton* case which prompted the Court to make the above statement of public policy are absent from the present case.

The plaintiff's equitable position in this case is obvious. Just as obvious is the lack of equity on the part of Golden Savings and Loan Association. Golden is in the business of lending money and taking an interest in real property as security, and it surely must have understood, and was under constructive notice, that it was taking title clouded by the possibility of reverter in the City of Idaho Springs. See Sears, *COLORADO SECURITY LAW,* § 18. For it to acquire title, refuse to operate the property as a swimming pool and ignore the city's interest on the basis of some dictum in a weird and unusual case completely distinguishable on its facts, does not put equity on its side.

CONCLUSION

The findings of fact and conclusions of law of the trial court in this case are predicated upon that court's interpretation of the *Centennial v. Littleton* case. Such interpretation was erroneous, insofar as it concerned the scope of C.R.S. 139-32-2 (1963). There is no good reason for this Court to follow such a restrictive interpretation of C.R.S. 139-32-2 (1963). There is nothing in the common law or equity, nothing in Colorado law, except possibly some unfortunate dictum in the *Centennial v. Littleton* case, which would compel such interpretation. This Court should clarify its holding in *Centennial v. Littleton* by specifically ruling out any interpretation of it which would prevent imposition of valid future interests on conveyances made by municipal corporations.

We respectfully submit that in the interests of all of the towns and cities of this state, and of their citizens, and in the interest of justice in this case, this court should hold that C.R.S. 139-32-2 (1963) does not prevent the retention of a possibility of reverter in otherwise valid conveyances by municipal corporations.

The judgment of the trial court is not supported by the law and the same should be reversed with directions to enter judgment for

the plaintiff herein in accordance with its original prayer for relief.

Respectfully submitted,

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