

1950

Modesta Marie Bertagnoli v. Hon. Clarence E. Baker : Brief of Petitioner

Utah Supreme Court

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BRIEF

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In the Supreme Court of the State of Utah

MODESTA MARIE BERTAGNOLI,
ANSEL H. PRATT and RHODA
R. PRATT, his wife, L. M.
SPROUL and BELVA SPROUL,
his wife, C. A. CHIDESTER and
JESSIE R. CHIDESTER, his wife,
Petitioners,

— vs. —

HON. CLARENCE E. BAKER,
HON. JOSEPH G. JEPPSON,
HON. ROALD A. HOGENSON,
HON. J. ALLAN CROCKETT,
HON. RAY VAN COTT, JR., and
HON. A. H. ELLETT, in their
capacity as Judges of the District
Court of the Third Judicial Dis-
trict of the State of Utah, in and
for Salt Lake County, and THE
BOARD OF EDUCATION OF
SALT LAKE CITY, a public cor-
poration,

Respondents.

Case No.

7408

BRIEF OF PETITIONERS

HISTORY OF PROCEEDINGS

1. The respondent, Board of Education of Salt Lake City (hereinafter designated "SCHOOL BOARD") is a public corporation organized and existing under and by virtue of the laws of the State of Utah. The respondents, Hon. Clarence E. Baker, Hon. Joseph G.

Jeppson, Hon. Roald A. Hogenson, Hon. J. Allan Crockett, Hon. Ray Van Cott, Jr., and Hon. A. H. Ellett (hereinafter collectively designated "DISTRICT COURT") were at all times hereinafter mentioned and are now regularly elected, qualified and acting judges of the District Court of the Third Judicial District of the State of Utah, in and for Salt Lake County.

The petitioner, Modesta Marie Bertagnoli, is the principal owner in fee simple, and the other petitioners claim an interest (such interest being hereinafter described) in the following described tract and parcel of land situate in Salt Lake County, Utah:

Commencing at the Southeast corner of Lot 2, Block 14, Five Acre Plat "C", Big Field Survey, and running thence North 89 deg. 49' 10" West 762.24 feet; thence North 0 deg. 03' 32" West 578.74 feet; thence South 89 deg. 42' 16" East 628.35 feet; thence South 88 deg. 26' 06" East 132.45 feet; thence South 0 deg. 12' 32" East 574.29 feet to point of beginning.

2. On September 7, 1949, the School Board commenced an action known and designated as Case No. 87,004 (hereinafter designated "CONDEMNATION ACTION", in the District Court of the Third Judicial District of the State of Utah in and for Salt Lake County, against the petitioners and Zions Savings Bank & Trust Company, a corporation of Utah, by filing with the Clerk of said Court its verified complaint (petitioners' exhibit "2") praying for judgment of said Court whereby the above described tract and parcel of land would be condemned for the use and benefit of said School Board.

Summons was duly served upon each and all of the said petitioners and the said Zions Savings Bank & Trust Company. Within the time allowed by law, the petitioners appeared in said action by counsel, and served and filed their general and special demurrer (Petitioners' Exhibit "3") to the complaint in said action, on the following grounds:

"1. That the said complaint does not allege facts sufficient to constitute a cause of action against these demurring defendants, or any of them.

"2. That the said complaint is uncertain in the following respects and particulars:

(a) That the said complaint does not allege or state by proper technical and legal description the part of the real property involved in this action and described in paragraph 2 thereof, which is located within the municipal limits of Salt Lake City Corporation, and the part thereof which is located without the municipal limits of said Salt Lake City and within the limits of Salt Lake County, Utah.

(b) That the said complaint does not allege or state the type and nature of the school house proposed to be erected upon the said land described in paragraph 2 thereof, distinguishing between high school, junior high school, or elementary school use.

(c) That the said complaint does not allege or state the number of students that will be accommodated in said proposed school house to be erected upon said land described in paragraph 2 thereof.

(d) That the said complaint does not allege or state the particular and specific intended use

of said real property by the plaintiff with respect to the location of the proposed school house thereon, the part thereof which it is proposed to use for play ground and recreational area in connection with said school house, and the part thereof which will not be subjected to use for the aforesaid purposes.

“3. That the said complaint is ambiguous for the reasons set forth and alleged in sub-paragraphs (a), (b), (c), and (d) of paragraph 2 hereof.”

Simultaneously with the service and filing of said demurrer, said petitioners served and filed their notice of intention (petitioners' Exhibit “4”) to move the Court for an order requiring said School Board to make its complaint in said condemnation action more definite and certain in the following particulars:

“1. That the plaintiff be required to allege and state in its complaint by proper technical and legal description the part of the real property involved in this action and described in paragraph 2 of its complaint which is located within the municipal limits of Salt Lake City Corporation, and the part thereof which is located without the municipal limits of said Salt Lake City and within the limits of Salt Lake County, Utah.

“2. That the plaintiff be required to allege and state in its complaint the type and nature of the school house proposed to be erected upon the said land described in paragraph 2 of plaintiff's complaint, distinguishing whether the said school house will be used for high school purposes, junior high school purposes, or elementary school purposes.

“3. That the plaintiff be required to allege and state in its complaint the number of students

that will be accommodated in said proposed school house to be erected upon said land described in paragraph 2 of plaintiff's complaint.

"4. That the plaintiff be required to allege and state in its complaint the particular and specific intended use of said real property by the plaintiff with respect to the location of the proposed school house thereon, the part thereof which it is proposed to use for play ground and recreational area in connection with said school house, and the part thereof which will not be subjected to use for the aforesaid purposes."

On the 5th day of October, 1949, the said School Board served upon the petitioners and filed in said Court and cause its motion (petitioners' Exhibit "6") for an order under Section 104-61-5 Utah Code 1943 authorizing entry upon said real property for the purpose of making examinations, surveys and maps thereof.

3. By consent of Court and counsel, on the 7th day of October, 1949, the said motion of the School Board (petitioners' Exhibit "6") came on for argument, pursuant to notice (petitioners' Exhibit "8"), before the Honorable J. Allan Crockett, a Judge of said District Court. Upon stipulation of counsel, made in open court, the aforesaid demurrer and motion of petitioners (petitioners' Exhibits "3" and "4") were argued simultaneously with the argument of the motion of said School Board (petitioners' Exhibit "6"). Upon conclusion of said argument, the matters were submitted to the Court, and thereafter the said Court, acting by and through said Honorable J. Allan Crockett, a Judge thereof, made, entered and filed its minute orders over-

ruling the general and special demurrer of the petitioners (petitioners' Exhibit "3"), denying the said petitioners' motion for an order (petitioners' Exhibit "4") requiring the said School Board to make its complaint more definite and certain, and granting the motion of said School Board for entry upon the above described real property for purposes of making examinations, surveys and maps. Thereafter, on the 10th day of October, 1949, the said Honorable J. Allan Crockett, in his capacity as Judge aforesaid, signed and filed a file order (plaintiffs' Exhibit "11") affirming and including the matters determined by his aforesaid minute orders.

4. On the 13th day of October, 1949, the petitioners filed with the Clerk of the Supreme Court of the State of Utah their petition praying for an alternative writ of Prohibition directed to the District Court and the School Board. Upon consideration of said petition by the Honorable Chief Justice of the Supreme Court, it was ordered that said alternative writ of Prohibition issue, and under date of October 13, 1949, the same was issued by the Clerk of said Supreme Court. By said writ the said District Court and the judges thereof were commanded to refrain from any further proceedings in said condemnation action, insofar as it pertains to real property located without the municipal limits of Salt Lake City, until further order of said Supreme Court. Service of the writ was made upon the District Court and the School Board on the 14th day of October, 1949. The return day of said writ was October 24, 1949, at 10:00 o'clock A.M. In response to said alternative

writ of Prohibition, respondents have filed their (a) demurrer to the petition, (b) motion to quash the said alternative writ, and (c) answer to said petition. By stipulation of counsel signed and filed on October 21, 1949, a map of Salt Lake City, certified by W. D. Beers, City Engineer (hereinafter designated "School Board Map") was made part of the record in said action. By said stipulation also there was made part of the record, subject to the petitioners' objection that the same are immaterial, (a) map of Salt Lake City showing junior high school zones, (b) drawing entitled "Map of Southeastern Salt Lake City" showing the homes immediately adjacent to proposed junior high school site, and (c) drawing entitled "Pupil Distribution in Southeastern Salt Lake City as per 1948 School Census".

STATEMENT OF FACTS

1. The tract and parcel of land hereinbefore particularly described is situate at the Northeast corner of the intersection of South 19th East Street and 17th South Street. The area is shown in hatched lines on the School Board Map, and is also delineated upon petitioners' Exhibit "1", being an official plat of the South half of Block 14, Five Acre Plat "C", Big Field Survey, prepared by the County Recorder of Salt Lake County, Utah. This parcel of land contains 10.12 acres, and is situate partly within and partly without the municipal limits of Salt Lake City, a municipal corporation of the first class of the State of Utah. According to the records in the office of the County Recorder of Salt

Lake County, Utah, 6.07 acres of said land are situate without the municipal limits of said Salt Lake City and within Salt Lake County, Utah and also within the limits of Granite School District, a public corporation of the State of Utah, located in said County. Also according to the records in the office of the County Recorder of Salt Lake County, Utah, approximately 4.05 acres of said land are situate within the municipal limits of said Salt Lake City. According to the claim of the respondents, the total area of the land involved is 10.1 acres, with 4.51 acres being located within the municipal limits of Salt Lake City and 5.59 acres being located without the municipal limits of Salt Lake City. The part of the land without the municipal limits of Salt Lake City and the part of the land within the municipal limits of Salt Lake City are contiguous and adjacent, and together form one parcel of land, as hereinabove particularly described. The area delineated on the School Board map in yellow, outlined in red, constitutes territory within Salt Lake County and also within Granite School District. The exterior municipal boundary lines of Salt Lake City Corporation are delineated on said map in red.

2. The petitioner, Modesta Marie Bertagnoli, is the principal owner in fee simple of the tract and parcel of land sought to be condemned. The interests of petitioners Ansel H. Pratt and Rhoda R. Pratt, his wife, L. M. Sproul and Belva Sproul, his wife, and C. A. Chidester, and Jessie R. Chidester, his wife, arise through conflict of boundary and fence lines of the tract and parcel of

land above described with adjoining and adjacent areas owned by these latter petitioners. They were joined as parties defendant in the condemnation action, in order to eliminate certain clouds on and conflicts in title.

3. The School Board seeks to exercise its right of eminent domain and to condemn the land of the petitioners in order to secure an area upon which to construct, operate, and maintain a junior high school which will form part of the school system operated by the School Board under the authority conferred upon it by the Constitution and statutes of the State of Utah.

RELEVANT CONSTITUTIONAL PROVISIONS

“Private property shall not be taken or damaged for public use without just compensation.” (*Article I, Section 22, Constitution of Utah.*)

“In cities of the first and second class, the public school system shall be controlled by the Board of Education of such cities, separate and apart from the counties in which said cities are located.” (*Article X, Section 6, Constitution of Utah.*)

STATUTORY REFERENCES

“Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses: * * * (3) Public buildings and grounds for the use of any county, city, or incorporated town or board of education; * * *. (*Section 104-61-1, Utah Code 1943.*)

“The Public School System in cities of the first and second class shall be controlled by the

board of education of such cities, separate and apart from the counties in which the cities are located, and all school property therein shall be under the direction and control of the City Board of Education." (*Section 75-9-5 Utah Code 1943.*)

"Cities and school districts may contract and cooperate with one another in matters affecting the health, welfare and convenience of the inhabitants within their respective territorial limits; and cities may disburse public funds in aid of the school districts within the limits of their respective cities." (*Section 75-9-21 Utah Code 1943, approved March 14, 1949.*)

"Boards of Education of Utah school districts may participate in the joint construction or operation, or both, of a school attended by children within the district and children residing in adjoining districts, either within or outside the State, provided, the agreement between the boards of education of all participating districts, signed by the residents (sic.) of the respective boards, is filed with the State Board of Education." (*Section 75-11-26 Utah Code 1943, approved March 19, 1949.*)

"Every board of education shall have power and authority to purchase and sell schoolhouse sites and improvements thereon, to construct and erect school buildings and to furnish the same, to establish, locate and maintain kindergarten schools, common schools consisting of primary and grammar grades, high schools and industrial or manual training schools, to establish and support school libraries, to purchase, exchange, repair and improve high school apparatus, books, furniture, fixtures and all other school supplies. * * * and may adopt by-laws and rules for its own procedure and make and enforce all needful

rules and regulations for the control and management of the public schools of the district.”
(*Section 75-11-20 Utah Code 1943.*)

“The board of education of every school district shall be a body corporate under the name of the ‘Board of Education of School District or ‘..... City’ as the case may be (inserting the proper name), and shall have an official seal conformable to such name, which shall be used by its Clerk in the authentication of all matters requiring it. Said boards in the name aforesaid may sue and be sued, and may take, hold, lease, sell and convey real and personal property as the interests of the schools may require.” (*Section 75-9-8 Utah Code 1943.*)

“When all the territory of a school district shall become annexed to a city of the first or second class by the extension of the boundaries of the city, all the school property, including moneys on hand and due to such district, together with all records and papers belonging to such district, shall be transferred to and title shall vest in the board of education of such city, and such board of education shall assume and be held responsible for the legitimate floating and bonded indebtedness of such annexed district.” (*Section 75-9-10 Utah Code 1943.*)

For apportionment of bonded indebtedness, when by the extension of the limits of any city of the first or second class into an adjacent school district, see *Section 75-9-11.*

“Before property can be taken it must appear :

- (1) that the use to which it is to be applied is a use authorized by law ;
 - (2) that the taking is necessary to such use ;
- and,

(3) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use." (*Section 104-61-4 Utah Code 1943.*)

"In all cases where land is required for public use, the person, or his agent, in charge of such use may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of this chapter. The person, or his agent, in charge of such public use may enter upon the land and make examinations, surveys and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the lands, except for injuries resulting from negligence, wantonness or malice." (*Section 104-61-5 Utah Code 1943.*)

"The plaintiff may move the court or a judge thereof, at any time after the commencement of suit, on notice to the defendant, if he is a resident of the state, or has appeared by attorney in the action, otherwise by serving a notice directed to him on the clerk of the court, for an order permitting the plaintiff to occupy the premises sought to be condemned pending the action, and to do such work thereon as may be required for the easement sought according to its nature. The court or a judge thereof shall take proof by affidavit or otherwise of the value of the premises sought to be condemned and of the damages which will accrue from the condemnation, and of the reasons for requiring a speedy occupation, and shall grant or refuse the motion according to the equity of the case and the relative damages which may accrue to the parties. If the motion is granted, the court or judge shall require the

plaintiff to execute and file in court a bond to the defendant with sureties to be approved by the court or judge, in a penal sum to be fixed by the court or judge, not less than double the value of the premises sought to be condemned and the damages which will ensue from condemnation, as the same may appear to the court or judge on the hearing, and conditioned to pay the adjudged value of the premises and all damages in case the property is condemned, and to pay all damages arising from occupation before judgment in case the premises are not condemned, and all costs adjudged to the defendant in the action. The sureties shall justify before the court or judge after a reasonable notice to the defendant of the time and place of justification. The amounts fixed shall be for the purposes of the motion only, and shall not be admissible in evidence on final hearing. The court or judge may also, pending the action, restrain the defendant from hindering or interfering with the occupation of the premises and the doing thereon of the work required for the easement." (*Section 104-61-10 Utah Code 1943.*)

STATEMENT OF ARGUMENTS

I.

THE SCHOOL BOARD IS A PUBLIC MUNICIPAL CORPORATION CREATED BY THE CONSTITUTION OF THE STATE OF UTAH AND THE LEGISLATURE, POSSESSING ONLY SUCH POWERS AS ARE EXPRESSLY CONFERRED UPON IT AND SUCH IMPLIED POWERS AS ARE NECESSARY TO EXECUTE AND CARRY INTO EFFECT ITS EXPRESS POWERS.

The legal status of the Board of Education of Salt Lake City has been fully adjudicated by the State

Supreme Court. Quotations from the Court's decisions are all that is necessary to elucidate the legal status of the School Board.

1. * * * * The Board of Education is invested with the exclusive control of and responsibility for the public school system, independent of the county government." * * * (*Board of Education of Salt Lake City v. Bergon, et al*, 62 Utah 162, 217 Pac. 1112.)

2. "A board of education is a legal entity created by statute. For the purpose of administering the affairs relating to schools within a designated area, certain limited powers are conferred upon boards of education. These powers are exercised for the welfare and in the interest of the people within the designated area. In Utah there are three types or classes of school districts. Two of the classes are created by the Constitution insofar as the territorial area is designated, comprising cities of the first and of the second class. Constitution of the State of Utah, Article X, Section 6. The third type of class has been denominated 'county school districts of the first class', Laws of Utah 1905, Chapter 107, sometimes referred to as 'consolidated school districts' and now referred to as 'county school districts'." (*Hansen v. Board of Education*, Utah, 116 Pac. 2d 936.)

3. "The powers of the board of education are statutory, since the legislature may authorize the governing authorities of school districts, as the state's agents, to do anything not prohibited by the Constitution * * *. The board of education, being a creation of the legislature, has only such powers as are expressly conferred upon it and such implied powers as are necessary to execute

and carry into effect its express powers.” (*Beard v. Board of Education*, 81 Utah 51, 16 Pac. 2d 900-903.)

4. “* * * A board of education is a public municipal corporation.” (*Chamberlain v. Waters*, 10 Utah 298, 37 Pac. 566.)

5. Cf: (*Carbon County v. Carbon County High School District*, 45 Utah 147, 143 Pac. 220.)

II.

THE SCHOOL BOARD IS AUTHORIZED TO EXERCISE THE POWER OF EMINENT DOMAIN ONLY WITHIN THE MUNICIPAL LIMITS OF SALT LAKE CITY.

The power of eminent domain has its inception in the sovereignty of the state. It is a power inherent in the state and essential to its existence. It is based on the law of necessity. It is not dependent for its existence upon a specific grant in the Constitution of the state. The provision in the Utah State Constitution relating to the taking of property for the public use (Article I, Section 22) does not by implication grant the power of eminent domain to the government of the state, but limits a power which would otherwise be limitless. (*18 Am. Jur.*, Section 7, p. 635.) The right to authorize the exercise of this power belongs exclusively to the legislature. The legislature calls the power into operation from the depths of the state's sovereignty. No municipal corporation or other subdivision of the state has any right to exercise the power of eminent domain without specific authority from the legislature. It must follow that the legislature can control and limit the exercise of this power when delegated by it. (*18 Am.*

Jur., Sec. 9, p. 637.) Statutes granting the power of eminent domain to agencies or units of the state are in contravention of the common rights of persons, and should receive a strict construction. (*Lewis on Eminent Domain, 3rd Edition, Vol. 1, p. 708, Sec. 388; Cooley on Constitutional Limitations, 8th Edition, Vol. 2, p. 1112.*) The power of eminent domain, when delegated by the state to a political unit or agency, will be strictly construed against the agency or unit receiving the grant of power. (*Peavey-Wilson Lumber Company v. Brevard County, 31 So. (Fla.) 2d 483; 172 A.L.R. 168; Wise v. Yazoo City, 90 Miss. 507, 51 So. 453, 26 L.R.A. (NS) 1130.*)

Beyond doubt the School Board has received from the legislature of the State of Utah a grant of the power of eminent domain for the purpose of securing lands necessary for the construction and maintenance of school buildings and grounds. The statute granting this power makes no specific provision for the exercise of same by the School Board upon lands without and beyond the limits of the School Board's jurisdiction. It is therefore the contention of the petitioners that the School Board cannot exercise this power of eminent domain upon land located without the municipal limits of said city. The School Board, in seeking to obtain 6.07 acres of land admittedly without the limits of Salt Lake City and within the limits of Granite School District, is acting without either specific or implied authority.

The petitioners submit the following quotations from recognized authorities to sustain their position:

1. "The primary purpose of a municipal corporation is to contribute toward the welfare, health, happiness and public interest of the inhabitants of such corporation, and not to further the interests of those residing outside its limits; therefore, the general rule is that municipal corporations have no extra-territorial powers, but their jurisdiction ends at the municipal boundaries, and cannot, without specific legislative authority, extend beyond their geographical limits. * * * As a governmental unit, the municipal corporation is the agent of the state, exercising its powers for and in behalf of the state. * * * when a power granted to a municipal corporation cannot be exercised without going outside the corporate limits, the requisite authority to do so will be implied." (37 *Am. Jur.* p. 736, *Sec. 122.*)

2. "The power of the legislature to authorize a municipal corporation to acquire lands beyond the municipal limits, and for that purpose to exercise the power of eminent domain, cannot be disputed. It has long been recognized to exist where the use for which the property is taken is a proper and reasonable public use." (3 *Dillon, Municipal Corporations, 5th Edition, 1626, Sec. 1028.*)

3. "* * * Likewise, a municipality cannot condemn lands within the State but outside its own corporate limits, unless the power has been delegated by the legislature. However, it is well settled that the legislature may delegate such power." (4 *McQuillin, Municipal Corporations, 2nd Edition, 406, Sec. 1619.*)

4. "As a general rule, a municipal corporation's powers cease at municipal boundaries, and cannot, without plain manifestation of legislative intention, be exercised beyond its limits, even

though it may have acquired property outside its geographical limits. * * * Statutes authorizing the exercise of municipal power beyond the municipal boundaries are strictly construed." (43 C. J., Sec. 233, pp. 235-236.)

5. "As a general rule, a municipal corporation has no power to purchase and hold land for a park, highway, or other municipal purpose, beyond its territorial limits, unless the power has been specially conferred upon it by the legislature, *and such power is not conferred by a general grant of power to purchase, hold and convey such property, real and personal, as may be necessary for its public uses and purposes.*" (Italics supplied) (43 C. J., Sec. 2082, p. 1327.)

6. "The authority to condemn must be expressly given or necessarily implied. The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out by argument and inference, it does not exist. 'There must be no effort to prove the existence of such high corporate right, else it is in doubt; and if so, the State has not granted it.' If the Act is silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that the legislature intended that the necessary property be acquired by contract. * * * *As a rule, a municipal corporation cannot condemn property beyond its limits, unless authority to do so is expressly given.* (Italics supplied) (Lewis on Eminent Domain, 3rd Edition, Sec. 371).

7. "A municipal corporation cannot exercise its powers outside its limits, except when granted

express legislative authority to do so, for all powers and privileges conferred by the Constitution and statutes on municipal corporations must be held to be limited in their exercise to the territory embraced within the municipal boundaries and for the benefit of the inhabitants of the municipality, unless the Constitution or statutes expressly provide that such power and privilege may be exercised beyond the corporate boundaries and for the benefit of non-residents." (*Sweetwater v. Hamer*, 259 S. W. (Tex. Civil Appeal) 191.)

8. " * * * The city has and can have jurisdiction only within its own limits. While it is true that police powers may sometimes be given for a limited space around the city limits for special purposes, yet they must be specially given; and with that exception, the principle is universal that the city has no jurisdiction beyond its limits. A learned writer has said that one of the distinguishing features of differences between the civil law of Rome and the common law of England is that the civil law acted personally while the common law acts territorially. The civil law applied to every Roman citizen, wherever he was, and only a Roman citizen could claim the benefit of it, even in Rome; while the common law operates on every person and thing in the territory, and on those only. The State can levy on a man's property found within the State, but there is no way by which it can fix a personal liability on him outside the State." (*Jones v. Hines*, Alabama, 47 So. 739, 22 L.R.A. (NS) 1098.)

9. "The general rule is that a municipal corporation has no power to purchase and hold land for a park or other municipal purposes beyond its corporate limits, unless the power has been

specially conferred by the legislature.” (*City of Wichita v. Clapp, et al*, 263 Pac. (Kansas) 12.)

10. “It is equally well settled law that a municipal corporation is, as a general rule, restricted to its corporate limits in the exercise of its corporate powers.” (*Switzer v. Harrisonburg*, 52 S. E. (Va.) 174, 2 L. R. A. (NS) 910.)

11. “All powers and privileges conferred by the Constitution and statutes on municipal corporations must be held to be limited in their exercise to the territory embraced in the municipal boundaries and for the benefit of the inhabitants of the municipality, unless the Constitution or statute expressly provides that such powers and privileges may be exercised beyond the corporate boundaries or for the benefit of non-residents.” (*Childs v. City of Columbia*, 70 S.E. (So. Car.) 296, 34 L.R.A. (NS) 542.)

12. “The general doctrine is clear that such [municipal] corporations cannot usually exercise their powers beyond their own limits. The right to exercise extra-territorial powers can only arise by express grant of authority * * * or by necessary implication from other powers granted.” * * * (*Becker v. City of LaCrosse*, 40 L.R.A. (Wis.) 829.)

13. “It is a general principle that a municipal corporation cannot usually exercise its powers beyond its own limits, and if in any case it has authority to do so it must be derived from some statute which expressly or impliedly permits it * * *. The doctrine of ultra vires is applied with greater strictness to municipal bodies than to private corporations.” (*Farwell v. Seattle*, 86 Pac. (Wash.) 217.)

14. “A municipal corporation empowered ‘to

purchase, hold and convey any estate, real or personal, for the public use of said corporation' cannot take a conveyance of land beyond its boundaries for a public highway." (*Riley v. Rochester*, 9 N.Y. 64.)

15. " * * * Unless expressly empowered by statute, the Town of Craig has no authority to condemn land outside its corporate limits for sewer purposes. The bare right of the Town to construct and maintain sewers cannot be held to include the right to condemn property beyond its corporate limits, in connection therewith. * * * the giving of the right to construct sewers does not also grant authority to subject outside lands to operation of eminent domain. Such power is not implied, because there is nothing in our statutes to even indicate, much less imply such purpose." (*Mack v. Town of Craig*, 68 Colo. 337, 191 Pac. 101.)

There can be no denial of the statement that the statutes relating both to the exercise of the power of eminent domain and to the authority and powers of the School Board do not specifically and expressly authorize the School Board to exercise the power of eminent domain without and beyond the municipal limits of Salt Lake City. Under the authorities above cited, the power to condemn property beyond the boundaries of the municipal corporation, exercising the right of eminent domain, must be expressly given, and such power is not conferred by a grant of power to purchase, hold and convey real property, or by the grant of the right of eminent domain. The Utah statutes quoted in full above are startlingly silent with respect to the exercise of the powers of the School Board beyond the boundaries of Salt Lake City.

Rather, these statutes, when read and considered either separately or as a whole, compel the conclusion that the legislature had no intention of granting general extra-territorial powers to the School Board. There are, however, two statutes enacted in 1949 that directly imply that school boards in Utah cannot exercise extraterritorial powers without specific authorization from the legislature.

The first of these statutes is Section 75-11-26 Utah Code 1943, approved March 19, 1949, which authorizes boards of education of Utah to participate in the joint construction or operation, or both, of a school attended by children within the district and children residing in adjoining districts, either within or outside of the State. Undoubtedly this statute had its origin in the necessities arising in connection with the operation of schools located near State boundary lines. It is suggested that the situation at Wendover, Utah, or in the extreme southwestern corner of the State in Washington County, called for this legislative action. Furthermore, it is easy to imagine schools being located on or near the boundary lines between school districts in isolated and thinly populated areas which would be affected by this statute. It will be noted that here is a grant of extraterritorial power, and undoubtedly the statute was enacted because of the limitation on the powers of school boards which prohibited them from constructing or operating schools outside of their respective districts.

The second of these statutes is Section 75-9-21 Utah Code 1943, approved March 14, 1949, which (1) enables

cities and school districts to contract and cooperate with one another in matters affecting the health, welfare and convenience of the inhabitants within their respective territorial limits, and (2) authorizes cities to disburse public funds in aid of the school districts within the limits of the respective cities. This statute, for example, authorizes Salt Lake City Corporation and a school district adjacent to the boundaries of the city, to cooperate with one another in matters affecting health, welfare and convenience of the inhabitants within their respective territorial limits. This is a grant of extra-territorial power, both to Salt Lake City Corporation and to the adjacent school district, with a direct inference that without this grant of power no such power would exist. The second authorization of this statute enables cities to disburse their public funds in aid of school districts within the limits of the respective cities. Here again is a specific grant of power, not of an extra-territorial nature, but a grant of authority to use city funds for school purposes. It is therefore a grant of special authority of an extraordinary nature, and can well be likened to a grant of extraterritorial power.

The pattern set by legislation governing boards of education is well demonstrated by reference to Section 75-9-10 Utah Code 1943, quoted in full above. This statute provides that when all the territory of a school district shall become annexed to a city of the first or second class *by the extension of the boundaries of the city*, all the school property, including moneys on hand and due to such district, together with all records and

papers belonging to such district, shall be transferred to and title shall vest in the board of education of such city, and such board of education shall assume and be held responsible for the legitimate floating and bonded indebtedness of such annexed district. Section 75-9-11 prescribes the method of apportioning the bonded indebtedness of such annexed district. These two sections specifically recognize the territorial limits of the jurisdiction of a board of education of a city of the first class, and in effect extends the jurisdiction of such board of education over the newly annexed area of the city. It is declaratory of the principle that the jurisdiction of the School Board is co-extensive only with the municipal boundary lines of Salt Lake City. It is submitted that this statute alone argues loudly in behalf of petitioners' claim that the School Board, neither by direct grant or implication, possesses any extraterritorial powers, except in the specific instances above recited, and the power of eminent domain is not within these exceptions.

It is true that the facts of this situation are unique. The School Board map correctly shows that there is an area of Salt Lake County which is in effect an "island" within the municipal limits of Salt Lake City. It is within this county "island" that over half of petitioners' land is situate. A great many reasons may be suggested for the existence of this county "island" within the municipal boundaries of Salt Lake City, but for the purposes of this case such reasons are wholly immaterial. The fact is clear that this "island" is

county territory, and not an area over which Salt Lake City exercises jurisdiction. Petitioners submit that this unique situation does not in any degree change or mitigate the rule with respect to the exercise of extraterritorial powers by the School Board. The condemnation action seeks to take land which is within the jurisdiction of both Salt Lake County and the Granite School District, and not within the jurisdiction of the School Board.

When the statutes governing boards of education of the State of Utah are correlated and analyzed, one seeks in vain for a conclusion that there is any grant of extraterritorial power to the School Board, except in the case of the two 1949 statutes. These two statutes are a departure from the general pattern set by the fundamental legislation governing school districts, and appear to strongly support petitioners' contention that the School Board, in the exercise of the power of eminent domain, possesses no extraterritorial authority. If the School Board must be specifically authorized to participate in a joint construction or operation with another school district of the State or with a school district of an adjoining state, it follows that it must be *specifically* authorized to exercise the power of eminent domain upon land located without the jurisdiction of the School Board.

III.

PETITIONERS HAVE BEEN AND WILL BE SUBJECTED TO IRREMEDIAL AND IRRETRIEVABLE CONSEQUENCES AND INJUSTICE WHICH WILL DE-

STROY THE STATUS QUO AND RENDER AN APPEAL FROM THE FINAL JUDGMENT IN THE CONDEMNATION ACTION INEFFECTUAL TO UNDO THE MISCHIEF VISITED UPON PETITIONERS, IN THE EVENT THE SUPREME COURT SHOULD, UPON DIRECT APPEAL FROM SAID FINAL JUDGMENT, DETERMINE THAT THE SCHOOL BOARD DOES NOT POSSESS THE POWER AND AUTHORITY TO EXERCISE THE RIGHT OF EMINENT DOMAIN UPON LAND SITUATE WITHOUT THE MUNICIPAL LIMITS OF SALT LAKE CITY.

1. The petitioners demurred both generally and specially to the School Board's complaint in the condemnation action, and also moved the Court for an order requiring the School Board to make its complaint more definite and certain. By these demurrers and motion, the petitioners raised directly before the District Court the question as to the power and authority of the School Board to condemn land located without and beyond the boundaries of Salt Lake City. The District Court overruled the demurrers and denied the motion. Further, the District Court simultaneously granted the School Board's motion for an order to enter the land sought to be condemned for the purpose of making examinations, surveys and maps. It was at this stage of the condemnation action that petitioners applied to the Supreme Court for the alternative writ of Prohibition against the District Court and the School Board. Consideration must be given to the situation that then confronted the petitioners:

(a) The order of the District Court made, entered and filed on October 10, 1949, in the action of Board of Education of Salt Lake City v. Bertagnoli, et al, Case

No. 87,004, granting the said Board of Education authority to enter upon the premises sought to be condemned for the purposes of making examinations, surveys and maps, is but an interlocutory order, and non-appealable. (*Attorney General v. Pomeroy*, 93 Ut. 426, 73 Pac. 2d 1277, 1289; *Utah Copper Company v. Montana-Bingham Consolidated Mining Co.*, 69 Utah 428, 255 Pac. 672-676.)

(b) In the event the District Court in the action of Board of Education of Salt Lake City v. Bertagnoli, et al, Case No. 87,004, makes and enters an order granting said Board of Education authority to occupy the premises sought to be condemned pending said action, and to do such work thereon as may be required, pursuant to Section 104-61-10 Utah Code, 1943, such order will be but an interlocutory order, and not appealable. (*Attorney General v. Pomeroy*, *supra*; *Utah Copper Co. v. Montana-Bingham Consolidated Mining Co.*, *supra*.)

(c) The order of the District Court dated October 10, 1949, overruling petitioners' general demurrer to the complaint of the Board of Education in the action of the Board of Education of Salt Lake City v. Bertagnoli, et al, Case No. 87,004, is non-appealable. (*Attorney General v. Pomeroy*, *supra*; *Utah Copper Co. v. Montana-Bingham Consolidated Mining Co.*, *supra*; *Smith v. McEroy*, 8 Utah 58, 29 Pac. 1030.)

Petitioners' demurrers to the complaint of the School Board in the condemnation action, and their motion to require the School Board to make its complaint more definite and certain, with their resistance to the School

Board's motion for an order permitting it to enter the premises to make examinations, surveys and maps, afforded the District Court an opportunity to rule upon the questions regarding the District Court's jurisdiction over the action and whether the School Board possessed the power to condemn land situate without the municipal limits of Salt Lake City. The petitioners, exhausted their immediate legal remedies in the District Court.

“It is fundamental that the court or tribunal sought to be prohibited must be given a proper opportunity to rule upon objections to its proceedings before the writ of prohibition will lie. This is so even where the court or tribunal has no jurisdiction.” (*Olson v. District Court*, 106 Utah 220, 147 Pac. 2d 471; *Far Breeders' Agricultural Coop v. Wiesley*, 102 Utah 601, 132 Pac. 2d 384; *State ex rel Welling v. District Court*, 87 Utah 416, 49 Pac. 2d 950; *Van Cott v. Turner*, 88 Utah 535, 56 Pac. 2d 16.)

Therefore the petitioners fulfilled the first requirement for the issuance of the alternative writ of Prohibition.

2. The petitioners were further faced with the threat expressed by counsel for the School Board in open court, that on or about January 1, 1950 the School Board intended to apply to the Court for an order of occupancy of the premises by the School Board under the authority of Section 104-61-10 Utah Code 1943. The occupancy of the premises thus to be sought would be for the purpose of constructing the school building thereon, and undoubtedly work would be commenced on the structure during the pendency of the condemnation action in the District Court. Such situation would inflict

upon the petitioners such irretrievable loss and damage that a reversal of the final judgment of the District Court in said condemnation by the Supreme Court would not restore petitioners to their status quo. If the School Board does not possess the legal authority to condemn the part of petitioners' land located exterior to the boundaries of Salt Lake City, the petitioners are under no compulsion to surrender possession of the said part and parcel of their land to the School Board under Section 104-61-10 Utah Code 1943. They are entitled to the possession of their land, and they are entitled to their land as vacant land. The fact that the School Board may place a structure thereon which would be a loss to the School Board, should it finally be held that it had no authority to acquire the land, would not be placing the petitioners in the position they occupied prior to the institution of the condemnation action. Their fundamental right of exclusive possession of their land in its then condition would have been violated, and restitution to them in form of damages, or even by the acquisition of a partially or wholly completed school structure on the land would not leave them in the same position they would have occupied had possession of their land not been wrested from them. They were confronted with a particularly critical situation after the adverse rulings of the District Court, and they were not compelled to await the outcome of the condemnation action before testing the authority of the School Board in the Supreme Court. The irretrievable damage which would be inflicted upon them by their loss of possession of the

land and use thereof by the School Board presented a factual situation which authorized them immediately to apply to the Supreme Court for an alternative writ of Prohibition, to the end that the School Board's authority could be determined forthwith. The relief which a regular appeal from the condemnation judgment would afford would be wholly inadequate, under the circumstances.

Had the petitioners remained passive after the rulings of the District Court, and allowed the School Board to enter upon the premises and construct valuable improvements thereon, they would probably have been subjected to the charge of acquiescing in the action of the School Board. By their allowing the School Board to proceed with construction of a building and the expenditure of a large sum of money thereon, they might also be estopped from asserting that the School Board had no authority to condemn land without the municipal boundaries of Salt Lake City. In view of these perils, it was incumbent upon the petitioners to take immediate legal action not only to protect their own right, but also to forewarn the School Board that petitioners were contesting its authority to condemn the part of their land located outside of the municipal boundaries of Salt Lake City.

The authorities hereinafter cited sustain the issuance of the Writ under these conditions:

“What can be said is that ordinarily the superior court will look only to see if the lower court was acting without or in excess of jurisdiction.”

tion, and if so, whether there is still not some adequate and speedy remedy, but that in certain situations where it would work a palpable injustice or hardship or cause damage which could not be checked or remedied in any other way, the superior court will not go too refinedly into the question as to what constitutes error merely, or lack or excess of jurisdiction, before issuing the Writ." (*Atwood v. Cox*, 88 Utah 426, 55, Pac. 2d 377 at 388.)

North Point Consolidated Irr. Co. v. Utah and Salt Lake Canal Co., 14 Utah 155, 46 Pac. 824.

Olson v. The District Court, supra.

Broadbent v. Gibson, 105 Utah 53, 140 Pac. 2d 939.

Meyers v. Bronson, 100 Utah 279, 114 Pac. 2d 213.

Adolph Coors Co. v. Liquor Control Commission, 99 Utah 246, 105 Pac. 2d 181.

Allen v. Linbeck, 97 Utah 471, 93 Pac. 2d 220.

People v. Spiers, 4 Utah 385, 10 Pac. 601, 11 Pac. 509.

Cf. Home Owners' Loan Corporation v. Logan City, 97 Utah 235, 92 Pac. 2d 346.

Therefore the second condition for the issuance of the Writ of Prohibition is met in this case.

IV.

THE QUESTION AS TO WHETHER A BOARD OF EDUCATION POSSESSES POWER TO ACQUIRE LAND SITUATE WITHOUT THE BOUNDARIES OF THE DISTRICT BY EXERCISE OF THE POWER OF EMINENT DOMAIN PRESENTS AN ISSUE OF VITAL IMPORTANCE TO THE CITIZENS OF THE STATE OF UTAH,

**AND ON THIS BASIS A WRIT OF PROHIBITION
SHOULD ISSUE.**

Involved in this action is a question of broad public concern, and that is whether or not the boards of education of this state can, through the use of the power of eminent domain, go without their respective districts and acquire land. As indicated in this brief, the pattern of legislation of this state has been to confine the jurisdiction and powers of the boards of education to their respective districts. A decision that would uphold the School Board in the instant case would represent a deviation from this pattern, which might have far-reaching effect, particularly within the populated areas of the state. It can well be imagined that a segment of the population living within the municipal boundaries of Salt Lake City might be more conveniently served if the School Board located one of its new buildings without the city limits and within the limits of Granite School District. If conditions exist that require the School Board to build structures and operate schools without the municipal limits of Salt Lake City, it is respectfully suggested that legislative relief should be sought rather than attempting to acquire property against the wishes of its owners by means of the judicial process, when the authority for such action is open to most serious question. The public interest in this case is direct. It is notorious that in certain areas of Salt Lake City there is a pressing demand for more school buildings. If the petitioners are wrong in their contentions herein made, they should be so informed

immediately, so that the School Board can proceed forthwith in the construction of the necessary school building. On the other hand, if petitioners are correct in their resistance to the School Board's action, they are entitled to an immediate protection of the courts. This situation is well within the spirit and intention of the Supreme Court when it wrote:

“Perhaps the court is not entirely without some discretion in determining whether or not another adequate remedy exists. ‘Discretion’ does not mean happy or fortuitous choice, but a discretion guided by circumstances surrounding the litigation. If the term ‘adequate remedy’ were an absolute, it might be incorrect to say that we could ever grant the writ where there was another adequate remedy. But ‘adequate remedy’ is a matter of degree and may run the gamut of situations at one end where not to grant the writ would leave the petitioner where he could not retrieve himself. (*Atwood v. Cox*) to situations on the other hand where not to grant the writ would leave the petitioner where there were no factors of hardship other than those which attend the ordinary judgment and appeal. In between, situations may arise where, in the single case at bar, there appears to be a remedy adequate in the ordinary course of the law, but where there are urgent public questions or questions of public policy involved directly or indirectly related or dependent upon the outcome, or where the urgent rights of a large group of the public await the resolution of the question, or where a multiplicity of suits threaten, or where some factors, either intrinsic or extrinsic to the litigation, reveal the ordinary course of the law really not to be adequate although on the face of things it may

technically appear to be. In those cases the writ may issue in the sound discretion of the court. Perhaps another way of stating the proposition would be to say that such circumstances involve a contradiction and actually defeat the adequacy of the remedy at law—render it not so. In the last analysis, adequacy of legal remedy may be under certain circumstances a matter for reasonable differences of opinion. In such cases if judgment prevailed for issuing the writ over judgment against issuing it, it could be said to have issued in the sound discretion of the court, even though other minds might have reasonably concluded that the legal remedy was adequate. But ‘sound discretion’ must always be labelled with the precautionary admonition that the writ is for extraordinary occasions and should be sparingly used.” (*Broadbent v. Gibson*, supra, at p. 942 of 140 Pac. 2d.)

Cf. *Washington County v. State Tax Commission*, 103 Utah 73, 133 Pac. 2d 564.

WHEREFORE, petitioners respectfully submit that the District Court and the School Board should be permanently prohibited and restrained from prosecution of the condemnation action.

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