

1968

Salt Lake City, A Municipal Corporation v. State of Utah : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Leon A. Halgren; Attorney for Plaintiff-Respondents Phil L. Hansen and Dallin W. Jensen; Attorneys for Defendant-Appellant

Recommended Citation

Brief of Respondent, *Salt Lake City v. Utah*, No. 11141 (Utah Supreme Court, 1968).
https://digitalcommons.law.byu.edu/uofu_sc2/66

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

IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY, a municipal
corporation,

Plaintiff-Respondent,

vs.

STATE OF UTAH,

Defendant-Appellant.

Case No.
11141

BRIEF OF RESPONDENT

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

HOMER HOLMGREN
City Attorney

LEON A. HALGREN
Assistant City Attorney

Attorneys for Plaintiff
and Respondent

414 City & County Bldg.
Salt Lake City, Utah

PHIL L. HANSEN
Attorney General

DALLIN W. JENSEN
Deputy Attorney General

State Capitol Building
Salt Lake City, Utah

FILED

1966

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF NATURE OF CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2, 3
STATEMENT OF POINTS	3, 4, 5

ARGUMENT:

POINT I: THE RESPECTIVE AGREEMENTS MADE WITH REFERENCE TO FURNISHING FREE WATER WITHOUT TIME LIMITATION ARE ULTRA VIRES AND HENCE VOID.	5
--	---

POINT II: THE AGREEMENT OF 1890 TO FURNISH FREE WATER WAS CONTRARY TO PUBLIC POLICY WHICH POLICY WAS DECLARED IN WRITING AND EMBODIED IN ARTICLE XI, SECTION 6, OF THE UTAH CONSTITUTION, AND IS THEREFORE VOID	10
---	----

POINT III: THE AGREEMENT OF 1926 TO EXTEND THE USE OF FREE WATER TO "ADDITIONAL LANDS" WAS IN VIOLATION OF ARTICLE XI, SECTION 6, OF	
--	--

THE UTAH CONSTITUTION AND THERE- FORE VOID	13, 14
---	--------

POINT IV: THE AGREEMENT BY THE CITY TO PROVIDE THE TERRITORY FREE USE OF ITS WATER WAS NOT A GRANT OF A WATER RIGHT BUT MERE- LY AN ABORTIVE ATTEMPT TO ENTER INTO A CONTRACT TO PROVIDE WATER FREE OF CHARGE WHICH AGREE- MENT WAS VOID FOR LACK OF CON- SIDERATION	16
--	----

POINT V: THE CITY HOLDS ITS WATER RIGHTS AND REGULATES ITS WATER RATES IN A POSITION OF TRUST FOR THE USE AND BENEFIT OF ITS RESI- DENTS TO BE DISTRIBUTED AT EQUAL RATES, AND, THEREFORE, SO ACTS IN A STRICT GOVERNMENTAL CAPA- CITY, WHEREBY IT CANNOT LOSE SUCH WATER RIGHTS AND THE RIGHTS TO DISTRIBUTE ITS WATER AT EQUAL RATES BY ESTOPPEL, LACHES OR ADVERSE USE OF ITS WATER BY THIRD PARTIES	24, 25
CONCLUSION	38

AUTHORITIES CITED

McQuillin on Municipal Corporations, 1966 Revised Volume, Volume 10, Section 29.07, pp. 245, 246	5
Am. Jur. 2d, Vol. 16, § 87, pp. 270, 271	12
C.J.S., Vol. 16, § 36, p. 116	12, 13

CONSTITUTIONAL PROVISIONS CITED

Utah Constitution, Art. XI, § 6	10
---------------------------------------	----

TREATISES CITED

Proceedings Constitutional Convention, Utah, 1895, Volume I	11
--	----

CASES CITED

Ames vs. San Diego, 101 Cal. 394, 35 P. 1006	34
Belcher Sugar Refining Co. vs. St. Louis Grain Elevator Co., 101 Mo. 192, 13 S.W. 822	7
Boyce vs. Killip, 184 Or. 424, 198 P.2d 613	21
Brummitt, et al., vs. Ogden Waterworks Co., 33 Ut. 289, 93 P. 828	27
Central Pacific Railway Co. vs. Droge, 171 Cal. 32, 151 P. 663	32, 33
City of Big Spring vs. Board of Control, 389 S.W. 2d 523, 404 S.W.2d 810	24
City Council of Augusta vs. Richmond County, 178 Ga. 400, 173 S.E. 140	7, 25, 26
City of St. George vs. Public Utilities Commission, 62 Ut. 453, 220 P. 720	27, 28
Eastern Illinois State Normal School vs. City of Charleston, 271 Ill. 602, 111 N.E. 573	8
Fjeldsted vs. Ogden City, 83 Ut. 278, 28 P.2d 144..	29
Holt vs. City of Cheyenne, 22 Wyo. 212, 137 P. 876	29, 30

	Page
Horkan vs. City of Moultrie, 136 Ga. 561, 71 S.E. 785	25
Hyde Park Town vs. Chambers, 99 Ut. 118, 104 P.2d 220	14
Martin vs. City of Stockton, 39 Cal. App. 721, 179 P. 894	34
Patton vs. City of Wilmington, 169 Cal. 521, 147 P. 141	32
Placer Co. vs. Lake Tahoe Railway & Transpor- tation Co., 58 Cal. App. 764, 209 P. 900	33, 34
Reclamation District No. 833 vs. American Farms Co., 209 Cal. 74, 285 P. 688	32
Rowland vs. Kellog Power & Water Co., 43 Idaho 543, 253 P. 840	35
San Diego vs. Cuyamaca Water Co., 209 Cal. 105, 287 P. 475	30, 31, 32
Shannon vs. Huron, 9 S.D. 356, 69 N.W. 598	9
State of New Mexico vs. City of Aztec, 77 N.M., 524, 424 P.2d 801	37, 38
Warm Springs Co. vs. Salt Lake City, 50 Ut. 58, 165 P. 788	6
West Caldwell vs. Caldwell, 26 N.J. 9, 138 A.2d 402	29, 37

IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY, a municipal
corporation,

Plaintiff-Respondent,

vs.

STATE OF UTAH,

Defendant-Appellant.

Case No.
11141

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

This is an action filed by Salt Lake City under the declaratory judgment act against the State of Utah to determine the legal status of an 1890 and a 1926 "agreement" by Salt Lake City to provide free water to the territory of Utah and State of Utah, respectively, for use upon the buildings and grounds of the State Capitol.

As in appellant's brief, the respondent, Salt Lake City, in this brief will be referred to as the *City*, the territory of Utah as the *Territory* and the State of Utah as the *State*.

DISPOSITION IN THE LOWER COURT

The statement of the disposition in the lower court as set forth in appellant's brief is correct, except that appellant uses the words "grant of water", rather than a "grant of free use of water", the latter phrase appearing to be factually correct.

RELIEF SOUGHT ON APPEAL

The plaintiff and respondent seeks an affirmance of the summary judgment and decree granted it in the court below.

STATEMENT OF FACTS

While it is true that this case was submitted to the lower court on the basis of stipulated facts, which included three (3) exhibits, all of which are in the record on this appeal, there is one "fact" in appellant's "summarization" of these facts with which respondent cannot agree.

On page four (4), first paragraph at the top of the page, the appellant in its brief takes argumentative

liberties with the stipulated facts in saying, "as a part of this same arrangement and in order to carry out certain of the conditions in the deed, the City also granted the State ('Territory) the use of water for the grounds and buildings located thereon."

The record actually shows that the 1888 grant of land by the City to the Territory on which land was to be built the capitol building did in fact *require the Territory to use said land as a capitol site and to park and beautify said grounds, nothing being said in the deed of grant with regards to the water to be required for such purpose.* These facts further show that no mention was made of the needed water until two years later when the Territorial Legislature enacted the legislation, (R 11), appropriating the sum of \$10,000.00 to be used to improve the capitol grounds, provided the City furnish free water for said grounds.

As to the remainder of appellant's Statement of Facts, they appear to be correct and accurate and devoid of any legal editorializing.

STATEMENT OF POINTS

POINT I.

THE RESPECTIVE AGREEMENTS MADE WITH REFERENCE TO FURNISHING FREE WATER WITHOUT TIME LIMITATION ARE ULTRA VIRES AND HENCE VOID.

POINT II.

THE AGREEMENT OF 1890 TO FURNISH FREE WATER WAS CONTRARY TO PUBLIC POLICY, WHICH POLICY WAS DECLARED IN WRITING AND EMBODIED IN ARTICLE XI, SECTION 6 OF THE UTAH CONSTITUTION, AND IS THEREFORE VOID.

POINT III.

THE AGREEMENT OF 1926 TO EXTEND THE USE OF FREE WATER TO "ADDITIONAL LANDS" WAS IN VIOLATION OF ARTICLE XI, SECTION 6, OF THE UTAH CONSTITUTION AND THEREFORE VOID.

POINT IV.

THE AGREEMENT BY THE CITY TO PROVIDE THE TERRITORY FREE USE OF ITS WATER WAS NOT A GRANT OF A WATER RIGHT BUT MERELY AN ABORTIVE ATTEMPT TO ENTER INTO A CONTRACT TO PROVIDE WATER FREE OF CHARGE WHICH AGREEMENT WAS VOID FOR LACK OF CONSIDERATION.

POINT V.

THE CITY HOLDS ITS WATER RIGHTS AND REGULATES ITS WATER RATES IN

A POSITION OF TRUST FOR THE USE AND BENEFIT OF ITS RESIDENTS TO BE DISTRIBUTED AT EQUAL RATES, AND, THEREFORE, SO ACTS IN A STRICT GOVERNMENTAL CAPACITY, WHEREBY IT CANNOT LOSE SUCH WATER RIGHTS AND THE RIGHTS TO DISTRIBUTE ITS WATER AT EQUAL RATES BY ESTOPPEL, LACHES OR ADVERSE USE OF ITS WATER BY THIRD PARTIES.

ARGUMENT

POINT I.

THE RESPECTIVE AGREEMENTS MADE WITH REFERENCE TO FURNISHING FREE WATER WITHOUT TIME LIMITATION ARE ULTRA VIRES AND HENCE VOID.

“The established rule (of law) is that municipal corporations have no power to make contracts which will embarrass or control them in the performance of their legislative powers and duties.” McQuillin on Municipal Corporations, 1966 Revised Volume, Volume 10, Section 29.07, p. 245.

This same treatise in said section 29.07 goes on to state:

“So, power conferred upon a city to contract respecting a particular matter does not confer power, by implication, so to contract with reference thereto as to embarrass and interfere with

its future control over the matter, as the public interests may require. *Hence, all contracts which interfere with the legislative or governmental functions of the municipality are absolutely void.*"

A most interesting case from this jurisdiction, involving this question, is that of *Warm Springs Co. v. Salt Lake City*, 50 Utah 58, 165 P. 788. In that case the city leased premises to plaintiff's assignor within city limits, which premises were comprised of a warm springs bath facility and a saloon for bar purposes, both premises leasing for \$200.00 per month. Plaintiff and assignee operated the bathing facility but sublet the saloon for \$100.00 per month, operating thus from 1906 to 1911 when the city passed an ordinance pursuant to state statute excluding the saloon premises from the district in which intoxicating liquors might be sold. Thereafter the plaintiff paid the \$200.00 monthly rentals under protest and in 1916 plaintiff presented its claim to the city for \$5,700.00, which claim the city denied. The court denied the plaintiff's right to recover back the rentals paid under protest, stating as follows:

"If the city had entered into a lease in which it had guaranteed the plaintiff the right to continue the saloon business in the teeth of chapter 106, *the lease to that effect would have been void. What could not be accomplished directly, therefore, cannot be accomplished indirectly . . .* In this case the act by the city which is complained of was governmental act, and hence the city is not liable for the consequences of the act." (Emphasis added.)

By analogy, if a City Commission in the instant case had purported to lease in perpetuity a water right to the Territory (and later to the State), thus attempting to deprive future City Commissions of the power to regulate the sale of water to its inhabitants, surely such lease in perpetuity would, under the reasoning and the rule of the Warm Springs Co. case be held void. Such was the ruling of the court in the case of *Belcher Sugar Refining Co. vs. St. Louis Grain Elevator Co.*, 101 Mo. 192, 13 S.W. 822, wherein it was held that where a city has the right to lease a part of its wharf for the purpose of a warehouse and grain elevator, *it must reserve the right to terminate such lease whenever the public interest demands such action.*

Along these same lines, and very much in point and on all fours with the facts in the instant dispute is the case of *City Council of Augusta vs. Richmond County*, 9134, 178 Ga. 400, 173 S.E. 140. In that case the plaintiff county brought action against defendant city to enjoin the city from cutting off water supplied by city to county courthouse for the past 40 years or more. The city and the county had jointly occupied the courthouse and grounds from 1820 to 1890 when, pursuant to an equitable proceeding in court, an agreement was entered into between the county and the then Mayor of the City which in part provided:

“The city council shall furnish all water necessary to run fountains, water closets, and for all other purposes to the county, free of rent.”

Thereafter, for a period of forty-three years the city did furnish free water to the county as provided in said agreement. In applying the law to the above stated facts the Supreme Court of Georgia in reversing the lower court, stated:

“We cannot concur in the judgment rendered by the court below. We do not think that the municipality could make a binding contract to furnish water free of charge for an indefinite time in the future, for the purpose mentioned in the contract referred to. *The agreement made in reference to furnishing water without charge on the part of the city was ultra vires, and could not be enforced as against subsequent councils of the municipality.*” (Emphasis added.)

A case from another jurisdiction, the State of Illinois, which further explains the law relating to a municipal corporation's lack of power to contract away its water and water rights, (and this without the benefit of a constitutional prohibition such as we have in this state) is that of *Eastern Illinois State Normal School vs. City of Charleston*, 271 Ill. 602, 111 N.E. 573. In that case the city owned and operated a waterworks plant and system and as an inducement to procure the location of the school at said city the City Council adopted a resolution which provided that if the school located within the city's limits the city would furnish water to the school for the consideration of five dollars for a period of fifty years. The court held that the city had no power to make such a contract and said contract was void and could not be enforced.

In the case of *Shannon v. Huron*, 9 S.D. 356, 69 N.W. 598, plaintiff sought to enforce payment of certain warrants issued by the city in payment of debts due for printing certain bills, pamphlets, circulars, letter-heads and envelopes, at the instance of persons who had been selected at a public meeting to compose a committee for the purpose of bringing forward the City of Huron as a candidate for the capitol of the State of South Dakota. The court held the warrants void, saying:

“The constitution of this state, legally adopted and ratified, was in full force at the time plaintiffs entered into an agreement with the capitol committee to do the printing for which three of the warrants in the suit were afterwards issued directly to plaintiffs; and article 10 of section 2 thereof provides that ‘no tax or assessment shall be levied or collected, or debts contracted by municipal corporations, except in pursuance of law for public purposes specified by law.’ The location of the state capitol for the benefit of private individuals was a matter wholly foreign to the purposes and objects of the corporation, the charter of which neither expressly nor by implication authorized any of its officers to burden the municipality with debts incurred in furtherance of the scheme; and the city was entirely powerless to issue its warrants therefor. Plaintiffs, the capitol committee, and all other persons dealing with the officers of the municipality, had notice and were charged with a knowledge of the law, under the limitations and restrictions of which no liability could be created or debt incurred against the city of Huron for printing

capitol campaign literature, and the warrants, when issued, were void in toto."

The application of law in the *Shannon* case to the matter before this court clearly points out the fact that when the city fathers purported to provide (for an indefinite period) free water to the Territory of Utah, such act was beyond the power and authority of the municipality and such an arrangement was void in toto as the court stated in the *Shannon* case.

POINT II.

THE AGREEMENT OF 1890 TO FURNISH FREE WATER WAS CONTRARY TO PUBLIC POLICY, WHICH POLICY WAS DECLARED IN WRITING AND EMBODIED IN ARTICLE XI, SECTION 6 OF THE UTAH CONSTITUTION, AND IS THEREFORE VOID.

In the year 1895, pursuant to the authority of the Enabling Act passed by the Congress of the United States, delegates were elected to serve in the Constitutional Convention of Utah. These delegates discussed at some length the article of the proposed Constitution which had reference to municipal corporations, and the part which concerned them most was Section 6 of Article XI, as adopted, and which reads as follows:

"Sec. 6. [Municipalities forbidden to sell waterworks or rights] No municipal corporation, shall directly or indirectly, lease, sell, alien or dispose of any waterworks, water rights, or sources of

water supply now, or hereafter to be owned or controlled by it; but all such waterworks, water rights and sources of water now owned or hereafter to be acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges: Provided, That nothing herein contained shall be construed to prevent any such municipal corporation from exchanging water-rights, or sources of water supply, for other water-rights or sources of water supply of equal value, and to be devoted in like manner to the public supply of its inhabitants."

It is interesting to read these proceedings and the record of this discussion for it clearly portrays the thinking of those men and the foresight they exercised in recognizing the need for declaring in writing the public policy of this state with reference to the sacred trust in which cities hold their water for the benefit of their inhabitants.

On page 672, first column, of Volume I, Proceedings, Constitutional Convention 1890, Utah, one of the delegates, a Mr. S. A. Thurman, in discussing Section 6 as it reads above, stated:

" . . . I think the amendment (deleting the phrase 'water at reasonable charges') ought to prevail, 'water at reasonable charges.' Now, I take the position that if we leave the balance of the section stand, *requiring cities to hold this property* (ownership and control of water rights and water supply) *as a trust for the benefit of the inhabitants to supply them with water*, the courts will always construe the question of a

reasonable charge, *because it will be a trust fixed and formed by the constitution for the purpose of supplying the people with water, . . .*" (emphasis added)

As hereinafter stated, on the basis of the history and the law, it is respondent's contention that Article XI, Section 6 of the Utah Constitution was a written declaration of the common law existing in the Territory of Utah prior thereto and specifically when the 1890 agreement to furnish free water was made.

In *Am. Jur.* 2d, Vol. 16, page 270 and 271, Section 87, under the heading Circumstances Attending Adoption of Provisions; Existing Conditions and History, on page 271, is the following statement:

"A constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing laws and with reference to them, and, like a statute, is properly to be expounded *in the light of conditions existing at the time of its adoption, the general spirit of the times, and the prevailing sentiments among the people.*" (emphasis added)

The court's attention is also called to a statement in *C.J.S., Constitutional Law*, Volume 16, page 116, Section 36, under the heading, Construction With Reference to Common Law, wherein it is stated:

"In the absence of a clear intention to the contrary, a constitution is generally to be construed in the light of the common law, since there is a presumption that no change in the common law was intended.

“Since a constitution is not the beginning of law in the state, it assumes the existence of a well understood system of law which is to remain in force.”

The court is fully aware of the history of the arid west, and particularly of the history of the Territory and State of Utah; that the early pioneers and settlers of this arid region realized that water was the life blood of their civilization and that particularly for cities and towns to grow, it would be necessary to zealously guard and protect the water rights of such cities and towns with a sacred trust against any political or economic maneuvering by elected officials which could in the future jeopardize and irreparably injure the residents of any such city or town; that when the framers of our constitution met and drafted it they expressed in Article XI, Section 6, the common law as it had existed in this Territory up to that time; and, finally, that the constitution when adopted did, therefore, not change the law of the State of Utah which now expressly prohibits, and in 1890 did impliedly prohibit, cities and towns from alienating or giving away in perpetuity any of their water or water rights and that said constitutional provision was a written declaration of such basic common law as did previously exist in this State when a Territory.

POINT III.

THE AGREEMENT OF 1926 TO EXTEND THE USE OF FREE WATER TO “ADDITION-

AL LANDS" WAS IN VIOLATION OF ARTICLE XI, SECTION 6, OF THE UTAH CONSTITUTION AND THEREFORE VOID.

The meaning of Article XI, Section 6 of the Utah Constitution (*supra*) appears to be absolutely clear and unequivocal. However, this Honorable court was asked to render an interpretation of this constitutional provision in the case of *Hyde Park Town v. Chambers*, 99 Utah 118, 104 P.2d 220, which case dealt with the power or right of a city or town to alienate any of its water rights in light of the above constitutional provision. The town of Hyde Park purported to exchange a water right or a right in perpetuity to free use of the town's water for a right of way for its water main, which transaction this court held to be in violation of Article XI, § 6, *supra*, as an abortive attempt to alienate the water rights of a city or town. This court stated: "We are of the opinion that the contract is void as contended by the town," (the Town's contention was that this contract was void as in violation of Article XI, § 6, (*supra*)).

The application of the law as rendered in the Hyde Park Town case would clearly make void and unenforceable the purported agreement entered into in 1926 between the City and the State.

There is no logical reason in the law why a state, as a party, should have any greater right to violate its own constitution with respect to subdivisions and municipalities of that state than would private indi-

viduals or any other party. There should be no question, therefore, but that the State of Utah was bound, and still is bound, by its own constitutional limitations in its contractual relationships with others, including a city of that state.

The State next advances the conclusion that the City's 1926 agreement to furnish free water to an additional 20 acres of land which the State added to the original capitol site was "No more than a clarification of the 1890 grant." Instead of being a clarification of the 1890 promise to "grant" free use of city water, this agreement actually purported to extend the terms of the former "grant" of free water to the additional land. Why was a clarification of the original promise necessary or required? Free water had been delivered under the original promise for about 36 years without question. No problem of construction or interpretation of the original promise had arisen that needed clarification. The fact is the State had acquired additional lands to add to the capitol grounds and persuaded the City to furnish free water to these grounds the same as the City was furnishing free water to the original capitol site. Such a "grant" of free city water could not relate back and be a part of or in any way clarify the original "grant". *It was a brand new promise to furnish additional water without charge to additional land, but made, we submit, in violation of Section 6, Article XI of the State Constitution and was, for that reason, void.*

POINT IV.

THE AGREEMENT BY THE CITY TO PROVIDE THE TERRITORY FREE USE OF ITS WATER WAS NOT A GRANT OF A WATER RIGHT BUT MERELY AN ABORTIVE ATTEMPT TO ENTER INTO A CONTRACT TO PROVIDE WATER FREE OF CHARGE WHICH AGREEMENT WAS VOID FOR LACK OF CONSIDERATION.

Historically, the arrangement for the City to furnish free water for the grounds and any building erected thereon was an after-thought and was not related to, nor a part of, the consideration for the State Capitol being located in Salt Lake City.

The State first argues that the conveyance of the Capitol site to the Territory and the later granting of free water to the capitol grounds commission were one arrangement or transaction. We maintain that this is no more than a fortuitous assumption, wholly fallacious and contrary to the stipulated facts. We shall demonstrate this by the following detailed reference to the facts as stipulated.

The deed to the Capitol site was dated May 1, 1888. It provides:

“To have and to hold the above granted premises, with appurtenances, and every part thereof unto the said party of the second part . . . for the erection and maintenance of the capitol buildings of Utah Territory or future state of

Utah and the proper appurtenances and surroundings, including a reservoir to said capitol buildings and grounds."

It provided further as a condition to the grant, "that a portion of said land not actually devoted to buildings as aforesaid be improved and cultivated as a public park."

At the 1888 Session of the Territorial Legislature, according to the certificate by C. A. Tingey, Secretary of State, (page 5, Exhibit "A"), it passed an Act, Chapter 28, creating a board of commissioners on capitol grounds, "to take possession and control of the grounds conveyed by the city of Salt Lake to the Territory of Utah . . . to grade, fence, improve," the same.

The Territorial Legislature approved an appropriation March 13, 1890, Chapter XXXIX, Item 52, which provided "for the improvement of capitol grounds to be drawn and expended under the supervision of the capitol commission, \$10,000.00, provided that the above amount be expended on the condition that Salt Lake City furnish, free of charge, sufficient water for said grounds and for the building proposed to be erected thereon." (Paragraph 3, page 2, stipulation of facts.)

The Board of Commissioners on Capitol Grounds, under date of April 29, 1890, in a letter to Salt Lake City, called attention to the lack of funds in the Territorial treasury to pay its share of the cost of the reservoir, asking the city to pay its share. The letter further stated that the late Legislature appropriated \$10,000.00

for improvement of the grounds with the proviso that the city furnish water without charge for the grounds and any building erected thereon, "*as this was specifically understood with the city when arrangements were made to begin the work.*" (Meaning the work of improving the grounds.) (Paragraph 4, page 4, Stipulation of facts.) (Emphasis added.)

The City on receipt of this letter under date of May 6, 1890, passed the resolution to furnish water without charge for use on the capitol grounds and buildings. This resolution reads:

"WHEREAS, the late Legislature appropriated the sum of \$10,000 for improvement of the Capitol Grounds with the proviso that the city furnish water without charge for the grounds and any building erected thereon.

"BE IT RESOLVED that the free use of water be granted to the Commission for the use of the Capitol Grounds and for the use of any buildings erected thereon *in accordance with the specific understanding with the City when the arrangements were made to begin work on said grounds.*" (Emphasis added.)

From the foregoing it is clear that *the matter of furnishing free water was an afterthought*, a unilateral condition imposed by the Legislature as a string to the appropriation of \$10,000.00 to improve the Capitol Grounds and came solely as a result of the action of the Legislature in this respect and had nothing to do with the prior grant of the Capitol site. *It also appears that this grant of free water was negotiated when the*

Capitol Grounds Commission began the work of improving the grounds and not before. This condition was not mentioned in the deed conveying the land to the Territory or as one of the several conditions contained in the deed under which and subject to which the land was conveyed for Capitol Grounds purposes. It was not until two years later when the Legislature appropriated \$10,000.00 to improve the land and the work of improvement began that the furnishing of water, free or otherwise, was raised. If there had been any agreement prior to the appropriation of \$10,000.00 that the City would furnish free water there would be no need for this proviso in the appropriation. The undisputed fact is that it was not until the Capitol Commission commenced work of improving the grounds after the Legislature had appropriated money therefor that the City agreed to furnish free water. The deed had already been executed and recorded.

Under the terms of the deed the Territory was bound to improve the grounds not used for buildings for a public park at its own expense. The deed also provided for the construction of a reservoir to supply water to the Capitol Grounds, the City and Territory each to pay one-half of the cost. *No mention was made of free water, although the matter of water was considered in providing for a reservoir.* It is curious indeed that this item of free water was not mentioned in the deed along with the reservoir and other conditions if it was a part of the original transaction. It was not until the Board on Capitol Grounds was ready to im-

prove the land and an appropriation of \$10,000.00 for that purpose was made that the matter of free water first arose. *When the Legislature appropriated that sum for the improvement of the grounds, it did only that which it was already obligated to do under the express terms of the deed, namely, improve the grounds not used for buildings for a public park.* If the Territory failed to use this money and improve the grounds it would be in violation of the terms of the deed even if the City demanded payment for the water. The conclusion is inescapable that there was, and is, no consideration at all for the grant of free water by the City. The obligation to improve the grounds as a public park already rested upon the State by the terms of the deed. In granting free water the City simply acceded to the demand of the Legislature (which the learned trial judge observed amounted to legislative "extortion") that it furnish free water when the \$10,000.00 appropriation was made to improve the Capitol Grounds, an obligation which already rested upon the Territory under the terms of the City's deed.

Although in its resolution the City Council of Salt Lake City used the word "granted", this word must be understood in light of the full context of the resolution of May 6, 1890. The court's attention is called to the specific language of said resolution wherein the council said "That the free *use* of water be granted to the Commission for the *use* of the Capitol grounds and for the *use* of any building erected thereon . . ." It is clear from this language that it was never the intent of the City

fathers to "grant" to the Territory any water right of any description, kind or nature. A water right, as the court is well aware, is in legal formalities considered realty. A grant of a water right, therefore, must needs carry with it in accordance with the laws of the State of Utah all of the necessary requisites of a conveyance of real property. Certainly, the appellant does not claim that the resolution of May 6, 1890, complies with such requirements and could in anywise purport to be an actual grant of a water right. There is nothing in said resolution which describes the nature of the water, the use of which is "granted", nor is there any reference to the point of diversion or to the quantity of any such water. The resolution, on its face, clearly shows that the intent of the City Council was only to allow the Territory to take water belonging to the City and use it without being charged therefor. Such use was *permissive* and no rights under the law can be or ever could be obtained in perpetuity to such water on the theory that the Territory obtained a "grant" of water from the City. The best that could be said for the "right" of the Territory is that it obtained a right to a free water supply, which it did not and could not do, rather than a water right. In the case of *Boyce v. Killip*, 184 Ore. 424, 198 P.2d 613, the Supreme Court of the State of Oregon held that the terms "water supply" and "water right" generally do not have the same connotation, the latter term meaning generally the right to divert water by artificial means from a natural stream or spring, and that where the parties had *claimed*

a right to divert water, not from a stream or spring, but from a pipe which was part of a water system originating at a stream, there was a right to a "water supply" rather than a "water right".

The position of the State in claiming a "granted" water right appears unfounded in law and in fact. Salt Lake City in effect "grants" to each and every resident of the city a right to take water from its water system, but this implied right or grant certainly does not give the City resident any "granted" right to obtain the water flowing in the city's mains without payment therefor. There is no reason in the law or under the facts of this case why the State should stand in any more favored position from a financial standpoint than any other person within the confines of Salt Lake City.

Futhermore, the source of supply of water which the City has delivered into the distribution system of the State for the last 77 years has been and always will be water belonging to Salt Lake City. The water does not come under the control of the State for its use and benefit until it leaves the water mains of the City, nor has the State acquired any right, whatsoever, in this water until it leaves the water mains of the City and flows into the distribution system of the State. At that point the water belongs to the State of Utah, not by reason of any water right thereto, but because the City has physically connected its water mains with those of the State, allowing this water to flow into the State's distribution system and the only question is

whether or not the State by reason of the agreements of 1890 and 1926 should be exempt from paying the City for said water used by it the same as any other private user. When understood in this light, this case is clearly one to determine whether or not the City fathers under the basic common law and later the constitutional prohibition had any power whatsoever to enter into such an agreement to deliver to the Territory and later the State of Utah free water which, under a sacred trust, belonged to, and was to be held for, the use and benefit of the residents of Salt Lake City. The court's attention is called once again to the discussion of the delegates to the Utah Constitution Convention as regards Article XI, Section 6 (*supra*). Most of their fears were directed to the question of cities and towns in the State using their water systems in an equitable manner so that all the users thereof would be charged fair, equitable, and equal rates for the water used. In light of this discussion it would appear a clear violation of the intent of the framers of our constitution to allow the State of Utah as one of the users of that water to violate the spirit of this constitution. Particularly is this true where the facts clearly indicate that the 1890 arrangement "granted" to the Territory only the free use of the City's water rather than a clear grant of a water right out of a stream or other source of that water.

In view of the foregoing law and facts it is clear that the State of Utah has acquired no right whatsoever to the use of the City water by a grant of a water right.

One of the cases cited by the appellant is the case of *City of Big Spring*, 389 S.W.2d 533, 404 S.W.2d 810, wherein a court upheld the validity of a contract in which the City agreed to deliver free water to a hospital so long as it remained and was operated in the said city. This case is of little value to prove the defendant's point for the reason that Texas does not appear to recognize the common law of the State of Utah, nor has it ever by any constitutional provision declared any such conduct of the City Council to be invalid. Furthermore, the City in that case received the consideration that the hospital would be located in said city to the benefit of the city in exchange for the water. Under the facts of the instant case the city received absolutely no benefit from the Territory for the free water which the city agreed to deliver as has been discussed under this Point IV of this brief.

POINT V.

THE CITY HOLDS ITS WATER RIGHTS AND REGULATES ITS WATER RATES IN A POSITION OF TRUST FOR THE USE AND BENEFIT OF ITS RESIDENTS TO BE DISTRIBUTED AT EQUAL RATES, AND, THEREFORE, SO ACTS IN A STRICT GOVERNMENTAL CAPACITY, WHEREBY IT CANNOT LOSE SUCH WATER RIGHTS AND THE RIGHTS TO DISTRIBUTE ITS WATER AT EQUAL RATES BY ESTOPPEL, LACHES

OR ADVERSE USE OF ITS WATER BY THIRD PARTIES.

In the case of *City Council of Augusta vs. Richmond County*, (supra) the court cites from the case of *Horkan vs. City of Moultrie*, 136 Ga. 561, 71 S.E. 785, wherein the court in the latter case says:

"A council of a municipality cannot make a binding contract by which it undertakes to obligate the municipality to furnish 'free of charge', for an indefinite time in the future, sufficient water for the closets in a given building situated within the corporate limits, in consideration of the owner of the building allowing the municipality to lay its sewers through the land. *Such a contract, being ultra vires and void, could not be ratified by the continued use, under the contract of the sewer through the land by the municipality; nor would the benefit thereby received estop it from subsequently setting up the invalidity of the contract.*" In the opinion Chief Justice Fish said: 'We have found no case, however, that would tend to support a contract made by a city council in behalf of the municipality to furnish water indefinitely to one of its citizens, in consideration of his permitting it to lay a sewer through his land. Succeeding councils would necessarily have the power, we think, to change the water rates from time to time as circumstances might require or justify, in order to obtain sufficient revenue to maintain its waterworks system on the one hand, and, on the other, in order to serve all its patrons at reasonable rates and on equal terms. To allow one council to legally bind the city by a contract of the kind

here in question might so tie the hands of its successors as to result in great injury to the municipality and to the public. * * * *Power in a municipality of making and changing, by ordinance, water rates from time to time, whenever necessary to protect the city in its revenues and to enable it to furnish to all on equal terms and at reasonable prices, is a legislative or governmental power, and therefore cannot be legally bargained or bartered away by one council, or as to forever deprive succeeding councils of the right to exercise it.*" (Emphasis added).

Of further interest is the disposition which that court made with regards to the argument that the City, having received the consideration, (the locating of the school within the city limits) *was estopped* to dispute the validity of the contract even though it had no power to enter into the said contract in the first instance. The court answered this claim by stating:

"Every one is presumed to know the extent of the powers of a municipal corporation, and it *cannot be estopped to aver its incapacity*, which would amount to conferring power to do unauthorized acts simply because it has done them and received the consideration stipulated therefor." (Emphasis added.)

It may be argued that Salt Lake City operates its water system in a proprietary capacity and that, therefore, none of the cases heretofore cited would be applicable law to the facts of this case. Such a position is without any legal basis whatsoever. Our Supreme Court has already ruled in the case of *Brummitt, et al.*

v. *Ogden Waterworks Co.*, 33 Ut. 289, 93 P. 828, as follows:

"That the fixing and regulating of water rates is a governmental function and cannot be surrendered nor suspended by the city council is agreed to by all concerned in this action." (Emphasis added.)

Municipalities in this State, therefore, cannot enter into valid and binding contracts with regard to the rates for services rendered to the public. The right to regulate and fix rates cannot be surrendered. The court in the *Brummitt* case goes on to say:

"In short, while a municipality cannot impair the obligation of its contract under the guise of exercising its police power, yet it cannot surrender or barter away its police powers under the guise of making a contract . . . We are constrained to hold, therefore, that the agreement fixing the rates for the entire period of the contract cannot be upheld; that the city council had the right to agree upon and fix *temporary* rates; . . . that the city council cannot delegate its duty to regulate, fix, and maintain reasonable rates, but that it must exercise this power and duty in that regard whenever the rates are or become excessive and unreasonable."

Another Utah case in which the court has spoken clearly on the law with regards to the fixing and regulating of rates for city services is the case of *City of St. George v. Public Utilities Commission*, 62 Ut. 453, 220 P. 720. In that case the city had a contract with the Power Company to provide free light service to the

city. The Power Company asked the Public Service Commission for a change in rates, which change was granted and the Public Service Commission took away free service to the city when it changed its rates, allowing the city a credit of \$9,907.00. The court upheld the cancellation of free service to the city, and in its ruling made the following statement:

“In this connection it is also well to remember that there are many decisions emanating from respectable courts of last resort in which it is held that the state can under no circumstances surrender its governmental function of regulating the rates for public utilities’ service at any and all times to the end that rates shall be just and fair to all, and that no one can be permitted to obtain an advantage whether for a short or for a long period of time and whether contractual or otherwise.”

Again, we see by the law as expressed by this court in the *City of St. George* case that it has been the declared policy of this State that the *regulation of rates for public utilities’ service is a governmental function which cannot be surrendered or suspended by a city council or a state regulating agency*. The court further held that municipalities cannot enter into binding contracts regarding rates for services rendered to the public for the reason that the right to regulate and fix rates cannot be surrendered in the absence of constitutional or statutory authority. The policy announced in both the *Brummitt* case and *City of St. George* case has been in force in this State for many years and is still the law of the State of Utah.

Another interesting Utah case is that of *Fjeldsted v. Ogden City*, 83 Ut. 278, 28 P.2d 144, in which our Supreme Court stated:

“The power to fix reasonable rates for the commodity of service is in the board of commissioners, and by the constitution it is under a duty to operate the system and supply water at reasonable rates. Constitution, Art. 11, § 6. *The board of commissioners may not by contract, restrict or curtail the powers of future boards to determine and to fix reasonable rates.*” (Emphasis added).

There are cases from other jurisdictions which have ruled on this matter the same as this Honorable Court. In the case of *West Caldwell v .Caldwell*, 26 N.J. 9, 138 A.2d 402, the court stated:

“A municipality cannot bind itself by perpetual contract of unreasonable duration, unless by legislative sanction. . . . *where, as here, the subject matter of the contract bears on legislative or governmental function of local subdivisions of government, involving the exercise of police power in the vital area of health and sanitation in fulfillment of the public need attendant on growth in population and new and different land uses and the expansion of old uses.*”

A case from a sister state whose arid nature is similar to that of Utah, involving this problem, is that of *Holt v. City of Cheyenne*, 22 Wyo. 212, 137 P. 876, wherein the plaintiff claimed title to water by adverse use for 24 years as against the City of Cheyenne. The court in that case says:

"We have no express statutory provision creating or conferring the right to acquire title in municipal property by adverse user as against the municipality, *which property is held by in trust for its inhabitants, and in such case the right is denied by the great weight of authority.* Citing authority applying the rule to lands and streets. The court goes on to say:

"Such, we think, is the better reasoning, and is supported by the great weight of authority, and to which many courts have in later cases acceded, although a contrary doctrine had been announced in earlier decisions. The principle applicable in the case before us, for it may with equal propriety be said that the city of Cheyenne *in the matter of acquiring and holding the right to the use of water for the benefit of the whole public, acts as the agent of the state in exercising within the provisions of its charter and the statutory law, governmental functions and powers and as already stated, the securing of water sufficient not alone for its present but such as may be necessary for its future inhabitants was at is within its governmental powers.* Upon the facts alleged we are of the opinion that plaintiff's theory of title by adverse user is untenable (Emphasis added).

In the case of *San Diego v. Cuyamaca Water Co.* 209 Cal. 105, 287 P. 475, the court says:

"It may be stated as a general rule that the invasion of rights of property which are held by public or municipal corporations in perpetuity in trust for public uses can be held sufficient to furnish the basis of defense based solely upon prescription.

“In the case of *Vernon Irrigation Co. v. Los Angeles*, 106 Cal. 237, 39 P. 972, it was stated, with special reference to the rights to the waters of the Los Angeles river which the city had derived from the pueblo of Los Angeles, that the waters of all rivers were under the Spanish and Mexican rule, public property, for the use of the inhabitants. If this be true, it necessarily follows that the public right and public trust which the pueblo and its successor, the city of San Diego, had in these waters in no respect differed from those other public rights and properties which the state and its various subdivisions and agencies possess and administer; *that it has been uniformly held that such public rights cannot be lost nor the public trust as to their administration and exercise be destroyed either by adverse possession or by laches or by other negligence on the part of the agents of the state or municipality who may from time to time be invested with the duty of their protection and administration.*

“The court found there were not facts upon which to base an estoppel in the usual case.”

“Even if it were conceded that a right based upon estoppel could arise by virtue of mere acquiescence in its assertion as between private persons, *we are satisfied that no such claim of right could come into being as against a municipal corporation, founded upon its mere acquiescence or that of its officials in the diversion by any number of upper appropriators or even of upper riparian owners of the waters of a stream to the use of which such public or municipal corporation was entitled as a portion of its public rights and properties held in perpetual trust for*

public use. The general rule upon this subject stated in 10 Cal. Juris., page 650, and cases cited. (Emphasis added).

In *Reclamation District No. 833 v. American Farms Co.*, 209 Cal. 74, 285 P. 688, the court held that an easement in a canal of a drainage district could not be acquired by adverse use as a private right may not be acquired in property of a public corporation devoted to public use.

In *Patton v. City of Wilmington*, 169 Cal. 521, 147 P. 141, the court says:

“Possession under adverse claim of title of land devoted to public use at the time, is wholly ineffectual, not only upon the public use or easement, but also upon the title to the soil, or land including the public easement and every subordinate estate, as well.”

The court quotes from *Archer v. Salinas*, 93 Cal. 51, 28 P., at page 841:

“The property dedicated has become public property, impressed with the use for which it was dedicated, and neither can the public divert it from that use, nor can it be lost by adverse possession.”

In *Ames v. San Diego*, 101 Cal. 394, 35 P. 1006, it is said that land held by a city in trust for a public use “ ‘cannot be alienated by the city, and the title of the public thereto cannot be lost by a possession adverse to the city.’ ”

In *Central Pacific Railway Co. v. Dodge*, 171 Cal.

32, 151 P. 663, the court refers to *Northern Pacific Railway v. Townsend*, 19 U.S. 267, 47 L.Ed. 1044, in which a grant of a 400 foot right of way had been granted by Congress to the railroad as follows:

“In the last named case the court declared the rule to be that the estate granted in the strip designated as a right of way was an estate in fee for a special public purpose, subject only to reverter at the instance of the United States if the public use was not properly maintained, that the railroad company could not alienate any part of the right of way so as to interfere with the full exercise of the franchise granted. Referring to the claim of Townsend to a title by prescription, the court said:

“ ‘It is evident that to give such efficacy to a statute of limitations of a state as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use *would be to allow that to be done by indirection which could not be done directly*, and that the possession by individuals of portions of the right of way cannot be treated, without overthrowing the act of Congress, as forming the basis of an adverse possession which may ripen into a good title as against the railroad company.’ ” (Emphasis added).

The court in the case of *Placer Co. v. Lake Tahoe Railway & Transportation Co.*, 58 Cal. App., 764, 209 P. 90, held that no interest could be acquired by adverse possession in a commons shown on a township plat as a common for public use, saying:

"It is well settled that where a piece of ground is reserved for or dedicated to public purposes and therefore becomes public property, title thereto cannot be acquired as against the public by adverse possession, and the right of action to recover possession of the same for the public purposes to which it was dedicated is not subject to the statute of limitations, Board of Education of the City and County of San Francisco v. Martin, 92 Cal. 200, 28 P. 799."

This court's attention is called to the case of *Martin v. City of Stockton*, 39 Cal. App. 721, 179 P. 894. This was a suit to quiet title to a parcel of land through which ran a waterway known as Miner's Channel, used as a drain by the city under a conveyance to it which contained a provision that the grant was upon the express condition that the city use the premises as a waterway and drain only. Plaintiff had occupied part of the premises with a building and platform and paint shop for 20 years and claimed title by adverse possession. The court says:

"It has been held and decided that no rights can thus be acquired in and to the public property, or property devoted to a public use, or owned by a municipality for public uses. The mere fact that the municipal officers have been either ignorant of, or indifferent to, the public rights of a municipality, does not enable any trespasser thereon to acquire any ownership therein or divest the city of one particle of its fee in the estate involved."

The court further held that plaintiff could not

adverse the reversionary interest of the grantor to the city.

Another most interesting case which involved the claim of adverse use of city water as against the city is that of *Rowland vs. Kellogg Power & Water Co.*, 43 Idaho 643, 253 P. 840. In answer to the claim of the water user that he by adverse use had acquired a right to use city water without paying therefor, the court stated: ". . . that private ownership of water, devoted to the domestic use of the inhabitants of a city, may not be so acquired." In a concurring opinion one of the justices further stated: "Respondent refused to pay for the service, and urges that by reason of the fact that he has received this service gratuitously for many years he thereby acquired the right to the use of the water by adverse user." This contention is not tenable. A water right can neither be initiated nor acquired by adverse use from the distributing system of a public service corporation. 1 Cal. Jur. 585.

"Respondent claims no right in the system and admits that title and ownership thereto rest in appellant (City). While he claims a water right, under the facts he has nothing more than a right to service, upon compliance, in common with all other users, with the rules and regulations promulgated by the Public Utilities Commission."

In view of the foregoing authorities and the law cited to the court, there should be no question whatsoever that the abortive attempt of the city council of

Salt Lake City on May 6, 1890, to "grant" for an undefined period of time to the Territory free use of City water was null and void and could not be enforced at the time such agreement was entered into, nor could the fact that the City these many years last past has been serving its water to the State free of charge amount to an estoppel which would in any way validate or make enforceable such purported contract.

The cases are legion which hold that a city may not lose property held in trust for the benefit of the residents of such city by adverse use, nor can any such city be estopped to deny the invalidity of any ultra vires act of prior legislators where such act involves a purely governmental function such as the control of water rates. There is no basis for a defense of laches nor estoppel since *the State cannot in any manner whatsoever show how it has changed its position with reference to the use of water to its detriment in reliance on the alleged contract of the city to furnish free water to the State in perpetuity.*

Regardless of all the authorities which hold as stated above, there is the further logical argument that since cities in the State of Utah cannot alienate their water rights by any direct action, it would certainly run contrary to the law if indirectly through adverse use the application of estoppel or laches a city could lose any of its water rights.

The court's attention is called to the fact that the 1890 agreement merely provided for the City to furnish

free use of water to the Territory. Nothing was said in the resolution of the City Council as to how long would be the duration of this arrangement. The 1926 agreement specifically refers to the *perpetual* use of free water by the State and refers back to the 1890 agreement. Whether or not it was the original intent of the City to supply water free of charge to the Territory in perpetuity it is certainly an ambiguous and uncertain aspect of the 1890 arrangement. The courts, in any event, do not favor contracts which by their terms are construed to be perpetual and particularly is this true with regards to a governmental function involving the exercise of police power such as the protection and preservation of the necessary water right held in trust for the benefit of the residents of that city. The case of *West Caldwell v. Caldwell*, supra, also deals with this question. The court in that case stated as follows:

“ . . . perpetual and contractual performance is not favored in the law, and a construction affirming a right in perpetuity is to be avoided unless given in clear and peremptory terms.”

It may be argued by the appellant that the State being superior to the City in its governmental status is not bound by the provisions of Article XI, Section 6 of the Utah Constitution. In this regard, the court's attention is called to the case of *State of New Mexico v. City of Aztec*, 77 N.M. 524, 424 P.2d 801 (March 6, 1967). This case involved a question as to whether or not a constitutional provision, limiting the power of a city to contract a debt, applied to a city's indebted-

ness to a state agency. *The court held that the constitutional provision did apply to the state and its agencies and the contract was held to be invalid whereunder the city had agreed to pay a share of the cost of a storm sewer in connection with a highway project. There appears to be no logic which would justify excluding this State from the effect of its own constitutional provisions and it would, therefore, follow afortiori that any contract entered into by this State which violates an express provision of its own constitution is null and void.*

CONCLUSION

In view of the foregoing authorities cited to the court (and many others of which the court is more fully aware than counsel) which support the respondent's position, it is respectfully submitted that the 1891 arrangement for the City to provide free use of city water to the Territory and that the 1926 agreement for the City to provide the free use of additional city water in perpetuity to the State are both null and void and of no legal effect for the reasons set forth herein and that the lower court did not err in granting summary judgment for the respondent, which judgment the honorable court should affirm.

Respectfully submitted,
HOMER HOLMGREN
City Attorney
LEON A. HALGREN
Assistant City Attorney