

1968

Salt Lake City, A Municipal Corporation v. State of Utah : Brief of Defendant-Appellant

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 Appellant, *Salt Lake City v. Utah*, No. 11141 (Utah Supreme Court, 1968).
https://digitalcommons.law.byu.edu/uofu_sc2/67

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (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 Defendant-Appellant

**Appeal from Declaratory Judgment
of the District Court of Salt Lake County, Utah
Honorable Leonard W. Elton, Judge**

PHIL L. HANSEN
Attorney General
DALLIN W. JENSEN
Assistant Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah
Attorneys for Defendant-
Appellant

LEON A. HALGREN
Assistant City Attorney
414 City and County Building
Salt Lake City, Utah
Attorney for Plaintiff-
Respondent

FILED

MAR 21 1968

CLERK, Supreme Court, Utah

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	2
RELIEF SOUGHT ON APPEAL	3
STATEMENT OF FACTS	3
ARGUMENT	8
POINT I. SALT LAKE CITY HAS BEEN LIMITED IN ITS AUTHORITY TO CHARGE THE STATE FOR THE WATER USED ON THE CAPITOL GROUNDS AND IN THE BUILDINGS LOCATED ON THESE GROUNDS.	8
POINT II. THE CITY WAS NOT ACTING ULTRA VIRES OF ITS AUTHORITY IN MAKING THE USE OF WATER AVAILABLE TO THE STATE WITHOUT CHARGE.	12
POINT III. THERE WAS AMPLE CONSIDERATION FOR BOTH THE 1890 AND THE 1926 GRANT OF WATER BY THE CITY AND THE SUFFICIENCY OF THE CONSIDERATION CANNOT NOW BE QUESTIONED.	

	Page
A. AS TO THE 1890 GRANT	18
B. AS TO THE 1926 CONTRACT	22
POINT IV. IN THE ALTERNATIVE IT IS SUBMITTED THAT THE GRANT OF WATER BY THE CITY CAN BE SUSTAINED AS CONVEYANCE OF A PORTION OF THE CITY'S WATER RIGHT.	24
POINT V. THE ADOPTION OF THE UTAH CONSTITUTION DID NOT APPLY RETROACTIVELY TO VOID THIS GRANT.	27
POINT VI. THE STATE HAS ACQUIRED THE RIGHT TO THE USE OF THIS WATER UNDER THE DOCTRINE OF ADVERSE POSSESSION.	31
POINT VII. AT THIS LATE DATE THE CITY SHOULD NOT BE ALLOWED TO QUESTION THE VALIDITY OF ITS GRANT OF WATER TO THE STATE.	
A. ESTOPPEL	33
B. LACHES	36
POINT VIII. ANY CLAIM FOR PAYMENT THAT THE CITY HAD FOR THE VALUE OF WATER WHICH IT HAS DELIVERED TO THE STATE IS NOW BARRED BY THE STATUTE OF LIMITATIONS.	36
CONCLUSION	37

AUTHORITIES CITED

United States Constitution

Article I, Section 10	30, 31
-----------------------------	--------

Utah Constitution

Article XI, Section 6	2, 8, 14, 27
Article XXIV, Section 1	30
Article XIX, Section 1	30

Utah Statutes

Compiled Laws of Utah, 1888, Chapter X, Section 306	24
Section 73-3-1	32
Section 78-12-25	37

CASES

Argyle v. Mitchell, 59 Utah 263, 202 Pac. 542 (1921)	26
Arizona v. California, 373 U.S. 546 (1963)	26
Brummit v. Ogden Waterworks Co., 33 Utah 285, 93 Pac. 829 (1908)	14
City of Big Spring v. Board of Control, 389 S.W. 2d 523 (Texas 1965), 404 S.W. 2d 810 (Texas 1966)	16, 20, 35
City of East Cleveland v. Board of Education, 157 N.E. 575 (Ohio 1927)	11
City of Gainesville v. Board of Control of the State of Florida, 81 So. 2d 514 (Florida 1955) 9, 14, 17	

	Page
Ebel v. City of Baker, 299 P. 313 (Oregon 1931)	32, 37
Fretz v. City of Edmond, 168 P. 800 (Okla. 1916)..	13
Hammond v. Johnson, 94 Utah 20, 66 Pac. 2d 894 (1937)	32
Higgins v. Oklahoma City, 127 P. 2d 845 (Okla. 1937)	25
Los Angeles v. Los Angeles City Water Company, 177 U.S. 558, (1900)	11, 31
McDonald v. Price, 45 Utah 464, 146 Pac. 550 (1915)	24
McGrew v. Industrial Commission, 96 Utah 203, 85 P. 2d 608 (1938)	28
Mercur Gold Mining & Milling Co. v. Spry, 16 Utah 222 (1898)	28
Morgan v. Johnson, 106 F. 452 (1901)	27
New Orleans Waterworks Co. v. Rivers, 115 U.S. 674 (1885)	11, 31
Omaha Water Company v. City of Omaha, 147 F. 1 (1906)	11
Reed v. City of Anoka, 88 N. W. 981 (Minn. 1902)	17
Salt Lake City v. Investment Company, 43 Utah 181, 134 Pac. 603 (1913)	36
Salt Lake City v. Tax Commission of Utah, 11 U. 2d 359, 359 P. 2d 397 (1961)	9
Shreveport v. Cole, 129 U.S. 36 (1889)	28
Snow v. Keddington, 113 Utah 325, 195 P. 2d 234 (1948)	28

	Page
Wall v. Salt Lake City, 50 Utah 593, 168 Pac. 766 (1917)	34
Walla Walla City v. Walla Walla Water Company, 172 U.S. 1 (1898)	30

TREATISES

16 Am. Jur. 2d, Constitutional Law, Section 441	31
17 Am. Jur. 2d, Contracts, Section 102	22
94 C.J.S. Waters, Section 286	9
1 Corbin on Contracts, Section 121	23
1 Corbin on Contracts, Section 122	23
1 Corbin on Contracts, Section 127	22
2 McQuillin, Municipal Corporations, Section 4.03 (3rd ed. 1966)	9
10 McQuillin, Municipal Corporations, Section 28.38a (3rd ed. 1966)	24
10 McQuillin, Municipal Corporations, Section 28.43 (3rd ed. 1966)	24
10 McQuillin, Municipal Corporations, Section 28.47 (3rd ed. 1966)	24
10 McQuillin, Municipal Corporations, Section 28.55 (3rd ed. 1966)	32
10 McQuillin. Municipal Corporations, Section 49.09 (3rd ed. 1966)	36
12 McQuillin, Muunicipal Corporations, Section 34.104 (3rd ed. 1950)	12

	Page
17 McQuillin, Municipal Corporations, Section 49.06 (3rd ed. 1968)	37
2 Sutherland, Statutory Construction, Section 2201 (3rd ed. 1943)	29
6 Thompson on Real Property, Section 3130 (Replacement 1962)	25

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 Defendant-Appellant

NATURE OF THE CASE

Salt Lake City filed this action seeking a declaration of the rights and duties of the State and the City under an 1890 grant, and supplemental contract in 1926, which provided that the City would furnish water for use on the State Capitol Grounds and in the buildings that have been erected on these grounds without charge to the State.

In this brief, the State of Utah will be referred to as the *State*, and the Territory of Utah will be referred

to as the *Territory*; Salt Lake City will be referred to as the *City*. When the rights of the State are referred to it in this brief it will include the rights acquired by the Territory.

DISPOSITION IN THE LOWER COURT

This matter was heard before the Honorable Leonard W. Elton of the Third Judicial District Court in and for Salt Lake County upon a written stipulation of the Facts. At the hearing on this matter both the City and the State moved for summary judgment. The lower court granted the City's motion and held that the grant of the free use of water by the City to the State was null and void. The lower court concluded: that the grant water was void because of a lack of consideration; that the grant was in violation of the trust under which the City must operate its water system without favor or discrimination to its inhabitants; that the grant violated the public policy of the Territory as was later set forth in Art. XI, § 6 of the Utah Constitution and that the 1926 agreement was in specific violation of said constitutional provision; and, finally, that a municipality holds water rights in a sacred trust for the benefit of its inhabitants and this right cannot be lost by estoppel, laches or adverse use. The court denied, without prejudice, the City's request for an order which would allow the City to collect from the State for water delivered in a separate cause of action.

RELIEF SOUGHT ON APPEAL

Appellant submits that the decision of the lower court should be reversed and that the City should be required to deliver water to the State Capitol grounds and the buildings located on these grounds without any charge to the State.

STATEMENT OF FACTS

This case was submitted on an agreed stipulation of facts, which included three exhibits. Rather than reiterate the information in the stipulation in its entirety, we will summarize the pertinent facts and then direct the court's attention to the appropriate paragraphs of the stipulation as the argument is presented.

When the territorial government of Utah moved the capitol from Fillmore to Salt Lake City, the City conveyed 19.46 acres of land to the Territory for governmental purposes. The State Capitol is located on this site. This conveyance was made in 1888 and the deed is attached to the stipulation of facts as Exhibit "A" (R. 16). The grant of land also conveyed to the Territory a one-half interest in an additional five acres of ground for reservoir purposes (R. 18). One of the conditions of this deed was that the land not actually used for governmental purposes be improved and maintained as a public park (R. 19). That same year the Utah Territorial Legislature created the Board of Commissioners on Capitol Grounds to take possession and

control of the grounds conveyed by the City. The sum of \$25,000.00 was appropriated and expended to improve and beautify these grounds (R. 10).

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 the use of water for the grounds and buildings located thereon. During the 1890 legislative session the Territorial legislature enacted the following legislation (R. 11) :

For the improvement of capitol grounds to be drawn by and expended under the supervision of the capitol commission . . . \$10,000.00.

Provided, that the above amount be expended on condition that Salt Lake City furnish, free of charge, sufficient water for said grounds and for the building proposed to be erected thereon.

On May 6, 1890, the City adopted a resolution granting the free use of water for the Capitol grounds and buildings (R. 21) :

Whereas the late Legislature appropriated the sum of \$10,000.00 for the 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 building erected thereon - in accordance with the specific understanding with the City when arrangements were made to begin work on said grounds.

In order to furnish water to the Capitol grounds and buildings it was necessary to construct a reservoir and pipeline system. The Territory participated with the City in the initial expense of constructing these facilities. However, the City at its own expense has replaced the old reservoir with steel storage tanks and has cleaned the water line to the Capitol grounds (R. 12).

In 1914 the State completed construction of the Utah State Capitol Building on the tract of land described in Exhibit "A". The cost of said building was approximately \$2,309,235.56 and an additional sum of \$126,686.85 was expended for the purpose of grading, excavating, improving and parking the remaining land covered by said conveyance. Upon completion of the Capitol building the City immediately began the delivery of water to satisfy the needs and requirements within the Capitol building and on the surrounding grounds and this practice has continued up to the present time (R. 13 and 14).

Subsequent to the conveyance of land from the City in 1888 the State acquired approximately twenty acres of additional land surrounding the State Capitol building and grounds (R. 13).

In 1926 the State and City entered into an agreement wherein the State agreed to improve and maintain that portion of this additional twenty acres of land which was not being used for government purposes as

a park and the City agreed that its former grant would extend to these lands (R. 22) :

THIS AGREEMENT made and entered into this 25th day of October, A.D. 1926, by and between Salt Lake City, a municipal corporation of Utah, and the State of Utah:

WHEREAS the State of Utah has acquired certain lands adjoining its present Capitol Grounds in Salt Lake City, Utah, and it is now the intention of the State of Utah to improve said land and park the same and to maintain the same as a part of the State Capitol Grounds.

NOW, THEREFORE, in consideration of said improvement and parking of said grounds, and the perpetual maintenance thereof as the State Capitol Grounds, said city does hereby agree that its former grant to the State of the perpetual free use of water for the Capitol Grounds, and the purposes for which it was used, shall also extend to such additional lands as shall be parked, improved and maintained as a part of the Capitol Grounds of the State.

It is understood and agreed that the State will be as economical as possible in the use of the water upon such additional land as shall be parked and improved, and will conserve the said water supply by using only a sufficient amount to preserve and maintain the beauty of the grounds, the lawns, flowers, trees and shrubbery thereof.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written. Done by

authority of a resolution of the Board of Commissioners of Salt Lake City, Utah.

* * * *

The State is supplied with water from the City Creek portion of the City's water system. Over the years it has been necessary for the City to expend substantial sums of money to provide its residents with a quality of water that would meet the health standards of the State of Utah and the United States Department of Health (R. 13). The State has not contributed any funds toward these improvements, however, no claim is being made in this action for reimbursement of these expenditures (R. 14).

Since the construction of the Capitol Building in 1914 the State has constructed a number of other buildings on the Capitol grounds for which the City has also furnished water without charge (R. 14).

The State has, over the years, expended large sums of money to construct, landscape and improve the Capitol grounds as a public park and tourist attraction. In addition the State expends a substantial amount of money annually to maintain the Capitol grounds as a public park (R. 15).

In 1960 the City made a demand on the State to pay for the use of this water. The State refused to make payment alleging that it had no right or obligation to expend public funds for this purpose. This action was then filed by the City.

In the lower court the City relied primarily on the following propositions to sustain its position: that the grant in 1890 was ultra vires the power of the City Commission; that the grant violated the common law of the Territory; that if the grant was valid in the first instance Utah Constitution Art. XI, § 6 voided it and that this constitutional provision prohibited the 1926 agreement; that there was no consideration for the grant of the free use of water; and, finally, that the affirmative defenses raised by the State are invalid. These contentions will be discussed as each relates to the points of argument.

ARGUMENT

POINT I

SALT LAKE CITY HAS BEEN LIMITED IN ITS AUTHORITY TO CHARGE THE STATE FOR THE WATER USED ON THE CAPITOL GROUNDS AND IN THE BUILDINGS LOCATED ON THESE GROUNDS.

When the Territory appropriated the \$10,000.00 for use on the Capitol grounds in 1890 it expressly provided that the appropriation was on the condition that the City was to furnish water without charge, Stipulation of Fact No. 3 (R. 11). The City has accepted this condition and limitation by its action in delivering water to the State for over seventy-five years. This alone would constitute sufficient acceptance of this condition

without any formal acceptance by the City Commission. However, the City did by formal action in 1890 and 1926 expressly accept the condition imposed upon it by the legislature in 1890. By imposing this condition on the City the legislature limited the power of any future city commission to charge the State for the water used on the Capitol grounds and in the buildings. This legislative action did not disturb the general power of the City to charge its inhabitants for the use of water but merely limited the City's power as it affected the State.

As a creature of the State the legislative authority over municipal corporations is plenary and virtually unlimited, 2 McQuillin, *Municipal Corporation*, § 4.03 (3rd ed. 1966); *Salt Lake City v. Tax Commission of Utah*, 11 U. 2d 359, 359 P. 2d 397 (1961). Further, the general power of a municipality to charge for water may be restricted by statute. 94 C.J.S. *Waters*, § 286.

The extent of legislative authority over cities in this regard was discussed by the Supreme Court of Florida in the case of *City of Gainesville v. Board of Control of the State of Florida*, 81 So. 2d 514 (1955). This was an action by the City of Gainesville to determine the rights of the City and the State under a contract where the City had, some forty-five years prior to the action, agreed to furnish water to the State University without charge as an inducement for locating the University in the City. The court held that the City was obligated to continue to furnish the water without charge and in so doing reviewed the circumstances

surrounding the location of the University within the City. One matter commented on by the court was the action of the Florida legislature in setting up a procedure to determine a location of certain educational institutions in the State of Florida and the requirements imposed on certain municipalities under what was known as the "Buckman Act":

So in the Buckman Act and in Section 323 of the Revised Statutes of Florida, the legislature, creator of municipalities, recognized, approved, and, at least in some instances, required contributions from city treasuries of monies as a condition to the establishment and maintenance of institutions of learning within their borders.

Further evidence of the attitude of the legislature with regard to such donations is found in Chapter 5498, Laws of Florida, Acts of 1903, expressly empowering the City of Gainesville to issue bonds for such amount as the city council should determine "for the purpose of securing educational advantages and facilities in or adjacent to such city." F.S.A. § 282.01.

And as late as 1953 the legislature in a footnote to Item No. 62 of the appropriation bill. " * * Provided that none of these monies shall be used to purchase water from the City of Gainesville," Chapter 28115, Laws of Florida 1953, F.S.A. § 282.01, item 62. Of course, we realize that this was long after the promise of the citizens' committee was made but it does indicate to us that the legislative intent forty-eight years afterwards harmonized with the pattern we think was set by the acts to which we have referred.

Also compare *City of East Cleveland v. Board of Education*, 157 N. E. 575 (Ohio 1927).

Limitations on the power of a city to charge for water has been sustained as valid in other cases. In the case of *Los Angeles v. Los Angeles City Water Company*, 177 U.S. 558 (1900) the United States Supreme Court upheld a contract where Los Angeles City had leased its waterworks to a water company for a term of 30 years and the company was to supply water to the inhabitants of the city. The city agreed that this was to be the exclusive supply of city water. The contract further provided that the city would not reduce the water rates below what was then being charged by its lessee. This contract was ratified by the California legislature. The court concluded that this contract was not a grant of the city's rate-making power but rather a valid limitation upon it. It was also held that the provisions of the new California constitution, which would have prohibited the city from granting certain of the privileges provided for in the contract, could not affect an existing contract. Also see *New Orleans Waterworks Co. v. Rivers*, 115 U.S. 674 (1885), and the case of *Omaha Water Company v. City of Omaha*, 147 F. 1 (1906).

The condition and limitation placed on the City by the Territorial legislature was valid when it was imposed, and applied when the parties executed the agreement in 1926 and it is a valid limitation today on the City's power to charge the State for the use of this water.

POINT II

THE CITY WAS NOT ACTING ULTRA VIRES OF ITS AUTHORITY IN MAKING THE USE OF WATER AVAILABLE TO THE STATE WITHOUT CHARGE.

The City was acting within its authority to grant the State the use of water free of charge even if the legislature had not expressly authorized such action. Grants of this nature have been sustained as either a donation or a binding contractual arrangement.

There was nothing inherently wrong with the City providing the State with water free of charge as was concluded by the lower court. Nor did this grant in any way violate the public policy of the State. The action of the City was in furtherance of a public purpose and this is sufficient to justify not charging the State for the use of this water, 12 McQuillin, *Municipal Corporations*, § 34.104 (3rd ed. 1950) :

Discriminations in the interest of the public and which benefit the people generally appear to be favored. Perhaps no rule can be formulated with sufficient flexibility to apply to every case that may arise. As once said: "It is only when the discrimination inures to the undue advantage of one man in consequence of some injustice inflicted on another that the law intervenes for the protection of the latter." Discriminations in favor of the government or charitable institutions, however, have been upheld. Discriminations in favor of the public at large, it has been said, are not opposed to public policy inasmuch

as they benefit the people generally by relieving them of part of their burdens and consequently such discrimination cannot be held illegal in the absence of legislation upon the subject.

The Supreme Court of Oklahoma in the case of *Fretz v. City of Edmond*, 168 P. 800 (1916) specifically upheld a grant of free water to a public institution on the ground that it was for a public purpose:

The contention that the city has the power in proper case to give from the resources of its public service plants to public institutions or public uses without unjustly discriminating against the rights of its inhabitants seems to be supported by reason, logic, and abstract justice. A fire originates within the borders of a city upon the property owned by some person who has never been a user of the city water. The fire is extinguished by water furnished by the city plant. Can it be said that the city is required to install a meter at some place upon the hose line in order to determine the number of thousand gallons for which the owner of the property must pay, or that by failing so to do and giving the water, not only for the benefit of the private individual, but for the benefit of the public, it unjustly discriminated against some person who has paid for all the water that he used? The statement of the proposition, of course, reveals its absurdity, and shows that the conduct of the city must be based, not upon absolute equality of service, but upon discrimination which is not essentially unjust. The public lavatories, rest rooms, public fountains, and public parks maintained by cities, are all places where water is donated for the public good. So it must seem

that water might be given for use in the city hall, or the city's public buildings. Does the rule extend to those institutions which are owned and controlled, not by the city, but by the State? We can see no good reason for the distinction between them, where the state institution of learning is located within the city and redounds, as it must both to the benefit of the business activities of the city and to the intellectual and moral life of its inhabitants. The support of that institution must be for the public good.

The case of *Brummitt v. Ogden Waterworks Co.*, 33 Utah 285, 93 Pac. 829 (1908) which is the principal case the City relied on in the lower court does not contravene this proposition. In this decision the court was concerned with the City delegating its general power to fix rates and with the problem of prohibiting a private benefit at public expense. This is clearly distinguishable from this situation. Further, there is nothing in Art. XI, § 6 of the Utah Constitution which would require a completely uniform charge to all users of City water. Hence, it would not matter whether such a grant was made before or after the Utah Constitution was adopted. Therefore, the 1926 agreement is valid even if it is considered to be separate and distinct from the 1890 grant. However, it appears that the 1926 contract was an attempt to clarify and more clearly define the limits of the prior arrangement of the parties regarding the maintaining of the Capitol grounds as a public park.

In *City of Gainesville v. Board of Control of the*

State of Florida, supra, the Florida court concluded that there was authority for the city to make such grant:

By the express terms of the Buckman Act the Board of Control was given the power "to receive donations" and we construe this provision to authorize acceptance of donations by the City of Gainesville. We have been directed to no provision of the city charter, expressly granting to the city the power to enter such an agreement as was executed by the "committee of citizens." Nor has our research revealed express authority so to contract.

After a careful study of this record, we conclude that the whole pattern for reorganizing and maintaining the educational system offered an opportunity for legal contributions by cities from their funds in order to secure to the citizens the obvious advantages of having institutions located in their midst. True no express grant of power so to contribute appeared in the Gainesville charter but it was properly implied from the powers expressed.

* * * *

The donation was, in effect, one for the benefit of the State, as well as the city, and was made to agents of the State with apparent sanction of the State. This, of course, would apply to any city offering a similar inducement. And there is nothing innately wrong with the donation. We would have to hold it of such character on the ground that no express power in that regard was given and none was given from which the power could be implied or to which the power to spend was incidental. We cannot find in the history of the transaction such defects or in the law such

a lack that would justify this absolute decision. Not only do we reject this conclusion but we think the action of the legislature in dealing with the educational system for half a century manifested a sanction by that body of the action of the city—or on behalf of the city.

We end the discussion on this point by remarking that in our opinion the commitment was not void; that it was ratified both by the city and the State.

The Texas court in the *City of Big Spring v. Board of Control*, *infra*, had no difficulty in sustaining a contract in which the City of Big Spring agreed to supply water to an agency of the State of Texas at a specified rate for as long as the State maintained a hospital within the city:

Under the first point it is argued that by the contract the City of Big Spring surrendered its right to determine the rates to be charged water users for water; that this is a legislative or governmental function, and a contract which is a surrender by the City of such rights is therefore void. Cases discussing governmental functions of a city and its inability to delegate or surrender these functions are cited to sustain this point. We have no quarrel with these cases. In the case we have before us the City is exercising a proprietary or business function only. In such capacity a city can make a contract, under authority of legislative enactment, in all things as an individual or private corporation. *City of Texarkana v. Wiggins*, 151 Tex. 100, 246 S. W. 2d 622 (1952); *City of Crosbyton v. Texas-New Mexico Utilities Co.*, 157 S.W. 2d

418, 420 (Tex. Civ. App., 1942, error refused, want of merit); 39 Tex. Jur. 2d 638, § 308.

The Supreme Court of the State of Minnesota in an early case when presented a similar question reached this same conclusion. *Reed v. City of Anoka*, 88 N. W. 981 (1902). The Minnesota Court concluded that where large investments are required under long-term contracts of this nature, these contracts should be a matter of stability and not subject to the whim of each succeeding municipal council. The court further concluded that the purpose of these contracts is not to govern but to secure for the municipality a private benefit, hence are business in nature and not governmental.

At this late date all doubts concerning the authority of the City to make this grant should be resolved in favor of the grant being valid. As stated by the court in the *City of Gainesville* case, *supra*:

The circuit judge thought there could be no serious contention that the city had not either authorized the contract in the first place, or ratified it when it honored the agreement for about fifty years. While he felt that a city could not be estopped to assert the invalidity of a contract that was ultra vires, he found that the fact that the municipal officials, as well as the members of the Board of Control, considered that the city was acting within its powers highly "persuasive to the conclusion that the City did have power to make the contract."

POINT III

T H E R E W A S A M P L E C O N S I D E R A T I O N F O R B O T H T H E 1890 A N D T H E 1924 G R A N T O F W A T E R B Y T H E C I T Y A N D T H E S U F F I C I E N C Y O F T H E C O N S I D E R A T I O N C A N N O T N O W B E Q U E S T I O N E D .

A. AS TO THE 1890 GRANT.

While the 1890 grant of water can be sustained as a separate and distinct transaction from the grant of land by the City to the Territory it is submitted that the grant of land and water to the Territory evolved out of one transaction even though the grants were made in two separate documents. We direct the court's attention to the following facts which substantiate this contention.

It is apparent from the recitals in deed of the land and the grant of the water that the City was offering the land and water to the Territory to gain the financial benefits which flow to the capitol city of the State. The City also secured the benefit of an additional public park (R. 19).

In addition to the 19.46 acres of land for governmental purposes, the grant of 1888 also conveyed to the Territory a one-half interest in an additional five acres of ground for reservoir purposes (R. 18). It seems apparent that the parties were contemplating the use of water under this original deed. The Territorial Legislature obviously thought the City was furnishing

water in 1888 when \$25,000.00 was appropriated to construct a reservoir in conjunction with the City for the purpose of supplying water to the grounds and buildings and to improve and beautify the Capitol grounds. Further, the 1890 act which appropriated \$10,000.00 for the improvement of the Capitol grounds was made on the express condition that the City furnish water free of charge (R. 11).

This prior understanding concerning the City's obligation to furnish free water was also reflected in the City's resolution of May 6, 1890, wherein water was granted for use on the Capitol grounds and any building erected thereon, ". . . in accordance with the specific understanding with the City when arrangements were made to begin work on said grounds," (R. 21). The record is clear that the grant of land and water both evolved from the single transaction of relocating the state capitol.

Turning now to the matter of the consideration which flowed to the City by virtue of this relocation. We admit that this is somewhat of a unique contract, but that does not make it invalid. It is rare indeed that a state government moves its capitol from one city to another. Some of the background surrounding this transaction is briefly reflected in the recitals of the deed conveying the original 19.46 acres to the Territory in 1888 (R. 16). However, suffice to say, the Territory and the City reached an accord concerning the relocation of the state capitol in Salt Lake City.

Certainly the benefits the City received for relocating the state capitol within its boundaries was ample consideration for the grant of the land and the water. Salt Lake City's purpose in making the land and water available to the Territory of Utah was to secure the financial benefits which flow to a capitol city of a state. The rewards to the City have been numerous and include new residents, tourist trade, substantial state payrolls and periodic state expenditures of funds for capital improvements; as well as the construction and maintenance of an additional public park within the city.

There is a recent decision from the Supreme Court of the State of Texas which is factually almost identical with this litigation and the Texas Court deals with a number of the questions which have been raised in this litigation. *City of Big Spring v. Board of Control*, 389 S. W. 2d 523, Court of Civil Appeals of Texas (1965); 404 S.W. 2d 810, Supreme Court of Texas (1966). One of the matters considered in this case was the matter of consideration under this type of contract. The City of Big Spring sought a declaratory judgment against the State of Texas to determine the rights of the parties under a certain contract wherein the city had agreed to furnish water to the Big Spring's State Hospital, an agency of the State of Texas, at a rate of ten cents per thousand gallons. The contract provided that the quantity would not exceed three hundred thousand gallons per day and would continue as long as the state, in good faith, maintained and operated the hospital on a site within the city. The contract was entered

into in 1938 and the parties had performed under it since that time. The city complained that the contract was costing it money in recent years because the cost of treatment and distribution of water had increased substantially since 1938. The cost of water to the city for delivery to the hospital during the period 1960-1964 was 33.75 cents per thousand gallons. The Texas court took cognizance of the fact that the state had spent in excess of 18 million dollar establishing the hospital facilities and had a payroll of approximately \$91,000 per month. The court considered these items to be a substantial benefit to the City of Big Spring and sufficient consideration for the contract. After reviewing the circumstances of that transaction and expenditures made by the state, the Texas Court found:

The State has paid a valuable consideration for its contract right to purchase water from the City, to-wit, the establishment and maintenance of the hospital since the late 1930's. Its acceptance of the benefits under the contract makes the City's obligation to furnish water needed by the State a subsisting and binding obligation. *Guadalupe-Blanco River Authority v. City of San Antonio*, 145 Tex. 611, 200 S.W. 2d 989 (1947). See also *Pace Corp. v. Jackson*, 155 Tex. 179, 284 S.W. 2d 340 (1956); *Portland Gasoline Co. v. Superior Marketing Co.*, 150 Tex. 533, 243 S.W. 2d 823 (1952); *Landley v. Norris*, 141 Tex. 405, 173 S.W. 2d 454, 148 A.L.R. 555 (1943).

The facts of the above case are entirely analogous to this situation and the rule announced above should be determinative here.

However, if this court determines there was a need for some independent consideration to support the 1890 grant of water, there was a specific monetary consideration for this grant. The legislature in 1890 appropriated \$10,000.00 for the improvement of the Capitol grounds on condition that the City execute this grant, Stipulation of Fact No. 3 (R. 11). Also, the State has continued to expend substantial amounts of money to improve and maintain the Capitol grounds as a public park in reliance of the 1890 grant, Stipulation of Fact Nos. 12 and 13 (R. 15). But the point here is, there was consideration for this grant and the adequacy of it cannot be questioned at this time. This is fundamental contract law.

The general rule that the adequacy of the consideration is immaterial has been undoubted ever since the concept of consideration began to be developed. 17 Am. Jur. 2d, *Contracts*, § 102 p. 446.

Also see 1 *Corbin on Contracts*, § 127.

There is absolutely no basis upon which to conclude that there was a lack of consideration for the grant of water in 1890, and the present City Commission has no power to rescind this contract.

B. AS TO THE 1926 CONTRACT.

The 1926 agreement specifically provided that the free use of water was extended to the additional lands which had been acquired by the State adjoining the

present Capitol grounds in consideration of the improvement and maintenance of said lands as a public park.

There is no doubt but what the City received substantial benefits under the 1926 agreement. The enlargement of the public park around the Capitol makes it a valuable asset to the City. The State has spent in excess of \$350,000.00 in constructing, improving and maintaining the entire Capitol grounds as a public park and tourist attraction (R. 15). This park attracts thousands of visitors annually, many of whom are residents of the City. The Daughters of the Utah Pioneers Museum has been constructed on this later acquired land and receives approximately 200,000 visitors annually (R. 14). This surely results in many direct and indirect financial benefits to the City.

It is costing the State approximately \$40,000.00 annually to maintain the Capitol grounds as a public park (R. 15). This is a continuing benefit to the City and will remain an obligation on the State as long as it maintains the seat of state government on these grounds. The benefits to the City under this arrangement are substantial and sufficient to sustain this agreement, 1 *Corbin on Contracts*, § 121 and 122.

It is no answer to this proposition to state that these grounds would have been maintained in any event. Whether Utah would be enjoying the extensive and attractive Capitol grounds it now has may be questionable. But the fact is that the City bargained for this additional public park and the State has performed on

this agreement. After receiving the benefits under the agreement for all of these years the City should not now be allowed to disclaim its legally incurred obligations.

POINT IV

IN THE ALTERNATIVE IT IS SUBMITTED THAT THE GRANT OF WATER BY THE CITY CAN BE SUSTAINED AS CONVEYANCE OF A PORTION OF THE CITY'S WATER RIGHT.

The legislature in granting Salt Lake City its charter in 1888 empowered the City to sell, lease, convey or dispose of property both real and personal for the benefit of the City, Utah Compiled Laws of 1888, Ch. X, § 306. There is nothing in the record to indicate that this particular source of water was at the time of the conveyance being devoted to public use or was needed to meet the reasonably foreseeable demands of the City. Indeed this water was apparently surplus to the City's needs and as such could be sold. 10 McQuillin, *Municipal Corporations*, § 28.38a (3rd ed. 1966). Also see § 28.43 for transfer of property for a public use. Further, the law usually indulges in presumptions in favor of the authority of a municipality to convey and the legality of a conveyance. 10 McQuillin, *Municipal Corporations*, § 28.47 (3rd ed. 1966). This court has even concluded that city may dispose of a public utility when it is in the best interests of the City to do so, *McDonald v. Price*, 45 Utah 464, 466, 146 Pac. 550 (1915).

The resolution setting forth this conveyance uses the word "grant" and this is generally sufficient to convey an interest in real property.

The word "grant" is of very general use as a word of conveyance. It has lost its restricted meaning at common law and is at the present date effectual to convey an estate in a corporeal hereditament. 6 *Thompson on Real Property* § 3130 (Replacement 1962).

This principle was noted by the Supreme Court of Oklahoma in the case of *Higgins v. Oklahoma City*, 127 P. 2d 845 (1937) :

"Grant" and "conveyance" are words often used interchangeably and either is sufficient as an operative word in the deed to pass title to a present state.

It seems clear that the City at the time it made this grant intended to pass a permanent vested right to the use of this water to the State.

Further, the grant was sufficiently definite to constitute a valid conveyance of a water right. The place where the water was to be used was abundantly clear. This included the Capitol grounds and buildings, nothing more is needed in this regard. The nature of use is also adequately spelled out. The water was to be used for the irrigation of the Capitol grounds in order that they may be maintained as a public park and for the domestic requirements of the various state office buildings which were to be constructed upon this

ground. The City obviously knew the point at which the water was to be diverted and the quantity required, as it has been delivering the water for many years.

As a matter of water law the fact that a water right does not set forth an exact quantity of water does not defeat the right. This court has sustained a fractional apportionment of water between users where no specific quantity was given as not being indefinite and uncertain, *Argyle v. Mitchell*, 59 Utah 263, 202 Pac. 542 (1921). This principle has also been made abundantly clear in the case of Indian Reservations. The United States Supreme Court has held that when the government reserved land for the Indians it impliedly reserved sufficient water to carry out the purposes of the reservation, *Arizona v. California*, 373 U.S. 546 (1963). In this case the court found it proper to determine the quantity of water allowed under the water right based on evidence other than the document which created the right. The above case is not set out for the purpose of urging any reservation concept, but rather to demonstrate that there is nothing improper in determining the quantity of water under a specific water right based on extrinsic evidence, rather than the limited language of the document creating the right. Any ambiguity concerning the extent of the grant in 1890 was clarified by the 1926 agreement between the parties. This was the purpose of this latter contract. The fact that the City has been supplying sufficient water for State purposes for some 75 years leaves n

doubt that both parties understood what quantity of water was conveyed.

Further, this conveyance is not defective simply because it is evidenced by a resolution. This question was presented to the Circuit Court of Appeals for the 8th Circuit in the relatively early case of *Morgan v. Johnson*, 106 F. 452 (1901). In that case the City of Denver attempted to rescind a deed by which it had by motion conveyed certain real property to an individual some 18 years before the action arose. The court in sustaining the conveyance stated that, under such circumstances, it would have to find an insurmountable legal hurdle before it could be induced to disturb defendant's possession.

POINT V.

THE ADOPTION OF THE UTAH CONSTITUTION DID NOT APPLY RETROACTIVELY TO VOID THIS GRANT.

In the lower court the City relied heavily on Utah Const. Art. XI, § 6 to avoid the consequences of its prior commitment to furnish water to the State. This section prohibits a municipality from directly or indirectly selling or disposing of its water rights. We have pointed out above that this constitutional provision does not apply to the facts of this case. However, in addition the grant here involved was made in 1890 and the constitution was not adopted until 1896. It

is a well-accepted general rule that constitutional provisions only operate prospectively unless it is clear there was a contrary intention. The United States Supreme Court spelled this concept out in the relatively early decision of *Shreveport v. Cole*, 129 U. S. 36 (1889):

Constitutions as well as statutes are construed to operate prospectively only, unless, on the face of the instrument or enactment, the contrary intention is manifest beyond reasonable doubt.

This court enunciated this same rule in the case of *Mercur Gold Mining & Milling Co. v. Spry*, 16 Utah 222 (1898) shortly after the Utah Constitution was adopted:

Constitutions, as well as statutes, should operate prospectively only, unless the words employed show a clear intention that they should have a retrospective effect. This rule of construction as to statutes should always be adhered to, unless there be something on the face of the statute putting it beyond doubt that the legislature meant it to operate retrospectively. Cooley, Const. Lim. p. 73; Suth. St. Const. § 463-465.

This same principle has been applied to constitutional amendments, *McGrew v. Industrial Commission*, 96 Utah 203, 85 P. 2d 608 (1938) and *Snow v. Keddington*, 113 Utah 325 195, P. 2d 234 (1948).

The very language of the constitution makes it clear that the above quoted section was only to operate prospectively. The section discusses water right, "...

now or hereafter to be owned or controlled by it." This language evidences only a prospective intent. It would certainly be an unsettling proposition to find out that all pre-constitutional rights were in jeopardy where constitutional prohibitions were enacted. 2 Sutherland, *Statutory Construction*, § 2201 (3rd ed. 1943) discusses the evil of applying laws retroactively.

Retrospective operation is not favored by the courts, however, and a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application. The rule is the converse of the general principle that statutes are to operate prospectively and is founded on judicial premonition that retroactive laws are characterized by want of notice and lack of knowledge of past conditions and that such laws disturb feelings of security in past transactions.

The kinship between ex post facto laws and civil retroactive laws is likewise recognized, and since the ex post facto provision is limited to criminal statutes, protection from improper retroactivity has been included within the due process clause.

The City seeks to reap the benefits of one constitutional provision and ignore the remainder of this important document. The City's position gives the impression that there was one set of rules prior to 1896 and another set after. We do not argue that what constitution prohibits cannot be allowed, but we do not believe there was any intent to disrupt vested rights.

In fact Utah Const. Art. XXIV, § 1 spells just the opposite intent:

In order that no inconvenience may arise, by reason of the change from a Territorial to a State Government, it is hereby declared that all writs, actions, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, both public and private, shall continue as if no change had taken place; and all process which may issue, under the authority of the Territory of Utah, previous to its admission into the Union, shall be as valid as if issued in the name of the State of Utah.

This provision makes it clear that the rights acquired by the State under the 1890 grant continued. It is further provided in Utah Const. Art. XIX § 1 that:

All institutions and other property of the Territory, upon the adoption of this Constitution, shall become the Institutions and property of the State of Utah.

To apply this constitutional provision retroactively as contended for by the City would be an impairment of contract under Art. I, § 10 of the United States Constitution. Rights acquired under the legislation of a territory are subject to Art. I, § 10 of the United States Constitution against impairment of contracts. The United States Supreme Court so held in the case of *Walla Walla City v. Walla Walla Water Company*, 172 U.S. 1 (1898). This was an action by the water company to enjoin the city from erecting waterworks pursuant to a city ordinance. The Territory of Wash-

ington incorporated the City of Walla Walla and gave it the power to provide a water supply for its inhabitants and to grant the use of city streets for the purpose of laying pipes to furnish water to the residents of the city. The terms of such a grant could not exceed twenty-five years. Pursuant to this legislation the city granted the water company the right to lay and maintain water lines and supply water to the city for a twenty-five year period. The city also agreed that it would not maintain a water system of its own during this time. The contract had been in force for about six years when the city enacted an ordinance to construct its own water supply system. The court found that the city was bound by the provisions of its prior contract and this contract was protected by Art. I, § 10 of the United States Constitution. Also see *Los Angeles v. Los Angeles City Water Company*, supra, and *New Orleans Waterworks Co. v. Rivers*, supra, on this point. These cases make it clear that the constitutional protection against impairment of contracts applies to public contracts. Also see 16 Am. Jur. 2d *Constitutional Law*, § 441. The above cited cases also make it clear that it makes no difference whether the impairment occurs by statute or under a state constitutional provision.

POINT VI.

THE STATE HAS ACQUIRED THE
RIGHT TO THE USE OF THIS WATER UN-
DER THE DOCTRINE OF ADVERSE POS-
SESSION.

If the court were to determine that the prior grant of the City was invalid, the State is still entitled to the use of this water under the doctrine of adverse possession. Ever since 1890, the State has had possession and use of a sufficient quantity of water for the Capitol grounds and the buildings located thereon. The use has been made under a claim of right, exclusive of all other rights and has been used continuously without interruption, openly and notoriously to plaintiff against all the world for more than 75 years. Such use is sufficient to establish a right. *Hammond v. Johnson*, 91 Utah 20, 66 Pac. 2d 894 (1937). We are aware that the Utah Legislature in 1939 terminated the possibility of acquiring any further rights to water under this doctrine, Section 73-3-1, U.C.A. 1953. However, any right which had vested prior to that time was not affected by this enactment. Therefore, the State is entitled to the quantity of water which it was beneficially using as of 1939.

While it is generally considered that property held by a municipal corporation for a governmental purpose cannot be acquired by adverse possession, there is authority which holds that other municipal property may be lost by adverse use. 10 McQuillin, *Municipal Corporations*, § 28.55 (3rd ed. 1966).

The Supreme Court of the State of Oregon expressly held that a city can lose its water rights by adverse possession, *Ebell v. City of Baker*, 299 P. 91 (1931):

The statute of limitations runs against the city in its proprietary or business capacity. *Phillips v. Leininger*, 280 Ill., 132, 117 N.E. 497, 498. A city can lose its water rights by adverse possession and user by another, amounting to prescription. 3 *Kinney on Irrigation and Water Rights* (2d ed.) p. 2599, § 1441. The power to provide a water system is not governmental or legislative in character, but strictly proprietary, and the city engaged in the prosecution of such an improvement and selling water for gain is clothed in such authority and subject to the same liabilities as a private person. *Tone v. Tillamook*, 58 Or. 382, 386, 114 P. 938; *Twohy v. Ochoco*, 108 Or. 1, 40, 210 P. 873, 216 P. 189, and cases there cited.

POINT VII.

AT THIS LATE DATE THE CITY SHOULD NOT BE ALLOWED TO QUESTION THE VALIDITY OF ITS GRANT OF WATER TO THE STATE.

A. ESTOPPEL.

Under the fundamental principles of equity, the City should now be estopped to deny the validity of its prior grant of water. We have already pointed out the facts and circumstances surrounding the execution of this grant. The City should not now be permitted to take an inconsistent position regarding its authority or raise technical objections concerning the execution of the document after the State has relied to its detri-

ment on the City's action. Their prior representations are now a bar to the present claims. Large sums of money have been expended by the State to construct buildings and improve and maintain the grounds according to the terms of the grant and with the full knowledge of the City.

Nor is there any doubt that the doctrine of estoppel applies to a municipal corporation under this type of grant. This Court in the case of *Wall v. Salt Lake City*, 50 Utah 593, 168 Pac. 766 (1917), specifically allowed this defense against Salt Lake City. In the Wall case, the City attempted to disavow a prior conveyance of land. The court found that the city council after a complete investigation had authorized the conveyance and that the plaintiff had relied on the conveyance to the extent of lending money on the property. Under these circumstances, it was held that the city was now estopped to deny its former action:

We believe, as was said by the court in *City of Sullivan v. Tichenor*, supra, cited by appellant, that:

"A municipal corporation can no more profit by fraud upon property owners than an individual and may be estopped by conduct."

Or, as said by Judge Dillon, in note one to the section above quoted, referring to the character of acts necessary to constitute an estoppel:

The principle of estoppel in pais has been applied to exceptional cases where the elements calling for its exercise appear to have been

abandonment of the public use for the prescriptive period, inclosure and expensive improvements, such as large and costly buildings, or acts of the municipality inducing the abutter to believe that there is no longer any street, and the expenditure of money in reliance upon the acts of the municipality. The absolute bona fides of the abutter or adverse possessor is a most important factor where an estoppel in pais is claimed. The acts relied on must be of such character as to amount to a fraud, if the city were permitted to claim otherwise.

We hold that this case falls within the exceptional class of cases referred to by Judge Dillon, and that it is the duty of the court to decide it as "right and justice require." It is our opinion that the city is estopped from claiming the premises in question as a public street.

This same concept was expressly stated by the court of civil appeals of Texas in the case of *City of Big Spring*, supra:

Even if the Contract is invalid, we are of the opinion that the City is in no position to complain. It is estopped to do so under the plainest principles of equity. In *Boiles v. City of Abilene*, 276 S.W. 2d 922, Eastland C.C.A., writ ref., it was held that the City could not repudiate the obligations of a Contract on the ground of its partial invalidity while retaining its benefits, the Court saying: "It is the settled law that a municipal corporation is estopped to deny the validity of a contract where it exacts performance from the other party and accepts the benefits accruing to it therefrom."

B. LACHES.

Salt Lake City is certainly in no position to question the form or substance of the 1890 grant. By waiting some 70 years to raise these questions, the City is unquestionably guilty of laches and lack of diligence. Although some authorities hold that the doctrine of laches does not apply to a municipal corporation, many hold to the contrary. This Court in the case of *Salt Lake City v. Investment Company*, 43 Utah 181, 134 Pac. 603 (1913), has expressly recognized that the doctrine of laches is applicable to cities in this state:

It is also a well-recognized rule that all the consequences of notice, laches, and lack of diligence apply to a municipal corporation with the same effect that those matters do to private corporation or individuals.

The question of whether laches applies to a particular situation should be determined from the facts of the particular case and whether injury has resulted. 10 McQuillin, *Municipal Corporations*, § 49.09 (3rd ed. 1966). There is no doubt that the State has relied on this grant of water and would be injured if the grant were not upheld. The City is guilty of unreasonable delay in bringing this action and as a matter of equity should now be barred from questioning its prior grant.

POINT VIII.

ANY CLAIM FOR PAYMENT THAT THE CITY HAD FOR THE VALUE OF WATER

WHICH IT HAS DELIVERED TO THE STATE IS NOW BARRED BY THE STATUTE OF LIMITATIONS.

If the City ever had a valid claim for payment for the value of the water which it has historically delivered to the State for use on the Capitol grounds that claim is now barred under the provisions of Section 78-12-25, Utah Code Annotated, 1953. This section provides that an action for claims of this nature must be commenced within the four years after the cause of action accrued. Over seventy-five years have elapsed since the City entered into the arrangement to deliver water to the State.

Limitations of actions are generally applicable to a municipality when it is acting in its business or proprietary capacity. This rule is stated in 17 McQuillin, *Municipal Corporations*, § 49.06 (3rd. ed. 1968), as follows:

It is generally held that the statute of limitations may be interposed as a defense in an action of a municipal corporation to enforce rights held by it in its private or corporation capacity.

Also see the Oregon case of *Ebell v. City of Baker*, 299 Pac. 313 (1931), where this same rule was found to be applicable.

CONCLUSION

The grant of water by the City for use on the State Capitol grounds and the buildings located on these

grounds is a valid and binding obligation on the City. In accordance with the terms and provisions of this grant the City should be required to continue to deliver sufficient water for use on the Capitol grounds and in the buildings without charge to the State.

Dated this 21st day of March, 1968.

Respectfully submitted,

PHIL L. HANSEN
Attorney General

DALLIN W. JENSEN
Assistant Attorney General
State of Utah

236 State Capitol
Salt Lake City, Utah

Attorneys for Defendant-Appellant