1939

Hyde Park Town v. George Chambers and Tacy Chambers, E. S. Chambers, Bertha Poulsen, David J. Weeks, and Mary Weeks : Brief of Appellant

Utah Supreme Court

DeVine, Howell and Steine; Neil R. Olmstead; Shirley P. Jones; Attorneys for Plaintiffs;

No. 6201

In

The Supreme Court
of the
State of Utah

HYDE PARK TOWN,
a Municipal Corporation,
Plaintiff and Appellant,

vs.

GEORGE CHAMBERS AND TACY CHAMBERS, His Wife, E. S. CHAMBERS, a Single Man, BERTHA POULSEN, as Guardian of ADELLDA POULSEN, a Minor, DAVID J. WEEKS, and MARY WEEKS, His Wife,
Defendants and Respondents.

Appeal From First Judicial District Court in and for Cache County
Honorable Lewis Jones, Judge

BRIEF OF APPELLANT

YOUNG & BULLEN, AND
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and Appellant.

TABLE OF CITATIONS

11 Am. Jr. at Page 695, Note 13; 12 C.J. 731, Note 63. 15

Volume 122 A.L.R. 1370-1371 20

Boise City v. Boise Etc. Co. 186 Fed. 705 Cert. Denied 220 U.S. 616, Appeal Dismissed, 230 U.S. 98. 13-20

Brummit v. Water Works Co. 33 Utah 285; 93 Pac. 829. 18

Cobb v. City, 179 Okla. 126; 64 Pac. (2d) 901..... 16

43 C.J. 176. 15

43 C.J. 225. 15

33 C. J. 1103. 24

Herdy v. Beaver County Irr. Co., 65 U. 28, 234 P. 524. 24

Genola Town v. Santaquin City et al. 96 Utah 88; 80 Pac. (2d) 930.....19-22-23

Genola Town v. Santaquin, 96 Utah 104; 85 Pac. (2d) 790. 19

Hand v. Twin Falls County, 40 Idaho 638, 236 Pac. 936. 24

Horkan v. City of Moultrie (Ga.) 71 S.E. 785. 12-20

News Etc. v. Carbon County (Utah) 72 Utah 88; 269 Pac. 129..... 16

(Table Continued)

TABLE OF CITATIONS

(A Continuation)

Ogden City v. Bear Lake & River Water Works & Irrigation Company, 16 Utah 440; 52 Pac. 697. 16

Robbins v. Hoover etal. 50 Colo. 610; 115 P. 526..... 14

Ryan v. Thomas (Arizona) 53 Pac (2d) 863..... 16

San Francisco v. Itsell, 80 Cal. 57; 22 Pac. 74. 16

Section 6, Article XI, Constitution of Utah 14

Sharp v. Whitmore, 51 U. 14, 168 P. 273. 24

State Ex rel Ellerbeck v. Salt Lake City, 29 Utah 361; 81 Pac. 273... 17

State of Minnesota ex rel. St. Paul v. Minnesota, Etc. Co. 80 Minn. 108, 83 N.W. 32; 50 L.R.A. 656..... 13

10 S.Ct. 24; 133 U.S. 65; 32 L.Ed. 570. 16

Utah Rapid Transit Co. v. Ogden City, 89 U. 546; 58 Pac. (2d) 1. 16

Westminster Water Co. v. Westminster, 98 Md. 551; 56 Atl. 990; 64 L.R.A. 630. 13

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BRIEF OF APPELLANT

STATEMENT OF FACTS

The appellant is a Municipal Corporation organized under and existing by virtue of the laws of the State of Utah, and situated in Cache County, Utah.

About the year 1911, the appellant, being without a municipal water system, entered into an oral contract with the Smithfield Irrigation Company.

By means of this contract, the right to use water from a certain spring in Birch Creek Canyon was granted by Smithfield Irrigation Company, a mutual irrigation company. The Town constructed a pipe-line to convey the water from this spring in Birch Creek Canyon in a general south or southwesterly direction to a reservoir situated at a slightly higher elevation than the Town.

The pipe-line thus constructed was made of clay tile pipe, and was a gravity line. For this reason, it was necessary to follow the contour of the uneven surface of the lands over which it passed. The lands of the respondents were crossed by this pipe-line in the course of its route to the reservoir. It was necessary for the Town to acquire a right of way across each of these lands, and in consideration of the grant of this right of way the Town orally granted each of said respondents a tap on their respective lands. These taps, connected with the water system of the appellant, flowed a constant dripping stream and this stream was used by the respective land owners for culinary purposes and for stock-watering purposes. None of the respondents ever resided on his lands at any time after said taps were installed, so that by "culinary uses" it is meant only that the water was used for drinking purposes while the men were working on their lands. The oral agreement did not mention any time limit nor was there any discussion of any other consideration for the granting of these taps, except only the grant of the right of way.

The lands of the respondents are used principally for pasturage, although possibly a little of the land is farmed. It is largely mountainous

or side-hill land. There is no evidence tending to show the number of animals grazed on the Chambers' land, and there is little or no evidence to show the number grazed from year to year on the Weeks' land. The latter did, however, testify that during the year 1939 he kept some 25 or 26 animals there; but no proof was introduced as to whether or not this was the number which he had ordinarily kept there.

Within a year or two after the original pipeline was constructed, the springs proved inadequate and the pipe-line was then extended a short distance up Birch Creek Canyon, in an attempt to tap another small spring area; both springs being used. Some years later, this was repeated and the Town tapped a third spring, using all three. About 1916, the line was extended further up Birch Creek Canyon and an additional spring tapped; all of the spring areas being used by the Town.

Notwithstanding these additional sources, the water supply proved very inadequate and along about the year 1935, a large spring situated several miles up Birch Creek Canyon, was tapped. At that time appellant entered into a new contract with Smithfield Irrigation Company, thus securing the waters it now uses in the amount of one-half c.f.s. (Amended Answer, Ab. 19; Finding of Fact No. 15, Ab. 87-88).

During all this period of time, the respondents used their taps. They paid no rentals of any kind to the Town. Shortly after this, the Town decided that it was necessary to replace the old pipe-line with a new pipe-line, for the reason that the old pipe-line leaked and was very wasteful. This new

pipe-line was constructed in the same general route as the old line, but being a pressure pipe, it no longer followed the contours of the land, but went in a nearly straight course. Thus in the lands belonging to the respondents, part of the time it followed the same course, but often left it, cutting out curves and bends.

About the year 1887, the respondents Weeks, homesteaded the lands belonging to him, and about that time he built a house on the lands. He constructed a ditch called the Lower Ditch, which had its source in the same springs as the original source of the town's pipe-line. This ditch conducted water to the lower end of his land. He lived on the land while he was required to do so for homestead purposes, then he left the place and moved to Smithfield and has never resided there since. This was about the year 1896. Shortly before he left his land, he constructed what was known as the Upper Ditch. This ditch had its source in Birch Canyon, some 160 rods above the Hyde Park intake. It conducted water for stock-watering and irrigation purposes to the lands belonging to the respondents, and this water was used by each of the respondents in connection with others. It was what is known as a High-Water right, and as soon as the stream in Birch Canyon receded from its spring flow, no more water was permitted to run through this ditch for irrigation purposes; but it is claimed that a small amount passed through the ditch and was used for stock-watering purposes, etc., during the greater part of the season.

The respondents never used the lower ditch after the upper ditch was constructed. The upper ditch is still in use for irrigation purposes, but of course, it is still a High-Water right and no water

flows in it after the High-Water season ends. Respondents testified that as soon as they got the tap water, they found that it was superior to the culinary water which they had previously conducted through the upper ditch and they, therefore, abandoned their culinary stream. They do not claim that this abandonment was induced by the Town of Hyde Park, or any of its officials, but was due solely to the fact that they preferred the tap water. Respondents seemed to take the position that because of their abandonment of the culinary stream conducted through the upper ditch, they cannot be placed in status quo if the Town refuses to supply them longer with tap water. This abandonment was voluntary on their part, and not induced by appellant.

After the construction of the new pipe-line, the Town permitted its old pipe-line to remain in place and offered to give this pipe-line to the respondents if they wished to accept it. The dripping stream in each of the taps in question passed through a small hole in a cap screwed to the end of a hlaf-inch pipe and some controversy grew up between the appellant and respondents, due to the claim of the appellant that the respondents greatly enlarged the holes in the caps and at times removed the caps entirely, thus causing much more water to flow through the taps than originally contemplated. Respondents claim that these acts, if done at all, were not done by them, but were done by hunters and other people coming to the taps for a drink of water. Be that as it may, some irritation developed because of the claim of appellant that the respondents wasted considerable water. When the appellant constructed this new pipe-line it did not permit respondents to construct taps in its new line. Some

was so pronounced that at times some of the citizens could not obtain a drink.

ASSIGNMENT 3

Finding No. 10 is clearly error. All of the evidence including the contracts in evidence, show that the Town was the owner of one-half a cubic foot per second, instead of one and one-half as found by the court. This may have been only a typographical error; but it should be corrected.

ASSIGNMENT 4

Assignment Four is subject to the same observations as we made in our argument on Assignment No. 2.

ASSIGNMENT 5

The Finding No. 13, wherein the court found that the "defendants and their predecessors in interest conveyed a portion of the water of Birch Creek to the Town of Hyde Park for culinary purposes" is totally and entirely unsupported by the evidence. Mr. Weeks, the only witness testifying on this matter, said (Ab. 86) that the only thing he gave the Town was a right of way. It is true he said that "after he got the culinary water from plaintiff's system, he abandoned the culinary system he had in the upper ditch." He did not claim that the Town of Hyde Park used, or could use, this water so abandoned. Presumably, it flowed down Birch Creek, a live stream, to the benefit of Smithfield Irrigation Company, the owner of the stream.

Hyde Park obtained its waters from springs tributary to Birch Creek, and not from Birch Creek

itself; hence, the increase in the size of the stream in Birch Creek, if it were increased by this abandonment, would not benefit Hyde Park, but would benefit the Irrigation Company. This abandonment was not made at the request of Hyde Park or any of its officers, but was made voluntarily by the defendants after the right of way was given to the Town and he had found the advantages of using the water from the pipe-line.

ASSIGNMENT 6

We have already called the attention of the Court to the fact that the pleadings and the evidence show that defendants were not supplied with water during any part of the year 1939; hence, this finding that the plaintiff has supplied the defendants with water "ever since 1911" must be error.

ASSIGNMENT 7

There is no evidence to support the court's finding "that ever since said year 1911 these defendants have openly, continuously, adversely and under claim of right, used the said taps and the water flowing therefrom for the purpose of human consumption and watering their livestock, in an amount of about 300 gallons per day."

All the evidence shows that the use by defendants was permissive and with the consent of plaintiff, and hence the use could not be adverse. The right would depend on contract (if there was any contract) and not on adverse possession. We will discuss this further, hereinafter. Then, the finding is not supported, because of another fact. There is no evidence whatsoever as to the amount used by defendants. Weeks said he had enough to run

down a corn row. (Ab. 29). He did not say how long the corn row was. There was no other quantity testified to. The defendants, and each of them, lived in Smithfield and did not live on their lands. They say they watered cattle at the taps, and drank the water when they worked on their lands. There was no proof as to the number of cattle pastured by either of the defendants, and the amount found by the court (300 gallons) is based on no evidence whatsoever. There is no evidence whatsoever that any use is made of the water during the winter season, yet the court required the taps to run all year. This would seem to be a clear case of waste. In any event, it finds no support in the evidence.

ASSIGNMENT 8

We have previously, under Assignment No. 5. considered the facts showing that this assignment is well taken.

ASSIGNMENT 9

It would seem obvious that Finding No. 21 is a conclusion, rather than a finding of ultimate facts.

ASSIGNMENT 10

We have called the attention of the Court to the fact that there is no evidence that plaintiff benefitted from the abandonment by defendants (if they did so abandon) of their water rights. Nor were they abandoned at the request of the plaintiff. Plaintiff then would have no duty to restore defendants to the status quo. The rights of plaintiff

in this case do not depend on such a restoration. We will discuss this hereinafter.

ASSIGNMENT 11

It is clear that this is not a finding of any fact, but is a conclusion of law drawn by the court from other facts.

ASSIGNMENT 12

This assignment can best be considered later in connection with other assignments.

ASSIGNMENTS 13 AND 14

It is self-evident that no court can determine the amount of water required to supply defendants' cattle, without determining how many cattle belonging to defendants, require water. The court failed to make any such findings; hence, its finding that the defendants are each entitled to 300 gallons per day for human consumption, and sufficient to water the livestock of each defendant, is not based on evidence. The defendants do not live on their lands, and the court did not find the number of cattle to be supplied.

ASSIGNMENT 15

This assignment is best considered later, in connection with others.

ASSIGNMENTS 16, 17, 18 AND 19

These assignments are best considered later, likewise.

The assignments not discussed above will now be discussed together.

The decree entered in this case is based on the general assumption by the court that the oral agreement between plaintiff and defendants, or their predecessors in interest, is now a valid and subsisting agreement and perpetual in its duration. The only testimony on this matter was by Mr. Weeks (Ab. 31-32), and Mr. Toolson (Ab. 38) the predecessor of Chambers. Weeks said he agreed to give a right of way for the tap. No statement was made as to duration of the contract. Mr. Toolson testified to similar facts. The court interpreted this agreement to be perpetual. This interpretation is erroneous. The proper construction of such a contract is that it is terminable at will.

Thus, where a city agreed to perpetually supply a land-owner with water to operate his toilets, free of charge, in exchange for the right granted to the city to lay its sewer pipes across the land-owner's land, it was held that such a contract was null and void and ultra vires, and could be terminated by the city. This was because the city had no power to enter into perpetual contracts. The case also held that notwithstanding the city still continued to use the sewer, it was not estopped from repudiating the contract.

Horkan v. City of Moultrie (Ga.) 71 S.E. 785.

The Court in the above case based its ruling on the fact that it would be unfair to let one council bind future ones in such a way that they could not fix equal uniform water rates from time to time.

Thus, also, a right granted to a water company to use the streets of Boise without stating any limit of time, for the purpose of constructing water mains to be used in supplying the inhabitants of the city with culinary water, was held to be a mere

license, terminable at will. The Court also held that the officers were not estopped to set aside a void agreement.

Boise City v. Boise Etc. Co. 186 Fed. 705 Cert. Denied 220 U.S. 616, Appeal Dismissed, 230 U.S. 98.

This ruling was placed upon the ground that a perpetual contract cannot be granted by a city, and if attempted to be granted, the contract is terminable at will.

The city agreed to levy a tax of five cents on the dollar perpetually, and pay the money so raised to a water company in order to obtain a water supply. This was held void on the ground that such a perpetual contract was ultra vires and void.

Westminster Water Co. v. Westminster, 98 Md. 551; 56 Atl. 990; 64 L.R.A. 630.

A city and a street railway company entered into a contract to construct an overhead crossing, each to pay a portion of the costs. The contract required the city to keep the crossing in repair perpetually. The law of the State required the railroad company to maintain crossings, and this contract was intended to change this requirement for the reason that the viaduct was much more expensive than was necessary for railroad purposes. The Court held that the contract which purported to perpetually bind the city to assume the duties of the railroad company, was ultra vires and void.

State of Minnesota ex rel. St. Paul v. Minnesota, Etc. Co. 80 Minn. 108, 83 N.W. 32; 50 L.R.A. 656.

A devise to build a hospital providing that the County would support and maintain the hospital

perpetually, was held invalid for the reason that the County could not bind itself perpetually to support the hospital.

Robbins v. Hoover etal. 50 Colo. 610; 115 P. 526.

These cases seem to make it clear that Hyde Park did not have the power to barter away the rights of its citizens for all future time, as contended for by respondents. And, also, the Court should construe such contracts as subject to being terminated at will. Clearly, Assignments of Error Numbers 15 to 20, inclusive, are well taken.

We have already called the attention of the Court to the fact the only consideration for the grant to the defendants of the right to use the water flowing from the taps, was the grant of a right of way for the pipe-line. This was clearly a "sale" or "exchange" of water rights for a grant of right of way, and is in violation of the provisions of our Constitution.

Section 6, Article XI, Constitution of Utah reads as follows:

"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 supply now owned or hereafter acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges: Provided, that no-

> thing 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."

No sale of water rights is ever permitted, and an exchange can be made only for water rights of equal value. The plaintiff purchased the only waters it owns, or has ever owned, in Birch Canyon or in any of the springs tributary thereto, from Smithfield Irrigation Company, and obtained none from defendants or their predecessors in interest.

It is generally held that prohibitory provisions such as the one quoted above, are self-executing, and that an act done in violation of these provisions is void.

11 Am. Jr. at Page 695, Note 13; 12 C.J. 731, Note 63.

Being a creature of statute, a municipal corporation possesses such power, and such power only, as the State confers upon it. Subject at all times to constitutional limitations, the legislature may confer upon such corporations such power as it sees fit.

43 C.J. 176.

Municipal corporations are subject to the limitations of both State and Federal Constitutions.

43 C.J. 225.

Parties contracting with a municipality must take notice of its powers. If it goes beyond its

powers, the parties so contracting, do so at their peril.

Cobb v. City, 179 Okla. 126; 64 Pac. (2d) 901.

Ryan v. Thomas (Arizona) 53 Pac (2d) 863.

Utah Rapid Transit Co. v. Ogden City, 89 U. 546; 58 Pac. (2d) 1.

News Etc. v. Carbon County (Utah) 72 Utah 88; 269 Pac. 129.

On the question of the effect of acquiesence in a given situation, or in the performance of an agreement, over a long period of time, see:

San Francisco v. Itsell, 80 Cal. 57; 22 Pac. 74.

This case was appealed to the Supreme Court of the United States and the appeal dismissed; see

10 S.Ct. 24; 133 U.S. 65; 32 L.Ed. 570.

We come now to a consideration of the Utah cases involving sales and exchanges of water by municipal corporations.

Ogden City v. Bear Lake & River Water Works & Irrigation Company, 16 Utah 440; 52 Pac. 697.

This case came before our Supreme Court in 1898, two years after the adoption of the Utah Constitution. It involved a controversy and a consideration of questions atedating the adoption of the Constitution; hence, the prohibitory provision was not referred to in the opinion. The case simply

held that the provisions of the charter of a city must be strictly construed. Provisions authorizing the city to lease, convey and dispose of property, both real and personal, for the benefit of the city, the case held, did not authorize the city to lease or otherwise transfer its waterworks system, or its water right used in supplying its inhabitants with water, and that in order to authorize such a sale or transfer the charter would, of necessity, have to specifically authorize that specific act.

State Ex rel Ellerbeck v. Salt Lake City,
29 Utah 361; 81 Pac. 273.

This case was decided on June 24, 1905. It involved the application for a writ of prohibition restraining Salt Lake City and its officers from issuing, negotiating or selling certain municipal bonds issued by the city for the purpose, among other things, of procuring a permanent and adequate increase in the water supply of the city. The munipality had entered into an agreement with certain farmers for the exchange of its Utah Lake Reservoir water for mountain water which could be used for culinary purposes. It was contended that the exchange was not valid, because of the fact that the irrigation water was greater in quantity than the mountain water which the city received in exchange therefor.

The Court had before it the question of exchange referred to in the Utah Constitution. It held that the exchange was valid, even though there was a disparity in the quantity, the value of the water being equated by the superior quality of that received from the farmers. This case simply construes a provision of the Constitution which in and

of itself is clear and, it would seem, needs no judicial construction.

Brummit v. Water Works Co. 33 Utah 285; 93 Pac. 829.

This case was decided on February 2, 1908, and had to do with the contract involved in the case of Ogden City v. Bear Lake & River Water Works & Irrigation Company, supra. So far as its application to the facts of the instant case are concerned the syllabus (17) reflects the holding of the Court. It reads:

> "Waters — Public Water Supply — Right of City to Dispose of Water Rights — Constitutional Provisions — Constitution, Art. 11, Section 6, provides that no municipal corporation shall directly or indirectly lease any water rights or sources of water supply controlled by it, but all such rights, etc. 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 an exchange of water rights or sources of water supply for others of equal value, and to be devoted in like manner to the public supply of its inhabitants. Prior to the time the constitution went into effect, a city had made a contract purporting to lease certain water rights to one who agreed to construct and operate a system of waterworks to supply the city, etc., under which the lessee was to furnish certain free water to the city.
>
> After the Constitution was adopted, the city passed an ordinance regulating its relations with the company which succeeded

to the rights of the lessee in which some changes in rates, etc. were made, and this ordinance granted to the company the use of the water rights for a term of fifty years as a part of the arrangement; but the city was still to receive considerable water for public purposes free of charge.

Held, that the ordinance was in effect a mere continuance of the former contract, and the disposition of the city's water right was valid."

This case makes it clear that neither it nor the case of Ogden City v. Bear Lake & River Water Works & Irrigation Company, supra, were decided under the constitutional provision above mentioned; that both were expressly decided on a state of facts antedating the enactment of the Constitution.

Genola Town v. Santaquin City et al. 96 Utah 88; 80 Pac. (2d) 930.

This Court held that in the Genola case there was an actual exchange of water, and the case was sustained on that theory. The Court did not hold that water rights might be exchanged for other property such as rights of way.

If there is any doubt as to the holding in the Genola case, we cite the opinion of the Court on the petition for rehearing. See

Genola Town v. Santaquin, 96 Utah 104; 85 Pac. (2d) 790.

There the Court made it very clear that it expressly held that a municipality may not directly or indirectly sell, alienate or dispose of any of its water rights, and that it may only exchange some of its rights when the value of the use of the water received is equal to the value of the use of the water

with which the city has parted. The ruling on the petition for rehearing is short and concise. We respectfully direct the Court's attention to it.

Throughout the proceedings in the case at bar, from time to time, counsel for defendants contended that the plaintiff was estopped to repudiate the agreement of 1911 and from seeking refuge behind the constitutional provision. We refer to the original Genola Town case,

96 Utah 88; 80 Pac. (2d) 930.

In the concluding paragraph the Court deals with the question of estoppel in the following language:

> "While in some cases a party may be estopped from taking advantage of the unconstitutionality of an Act (Tite v. State Tax Commission, 89 Utah 404; 57 Pac. (2d) 734) the representatives of a municipality must act within their powers, and the city cannot be estopped from declaring its own acts as unconstitutional."

See to same effect:

Horkan v. City of Moultrie (Ga.) 71 S.E. 785, supra.

Boise City v. Boise, etc. Co., 186 Fed. 705, supra.

In the latest volume of American Law Reports (Volume 122 A.L.R. 1370), under an annotation dealing with the right of a municipality to enforce a contract which was in excess of the municipality's power, we find the following statement of the principle of law under consideration. We quote the following from page 1371:

> "The doctrine of ultra vires has, with good reason, been applied with greater strictness

> to municipal bodies than to private corporations; and in general a municipality is not estopped from denying the validity of a contract made by its officers, where there has been no authority for making such a contract. Thus it is generally held that when a contract has been entered into by a municipal corporation with respect to a subject matter which was not witihn its corporate powers, the corporation cannot be held liable on the contract whether or not the other party thereto has fully carried out his part of the agreement. This rule has reference to the liability of the municipality on its ultra vires contracts when sued by the other party to the contract."

In the Genola case, the Supreme Court exercised its equitable powers to require performance of a contract which the Court itself held was a valid exchange of water rights. The fact that the Court gave as an added reason for enforcing the contract, its disinclination to "make for naught a large portion of Genola's expenditures and delay the benefits of them," is wholly immaterial to the actual holding of the case. Had there been no exchange of water, would it now be contended that, because of the expenditures of Genola, the courts would still be of a disposition to enforce specific performance? The answer to this is that no court would enforce a void contract because of any equitable consideration.

On more than one occasion we were reminded by counsel that the Town of Hyde Park was endeavoring to evade the performance of an agreement solemnly entered into in 1911 and which, for a number of years, was faithfully carried out.

Such reminder is wholly beside the point. If, in fact, the Town was, under the express provisions of the Constitution, prohibited from selling to defendants a portion of its water supply, we are unable to see why it must forever act unlawfully and continue to carry out the terms of the invalid agreement, even though it had done so for a number of years.

The defendants, as a matter of law, must be held to have had knowledge that the execution of the agreement was not within the powers of the Town. They had no right to expect that it would forever be carried out. On the contrary they must have assumed that at sometime the officers of the municipality would do their duty and repudiate the invalid agreement.

Neither can it avail defendants anything to say that the quantity of water claimed by them constituted but a very small portion of Hyde Park's supply. If the Town had the right to sell a small stream, it also had the right to sell a larger one. The question of quantity cannot influence the case one way or the other. This was made clear in the Genola case, supra. On page 935 of the original opinion, 80 Pacific (2d) 930, the court recognized the right of a city to sell its surplus water, even to outsiders, provided the sale was made in the same manner that it sells water to its own inhabitants, and provided also that the sale was not made in perpetuity. Under the prohibition found in the Constitution, the court said a municipality was not permitted to alienate its water even though the alienee was another worthy community or person, such, as it will be contended, and such as we are

willing to admit, the defendants are in the instant case. We quote the following language:

> "A city may sell its excess water to outsiders. Such is not a sale of its water sources or water rights but water from its system in the manner it sells to its citizens. But may it obligate itself to deliver a definite amount in perpetuity? We think this agreement is, in effect, a parting with its water right pro tanto. We see no real difference in parting with a water right which yields 100 gallons per minute by transfer and obligating one's self to deliver from a water right 100 gallons per minute in perpetuity. Sec. 6, Art. 11, should not be narrowly or strictly construed. It was meant to secure to communities their water systems and prohibit any sale or lease to private parties. This is one project which the Constitution decreed should be kept in social ownership by the community. Where another town or community needing water would be the beneficiary of a total or partial alienation of water rights or sources, especially where the granting community had an excess supply was perhaps not really intended to be prohibited, yet the language is definite that it shall not be alienated and does not exclude the case where the alienee is another worthy community. We see no escape, therefore, from the proposition that under the agreement the City was, in effect, parting pro tanto with its water rights."

The Genola case was decided on the definite proposition that the agreement between the two towns involved an exchange of water. This brought

it within the exception contained in the constitutional provision.

In conclusion, we wish to make one specific reference to Assignment of Error No. 19 in the instant case. Paragraph two of the decree, after naming the defendants, contains the following provision:

> ". . . . are each entitled to the use of a tap connected with the plaintiff's pipe-line to supply the said defendants and their successors in interest with sufficient culinary water for human consumption and stock-watering purposes for the same number of domestic animals heretofore habitually kept on said respective premises, the said human consumption from each of said taps to not exceed 300 gallons per tap per day."

This provision is too indefinite to be performed. There are no human beings residing on either of said lands. No water is used except in the summer. Why should the court say not to exceed "300 gallons" for this use? No attempt was made to fix the number of cattle nor the amount they would require. Such a decree is too indefinite to stand.

33 C. J. 1103.

Hand v. Twin Falls County, 40 Idaho 638, 236 Pac. 936.

Sharp v. Whitmore, 51 U. 14, 168 P. 273.

Herdy v. Beaver County Irr. Co., 65 U. 28, 234 P. 524.

Respectfully submitted

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