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

Utah Supreme Court

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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, DAVID J. WEEKS,
and MARY WEEKS, his wife,
Defendants and Respondents.

Respondent's Brief.

M. C. HARRIS,

Attorney for Respondents.

Appeal from the District Court of the First Judicial
District of the State of Utah, in and for Cache County.

Received copy of with
Brief this 16th day of
Jan. 1940

Young & Buel
Irvine Spurr &
Thurman

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STATEMENT OF FACTS.

The facts involved in this case are rather fully covered in the Plaintiff's brief and only one or two slight additions or contradictions are herein recorded.

It is the contention of the defendants that even though there was no express agreement that they should give up their culinary streams as a part of the consideration of the town granted^{by} them these taps, that under all the facts and circumstances there was an implied agreement that as consideration for such taps the plaintiff could have any additional water that might be saved from the culinary streams of the defendants, so that it is our contention that the consideration for the taps was both the granting of the

right of way and the culinary water rights of the defendants and their predecessors.

Much of the lands involved in the defendants Weeks case are pasture lands and hillside lands but he also cultivates a substantial portion of his land, and all of the defendant Chambers' lands are under cultivation.

The question of the adequacy of the water during all of these times is disputed, it being the contention of the defendants that whatever shortage there might have been in Hyde Park was largely the result of roots getting in the old pipe line and wastful practices in Hyde Park Town.

QUESTIONS INVOLVED.

The primary question involved is: Did the plaintiff show such facts as to constitute a necessity for this condemnation proceeding?

The defendants contend and the court found that the plaintiff already was the owner of the right of way sought to be condemned and, therefore, it was not necessary or proper to maintain this condemnation proceeding.

There is therefore, involved the question of whether or not the plaintiff was at the time of the commencement of this action already the owner of the right of way sought to be condemned.

It is conceded that at the time Hyde Park acquired its culinary water system (about 1910 or 1911) an oral contract was entered into between the town of Hyde Park

and the defendants Weeks and the predecessors in interest of the defendant Chambers, whereby the defendants granted to the plaintiff substantially the same right of way as they are seeking to condemn at which time the town of Hyde Park granted to the defendants the right to tap the plaintiff's pipe line for culinary and stock watering purposes and that pursuant to the said agreement the town constructed the pipe line over the right of way and the defendants used the tap without interruption from approximately 1911 to 1938.

The plaintiff claims that they do not own the right of way as a result of this agreement for three reasons.

1st. That the oral agreement granting the right of way and the right to tap the pipe line is void for failure to comply with the statute of frauds.

2nd. That the said contract is void because it violates the constitutional provision which prohibits municipalities from selling their water works systems.

3rd. That the contract is still an executory contract and could be terminated by either party at any time, and apparently they contend that by commencing this proceeding they have elected to terminate it.

In addition to these items the appellants charge that a number of the Findings were not supported by the evidence.

ARGUMENT.

ASSIGNMENT No. 1.

This action was commenced in June 1937. The Answer and Counterclaim was filed in April 1939 so that the assignment that the Findings that "plaintiff is the owner of culinary water which supplies the defendants with culinary water" is clearly within the issues in this case and what happened after April 1939 has no bearing on the question. In Findings No. 20 the court expressly makes no findings in this action as to damages if any sustained by the defendants during the late spring and summer of 1939 so that this matter is reserved for future determination should it arise in a proper action.

ASSIGNMENT No. 2.

Assignment No. 2 complains as to the Findings that the defendant is the owner of adequate water to supply both the town and these defendants through the said pipeline. Since this assignment goes to some important matters to be discussed later it will be necessary to examine the record somewhat in detail in connection therewith. It should be remembered that the court also finds in Finding No. 10, as follows:

"That the Town of Hyde Park is the owner of 1.5 c.f.s. of water in their said culinary water system which is sufficient to supply the 750 inhabitants of Hyde Park with 432 gallons of water per person per day and that there are approximately 181 families in Hyde Park using water so that there

is sufficient water to furnish each family of four people 1728 gallons per day. That 300 gallons per day per person is a reasonable amount of water to be allowed for culinary purposes, and 1200 gallons per day is a reasonable amount of water to be allowed to a family of four persons and that the Town of Hyde Park is the owner of an adequate supply of water for culinary purposes to supply the defendants with water for human consumption and for cattle watering purposes in addition to an adequate supply for all culinary purposes for all of the inhabitants of the Town of Hyde Park and that the use of the water in question by the defendants has not and will not seriously impair the use and enjoyment by the citizens of Hyde Park of their rights to the use of culinary water from the said springs. That it does not appear that the Town Board of Hyde Park has ever by any resolution or ordinance determined that the use of a small portion of its water by the defendants as hereafter described, has worked or will in the near future bring about any water shortage to said municipality nor its inhabitants.”

and it is apparently this finding that is attacked by Assignments Number Two and Three.

It is conceded that the original finding prepared by the court does contain the typographical or clerical error that Hyde Park is the owner of 1.5 c.f.s. which should have been one-half c.f.s.

In its finding No. 15 the court found that the quantity of water owned by the plaintiff was one-half c.f.s. and that is in accordance with the pleadings and evidence so that the clerical error is apparent on the face of the finding

and, therefore, should be harmless. But we have no objection to the Supreme Court calling the matter to the trial court's attention and asking that it be corrected as a clerical or typographical error.

It is contended in plaintiff's brief that because the witnesses on behalf of Hyde Park Town, namely the town officers and former water masters, testified that at times it was necessary to restrict the citizens of Hyde Park in watering their lawns to two hours per day and also that at times some parties living in the upper part of the town were short of water that this evidence necessarily should have been adopted by the court to find that Hyde Park was short of water. The reasons that the trial court probably declined to adopt this theory were not all stated by the trial court but some reasons that appear proper to us are the following:

- 1.

In the first place the plaintiff's own testimony shows that since the construction of the new pipe line in 1937 there is no shortage of water. Witness Fred Duce testified as follows: (Tr. 113, Ab. 44-45)

“Q: While you were mayor after you got this new system constructed was there sufficient water to furnish the citizens of Hyde Park culinary water?

A: Yes, sis.”

Witness Martin C. Reeder testified that there was no shortage of water after the construction of the new system (Tr. 173).

J. E. Hansen, the present water master testified on direct examination (Tr. 204, Ab. 69):

“I believe we have plenty of water but we have no surplus at the present time.”

And this same witness testified that at present the witness Karby is using the overflow from the city reservoir for irrigation purposes.

All of the testimony indicates that during at least a major portion of the time there was always an overflow at the intake of the Hyde Park water system.

Foster Gordon also testified (Tr. 102, Ab. 42):

“Every time I have been there they had an overflow.”

The witness Ephraim Weeks testified that he always saw an overflow at the intake box and he also testified on the one occasion he went to the Hyde Park Reservoir there was an overflow there (Tr. 134, Ab. 51).

The plaintiff's witness Geo. Z. Lamb who was appointed by the Town Board to negotiate this contract with the defendants to furnish them water for the right of way testified on direct examination by Mr. Thurman as follows: That he was the mayor of the Hyde Park Board in 1911 when the water system was constructed (Tr. 209, Ab. 58):

Q: Were you water master, at all?

A: When it was first installed, I was.

Q: Were you water master while you were a member of the board?

A: Yes, sir.

Q: Were you water master during the period of the distribution of the water after the pipe line had been completed?

A: For a little while.

Q: Did you make observations as to the efficiency of the supply at that time to take care of the needs of the people in Hyde Park?

A: We had sufficient.

Q: You had sufficient?

A: At that time.

Q: Did you have more than a sufficient?

A: Not much. Sometimes."

2.

The undisputed evidence in the case indicates that much of the trouble was caused by the drain-pipe installed in plaintiff's pipe line leading from the spring to the reservoir becoming clogged with roots between the intake and the reservoir.

Plaintiff's witness Kirby testified as follows (Tr. 220, Ab. 60):

"Q: You would go up and clean out the roots very often while you were water master.

A: Yes, sir, I did."

Plaintiff's witness George S. Daines on direct examination testified (Tr. 262, Ab. 71):

"A: I think the pipe line must have more or less got clogged in places with roots. It was difficult to get the

water along the line and get water to the reservoir. It was necessary to put in the new pipe."

3.

However, the important testimony in the case which bears out the court's finding is the expert testimony of engineers Schaub and Clyde.

Mr. Schaub testified (Tr. 190, Ab. 52) that under good engineering practice an engineer designing a culinary water system for a small community of this kind would be satisfied with 200 gallon of water per person per day for culinary water system and that this takes into consideration all requirements for drinking, watering flowers, gardens, lawns, etc.

Engineer Clyde, plaintiff's engineer, placed this amount at between three and four hundred gallon (Tr. 240-241, Ab. 65).

On cross examination Engineer Clyde admitted that the consumption according to a table which he had supplied for human consumption was 30 gallons per day per person and for each horse and head of cattle 10 gallons per day. Taking Mr. Clyde's highest figures of 40 gallons per day per person the daily consumption of 750 people would be 30,000 and allowing a liberal estimate (and it was only an estimate) of 2700 head of horses and cattle would be another 27,000 gallons or a total of 57,000 gallons per day for drinking and culinary purposes.

It is admitted, both in the pleading and in the evi-

dence, that Hyde Park Town has one-half c.f.s. of water which measured at the reservoir by Engineer Clyde actually showed that there was being delivered at the Hyde Park reservoir .55 c.f.s. (Tr. 252, Ab. 68). One-half c.f.s. equals 225 gallons per minute which equals 324,000 gallons per day so that under plaintiff's engineer's own testimony Hyde Park has 57,000 gallons per day for drinking and stock watering purposes and 267,000 gallons per day for irrigating and other purposes. In this connection Engineer Clyde testified that large amounts of water were required at times of fire. The undisputed evidence shows that the capacity of the Hyde Park reservoir is 62,000 (Tr. 261) so that there is enough water flowing into the Hyde Park reservoir each day to fill it five times and it is submitted that any additional fire protection needed by Hyde Park could be easily taken care of by increasing the capacity of the reservoir and stopping the waste from the present overflow. The undisputed evidence, therefore, shows that Hyde Park now has enough water to supply its 750 citizens with 432 gallons per day. If we adopt the defendants' expert testimony this is more than twice as much water as good engineering would require and if we adopt the plaintiff's engineer's theory of 300 gallons per person per day Hyde Park has a surplus of 750 times 132 or approximately 99,000 gallons per day, and if we adopt the 400 gallons per day, which is the greatest amount the plaintiff's engineer would allow and is the most favorable testimony in the record to them, Hyde Park still has a sur-

plus of 24,000 gallons per day, 600 gallons of which will supply the two tap of these defendants.

Plaintiff's engineer also testified by way of comparison that in Logan where people are on meters the average consumption is 150 gallons per day per person and the record also discloses that the usual meter arrangements is a minimum charge for 10,000 gallons per month per meter or family. Hyde Park has approximately 51,840 gallons per family of her people so that Hyde Park now has approximately five times as much water as is usually allowed as a minimum and the evidence in this case is that the average use is about one-half the minimum and it, therefore, seems that there is not only ample evidence to sustain the Finding of the court in connection with Hyde Park having ample water but the overwhelming weight of the evidence demonstrates that Hyde Park has an excess of water over any reasonable requirements for culinary purposes.

It is common knowledge that cities frequently find it necessary to make some restriction of hours for sprinkling lawns. It is elementary that public policy as applied by the courts must not encourage waste of water, particularly water fit for culinary purposes. Bearing in mind the equities and all the surrounding circumstances in this case before this court should stop these farmers from securing drinking water and water for culinary and stock watering purposes they might suggest to Hyde Park that they consider ending the waste there by installing meters.

Defendants offered to show that similar contracts to to the one in question exists in many of the communities in Cache County (Tr. 182) and if this sort of practice were to be condemned by this court it would mean ruin to a lot of our fine farm families who are clinging to the soil and to rural life and producing the kind of citizenry that today is the countries greatest need.

ASSIGNMENT No. 7.

Plaintiff complains that there is no evidence to support the finding that the use of the water by the defendants was adverse and under claim of right. The plaintiff admitted that these taps were installed by the Town of Hyde Park and were used continuously until the year 1938 (Tr. 137) and both Weeks and Toolson (Chamber's predecessor in interest) testified that the Town granted them the right to the use of this water. It is contended that under these circumstances the use was under a claim of right and that there is no evidence of any permissive use.

However, if this court should be convinced that the Finding as to adverse possession is not supported by the evidence, the other evidence in the case is ample to support the judgment that the plaintiff is the owner of the right of way and that this proceeding in condemnation is not necessary and for that reason any finding in connection with the matter of adverse use by the defendants of the said waters would be harmless error even if the Sup-

reme Court should conclude that it was not justified by the evidence:

Butler vs. Payne, 59 Utah 383, 203 Pac. 869.

Thomas vs. Foulgar, 71 Utah 274, 264 Pac. 975.

Plaintiff also claims that the proof is indefinite as to the exact amount of water used and that the judgment and decree is so indefinite as to make the same void. There is evidence as to the number of cattle that both Weeks and Chambers customarily had on their premises, and there is ample evidence as to the usual amount of water allowed to a family for culinary and stockwatering purposes and the judgment in this case that these defendants may not consume more than 300 gallons per day is sufficiently definite to prevent any waste of water and no cases cited by the plaintiff holds that order for a decree for culinary water to be sufficiently definite must define the number of people who take a drink, or the number of drinks (of water) a man may take in a day, or the different size drinks that a man or a boy might take, or the number of cattle permitted to drink at these taps. It has abundantly been demonstrated heretofore that 300 gallons per day will not in any way work to the material injury of the Hyde Park culinary system. This limit was inserted in the decree altho apparently it was not in the original contract. Complaint is made as to the indefiniteness of both the contract and the decree. The words of Judge Wolfe in the case of Genola vs. Santaquin City, 96

Utah 88, Pac. (2nd) 930 constitutes a sufficient answer to these arguments of indefiniteness:

“When the contract is read in the light of the purposes to be accomplished, there is no indefiniteness. Because laymen agree on very definite propositions derived from the actualities of the whole situation which they must deal with, these propositions do not become less definite in actuality because lawyers have difficulty legally labeling the nature of the transactions or in determining the legal aspects of those transactions. It is but natural that each side will choose to give the transactions that legal aspect which best suits its position.”

and again at page 934:

“Specific performance is granted by equity when it is plain that the party should and can perform and refuses to do so, and injustice not remediable by a money judgment would otherwise result. The nature of the remedy is revealed by the fact that equity takes a hand because the legal remedy is inadequate.”

Here the contract was sufficiently definite to satisfactorily work for twenty-eight years and surely all of the equities and circumstances of this case abundantly appeal to the conscience of the court, that after all of these years the town of Hyde Park should not be permitted to repudiate their contract and cut off the culinary water supply of these defendants and resort to condemnation of their right of way ignoring the justice and importance of the matter to the defendants so that the injustice that

would not only result to these individuals but to the far more important proposition of the injustice resulting to all individuals living without the corporate limits of municipalities dependent upon their water supply from the municipal water supply would be a serious injury to farmers all over the state. Public policy requires that farmers owning property outside of a city limit ought to be permitted to utilize drinking water running past their door where a contract for that purpose has been made in good faith and we contend the public policy of the Constitution was not intended to prohibit any such contract.

The other assignments as to the Findings being supported by the evidence are covered in later discussions.

It is the defendants' contention that not only is there sufficient evidence to sustain the Findings herein but that the findings are made in accordance with the clear weight of the evidence, most of which is undisputed.

THE CONTRACT TO DELIVER WATER TO THESE DEFENDANTS WAS VALID AND BINDING.

It is the defendants contention that the contract in 1911 was a valid and binding contract whereby the plaintiff secured the right to the use of the right of way as well as the waters saved by piping the same to the defendants for which the defendants secured the right to use water from the pipe line for culinary and stockwatering purposes. It is likewise our contention that the contract was a completed contract and, therefore, has nothing to do

with the claim of counsel that it is a contract in perpetuity. It is no more a contract in perpetuity than every exchange of property or property rights which if completed is a contract in perpetuity.

It is likewise the defendants contention:

1. That the contract was not void for the statute of frauds because it was not only partially performed but was completed and has been acted upon in accordance with the completed contract for 28 years.

2. The contract was not void as a violation of the constitutional prohibition against municipalities alienating water rights.

- a. Because it is not a contract to sell or dispose of water rights belonging to the community but was a contract whereby these taps were granted as incidental to the plaintiff acquiring its culinary water system.

- b. It was a mere agreement to supply water out of the excess water owned by the plaintiff.

- c. There is ample evidence to sustain the contention that the agreement was in fact an exchange of water or, that plaintiff was delivering to defendants water already owned by them, the plaintiff to retain any water saved by reason of piping the old culinary streams to the defendants.

1.

Counsel have cited no authorities and apparently have not seriously argued that this contract was void because it was barred by the Statute of Frauds. Section 33-5-8 R. S. U. 1933 reads as follows:

“33-5-8. Nothing in this chapter contained shall be construed to abridge the powers of court to compel the specific performance of agreements in case of part performance thereof.”

and that part performance takes a contract out of the Statute of Frauds has been sustained many times by this court and no attempt has been made here to exhaust the authorities on this subject because no authorities have been cited by the appellants to sustain their contention as to the Statute of Frauds. Two cases, however,, are cited.

Brinton vs. Van Cott, 8 Utah 480, 33 Pac. 218;

Lynch vs. Coviglio, 17 Utah 106, 53 Pac. 983.

2.

a. It is admitted that the contract was entered into between these parties and fully performed by both sides for 27 or 28 years and it is our contention that in place of it being a contract to sell its water works and water rights it is a contract incidental to, and a part of, its acquiring its culinary water system that the granting of these two taps under the circumstances here was one of the incidentals to securing, acquiring and installing its water works system and no part of any contract for Hyde Park to sell its water rights.

No case holding a similar contract to be a sale of its water rights is cited by plaintiff.

A few of the many cases holding such a contract to be valid as incidental to acquiring a water works system are as follows:

Colorado Springs vs. Colorado City, 94 Pac. 316.

Colorado Springs agreed to furnish water to Colorado City as a part of the consideration of the right of way. They undertook to charge additional rates on the ground the original contract to furnish water beyond the city limits was ultra vires. Held they were bound by their contract.

Pikes Peak vs. Colorado Springs, 44 CCA 333, 105 Fed. 1.

Colorado Springs granted a contractor certain rights to the water in consideration of his completing a tunnel for municipal water purposes. City later undertook to repudiate the contract on the grounds that the contract was ultra vires. Held contract was binding on the City.

Fellows vs. Los Angeles, 151 Cal. 52, 90 Pac. 137.

City acquired a water system which had previously furnished water to plaintiff's lot. Held city must continue to furnish the water to the lot. The court said:

“The water, as we have seen, was appropriated to a public use of which the plaintiff was and is a beneficiary. The city cannot thus continue to hold and control property so appropriated to public use and at the same time refuse the public duty which such possession and control impose.”

State Ex Rel, Ellenbeck vs. Salt Lake City, 29 Utah 361, 81 Pac. 273.

Held that a city might exchange irrigation water for culinary water which involves the idea that water of different quality may be exchanged.

Salt Lake City vs. Salt Lake City Water and Electric Power Company. 24 Utah 249, 67 Pac. 672, 25 Utah 456, 71 Pac. 1069.

Held that a private power company might condemn the right to use a part of the canal in the city's water system, and likewise held that the power company, under the law of appropriation, could acquire a secondary right to the use of the waters owner by the city.

This is a very famous case in which the constitutional provision now being discussed was elaborately discussed by able counsel and is similar to the case at bar in the respect that the city first entered into an agreement with the power company which was later repudiated by the city resulting in the litigation. When the case was first decided in February 1902 Judge Bartch speaking for the court said:

“Nor do we think a secondary water right, such as is claimed by the power company, is inhibited by section 6, art. 11, of the constitution. That provision of the fundamental law prohibits the leasing, selling, aliening, or disposing of water works, water rights, or sources of water supply by municipalities, and doubtless was also intended as an interdiction against the power of the legislature to authorize municipalities to lease, sell, alien or dis-

pose of such property; but there is nothing to indicate that it was the intention of the framers of the constitution thereby to inhibit the acquisition of secondary water rights, such as the one here under consideration. We, therefore, regard the constitutional provision above referred to as having no application to this case.”

Very learned counsel took part in this case. George L. Nye, city attorney for Salt Lake City, C. C. Richards and Judge J. S. Varian attacked the decision in a motion for rehearing, Ogden Hiles and Lindsey R. Rogers were on the other side and the rehearing was granted and in the new opinion written April 1st, 1905, Judge Bartch recognized the importance of the decision and states that a very thorough examination of the law had been made by the court,

“Resulting in an irresistible conclusion that the learned trial judge had made a decision not only just and wise, as an application of the principles growing out of and adapted to the peculiar conditions and necessities of our arid country.”

b. It is likewise well settled under the law of this state that a municipality may furnish water to persons living outside of the city limits where they have a surplus of water. (Statutes and authorities cited later under heading “Utah Law”.) Figures have heretofore been given to show that the municipality has always had and still has such a surplus so that upon this theory the contract to furnish the water is not unconstitutional but was at the time it was entered into a valid contract. It is significant

that for all of the years between the time the first culinary system was built when because of the inefficiency of the system, and not for lack of water, there were times when some citizens in the upper part of Hyde Park had difficulty getting ample water and it became necessary to limit the time for sprinkling to two hours per day no one ever thought of or mentioned shutting off the water of these defendants and even after the new system was built in Mayor Duce's time the town continued to furnish water to these defendants until the election of the new officers in 1938 when this action was brought, notwithstanding the fact that the evidence clearly is that the town has more water than a well designed water system requires so that upon this ground alone it is contended the judgment should be sustained.

EXCHANGE OF WATER.

c. The record discloses that two contracts that Hyde Park entered into with Smithfield Irrigation Company in both of which contracts they exchanged 25 shares of stock in the Logan-Northern Canal Company, (then the Logan-Richmond Canal Company) for waters from Birch Creek. The two contracts with Smithfield Irrigation Company are in evidence, (Tr. 293-297) In the first contract they agreed to pay the assessments on this water stock. In other words they merely turned the use of the water stock to Smithfield Irrigation Company for the use of the springs in Birch Creek. In the second contract the agreement is the same except that the stock was transferred to the

Smithfield Irrigation Company and they were paid \$500.00, the interest from which was supposed to be sufficient to pay the taxes on the water stock. So that if Hyde Park ever had acquired any additional water after 1911 they did not acquire it from the Smithfield Irrigation Company, and the only fair inference is they acquired it by their conduct and in this connection the evidence in this case is undisputed in three particulars.

1. That the defendants were the owners of a culinary water stream out of Birch Creek Canyon, used by them for more than twenty years prior to the contract and construction of the Hyde Park system.

2. That after Hyde Park constructed its culinary system in 1911 these defendants abandoned that culinary stream.

3. That between 1911 and 1935 at least on two occasions Hyde Park undertook to use additional waters in Birch Creek and that finally for a conveyance back to Smithfield City of all of their claims of any nature to the waters of Birch Canyon and the springs therein they accepted .5 c.f.s. of water at the present spring which flow must be guaranteed by Smithfield Irrigation Company.

I again repeat that the pleadings are not founded upon the theory of an express contract or exchange of water. Neither was the trial of the case upon any such theory. Neither did counsel attempt to induce the witness, Weeks or his wife, to testify to facts upon that theo-

ry, but the case was brought and tried upon the theory that part of the consideration was express and part of it was implied from the conduct of the parties. The implied part being that Hyde Park in effect affected the saving between the culinary stream and the tap, and as between Hyde Park and Smithfield Irrigation Company and these defendants became the owners of the water so saved and this in effect amounts to an exchange of water. The fact that on cross-examination Mr. Weeks did not expressly mention the giving up of the culinary stream does not change the fact that he did give up the stream, a fact which is not disputed in this case.

PLAINTIFF'S AUTHORITIES.

Plaintiff cites 43 C. J. 176 and 225 for the general propositions that municipalities were subject to both the State and the Federal Constitution. Of course we have no quarrel with those propositions, and likewise the plaintiff cites a number of cases where the result has been reached that the action of the municipality officers have been ultra vires. We do not burden the court with a desertation of the different facts in these cases cited for the reasons that they are not similar at all to the facts involved. Cases of ultra vires acts might be cited worlds without end but would be neither interesting nor instructive to the issues involved in this case.

UTAH LAW.

The policy of the law is not only determined by the constitution of the State but by the statutes and the decisions of the courts. The statutes defining the policy of the law in this state for those matters are as follows:

“Section 15-8-14. Towns may construct, maintain and operate water works***, and they may sell and deliver the surplus product or service of any such works, not required by the city or its inhabitants to others beyond the city limits.”

“Section 15-8-15. They may construct or authorize the construction of water works within or without the city limits * * *”

Muir vs. Murray City, 55 Utah 368, 186 Pac. 433. Held that money borrowed by Murray City to construct a power line outside of the city limits was a valid city obligation.

In referring to the question of ultra vires the court states that authorities cited from Oregon and Washington denying municipalities the right to operate outside of their said city limits are controlled by local statute, and our court says:

“and in this connection it is pertinent to remark that perhaps no state in the Union confers greater powers upon its municipal corporations than does the State of Utah.”

“In view of the facts and circumstances disclosed by the record in this case and the law applicable thereto, the court can arrive at no other conclusion than that the defendant is legally liable for the debt in question. The money was borrowed for a corporate purpose. It was profitably and judiciously expended, and the city and its inhabit-

ants have already derived, and in years to come will continue to derive, substantial benefits therefrom. In these circumstances, even if the transaction were not in all respects regular and in strict accordance with law, this court does not feel authorized to say that the defendant should be permitted under the plea of ultra vires to escape its liability."

The first three cases cited by counsel under the above heading were determined, as suggested, on a state of facts antedating the Constitution. However, the *Ellerbeck vs. Salt Lake City*, 29 Utah 361, 81 Pac. 273, and the case of *Brummit vs. Water Works Co.*, 33 Utah 289, 93 Pac. 829, were both decided after the constitutional provision was enacted. Counsel says that constitutional provision in question is clear and needs no construction and yet it would appear significant to mean that culinary water could be exchanged for greater volumn of irrigation water and in the *Brummit* case the court held that it was proper for the city to make a contract (referred to as a lease for the purpose of the argument) where the city did not own sufficient water for its needs the court in referring to this same constitutional provision says:

"Does the constitutional provision above quoted stand in the way? Our answer is again in the negative. Would it not be most forced and unreasonable construction of the constitutional provision to say that it meant that a city owning a small quantity of water entirely insufficient for its public needs, say nothing of the needs of its inhabitants, could not make any arrangement with

any person to permit its water to flow through the pipes owned and controlled by such person and to distribute it for use of the city? Would it alter the case if such an arrangement were called a lease? Does it not in substance amount to this? The city has some water but no means of distribution. Some one has the means of distribution and an additional amount of water, which, if combined with what the city owns, the needs of the city and its inhabitants, may be met. In order, therefore, to make use of the city's water, it enters into an arrangement with the person owning and controlling the water works and the additional water to permit its water to flow through the system owned by such person and in order to preserve its title to the water the city requires the distributor to make a proper acknowledgment of this title. The mere fact that the city cannot say that the identical water owned by it is distributed to it in no way changes the effect of the arrangement. As we have already pointed out, the city may exchange water for water, and this in effect is all that it has done in this case, and that is all that can in any event be done under the provisions of the ordinance."

Here is a matter it would seem somewhat analogous to our contention in this case that a city may acquire water or water works by leasing its water to be co-mingled and used with other privately owned waters while in the case at bar we have them acquiring a right of way together with whatever water rights they did acquire in the deal with these defendants as a method of acquiring a water works system.

It is very significant that the constitutional provision

under discussion has been before the Supreme Court of this state in a comparatively large number of cases with the Genola case being the last case and in every instance ways have been found to permit the municipalities to supply the water outside of their city limits. Not a single contract in connection with light or water or money borrowed for that purpose has been decided against a city supplying these items outside the city limits.

It must be that the Supreme Court, feeling that the true purpose of the constitutional provision was to prevent city water supplies (essentially a public utility necessary for every person in every community) from getting into the hands of private ownership for distribution to the public and not to prevent the development of this arid country where good culinary water is so very scarce and public policy requires its conservation on every hand and such culinary water is just as essential to the life and health and development of families residing outside city limits as inside such communities that some way has been found to supply the culinary water to the persons outside of the towns. In the Genola case holding that \$2500.00 in cash and stock in an irrigation company costing \$3050.00 which represented water that had to be taken in turns and not a constant flow was water of equal value with 119 gallons per minute culinary water constant flow, went much farther to sustain the contract than is necessary to go here. This in the interest of public policy and development of the state and in no way vio-

lating the principal that private ownership should not acquire public water supplies.

We will take time, however, to briefly discuss the authorities cited by plaintiff from the State of Utah.

Utah Rapid Transit Co. vs. Ogden City, 89 Utah, 546 58 Pac. (2nd) 1.

Held statute authorizing city to operate "Street Railways" did not authorize Ogden City to enter into the business of operating motor busses as a common carrier.

News etc. vs. Carbon County, 72 Utah 88, 269 P. 129.

Held county not liable for newspaper publications of notice of sale of property (ordered by clerk) where the property was property of Irrigation District and not the County.

CONCLUSION.

The judgment should be affirmed, because:

1st. The Findings are not only supported by the evidence but are in accordance with the great weight of the evidence most of which was undisputed.

2nd. The contract by which the plaintiff was the owner of the right of way sought to be condemned was a valid contract and, therefore, the plaintiff was the owner of the right of way sought to be condemned and the condemnation proceedings were entirely unnecessary because,

- a. There was sufficient performance to take it out of the Statute of Frauds.
- b. Because it is not a contract to sell or dispose of water rights belonging to the community but was a contract whereby these taps were granted as incidental to the plaintiff acquiring its culinary water system.
- c. It was a mere agreement to supply water out of the excess water owned by the plaintiff.
- d. There is ample evidence to sustain the contention that the agreement was in fact an exchange of water, or, that plaintiff was delivering to defendant water already owned by them, the plaintiff to retain any water saved by reason of piping the old culinary streams to the defendants.

Respectfully submitted,

M. C. HARRIS,

Attorney for Respondents.