

1950

North Salt Lake v. St. Joseph Water and Irrigation Company et al : Brief of Appellants

Utah Supreme Court

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Clyde, Mecham & White; Attorneys for Appellants

Recommended Citation

Brief of Appellant, *North Salt Lake v. St. Joseph Water and Irrigation Co.*, No. 7455 (Utah Supreme Court, 1950).
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IN THE SUPREME COURT OF THE STATE OF UTAH

NORTH SALT LAKE, a municipal
corporation,

Plaintiff and Respondent,

vs.

ST. JOSEPH WATER AND IRRIGATION
COMPANY, a corporation,

Defendant and Respondent,

LAUREN W. GIBBS,

Defendant and Appellant,

MARY GODBE GIBBS and

GRANT G. TUFT,

Interveners and Appellants,

DORA SQUIRES, C. Y. ROBINSON,

MRS. RALPH T. RICHARDS,

MRS. GEORGE S. GIBBS, MRS.

B. CECIL GATES, GEORGE M.

MARSHALL, CHARLES W.

GIBBS and RALSTON S. GIBBS,

Interveners and Respondents.

Case No.

7455

FILE
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Clerk, Supreme Court,

Brief of Appellants

CLYDE, MECHAM & WHITE

Attorneys for Appellants.

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Interveners and Respondents.

Case No.
7455

Brief of Appellants

This suit was brought by the Town of North Salt Lake to condemn the water rights and water system of St. Joseph Water and Irrigation Company, a public utility. The complaint also asked for the condemnation

of a 600 feet pipeline extension. (R. 5) The complaint alleged that L. W. Gibbs claimed ownership of this 600 feet extension. (R. 5) Gibbs claims in his answer that he and his wife owned it jointly, (R. 38) and his wife, Mary Godbe Gibbs, claimed joint ownership in her complaint in intervention. (R. 48)

This 600 feet extension was only part of a 2400 feet pipeline system constructed by the appellants Gibbs to connect the St. Joseph Water system with an area which was being developed by them for a housing project. (R. 187-93, Ex. 5) The Gibbs, before building the pipeline, had applied to St. Joseph for 60 water connections. This application had been accepted and approved by St. Joseph and the connection charge of \$20.00 each had been paid on forty of these accepted applications. (R. 199, Ex. 8) Thereafter this 2400 feet extension line was constructed at a cost in excess of \$4,000.00. (R. 190-3) Other homes were in the process of construction and several building lots had been sold. (R. 195, 349)

Thereafter a group of individuals who also were being served with culinary water by St. Joseph caused the Town of North Salt Lake to be incorporated. The incorporated limits of the Town were so fixed that all of the Gibbs development was excluded from the Town. (R. 10) Then this action was brought to condemn the water rights and water system of St. Joseph. The complaint also sought to condemn 600 feet of the pipeline extension of the Gibbs. The balance of some 1800 feet of the Gibbs extension was not sought to be condemned. (R. 186-8).

The Gibbs opposed the condemnation suit on the grounds that the property was already devoted to the highest public use. (R. 40, 50) They also contended that if the town were to be permitted to take that portion of the water supply and water system devoted to serve the Town area, that in any event the portion of the water and the water system available to serve the areas outside the Town could not be taken and the rights of those located outside the Town had to be protected. (R. 40, 50) The court did require continued delivery of 6,000 gallons of water per day to the six completed homes, but permitted the Town to condemn all of the water rights and the system. (R. 127) Those living outside the Town were given rights to use the excess capacity of the system, (not the water) but this can better be noted in detail elsewhere. (R. 128)

The Gibbs, after having had the court determine that the waters and system could be taken by eminent domain without obligation to furnish water to the Gibbs attempted to prove their damages, contending: (1) that the contract for sixty connections, for which they had paid \$800.00, and the 600 feet of pipeline which the complaint sought to condemn, both had value which the jury should be permitted to assess; (2) that the remainder of the pipeline extension, consisting of 1800 feet, which was not to be taken, would be damaged by reason of the severance of it from the St. Joseph system; and (3) that when the Gibbs laid out their housing project, the area developed was within the St. Joseph franchise area, that they had a firm contract for sixty connections, had in reliance on that contract commenced construction

of houses, paid engineering fees, purchased the land, etc., all of which value was lost by reason of the waters being taken from the housing project. (R. 30-50)

At the close of a three-day trial, the court ruled that the plaintiff did not need to take the 600 feet, and then held as a matter of law that the Gibbs were not to any extent damaged. The Town was permitted to take all the water and the water system, and the Gibbs were given nothing for their contract rights, for which they had paid the \$800.00 connection charge. Mary Godbe Gibbs was permitted to intervene by Judge Cowley, but after the foregoing ruling, Judge Hendricks dismissed the complaint in intervention. (R. 355) Later when judgment was entered, (R. 124) the decree was that there was "no cause of action" for the interveners. It is not now known whether the prior dismissal or the later judgment of no cause of action was intended to control. In any event, the court held that the Gibbs were entitled to no water nor connections, and that they had suffered no damages. It is from this judgment that the Gibbs appeal.

The amount assessed by the jury as damages to St. Joseph was acceptable both to the Town and to St. Joseph, and the judgment has been paid. This phase of the case, is therefore, of no concern here.

ASSIGNMENTS OF ERROR ON POINTS RELIED ON IN THE APPEAL

I. The Gibbs had an interest in the St. Joseph system which: (a) could not be taken by condemnation, because it was already devoted to the highest public use; and (b) if it be held that the Gibbs are wrong in this con-

tention, then in any event the interest of the Gibbs which was taken had a value which the jury should have been permitted to assess.

II. Since the Gibbs had constructed a pipeline extension pursuant to an existing contract with St. Joseph and had made other improvements, they were entitled to damages when the pipeline extension was severed from the system of St. Joseph and thus left without water.

III. It was error to permit the Town to dismiss its action to condemn the 600 feet extension after the close of the trial, in that: (a) The Town had held possession under an order of immediate occupancy for over seven months, and Gibbs was enjoined from interfering with it, all without compensation; and (b) the Gibbs had been required to protect their interest, adduce evidence, and in any event should have been allowed their costs when the Town decided at the close of the trial not to condemn.

IV. The jury should have been permitted to determine: (a) whether or not the property of the Gibbs was within the St. Joseph franchise area; and (b) whether or not there was surplus water to fulfill the Gibbs contract for new connections.

V. It was error to permit the City to furnish water to six users at city rates through the Gibbs pipeline without paying the Gibbs therefor.

THE FACTS

The St. Joseph Water and Irrigation Company was a public service corporation, engaged in the distribution and sale of culinary water. (R. 8 and 128) Its lines ran

north along the west side of Highway 91, (the Ogden-Salt Lake highway) beginning at a point near the Salt Lake-Davis County line. Most of the users of the water were located west of that highway, but there were also users to the east. (R. 35 and 36) To show that the Gibbs land was within the franchise area, the Gibbs showed that up until the time of their application for sixty new connections the company had served all applicants (east or west of the road) adjacent to its pipelines. (R. 19) They had not within the president's memory ever refused connections. (R. 36) The president of the company described the area served as including the Gibbs land. (R. 18-19) The company had previously had a dispute over its franchise area. It complained to the Public Service Commission of Utah that the O'Dell Water Company, which served the area to the north of the St. Joseph area, had infringed on the St. Joseph area by furnishing water to one house located east of Highway 91, and one house located west of said highway. (R. 102) A hearing had been held before the Public Service Commission on this complaint. As a result of that hearing the Public Service Commission entered an order describing the north boundary of the St. Joseph system. The order described the north boundary as extending both east and west of said highway 91. (R. 100, Ex. 304) The disputed O'Dell connections were in the St. Joseph territory both east of the highway and west of the highway. (R. 102) The Public Service Commission order did not fix the east boundary or the west boundary of the St. Joseph system, but it did describe the north boundary, beginning at a point considerably east of all the Gibbs properties de-

scribed herein. The Gibbs property adjoins U. S. Highway 91 on the east and lies to the extreme north end of the St. Joseph territory, as described in the Public Service Commission's order. (R. 20, Ex. 3 & 4, R. 102) There was evidence to the effect that the land (Elias Parkin corner) owned now by intervener Dora Squires (purchased from the Gibbs tract) had once had a water connection. (R. 36) There had never been any applications made which had been refused. (R. 36)

Mary Godbe Gibbs purchased land in this area, and a housing project was organized and construction commenced. (R. 183) Before commencing construction the Gibbs had applied in December, 1945, for sixty connections and had paid \$800.00 in full payment for forty of these sixty connections. (R. 199) The application for the sixty connections was accepted and approved by St. Joseph. (R. 199) The Gibbs then under contract with St. Joseph constructed a pipeline extension from the St. Joseph system across U. S. Highway 91, into the area being developed as a housing project. (R. 214) The evidence shows that in excess of \$4,000.00 was expended on this pipeline (R. 192-3) It was stipulated that the first 126 feet of this pipeline had a value of \$750.00. (R. 353)

At the time of these Gibbs applications for sixty connections (1945) St. Joseph had two springs. One had a flow fixed by one witness at 27 gallons per minute. (R. 63) The other had a flow of about five gallons per minute. (R. 74) The jury thus could have found that these two springs had a combined flow of 32 gallons per minute. In addition the company leased water from the McDuff Springs which had a flow fixed at about forty gallons

per minute, (R. 109) A normal family of four or five persons with lawn, shrubs, and normal household use will use about 1,000 gallons of water per day during the summertime when lawns are watered. (R. 126) By simple mathematics, it can be determined that a flow of one gallon per minute will yield 1440 gallons per day. The water of St. Joesph, plus the McDuff leased water would thus have furnished water for 105 connections during the summertime when the use was high. Richards, who only measured the McNiel Spring as it flowed into the reservoir, (and thus missed some five gallons per minute which wasted) testified that the combined flow which he had measured would furnish water for 97 families. (R. 110) The five gallons per minute which he did not measure would have furnished water for eight more families. At the time of the trial there were only sixty four connections, (Ex. 1, R. 4) eleven of which had been permitted to connect after the applications by the Gibbs. (Ex. 10) Therefore, at the time (December) 1945, the Gibbs applied for sixty connections there were only fifty three users, and the water supply would serve 105 families, even at the periods of heaviest use.

Further, an application had been filed with the State Engineer by Ward Holbrook, president of the St. Joseph, for a well. The application expressly stated on page 2:

“The supply of water coming from sources owned by the St. Joseph Co. and also leased to the St. Joseph Co. do not appear adequate to supply the needs of applicant and of other customers now connected and the numerous consumers seeking service from the company. In the event this application is approved and the contemplated well pro-

duces sufficient water, the entire flow will be used for the primary purposes heretofore set forth, if such becomes necessary to supply customers requesting service from said St. Joseph Water & Irrigation Co.”

This application was approved on February 25, 1947, and the well had been drilled with a flow of some 250 gallons per minute, or enough water to supply some 360 connections. This application was filed on April 30, 1946. (Ex. 14) Thus at the time the controversy arose, this well would have furnished a full water right for an additional 360 homes and thus more than have supplied the Gibbs application for sixty connections. Thereafter, the company and Holbrook made a written agreement for the use of the well for ten cents per 1,000 gallons pumped into the company lines. (R. 221) It was agreed by Holbrook and St. Joseph that a rate increase was necessary to permit repair to the system and to acquire water from the new well. (R. 222) The company had shown no profits for a number of years, and the pipeline system was badly in need of repair. (R. 222) An application was made for a rate increase. (R. 222) This was opposed by the people who later formed the Town of North Salt Lake. (R. 222) The Commission never made a ruling on this application in the more than two years between the date of the application and this trial. (R. 222)

The Gibbs discontinued further development in the housing project while this dispute pended. (R. 202) but prior thereto over \$4,000.00 had been expended on pipelines, (R. 192-3) at least ten homes were constructed, (R. 195) and other sums were expended, (R. 193) and building lots were sold. (R. 195) The applications for the sixty

connections were still in good standing, and the water from the Holbrook well was available.

After the Gibbs had made these expenditures and had their applications approved by the company, the Public Service Commission investigated the question of availability of water. It noted that a well was contemplated (p. 3 of Ex. 10) but not yet drilled; that the McNeil Spring was at least temporarily unfit for use, and that the McDuff water might be lost, and that in view of this there might not be sufficient water. It, therefore, concluded that it should prohibit new connections "*until the company has been able to determine adequately what its future supply will be.*" (p. 5) It ordered: (1) that the tunnel to the McNeil Spring be cleaned and repaired; (2) that St. Joseph discontinue new connections "pending completion of arrangements for an adequate supply of water in the future" except that five users, plus the six homes in the Gibbs lands were to be connected. (p. 7 of Ex. 10) It is to be noted that the five persons ordered to be connected applied after the application for sixty connections were made by Gibbs.

The McNeil spring had been declared unfit, the McDuff lease was about to expire, (Ex. 10) and the well had not yet been drilled. It was because of these uncertainties that the Public Service Commission prohibited new connections (R. Ex. 10) Throughout the trial the plaintiff asserted that the Public Service Commission had determined that the water supply was all in use and that it was inadequate to fill the needs of Gibbs. This is not correct. It merely concluded that the supply was uncer-

tain, and prohibited connections until the uncertainties could be cleared. (R. Ex. 10, p. 4-5,7)

In the meantime, because of motives not material here, one part of the franchise area of St. Joseph was incorporated into a town (North Salt Lake) and the town brought action to take over all of the water and the system. (p. 1-3)

The property owners excluded from the town sought to intervene. Judge Cowley permitted the intervention of some, (p. 44) but Judge Hendricks dismissed them and denied all others the right to intervene. He then proceeded to protect the rights of the six home owners who had been using water under the Public Service Commission order. (R. 353-5) However, they were not parties. They were given 6,000 gallons per day at town rates, (R. 354) and were given the right to use the Gibbs pipeline to get water to their lands from the St. Joseph system. They were not required to pay anything for either the water rights or the pipeline.

The Gibbs were denied any damages for their \$4,000.00 pipeline and four houses were left without water. (R. 353-5) The \$800.00 which they paid for the sixty connections was confiscated and they were denied the right either to have the connections or to be paid for their loss.

POINT I

THE APPELLANTS GIBBS HAD AN INTEREST IN THE ST. JOSEPH SYSTEM WHICH COULD NOT BE TAKEN BY CONDEMNATION BECAUSE

THE PROPERTY WAS ALREADY DEVOTED TO THE HIGHEST PUBLIC USE

It must be kept in mind that the Gibbs had sixty connections applied for, approved and paid for, that they had made six connections, completed a pipeline extension into the property being developed and had houses under construction. They thus stand on a stronger footing than those whose desire for water connections had not been formulated or approved prior to the commencement of this suit. It is our position that these rights, based on an existing contract, must in all events be given protection.

The right of a city to acquire a water system by eminent domain must be conceded. Section 15-7-4, U.C.A. 1943. Yet in exercising that right the city is controlled by the general statutes governing eminent domain proceedings. If this were not so, then there would be no procedure prescribed, and the right of eminent domain would have to be denied. See *Lone Star Gas v. Fort Worth*, 98 S.W. (2d) 799, 128 Texas 392; annotation 109 A.L.R. 384.

By section 104-6-3, the particular private property which may be taken is enumerated. It is there provided.

“The private property which may be taken includes * * *

“(3) property appropriated to public use; provided that such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated.”

“As a general rule, property already devoted to a public use can not be taken for another public use which

will totally destroy or materially interfere with the former use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication, mere general authority to exercise the power of eminent domain being in such case insufficient; * * * The rule also applies to property about to be lawfully appropriated, although the appropriation is not completed." 29 C.J.S. 862; *Vermont-Hydro Electric Corporation v. Dunn*, 112 Atl. 223, 95 Vermont 144, 12 A.L.R. 1495. But where it is expressly authorized so to do, the city may take property already devoted to a public use if under Section 104-61-3 the proposed use is a higher use. But it can not, as is attempted here, take service away from one territory or area (the area outside the town) for exclusive use in the town, for such would not be a higher use.

One of the early cases dealing with this problem is *Mono Power Co. v. City of Los Angeles*, C.C.A. Cal., 284 Fed. 794; certiorari denied 43 S. Ct. 700, 262 U. S. 751, 67 L. Ed. 1214. There the Mono Power Company was a public corporation furnishing power to the inhabitants of several cities, towns and counties. It furnished no power to the City of Los Angeles. Los Angeles brought a condemnation proceeding to condemn all of the property of the power company and to thus deprive the inhabitants of the territories being served of power service. The court expressly noted that the problem was not merely whether one town could condemn property serving the inhabitants of another town. Rather it was a question of the collective inhabitants of the territory served, including the county areas. See page 793.

The statute involved was very close to our Section 104-61-3 (3). The Court held that the property being devoted to serve the collective inhabitants of other areas by a public service company could not be taken by the City of Los Angeles. As noted above, the United States Supreme Court affirmed this decision by denying certiorari.

Later in the case of *East Bay Municipal Utility District v. Railroad Commission*, 229 Pac. 949, 194 Cal. 603, a slightly different fact situation was presented. There, like here, a public service company served areas both within and outside the municipal district. The district sought to condemn all of the properties of the public service company, but it proposed to continue to serve the territory located outside the municipal district. Emphasis is placed on the fact that it did not merely propose to serve the *present users* located outside the district. Rather, it proposed to continue to serve the same "*territory*", but merely to change the ownership from a private to a public entity. On page 956 of the Pacific Reporter the court said that:

"It is proposed to continue the use of the water to the same *territory* to which it has heretofore been appropriated. The territory and the people are not to be disturbed in the use to which the water is now put and are to enjoy an uninterrupted use thereof."

The court also said:

"The change will result not in the disturbance of the use or *appropriation of water*, but in the agency authorized by law to administer the trust."

In an early California case, *City of South Pasadena v. Pasadena Land and Water Company*, 152 California 579, 93 Pac. 490, a public water company attempted to sell all of its water and its distribution system to a city. About two-thirds of its consumers resided inside the city, and approximately one-third resided outside the city. Those residing outside the city sought an injunction to prohibit the sale by the public utility to the city. It is thought that this case is very close in point, because the city could take no more by eminent domain proceedings than the company could voluntarily sell—for eminent domain is a compulsory sale. The court held that the public utility could sell all of its facilities to the city, but it further held that the city received the property subject to the same trust and duties as were imposed upon the utility. It expressly protected the rights of those persons outside the city who may “become entitled” to make *future* connections. In so holding the court said:

“The respondent is a quasi public corporation engaged in supplying water for public use. This is admitted, and it is also conceded that corporations of that character can not, without legislative sanction, transfer to another the entire property devoted to public service and the business of carrying it on * * *

“It is urged that the effect of a transfer, such as that here proposed, would relieve the defendant corporation of its duty to continue the service of supplying water, which is imposed upon it by reason of its control of the water and its enjoyment of the constitutional franchise to use the streets for its pipelines, and that there would be no corresponding transfer of the duty to the transferee

of the property, the city of Pasadena, * * * The section does not forbid the transfer of a franchise so as to relieve the previous owner thereof, or the grantee or lessee, personally, from liability incurred in the operation of the franchise, if such a thing were possible. *It merely forbids the transfer of a franchise 'so as to relieve the franchise, or property held thereunder' from liabilities so incurred or contracted, * * **

“It appears from the complaint that for many years the defendant company has been supplying water to portions of the two cities, precisely as it does now, the area supplied in South Pasadena being about two-thirds of its territory, that more than three hundred families are now supplied therein from this source, and that if they are now deprived thereof, there is no other known source from which it can be replaced, and they would be without water for any purpose. It may well be assumed that Pasadena could obtain no sufficient quantity of water for a municipal water system, except by buying or condemning that portion of the water of the defendant company now distributed to its inhabitants, or some other supply already devoted to use outside the city. It would be bad policy under these conditions to require a city, desiring to acquire water for its inhabitants to take water in use by others for similar purposes outside its limits, where the effect would be to devastate and depopulate such outside territory. To condemn the individual right of each member of the outside community would be impracticable, and even if it could legally be done it would probably prove too costly for the resources of the city. To separate the supply and endeavor to control, manage, and if necessary develop and increase the supply from time to time, in concert or partnership with some other corpora-

tion, would probably cause many complications, and render the successful administration of the municipal system much more difficult and doubtful. In order to accomplish the purpose for which these powers were given, it is reasonably certain that it would be advisable, and it might be necessary, for the city to take over a supply already partly in use outside, and continue the service to the outside territory, while supply the remainder to the use of its own people * * * Having taken over the whole system subject to the burden of supplying part of the water to the inhabitants of South Pasadena, the city of Pasadena will have no greater rights or powers, respecting that part of the service than its grantor previously had. *It will be under the same obligation as its grantor to continue the service and to supply the water to all persons who may become entitled to it in the future, so long as it retains possession and control of the property so charged* * * * The city will not sell its surplus * * * in the sense intended by the statute. The right to the use of the required quantity of this water is now vested in the city of South Pasadena, and its inhabitants within the portion of its territory where it is to be served and the City of Pasadena does not propose to take away this right. It is about to buy only the right of the Pasadena Land & Water Company to the water which did not include this use. It will be obligated to put it to the same use as fully as that company is now compelled to do so. Water which is in this manner dedicated to the use of an outside community, can not be at the same time surplus water subject to sale to others. The sale is already, in effect accomplished. The City of Pasadena, with respect to this part of the water will hold title as a mere trustee, bound to apply it to the use of these beneficially interested.

This is one of the earliest California cases. The later cases which are cited and discussed above frequently speak of the duty of the city to supply water to the "territory" or "area" previously served by the private water company whose property was condemned. Here the town has throughout this proceeding argued that its duty is only to those persons who already had water connections and were actually using water, that its duty ceased when it furnished them with the quantity of water which they were using at the time the suit was brought. They have contended that the right to make new connections in the future rests entirely with the members of the town, and that the territory previously served by St. Joseph can make no increased use, nor have any new connections. This idea is expressly negative by the Pasadena case. The court on page 956 of the Pacific reporter expressly said that the city in taking over the private water company would be obligated to supply not only the existing needs, but "it will be under the same obligation as its grantor to continue the service and to supply the water to all persons who may become entitled to it in the future, so long as it retains possession and control of the property so charged," citing *Fellows v. Los Angeles*, another California case. It seems crystal clear to us that this property, which was devoted to a public service, became charged with a public trust. As is discussed in the next subdivision, this corporation, the St. Joseph, could not have taken the property from this public trust. Counsel for the town repeatedly asserted this proposition in the trial in an attempt to hold down the money damages. They objected time and again to questions designed to

ascertain the value of this property for purposes other than supplying water to the inhabitants of the town and said that: "this water is already devoted to a public service, and it can not be used for anything else." Having thus gained their point, they now argue that by this condemnation suit they freed this property from part of the public trust, to wit, the duty of supplying service to the franchise area. While the cases dealing squarely with this point are not numerous, those which are available sustain the position taken by appellants that this property, insofar as it was supplying the needs of persons who reside outside the town was already devoted to the highest public use and could not be taken by eminent domain, except subject to the same trust. As said by the court in the *South Pasadena* case, the trust which was imposed upon the property was such as to permit those in the franchise area who "*may become entitled*" to use water in the future to make their water connections.

These appellants would have had no particular complaint had the trial court compelled the Town to honor the approved applications for 60 connections which the St. Joseph had agreed to and had undertaken to serve. But this court refused to do. It gave only limited protection to the six persons who were actually using water. It limited them forever to 6,000 gallons per day, and all of the other territory outside the town was forever denied the right to any water. This holding abolished the contract rights of the Gibbs with St. Joseph.

It simply can not be that it is a higher public use for an inhabitant of the Town of North Salt Lake to have a drink of water, than it is for an inhabitant living imme-

diately outside the town boundary. Both of said inhabitants were within the St. Joseph franchise area. By section 100-1-5 all uses of water are made public uses. Under the general law already clearly established here in Utah any inhabitant of the franchise area could have compelled St. Joseph to allow it to connect on to the system. See *Home Owners Loan v. Logan City*, 97 Utah 235 at 242, 92 P. (2d) 346. Had the system continued in the ownership of St. Joseph and water were available, the Gibbs, under the holding of the *Home Owners Loan case*, could have compelled St. Joseph to give to them sufficient water for the connections. Their applications gave them a priority to the next sixty connections if water was or became available. As will be demonstrated below, the jury not only could have found, but probably would have been compelled to find that there was surplus water in the St. Joseph system in quantities more than adequate to supply the connections asked for by the Gibbs.

The property of St. Joseph had been dedicated to public use. One person within the franchise area had a right to connections equal to the right of any other person within that area. If there were not water for both, then priority of application should control. Yet the trial court here cancelled the 60 approved applications and gave the exclusive right to make new connections to the people of the town. It refused to let the jury determine whether there was sufficient water for both. Its ruling is that if a person resides in a town he has a preferential right to have a drink of water superior to persons residing outside the town; that it is a higher public use for persons residing in the franchise area of St. Joseph (if they will

incorporate into a town) to have water than for the persons residing outside the town to have water.

The cases cited above will not permit such a holding. The *Mono Power* case would prohibit the city from condemning the system at all. The *East Bay Municipal Utility District* case would permit the town to take the system but would make them carry on the same trust—the same duty—to the territory previously served. The *Pasadena* case obligated the city to hold the water in trust both for the existing users and for those in the territory served “who *may become entitled*” to use it. The contention that the people outside the town could only be allowed water if it were surplus to the needs of the town under a situation such as this was also expressly denied in the case of *Sacramento Municipal Utility District v. Pacific Gas & Electric*, 165 P. (2d) 750. In that case the nature of the burden assumed by a town when it takes over a public service company rendering service both within and outside the town is further described. It there stated that the town’s burden is not limited to furnishing service from its surplus water. It must take over the duties of the public service company and perform the obligations of the trust it owed, because it had devoted its property to a public service. It must take over the duties of the public service company to furnish the territory previously served so far as it is possible to do so. In this regard the court said:

“One of the contentions advanced by appellant in this connection, to the effect that it is only the surplus energy that may be used for the service of persons outside the district, does not find

support in the authorities. It is held that this is not the theory on which such service may be provided, but it is rather the theory that in taking over facilities serving another area, the district must, on principles of fairness and justice, continue the service which was furnished outside the district, where this can be done efficiently and economically. 'In these operations the municipality is not selling surplus or excess waters to the prior users. The purchase of the system is impressed with a trust * * *' Durrant v. City of Beverly Hills, 39 Cal. App. 2d 133, 137, 102 P. 2d 759, 761."

There are not a great number of cases dealing with this subject. It seems to be clearly established that insofar as facilities devoted solely to the needs of the Town are concerned it is a higher public use for the Town to own its own system. For this reason, the principle is established in the textbooks and in the cases that a town can condemn a public service corporation which is serving the area embraced by the town. In order for the town so to do, it must have express legislative authority, but once granted that authority it does have this power. This matter is considered in great detail in an annotation in 173 ALR beginning a page 1362. Further along in said annotation at pages 1376-78, the right of a city to condemn a public service corporation which serves people, both within and without the town area, is described. A very limited number of cases are there noted, but uniformly they are to the effect that if the town does take over a utility which is serving an area outside the town it must perform that company's public duty to that territory. The *Mono Power Company* case is cited along

with *Plainfield Union Water Company v. Plainfield*, 83 New Jersey Law, 332, 86 Atl. 311.

(a) *St. Joseph could not have withdrawn service from any of its franchise area by a voluntary sale or otherwise.*

To further demonstrate the fact that the peoples of a franchise area do have an interest in the discontinuance of service, reference is made to that group of cases which prohibit a public utility from withdrawing service from particular areas without legislative authority. It is clear from these cases that persons located in the franchise area had a right to be heard before St. Joseph could have withdrawn service itself. If it could not have voluntarily done so, it is difficult to see upon what principle service could be withdrawn from the area by eminent domain proceedings. It was upon this principle that the users outside the city sought to enjoin the sale of a private water company to Pasadena in the *South Pasadena* case supra. The court said that the persons being served would have an interest which had to be protected. It protected it by permitting the city to buy the system, but held that the property was imposed with a trust to serve both existing users and those "who may become entitled" to service in the future.

The books are full of cases wherein a utility has attempted to withdraw service from a particular area or to change the nature of the services rendered. See, for example, two Utah cases, *L. A. and S. L. R. Company v. Public Service Commission*, 80 Utah 455, 15 P. (2d) 358, and *L. A. and S. L. R. Company v. Public Service Commission*, 81 Utah 286, 17 P. (2d) 287.

The principle is well stated in an early Connecticut case, *Gates v. Boston & N. Y. Air Line R. Co.*, 53 Conn. 333, 5 Atl. 695, and in an annotation at 11 ALR 252. In the *Gates* case the court said:

“* * * Having exercised those powers, the corporation has no right, against the will of the state, to abandon the enterprise, tear up its track, and sell its rolling stock and other property, and divide the proceeds among the stockholders. The possible effects of the exercise of such a claimed power are utter disaster to the great interests of the state, certain destruction of private property in which whole communities, created and existing upon the faith of the continuous use of the chartered powers, are interested; and, indeed, the life of the citizen as well as his property rights are thus jeopardized. Upon principle it would seem plain that railroad property once devoted and essential to public use must remain pledged to that use, so as to carry to full completion the purpose of its creation; and that this public right, existing by reason of the public exigency, demanded by the occasion, and created by the exercise by a private person of the powers of a state, is superior to the property rights of corporations, stockholders, and bondholders.”

CONCLUSION ON POINT I

The evidence is undisputed that St. Joseph owned in its own right and leased from McDuff sufficient water to furnish 105 connections. The evidence is also uncontroverted that St. Joseph had a written contract to use at a rate of ten cents per thousand gallons the 250 gallon flow of the Holbrook well. Combined, these water sources would have furnished a complete water supply for well

over 450 connections. At the time of the trial it was stipulated that there were only 64 connections. It is thus crystal clear that there was adequate water under the control of St. Joseph to furnish water for all of the 60 applications which were made by the Gibbs. The applications had been made, approved and paid for. The pipeline extension had been completed, and houses were under construction before the condemnation suit was brought. Certainly the Gibbs had established a right to have water connections which St. Joseph could not have refused. The water and the property had been dedicated to public use and were imposed with a public trust. The cases appear to permit the town to condemn the system, but deny the right of the town to free the property from the obligations of its previous trust. The Town was obligated to furnish water and to perform the obligations that St. Joseph would have had had it retained ownership of the system. Under the *Pasadena* case and the others cited, the obligation of the town was to furnish water to all existing users outside the town, to those who had established a right to water like the Gibbs, and also to those who might become entitled to use the water in the future in the franchise area. The Gibbs are not interested particularly in establishing the principle that all persons in the franchise area must be served. They base their case squarely upon the fact that they had connections approved and paid for, that they had made the necessary pipeline installations. They had existing rights as against the St. Joseph to the available water of the St. Joseph system. We think the law is as laid down in the *Pasadena* case, that the Gibbs would be entitled to water, even

without the approved applications, but certainly in view of the approved applications the Gibbs had rights which could not legally be taken.

Since the Town did not condemn the St. Joseph contract to purchase water from the Holbrook well the matter is left somewhat muddled. Had the Town taken over all of the water supply of St. Joseph, including its contract rights to the Holbrook well, then a decision that the Town was required to serve the Gibbs would have disposed of this case. But since the Town has acquired only the 27 gallons per minute flow from the springs owned by St. Joseph, it does not have sufficient water to meet its existing needs, and of course will in the future be compelled either to acquire the McDuff water, (which already has been devoted to public use by St. Joseph) or the water from the Holbrook well. It seems that the Town should be prohibited, as we contended, from taking the St. Joseph system at all, unless it can perform the trust which had been assumed by St. Joseph. By breaking up the system as it has done, it has rendered it impossible for the Gibbs to get water. Unless the Town increases its supply and is obligated then to supply water for the sixty connections, or unless the system is returned to St. Joseph, which can continue to perform its trust the Gibbs cannot be protected. The Gibbs do not care which is done, but it is their desire to procure water for the sixty connections rather than to have damages for the taking of their contract rights and severance damages to their pipeline and housing project.

POINT II

IF THE PROPERTY OF ST. JOSEPH COULD BE FREED OF ITS OBLIGATION TO SERVE THE SIXTY CONNECTIONS OF THE GIBBS, THEN IN ANY EVENT, THE GIBBS WERE ENTITLED TO COMPENSATION.

There could be no principle which would justify the termination and avoidance of the Gibbs contract rights, and since they were destroyed they must be compensated for. Being property rights, they are protected by the provisions both of the Federal and State constitutions which prohibit a taking of property without just compensation. This principle is too well established to need citation of authority.

There is no evidence even to suggest that the Gibbs did not have a valid contract with St. Joseph for sixty water connections. There likewise can be no doubt that those contract rights have been destroyed by the taking of the property in a suit to which both St. Joseph and the Gibbs were parties and in which the Gibbs asserted their rights, but were awarded no interest.

It is a familiar principle in eminent domain proceedings that where several parties have an interest in the property being taken, their rights must be separately valued and each must be paid for his interest. See for example, Lewis on Eminent Domain, Third Edition, Sections 716-719. See also 29 C. J. S., Section 236 (b), page 204, wherein the rights of a lessor and lessee, landlord and tenant, mortgagor and mortgagee, trustee and beneficiary, etc. are discussed. It is there stated that both

the lessor and the lessee, the landlord and the tenant, etc. are necessary parties to the condemnation suit, and that the rights of each must be fixed. Here Gibbs had a contract interest in the St. Joseph system and were not only proper parties, but were necessary parties to the taking of that interest and the termination of their contracts. If the property was to be taken (and we strenuously deny the right of the city to take it free of its obligations) then this interest of the Gibbs should have been paid for by someone, and it should have been assessed by this same jury, not by some subsequent or other jury.

One case which clearly holds that the Gibbs contract with the utility was a property interest in the property taken, is the case of *Plainfield Union Water Company v. Plainfield*, 83 New Jersey Law 332, 86 Atl. 311. The court there held that one city could not condemn a water system already devoted to serve several other areas. It based its holding upon the fact that the statutes were not broad enough to permit such condemnation. In reaching this conclusion the court discussed the nature of the rights of these other areas which had contracts with the utility for service. The court said that by reason of these contracts the areas had an interest in the system, that their interest entitled them to water, that the contracts were unique in that they could be specifically enforced by mandamus to compel a water connection, and that had the legislature permitted the city to condemn the utility then the holders of these contract rights would be entitled to compensation.

The principle is no different here. The Gibbs had a contract interest with the St. Joseph. Under a letter dated the 14th day of December, 1945, they submitted an application for sixty connections. (Defendant's exhibit 8) The corporation, by a resolution of its Board of Directors, approved these applications. (R. 199) Thereafter on December 18, 1945, the Gibbs sent a letter acknowledging the connections and gave their check No. 873 for \$800.00 in payment therefore. (Defendant's Exhibit 8) At that time there was not even the most remote idea that the system would be condemned. The Town of North Salt Lake had not yet even been incorporated. Nor was there any plan afoot to incorporate it. Gibbs simply wanted to develop a housing project and applied to St. Joseph for water. If the St. Joseph had not had sufficient water to supply these connections, then the Gibbs would never have gotten them, because under no circumstances could the company have taken away from its existing users to meet applications for new connections filed by the Gibbs. It was a public utility under the regulation of the Public Service Commission, and any apprehension that Gibbs was going to take away from the other users their right to use water was indeed far-fetched. He did, however, establish a priority to the sixty connections into the system. The evidence is clear that there was sufficient water. The system was delapidated, and part of the water was wasted, but the flow of water was adequate if the system were repaired.

There can thus be no doubt that the Gibbs had a valid contract for sixty connections, that they had paid \$800.00 for them and were obligated to pay an additional

\$400.00. The water was available to serve their needs. In reliance on these contracts, and pursuant to the express requirements thereof, the Gibbs proceeded to install a pipeline extension. It is to be noted from their arrangement with St. Joseph that they were required to install the pipeline and to transfer it to St. Joseph, after they had been paid therefor from the revenues from the sale of water. (R. 199) St. Joseph later relinquished all of its claim to the pipeline. (R. 223) But the Gibbs did install the pipeline pursuant to contract and in reliance on its contract rights. When the town condemned the system, it should have been compelled in any event to compensate the Gibbs for the reasonable value of these contract rights, and as is set out in more detail below, they should have been allowed severance damages for the severance of their pipeline and other properties from the St. Joseph system.

POINT III

SINCE THE GIBBS HAD CONSTRUCTED A PIPELINE EXTENSION PURSUANT TO AN EXISTING CONTRACT WITH ST. JOSEPH AND MADE OTHER IMPROVEMENTS, THEY WERE ENTITLED TO DAMAGES WHEN THE PIPELINE EXTENSION WAS SEVERED FROM THE SYSTEM OF ST. JOSEPH AND THUS LEFT WITHOUT WATER

The Gibbs, in reliance upon an existing contract with St. Joseph, constructed a pipeline extension at a cost in excess of \$4,000.00. They not only had the approved applications for sixty connections, but the company had

expressly agreed with the Gibbs that if they would construct a pipeline extension from the St. Joseph pipeline to their housing project, that they would be reimbursed therefor by the company from the proceeds from the sale of water in the Gibbs subdivision. (R. 199) Counsel read from the corporation minutes, upon the stipulation of the parties as follows :

“Mr. L. W. Gibbs presented a letter requesting extension of water service to supply the new homes about to be constructed in Hillside Gardens ; upon a motion of Ward C. Holbrook this extension was authorized with the understanding that the work be done by Mr. Gibbs, and that the cost of labor and materials be paid for by L. W. Gibbs, with the understanding that the said L. W. Gibbs be refunded all accounts collected for water service and water connections during a period of five years from the time of the completion of the extension in accordance with the conditions of paragraph 11 of the Rules and Regulations.”

Pursuant to that arrangement, Gibbs paid \$800.00 for forty of the sixty connections, and by his letter of December 18, 1945, he agreed to pay for the remaining twenty connections as the housing construction progressed. (Ex. 8) Gibbs thereupon commenced the construction of the pipeline system. The evidence is uncontradicted that he paid \$100.00 to A. Z. Richards for engineering work in laying out the system. (R. 192) He paid the Higham Plumbing Company \$747.50 on July 14, 1946, and \$817.20 on July 31, 1946, for plumbing supplies and work shown on two statements introduced as Exhibit 7. (R. 172) He paid Grant Tuft \$775.50 for installation of other pipelines, the Chytraus Construction Company

\$839.38 for construction work on the pipelines and \$900.00 to the Waterworks Equipment Company for pipe. (R. 189) All of these expenditures were made pursuant to a valid and subsisting contract entered into more than two years prior to the bringing of this condemnation suit. When the company was stopped by these proceedings from furnishing water, it disclaimed all interest in the pipeline. (R. 223) So it is clear that the Gibbs owned the pipelines, that they expended well over \$4,000 to construct them, and that they were constructed under valid, subsisting contracts. As has been demonstrated above, St. Joseph had under its control sufficient water to supply in excess of 450 connections, and at the time of the trial it was supplying only 64, so that had this system remained under the control of St. Joseph the Gibbs would have had water for their pipeline, and through the sale of water would have been reimbursed for their costs of installing it. Both the contract right which entitled them to the connections and the investment in the pipeline system have been totally destroyed and rendered worthless by this condemnation suit.

This case must be distinguished from those cases where members of the general public have constructed improvements on their own land in reliance on the location of a railroad track or a highway which is later changed. Such people have no rights for which they can be paid money damages, if the utility discontinues operation or the highway is moved to suit the greater public convenience. But such is not the law where the facility is constructed pursuant to a contract with the utility to render service, and the utility then seeks to withdraw service

without paying for the value of the improvement. Again the fact situation is one upon which there has not been a great deal of litigation. There is, however, an annotation in 23 ALR 555, in which the general rule is given as stated above. Of course, in no case is the utility permitted simply to abandon service without getting authority of the regulatory department of the State. This is discussed in detail above with the cases that hold that the person being served has an interest in continued service, and that property once devoted to public use can not be withdrawn from public service, except with legislative authority. However, in those cases where legislative authority to withdraw is granted, the utility generally may discontinue its line without paying its customers damages because of its abandonment or relocation. The particular cases covered by the annotation in 23 ALR 555 deal with the change in location of railroad tracks and facilities. After giving the general rule that damages can not be recovered by the public at large the annotation then refers to a group of cases where the service is being rendered or improvements were installed pursuant to a contract. In such instances, the courts hold that damages may be recovered if the service is taken away.

No other rule could be justified either in law or morals. Where a customer of a public utility which is obligated by law to render service enters into a firm contract with that utility under the terms of which the customer constructs connecting facilities, the utility can not discontinue service without paying damages to the customer whose facilities have thus been rendered valueless. *The rule would be otherwise were there not a con-*

tract, but where, as here, there is a contract and the pipeline was constructed pursuant to it, the cases appear to hold uniformly that persons in the position of the Gibbs in this case must be paid damages when their contract is confiscated and their investment and facilities under the contract are rendered worthless. It is no different in principle from a person who leases my farm and pursuant to the lease constructs valuable improvements thereon. Thereafter a public agency condemns the farm, destroys the improvements and terminates the lease. There is no principle under which the condemnor should be permitted to thus destroy the improvement and the contract without paying to the lessee the value of the property thus taken.

In the instant case the property taken consisted only of the contract rights, which entitled the Gibbs to water and the connections but in addition damages should have been assessed because of the destruction of the value of the property not taken. There should be no doubt that the Gibbs are entitled to damages, because they were connected on to the system of St. Joseph pursuant to a valid contract. They were severed from that system, and their contract was abrogated. They are without water and have a pipeline system constructed at a cost in excess of \$4,000.00, which is now worthless, because there is no water to fill it. Further, they had started the construction of several homes and had made other expenditures in connection with their property, all of which are valueless without culinary water. Severance damage should have been assessed by the jury, and the Gibbs should have

been compensated therefor by the Town of North Salt Lake.

(a) WAS THERE SURPLUS WATER IN
THE SYSTEM?

The contention has been made and undoubtedly will be made on this appeal that there was not surplus water. Our position in this regard simply is that the jury could have found that there was surplus water under the control of St. Joseph. The Gibbs and St. Joseph tendered special interrogatories calculated to have the jury determine whether or not there was surplus water, and whether or not there was a contract. The court simply held that as a matter of law the Gibbs had no interest in the matter and refused to permit the jury to make the determination. We believe that the evidence is so strong on this point that a jury could not have found otherwise than that there were valid contracts, that there was surplus water, etc., but we need not go that far. Certainly it can not be successfully urged that a jury could not have found from the evidence adduced that there was surplus water and that the other conditions outlined above did exist. It is respectfully submitted that if the system can be taken free of the trust (its obligation to furnish the territory previously served), then in any event the Gibbs were entitled to compensation for their contract rights and severance damages to their pipeline, homes and other properties.

POINT IV

IT WAS ERROR TO PERMIT THE TOWN TO DISMISS ITS ACTION TO CONDEMN THE SIX HUNDRED FEET EXTENSION

The Town held possession under an order of immediate occupancy and Gibbs was enjoined from interfering with the occupancy, all without compensation. In this regard appellants consider the case of *Salt Lake City v. Moyle*, 111 Utah 201, 176 Pac. (2d) 882, to be directly in point and controlling. At the time the action was filed by plaintiff on November 16, 1948, the complaint sought to condemn 600 feet of pipeline which was owned by the Gibbs. (R. 4) The complaint asked for immediate occupancy and a hearing was held thereon. The court granted the order of immediate occupancy, by a minute order on December 28, 1948, and the written order was filed on February 7, 1949. (R. 20, 35) In the order of immediate occupancy Gibbs was enjoined from interfering with the property described in the complaint. This order of occupancy and the injunction continued until after the trial. At that time the plaintiff indicated that it did not want to condemn the entire 600 feet, but only 126 feet thereof. The parties stipulated that the 126 feet which was still to be taken had a value of \$750.00.

The verdict which was submitted to the jury even had on it the \$750.00 item. (P. 125) The judgment which was finally entered recited that a motion had been made to dismiss the action as to Lauren W. Gibbs conditionally, and the court granted to the Town the right to take 126 feet of the Gibbs pipeline if it desired to do so upon condi-

tion of the Town paying the Gibbs \$750.00. The court then provided in its judgment that the plaintiff did not need to take any of the pipeline, unless it elected to do so. It, therefore, permitted the plaintiff to dismiss the action to take over the Gibbs pipeline at the end of the trial and after the jury verdict.

The Gibbs had been placed to the expense of defending their rights and proving their damages, and in addition the town had been granted the immediate occupancy of said pipeline and the Gibbs had been enjoined from interfering with that occupancy. The trial was had in September and the minute order on immediate occupancy was entered in December of the previous year. The Town therefore, held occupancy of the Gibbs pipeline and the Gibbs were enjoined from interfering with it for nine months. The Gibbs had been given no indication during the trial that the pipeline was not going to be condemned, and of course made no effort to prove what damage they had suffered by reason of the order of immediate occupancy. But the case was dismissed without giving the Gibbs any compensation. If the entire action had been dismissed before trial the Gibbs could have then brought their action for damages for the nine months of occupancy, but here the matter was not dismissed until after the trial. If the Town decided it did not want to take this particular property, then certainly the Gibbs should have been awarded damages and this jury should have been permitted to assess them for the nine months of occupancy by the town. Secondly, After the Gibbs had been required to go through a three day trial, had been placed to the expense of employing an attorney, called witnesses,

etc., to defend against the taking of their property, the court permitted this order that the town had an election as to whether it would take the pipe line. Defendants had to prove its value because it appeared that the line was to be taken. Certainly the Town should be required to pay those expenses. In this regard they should have been compelled to pay the attorney fee as well as the court costs incurred by the Gibbs in defending an action which the city later decided to dismiss.

POINT V

THE JURY SHOULD HAVE BEEN PERMITTED, (A) TO DETERMINE WHETHER OR NOT THE PROPERTY OF THE GIBBS WAS WITHIN THE ST. JOSEPH AREA, AND (B) WHETHER OR NOT THERE WAS SURPLUS WATER TO FULFILL THE GIBBS CONTRACT FOR NEW CONNECTIONS

Both St. Joseph and the Gibbs requested the court to permit the jury to answer special interrogatories concerning the availability of water under the Gibbs contract for connections, and whether or not the Gibbs land was within the St. Joseph franchise area. (R. 68, 70, 71) These matters were of importance in determining the question of damages to the Gibbs. When the court refused to permit the jury to award the Gibbs any damages by its refusal to submit defendant's requested instruction No. 5. (R. 78), then the question of whether or not there was surplus water and whether or not the land was within the franchise area failed too. It is the contention of the appellants that the jury should have been permitted to find from the evidence actually produced that there

was surplus water, that the Gibbs were within the St. Joseph franchise area, and that there were valid contract rights held by the Gibbs in the St. Joseph system. The refusal of the court to submit these matters to a jury was error, and it should be corrected here, so that on a re-trial of the damage question these matters can be brought properly before the jury. Further is was error to admit the order of the Public Service Commission regarding water availability. The question as to whether there was sufficient water was for the jury and it would not be controlled by any determination of that question by any other agency.

POINT VI

IT WAS ERROR TO PERMIT THE CITY TO FURNISH WATER TO SIX USERS AT CITY RATES THROUGH THE GIBBS PIPELINE WITHOUT PAYING THE GIBBS THEREFOR.

It should also be noted that the court provided that 6,000 gallons of water per day was to be delivered by the Town into the Gibbs pipeline for the benefit of six people who were not parties to the action, and they were given permission in the action to utilize the Gibbs pipeline to convey their water from the St. Joseph system to their own houses. The Gibbs were given no compensation for this encumbrance placed on their pipeline, and this was also error. There is nor can be no legal basis upon which the Town could be granted permission to deliver water through the Gibbs pipeline to the six individuals named in the judgment without paying the Gibbs some compensation for the use thereof. The judgment specifically provided that the Town would receive from said six users

city rates for the use of the water. The Town is thus given all of the revenue therefrom and the Gibbs pipeline is encumbered by this use, and still the court held that it was not taken and that the Gibbs were entitled to no compensation. The order providing for delivery of the 6,000 gallons per day into the pipeline is shown in the record at page 127. The right of the city to collect city rates therefore was prescribed by the court at pages 354-5 of the record, in its oral order and on page 178 of the written judgment. This order was excepted to, (R. 359) but without avail. Certainly, the city should not be permitted to collect city rates for furnishing water through the Gibbs pipeline to users who are strangers to the Gibbs, but that is the effect of the order. We think it is tantamount to taking the Gibbs property even though the court ruled that it was not being taken, and we respectfully submit that this was error.

CONCLUSION

By way of conclusion, the appellants Gibbs contend that by reason of their contracts with the St. Joseph they had an interest in the property of the St. Joseph equal to the right of the six individuals (actual users of water) whose rights were protected by the court; that this interest gave them a right to water connections with St. Joseph, for which they could have used the writ of mandamus to enforce; that the properties of St. Joseph were imposed with the burden and obligations to honor these contract rights; and that the Town could not take the portion of the system necessary to supply those rights except by assuming the same trust and obligations which

were imposed upon this property while dedicated to public use by St. Joseph.

If the court should hold that the Gibbs interest could be taken without any obligations, then these appellants contend that the termination of their contracts and the severance of their pipeline system and their home developments from a source of culinary water was a taking of property without compensation. I caution the court not to misunderstand us as basing this contention upon the mere fact that the Gibbs were in the St. Joseph Franchise area. Their position is much stronger than that. It is based upon the fact that they had firm existing contracts with St. Joseph, that those contracts were terminated by the taking. Secondly, the improvements which were made were also made pursuant to contracts with St. Joseph, and it is upon the basis of these contract rights that the appellants contend that they had an interest which was terminated and taken without compensation.

Further, the property of the Gibbs was occupied by the Town from December until September, and the Town furnished water through the pipe line to six water users and took the revenues therefrom without compensating the Gibbs. They should not have been permitted to dismiss their action without compensating the Gibbs for damages during the time the property was occupied by the Town and for their costs in defending an action which was dismissed at the end of the trial. Finally, the order permitting six people to continue to take water through the Gibbs pipeline, and permitting the Town to receive

the revenues therefrom, imposed a burden on the Gibbs property which is tantamount to taking it without compensation. On these bases, we submit that judgment of the court must be reversed. Upon the uncontradicted evidence regarding Mr. Gibbs contracts the court should adjudge and determine the rights of Gibbs to connections without the necessity of a new trial. If the court should determine that the Gibbs are not to be protected as to connections, then the damages must be assessed for the taking.

Respectfully submitted,
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