

1979

Utah State University of Agriculture and Applied Science, A Utah Body Politic and Corporate v. Bear Stearns & Co., A Corporation v. Phillip A. Bullen, Jay R. Bingham, O.C. Hammond, Jay Dee Harris, Beverly D. Kumpfer, Snell Olsen, Rex G. Plowman, W. B. Robins, Alva C. Snow, William R. Stockdale, Jane S. Tibbals, Glen L. Taggart, Dee A. Broadbent, L. Mark Neuberger, Donald A. Catron, John Does, the Industrial Council of Utah State University of

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Brief of Respondent Utah State University of Agriculture and Applied Science : Brief of

This Brief of Respondent was submitted to the Utah Supreme Court. Digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Robert S. Campbell, Michael Heyrund, Lyle W. Hillyard, David R. Melton; Attorneys for certain Third-Party Defendants Darwin C. Hansen; Attorney for Third-Party Defendant Catron David L. Wilkinson; Attorney for Plaintiff Daniele M. Allred, Kathlene W. Lowe; Attorneys for Appellants

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IN THE SUPREME COURT OF THE STATE OF UTAH

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UTAH STATE UNIVERSITY OF :
AGRICULTURE AND APPLIED :
SCIENCE, a Utah body :
politic and corporate, :

Plaintiff and :
Respondent, :

vs. :

BEAR STEARNS & CO., a :
corporation, :

Defendant-Third :
Party Plaintiff :
and Appellant, :

vs. :

PHILLIP A. BULLEN, JAY R. :
BINGHAM, O.C. HAMMOND, JAY :
DEE HARRIS, BEVERLY D. :
KUMPFER, SNELL OLSEN, REX :
G. PLOWMAN, W. B. ROBINS, :
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DONALD A. CATRON, JOHN DOES, :
THE INDUSTRIAL COUNCIL OF :
UTAH STATE UNIVERSITY OF :
AGRICULTURE AND APPLIED :
SCIENCE, :

Third-Party :
Defendants. :

BRIEF OF RESPONDENT
UTAH STATE UNIVERSITY

Docket No. 16274
(Consolidated)

UTAH STATE UNIVERSITY OF :
AGRICULTURE AND APPLIED :
SCIENCE, a Utah body :
politic and corporate, :

Plaintiff and :
Respondent, :

vs. :

SUTRO & CO., INCORPORATED, :
Defendant-Third-
Party Plaintiff :
and Appellant, :

vs. :

PHILLIP A. BULLEN, et al., :
Third-Party
Defendants. :

UTAH STATE UNIVERSITY OF :
AGRICULTURE AND APPLIED :
SCIENCE, a Utah body :
politic and corporate, :
Plaintiff and :
Respondent, :

vs. :

HORNBLOWER & WEEKS-HEMPHILL :
NOYES, INC., a corporation, :
Defendant-Third-
Party Plaintiff :
and Appellant, :

vs. :

PHILLIP A. BULLEN, et al., :
Third-Party
Defendants. :

UTAH STATE UNIVERSITY OF :
AGRICULTURE AND APPLIED :
SCIENCE, a Utah body :
politic and corporate, :
Plaintiff and :
Respondent, :

MERRILL LYNCH, PIERCE, :
FENNER & SMITH, INC., a :
corporation, :

Defendant-Third- :
Party Plaintiff :
and Appellant, :

vs. :

PHILLIP A. BULLEN, et al., :
Third-Party :
Defendants. :

UTAH STATE UNIVERSITY OF :
AGRICULTURE AND APPLIED :
SCIENCE, a Utah body :
politic and corporate, :
Plaintiff and :
Respondent, :

vs. :

BOSWORTH, SULLIVAN AND :
COMPANY, :
Defendant-Third- :
Party Plaintiff :
and Appellant, :

vs. :

PHILLIP A. BULLEN, et al., :
Third-Party :
Defendants. :

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR CACHE COUNTY, UTAH
THE HONORABLE VENOY CHRISTOFFERSEN

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BRIEF OF RESPONDENT
UTAH STATE UNIVERSITY

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STATEMENT OF THE NATURE OF THE CASE

Respondent Utah State University ("the University") filed each of these five actions against the various brokers to recover its losses on investments in securities which this Court has already held were ultra vires.^{1/}

Each broker subsequently filed a third-party complaint against various University officials seeking indemnity. Four of the brokers also filed Counterclaims.

These five lawsuits were consolidated for purposes of this intermediate appeal.

DISPOSITION IN LOWER COURT

Two of the five brokers filed motions for change of venue to Salt Lake County. The other three brokers filed motions to dismiss for lack of in personam jurisdiction. These motions were all denied.

All of the brokers also filed motions to dismiss for failure to state a claim for relief under Rule 12(b)(6). These were also denied. Later, all of the brokers renewed

^{1/} First Equity Corporation of Florida v. Utah State University, 544 P.2d 887 (Utah, 1975). These brokers appeared there as amici curiae.

their Rule 12(b)(6) motions to dismiss but they were again denied.

Meanwhile, the University filed motions for partial summary judgment against each broker on the issue of liability alone. The Court granted these motions and entered orders thereon on January 3, 1979. Simultaneously it entered orders dismissing the brokers' third-party actions and counterclaims.

RELIEF SOUGHT ON APPEAL

All brokers petitioned for intermediate appeal (1) from the orders denying their motions to dismiss for lack of in personam jurisdiction or for change of venue, respectively, and for failure to state a claim for relief, and (2) from the orders granting the University's motions for partial summary judgment and dismissing the brokers' third-party complaints for indemnity and counterclaims. This Court granted these petitions as to the aforementioned orders.

STATEMENT OF FACTS

The University's Statement of Facts falls into two natural divisions. The first part consists of those facts surrounding the issue of liability (1) as between the University and the brokers and (2) as between the brokers and the third-party defendants (University officials). The second part consists of those facts controlling whether or not in personam jurisdiction is had or venue was proper.

The University will present a separate Statement of Facts dealing with jurisdiction and venue at the point in this brief where it addresses those issues. This format somewhat follows that of the brokers who defer their discussions of jurisdiction and venue until the end of their briefs.

The University does not wish to burden the Court with a separate Statement of Facts on the issue of liability. The two broker briefs^{2/} have already devoted 30 pages to this subject, much of which is relevant, if at all, to their assertion that the University officials who authorized the ultra vires stock purchases should bear the ultimate legal liability for the losses. Any rebuttal of these alleged facts as they might bear on the question of indemnity will undoubtedly come from counsel for the third-party defendants. The University will comment here on the brokers' Statements of Facts only as those alleged facts relate to the issue of liability on the part of the brokers. That is to say, the University here addresses the facts only as they concern its motions for partial summary judgment and the brokers' Rule 12(b)(6) motions to dismiss.

^{2/} One brief of Bosworth, Sullivan and Company ("Bosworth") and the second a joint brief for the other four brokers. Hereafter, the briefs will be distinguished by calling them "Bosworth's brief" and "the four brokers' brief."

The most important point to remember in sifting through the brokers' lengthy treatment of the facts is that the University's motions for partial summary judgment are not dependent upon one or another version of the facts. The brokers are liable to the University as a matter of law even if the facts are as they assert them to be. The University sets forth the following comments to the separate statements of facts submitted by Bosworth and the four brokers not to preclude the existence of issues of material fact--because there are none. But it does feel an obligation to correct factual errors and omissions present in the brokers' statements of facts. It will not submit its own Statement of Facts to do this but will merely comment on certain assertions made by the brokers. Additionally, the University will submit a short supplemental statement of facts in two pertinent areas which the brokers have not treated.

1. Reply to the Brokers' Statements of Facts

a. The brokers frequently recommended to the University that it purchase a particular stock.

The four brokers state that ". . . only on a few occasions did any of them make recommendations that the University purchase any particular stock."^{3/} This assertion is not only unsupported by the record references they cite but is flatly contradicted by the uncontroverted testimony

3/ Four brokers' brief, p.4.

of the University's investment official, Donald Catron. His sworn testimony was that every stock the University bought from or through Hornblower & Weeks-Hemphill Noyes, Inc. ("Hornblower") had been recommended to him by a Hornblower salesman (Hornblower, R. 152, 153). As to the stocks bought from or through Bear Stearns & Co. ("Bear Stearns"), Catron testified that a Bear Stearns salesman recommended to him at least thirteen stocks and also probably eight other stocks. (Bear Stearns, R. 152, 153).^{4/}

b. "The primary cause" of the investment program.

Bosworth avers categorically that the investment program was "prompted primarily" by (1) criticism the State Auditor voiced at the University for not drawing interest on substantial sums of operating capital it kept in non-interest bearing bank accounts and (2) an announced cut in legislative appropriations to the University. While several University witnesses believed that one or both of these factors may have contributed to the institution of the program, the consensus

^{4/} Catron's affidavit concerning which brokers recommended what stock was prepared in opposition to motions to dismiss for lack of jurisdiction filed by Hornblower, Bear Stearns, and Sutro. Since neither Bosworth nor Merrill Lynch filed such motions, Catron's affidavit does not detail the recommendations made by those brokers. However, Catron's testimony as prepared for related federal court litigation was that both Bosworth and Merrill Lynch recommended stock which the University bought. Bosworth, it should be noted, does not claim in the instant litigation that it did not make recommendations to purchase certain stock.

of the testimony was that the program was simply prompted by a general concern among University officials that these operating funds should be put to work (Bullen 11-12; Robins, 19; Olsen, 22; Stockdale, 17; Harris, 10; and Catron, 60, 62).^{5/}

c. Influence of the Ford Foundation report.

The five brokers suggest that the University adopted and incorporated into its program certain themes it took from a Ford Foundation report--namely, an aggressive investment policy and concentration of investment decision-making in one person. The role played by the Ford Foundation report, as thus claimed, is greatly exaggerated. Catron believed the awareness of the report was simply an additional step in the evolution of the program (Catron, 70). Council member Tibbals doubted it was the primary source (Tibbals, 27) and many key University personnel had no recollection of the "themes" the University allegedly lifted from the report or, indeed, of the report itself. (Harris, 17; Kumpfer, 38; Plowman, 24; Robins, 40-41; Snow, 13; Neuberger, 21)

d. The ambivalence of the Institutional Council.

Bosworth states: "Throughout 1972, the Institutional Council gave wholehearted support and assistance to Catron."

^{5/} References are to deponents and pages of their depositions. An index of the deponents by full name and title is appended hereto as Exhibit 1.

Bosworth then paints a picture of perfect harmony by drawing selectively from the record. For instance, Bosworth quotes Councilman Harris as saying in June that "the University was moving in the right direction" and as saying in July that the "investment staff was doing a remarkable job." Yet the first comment was made with specific reference to the staff reporting on its activities to the Council, not on the staff's track record in the market. And the second comment also related to the development of better means to evaluate Catron's performance (Harris, 35-36). Indeed, Harris was critical of the staff's investment decisions as early as April, 1972, and he even stated he would vote to discontinue the program if Catron did not become more conservative in his positions (Harris, 31; Deposition Ex. 39). Again in November, Harris felt the investment portfolio was in poor condition (Deposition Ex. 49). Harris was not alone in criticizing the program in early November. Councilman Hammond and even Chairman Robbins voiced criticism. Id. The statements of Hammond were said to typify the ambivalence of the entire Council in 1972. (Broadbent, 140. See also Hammond, 47; Tibbals, 36)

e. The January, 1972, corporate resolution.

The four brokers would have the Court believe that the Council thoroughly discussed, before passing, the resolution of January 20, 1972, giving Catron broad authority to

purchase stock. They cite the testimony of one Councilman. They omit, however, the sworn testimony of everyone else present at that meeting--eleven in number--which was that no discussion at all preceded the passage of the resolution. Specifically, Catron testified there was no discussion and he certainly would remember because he had drafted the resolution and knew full well that it was worded to give him power to sell short and buy on margin. (Catron, 155, 156, 261)

- f. What the brokers did to assure themselves that the University had power to purchase stock.

Repeatedly the brokers assert that by obtaining from the University a written resolution reciting that it had power to purchase common stock, they discharged their duty of inquiry into the legality of accepting the University's purchase orders. What they do not aver they did in checking out the University so as to discharge this duty is more significant than what they allege they did do. Although throughout the brokers repeat that at no time did the University seek an opinion as to whether it could legally purchase common stock, nowhere do the brokers aver that one of them sought such an opinion, either from the Attorney General or their own private counsel. Nor does any broker claim that the question of whether it was legal to sell stock

in the quantity involved here to a public institution was ever referred to top-level management within its own organization. Indeed, the only step each broker claims to have taken to ascertain whether the University had power to purchase stock in seven-figure volumes was to obtain a written resolution from the University. In the case of at least two brokers, even this was not done until many months after the broker began to buy stock for the University. See infra, at pp. 65-67. Although there is some question that each broker ever requested or obtained such a resolution,^{6/} even if it did, this is no more than it would have required from any private corporate client.^{7/}

2. Supplemental Statement of Facts.

a. Margin account loans.

Merrill Lynch correctly states that it alone of the brokers dealt with the University on margin. It omits to state that its margin dealings with the University were not

^{6/} In the case of Hornblower and Bear Stearns, the record does not establish that the broker ever obtained a resolution. Hornblower's affiant filed an affidavit in which he purported to attach a copy of the University resolution Hornblower supposedly received. Nothing is attached to either the file copy (Sutro Record, Volume 22, p. 1975) or the University's service copy. Bear Stearns' affiant also purported to attach to his affidavit a copy of the resolution Bear Stearns allegedly received, but the attachment is missing the seal and signature which were part of the certified resolution. (Bear Stearns, R. 1999)

^{7/} It is a routine practice in the industry that before a broker does business with any corporation (or trust or estate) it requests a copy of the legal document empowering the investment and authorizing a person(s) to make the investment. See e.g. Bosworth, R. 920; Merrill Lynch, R. 1437-1438; Bear Stearns, R. 263, 2004.

the usual kind where the buyer puts up at the time of purchase only a part of the purchase price. The omitted facts are that on many occasions Merrill Lynch loaned to the University substantial sums of money, which loans it secured with stock it held for the University's account. (Exhibit 64, page 17. Exhibits are to all depositions.) The volumes of these loans was such that on at least three occasions during the life of the investment program, the University had an outstanding balance with Merrill Lynch on these loans of over \$2,500,000.00 (two and one-half million dollars).^{8/} The rate of interest Merrill Lynch charged the University on these loans was one-quarter percent above the "prime rate" meaning that for much of the time during which the margin account was maintained, Merrill Lynch charged interest rates between 11.50% and 12.75% (Merrill Lynch, R. 1598-1604). Before the account was closed out, Merrill Lynch charged the University over \$193,000.00 in interest alone (Merrill Lynch, R. 1488).^{9/}

<u>8/</u>	<u>Date</u>	<u>Amount Due Merrill Lynch</u>
	November 30, 1972	\$3,100,000.00
	December 31, 1972	2,700,000.00
	February 28, 1973	2,700,000.00

Source: Exhibit 64, page 17.

9/ Merrill Lynch actually realized this amount when it closed out the University's margin account by retaining stocks belonging to the University worth over \$193,000. See the Second Count of the University's Complaint, R. 2-3. The account was closed out after the Complaint was filed.

The only step Merrill Lynch claims it took to ascertain if the University had the power to borrow these sums and pay these rates of interest was to obtain the same type of corporate resolution it would require of a private corporate client. Indeed, the resolution upon which Merrill Lynch first relied in accepting business from the University was a Merrill Lynch stock form entitled "Corporate Authorization for Cash Accounts." This form resolution the University received from Merrill Lynch. (Merrill Lynch, R. 1437-1438)

- b. The publication in newspapers that the Attorney General concluded in December, 1972, the investment program was illegal.

In ordering stock from all of these brokers, the University specified that the orders be paid for "payment against delivery of the certificates" at one or another of two banks located in Logan.^{10/} The function of these so-called collecting banks was to receive the certificates from the brokers and manually deliver them to the University when the University's agent manually delivered a check for the purchase price to the bank (Bear Stearns; R. 252). The brokers all knew of this arrangement, including the identity of the collecting banks, and agreed to it.

^{10/} The Logan branches of First Security Bank and Walker Bank & Trust.

On or about December 15, 1972, the managing officers of the two banks involved read newspaper accounts appearing in The Salt Lake Tribune, The Deseret News, and The Logan Herald-Journal of an Attorney General's opinion of that date which concluded that the University never had the power to purchase common stock with public monies and therefore its investment program was illegal (Bear Stearns, R. 1144-1147, 1253). Nevertheless, all of these brokers except Merrill Lynch^{11/} and Hornblower continued thereafter to accept and fill purchase orders on the University's behalf. The record contains no suggestion that either collecting bank communicated to any broker the contents of the newspaper accounts of the Attorney General's opinion finding the investment program illegal or that if there was any such communication, that any broker took any steps to verify the correctness of the Attorney General's opinion thus reported. What does appear from the record is that three of these brokers continued their dealings with the University through one of the collecting banks as if nothing had happened.

3. Conclusion to the University's Statement of Facts.

As will be seen, the University's motions for partial summary judgment do not depend upon whether any of the

^{11/} Merrill Lynch had discontinued accepting purchase orders from the University prior to December 15, 1972, for unrelated reasons.

above facts is contested. The University, moreover, does not believe that any of the facts it sets forth above can be contested. Assuming, arguendo, the University's motions for partial summary judgment fail because this Court finds a material contested fact to exist, it does not follow that the brokers' motions to dismiss should be granted. The record as highlighted above poses many barriers to this Court holding that under no conceivable set of facts can the University plead and prove a claim for relief as would be necessary to warrant outright dismissal.

ARGUMENT

I

THE TRIAL COURT CORRECTLY HELD THAT THE
BROKERS WERE LIABLE TO THE UNIVERSITY.

A. INTRODUCTION.

The record in this case is voluminous.^{12/} However, only a relatively small part of the record is devoted to evidentiary matters. The bulk of it consists of legal memoranda which for the most part plow the same ground. Judge Christoffersen has issued not one but four

^{12/} The record contains 8604 pages excluding depositions (22) and exhibits (one box).

separate memoranda decisions addressing the issue of liability.^{13/} It is difficult to imagine how any trial court judge could have devoted more time and patience in considering all the brokers' motions and requests than was done here.^{14/} No decision deserves more the indulgence on appeal which the law has long recognized as does Judge Christoffersen's ruling that the brokers are liable to the University under common-law principles of public contracts which this Court affirmed in 1975 in First Equity Corporation of Florida v. Utah State University, 544 P.2d 887 (hereafter referred to as "First Equity").

These cases do not present the diffuse issue, as the brokers state, "whether there are, under any conceivable state of facts, any limits on the ability of the sovereign to recover against its innocent agents the losses which it sustains as a result of the proprietary and ultra vires conduct, negligence and irresponsibility of its own high public officers." ^{15/} These cases, rather, present

^{13/} Bear Stearns, R. 289-291, 1775-1785, 2183-2186; Merrill Lynch, R. 391-397. The first two were withdrawn.

^{14/} Each broker, for instance, filed two identical Rule 12(b)(6) motions to dismiss. Further, the trial judge deferred ruling on the University's motion for partial summary judgment for some 30 months. Most of this delay was in response to the brokers' urging that he should not decide the summary judgment issue until after he ruled on motions filed after the University's motion for partial summary judgment. For a one-sided summary of the many motions and other filings made in this litigation, see pp. 20-28 of the four brokers' brief. This summary omits mention that the four brokers filed affidavits of prejudice against the trial judge, further delaying proceedings (e.g. Bear Stearns, R. 423).

^{15/} Four brokers' brief, p. 29.

the narrow and fairly simple issue whether the taxpayer or these brokers should bear the loss from ultra vires stock transactions where neither the University nor the brokers knew they were ultra vires and where neither inquired of their lawyers to ascertain the University's legal powers to purchase the securities in question. A related issue, present only in the Merrill Lynch case, is whether the University has power to borrow on margin and if not, does the taxpayer or the broker bear the loss of almost \$200,000.00 in interest charged on the ultra vires margin account. As to the main issue, this Court has already all but answered it in First Equity. As to the Merrill Lynch margin account issue, this Court's reasoning in First Equity compels the conclusion that the margin loans were ultra vires and that the broker should bear the loss, being charged with knowledge of their unlawful nature.

B. FIRST EQUITY SQUARELY HOLDS THESE STOCK PURCHASES AND MARGIN LOANS WERE ULTRA VIRES.

In First Equity, another broker with which the University did business had accepted a purchase order for stock but had not been paid when the Attorney General instructed the University not to accept or pay for any more stock. The stock declined in value after the broker bought it for the University and when the University failed to

take delivery, the broker sought to recover the amount the stock declined plus brokerage commissions. Judge Christoffersen dismissed the suit on the University's motion for summary judgment. On appeal, the five brokers herein appeared as amicus curiae and urged unsuccessfully most of the grounds they advance as parties herein. In a unanimous opinion (Justices Henriod, Ellett, Crockett and Tuckett and Judge Hyde filling in for Justice Maughan) the Court held:

1. "USU had no specific designated power from the Constitution or the Legislature to invest its funds in securities outside those declared lawful by [sec.] 33-1-1 [Utah Code Annotated, 1953] and investments in common stock are ultra vires acts." 544 P.2d 887, 892.
2. The stock purchase agreements were unenforceable.

Because the First Equity opinion disposes of most of these brokers' arguments, a copy of the entire opinion is appended hereto for convenience as Exhibit 2.

The brokers here urge this Court to reverse a decision reached unanimously less than four years ago and to hold that the stock transactions were lawful. They argue that Article X, Section 4 of the Utah Constitution and Section 53-32-4 (part of the "Higher Education Act of 1969") each grants broad enough authority to cover the purchase of stock. In First Equity, the University devoted 35 pages of brief to countering the same arguments based on

the same constitutional and statutory provisions the same brokers invoke here.^{15a/} In the First Equity opinion, Judge Hyde discussed these same arguments for over three pages (pp. 889-892) before rejecting them.^{16/} The key passages from his opinion of this issue are:

Nothing in the Constitution or legislative action involving USU specifically grants or denies to USU the power to invest state appropriations in common stock. P. 890.

. . .

Whether or not the grant of a "general control" of "all appropriations" and the right to "handle its own financial affairs" grant unrestricted power to invest is answered by The University of Utah v. Board of Examiners of the State of Utah [4 Utah 2d 408, 295 P.2d 348] case. After quoting Sections 1 and 2 of Article X of the Constitution which mandates the Legislature to provide for the maintenance of the University of Utah and USU, the Court states:

Would it be contended by the University that under Article X, Section 1, it might compel the Legislature to appropriate money the University considers essential? Is it contended

15a/ Those briefs (Respondent's Brief and Respondent's Reply Brief) are now included in Volume 904, Utah Supreme Court Abstracts and Briefs.

16/ A careful comparison of the opinion and the University's two briefs in First Equity indicates that Judge Hyde read the briefs with some care and used substantial parts of them in his opinion.

that the demands of the University are not subject to constitutional debt limits? If so, respondent would have the power to destroy the solvency of the State and all other institutions by demands beyond the power of the State to meet.

The Court then quotes in full Sections 5 and 7 of Article X of the Constitution, which provide, respectively, that the proceeds of the sale of land reserved by Congress for the University of Utah shall constitute permanent funds of the State, and that all public school funds shall be guaranteed by the State against loss or diversion. Then the Court concludes:

It is inconceivable that the framers of the Constitution in light of the provisions of Sections 1, 5 and 7 of Article X and the provisions as to debt limitations intended to place the University above the only controls available for the people of this State as to the property, management and government of the University. We are unable to reconcile respondent's position that the University has a blank check as to all its funds with no pre-audit and no restraint under the provisions of the Constitution requiring the State to safely invest and hold the dedicated funds and making the State guarantor of the public school funds against loss or diversion. To hold that respondent has free and uncontrolled custody and use of its property and funds while making the State guarantee said funds against loss or diversion is inconceivable. We believe the framers of the Constitution intended no such result. (emphasis added)

[1] As stated above, it is clear since The University of Utah v. Board of Examiners of the State of Utah (supra) case that USU is clearly a state institution and that it holds property in trust for the State of Utah and is subject to the laws of the State enacted relating to its purposes and government. P. 890

. . .
This Court has held that municipal powers cannot lightly be inferred by implication. P. 891.

. . .
A general grant to handle its financial affairs does not give authority to invest in common stock. The power to invest is not granted in the absence of legislation to the contrary but the reverse is true. It depends upon a specific authorizing grant of such power. P. 891.

The opinion then discusses Section 33-1-1, the "only specific Utah statute on the subject of investment," and concludes that it does not empower Utah public bodies to invest in common stock.

There is no need to canvass the law so recently and ably discussed in First Equity. These stock purchase transactions are clearly ultra vires, being the same transactions as this Court has already ruled upon.

While First Equity was not concerned with margin loans, its reasoning disposes also of Merrill Lynch's contention that its loans to the University were lawful. Indeed, there is absolutely no plausible argument based on any specific statute for the legality of these loans. Merrill Lynch does not cite any statute to justify the loans; the four brokers' brief on this point (pp. 55-58) only argues for the legality of the stock purchases.

It is obvious that these loans were not of the kind involved in the university bond issues described in

Spence v. Utah State Agricultural College, 123 Utah 182, 257 P.2d 367 (1953). If the University could borrow millions without limitation, and pile up interest charges in six figures, as it did here, why could it not borrow hundreds of millions and run up interest charges in the millions? As First Equity discussed, all public school funds are to be guaranteed against loss or diversion by the State. To quote from The University of Utah v. Board of Examiners of the State of Utah, supra, as reiterated in First Equity, the University would "have the power to destroy the solvency of the State and all other institutions by demands beyond the power of the State to meet" if it could pay high interest rates to borrow in an unlimited amount and have the State be obligated to guarantee payment of principal and interest.

The sections of the Code cited to support the stock purchases as incidental to the University's powers to invest in certain instruments obviously do not apply here since these loans clearly were not investments. Merrill Lynch's position that these loans were lawful is even less tenable than the brokers' argument that the stock purchases were legal.

C. THE LOGIC OF FIRST EQUITY COMPELS THE
RESULT THAT THE BROKERS BEAR THESE LOSSES.

This was the nub of Judge Christoffersen's two memoranda decisions.^{17/} The University's position is nowhere better stated than in those decisions. In his decision of July 6, 1977, denying the brokers' first set of Rule 12(b)

^{17/} See footnote 13, supra.

(6) motions to dismiss, he stated:

. . . the broker-dealers are not innocent as opposed to those individuals they dealt with at the University. [T]hey too are charged with the knowledge that the University could not deal in common stocks, yet they entered into the transactions assumingly for profits of their own and now seek to avoid the responsibility for them.

The question still remains where the University does not have to pay for commissions unpaid related to the transactions, can they recover those they have already paid. This is not a transaction that involves just the hierarchy of Utah State University and the broker-dealers but involves public funds and monies placed there by the taxpayers. To hold that the public funds could not be recovered could further encourage unauthorized expenditure of public funds and would be no deterrent to unauthorized expenditures if there could be no recovery, since those dealing with public entities in ultra vires acts would know that they could enter into such transactions, for their profit, of unauthorized expenditures of public funds knowing there could never be any action against them for recovery of those public funds, no matter how illegal or unauthorized the expenditure.

This Court does not feel this was the intent of either the Legislature or the Constitution to expose the public funds to such disbursement even though the disbursement was made by persons in an authorized position but where the transaction itself was unauthorized or illegal. Therefore, the motions are denied. 17a/

Later, in his decision granting the University's motions for partial summary judgment, the trial judge stated emphatically:

This Court has in other cases involving USU and other brokers and in decisions involving these other issues in connection with these defendants, held and indicated the contracts

for purchase of stocks were illegal, that the brokers had notice or were required by law to know that the transactions they were entering were illegal. The defendant brokers argue that even if they were to assume this to be so USU is equally to blame and is equally to be charged with the knowledge of the transaction since Catron was the agent of the University and was given specific authority by the board to enter into such contracts.

This Court has repeatedly stated and now holds that in this case there are more than two parties interested in this matter and who have financial interest other than Utah State and the brokers and that is the taxpayers whose money was used in these transactions and whose money was lost by reason of these transactions. This Court feels that the brokers cannot escape liability for their illegal acts, acts with which they are charged legally with knowing to be illegal by saying officials of Utah State also knew this and were charged with this knowledge. The Court feels where a governmental entity is involved and the parties are charged with the legal use of public funds that the other illegal party cannot escape liability by saying the specific party we dealt with does not come into this matter with clean hands either.

The Court would, therefore, grant the motion of USU for partial summary judgment and would deny the second motion to dismiss by the brokers. (Bear Stearns, R. 2185-2186.)

D. THE OVERWHELMING WEIGHT OF AUTHORITY FROM OTHER JURISDICTIONS AND COMMENTATORS SUPPORTS THE TRIAL COURT'S HOLDING.

Although Judge Christoffersen cited no case law or other authority for his ruling, he was aware of over 80

cases from other jurisdictions (30 decided within the last 30 years) which the University had collected and repeatedly relied upon. Rather than burden the Court with a complete list of those cases (which the Court can find in the record, e.g. Bear Stearns, R. 689-719), the University will here discuss only some of them.^{18/}

1. Rationale of allowing recovery.

Various reasons have been set forth by the courts in the below cases for the rule allowing recovery where the contract in question was wholly ultra vires, i.e. wholly outside the power of the public body to make.^{19/} These reasons may be synthesized under three headings:

(a) Public policy requires courts to allow recovery because a third-party contractor, who is deemed to know the limitations of power of a public entity, would

^{18/} The four brokers claim they "distinguished" the University's cases (Bear Stearns, R. 2005, at 2062). Their claimed review of "most" of the University's cases did not even address 60 such cases. See the University's rebuttal to the brokers' "distinguishing" of its cases in its Joint Reply Memorandum Supporting Motion for Partial Summary Judgment, pp. 22-27 (e.g. Sutro, R. 2027-2033).

^{19/} The result is sometimes different where the body has power to make a contract but does not follow the required procedure in making it.

otherwise be able to enter a contract with that entity which is beyond those limitations, receive payment, and the taxpayer would be left to pay for the unauthorized expenditure. (See the cases from California, New York and Florida discussed below.)

(b) Such a contract not only should not be made but it cannot be made, and the agent making it on behalf of the entity does not thereby bind his principal notwithstanding he may be unaware of the lack of power in the entity. For cases reflecting this rationale, see Stone v. United States, 286 F.2d 56, 58 (8th Cir., 1961); County of St. Francis v. Brookshire, 302 S.W.2d 1, 5, (Mo. 1957); and Fulk v. School District No. 8 of Lancaster County, 53 N.W.2d 56, 63 (Neb. 1952).^{19a/}

(c) As a matter of contract law, although in the case of private individuals money paid out under a mistake of law (as opposed to a mistake of fact) is not generally recoverable, an exception exists in the case of payment by public entities made under a mistake of law. The leading case espousing this rationale is State v. Axtell, discussed under Section 3, infra. Other cases following this reasoning are numbered in Section 4 as cases 1, 8, 9, 10, 11, 18, and 27.

^{19a/} See also Norfolk County v. Cook, infra, at p. 25.

2. California cases.

The California Courts have repeatedly held that public monies expended pursuant to unlawful contracts may be recovered. Miller v. McKinnon, 124 P.2d 34 (Cal. 1942). Plaintiff taxpayer sued to recover money already paid a contractor for work done pursuant to a contract which had been let without following bidding procedures. After dismissing the argument that it is harsh and unfair to force repayment when the public body has already received what it paid for and cannot restore it, the Court stated at p. 37:

(3) Persons dealing with the public agency are presumed to know the law with respect to the requirement of competitive bidding and act at their peril [citing cases].

(4) With the principles being as above stated, it inescapably follows that a right of action exists to recover moneys paid to a contractor for work and materials furnished the public agency where they were furnished in contravention of a statute requiring competitive bidding. If, as we have seen, the contract is absolutely void as being in excess of the agency's power, the contractor acts at his peril, and he cannot recover payment for the work performed, it necessarily follows that any payments made to him for the work are illegally made and may be recovered. If that were not true, the competitive bidding requirement would be completely nullified because the agency could have the work done, pay the charges therefor, and the taxpayers would be helpless to compel observances of the law. The only event preventing that result in any case would be whether some taxpayer acted soon

enough to forestall the payment by injunction proceedings. The effective operation and enforcement of the public policy declared in the statute cannot be dependent upon such an uncertainty. The temptation on the part of officials and the persons contracting with the agency desiring to evade the law would be to act quickly and secretly in order that the taxpayers would be caught off guard. Such a condition is manifestly undesirable.

In People v. Union Oil Company of California, 310 P.2d 409, 413 (Cal., 1957), the Court said:

While as a general rule a mistake of law is of no legal consequences . . . it has been said that the recovery of public moneys paid out through mistake by the state or an agency of government should be permitted "in many instances where, if paid out by a private corporation [they] could not be." Aebli v. Board of Education, 62 Cal. App.2d 706, 725, 145 P.2d 601, 610; see also 70 C.J.S. Payment § 156, p. 365.

In the Aebli case, supra, a 1944 decision of the California Court of Appeals, the Court quotes the following reason for this rule from Norfolk County v. Cook, 97 N.E. 778 (Mass. 1912):

An individual is dealing with his own money. . . . public officers are dealing with money which is not their own and over which their powers are subject to well known limitations. . . . when they act beyond their powers they do not bind their principals. The payment of this money in this case was not the act of the county, but simply the unauthorized act of a public officer. It was not the voluntary payment of money by the owner, but by one who had no beneficial interest in it. . . .

See also, Los Angeles City School District v. Landier, 2 Cal. Reprtr. 662, 666-667 (Ct. App. 1960) and Greer v. Hitchcock, 76 Cal. Rptr. 376, 378 (Ct. App. 1969), affirming that Miller v. McKinnon, supra, is still good law.

3. State v. Axtell--A leading case allowing recovery under the rule that public bodies can recover monies paid out under a mistake of law.

In State v. Axtell, 393 P.2d 451, 454 (N.Mex. S.Ct. 1964), the Court allowed the state to recover monies paid out unconstitutionally. In doing so, it exhaustively canvassed the question whether monies paid out by public entities under a mistake of law could be recovered. The Court stated:

Neither they nor the appellees knew at the time the funds were expended that the payment was illegal--this knowledge had to await the decision of this court in Hannah.

The rule simply stated is:

"Payment of public money by officials made under a mistake of law may be recovered."

5 Williston on Contracts, rev. ed. [1937] § 1590 [p. 4436]. Such a rule, although differently worded, is followed in practically every jurisdiction throughout the country. See 3 Corbin on Contracts, § 617, and cases cited in footnote 65; and Restatement of the Law, Restitution, § 46(a), and

cases cited in the reporter's notes. It is of interest to note that approximately forty courts of last resort follow the rule, although in some cases it is not always applied under all circumstances. In at least nine jurisdictions, which had initially followed the rule of no recovery under mistake of law, the courts have found it necessary to either directly or impliedly overrule earlier decisions, in order that a state or subdivision may recover funds paid under mistake of law (emphasis added).

The Court in Axtell was faced with the additional question of whether the state could recover monies expended pursuant to a seemingly valid legislative enactment which was later declared unconstitutional. In holding that this did not defeat the right of the state to recover, the Court emphasized (at p. 457) that although the good faith of the parties was not questioned, the statute "unfortunately" was unconstitutional and the payments therefore were illegal.

In these cases, the University did not pay out monies pursuant to a seemingly valid statute which was later struck down. The reasoning of Axtell would therefore apply with greater force to these cases.

4. New York cases.

A recent case involving the question of whether public entities can recover monies paid out illegally by a public entity notwithstanding that substantial benefits

were conferred on the entity which cannot be returned is Gerzof v. Sweeney, 264 N.Y.S.2d 376 (N.Y.Ct.App., 1965), 276 N.Y.S.2d 485 (N.Y.S.Ct., 1966), 286 N.Y.S.2d 392 (N.Y.S. Ct., 1968), modified at 289 N.Y.S.2d 392, and 239 N.E.2d 521 (N.Y.Ct.App., 1968). In that case, a contractor installed a generator for the Village of Freeport pursuant to a contract held to have been awarded in violation of state bidding law. In the fourth phase of the case, the Court said (276 N.Y.S.2d 485, 489):

Permitting the Village to retain the generator and directing repayment of the sums illegally paid is indeed a harsh result. Nevertheless the law is clear, and to permit literal application of equitable principles in this case would invite the evils the statute is obviously intended to prevent.

In the final phase of the litigation, the Court of Appeals was "concerned only with the question of remedies" (239 N.E.2d 521, 522). In holding that the generator was nonreturnable and the contractor should be required to pay the Village the difference between the price of the generator and a competitor's bid for a smaller generator, plus the difference in installation costs and interest, the Court said, at pp. 523-524:

If we were to sanction payment of the fair and reasonable value of items sold in contravention of the bidding requirements, the vendor, having little to lose, would be

encouraged to risk evasion of the statute; by the same token, if public officials were free to make such payments, the way would be open to them to accomplish by indirection what they are forbidden to do directly. [Citing authorities.]

. . . There should, logically, be no difference in ultimate consequence between the case where a vendor has been paid under an illegal contract and the one in which payment has not yet been made. If, in the latter case, he is denied payment, he should, in the former, be required to return the payment unlawfully received-and he should not be excused from making this refund simply because it is impossible or intolerably difficult for the municipality to restore the illegally purchased goods or services to the vendor. In neither case can the usual concern of equity to prevent unjust enrichment be allowed to overcome and extinguish the special safeguards which the Legislature has provided for the public treasury.

. . . Only thus can the practical effectiveness and vigor of the bidding statutes be maintained.

Other New York cases have followed Gerzof.
S.T. Grand, Inc. v. City of New York, 298 N.E.2d 105,
107-108 (N.Y.Ct.App., 1973); Cupid Diaper Service v.
New York City Health and Hospitals, 381 N.Y.S.2d 996,
999 (N.Y. S.Ct., 1976); Lance Investigation Service v.
City of New York, 387 N.Y.S.2d 32 (N.Y.S.Ct., 1976).
Federal cases applying New York law to this effect are
Board of Education Central School District No. 2 etc. v.

Aetna Casualty and Surety Co., 453 F.2d 264, 268 (2d Cir., 1971) and Fabrizio & Martin, Inc. v. Board of Education Central School District No. 2, etc., 290 F. Supp. 945, 956 (S.D. N.Y. 1968).

5. Recent cases from other jurisdictions.

Many other cases decided since 1950 hold that a public body may recover payments made ultra vires.

Federal

5th Circuit:

1. J.W. Bateson Co. v. United States, 308 F.2d 510, 515 (1962)

8th Circuit:

2. Stone v. United States, 286 F.2d 56, 58 (1961)

Alabama:

3. State v. Fourth National Bank of Columbus, Ga., 117 So.2d 145, 154 (1959)

Alaska:

4. Reliance Insurance Co. v. Alaska State Housing Authority, 323 F.Supp. 1370, 1373 (D.Alas. 1971)

Arkansas:

5. Mackey v. McDonald, 504 S.W.2d 726, 732-733 (1974)

Florida:

6. Mayes Printing Co. v. Flowers, 154 So.2d 859, 865 (Ct.App. 1963)

Georgia:

7. Polk County v. Lincoln National Life,
262 F.2d 846, head note 3 and 847
(5th Cir., 1959)

Idaho:

8. State v. McCarty, 279 P.2d 879, 881 (1955)

Iowa:

9. National Fire Insurance Co. v. Butler,
152 N.W.2d 271, 273 (1967)

Maryland:

10. State v. Rucker, 126 A.2d 846, 850 (Ct.
App. 1956)

Massachusetts:

11. Dunne v. City of Fall River, 104 N.E.2d
157, 160 (1952)

Minnesota:

12. City of St. Paul v. Dual Parking Meter Co.,
39 N.W.2d 174, 181 (1949)

Mississippi:

13. J.S. Love Co. v. Town of Carthage,
65 So.2d 568, 573-574 (1953)

Missouri:

14. County of St. Francis v. Brookshire,
302 S.W.2d 1, 5 (1957)
15. City-Wide Asphalt Co. v. City of Independence, 546 S.W.2d 493, 497 (Ct.App. 1976)

Nebraska:

16. Fulk v. School District No. 8 of Lancaster County, 53 N.W.2d 56, 63 (1952)
17. Cosentino v. Carver-Greenfield Corp., 433
F.2d 1274, 1276 (8th Cir., 1970)

New Hampshire:

18. Opinion of the Justices, 175 A.2d 396, 398 (1961)

New Jersey:

19. Thornton v. Village of Ridgewood, 111 A.2d 899, 904 (1955)
20. Shebell v. Strelechi, 249 A.2d 10, 13 (Superior Ct., 1969)

North Carolina:

21. Rider v. Lenoir County, 78 S.E.2d 745, 748 (1953)
22. Horner v. Chamber of Commerce of City of Burlington, 72 S.E.2d 21 (1952)

South Carolina:

23. Town of Beenettsville v. Bledsoe, 845 E.2d 554, 556 (1954).

South Dakota:

24. Hauck v. Bull, 110 N.W.2d 506, 508 (1961)
25. Carlson v. City of Faith, 67 N.W.2d 149, 151 (1954)

Tennessee:

26. Crass v. Walls, 259 S.W.2d 670, 673 (Tenn. Ct. App., 1953)

Washington:

27. State v. Continental Baking Co., 431 P.2d 993, 996 (1967)

Wisconsin:

28. Leuch v. Egelhoff, 38 N.W.2d 1, 2-3 (1949)

E. THAT THE BROKERS IN MANY CASES WERE
ACTING ONLY AS AGENTS FOR THE SELLERS
IS NO BAR TO THESE ACTIONS.

Two of the brokers apparently never acted as principals in these transactions--that is, they never sold securities to the University out of their own inventories but always acted as brokers in putting the University together with willing sellers. All of the other brokers admit they were direct sellers in at least some transactions. Thus, the argument they raise concededly only applies to some of the University's purchases and even if successful, would not defeat these motions for partial summary judgment insofar as they embrace the direct sales by the brokers. Moreover, the University in any event can recover the commissions it paid directly to the brokers, which alone total in six figures. The brokers appear to concede this point. By doing so, they concede that this defense does not defeat a motion for judgment as to liability alone which by definition does not go to damages.

But even as to the transactions these appellants merely brokered, their contention must fail. Like most of their other defenses, this has been weighed and found wanting in First Equity. The Court's reasoning there is dispositive here:

Although this action was commenced and argued at the lower Court on the basis of breach of contract between the parties, plaintiff and Amici now contend that in any event plaintiff should be entitled to recover because they were acting as the agents of USU. Under the theory of agency, one of two things would occur; either the loss would have to be absorbed by the seller of the stocks who doesn't have the faintest idea that his stock is being purchased by a public corporation or the rules denying recovery on ultra vires contracts of a public corporation would be meaningless. Substantive rights involving public funds should not be determined by the custom of the securities industry in designating the broker as the agent of the buyer or as agent of the buyer and seller. The rules denying recovery of an ultra vires contract are based on the theory that the party actually dealing with the public entity is charged with the knowledge that the contract is ultra vires and unenforceable, and in this case the plaintiff is the party actually dealing with the public entity and this action was filed on that basis--that USU was a customer of First Equity. Pp. 892-893.

As already noted, the Amici just referred to were the brokers herein.

Bosworth attempts to distinguish First Equity on this point on the ground the broker there sought enforcement of the ultra vires contract, relying ostrich-like on the technical meaning of the language employed. But it gives no reason why the public interest underlying the result in First Equity does not compel the same result here.

None of the brokers' cases cited on this point help them since they all involve valid contracts and none involves the public policy considerations existing where a public body pays out tax monies under an ultra vires contract.

F. NEITHER THE SO-CALLED ILLEGALITY OF THESE CONTRACTS NOR THE FACT THAT PAYMENT WAS MADE UNDER A MISTAKE OF LAW PRECLUDE THESE SUITS

The brokers urge that the University should not be allowed to recover here because the "contracts" were executed even though they might be ultra vires. This part of their memorandum encompasses two distinct arguments: (1) these contracts were not only ultra vires and therefore void, they were also illegal so that the law will not assist the University in recovering its monies; and (2) the University paid monies voluntarily under a mistake of law for which there is no right of recovery. Both arguments are fallacious:

1. Assuming, arguendo, these contracts were illegal as opposed to being ultra vires, the rule contended for does not apply to the University.

Nowhere did the Utah Supreme Court in First Equity intimate that contracts to buy common stock were anything but ultra vires. The rule that payments made

under contracts which are illegal may not ordinarily be recovered where the parties are in pari delicto has not been said to apply to ultra vires contracts. Moreover, the "rule" has limited validity even as applied to illegal contracts. As stated in McCormick v. Life Insurance Corporation of America, 6 U.2d 170, 308 P.2d 949, 951 (1957):

. . . The Courts have carved out so many exceptions to the so-called "general rule" that it can hardly be properly so designated.

See also Second Russian Ins. Co. v. Miller, 268 U.S. 552, 562, 69 L.Ed. 1089, 1092 (1925). One of the many exceptions is stated in Corpus Juris Secundum as follows:

The ordinary rule governing individuals, that when a contract against public policy is executed, the law will leave the parties where it finds them, does not apply where the public is one of the parties. 17 C.J.S. Contracts, 1197

The same proposition is formulated in 2d American Jurisprudence, Contracts, Paragraph 225:

. . . where a state is an interested party to an action, the contributing guilt of the parties to the suit will not operate as a bar to the granting of relief to the state.

See also Gwinnett County v. Archer, 118 S.E.2d 97, 101 (Ga. App. 1960); City of Philadelphia v. Rosin's Parking Lot, 56 A.2d 207 (Penn. 1948); State v. Weatherby, 129

S.W.2d 887, 892 (Mo. 1939); Burke v. Wheeler County, 187 S.E. 246, 249 (Ga. App. 1936); Restatement, Contracts, Section 601, p. 1116 (1932), especially illustration 4. It can hardly be questioned that the plaintiff herein is suing on behalf of "the public," being the State of Utah, First Equity, p. 890. Indeed, this is conceded by the brokers. It follows that the University is not governed by the so-called "rule" urged here.

Because this Court in First Equity was not dealing with an illegal contract, the brokers' oft-repeated argument that the rationale behind the First Equity opinion precludes recovery in these cases is specious. The ground on which this Court decided First Equity was clearly not that it wished to leave the parties to an illegal contract where it found them but rather because it wished to safeguard public monies. That same ground dictates that recovery be allowed in these cases.

2. The rule barring recovery of money voluntarily paid under a mistake of law does not apply to payments made by the State.

The brokers rely on Section 45 of the Restatement of the Law of Restitution which, "[e]xcept as otherwise stated in Sections 46-55" bars recovery of monies

paid voluntarily under a mistake of law. Perhaps they did not read the noted exceptions to the rule. The first such exception found in Rule 46 states:

A person who has conferred a benefit upon another because of an erroneous belief induced by a mistake of law that he is under a duty so to do, is entitled to restitution as though the mistake were one of fact if:

(a) the benefit was conferred by a State or subdivision thereof. . . .

Of the rule which governs these lawsuits, the Court said in State v. Axtell, 393 P.2d 451, 454 (N.Mex. 1964):

The rule simply stated is:

"Payments of public money by officials made under a mistake of law may be recovered."

5 Williston on Contracts, rev. ed., Section 1590. Such a rule, although differently worded, is followed in practically every jurisdiction throughout the country. See 3 Corbin on Contracts, Section 617, and cases cited in footnote 65; and Restatement of the Law, Restitution, Section 46(a) and cases cited in the reporters notes. (Emphasis added.)

See the more extensive discussion of State v. Axtell, supra, p.26. As that Court noted, some 40 states follow the aforestated rule.

3. The brokers' reliance on two Utah cases involving the Millard County School District is misplaced.

After complaining that the University's collection of cases referred to in D, supra, consists mostly

of decisions earlier than 1950, the brokers place considerable emphasis on two cases out of Millard County decided in 1919 and 1932, respectively. These cases, they say, support their contrived theory that this Court's logic in First Equity would lead it to deny recovery here by leaving the parties where it found them. As to the 1919 case, Judge Christoffersen disposed of it as follows:

The defendants not only rely on the First Equity case but also other Utah cases and more specifically Moe v. Millard County School District, 170 P. 980. In this case, Moe entered into contracts with the school district for purchase and installation of heating and plumbing materials for which partial payment was made; Moe sued for the remaining purchase price. The district had exceeded the debt limitation of the state constitution and had not obtained a vote of the taxpayers required to exceed the limitation formula. Moe conceded he could not recover upon the contracts nor upon quantum meruit but the defendants here argue that because Moe was not required to return the partial payment this is authority that Utah State cannot recover payments made to the brokers on commissions or other losses. However, this would be a case where the school would enjoy the benefits of the plumbing and heating materials installed plus a return of their partial payment which is not the case here. The University does not seek to retain the stocks and receive back their payments for the same nor do they seek to retain the profits they may have made in stock transactions and recover only their losses, that any monies received by way of the contract would be offset against the losses. (Memorandum decision denying brokers' first round of Rule 12(b)(6) motions to dismiss, July 6, 1977, Merrill Lynch, R. 395)

Although Judge Christoffersen perceived the crucial distinguishing feature of Moe, there is yet another reason why it is inapposite here. The School District resisted plaintiff's suit to recover the remaining purchase price on the ground the contracts were ultra vires in that at the time the contracts were entered the District had exceeded the debt limitation of the Constitution, and had not first obtained a vote of the taxpayers required to exceed the limitation formula. Plaintiff conceded that he could not recover upon the contracts nor upon quantum meruit, but argued that he should be allowed to remove all the plumbing and heating materials if he returned to the District the monies he had received as partial payment. The District claimed that the materials had become fixtures and could not be removed without harm to the building. In rejecting this defense, the Court noted that many of the items could be removed easily and without damaging the building. It then held that the contractors be permitted to remove so much of the materials in value as had not been paid for. It further stated:

. . . there is nothing to prevent the defendant school district from now . . . entering into a valid contract for the purchase of the materials as presently installed. 54 Utah 144, 150.

Judge Christoffersen thus could have added as an additional ground for not applying Moe the fact that the contracts there were not wholly outside the powers of the District to make but the District could have cured the temporary defect by entering new valid contracts. The contracts here, however, are ultra vires in the primary sense of being wholly outside the powers of the entity to make under the holding of the First Equity case.

The brokers also offer language from Millard School District v. State Bank of Millard County, 80 Utah 170, 185 (Utah, 1932). However, the contract in question there was outside the powers of a private corporation, not outside the powers of the school district. The language quoted is therefore completely inapplicable.

G. THESE TRANSACTIONS, BEING ULTRA VIRES,
CANNOT BE RATIFIED.

Bosworth--but not the four brokers--assert that the University ratified the purchase contracts, or at least a question of fact exists on this point. It is not necessary to determine if there is such a factual dispute since as a matter of law these ultra vires contracts cannot be ratified. The leading treatise states simply:

Contracts which a municipal corporation is not permitted legally to enter into are not subject to ratification [citing

scores of cases from 29 jurisdictions] . . .
McQuillin, Municipal Corporations (3rd Ed.),
Section 29.104(c), pp. 512-513.

The rationale for not applying traditional concepts of ratification law to these contracts should be obvious. Dishonest public officials otherwise could easily circumvent the prohibition against ultra vires contracts by the simple expedient of ratifying them.

Bosworth's cases are not helpful because they do not involve ultra vires contracts of public bodies.

H. THE UNIVERSITY IS NOT ESTOPPED FROM
SEEKING RECOVERY OF ITS LOSSES

The brokers place great emphasis on their argument that estoppel precludes any recovery here. Their argument fails because as a matter of law estoppel does not apply against a public body, at least in these circumstances. It also fails because even if estoppel were available, the brokers have not and cannot make out the facts necessary to give rise to an estoppel.

The brokers' reliance on estoppel is not new. As amicus curiae, they argued it unsuccessfully to this Court in First Equity. The Court stated:

" . . . All persons dealing with officers or agents of counties are bound to ascertain the limits of their authority or power as fixed by statutory or organic law, and are

chargeable with knowledge of such limits. No estoppel can be created by the acts of such agents or officers in excess of their statutory or constitutional powers."

For further authority for the proposition that "one who deals with a municipal corporation does so at his peril" see Thatcher Chemical Co. v. Salt Lake City Corporation, 21 Utah 2d 355, 455 P.2d 769 (1968) and cases cited therein.

If the enforcement of this rule at times appears harsh, it is a matter for the State Legislature to correct. P. 892.

Additional Utah authority that the government cannot be estopped is found in Petty v. Borg, 106 Utah 524, 150 P. 2d 776 (1944) in which the Court stated:

. . . the government is not bound or estopped by the acts of its officers or agents which are not within the scope of their authority so the doctrine of estoppel is of no aid to the defendant here.

See also 10 McQuillin, Municipal Corporations, (1966 Rev. Vol.) Section 29.104c, p. 517, citing 22 cases from 17 jurisdictions.

The two Utah cases cited by the brokers herein^{20/} were cited by them as amici curiae in First Equity--but with no success. In Provo City v. Denver & Rio Grande Western, 156 F.2d 710 (10th Cir., 1946), the Court construed those two cases very narrowly. The Court said, at p. 712:

20/ Wall v. Salt Lake City, 50 Utah 593, 168 P. 766 (1917) and Tooele v. Elkington, 100 Utah 485, 116 P.2d 406 (1941).

These . . . cases, considered in their composite effect, seem to make it clear that in Utah the principle of estoppel in pais is to be applied very narrowly to a city in respect of its right to reopen a street for use as a public thoroughfare and only in cases where the city acted within the ambit of its legal authority but in an irregular way. . . .

In the appeal at bar, the University did more than act "within the ambit of its legal authority, but in an irregular way;" it acted completely outside the ambit of its legal authority.

The four brokers refer to the views of several commentators and state that the rule precluding the application of estoppel to the government is "now a largely discarded traditional view." Nowhere can support for this hyperbole be found. Even the brokers' leading critic of the estoppel rule--Professor K.C. Davis--admits that

. . . the courts usually hold that the doctrine of equitable estoppel does not apply to the government.^{21/}

Professor Davis nowhere says the courts have abandoned or are abandoning this rule.^{22/} Recent cases he cites

21/ 2 K. Davis, Administrative Law Treatise, Section 17.01 at 491 (1958).

22/ Even in K. Davis, Administrative Law of the Seventies, he states: "Of course close and difficult problems of estoppel of states or cities still arise which can properly go either way." Paragraph 17.05, p. 409.

following the traditional view and not applying estoppel to states or cities include Austin Liquor Mart, Inc. v. Department of Revenue, 280 N.E.2d 437 (Ill. 1972) and Sykes v. Bell, 179 S.E.2d 439 (N.Car. 1971). In Austin Liquor Mart, supra, the Court stated significantly:

It is firmly established that where the public revenues are involved, public policy ordinarily forbids the application of estoppel to the State.

The above language points up the defect in the brokers' argument that the winds of change are blowing away the rule in question in all situations. The cases they cite, such as Moser v. United States, 341 U.S. 41 (1951), do not involve the payment of public monies under ultra vires contracts and hence do not consider the public policy considerations present here. In Moser, the application of the estoppel doctrine was necessary to allow a person to apply for American citizenship on the same footing as others. The protection of this personal right involves the weighing of considerations far different from those requiring a corporation to ascertain the limits of authority of a public agency from whom profit is sought. Other cases the brokers cite are City of Marseilles v. Hustis, 325 N.E.2d 767 (Ill. 1975) and Franks v. City of Aurora, 362 P.2d 561 (Colo. 1961).

These likewise do not involve ultra vires payments and attendant public policy considerations relating to fiscal integrity.

The four brokers devote several pages to an 1878 decision of the United States Supreme Court, Hackett v. City of Otowa, 99 U.S. 86 (1878). There, a city issued bonds which recited on their face that the proceeds therefrom were to be used for municipal purposes. The city had unquestioned authority to issue bonds for municipal purposes but the proceeds from the bonds in question were used to assist a private corporation. The Court held the bond holder did not know how these proceeds were to be used and had no way of knowing they would be used for a non-municipal purpose. The cases at bar are easily distinguishable in that the brokers could have known, and therefore should be charged with knowledge, that the investments here were ultra vires. In Hackett, it was not the issuance of bonds which was ultra vires but how the bond proceeds were spent. Here, the purchase itself was ultra vires.

But even if this Court overrules itself in First Equity and earlier cases and holds that estoppel will lie against the State in some circumstances, the brokers have still not made out the facts raising the defense under

the most favorable case law they cite. Under the cases cited by the brokers, for estoppel to serve as a bar against the government, the government must have been aware of the facts given rise to the estoppel at the time of their operation (Four brokers' brief, p. 32). The brokers have not shown, nor can they, that when the University purported to authorize Catron to purchase stock, it knew it had no statutory power. The brokers' argument is ironic. It recognizes that for estoppel to lie, the party to be estopped must know the facts and the party asserting estoppel must be ignorant of the true facts. Id. And whereas the cases, including those of this Court, have universally held that a party dealing with the government is charged with knowledge of the extent of its power to contract, the brokers urge this Court to hold that such a party is ignorant of the true facts for purposes of applying estoppel; at the same time the brokers would have this Court charge the University with knowledge that it lacked power to invest in common stock for purposes of the estoppel rule. Such a rule as the brokers thus espouse should control the facts here finds support from no source, even from Professor Davis. Nowhere is the weakness of the brokers' estoppel argument better refuted than in Judge Christoffersen's second memorandum decision on liability:

This Court feels that the brokers cannot escape liability for their illegal acts, acts with which they are charged legally with knowing to be illegal by saying officials of Utah State also knew this and were charged with this knowledge. The Court feels where a governmental entity is involved and the parties are charged with the legal use of public funds that the other illegal party cannot escape liability by saying the specific party we dealt with does not come into this matter with clean hands either. (Bear Stearns, R. 2186)

1. Rules of the National Association of Security Dealers and Stock Exchanges of which these brokers are members require that knowledge of the University's lack of power be charged to the brokers.

These brokers were at all relevant times members of the National Association of Securities Dealers ("NASD"), the New York Stock Exchange ("NYSE") and the American Stock Exchange ("AMEX").^{23/} As such, they were all subject to rules of those organizations which imposed on them a duty to ascertain if a customer had legal power to purchase stock or borrow money. These rules read as follows:

Section 2, Article III, of the NASD Rules of Fair Practice ("suitability rule").

In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his

^{23/} See e.g. Bear Stearns, R. 210, at 221-222 and 225-226, 228; and Security Dealers of North America, 100th through 102nd Revised Volumes.

other security holdings and as to his financial situation and needs. (Emphasis added.)

Rule 405 of the NYSE ("due diligence rule").

Every member organization is required through a general partner, a principal executive officer or a person or persons designated under the provisions of Rule 342(b)(1) . . . to . . . use due diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization. . . . (Emphasis added.)

Rule 411 of the AMEX ("due diligence rule").

Every member, member firm or member corporation shall use due diligence to learn the essential facts relative to every customer and to every order or account accepted. . . . The member, general partner or officer approving the opening of an account shall, prior to giving his approval, be personally informed as to the essential facts relative to the customer and to the nature of the proposed account. . . . (Emphasis added.)

These rules exist pursuant to federal securities law. The suitability rule was promulgated under Section 15A of the Securities and Exchange Act of 1934 (15 U.S.C. Section 78o-3). The due diligence rules of the major exchanges were filed pursuant to Section 6 of the same act (15 U.S.C. Section 78f).

All of the brokers except Sutro violated the NASD suitability rule by recommending stock the University was precluded by law from purchasing. Further, none of these brokers fulfilled their duty of due diligence to learn whether

the University had power to purchase stock or borrow on margin. Certainly, their lone act of obtaining a routine corporate resolution did not discharge this duty. See footnote 7 at page 9, supra.

As held by the Trial Court, the law has always charged a person dealing with a public body with constructive knowledge of the body's contractual powers. This it has done even in the absence of rules imposing affirmative obligations on a person dealing with the government to ascertain its powers. Where, as here, such rules exist pursuant to law, there is even greater reason to charge the brokers with knowledge of the University's limitations as to these stock purchase and margin loans. Although this Court might be inclined to relax the traditional view of estoppel as applied to public bodies in the right situation, the brokers' failure in these cases to comply with their duty (1) to have reasonable grounds as to the suitability for the University of the many stocks they recommended, or (2) their duty to use due diligence to learn the most essential fact relative to the University's purchase orders and loan requests--whether they were lawful--militates against departing from settled law here.

- I. IT IS NO DEFENSE THAT THE BROKERS HAVE CHANGED THEIR POSITION IN RELIANCE ON THE REGULARITY OF THESE TRANSACTIONS.

The four brokers argue that all they retained in

these transactions were their broker commissions. They then assert that all these commissions were "paid out through the ordinary course of business to satisfy [their] regular expenses. . . ." (four brokers' brief, p. 50). They apparently would have the Court believe that none of the commissions thus retained contributed to their profits--which is on its face totally unbelievable. But even if all four brokers lost money during the three years in question--a conjecture not supported in the record--their argument does not cover the underwriting discounts they retained in those instances where they sold the University stock out of their own inventories. Nor does it explain why Merrill Lynch should not return to the University over \$193,000.00 it received as interest. Since this Court must affirm on the liability issue even if the University is entitled to recover only some of its claimed losses, and the four brokers' argument does not go to all of the University's damages claims, their argument is no good defense here.

But even more defeating than the above factual difficulty is the erroneous legal basis of their argument. The four brokers rely on a case not involving ultra vires payments by a public entity for their position that restitution is not proper where the money wrongfully received has since been spent.^{24/} This case they link with Section 69

24/ Sawyer v. Mid-Continent Petroleum Corp., 236 F.2d 518 (10th Cir. 1956). See footnote 164 of the four brokers' brief.

of the Restatement of Restitution. But as discussed, supra, at p. 38, the section of the Restatement of Restitution which applies here is 46(a).^{25/}

Bosworth also urges the defense of change of position in reliance on the regularity of these transactions but cites only one case in its support. In Maricopa County v. Cities and Towns, 467 P.2d 949 (Ariz. Ct. App. 1970), the county sued its own cities and towns to recover tax funds it erroneously transferred for over 16 years. Because the defendants were also public bodies, had not sought the payments, and had spent the funds on public roads, the court departed from what it expressly acknowledged as the general rule of Section 46(a) of the Restatement of Restitution and denied recovery. The announced rationale, however, was not solely a change of circumstances as Bosworth claims. The court underscored the narrow scope of its holding by invoking laches and estoppel as well. It stated:

We agree to the extent that neither laches nor its generic parent, estoppel, can be asserted to gain rights against the public or to defeat the public interest [citing cases]. But the reason for the rule denying the defense disappears when the contest is solely between two public bodies. 467 P.2d 949 at 953.

First Equity has held that estoppel is not a defense where, as here, one of the contestants is a private party. The same would be true of its generic offspring, laches and change of circumstances.

^{25/} Stating that a State agency conferring benefits under a misreading of law is entitled to restitution.

J. THE UNIVERSITY'S CLAIMS ARE NOT BARRED
BY THE EQUITABLE DOCTRINE OF UNCLEAN HANDS.

Only Bosworth raises the defense of unclean hands. Its argument is that since the University is seeking the equitable remedy of rescission, the University's action in wrongfully inducing Bosworth to accept the purchase orders constituted "unclean hands." Further, Bosworth claims that the University's failure to notify it after December 15, 1972, that the Attorney General questioned the legality of the investment program was a separate instance of unclean hands.

Bosworth's argument suffers from at least three defects. First, the University does not seek equitable relief; therefore, the equitable defense of unclean hands does not apply. These suits do not seek rescission of voidable contracts but instead seek repayment of monies paid out under void contracts. The rules governing the recovery of ultra vires public expenditures have been treated as part of the common law unaffected by equitable considerations. See e.g. the discussion in Gerzof at pp. 28-29, supra. The four brokers recognize this and call these suits "common law claims" (four brokers' brief, p. 5).

Assuming, arguendo, that the University here seeks equitable relief, it is decidedly untrue, as Bosworth boldly avers, that "it must be taken as true that the University affirmatively and wrongfully induced Bosworth to act to its detriment" (Bosworth brief, p. 30). As Judge Christoffersen early notes:

. . . the broker-dealers are not innocent as opposed to those individuals they dealt with at the University. [T]hey too are charged with the knowledge that the University could not deal in common stocks, yet they entered into the transactions assumingly for profits of their own and now seek to avoid the responsibility for them (Merrill Lynch, R. 396).

And as he stated in his final memorandum decision on liability:

This Court has repeatedly stated and now holds that in this case there are more than two parties interested in this matter and who have financial interest other than Utah State and the brokers and that is the taxpayers whose money was used in these transactions and whose money was lost by reason of these transactions. This Court feels that the brokers cannot escape liability for their illegal acts, acts with which they are charged legally with knowing to be illegal by saying officials of Utah State also knew this and were charged with this knowledge. The Court feels where a governmental entity is involved and the parties are charged with the legal use of public funds that the other illegal party cannot escape liability by saying the specific party we dealt with does not come into this matter with clean hands either (Bear, R. 2185).

Finally, Bosworth's assertion that the University soiled its hands as to those transactions after December 15, 1972, by not alerting Bosworth to possible legal problems raised by an Attorney General's opinion of that date is no ground for reversal of the ruling on liability since Bosworth did business with the University on many occasions prior to December 15, 1972. At best, the argument only goes to reduce

recoverable losses. The assertion, moreover, suffers from the more fundamental weakness that the maxim "One who deals with a municipal corporation does so at his peril"^{26/} does not depend upon whether the municipal corporation is itself aware of its own contractual limitations. Bosworth's duty to ascertain the limits of the University's power obtains irrespective of the University's ignorance or knowledge of them. Bosworth cannot be heard to complain that the result of this rule in these circumstances is inequitable in view of the widespread publicity given to the Attorney General's December 15, 1972, opinion in both Salt Lake City newspapers (where Bosworth's office was) and the fact that the managers of the collecting banks in Logan which Bosworth used had read the newspaper reports and knew of the possible illegality.

Wall v. Salt Lake City, supra, upon which Bosworth relies, has been discussed and distinguished already, supra, pp. 43-44. Marin v. Calmenson, 197 N.W. 262 (Minn. 1924), is inapposite because, inter alia, it did not involve a public body or tax monies.

K. THE TRIAL COURT'S RULING VIOLATES NEITHER
DUE PROCESS NOR EQUAL PROTECTION GUARANTEES.

The four brokers complain their rights guaranteed by the due process and equal protection clauses of the Utah

^{26/} First Equity, p. 892.

and United States Constitutions were violated. Bosworth echoes these complaints as to due process, but not as to equal protection.

The brokers' briefs at this point are long on rhetoric but short on closely analyzed legal precedent. Typical of the rhetoric are Bosworth's claims that it "took great pains" and "did everything reasonably within its power to determine the validity of its dealings with the University." ^{27/} Significantly, however, not one case cited in support of either the due process or equal protection arguments involves an ultra vires transaction by a public body. It is instructive that the brokers cannot find even one case on point in view of the hundreds of cases decided in virtually every jurisdiction on the issue of whether a public entity can recover monies paid out pursuant to ultra vires contracts. Surely if these well known constitutional objections were persuasive defenses under these circumstances, they would have been urged many times before. The fact that no court has discussed either objection in an ultra vires setting is convincing, if circumstantial, evidence that judges have not been impressed by them.

The short answer to the due process objection was that given by the Trial Court here:

^{27/} Bosworth brief, pp. 30, 33. That Bosworth took no pains which it would not have taken for a private customer is discussed, supra, at page 9.

As to their fifth allegation alleging there should be a dismissal because of a denial of due process has been determined in Utah in Thatcher Chemical Co. v. Salt Lake City Corp., 455 P.2d 769, News Advocate Publishing Co. v. Carbon County, 269 P. 129, and in the First Equity case. The one who deals with a public entity, such as Utah State, does so at their peril and that recovery is appropriate if other defenses are not valid. (Merrill Lynch, R. 394)

The four brokers' equal protection argument is that there is no rational basis for treating the University different from private persons in the matter of legal defenses available to these lawsuits. As might be expected, no real authority is mentioned for this sweeping proposition. Moreover, in light of the public policy considerations painstakingly articulated in First Equity, Miller v. McKinnon, supra, and Gerzof v. Sweeney, supra, to name only a few of the many cases cited in D, supra, the proposition is demonstrably false. There are ample legitimate public policy grounds for precluding the defense of estoppel where to allow it would open wide the doors to the public treasury. Greenhalgh v. Payson City, 530 P.2d 799 (Utah, 1975) is not authority that this Court feels the University's "right to resist estoppel is properly no broader than its right to invoke sovereign immunity." (Four brokers' brief, p. 46.) That case simply construed the term "governmental function" to exclude a city hospital. The holding of that case assumes no

constitutional dimensions as the brokers suggest. Indeed, the holding has been legislatively reversed by a 1978 amendment to the Governmental Immunity Act, Section 63-30-3, Utah Code Annotated (1953).

L. THE ARGUMENT BASED ON THE UTAH UNIFORM FIDUCIARY ACT IS NO BAR TO THESE SUITS.

The brokers contend that the University had authority to invest non-appropriated funds in common stock, and that Catron was a fiduciary of the University. From these assumptions, they conclude no liability lies against the broker-dealers by reason of the Utah Uniform Fiduciary Act. This argument has three defects. First, the first assumption has already been rejected by this Court in First Equity in holding that all monies in the University's possession, even monies acquired by gift, were subject to the same investment restrictions. That the Court dealt with the issue is seen from its conclusion that the University "had no specific designated power from the Constitution or the legislature to invest its funds in securities outside those declared lawful by 33-1-1 . . . 27a/," which section governs all funds "in [USU's] possession." Secondly, this Court in that case fully considered the Utah Uniform Fiduciary Act argument urged here, it having been raised and thoroughly briefed in the Petition for Rehearing. See the University's nineteen-

27a/ First Equity, p. 892.

page Brief opposing the Petition, Utah Supreme Court Abstracts and Briefs, Volume 904. The petition was denied.

The key case cited by the four brokers is Sendak v. Trustees of Indiana University, 260 N.E.2d 601 (Ind. 1970). In Sendak, the court was faced with the simple question of whether Indiana University could use donated monies to buy stock in a private corporation without violating the Indiana Constitution prohibiting the State of Indiana from becoming a stockholder in a private corporation. The court concluded that it could do so, on the ground that Indiana University had been held to be a "private corporation" by prior decisions and not part of the State; the monies, therefore, never became property of the State and thus could be managed free from state restrictions. 260 N.E. 2d 601, 604. In contrast, the Utah Supreme Court on two occasions has soundly rejected the argument that the University (and the University of Utah) are corporations separate and apart from the State of Utah. University of Utah v. Board of Examiners, supra; and Spence v. USAC, 119 U. 104, 113-114, 225 P.2d 18. Moreover, the Utah Legislature has never believed that monies donated to the University do not become subject to the control of the state; this clearly appears from the passage of an Act in 1925, found in Chapter 16 of the Session Laws for that year. Section 6 of that Act states, in relevant part:

All monies received by the University of Utah or the Agricultural College of Utah from any source whatsoever, shall be paid into the state treasury at the close of the months of June and December of each year and shall be placed to the credit of the maintenance account of the respective institution. (Emphasis added.)

The above statute was itself merely a rephrasing of statutory language appearing as early as 1917. At no time in the some thirty years or more that language was law was it even challenged, let alone held to be invalid.

A third fatal defect to the Fiduciary Act argument is the inapplicability of that Act to these facts, which clearly appears from language in Sugarhouse Finance v. Zions First National Bank, 21 Utah 2d 68, 440 P.2d 896 (1968):

The purposes to be accomplished by this [Uniform Fiduciary] Act would seem to be to facilitate banking and financial transactions by relieving the depository banks and others dealing with a fiduciary from the duty imposed at common law of seeing that fiduciary funds are properly applied to the account of the principal. In other words, the statute places a duty upon principals to use only honest fiduciaries, and gives relief to those who deal with fiduciaries except where they know the fiduciary is breaching his duty to his principal or where they have knowledge of such facts that their actions in dealing with the fiduciary amount to bad faith. (Emphasis added.) Pp. 69-70.

The operative language of Section 22-1-5 relied upon here states that the "payee" of a check "is not bound to inquire whether a fiduciary is committing a breach of his obligations as fiduciary in drawing" the check unless he takes the check with actual or constructive notice of the breach. In

the cases at bar, there is no issue as to whether Catron breached his obligation to the University under Section 22-1-5 because the Administration and Institutional Council believed all monies in the pool could lawfully be used to purchase stock. This is not a case where Catron had authority to invest only non-appropriated funds but breached his duty by investing appropriated funds as well.

The four brokers refer to informal oral and written opinions of the Attorney General to the effect that endowment funds could lawfully be invested in stock even if appropriated funds could not. The two informal letter opinions cited no authority at all for their conclusion and were written before First Equity held that no money in the University's possession could be invested in stock. The first letter was the December 15, 1972, informal opinion which first cast doubt on the investment program's legality and the second was written long after the program terminated. The brokers do not claim any of them relied on the Attorney General's erroneous advice so they can claim no prejudice resulted from these opinions. Indeed, the brokers strenuously urge that they should not be charged with knowledge of the newspaper accounts of the Attorney General's December 15, 1972, opinion letter merely because the managers of the two collecting banks read those accounts.

M. THE UNIVERSITY CLEARLY SUFFERED
SUBSTANTIAL MONETARY LOSSES.

Bosworth--but not the four brokers--argues there is a question of fact as to whether the University suffered any loss because the Legislature appropriated to it slightly over one million dollars to cover some of its losses. This argument has been urged many times before in this and the earlier federal litigation but never accepted. (To be sure, Bosworth devotes only three sentences to its repetition here.) Common sense, however, wars with the notion that the University, as arm of the State, suffered no loss because the Legislature passed a special appropriation to assist the University in its most dire extremities. The simple refutation is that there is no evidence the Legislature intended to extinguish any right of recovery against the brokers or otherwise aid them. Indeed, it would have been unconstitutional for the Legislature to have so aided the brokers. Utah Constitution, Article IV, Section 29. It is elementary that a statute should be construed so as to avoid unconstitutionality. In this case, it is easy to construe the Supplemental Appropriations Act of 1974 to avoid an unconstitutional result. The Act only says as to the amount going to the University that it is to "replace losses incurred in the University's investment program. . . ." How Bosworth can

construe that language to be intended to absolve it or any other person legally liable for those losses escapes comprehension.

The argument has a second flaw. The Legislature appropriated only a million dollars. The complaints together pray for over four million. The complaint against Bosworth alone seeks over one million. Although the University has not established its losses on the Record, the reason it has not is because the Court has not yet reached the issue of damages. To say, as Bosworth does, that the University must prove its damages to be over the amount of the special appropriation is to ignore the procedural posture of this case.

N. THE DECISION OF THE TENTH CIRCUIT IN
RELATED LITIGATION IS NO BAR TO RECOVERY
IN THESE SUITS.

The brokers suggest that this Court should be bound by a decision of the Tenth Circuit in related litigation. Utah State v. Bear, Stearns & Co., 549 F.2d 164 (10th Cir. 1977). Contrary to the brokers' view, however, there is little if any similarity between the University's federal law claims rejected there and its state law claims allowed by the Trial Court here. In Federal Court, the University sued on the basis that the brokers violated the "suitability rule" of the NASD and the "due diligence" rule of the New

York and American Stock Exchanges discussed, supra, at pp. 48-50. The University's theory was that these violations were of rules of quasi-public associations and as such constituted wrongs against the University giving rise to private actions in the courts. The Tenth Circuit held, however, that absent broker conduct "tantamount to fraud," no private right of action arose under either of these rules. The rule that a public body can recover monies paid out pursuant to ultra vires contracts was not before the Tenth Circuit. Indeed, the actions before this Court are based on state law ultra vires principles over which there is no federal jurisdiction. The Tenth Circuit's language means only that the ultra vires character of these purchase orders does not imply that the brokers' acceptance of them was "tantamount to fraud" so as to give the University a federal right of action. The Tenth Circuit did not say that the brokers did not violate the rules for purposes of disciplinary action by the New York or American Stock Exchanges or by the NASD.

Not only is the language quoted from the Tenth Circuit opinion irrelevant to these suits but one sentence of it is totally untrue. The University here does not seek to "retain the profits it has made and recover from the brokers the losses which it has sustained." In all these cases, it prays only for the difference between its losses on securities purchased through the defendant broker and

what it gained on profitable security investments made through the broker.^{28/}

Finally, it is not true as the brokers intimate that the suits before this Court now are the same as those brought in federal court. The University's suits against these brokers were initially filed in the United States District Court for the District of Utah because only in federal court could it urge its securities law (NASD and Stock Exchange Rules) theories. To those federal law theories, it is true, the University added under the doctrine of pendent jurisdiction the theory of recovery under common law urged here. When Judge Aldon Anderson dismissed the federal law theories, there were no longer any claims for relief over which he had jurisdiction to which the common law theory of recovery urged here could be appended. Consequently, Judge Anderson dismissed the common law theory of recovery without prejudice to it being refiled in state court. At no time did any federal court rule on the theory of recovery now before this Court.

- O. EVEN IF THIS COURT HOLDS THAT THE BROKERS ARE NOT LIABLE FOR LOSSES FROM STOCKS PURCHASED AFTER THE BROKERS OBTAINED CORPORATE RESOLUTION FROM THE UNIVERSITY, THE JUDGMENTS SHOULD STILL BE AFFIRMED AS TO AT LEAST THREE OF THE BROKERS.

The four brokers state that they did not open

^{28/} In the Merrill Lynch case, the University seeks other heads of damage occasioned by margin account dealings.

accounts for the University until after they received written resolutions from University officials (four brokers' brief, p. 59). This is demonstrably false. Merrill Lynch's own affiant admits it opened an account with the University on July 22, 1970, although no corporate resolution was received until November 30, 1970 (Merrill Lynch, R. 1433, 1437). Before receiving the resolution, Merrill Lynch conducted nineteen (19) transactions for the University (R. 1, 10-11).

As has already been noted, neither Hornblower nor Bear Stearns has established that they ever obtained a University resolution. See, supra, page 9, footnote 6. Bear Stearns' affiant does attach to his affidavit the first page of the January 20, 1972, corporate resolution but not the second page which would have borne the signature and seal of the Secretary of the University's Institutional Council.^{29/} But even if this Court admits new evidence sufficient to satisfy it that Bear Stearns did receive an authentic copy of the January 20, 1972, resolution on or soon after that date, it should still affirm the judgment as to liability against Bear Stearns as to six purchase orders it accepted from the University between August 20, 1971, and the date of the resolution. (Bear Stearns, R. 720-722, 1998-1999). Bear Stearns concedes it did not obtain a resolution copy for five

^{29/} See pp. 91-92 of the four brokers' brief for both pages of that resolution.

months and that in opening a new account for the University it ignored its own requirement to obtain a corporate resolution (R. 263, 1998-1999, 2004).

As has also been noted, Hornblower's affiant attached nothing to his affidavit. As far as the record shows, then, Hornblower never received a true copy of any corporate resolution. Assuming, however, this Court allows Hornblower to supplement its evidence at this late date, and that evidence shows Hornblower relied on a copy of the January 20, 1972, resolution, it should still affirm the judgment against Hornblower as to fourteen trades it executed for the University from December 8, 1971, to the date of the resolution. (Hornblower, R. 447-449)

II

EVEN IF THE UNIVERSITY'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT ARE REVERSED, THE TRIAL COURT'S DENIAL OF THE BROKERS' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM FOR RELIEF SHOULD BE AFFIRMED.

The brokers blithely assume that their Rule 12(b)(6) motions to dismiss must be granted if the University's motions for summary judgment as to liability should fail. This assumption is fallacious in at least two respects.

A. THERE ARE TRIABLE ISSUES OF FACT AS TO THE CORPORATE RESOLUTIONS OF AUTHORITY

Except for Merrill Lynch, the brokers have not

filed their own motions for summary judgment.^{30/} They have, however, submitted affidavits purporting to demonstrate that each of them obtained a copy of a corporate resolution from the University before transacting business with it. However, as has just been discussed, supra, pp. 65-67, there is a substantial question as to whether Bear Stearns and Hornblower ever obtained copies of any resolution purporting to authorize the purchase of stock. Moreover, it is clear from the record that none of these brokers filed testimony as to when they obtained copies of resolutions from the University.^{31/} It is also undisputed that Hornblower and Bear Stearns accepted and filled many University purchase orders months before January 20, 1972, the date of the resolution upon which all the other as well as Bear Stearns definitely rely. Likewise, Merrill Lynch alone accepted and executed nineteen purchase orders before first receiving a copy of a University resolution of authority (Merrill Lynch, R. 1, 10-11). Finally, a question is raised as to whether Bosworth obtained a copy of the January 20, 1972, resolution upon which it relies before February 1,

^{30/} Merrill Lynch's motion for summary judgment was denied, the Trial Court finding triable issues of material facts.

^{31/} Not even Merrill Lynch's affiant gave a date although a resolution attached to his affidavit appears to bear a date stamp of November 30, 1970 (R. 1433, 1437).

1972--the date of its first purchase for the University. All that is known is that Bosworth's affiant did not specify when the resolution copy was received.

If this Court holds that the brokers should not answer for any University losses after receiving written authority, the University's complaints cannot be dismissed as to those transactions conducted before then. At the very least, Bear Stearns, Hornblower and Merrill Lynch are liable for losses on all securities they brokered for the University prior to January 20, 1972, when the University passed the resolution upon which they appear to rely. Therefore, the brokers' Rule 12(b)(6) motions were properly denied below.

B. THERE IS A TRIABLE ISSUE OF FACT WHETHER PUBLICITY SURROUNDING THE DECEMBER 15, 1972 ATTORNEY GENERAL LETTER OPINION WAS KNOWN TO, OR SHOULD BE CHARGED TO, THE BROKERS.

As discussed, supra, pp. 11-12, the Logan and both major Salt Lake City newspapers published accounts on December 15 and 16, 1972, of the Attorney General's opinion that the investment program was illegal. Both managers of the two "collecting banks" read these articles. Whatever these managers may have then told the brokers about what they read (the record is silent on this point), three brokers-- Bear Stearns, Bosworth and Sutro--continued thereafter to

fill University purchase orders. This despite there being ample evidence that Catron was ordered to stop buying stock (Broadbent 203; footnote 46 of the four brokers' brief).

It is because of the purchases made after December 15, 1972, that the University suffered most of its multi-million dollar loss.^{32/}

For the brokers to prevail on their Rule 12(b)(6) motions, they must show that under no set of facts could the University prove a cause of action as to those securities purchased after December 15, 1972. This they cannot do. There is a triable issue of fact as to whether Catron received orders to buy no more stock sometime in December, 1972.^{33/} Even the brokers concede this (Bosworth brief, p. 8). There is also at least a triable issue of fact as to whether the brokers should be charged with knowledge that on December 15, 1972, the Attorney General opined that the University could not legally purchase stock. Both Salt Lake City

^{32/} Although the record is not complete on this point, it not being central to the issue of liability, it is fully documented that between December 15, 1972, and mid-March, 1973, when Catron was terminated and all new purchases ceased, the market fell dramatically.

^{33/} On December 4, 1972, Catron was told by certain key members of the Board of Regents (then the Board of Higher Education) and later that day by the Institutional Council to "immediately reverse the Investment Policy." (Exh. 85D, January 10, 1973, Minutes of Council, page 3).

newspapers reported on the opinion. Since Bosworth's office was in Salt Lake City and the office manager and salesman handling the University's account--Mark Haroldsen--presumably read one or both newspapers on a periodic basis, it is a triable issue of fact as to whether Mark Haroldsen or someone else at Bosworth read or heard about the newspaper accounts or of the Attorney General opinion itself. It is also at least a triable issue of fact whether the collecting banks should be treated as Bosworth's agent for the purpose of imputing to it the knowledge the managers of those banks acquired by reading the newspaper accounts. Indeed, the Trial Court impliedly so held by its expressly holding that the collecting banks were the brokers' agents.^{34/} Although the brokers submitted several dozen affidavits covering many points, it is noteworthy that no affiant for any of the brokers denies ever hearing of the publicity surrounding the Attorney General's opinion. This is all the more interesting in light of sworn testimony submitted by a collecting bank that it was unaware that the University ever discussed the Attorney General's December 15, 1972, opinion with any broker (Bear Stearns, R. 1547, 1548).

^{34/} Judge Christoffersen expressly held the collecting banks to be the brokers' agents: "A bank in Cache County was designated as an agent to receive delivered orders from [the brokers] and to pay for such orders in Cache County out of the accounts of USU" (Bosworth, R. 150). A collecting bank's affiant likewise characterized his relationship with the brokers as one of agency. Bear Stearns, R. 1548.

The issue, of course, is not whether the University discussed the opinion with the brokers but whether the brokers learned of the opinion, either through the collecting banks or otherwise.

The University's principal theory of recovery is that the brokers were charged with constructive knowledge that all the stock purchases here were ultra vires. A secondary theory of recovery, pleaded here and in the earlier federal litigation, is that the brokers were put on actual notice on or shortly after December 15, 1972, that the University might not have power to purchase stock and that Catron may no longer have authority from the University to continue to place purchase orders. If this Court denies recovery as to all purchases on the primary theory, the University should be allowed to argue under its secondary theory the facts by which it claims the brokers acquired actual knowledge. Although the University did not conduct any discovery in these cases,^{35/} the Record already contains enough evidence to raise triable issues of fact whether the brokers knew that possibly the University had no power to purchase any stock and/or that the University had revoked Catron's authority.

^{35/} After September, 1977, the Trial Court limited the taking of depositions to a period of less than a month and seemed to extend this right only to the brokers (Bear Stearns, R. 1634-1636).

CONCLUSION TO PARTS I AND II

Although the brokers have adduced a lengthy list of purported defenses, the issues of this litigation are few and relatively simple. Those issues were squarely before this Court in First Equity. These brokers were also before this Court in that case and argued at length--and unsuccessfully--most of the defenses raised here. Throughout the protracted proceedings below, lasting four years, Judge Christoffersen let himself be guided by the implacable logic of the First Equity opinion. However harsh the result, it was for the Legislature to change.^{36/}

The brokers' appeal is not to the settled law of this and virtually every other state. Their appeal is to their self-interested view of equity. They say, in effect, that the State should be treated under these facts like any private individual.^{37/} This view is simplistic. The law does not treat all private individuals the same. Minors are treated differently from adults in many contexts; women sometimes treated differently from men. In each case of dissimilar

^{36/} First Equity, p. 892. Some states have enacted legislation to modify the common law in this regard. See Wisconsin, Section 66.295 Stats. (1941). Utah has not passed such a statute.

^{37/} Their quotation from Driggs v. Utah State Teachers Retirement Board, 105 Utah 417, 425-426, 142 P.2d 657, 660-661 (1943) is misleading. The ruling there was not that the state should make ultra vires pension payments but that the teachers' rights to these payments had vested; and under elementary principles of constitutional law those rights could not be impaired by subsequent legislation.

treatment, the law has concluded that policy considerations justify different treatment. This rudimentary principle of jurisprudence the brokers totally ignore. They have failed to show how circumstances have so changed in Utah that it is no longer necessary to safeguard the public treasury and protect the citizenry from unlimited expenditures by their unbridled public servants wishing to enter the stock market. It is not a matter of a "conservative" versus a "socialistic" view of government. It is a matter of whether the people control their elected or appointed officials or whether those officials are allowed to commit public money to investments not sanctioned by the Legislature.

The brokers' appeal to equity is thus inappropriate at this stage of these lawsuits. If this Court reverses, the University receives nothing and the public is out over four million dollars. Any resort to equity should be deferred to the damages phase of this litigation. Gerzof v. Sweeney, supra. If it is inequitable for the University to recover all its losses, despite the First Equity holding,^{38/} this Court would then be able to fashion a measure of damages to take into consideration any equities which it finds to be present. This was precisely what was done in Gerzof. In

^{38/} There the broker sought commissions and the decline in the value of stock between the time it purchased it for the University and the time the University refused payment. This Court denied recovery as to both elements of claimed damage.

stating this, the University does not concede there are any equities in the brokers' favor.

The four brokers also appeal from the Trial Court's order denying their counterclaims against the University (Bosworth did not file any counterclaims). They expressly ask this Court to reinstate the counterclaims to allow them to recover their costs and attorneys' fees even if they prevail on the issue of liability in the principal actions. They devote, however, no part of their brief to their counterclaims (as opposed to their third-party complaints). Their counterclaims are nothing more than a repetition of their basic position that the University should bear these losses. They add nothing (except for their prayer for costs and attorneys' fees) and should be treated like their Rule 12(b)(6) motions.

As to their prayer for costs and attorneys' fees, the brokers cite no relevant case authority. Even if these brokers prevail here, these suits can hardly be deemed frivolous in light of First Equity and supporting case law.

The Trial Court should be affirmed as to all orders affixing the brokers with liability.

III

THIS COURT SHOULD AFFIRM THE ORDERS HOLDING THAT JURISDICTION IS HAD OVER THREE BROKERS AND VENUE IN CACHE COUNTY WAS PROPER AS TO TWO OTHERS.

A. JURISDICTION IS HAD OVER HORNBLOWER;
BEAR STEARNS; AND SUTRO UNDER BOTH
THE "MINIMAL CONTACTS" AND THE "DOING
BUSINESS" TESTS.

In Abbott G.M. Diesel v. Piper Aircraft, 578 P.2d 850 (1978), this Court recognized two distinct concepts of jurisdiction over non-resident defendants which it called the "doing business" and "minimal contacts" tests. See especially footnote 6. That opinion was handed down after the parties hereto briefed and the Trial Court ruled on the three brokers' motions to dismiss for lack of in personam jurisdiction. At that time, this Court had failed to distinguish between the two tests. Hill v. Zale Corp., 25 Ut.2d 357, 482 P.2d 332 (1971). Now that this Court has clarified the law, the University contends jurisdiction is had here over the brokers under each test.

1. Statement of Facts.

Hornblower

(1) During the period when Catron purchased stock from or through it, Hornblower advertised its operations as "Nationwide Underwriting and Distribution Services" with 65 offices "coast to coast" and "over 1100 registered representatives" (Bear Stearns, R. 222; hereafter, references to the record are to the Bear Stearns record unless noted). During said period, Hornblower had been in business since 1888, and was a member of all major stock exchanges. It also was registered in 39 states, including Utah. By early 1976, when it

was served herein, it was registered in all states (R. 234).

(2) It has been duly registered as a broker-dealer with the Utah Securities Commission since May 14, 1965 (R. 213).

(3) Between December, 1971, and September, 1972, it executed for the University either as principal or agent 82 purchases of stock with a total net purchase price of \$2,238,974.80 for which it received commissions of \$32,622.43 (Hornblower, R. 56-57).

(4) Most if not all of the securities purchased from Hornblower were paid for by the University delivering its drafts to a Logan bank in exchange for the stock certificates (R. 156-157).

(5) Hornblower directed by mail to the University at Logan a confirmation slip for each of the 82 purchases and a monthly account statement during each month of the aforesaid period.

(6) All of the 82 purchases were made by the University following recommendations made by Louis Aragon, a Hornblower employee, to Catron. Aragon also recommended the University purchase securities in other companies (R. 152).

(7) Between June, 1972, and January, 1973, advertisements for Hornblower appeared in periodicals widely circulated and read in Utah. Incomplete investigation reveals

17 such advertisements appeared in said period in Business Week, Finance Magazine, Forbes, and the Wall Street Journal, five of them being full-page ads. On November 12, 1975, another ad appeared in the Wall Street Journal (R. 180-181).

(8) Between December, 1971, and September, 1972, Catron and other University employees conversed by telephone with Aragon and other Hornblower employees over 100 times, either placing or receiving virtually all if not all of these calls in Utah. When Catron placed these calls, it was usually collect, which Aragon always accepted (R. 152).

Bear Stearns ("Bear")

(1) During the period when Catron purchased stock from or through it, Bear was registered in 34 states and was a member of all major stock exchanges (R. 228). By the time service was effected upon Bear in this action, in March, 1976, it had registered in four more states, including Utah (R. 228).

(2) Bear has been duly registered as a broker-dealer with the Utah Securities Commission since September 26, 1974 (R. 214).

(3) Between August, 1971, and February, 1973, it executed for the University, either as principal or agent, at least 47 orders to purchase stock with a total net purchase price of \$4,863,574.35 for which it received commissions of \$35,323.59 (R. 81-82). Also, from December, 1971, to March, 1973, it executed for the University 25 sell orders for which it received commissions of \$34,760.33 (R. 236).

(4) Most if not all of the securities purchased from Bear were paid for by the University delivering its drafts to a Logan bank in exchange for the stock certificates (R. 156-157).

(5) Bear sent to the University by mail at Logan a confirmation slip for each of the purchases and a monthly account statement during each month of the aforesaid period.

(6) Many if not most of the 47 purchases listed in the complaint were made by the University following recommendations made by Jim Christensen, a Bear salesman, to Catron (R. 152-153). Christensen admits making some recommendations (R. 239). Once, Catron and Christensen together visited the home office of one of the companies in which the University invested and spoke with a top company executive, the meeting having been arranged by Christensen (R. 153-154).

(7) Between October, 1972, and January, 1973, advertisements for Bear appeared in the Wall Street Journal. Incomplete investigation shows seven such advertisements appeared in that four-month period alone. Another ad appeared December 19, 1975 (R. 180-181).

(8) Between August, 1971, and March, 1973, Catron and other University employees conversed by telephone with Christensen and other Bear employees over 50 times, either placing or receiving virtually all if not all of these calls in Utah. When Catron placed the call, it was usually collected, which Christensen always accepted.

(9) Between November, 1971, and February, 1973, Catron sent by mail from Logan at least 20 items of correspondence to Bear (R. 157).

Sutro

(1) During the period when Catron placed orders with it to purchase securities, Sutro was registered in 12 states, including six states east of the Mississippi River, although its only offices were in California (R. 226). By the time service was effected upon it in this action, in March, 1976, it had registered in 17 more states, for a total of 29 states. Among the states with which it registered within the last three years are Arizona, Nevada, Colorado and Wyoming (R. 232).

(2) Between August, 1972, and January, 1973, it executed for the University either as principal or agent at least 12 orders to purchase stock having a total net purchase price of \$1,497,860.00 for which it received commissions of \$13,508.30 (R. 104).

(3) Most if not all of the securities purchased from Sutro were paid for by the University delivering its drafts to a Logan bank in exchange for the stock certificates (R. 156-157).

(4) Catron established an account for the University with Sutro after having been invited by Sutro to attend a two or three day seminar for institutional investment

managers in Los Angeles, at which top level representatives of many companies discussed the investment potential in their respective companies. Sutro not only brought together the company spokesmen and otherwise sponsored the seminar, but also paid for meals, refreshments and entertainment for all attendees. Catron attended two such Sutro seminars at Sutro's invitation (R. 154).

(5) Sutro sent to the University by mail at Logan a confirmation slip for each of the purchases and a monthly account statement during each month of the aforesaid period.

(6) Between March, 1972, and February, 1973, and between October, 1975, and February, 1976, advertisements for Sutro appeared in periodicals widely circulated and read in Utah. Incomplete investigation shows ten such advertisements appeared in the Wall Street Journal, Business Week and Finance Magazine during the first period and eight such ads appeared in the Wall Street Journal alone in the second period (R. 180-181).

(7) In said period, Catron and other University employees conversed by telephone with Diane Dyckman, Felix Juda, and other Sutro employees numerous times, either placing or receiving virtually all if not all of said calls in Utah. When Catron placed the call, it was usually collect, which Sutro always accepted (R. 154).

(8) In February, 1973, Catron sent to Sutro from Logan at least two items of correspondence relating to the

purchase and sale of 320 debentures issued by Hanover Square Realty Investors for over \$320,000.00 (R. 157).

2. Jurisdiction Exists Under the "Minimal Contacts" Test.

This Court in Abbott G.M. Diesel v. Piper Aircraft, supra, discussed what it termed the "minimal contacts" concept of Utah's long-arm statute and reiterated that Utah's jurisdictional standards should "not be more restrictive than those allowed by federal due process limitations." Id. at 853. Borrowing heavily from a recent law review article,^{39/} this Court mentioned (at p. 854) three factors should be considered in applying the minimal contacts test:

- (1) the nature and quality of defendants' acts;
- (2) whether the defendant engaged in purposeful rather than unintentional acts to avail itself of the privileges and protections of the forum state; and
- (3) any other relevant matters bearing on the notions of fair play and justice.

Applying these considerations against case law and the facts of this litigation, it is clear that the test is met.

a. The nature and quality of defendants' acts subject them to Utah's jurisdiction.

It is not necessary, as the brokers urge, that there be some physical presence in the State. Conn v.

^{39/} "In Personam Jurisdiction in Utah," 77 Utah Law Review 235 (1977).

Whitmore, 9 Ut.2d 250, 342 P.2d 871 (Justice Crockett); Reeder Contractors v. Higgins Industries, 265 F.2d 768, 773 (9th Cir. 1959) ("It is not necessary that defendants' agent be physically within the forum, for this act or transaction may be by mail only"). Since physical presence is unnecessary, this litigation is squarely controlled by Piantes v. Hayden Stone, 30 Ut.2d 110, 514 P.2d 529 (1973), cert. den. 415 U.S. 995, reh. den. 416 U.S. 963. There, a California based stockbroker sold stock to Utah residents. Of over 100 solicitations he made, all but 8 were made by telephone from California as was done here. There, the stockbroker did make eight solicitations while physically present in Utah but that fact it has been seen could not alone determine the holding there that jurisdiction was had.

In Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 627 (1935) an unregistered nonresident defendant was held to have carried on a securities business. The court stated that, "Iowa treats the business of dealing in corporate securities as exceptional and subjects it to state regulation." In Hanson v. Denckla, 357 U.S. 235 (1976), the Supreme Court cited Doherty and Hess v. Polasky, 274 U.S. 352 (1927), the then-leading case on nonresident motorist statutes, in support of statements that McGee v. International Life Insurance Co., 355 U.S. 220 (1975) involved special legis-

lation (The California Unauthorized Insurers Process Act). This Act, it said, was passed by California " . . . to exercise . . . its 'manifest interest' in providing effective redress for citizens who had been injured by non-residents engaged in an activity that the state treats as exceptional and subject to special regulation," thus equating insurance, blue-sky and nonresident motorist statutes as special situations.

Paulos v. Best Securities, Inc., 260 Minn. 283, 109 N.W.2d 576 (1961) involved an action under the Minnesota Securities Act by a Minnesota resident against a foreign corporation having no contact with Minnesota except the sale to the plaintiff of a security. Like Sutro, the broker was not registered in the forum. (The other two brokers were registered here.) The one sale, however, was held sufficient to subject the corporation to the jurisdiction of the Minnesota courts under the Minnesota long-arm statute.

In Koplin v. Thomas, Haab & Botts, 219 N.E.2d 646, 651 (Ill. 1966), the sale to Illinois residents by a securities broker having no offices or other "presence" in Illinois was held to subject the broker to Illinois jurisdiction. The Koplin case is especially helpful precedent because it construed the Illinois long-arm statute. As observed in Hughes Tool v. Meier, 486 F.2d 593, 595 (10th

Cir. 1973), the Utah long-arm statute is "virtually identical" to the language of the Uniform Interstate and Foreign Civil Procedure Act, the long-arm provision of which was patterned after the Illinois long-arm statute.

- b. The brokers engaged in purposeful acts to avail themselves of the privileges and protections of Utah.

As stated by Justice Crockett in Hill v. Zale Corp., supra, jurisdiction over a foreign corporation is warranted by the fact alone that the corporation is:

. . . permitted to enjoy the advantages of having activities carried on within a state to further its business interests under the protection of its laws. . . . pp. 359-360.

Hornblower and Bear Stearns, by virtue of their registration with the Utah Securities Commission, are permitted to act as broker-dealers in Utah under the protection of its laws. Furthermore, all three defendants are protected in the use of their trade names (service marks) used in their advertising in Utah under Sec. 70-3-1 et seq., Utah Code Ann. (1953) in that they may file for protection thereof. Engineered Sports Products v. Brunswick, 362 F.Supp. 722 (D.Utah 1973), per Anderson, J.

- c. Other relevant matters bearing on the notions of fair play and justice require affirmance of the Trial Court.

- (1) Registration of Hornblower and Bear Stearns with the Utah Securities Commission and of Sutro with 30 jurisdictions and their engaging in interstate commerce negates any claim of inconvenience or unfairness in defending in Utah.

In Mountain States Sports v. Sharman, 353 F.Supp. 613, 616 (D. Utah 1972), Judge Anderson construed the Utah long-arm statute, noting that factors going to the ultimate question of whether due process allowed the exercise of jurisdiction included "the extent to which defendants engage in interstate commerce . . . and the general convenience of defending in Utah." He then found nothing in the record there suggesting "hardship, injustice, or unusual inconvenience" would result from defending in Utah, stating the defendants there were engaged in interstate business dealings "which suggest their general ability to litigate matters outside of California." Likewise, all three brokers here are engaged in interstate business dealings. Their advertisements in nationally circulated periodicals highlight the interstate nature of their operations. Bear Stearns and Hornblower now are and were registered with the Utah Securities Commission at the time these actions were filed (as well as with the equivalent body in all other states in the case of Hornblower and most other states in the case of Bear Stearns) and thereby consented to service upon them through the Director of the

Utah Securities Commission in all matters arising under the Utah Uniform Securities Act. Sec. 61-1-26, Utah Code Ann. (1953).

With respect to Sutro, though not registered as a broker-dealer in Utah, it is registered in 30 separate jurisdictions, including adjacent states of Arizona, Nevada, Colorado and Wyoming. It is thus hard to see how Sutro (which has also advertised extensively in national publications widely read in Utah) would be inconvenienced by having to defend in Utah.

(2) The brokers knew they were dealing with public monies.

All the cases relied on by the brokers involved the more usual contract or tort litigation between private parties. Here, a public entity seeks to recover damages resulting from state monies having been paid out unlawfully. In accepting and filling the scores of orders for the purchase of securities involved here, the brokers must be presumed to have known that the University is a state institution supported by state monies. Thus, it is hardly unfair to have the brokers present their defenses in the state whose citizens paid over \$8,600,000.00^{40/} for the securities,

^{40/} Hornblower - \$2,238,974.80
Bear - \$4,863,574.35
Sutro - \$1,497,574.00

Source: see footnote 41, infra.

especially because they derived a total of well over \$105,000.00 in commissions.^{41/} It requires no citation that the ultra vires doctrine was promulgated to protect the public treasury to the ultimate benefit of the taxpayer. These suits are between the brokers and the taxpayers of Utah, as the Trial Court repeatedly noted. That fact alone confers jurisdiction in accordance with notions of fairness under the due process clause of the United States Constitution, incorporated into the Utah long-arm statute by sec. 78-27-22.

If the Court's ruling is that the University can recover damages, it follows logically that jurisdiction has been obtained. In Hill v. Zale, supra, Justice Crockett stated:

When a foreign corporation is permitted to enjoy the advantages of having activities carried on within a state to further its business interests under the protection of its laws, it is only fair and reasonable that its citizens have some practical means of redress if grievances arise.

In quoting the above passage, the Trial Court recognized its peculiar applicability to these cases. These brokers "entered

^{41/} Hornblower - \$32,622.43
Bear - \$35,323.59 + \$34,760.33
Sutro - \$13,508.30

Source: Bear Stearns, R. 236, 722-723; Hornblower, R. 449-450; Sutro, R. 84. The amounts do not include discounts or underwriting fees in those cases where the broker acted as a principal.

into the transactions assumingly for profits of their own (Memorandum Decision, Merrill Lynch, R. 396)" under the protection of Utah's laws. Since these cases involve taxpayer monies (Memorandum Decision, Bear Stearns, R. 2185-2186), it is only fair and reasonable that these taxpayers have some practical means of redress.

- (3) The brokers advertised in Utah and used the services of Utah banks to receive the stock certificates and to make payment for the stock.

As Judge Christoffersen stated in his Memorandum Decision:

All three defendants, however, advertise their operations throughout the United States and advertise in national periodicals that they are in the business of selling stocks, and that stocks may be ordered from all three defendants from outside the state of their place of business. In previous cases of University vs. Merrill Lynch and Bosworth, Sullivan Co., who are in the State of Utah, arrangements were made for USU delivering drafts to a Logan bank. Stock certificates were placed with these banks, paid for by USU drafts from the banks. The actual placement of the stock certificates with Logan banks and their payment by USU drafts by the banks were made in Logan, Utah. This would certainly seem to be doing business in the State of Utah and more particularly in Cache County. The acts of placing the stock certificates with Logan banks, payments of drafts at the Logan banks for such certificates, sending confirmation slips and account statements to Utah, and delivering certificates to Utah certainly appears to be sufficient acts to confer jurisdiction over non-resident defendants (Bear Stearns, R. 293). (Emphasis added.)

(4) The brokers solicited business from the University.

Clearly the brokers all solicited (and obtained) substantial business from the University. They all conversed frequently with Catron, either calling him or accepting his collect calls. Sutro invited him to and hosted him at two seminars for institutional customers and prospective customers, paying for meals, refreshments, and entertainment. The fact that Sutro may not have actually recommended he purchase a particular security does not mean that Sutro did not solicit the University's business. As every salesman knows, solicitation takes many forms. Hornblower and Bear Stearns actually recommended the University purchase certain securities, obviously hoping it would use their broker facilities to make those purchases. That it purchased and sold securities through these three brokers to the tune of over \$105,000.00 in commissions attests to the success of their solicitation efforts.

3. Jurisdiction is Had Under The "Doing Business" Test

The "minimal contacts" test has been developed to apply Utah's long-arm statute (Utah Code Ann., Sections 78-27-22 to 28). Preceding the passage of that Act in 1969, Utah Courts developed a "doing business" test for purposes of determining jurisdiction over a nonresident defendant alleged to be doing business in the State. Secs. 78-27-20,

21, Utah Code Ann. (1979); Rule 17(e), Utah Rules of Civil Procedure. Even under this older test, these brokers are subject to this jurisdiction.

- a. That the brokers solicited business from the University subjects them to Utah jurisdiction.

In 1944, this Court, per Wade J., stated in Industrial Commission v. Kemmerer Coal Co., 150 P.2d 373, with reference to subjecting a nonresident corporation to Utah jurisdiction:

. . . it would appear that very little more than mere solicitation is necessary to constitute "doing business" by a foreign corporation. . .

The liberalization of in personam jurisdiction in the last 35 years under the "doing business" test makes the Kemmerer Coal case more compelling authority today. The solicitation efforts of these brokers has just been summarized. That the "very little more" than solicitation required in Kemmerer to constitute "doing business" is present in these cases requires no additional recitation. As already discussed, two of the brokers were registered in Utah. All of them received substantial commissions which came from public monies. And all of them delivered stock certificates to Utah banks and mailed confirmation slips and account statements directly to the University. These activities alone, coupled with the brokers' solicitations, clearly satisfy the "solicitation-plus" rule of the "doing business" test. "In Personam Jurisdiction in Utah.

supra, pp. 235-239.

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- b. The services of the Logan banks were frequently used by the brokers; indeed, the banks were their agents as a matter of law.

The University maintains that as a matter of law, the banks were agents of the brokers. Judge Christoffersen so held:

A bank in Cache County was designated as an agent to receive delivered orders from [the brokers] and to pay for such orders in Cache County (Bosworth, R. 150).

See Phelan v. University National Bank, 229 N.E.2d 374 (Ill. 1967).

But even if the banks were not the brokers' agents in a technical legal sense, the brokers frequently and continuously used the banks' services which, for purposes of establishing jurisdiction, suffices. Remembering the language of Justice Crockett in Hill v. Zale, supra, the brokers fully utilized the services of two Utah banks to further their own business interests and thus cannot complain it would be unfair to compel them to defend in Utah.

- c. The brokers' activities in the State were substantial and continuous.

A significant factor in applying the "doing business" test is whether the activities of a nonresident corporation were substantial and continuous. Here, the brokers' activities ranged from a period of six months (Sutro) to eighteen months (Bear Stearns). Over eighteen months, Bear Stearns conducted over 72 trades for the University (Bear Stearns, R. 236, 722-723). Over a nine-month period, Hornblower filled

82 University purchase orders (Hornblower, R. 449-450). During these extended periods of trading for the University, the brokers' salesmen conversed frequently and continuously with Catron, accepting dozens of long distance calls in the process.^{43/} Throughout this time, the brokers sent a confirmation slip after each trade and also sent monthly account statements directly to the University in Utah. The brokers' solicitation for business within Utah was thus "continuous, systematic, and of long duration."^{44/}

4. The Brokers' Cases Are Distinguishable.

In Producers Livestock Loan Co. v. Miller, 580 P.2d 603 (Utah 1978), this Court gave examples of "necessary and practical limitations" upon the expanded concept of long-arm jurisdiction. One example was where a person buys stock in a corporation located in and carried on in another state. These cases, however, involve a person buying stock in dozens of corporations through the same broker, then suing the broker; they do not involve suits against the corporation issuing the stock as in this Court's example.

The brokers' reliance on Foreign Study League v. Holland-America Line, 27 Utah 2d 442, 497 P.2d 244 (1972) is

^{43/} Catron conversed long distance with Bear Stearns over 50 times, with Hornblowers' salesmen over 100 times, and also with Sutro's employees numerous times (Bear Stearns, R. 152-153).

^{44/} "In Personam Jurisdiction in Utah," supra, p. 237.

also misplaced. That case did not turn on the fact that the defendant's representatives traveled to Utah on several occasions. Conn v. Whitmore, supra.

Finally, Union Ski Co. v. Union Plastics Corp., 548 P.2d 1257 (Utah 1976) is neither controlling nor reliable authority. In Union Ski, there was no continuity of activity as here. The defendant there had not advertised or solicited business from the Utah plaintiff as here. There, the contract was made in California whereas here the orders were placed by telephone from Utah. Payments there were made in California; here, payments were made to Utah banks from which the University picked up the certificates. Finally, Union Ski did not involve two defendants registered with a Utah regulatory agency nor a factual setting where Utah tax monies were at stake. Parenthetically, Union Ski has been shown to be unreliable in several key respects. "In Personam Jurisdiction in Utah," supra, pp. 245-251.

B. VENUE WAS PROPER IN CACHE COUNTY ON THE GROUND THAT THE WRONG OCCURRED THERE.

1. Statement of Facts

The allegations of the complaints, supplemented by the affidavits, establish as uncontroverted the following:

(1) In a number of cases, some involving both brokers, Catron mailed from Logan checks drawn on the University's accounts with Logan banks to pay for purchases.

(2) The University's monies, which Catron used to

buy securities and pay commissions, were located in Logan.

(3) In the case of both brokers, Catron often requested in placing orders to purchase that payment be made against the securities at one of two Logan banks, and the brokers complied. Consequently, these securities were delivered by the brokers herein, or their agents, to the Logan banks which in turn delivered them to the University in exchange for payment. In the case of many payment-against-delivery orders placed with Bosworth, the Logan bank used in the "collection" process transmitted the funds it received from the University to the First National Bank of Denver, not to a Bosworth account in Salt Lake City (Bosworth, R. 126).

(4) In the case of six orders to purchase placed by Catron with Merrill Lynch, the latter acted as principal (dealer), selling the securities to the University for its own account (Bosworth, R. 314).

2. The Trial Court's Order

Bosworth and Merrill Lynch argue that venue was improper in Cache County and appeal from the Trial Court's order to the contrary. The Trial Court stated, after noting the brokers' contention that any wrong would have been in that the University placed purchase orders with their Salt Lake City offices:

Such an order may have been placed to people in the Salt Lake office but the performance of the same occurred in Cache County. A bank in Cache County was designated as an agent to receive delivered orders from both defendants and to pay for such orders in Cache County out of the accounts of the University.

Such payments, in Cache County out of the University funds, would comprise the alleged wrongful acts. Whether or not these were authorized by Catron, the University's agent, does not go the question of venue since both defendants had agreed to this procedure and followed the same. Since both defendants agreed to and designated Cache County as the place of delivery and the place of payment, the Court holds venue properly lies in Cache County (Bosworth, R. 150-151; emphasis added).

It is simply not true, as Bosworth contends, that the above holding rested on the ground that Cache County was the residence of the University.

3. Venue in Cache County Is Proper Under Utah Code Ann. Section 78-13-7 (1953).

a. The wrong occurred in Cache County.

The University relies upon that part of sec. 78-13-7 allowing actions not covered by other specific venue provisions to be tried in the county in which the cause of action arises. The brokers agree that the cause of action arises "where the wrong occurs."

The brokers argue, variously, that the wrong consisted of:

- (1) Merrill Lynch assenting to the transactions from its Salt Lake City office (four brokers' brief, p. 76); or
- (2) Bosworth opening an account for the University, accepting, transmitting and confirming all University purchase orders "at or from" Bosworth's Salt Lake City office; and receiving all new account documents and University authoriza-

tions at its Salt Lake City office (Bosworth brief, p. 44).^{44/} The brokers' above analysis ignores the gravamen of these complaints, which is that the University paid out monies illegally for which it now brings suit. The ultra vires doctrine, which these cases invoke, was designed to prevent the wrongful expenditure of public money; it was only designed to prevent third parties from executing contracts with public bodies to the extent those contracts called for unlawful expenditures. Thus, the wrong was not the accepting of purchase orders which may or may not have occurred in Salt Lake City but rather the accepting of the University's money--which occurred in Logan in the case of all payment-against-delivery orders. In the case of payment-against-delivery orders placed with Bosworth, the money never went to Salt Lake County but went directly from the Logan collecting bank to Denver.

b. The collecting banks were the brokers' agents for purposes of venue.

It is not necessary that the two Logan banks were the brokers' agents, strictly speaking, for this Court to affirm venue. Judge Christoffersen held them to be the brokers' agents, however, and if he was right no further inquiry is necessary. The fact that Catron initially chose the banks does not preclude them from being the

^{44/} The key sentence of Bosworth's brief: "All orders for the purchase and sale of securities were entered by the University at Bosworth's Salt Lake County office and were accepted, transmitted and confirmed by the defendant at or from its Salt Lake City office.", is not supported by any affidavit.

brokers' agents. Restatement (Second) of Agency, Section 15, 3 Am.Jur. 2d Agency, Sections 17-18. Nor does the fact that the banks may have been acting simultaneously as agents for both the University and the brokers. 3 Am.Jur.2d Agency, Section 234. Under Utah commercial law, a collecting bank is an agent for the owner of securities. Utah Code Ann.(1953) Sections 70A-4-201(1), 105(d) and 104(1)(g). Under the Illinois version of the Uniform Commercial Code, identical to Utah's in all material respects, the Illinois Supreme Court held a bank performing the same functions as the two Logan banks to be a collecting bank. Phelan v. University National Bank, supra. The brokers attack this holding on the ground the two banks were "payor" banks, not "collecting" banks. Their argument assumes, moreover, that the items the brokers sent the Logan banks were "sight drafts." The banks themselves convincingly demonstrated they were not payor banks and the items not "sight drafts" (Bear Stearns, R. 1548-1549, 1566-1567). Finally, it should be noted that if the University, after paying the Logan bank for an order of stock placed through the brokers and receiving the certificates, had then tried to stop the bank from transmitting the money on to the brokers, it most assuredly would have failed. Certainly, the banks' refusal to honor the University's instructions under these hypothetical facts would be inconsistent with the banks being the University's agent and not the brokers' agent.

- c. The injury occurred throughout the State and particularly in Cache County.

If these actions succeed, it is because the law recognizes a wrong done to taxpayers throughout the State. Indeed, this was the foundation of Judge Christoffersen's decision. Logically, these actions could be brought in any county in the State. Certainly they are properly laid in Cache County, the location of the University whose monies have been dissipated.

CONCLUSION TO PART III

The Trial Court held that the Logan banks were collecting banks acting as the brokers' agents in receiving their stock certificates, holding them until the University paid for them, and transmitting the funds so collected on to the brokers. This holding is sound and supported by case law. Since each broker used the collecting banks as agents in at least some of its transactions, that agency alone establishes jurisdiction over the three nonresident brokers and alone is a basis for proper venue of the suits against Bosworth and Merrill Lynch.

However, even if the banks were not agents for purposes of jurisdiction and venue, although clearly agents for purposes of commercial law, this Court should still affirm the orders below. Independent of the Trial Court's holding that the banks were the brokers' agents, there are sufficient grounds under both the Utah long-arm statute and the older concept of doing business to support jurisdiction over the

nonresident brokers; and likewise there is sufficient support for venue to be laid in Cache County where the ultra vires payments were made and accepted.

CONCLUSION

The central issue here is rather simple (although the brokers' ingenuity in devising defenses contained in two appellant's briefs necessitates a lengthy response). Should this Court follow the logic of First Equity to its inexorable conclusion; or should it in the name of equity carve out a broad exception to the principle that sound public finance requires private persons to ascertain the limits of a public body's powers. The brokers here did nothing more to ascertain the University's powers than in the case of a private customer-- and were further shoddy in executing trades for the University long before receiving written authority if, indeed, two of the brokers ever received such authority. To deny at least some measure of recovery would be to broadcast to vendors everywhere that the State's limitations on contractual powers can be circumvented if the public monies are unlawfully disbursed fast enough. It would also leave the taxpayer remediless although he had no control over the University's actions here and cannot be blamed for the ultra vires payments.

These orders should be affirmed.

Respectfully submitted September 28, 1979.

ROBERT B. HANSEN
Utah Attorney General

By David L. Wilkinson
DAVID L. WILKINSON
Special Assistant Attorney General
Respondent

INDEX TO DEPONENTS

<u>Deponent</u>	<u>Title</u>
Bingham, Jay R.	Member, Institutional Council of USU
Bowcutt, Jay	Staff Assistant to Donald A. Catron
Broadbent, Dee A.	Vice President for Business, USU
Bullen, Phillip A.	Member, Institutional Council of USU
Burr, Loren	Partner, Salt Lake City Office of Ernst & Ernst
Catron, Donald A.	Controller and Assistant Vice President, USU
Hammond, O.C.	Member, Institutional Council of USU
Harris, Jay Dee	Member, Institutional Council of USU
Janes, Lynn	Controller, USU
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Snow, Alva C.	Member, Institutional Council of USU
Stockdale, William R.	Member, Institutional Council of USU
Taggart, Glen L.	President, USU
Tibbals, Jane S.	Member, Institutional Council of USU
Watkins, William E.	Internal Auditor, USU

Exhibit 1



FIRST EQUITY CORPORATION OF FLORIDA, a Florida Corporation, Plaintiff and Appellant,

v.

UTAH STATE UNIVERSITY, a body politic and corporate, and Donald A. Catron, an Individual, Defendants and Respondents,

Bear Stearns & Co., Bosworth-Sullivan & Company, Inc., et al., Amici Curiae.

No. 13798.

Supreme Court of Utah.

Dec. 23, 1975.

Stockbroker brought action to recover commissions and other moneys lost as result of the refusal of state university to accept and pay for common stock ordered by university employee for the university. The First District Court, Cache County, VeNoy Christoffersen, J., granted summary judgment for the university, and stockbroker appealed. The Supreme Court, Hyde, District Judge, held that the university did not have the power to purchase common stock with public funds in its possession; thus, the agreement to purchase stock and pay commissions was ultra vires and unenforceable.

Affirmed.

1. Colleges and Universities \S 1, 6(4)

Utah State University which is a state institution holds property in trust for state and is subject to laws of state enacted relating to its purposes and government and, in this vein, is similar to a municipal corporation which also derives its powers from the state and deals with public funds.

2. Colleges and Universities \S 6(3)

Grant to Utah State University of the power to handle its own financial affairs did not give university authority to invest in common stock with public funds. Const. art. 10, \S 4; U.C.A.1953, 53-32-2, 53-48-10 (5), 53-48-20(3).

3. Colleges and Universities \S 6(3)

Statute allowing public corporations, such as Utah State University, to invest funds in their possession in bonds and other obligations of the United States did not give Utah State University the power to purchase common stock with funds in its possession. U.C.A.1953, 33-1-1, 33-1-3.

4. Appeal and Error \S 171(1)

Ordinarily, an appellant cannot raise a theory on appeal for first time different from that presented to trial court.

5. Public Contracts \S 14

Rules denying recovery on an ultra vires contract entered by public entity are based on theory that party actually dealing with public entity is charged with knowledge that contract is ultra vires and unenforceable.

6. Brokers \S 16

Stockbroker whose customer was state university was chargeable with knowledge that university's contract to buy common stock with public funds was ultra vires and thus could not shift to seller the loss incurred when university refused to accept and pay for stock.

7. Colleges and Universities \S 5, 6(3)

Agreement by Utah State University to purchase common stock with public funds in its possession and to pay commissions to broker was ultra vires and unenforceable. Const. art. 10, \S 4; U.C.

A.1953, 33-1-1, 33-1-3, 53-32-2, 53-48-10 (5), 53-48-20(3).

Norman S. Johnson, Randall P. Spackman and Christine M. Durham of Johnson & Spackman, Salt Lake City, for plaintiff and appellant.

Vernon B. Romney, Atty. Gen., David L. Wilkinson, Asst. Atty. Gen., Salt Lake City, for Utah State U.

Darwin C. Hansen, Bountiful, for Catron.

Keith E. Taylor of Parsons, Behle & Latimer, Salt Lake City, for Bear Stearns & Co., amici curiae.

Harold G. Christensen of Worsley Snow & Christensen, Salt Lake City, for Sullivan & Co., amici curiae.

HYDE, District Judge:

This is an action brought by a stock broker, First Equity Corporation of Florida, against Utah State University (USU) and Donald A. Catron, formerly the Assistant Vice-President of Finance of Utah State University, for the recovery of commissions and other monies lost by First Equity as a result of USU's refusal to accept and pay for certain shares of common stock which had been ordered by Catron for USU.

First Equity filed a Motion for Summary Judgment and USU filed a Cross-Motion for Summary Judgment based on its affirmative defense that the orders for the purchase of stock which Catron placed on behalf of USU were ultra vires in that USU had no power to purchase stock and, therefore, USU had no obligation to pay for the stock or any commissions.

First Equity appeals from the Trial Court's denial of their Motion and the granting of Summary Judgment to USU. The defendant Catron is not involved in the Motions or this appeal.

USU authorized Catron to purchase securities of any kind through any broker who was a member of any major securities exchange or the National Association of

Securities Dealers. Pursuant to this authority, Catron opened a special cash account with First Equity and through that account Catron ordered and USU received and accepted and paid for certain securities. After receiving an opinion from the Attorney General's office that USU should not be investing in stocks, USU refused to accept delivery and pay for the stocks giving rise to this action.

USU revoked Catron's authority prior to the purchase of the stocks in question but apparently neither the resolution granting Catron authority nor the resolution revoking his authority was transmitted to First Equity.

The case of *The University of Utah v. The Board of Examiners of the State of Utah*, 4 Utah 2d 408, 295 P.2d 348, which determined the status of the University of Utah would be applicable to Utah State University. USU is a corporation and thus constitutes a legal entity with limited capacity. It was created and exists for the sole purpose of more conveniently governing and conducting the educational institution. It is a state institution, a public corporation¹ not above the power of the Legislature to control and is subject to the laws of this state from time to time enacted relating to its purposes and government.

Utah State Legislature has from time to time exercised control over USU and given USU some power of investment. The direct question presented here is whether or not USU is empowered to invest in common stock with public funds.

It is the position of First Equity and the Amici Brokers that USU had the power to invest in common stock as part of its general power to control and supervise all appropriated and donated funds.

USU was created in 1888 (*Compiled Laws of Utah*, Section 1855) and a govern-

ing Board of Trustees was established with the following duties and powers:

They shall have the *general control* and supervision of the agricultural college, the farm pertaining thereto, and such lands as may be vested in the college by Territorial legislation, of *all appropriations* made by the Territory for the support of the same, and also of lands that may hereafter be donated by the Territory . . . or by any person or corporation, in trust for the promotion of agricultural and industrial pursuits. . . . (emphasis added)

It is this "general control . . . of all appropriations" that appellant claims was perpetrated in 1895 by Article X, Section 4, of Utah Constitution, which provides:

The location and establishment by existing laws of the University of Utah, and the Agricultural College are hereby confirmed, and all rights, immunities, franchises, and endowments heretofore granted or conferred, are hereby perpetuated unto said University and Agricultural College respectively.

In 1929 the Legislature changed the name of the Agricultural College to Utah State Agricultural College and constituted it a "body politic and corporate." In 1957 the Legislature again changed the name, this time to Utah State University of Agricultural and Applied Sciences. The Legislature expressly perpetuated "all rights, immunities, franchises, and endowments heretofore granted or conferred" upon the college. The statute further provided that USU:

. . . may have and use a corporate seal, may sue and be sued and contract and be contracted with. It may take, hold, lease, sell and convey real and

nominal, or small . . . and their officers and members (if any) have no individual interest in them, these organizations are sometimes described . . . as public quasi corporations." 1 McQuillin, *Municipal Corporations* (1971 Rev. Vol. Sections 2.03(b) p. 133).

1. "A public corporation which is not municipal is one created by the State solely as its own device and agency A *State University* . . . and a State Board of Education constitute, if incorporated, illustrations of this class. Because the independent power of such corporations is frequently

personal property as the interests of the college may require. (UCA 53-32-2)

The Higher Education Act of 1969 (UCA 53-48-10(5)) states each university or college . . . may do its own purchasing, issue its own payroll, and *handle its own financial affairs* under the general supervision of the Board as provided by this Act.

And in addition thereto, the 1969 Act specifies (UCA 53-48-20(3)):

Any institution, college or department or its foundation or organization engaged in a program authorized by the board may:

(c) Accept contributions, grant or gifts from any private organization . . .

(d) Retain, accumulate, invest, commit and expend the funds and proceeds of such authorized programs . . .

Nothing in the Constitution or legislative action involving USU specifically grants or denies to USU the power to invest state appropriations in common stock. Appellant and Amici contend that the general control and supervision of all appropriations and the granted power to do its own purchasing, is sue its own payroll and handle its own financial affairs are broad, general grants of power and would include the power to invest in common stock in the absence of specific legislative provisions to the contrary.

Whether or not the grant of a "general control" of "all appropriations" and the right to "handle its own financial affairs" grant unrestricted power to invest is answered by *The University of Utah v. Board of Examiners of the State of Utah* (supra) case. After quoting Sections 1 and 2 of Article X of the Constitution which mandates the Legislature to provide for the maintenance of the University of Utah and USU, the Court states:

Would it be contended by the University that under Article X, Section 1, it might compel the Legislature to appropriate money the University considers essential? Is it contended that the demands of the University are not subject to constitutional debt limits? If so, respondent would

have the power to destroy the solvency of the State and all other institutions by demands beyond the power of the State to meet.

The Court then quotes in full Sections 5 and 7 of Article X of the Constitution, which provides, respectively, that the proceeds of the sale of land reserved by Congress for the University of Utah shall constitute permanent funds of the State, and *that all public school funds shall be guaranteed by the State against loss or diversion.* Then the Court concludes:

It is inconceivable that the framers of the Constitution in light of the provisions of Sections 1, 5 and 7 of Article X and the provision as to debt limitations intended to place the University above the only controls available for the people of this State as to the property, management and government of the University. We are unable to reconcile respondent's position that the University has a blank check as to all its funds with no pre-audit and no restraint under the provisions of the Constitution requiring the State to *safely invest* and hold the dedicated funds and *making the State guarantor* of the public school funds *against loss or diversion.* To hold that respondent has free and uncontrolled custody and use of its property and funds while making the State guarantee said funds against loss or diversion is inconceivable. We believe the framers of the Constitution intended no such result. (emphasis added)

[1] As stated above, it is clear since *The University of Utah v. Board of Examiners of the State of Utah* (supra) case that USU is clearly a state institution and that it holds property in trust for the State of Utah and is subject to the laws of the State enacted relating to its purposes and government. In this vein it would be similar to a municipal corporation which also derives its powers from the State and deals with public funds.

The approach of common law in interpreting legislative grants of power to public bodies concerning the handling of public monies is illustrated by *National Surety v.*

State, 111 Okl. 180, 239 P. 257 (1925), a case involving the question of whether a county treasurer under a statute empowering him to sell bonds initially purchased with county sinking funds, had power to re-invest the proceeds of sale in similar bonds. In holding that he did not, the Court stated:

It seems certain that, in the absence of statutory authority to invest the sinking funds in his hands, it was the duty of the county treasurer to preserve the sinking funds which came into his official hands intact in money. Before the custodian of the sinking fund could invest such funds in any manner, he must be able to put his finger upon some express statutory provision which would authorize the investment. . . .

This Court has held that municipal powers cannot lightly be inferred by implication. In *Moss v. Board of Commissioners*, 1 Utah 2d 60, 261 P.2d 961 (1953) it was said:

This Court has not favored the extension of the power of the city by implication, and the only modification of such doctrine is where the power is one which is necessarily implied. Unless this requirement is met, the power cannot be deduced from any consideration of convenience or necessity, or desirability of such result, and no doubtful inference from other powers granted or from ambiguous or uncertain provisions of the law would be sufficient to sustain such authority.

A tendency to narrowly interpret grants of legislative power to municipalities is also seen in *Town of Worland v. O'Dell and Johnson*, 79 Wyo. 1, 329 P.2d 797 (1958):

. . . all the courts, without a single exception so far as we know, agree that a municipality has only such powers as are granted to it by the legislature. That itself seems to mean that a power not granted is a power prohibited. As stated

in *Van Eaton v. Town of Sydney*, 211 Iowa 986, 231 N.W. 475, 477, 71 A.L.R. 820, citing numerous cases:

"Where a statute confers certain specific powers, those not enumerated are withheld. In other words, enumeration of powers operates to exclude such as are not enumerated." (emphasis added)

[2] A general grant to handle its financial affairs does not give authority to invest in common stock. The power to invest is not granted in the absence of legislation to the contrary but the reverse is true. It depends upon a specific authorizing grant of such power.

The only specific Utah statute on the subject of investment of USU would be Section 33-1-1.² Section 33-1-1 is a one sentence paragraph containing over 450 words, but the basic structure is: Investments by (named parties) of their own funds or funds in their possession (in specified securities) shall be lawful. The "named parties" include "any private, political or public . . . corporation or person" and its provisions and meaning would apply to USU as a public corporation as well as private persons and private corporations. The "specified securities" enumerated are all government guaranteed securities such as "bonds and other obligations of . . . the United States." The stocks in question in this lawsuit do not fall within enumerated securities set forth in that section.

Section 33-1-3 which was enacted as part of the same act in 1939 as Section 33-1-1 provides in relevant part:

The provisions of this act are supplemental to any and all other laws relating to and declaring what shall be legal investments for the persons, corporations, organizations and officials referred to in this act . . . (emphasis added)

2. The State Legislature has taken an interest in investments by state agencies and regulated "industries".
Utah State Retirement Board, UCA 49-9-12
Fiduciaries, UCA 7-5-11

Utah Rep. 543-553 P.2d-5

Insurance Companies, UCA 31-13-1 et seq.
Department of Finance, UCA 63-2-34
State Land Board, UCA 65-1-65 (present statute)

[3] Section 33-1-1 is simply a declaration that investments in specified securities are lawful. Without prohibiting any other investments or requiring only the listed investments, the Legislature declared that certain investments were lawful. It is apparent that in enacting Section 33-1-3 the Legislature envisioned situations where the "named parties" mentioned in Section 33-1-1 might be empowered to invest in securities of a type not enumerated in Section 33-1-1.³ Further, the language of Section 33-1-3 quoted above was worded to include within its meaning any laws which the Legislature might enact thereafter. Subsequent to the enactment of Section 33-1-3, the Legislature has enacted statutory definitions of what are legal investments for some state agencies and regulated "industries".⁴ However, no other statute enacted prior or subsequent to 1939 defines specifically what type of securities USU may legally invest in. It must be concluded, therefore, that USU had no specific designated power from the Constitution or the Legislature to invest its funds in securities outside those declared lawful by 33-1-1 and investments in common stock are ultra vires acts.

What, then, is the effect of an ultra vires contract by a public corporation?

In *News Advocate Publishing Co. v. Carbon County*, 72 Utah 88, 269 P. 129 (1928), the Carbon County Clerk caused to be published in plaintiff newspaper a Notice of Sale of Property on which taxes were delinquent. Defendant County, on receiving the publication bill, refused payment on the basis that the contract was ultra vires because the County Commissioners had no statutory power to authorize such a publication as the one therein involved. Therein this Court said:

The general principle or rule of law that municipal corporations are not bound

3. In 1939 when Sections 33-1-1 and 33-1-3 were enacted, the State Land Board already possessed statutory power to invest its funds in securities not enumerated in Section 33-1-1, e. g., "state, county, city or school district bonds".

by contracts made without authority or in excess of the power of such corporations is conceded. The rule applicable is stated in 15 C.J. 540 as follows:

"A County is not bound by a contract beyond the scope of its power or foreign to its purposes, or which is outside of the authority of the officers making it. In this connection it is the rule that the authority of a county board to make contracts is strictly limited to that conferred, either expressly or impliedly, by statute, regardless of benefit to the county or of value received; and the same is true as to other county officers attempting to contract on behalf of the county. * * * All persons dealing with officers or agents of counties are bound to ascertain the limits of their authority or power as fixed by statutory or organic law, and are chargeable with knowledge of such limits. No estoppel can be created by the acts of such agents or officers in excess of their statutory or constitutional powers."

For further authority for the proposition that "one who deals with a municipal corporation does so at his peril" see *Thatcher Chemical Co. v. Salt Lake City Corporation*, 21 Utah 2d 355, 455 P.2d 769 (1968) and cases cited therein.

If the enforcement of this rule at times appears harsh, it is a matter for the State Legislature to correct.

[4-6] Although this action was commenced and argued at the lower Court on the basis of breach of contract between the parties, plaintiff and Amici now contend that in any event plaintiff should be entitled to recover because they were acting as the agents of USU.⁵ Under the theory of agency, one of two things would occur;

4. See Footnote 2 above.

5. Ordinarily, an appellant cannot raise a theory on appeal for the first time different from that presented to the Court below. *Davis v. Mulholland*, 25 Utah 2d 56, 475 P.2d 834 (1970).

either the loss would have to be absorbed by the seller of the stocks who doesn't have the faintest idea that his stock is being purchased by a public corporation or the rules denying recovery on ultra vires contracts of a public corporation would be meaningless. Substantive rights involving public funds should not be determined by the custom of the securities industry in designating the broker as the agent of the buyer or as agent of the buyer and seller. The rules denying recovery of an ultra vires contract are based on the theory that the party actually dealing with the public entity is charged with the knowledge that the contract is ultra vires and unenforceable, and in this case the plaintiff is the party actually deal-

ing with the public entity and this action was filed on that basis—that USU was a customer of First Equity.

[7] USU had no power to enter into an agreement for the purchase of common stock and the agreement to purchase and pay commissions thereon, are ultra vires agreements and unenforceable.

The Trial Court's granting of Summary Judgment to USU is affirmed.

No costs awarded.

HENRIOD, C. J., and ELLETT, CROCKETT, and TUCKETT, JJ., concur.

MAUGHAN, J., does not participate herein.

CERTIFICATE OF SERVICE

This is to certify that two copies each of the foregoing Brief of Respondent were mailed, postage prepaid, this 28th day of September, 1979, to each of the following:

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