

1957

Union Pacific Railroad Co. v. Trustees, Inc et al : Brief of Appellant

Utah Supreme Court

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In the
Supreme Court of the State of Utah

UNION PACIFIC RAILROAD COMPANY,

Plaintiff-Appellant,

vs.

TRUSTEES, INC., and JEAN C. CRAN-
MER, THOMAS D. BRADEN, and ED-
WARD G. KNOWLES,

Defendants-Respondents.

Case No. 8762

BRIEF OF APPELLANT

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UNION PACIFIC RAILROAD COMPANY

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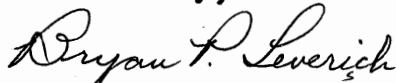
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Mr. Daniel J. Dykstra,
Dean of College of Law,
University of Utah,
Sale Lake City, Utah.

Dear Mr. Dykstra:

As requested by you, I am enclosing
copies of the Briefs filed with the Utah Supreme
Court in the case of Union Pacific Railroad Com-
pany vs. Trustees, Inc., and Jean C. Cranmer,
Thomas D. Braden and Edward G. Knowles.

Yours truly,


BRYAN P. LEVERICH

Encl.

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EDWARD G. KNOWLES,
Defendants-Respondents.

Case No. 8762
[REDACTED]

BRIEF OF APPELLANT

STATEMENT OF FACTS

Preliminary Statement

This appeal is from a declaratory judgment in favor of the defendants and against the plaintiff entered in the District Court, Third Judicial District, Salt Lake County, Utah on October 24, 1957 (R. 88-89) upon written findings of fact and conclusions of law (R. 81-87).

The action was commenced September 28, 1955 by the filing of the complaint with the clerk of the District Court, Third Judicial District, Salt Lake County, Utah (R. 1-16).

The plaintiff-appellant is Union Pacific Railroad Company, a Utah railroad corporation. The defendants-respondents are Trustees, Inc., a Delaware corporation, and Jean C. Cranmer, Thomas D. Braden and Edward G. Knowles, individuals, who were at all times pertinent to

this case owners of shares of stock of Union Pacific Railroad Company.

The complaint set forth a cause of action under and pursuant to the Declaratory Judgment statutes of the State of Utah, Section 78-33-1 *et seq.*; Utah Code Anno., 1953 (R. 1-16). The action was commenced to clarify the corporate power of the appellant to grant and contribute a sum to Union Pacific Railroad Foundation and to make contributions and donations for the public welfare, or for charitable, scientific, religious or educational purposes. The question at issue arose by reason of claims and demands of the respondents denying such power (R. 24, 43-46). The complaint asserted that such donations or contributions of corporate funds were within the implied powers of the appellant corporation, and lawful and proper in every respect, and in addition were specifically authorized under Section 16-2-14(8) Utah Code Anno. (1955 Pk. Supp.) (R. 4). The answer denied that the donation or contribution of corporate funds described in the complaint was within the implied or statutory powers of the appellant corporation and claimed such action to be *ultra vires* and void (R. 19).

The Court below based its determination that the defendants-respondents were entitled to the declaratory judgment herein appealed from, upon the following conclusions of law (R. 85-87):

1. The Board of Directors of the appellant in making a contribution to Union Pacific Railroad Foundation acted beyond the express or implied powers of the corporation, and the making of contributions for charitable, scientific, religious or educational purposes would similarly be beyond the express or implied powers of the corporation.

2. The statutory grant of corporate power to engage in philanthropy embodied in Section 16-2-14 (8) Utah Code Anno. (1955 Pk. Supp.) does not apply to the appellant so as to authorize the contribution to Union Pacific Railroad Foundation or similar charitable contributions.

3. The addition of the statutory power to donate to the powers of the appellant corporation would constitute a fundamental change in the shareholders' contracts embodied in the appellant's Articles of Association.

4. The application to the appellant of the statutory power to donate would constitute an impairment of the obligation of the shareholders' contracts in violation of the contracts clauses of both the Federal Constitution and the Constitution of Utah.

5. The application to the appellant of the statutory power to donate would constitute a violation of the due process clauses of both the Federal Constitution and the Constitution of Utah.

STATEMENT OF THE CASE

The appellant was incorporated on July 1, 1897, under an Act providing for the formation of railroad corporations, approved January 22, 1897 as supplemented and amended (R. 82). It was formed for the purpose of operating and maintaining a railroad, and was vested with the powers necessary for such purpose, as well as all the rights, privileges and franchises of railroad corporations organized under the laws of the State of Utah (R. 26).

The appellant's business is the transportation of freight and passengers by rail and activities incident thereto. The appellant operates approximately 10,000

miles of road, running through thirteen states, employs about 50,000 persons and its net income before Federal Income Taxes for the year 1955 was \$119,527,256 (R. 82).

On May 13, 1955, members of the Board of Directors of the appellant corporation organized the Union Pacific Railroad Foundation as a non-profit corporation under Section 16-6-1 *et seq.*, Utah Code Anno., 1953 (R. 83). The Foundation was organized for the objects and purposes of exclusively engaging in, assisting, contributing to the support of, creating and maintaining exclusively charitable, educational and scientific activities, projects, institutions, organizations and funds of any and every kind. (*Ibid.*) Only individuals who are directors of the appellant corporation (or a subsidiary or affiliate) are eligible to become members of the Foundation (R. 34). In the event that any member should cease to be a director his membership in the Foundation ceases forthwith (R. 35). The management of the affairs of the Foundation is vested in a Board of Trustees of whom a majority must at all times be members of the Foundation (R. 36). The Foundation was organized by the appellant as a medium through which its philanthropic activities would be conducted (R. 83), and it is at all times subject to the control of those directors of the appellant who have been elected to the Board of Trustees by their fellow directors (R. 64). This right in the membership to elect the Board of Trustees further subjects the Foundation to the control of the appellant, who may exercise additional control through its power to disburse funds to the Foundation (R. 64-65).

The advantages, of giving through a company-sponsored foundation rather than directly, sought by the Board of Directors of the appellant corporation in establishing the Union Pacific Railroad Foundation as

a medium for its philanthropy, included improved administration of a program of giving and the permitted reasonable accumulation of funds in years of high profit which might be drawn upon in years of low profit, thus levelling out fluctuation in giving and facilitating a systematic and deliberate planning of grants (R. 83, Sinclair Dep. p. 29).

On May 26, 1955, the appellant's Directors adopted a resolution authorizing a contribution of \$5,000 to the Union Pacific Railroad Foundation (R. 83). On June 30, 1955, the Foundation's Board of Trustees adopted a resolution authorizing a contribution of \$4,000 to Brigham Young University, to be applied one-half to the University's building program and one-half to current income needs (R. 83). Brigham Young University is a Utah non-profit corporation, control of which is vested in the Church of Jesus Christ of Latter Day Saints. The University is devoted exclusively to educational and religious purposes (R. 24).

The history of the eleemosynary activities of the appellant corporation covers a span of more than fifty years. Mr. E. Roland Harriman, Chairman of the appellant's Board of Directors and Chairman of the American National Red Cross under appointment by the President of the United States, testified at the trial that charitable giving by the appellant can be traced to as early as 1906 (R. 56). At the time of the San Francisco earthquake, the appellant shipped into the stricken area some 1,600 carloads of food and building materials free of charge. In addition to turning over stores and supplies to relief authorities, the appellant donated the cash sum of \$200,000 for general relief work and moved some 224,000 passengers out of the stricken area free of charge (*Ibid.*).

There has been a marked upward trend in corporate philanthropy in the United States since 1940* (Watson Dep. p. 10). In 1940, donations for charitable purposes by corporations were in the neighborhood of \$40 million. Since that year corporate giving has continued to rise, the Statistics of Income published by the Federal Government indicating aggregate contributions for the year 1951 to be \$341 million and estimates of the current total to be above \$500 million annually (*Ibid.*). On the average, corporations throughout the United States donate between .8 and .9 of 1% of their net income before taxes to charity (*Id.* at p. 14).

This growth in corporate donations since 1940 was occasioned in the first instance by the needs of charities during World War II and thereafter by the continued expansion of the activities and needs of health and welfare organizations (R. 55). At the trial Mr. Harriman testified that currently some 30 to 40 percent of the income of the National Red Cross and similar organizations as well as the Community Chest are derived from corporations (*Ibid.*). In the case of the National Red Cross, the remaining percentage of the \$85 million received during the year 1955 came from individuals, employee groups, foundations, women's groups, church groups and the like (Sinclair Dep. p. 23). The recipients of corporate philanthropy include educational institutions, primarily colleges and universities, community institutions, such

* For a general discussion of the background, legal aspects and growth of corporate giving in the United States, see: Andrews, *Corporation Giving*, pp. 229-244 (Russell Sage Foundation, 1952); Bell, *Corporation Support of Education*, 38 ABAJ 119 (1952); Bleicken, *Corporate Contributions to Charities*, 38 ABAJ 999 (1952); and de Capriles and Garrett, *Corporate Support to Education*, 38 ABAJ 209 (1952).

as united funds and community chests, and local institutions, such as hospitals, cultural and civic groups (Watson Dep. pp. 18-19; See also, Ex. 3 to Sinclair Dep. p. 7).

The growth in recent years of corporate aid to education has been in response to the needs occasioned by the financial crisis facing private higher education in the United States (Lincoln Dep., p. 7; Ex. 4 to Sinclair Dep., pp. 3-6). The critical needs of American colleges and universities are due to several factors, including the impact of taxation upon funds of individuals available for donations and endowments, continued increases in student enrollment, disparity between tuition and cost per student, decline of relative importance of endowment income and continued increases in operating expenses and capital expenditures (Ex. 4 to Sinclair Dep., pp. 3-6 and Ex. 1 to Lincoln Dep., pp. 4-7; see also, Mullendore Dep., p. 5). Corporate giving is one of the principal sources of adequate support available to private higher education (Ex. 1 to Lincoln Dep., pp. 8-11). Large private gifts and contributions to endowment have become, because of high taxes, almost non-existent and the same is true of the private foundation. Funds from alumni and friends are pitifully inadequate and financial support from government, the remaining source, constitutes a threat to the independence of the beneficiary institutions (*Ibid.*).

The purpose of the appellant corporation in organizing the Union Pacific Railroad Foundation as a medium through which its philanthropic activities would be conducted (R. 83) was to initiate a program under which the corporation, through its Board of Directors in the exercise of their collective prudent business judgment,

would (i) assume its reasonable share of the cost of preserving a favorable economic and social environment, within the framework of the free enterprise system, and in which the corporation may continue to prosper to its benefit and the ultimate benefit of its shareholders and, (ii) assume its reasonable and rightful share of the social responsibilities of both individual and corporate citizens of the community to preserve and maintain our economic and social order (R. 60-61, Mullendore Dep., pp. 6-8 and Sinclair Dep., pp. 8-10).

At the trial Mr. Harriman expressed his opinion as Chairman of the Board of the appellant, as to the reasonable distribution of corporate funds for the above purposes in the following language:

Well, I think it is good business to do so; in the long run, beneficial to our stockholders. The very continuance of our public service corporation depends upon the growth of our communities that we serve, and the healthy environment in which those communities operate.

If the communities were not there, we certainly would not be able to serve them, and in a like manner, if they are not in a good condition, mentally, morally and physically, they would not be as good customers. We really believe the existence of this atmosphere of healthy environment I speak of, is as much of a must in the maintenance of it by our company as the maintenance of our physical property, using reasonable judgment throughout.

Secondly, we think we can increase and maintain the goodwill in those communities. As I said, I think that the public has come to expect that we will support worthwhile local and national causes, and, in effect, we agree with this viewpoint (R. 60-61).

Another Director of the appellant corporation, John S. Sinclair* testified as follows with respect to the basis for his belief that the corporation should expand its support of educational and welfare institutions:

Now, as we know, each individual has certain responsibilities toward his fellowmen, some imposed by law, others imposed by his own conscience or by the influence of public or community opinion. A corporation is not much different in these respects. . . . it is given a corporate personality by law and is treated as a legal entity, and the general public thinks of it as something separate and apart from its shareholders and its employees and its management, which means that the corporation has a good name, or a bad or uncertain name in the public eye or the community estimation, it incurs either goodwill or illwill in communities where it operates and which it serves.

The studies that we have issued, which have been referred to, indicate that the public has come to expect that corporations shall act like responsible human members of society; that is, that they will contribute to worthy causes to strengthen and stabilize our economic and social structure.

Now, this does not mean that the people expect corporations to dissipate the shareholders' assets by unwise or foolish largesse. Such activity, of

* Mr. Sinclair is President of the National Industrial Conference Board, a research and educational institution for the study of the economic and administrative problems of American business. It assembles and disseminates to industry, labor, government, educators and the public facts on business organization and operation and on the national economy (Ex. 6 to Watson Dep.). The National Industrial Conference Board numbers among its membership over 3,000 of the foremost American corporations and educational and other institutions, including Anaconda Copper Mining Company, Kennecott Copper Corporation, the Utah Construction Company, Utah Power and Light Company and the Utah State Agricultural College (*Id.*, See, list following p. 107).

course, would bring prompt intervention by the courts at the instance of complaining shareholders. What I really mean is that we have come to expect corporations to behave in the field of social consciousness as individuals would behave—that is, with a prudent eye to its financial capacity and selectivity as to the objects of its generosity. I do not mean by this that corporations should give only where a measurable or direct tangible benefit is purchased with the so-called donation. The community does not expect that individuals shall give on any such basis, and corporations should not be so limited.

In my view, it is not good business to disappoint the public expectation I have described. Corporate donations create good will in the community. In many instances, assistance to private institutions will help reduce the burden on public institutions, and thus on the public purse and the extent of taxation for that purpose.

For example, I have no doubt that support for the Boy Scouts will help in a given community to reduce juvenile delinquency, and help to the Red Cross assists in the performance of many quasi-public functions which otherwise would have to be assumed by government. Assistance to private educational institutions of higher learning will help to create a pool of highly-trained and educated persons from which the future management of business corporations must be chosen.

I would not, however, want to base my theory of corporate support of education solely on the direct benefits to corporations from a pool of trained manpower. In my view, assistance to education will result in national benefits to our society as a whole—benefits of an ethical, moral, and spiritual nature—and that is why I favor such support.

Furthermore, I have also believed that if our young people are educated, they will freely choose our system of competitive enterprise over any competing system. The hope of America lies in knowledge, not in ignorance (Sinclair Dep., pp. 8-10).

William C. Mullendore, Chairman of the Board of Southern California Edison Corporation, testified as a Director of the appellant corporation with respect to the obligation of corporations to support educational and charitable institutions, and benefits accruing to them from such support, as follows:

The basis of our policy of making contributions in aid of the work and in support of educational and charitable institutions is, of course, first of all, as a citizen of the community dependent upon the goodwill of the customers. In considering the goodwill as an important part of our assets, we find a real need for playing our part in the community. That relates particularly to charitable contributions.

In educational matters, we believe that one of the primary duties of the Board of Directors and management of a corporation is to preserve the institution. It is just as much our duty to help preserve the basic principles upon which our public service enterprise depends for its continued existence within the framework of a free enterprise system, as it is to preserve the physical equipment against the physical elements, normal wear and tear and depreciation.

We recognize that in a free society the rights of the citizen are dependent upon the discharge of his obligations, and that if the free citizens fail to help preserve their free institutions through the education and training and passing on of our tradi-

tions of a free country to the youth, those institutions would be undermined by the inadequacy and lack of understanding and ignorance of the citizens.

It is therefore on that general line of reasoning that we feel that it is just as much the obligation of the corporate management to use some of its resources in helping to educate the youth of a country and of our community in the principles and traditions of our free institutions, as it is to use our resources in the construction and maintenance of our physical equipment.

Coincidentally, we have included in our regular operating expenses the provision for those donations, as necessarily included a much larger, of course, budget for maintenance of our physical equipment. In that very real sense we believe that it is protecting the interest of the stockholder in both the principal of his investment and his earnings through dividends (Mullendore Dep., pp. 6-8).

STATEMENT OF POINTS

I. The donation in question constitutes a proper exercise of a valid statutory corporate power embodied in Section 16-2-14(8) Utah Code Anno.

- a. The statutory power to make donations applies to pre-existing corporations.
- b. The statutory power to make donations does not constitute a fundamental alteration of the shareholders' contract embodied in appellants' corporate charter.
- c. Even if the statutory addition of a corporate power to make donations were a fundamental change in the shareholders' contract, such change would not violate the Constitutional prohibitions against impairment of contracts.

(1) Utah does not follow the "immutable contract" theory

(2) Even if Utah followed the “immutable contract” theory the statute authorizing donations is valid under the state’s reserved power over corporate charters or under the state’s police power.

d. The statutory addition of a power to make donations does not infringe the due process requirements of the Utah and Federal Constitutions.

II. The donation in question constitutes a proper exercise of an implied power possessed by Utah corporations without regard to Section 16-2-14(8) Utah Code Anno.

ARGUMENT

I

The contribution represents a valid exercise by the appellant corporation of a statutory power granted to it by Section 16-2-14(8) Utah Code Anno.

(a) The statutory power to donate is applicable to and was exercised by the appellant, a pre-existing corporation.

On May 10, 1955 Utah joined the ranks of thirty-eight sister states,¹ the District of Columbia and the Territory

¹ States with laws expressly granting to corporations the power to engage in philanthropy are the following: Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin. Citations to the statutes in the foregoing states, as well as the District of Columbia and the Territory of Hawaii, are set forth in Appendix A. Nine States have no permissive legislation with respect to power to donate and are as follows: Alabama, Arizona, Idaho, Iowa, Montana, North Dakota, South Carolina, South Dakota and Wyoming.

of Hawaii in expressly granting to corporations of the State, by act of the Legislature, the power to engage in philanthropy. The statutory power embodied in Section 16-2-14(8) Utah Code Anno., reads as follows:

The corporation in its name shall have power

* * * * *

(8) To make donations for the public welfare or for charitable, scientific, religious or educational purposes. *Provided, however,* that nothing in this section shall be construed as directly or indirectly affecting the restrictions on corporate contributions imposed by section 20-14-21, Utah Code Annotated 1953, as amended.

In empowering Utah business corporations to make charitable donations, the Legislature followed the model statute recommended by the Committee on Business Corporations of the American Bar Association.² The recommendation suggested that the donative power be added to the section of the corporation law enumerating the general powers of corporations and was specific in its grant of a power broad in its terms and without limitation as to amount. The Committee saw "no logical reason for prescribing a statutory yardstick for measuring the amount that can be donated."³ This recommendation of a power without statutory limitations or restrictions on the quantum of the donation is incorporated in the statutes of Arkansas, California, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Kentucky, Maine, Michigan, Nevada, New Hampshire, New Mexico, Oregon and Wisconsin.⁴

² See, Memorandum, dated September 1, 1950, from the Committee on Business Corporations of the Section of Corporation, Banking and Business Law of the American Bar Association, set forth in Appendix B.

³ *Ibid.*

⁴ See, Appendix A.

It should be clearly understood that the absence of any limitation in the Utah statute as to the amount of donations permitted does not furnish any proper ground for objection to the statute. The donative power, like all other corporate powers, must be exercised by the directors in accordance with sound business judgment. An improper exercise of this power would be subject to judicial restraint and personal liability as in the case of all improper actions by the board of directors. The idea that a statutory statement of the power of Utah corporations to make donations constitutes a license in the board of directors to give away all the assets of the corporation is obviously without merit. Each and every exercise of the donative power is subject to the rule of "reasonable business judgment"⁵ which may be enforced either by a shareholder suit or by the removal of directors by vote of the shareholders at their annual meeting.

In enacting the donative power provision, the Utah legislature has declared the public policy of the state to favor donations by Utah corporations for eleemosynary purposes. This declaration of policy was expressly noted at the trial by Attorney General Callister, when he stated:

. . . it is our position the statute is constitutional, and the Legislature by enacting Chapter 22, Laws of '55, has declared the policy of the State of Utah in favor of permitting corporations to make charitable donations . . . (R. 50)

The appellant is a Utah railroad corporation and as such has been vested by the Legislature with all of the powers of Utah business corporations including the recently-enacted power to donate.

⁵ See, *Fletcher Cyclopedia Corporations*, Vol. 7, Sec. 3453 (Perm. Ed.).

As stated above, the appellant was incorporated on July 1, 1897 under an Act providing for the formation of railroad corporations approved January 22, 1897, as supplemented and amended.⁶ Under this Act, railroad companies were granted certain express powers and were granted additional powers as follows:

Such corporations shall in addition to the foregoing powers be vested with and be entitled to exercise and enjoy all powers, rights, privileges and franchises which at the time of the sale belonged to or were vested in the corporation or corporations last owning the property sold, *as well as all the rights, privileges and franchises of railroad corporations organized under the laws of this State . . .* (Emphasis supplied.)

At the time of the appellant's organization, the Utah Constitution, which became operative on January 4, 1896⁷ contained the reserved power provision found in Article XII, Section 1, whereby "All laws relating to corporations may be altered, amended or repealed by the Legislature . . .".⁸ Accordingly, the Act under which the appellant was organized granted to it all the rights, privileges and franchises of Utah railroad corporations and, by reason of its reserved power, the state retained the right to alter, amend or repeal the powers so granted to it.

In 1901, the statutes relating to Utah railroad corporations were revised and codified to provide that all such corporations, regardless of when organized, should possess all of the powers and privileges conferred by the

⁶ L. 1897, Ch. 1, p. 13.

⁷ See, 1 Utah Code Anno., 1953, pp. 309, 311.

⁸ *Id.* at p. 259.

newly enacted railroad law.⁹ The present counterpart of such provision states that:¹⁰

Railroad corporations *heretofore organized and now existing* or hereafter organized under the laws of this state shall be subject to all the duties imposed and *shall have and possess all the powers and privileges conferred by this title*, as well as the powers and privileges conferred by the laws under which said corporations were organized or which are contained in their articles of incorporation and are not inconsistent with the laws and Constitution of this state. (Emphasis supplied.)

In 1907, by amendment to the railroad law, every Utah railroad corporation, regardless of when organized, was granted all the powers of corporations organized for pecuniary profit.¹¹ The present counterpart of such grant provides that:¹²

Every railroad corporation organized under the laws of this state shall, except as otherwise provided in this title and subject to the limitations and requirements hereof, have all the rights, privileges and powers, and be subject to all the duties and obligations, of corporations organized for pecuniary profit . . . (Emphasis supplied.)

The foregoing provisions of the Utah railroad law were of course in force in 1945 when the appellant's corporate life was extended by amendment to its articles of association¹³ and they thus form a part of the contract

⁹ L. 1901, Ch. 26, Sec. 8, p. 24.

¹⁰ Section 56-1-1, Utah Code Anno., 1953.

¹¹ C. L. 1907, Secs. 433 and 434.

¹² Section 56-1-5, Utah Code Anno., 1953.

¹³ See, Sixth Amendment to appellant's Article of Association, R. following p. 26.

between the appellant and its stockholders embodied in such articles.¹⁴

In enacting the recent grant of power to donate, the Utah Legislature clearly intended, as a matter of statutory construction, that the power should apply to corporations organized prior to the effective date of the statute as well as those organized thereafter. This is readily demonstrated from the unambiguous language of the applicable statutory provisions.

The donative power was enacted by the Utah Legislature as paragraph (8) to Section 16-2-14, Utah Code Anno. wherein the powers of corporations for pecuniary profit are enumerated. Section 16-2-14 begins with the phrase "*The corporation* under its name shall have power:" (emphasis supplied) and then proceeds to specify the powers granted. The phrase "The corporation" as used in such Section means all corporations for pecuniary profit regardless of when incorporated, for Section 16-2-2, Utah Code Anno., 1953, reads as follows:

Unless otherwise provided in any title of these statutes, the provisions of this chapter shall apply to *all* private corporations organized under the laws of this state. (Emphasis supplied.)

It should be clearly understood that the question which is the subject of this section of the brief is merely one of statutory construction, *i. e.*, putting to one side questions of Constitutional significance, did the Legislature intend to exercise the state's reserved power so as to make available to pre-existing corporations the statutory power to donate. That it has chosen to do so is beyond question. It is of course for this Court and not for the Legislature to resolve the question of whether,

¹⁴ See, *Fowler, et al. v. Provo Bench Canal & Irrigation Co. et al.*, 99 Utah 267 (1940), cert. denied 313 U. S. 564 (1941).
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as so applied, the statute is violative of any of the respondents' Federal and State Constitutional rights. These questions are discussed in following sections of the brief.

In its findings of fact, the court below held that it did not appear from the language of the donative power amendment that the Legislature intended the enactment to have retrospective application.¹⁵ If by "retrospective application" the court meant application to a pre-existing corporation, the finding is clearly erroneous and is contrary to the express language of the Legislature as demonstrated hereinabove. Moreover if by "retrospective application" the court below meant application of the donative power to validate a contribution made prior to the effective date thereof, the holding is equally erroneous. The facts of this case do not call for any such "retrospective application" since the donation by the appellant corporation was indisputably made after the effective date of the statutory power to donate. The effective date of the legislation in question was May 10, 1955.¹⁶ The Union Pacific Railroad Foundation, the recipient of the donation, was organized three days later, i.e., on May 13, 1955, as a Utah non-profit corporation.¹⁷ The resolution of the appellant's Board of Directors, granting and contributing the sum in question to the Union Pacific Railroad Foundation, was adopted sixteen days after the effective date of the legislation, i.e., on May 26, 1955.¹⁸

In *McCarrey v. Utah State Teachers' Ret. Board, et al.*, 111 Utah 251 (1947), this Court passed on the question of whether a teacher who had retired and had ceased

¹⁵ R. 85.

¹⁶ L. 1955, Ch. 22, p. 39.

¹⁷ R. 83.

¹⁸ *Ibid.*

to be a member of the State Teachers' Retirement System in 1943, a time when teachers' retirement benefits were based on years of service in the public schools only, was entitled to benefit from a 1945 amendment to the Teachers' Retirement Act which purported to extend the benefits of the retirement system to certain non-public school teachers. The court rejected the plaintiff's contention that she was entitled to such extended benefits and held that the 1945 amendment should not be so construed as to operate retrospectively "to persons who had retired and who were no longer members of the public school system when the amendment became effective" (*Id.* at p. 254). The decision might conceivably have some bearing on the question of whether the statutory power operates to validate retrospectively a corporate donation made prior to the effective date of the legislation. However, as noted above, such question is not presented in the case at bar.

The court below made reference in its findings to the fact that the evidence in the case did not show that any shareholders' action had been taken authorizing the donation by the appellant to the Union Pacific Railroad Foundation.¹⁹ There was in fact no such action by shareholders and none was required since the Corporation Code specifically provides that the "corporate powers of the corporation shall be exercised by the Board of Directors".²⁰ The phrase "corporate powers" includes those set forth in the statutory grant of general powers (among which is the power to donate), as well as powers implied at common law and on which appellant also relies to sustain its power to make the contribution at bar.

As noted in the Statement of Facts, this action arose out of a contribution made by the appellant to the Union

¹⁹ R. 85.

²⁰ Section 16-2-21, Utah Code Anno. 1953.

Pacific Railroad Foundation, a charitable foundation organized and sponsored by the appellant as a medium through which its program of giving might be conducted. The Foundation in turn made a contribution of funds received from the appellant to Brigham Young University. The Foundation was organized as a Utah non-profit corporation, and is limited under its affidavit of organization to:

. . . the objects and purposes of exclusively engaging in, assisting and contributing to the support of exclusively charitable, educational and scientific activities and projects and contributing to the support of and the creation and maintenance of exclusively charitable, educational and scientific institutions, organizations and funds of any and every kind . . . (R. 31)

It is hardly subject to question that a contribution to a donee whose objects and purposes are thus limited to eleemosynary activities constitutes the exercise of the statutory power to engage in philanthropy.

(b) The application to the appellant corporation of the statutory power to donate does not constitute a fundamental change in the shareholders' contracts embodied in the appellant's charter. Thus, no Constitutional objections on the theory of impairment of contract can be raised by the respondents.

The charter of a corporation is generally regarded as a tri-partite contract: first, a contract between the state and the corporation, second, between the corporation and its shareholders, and third, between the shareholders *inter se*.²¹ The plural nature of the contracts embodied in the charter of Utah corporations was recognized by this Court fifty years ago and formed the basis

²¹ See, *Fletcher Cyclopedia Corporations* Vol. 7, Sec. 3657 (Perm. Ed.).

for its holding in *Garey v. Mining Co.*,²² hereinafter discussed.

In *Dartmouth College v. Woodward*²³ the United States Supreme Court held that a corporate charter was a contract and as such entitled to protection under the provision of the Federal Constitution prohibiting any state from enacting a law impairing the obligation of a contract.²⁴ After the *Dartmouth College* case, it was recognized that a state legislature might not, without the consent of the corporation, alter or amend the charter, unless it specifically reserved the right to do so in its grant to the corporation. The general practice quickly arose, pursuant to Mr. Justice Story's suggestion in the *Dartmouth College* concurring opinion, on the part of the several states to reserve to the State, in the grant of corporate charters, the right to alter, amend or repeal the laws governing corporations. As has been noted previously, the Utah Constitution contained such reserved power at the time of the organization of the appellant corporation.

At the time of the *Dartmouth College* decision, and the passage of the legislation that case initiated, the plural contractual nature of the corporate charter had not been clearly developed in the case law. The question has since been raised as to whether the typical reserved power clause was enacted merely to avoid the rule of the *Dartmouth College* case, i. e., to enable the State to do what that case prohibited, to wit, effect a fundamental change which in the absence of the reserved power would constitute an impairment of the contract between the state and the corporation, or whether, on the other hand,

²² 32 Utah 497, 505 (1907).

²³ 4 Wheat. 518 (U. S., 1819).

²⁴ U. S. Const., Art. 1, Sec. 10, Cl. 1; See also, Utah Const., Art. I, Sec. 18.

the reserved power should be construed broadly so as to permit what would otherwise constitute impairment of the *corporation-shareholder* contracts and the contracts between the shareholders *inter se*. Under the so-called Massachusetts rule, the latter interpretation prevails.²⁵ However, under the theory of immutable contract, the reserved power was held to apply only to the contract between the State and the corporation.²⁶

It is important to note that the immutable contract theory was originated in the courts of the State of New Jersey; however, the highest court in that State has recently expressly refused to apply the theory so as to prevent the application of a statutory power to donate to a pre-existing corporation.²⁷ At any rate, the necessity of examining the scope of the state's reserved power does not arise at all, unless the statutory power to donate may be said to effect fundamental change in the corporate charter, as distinguished from a change which is merely incidental, such as a change made pursuant to the specific terms of the original "charter-contract". At the outset it should be understood that if a fundamental change in the charter of a Utah corporation is to be effective, unanimous consent of shareholders is required regardless of whether the change is accomplished either by means of a statutory amendment to the laws governing corporations or by means of an amendment by the shareholders to the certificate of incorporation. As a leading textwriter put it:²⁸

²⁵ *Durfee v. Old Colony and Fall River Railroad Company & Others*, 87 Mass. 230 (1862).

²⁶ *Zahriskie v. The Hackensack and New York Railroad Company*, 18 N. J. Eq. 178 (Ch. 1867).

²⁷ *A. P. Smith Manufacturing Co. v. Barlow*, 26 N. J. Super. 106, 97 A. 2d 186 (1953), *aff'd*, 13 N. J. 24, 145, 98 A. 2d 581 (1953), appeal dismissed 346 U. S. 861 (1953). The *A. P. Smith* case is hereinafter discussed at length.

²⁸ *Plehnner Encyclopedia Corporations*, Vol. 7, Sec. 3684, pp. 840-841 (Perm. Ed.).

A change in fundamentals is an amendment, whether it is called such or not and whether made by the legislature directly or by the corporation itself by legislative authorization. A material and fundamental change in the charter by an amendment to that charter is an unconstitutional violation of the contract rights of any shareholder who does not consent to such an amendment.

That the statutory power to donate does not constitute a change in fundamentals, but represents a mere incidental change in the appellant's charter may be demonstrated from the fact that it could have been engrafted on the appellant's charter by shareholder amendment rather than by legislative amendment and in such case unanimous consent of shareholders would not have been required.

The Articles of Association of the appellant corporation contained the following provision at the time of its incorporation, which provision has remained operative to date:²⁹

... It may also from time to time amend these Articles of Association by filing amended Articles of Association, increasing the capital stock, or otherwise, agreeably with law, *enlarging or changing the powers of the corporation* hereby formed... (Emphasis supplied.)

In addition to the fact that the appellant's Articles of Association specifically authorize additions to or changes in the powers of the corporation, the Utah Corporation Code specifically authorizes shareholder amendments to the Articles by adding to the purposes of the corporation by a mere majority vote in the absence of a specific charter provision. (The appellant's Articles are

²⁹ Sec. 8 of appellant's Articles of Association, R. following p. 26.

silent as to the vote required for a shareholders' amendment.)

The statute reads in part as follows:⁸⁰

The articles of incorporation of any corporation now existing or that hereafter may be organized under the laws of this state may be amended in any respect conformable to the laws of this state in such manner and by the vote of such proportion of all or any class or classes of stock as the articles of incorporation may provide; and in case the articles of incorporation do not so provide, by a vote representing at least a majority in amount of the outstanding stock thereof entitled to vote at a stockholders' meeting called for that purpose as prescribed in section 16-2-49; provided, that, if all the stockholders entitled to vote, vote in favor of such amendment at any meeting of the stockholders, the notice required by section 16-2-49 need not be given; *and provided further, that the original purpose of the corporation shall not be altered or changed without the approval and consent of all the outstanding stock, but the adding to the purposes or object or extending the power and business of the corporation shall not be deemed a change of the original purpose of the corporation . . .* (Emphasis supplied.)

The predecessor to this Section was construed by this Court in *Fowler et al. v. Provo Bench Canal & Irrigation Co. et al.*⁸¹ It was therein held that an amendment empowering an irrigation corporation "to purchase stock in other corporations, to purchase dams, canals etc. and to assess its own capital stock"⁸² was not a material and fundamental change which altered the original purpose

⁸⁰ Section 16-2-45, Utah Code Anno., 1953.

⁸¹ 99 Utah 267 (1940), cert. denied 313 U. S. 564 (1941).

⁸² *Id.* at 272.

of the corporation, and which would require unanimous shareholder consent.

The holding was as follows:³³

. . . Defendant corporation is engaged in the business of supplying irrigating water to its stockholders. . . . The amendments which we are considering empower the corporation to acquire additional facilities for diverting and transmitting irrigation water, to enter into contracts to acquire water rights, to encumber its property to pay its debts, to purchase stock in other corporations, to purchase its own stock and to assess its own stock for any and all corporate purposes. In other words, the corporation is enabled by virtue of such amendments, to secure for distribution to its stockholders irrigating water diverted into Provo River under the Deer Creek Project. *This change seems to be not only consistent with the original corporate purpose but a logical extension or growth which might have been expected in the corporate activity.* We hold such amendments to be in conformity with Section 18-2-44, R. S. U. 1933, which reads in part:

‘. . . the adding to the purposes or object or extending the power and business of the corporation shall not be deemed a change of the original purpose of the corporation. . .’

That the water is diverted from another watershed into Provo River before it is withdrawn by defendant is no basis for holding that the water is not conveyed ‘from Provo River to Provo Bench and lands adjacent thereto.’ *To us it appears that said amendments do not fundamentally change the purpose of the corporation, but rather, they represent a natural and foreseeable development of the business of the corporation in furtherance of its purpose. As more land is cultivated and*

the demand for irrigating water increases, as engineering science and study develop methods of preserving more of the run-off of water in our mountains and of transmitting and utilizing it for irrigation, and as capital becomes available to execute these projects, *it is logical and proper that the business of existing irrigation corporations be expanded to secure and distribute the additional water.* (Emphasis supplied.)

In *Salt Lake Automobile Co. v. Keith O'Brien Co. et al.*, 45 Utah 218 (1914) this Court rejected the claim by dissenting holders of existing preferred stock in the corporation that their Constitutional rights were invaded by an amendment to the charter which was adopted by a majority vote, pursuant to statutory authorization, and which authorized the issuance of a new preferred stock with preferential rights. The court did not hold the amendment to represent a fundamental change in the preferred shareholder's contract so as to give rise to an invasion of such Constitutional right.

The appellant submits that under the provision of its Articles of Association authorizing extensions of the powers of the corporation, the specific language of the Utah statutes authorizing shareholder amendments to add to the purposes of the corporation, and the prior determinations of this Court, the power to donate, which has been added to the appellant's charter by legislative amendment, could have been added thereto by shareholders' amendment without the necessity for unanimous consent. The donative power, therefore, does not represent a "fundamental change" in the contracts of the respondent shareholders so as to give substance to the Constitutional objections which they have raised.

The testimony of the appellant's witnesses, as well as the holdings of the New Jersey courts in *A. P. Smith*

Manufacturing Co. v. Barlow, *infra*, which will hereinafter be discussed, evidence the fact that the donative power is, under the tests laid down by this Court in *Fowler et al. v. Provo Bench Canal & Irrigation Co. et al.*, *supra*, “a logical extension or growth” and a “natural and foreseeable development” in the powers of the modern business corporation and of its social responsibilities. The appellant’s witnesses, without exception, supported expansion of its philanthropic activities as a necessary concomitant to the proper conduct of its business as a common carrier, and nowhere in the cross examination, or otherwise, is there the slightest suggestion of a change in the original purpose of the corporation.

(c) Even if the application to the appellant corporation of the statutory power to donate effects a fundamental change in the shareholders’ contracts embodied in the appellant’s charter, the exercise of such power does not constitute an impairment of the obligation of such shareholders’ contracts.

Even if it is assumed for purposes of the argument that the application to the appellant corporation of the statutory power to donate effects a fundamental change in the shareholders’ contracts embodied in the appellant’s charter, such application must be sustained as a valid exercise of the State’s reserved power. In the previous section reference was made to the fact that United States courts have adopted two views with respect to the scope of the reserved power of a State. Under the Massachusetts rule of *Durfee v. Old Colony and Fall River Railroad Company & Others*⁸⁴ it was held that the reserved power must be broadly construed so as to validate what, in the absence of such reserved power, would constitute impairments of any of the contracts embodied in the cor-

porate charter, including the shareholder-corporate contract. On the other hand under the theory of immutable contract first announced by the New Jersey Supreme Court in *Zabriskie v. The Hackensack and New York Railroad Company*³⁵ the reserved power was narrowly construed so as to apply merely to the state-corporate charter contract and not the corporate-shareholder contract.

Under the so-called Massachusetts rule, with respect to the broad scope of the state's reserved power, the impairment of contract objection raised by the respondents must fail. It is to be noted that this Court in its opinion in *Cowan, et al. v. Salt Lake Hardware Co.*³⁶ gave recent recognition to the broad scope of the Utah reserved power as pertaining not only to the corporate-state contract but also to the corporate-shareholder contract. The *Cowan* case was an action by preferred stockholders to determine the right of a corporation to amend its charter so as to make non-callable preferred shares callable. The shareholders contended that the charter did not contain authority to amend and that the Constitutional and statutory provisions permitting amendments were merely reservations of power protecting the relationship between the state and the corporation, and to be exercised only in matters of public concern and welfare. The court rejected this contention, quoting the reserved power found in the Utah Constitution, the statutory power to amend, and then made the following statement:³⁷

Counsel for appellants in their brief have provided this court with an interesting and learned treatise on the historical background of the rea-

³⁵ 18 N. J. Eq. 178 (Ch. 1867).

³⁶ 118 Utah 300 (1950).

³⁷ *Id.* at pp. 303-304.

sons for the adoption by states of constitutional and statutory provisions similar to ours quoted above in order to avoid the effect of the ruling of the United States Supreme Court in the case of *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, wherein it was held that the charter granted by a state to a corporation was in the nature of a contract between the state and the corporation, and that the state could not impair its obligations, thereunder by subsequent legislation. *However interesting this historical background is, it is now well settled that such constitutional and statutory provisions authorizing amendments of Articles of Incorporation do not only pertain to the relationship between the state and the corporation, but pertain to the rights between the corporation and its stockholders.* (Emphasis supplied.)

So then, in arriving at its holding in *Cowan*, this Court specifically regarded the broad construction of the reserved power to be "well settled" law in Utah. It is submitted that the holding requires the rejection by this Court of the Constitutional objections raised by the respondents herein.³⁸

Even if this Court were to examine such Constitutional objections in the light of a narrow construction of the reserved power under the immutable contract theory, it would be required to sustain the application of the donative power legislation to the appellant. The New Jersey Supreme Court, which itself gave first recognition to the theory, has recently refused to apply it so as to invalidate the application of the New Jersey statutory power to donate to a pre-existing corporation.

³⁸ See. Dvkstra, *Utah Corporation Code*, 4 Utah L. Rev. 439, 452-454 (1955).

In *A. P. Smith Manufacturing Co. v. Barlow*⁸⁹ the New Jersey court passed upon the legality of a contribution to a private university by a corporation which had been organized prior to the passage of the permissive legislation. The court held that the advancement of the public interest which would result from corporate giving justified the invoking of the reserved power so as to sustain the legislation even though contractual rights of shareholders may have been affected. With respect to its refusal to apply the immutable contract theory to the case the court stated as follows at pp. 156-157:

The appellants contend that the foregoing New Jersey statutes may not be applied to corporations created before their passage. Fifty years before the incorporation of The A. P. Smith Manufacturing Company our Legislature provided that every corporate charter thereafter granted 'shall be subject to alteration, suspension and repeal, in the discretion of the legislature.' L. 1846, p. 16; R. S. 14:2-9. A similar reserved power was placed into our State Constitution in 1875 (*Art. IV, Sec. VII, par. 11*), and is found in our present Constitution. *Art. IV, Sec. VII, par. 9*. In the early case of *Zabriskie v. Hackensack and New York Railroad Company*, 18 N. J. Eq. 173 (*Ch.* 1867), the court was called upon to determine whether a railroad could extend its line, above objection by a stockholder, under a legislative enactment passed upon the reserve power after the incorporation of the railroad. Notwithstanding the breadth of the statutory language and persuasive authority elsewhere (*Durfee v. Old Colony & Fall River Railroad Company*, 87 Mass. 230 (Sup. Jud. Ct. 1862)), it was held that the proposed extension of the

⁸⁹ 26 N. J. Super. 106, 97 A. 2d 186 (1953), *aff'd*, 13 N. J. 2d 145, 98 A. 2d 581 (1953), appeal dismissed 346 U. S. 861 (1953).

company's line constituted a vital change of its corporate object which could not be accomplished without unanimous consent. See *Lattin, A Primer on Fundamental Corporate Changes*, 1 *West Res. L. Rev.* 3, 7 (1949). The court announced the now familiar New Jersey doctrine that although the reserved power permits alterations in the public interest of the contract between the state and the corporation, it has no effect on the contractual rights between the corporation and its stockholders and between stockholders *inter se*. Unfortunately, the court did not consider whether it was contrary to the public interest to permit the single minority stockholder before it to restrain the railroad's normal corporate growth and development as authorized by the Legislature and approved, reasonably and in good faith, by the corporation's managing directors and majority stockholders. *Although the later cases in New Jersey have not disavowed the doctrine of the Zabriskie case, it is noteworthy that they have repeatedly recognized that where justified by the advancement of the public interest the reserved power may be invoked to sustain later charter alterations even though they affect contractual rights between the corporation and its stockholders and between stockholders inter se.* (Emphasis supplied.)

The court then went on to sustain the validity of the donation in the following language at pp. 160-161:

It seems clear to us that the public policy supporting the statutory enactments under consideration is far greater and the alteration of pre-existing rights of stockholders much lesser than in the cited cases sustaining various exercises of the reserve power. In encouraging and expressly authorizing reasonable charitable contributions by corporations, our State has not only joined with other

states in advancing the national interest but has also specially furthered the interests of its own people who must bear the burden of taxation resulting from increased state and federal aid upon default in voluntary giving. It is significant that in its enactments the State has not in anywise sought to impose any compulsory obligations or alter the corporate objectives. And since in our view the corporate power to make reasonable charitable contributions exists under modern conditions, even apart from express statutory provision, its enactments simply constitute helpful and confirmatory declarations of such power, accompanied by limiting safeguards.

In the light of all of the foregoing we have no hesitancy in sustaining the validity of the donation by the plaintiff. There is no suggestion that it was made indiscriminately or to a pet charity of the corporate directors in furtherance of personal rather than corporate ends. On the contrary, it was made to a preeminent institution of higher learning, was modest in amount and well within the limitations imposed by the statutory enactments, and was voluntarily made in the reasonable belief that it would aid the public welfare and advance the interests of the plaintiff as a private corporation and as part of the community in which it operates. We find that it was a lawful exercise of the corporation's implied and incidental powers under common-law principles and that it came within the express authority of the pertinent state legislation. As has been indicated, there is now widespread belief throughout the nation that free and vigorous non-governmental institutions of learning are vital to our democracy and the system of free enterprise and that withdrawal of corporate authority to make such contributions within reasonable limits would seriously threaten their continuance. Corporations have come to recognize

this and with their enlightenment have sought in varying measures, as has the plaintiff by its contribution, to insure and strengthen the society which gives them existence and the means of aiding themselves and their fellow citizens. Clearly then, the appellants, as individual stockholders whose private interests rest entirely upon the well-being of the plaintiff corporation, ought not be permitted to close their eyes to present-day realities and thwart the long-visioned corporate action in recognizing and voluntarily discharging its high obligations as a constituent of our modern social structure.

Fifty years ago in *Garey v. Mining Co.*⁴⁰ this Court was called upon to construe the scope of the State's reserved power and seemed at that time to favor the immutable contract theory. In *Garey* the action was instituted by dissenting stockholders, who objected to an amendment to the charter, which had been approved by majority vote in accordance with statutory authority and which made nonassessable full paid stock assessable and subject to sale. This Court held the statutory authorization to constitute an impairment of the obligation of contract, quoting from the New Jersey *Zabriskie* case, *supra*.⁴¹ However, the case is to be distinguished from the case at bar by two important facts. In *Garey*, this Court, in the following language, held that the action complained of did not relate in any way to the contract between the state and the corporation, and did not purport to be for the benefit of the public:⁴²

⁴⁰ 32 Utah 497 (1907).

⁴¹ *Zabriskie v. The Hackensack and New York Railroad Company*, 18 N. J. Eq. 178 (Ch. 1867).

⁴² See, Note 40 *supra* at p. 513.

Bearing in mind that the corporate charter is a dual contract—one between the state and the corporation and its stockholders, the other between the corporation and its stockholders—and that under the reserved power the state may alter or amend the former, but not the latter, the question is: Under which do the legislative enactment of 1903 and the action taken by the majority of the stockholders fall? We are of the opinion that they do not pertain to any right, privilege, or immunity which the state had granted to the corporation or to its stockholders, and that the action by such stockholders in no wise affected or was related to the contract existing between the state and the corporation. It merely pertains to and affects the contract existing among the stockholders themselves. Neither the enactment nor the stockholders' amendment of the articles purport to be for the benefit of the creditors or for the benefit of the public. Thereunder no right or privilege in favor of creditors or the public is created, and thereunder no creditor could assert any right or claim that could not have been asserted by him prior to the enactment.

Moreover, the opinion distinguished cases, where statutes enacted under the reserved power and imposing individual liability on incorporators for corporate debts had been sustained, on the grounds that such statutes pertained “directly to the very franchise and immunity granted by the state, and directly relates to and affects the contract between the state and the corporation and its stockholders”.⁴³

In the case at bar the statutory power to donate similarly relates to and affects the corporation-state contract. That the statute was enacted by the legislature

⁴³ *Id.* at p. 515.

in furtherance of the public interest is beyond dispute and has been amply demonstrated.

At any rate, as hereinabove noted, New Jersey, the state which originated the doctrine of immutable contract, has held it to be inapplicable where a statutory power to engage in corporate philanthropy is involved. An appeal was taken to the United States Supreme Court from the New Jersey Supreme Court's determination in *A. P. Smith*, however the appeal was dismissed for the "want of a substantial federal question".⁴⁴

The United States Supreme Court has consistently upheld legislative amendments to corporate charters enacted in exercise of the reserved power over objections on the grounds of impairment of the obligation of the charter contract even where the interests of stockholders were more substantially affected than they are under the granting of a statutory power to donate. The changes effected by the statutes which have been reviewed by the Court included changed voting rights,⁴⁵ repeal of the charter,⁴⁶ a change in the business from cooperative and assessment life insurance to life insurance of every kind,⁴⁷ a change in the liability of bank stockholders⁴⁸ and a change in the withdrawal rights of stockholders in a building and loan association.⁴⁹

The statutory power to donate was enacted by the Utah Legislature in order to encourage corporate giving by removing all doubt with respect to its legality and through such encouragement to promote the general

⁴⁴ 346 U. S. 861 (1953).

⁴⁵ *Miller v. The State*, 15 Wall. 478 (U. S., 1872) and *Looker v. Maynard*, 179 U. S. 46 (1900).

⁴⁶ *Greenwood v. Freight Co.*, 105 U. S. 13 (1881).

⁴⁷ *Polk v. Mutual Reserve Fund*, 207 U. S. 310 (1907).

⁴⁸ *Stockholders v. Sterling*, 300 U. S. 175 (1937).

⁴⁹ *Veix v. Sixth Ward Assn.*, 310 U. S. 32 (1940).

welfare of citizens of the state. It is the appellants' position that for this reason the statutory power to donate may be sustained, independent of the reserved power, as a valid exercise of the state's police power. In the *A. P. Smith* case the lower court specifically held that the legislation could be sustained solely as an exercise of the State's police power:⁵⁰

Finally, the legislation challenged in this case is clearly sustainable under the police power reserved to and residing in each State. 'The police power of a state is an inherent attribute of its sovereignty with which it is endowed for the protection and general welfare of its citizens, and of which the state may not divest itself by contracts or otherwise.'

* * * * *

Every person joining a chartered corporate enterprise does so subject to the paramount police power of the State. 'All contracts, whether made by the state itself, by municipal corporations, or by individuals, are subject to be interfered with, or otherwise affected by, subsequent statutes enacted in the *bona fide* exercise of the police power, and do not, by reason of the contracts clause of the constitution, enjoy any immunity from such legislation'. . . .

⁵⁰ *A. P. Smith Manufacturing Co. v. Barlow*, 26 N. J. Super. 106, 122 (1953); see also *St. Louis, Iron Mountain & Railway v. Paul*, 173 U. S. 404 (1899); *Erie RR Co. v. Williams*, 233 U. S. 685 (1914); *Sutton v. New Jersey*, 244 U. S. 258 (1917) and *Home Building & L. Assn. v. Blaisdell*, 290 U. S. 398 (1934).

(d) The statutory grant to Utah corporations of the power to make donations does not violate the Due Process clauses of the Constitution of the United States or of the Utah Constitution.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, among other things:

nor shall any State deprive any person of life, liberty or property, without due process of law;

Article I, Section 7 of the Utah Constitution contains a similar prohibition. Since the statute in question does no more than grant permission to corporations to make charitable gifts, it cannot be argued that the Legislature, in enacting it, has deprived any person of any property. Presumably the due process argument must therefore rest on the contention that the statute amends the corporate contract and that such amendment of itself deprives the shareholders of a property right. In this guise the argument is nothing more than a reiteration of the argument that the statute violates the Constitutional prohibition against impairing the obligation of contracts.

Courts have long recognized that Constitutional objections to statutory alteration of corporate charters are one and the same whether framed under the Contracts Clause or under the Due Process Clause. Thus in *Polk v. The Mutual Reserve Fund Life Association of New York*⁵¹ a statute of the State of New York was attacked before the United States Supreme Court under both of said clauses. The statute in question resembled the statute here involved in that it granted additional corporate powers, not permitted when the original charters were

⁵¹ 207 U. S. 310 (1907).

granted. The statute permitted mutual life insurance associations to reincorporate under new charters granting power to engage in various types of insurance business not previously permitted to such companies. The plaintiffs, who had become members and policy holders under the old charter, brought an action for dissolution of the company claiming that reincorporation pursuant to the statutory permission violated their Constitutional rights under the Contracts Clause and under the Due Process Clause. After holding that the statute did not impair the contractual rights of the plaintiffs, the Court said:⁵²

The other two questions certified inquire whether the law under which the reincorporation was made, or the reincorporation and changes in power made under its provisions, are in violation of the Fourteenth Amendment to the Constitution of the United States. These questions do not require separate or detailed consideration. As applied to the facts of this case, they are practically dealt with in the discussion which has preceded. It is not suggested that any rights secured to the complainants by the Fourteenth Amendment were violated in any other manner than by the reincorporation of the Association without the consent of its members, the change in and addition to its powers, and the consequent effect upon the contract rights of the complainants and upon their relation to the corporation. But it has been shown that the contract rights of the complainant have not been affected by the reincorporation, and the same reasoning that leads to the conclusion that the changes in the charter powers, made under the reserved powers of the State, do not violate the contract clause of the Constitution are apt to show that they do not violate the Fourteenth Amendment.

⁵² *Id.* at p. 327.

Likewise in *Veix v. Sixth Ward Building and Loan Association of Newark*⁵³ the United States Supreme Court sustained a statutory alteration of corporate rights against the contention that the statute violated the Contracts Clause and then disposed of due process objections in a summary fashion. In that case the Legislature of New Jersey had passed a statute altering the withdrawal rights of building and loan association certificate holders. A person who had become a certificate holder prior to the statutory change claimed Constitutional protection for his withdrawal rights as they existed prior to the passage of the statute. The court sustained the statute as a proper and reasonable exercise of the State's police power, analogous to the reserved power to amend corporate charters. It stated that the statute involved no impairment of the obligation of contracts and that separate consideration of the objection under the Due Process Clause was "wholly unnecessary".⁵⁴

In *Home Building and Loan Association v. Blaisdell*⁵⁵ the United States Supreme Court upheld a Minnesota mortgage moratorium law against a contention that the statute constituted an impairment of the obligation of contracts and violated due process of law. The court in that case did not even find it necessary to discuss the Due Process Clause, contenting itself with stating that what was said in the opinion concerning the Contracts Clause "is also applicable to the contention presented under the Due Process Clause."⁵⁶

The inherent police power of the state to act with respect to matters concerning the welfare, including

⁵³ 310 U. S. 32 (1940).

⁵⁴ *Id.* at p. 41.

⁵⁵ 290 U. S. 398 (1933).

⁵⁶ *Id.* at p. 448.

specifically the economic and social welfare, of its citizens and institutions, has always been recognized. When measured against the requirements of due process, the will of the Legislature is generally upheld where the enactment is not arbitrary and is a reasonable response to the exigencies of the given situation. The United States Supreme Court has consistently upheld state legislation affecting corporations even though such legislation substantially altered corporate property rights. Thus, a statutory requirement that railroads pay their employees at least semi-monthly and in cash was held not a deprivation of property without due process of law.⁵⁷ A requirement that New Jersey street railway companies furnish free transportation to police officers on duty was held not a deprivation of due process.⁵⁸ And a requirement that discharged employees be paid up to date with a *per diem* penalty for failure to do so was held not a violation of the Fourteenth Amendment.⁵⁹ Finally, in *A. P. Smith Manufacturing Co. v. Barlow, supra*, state legislation closely paralleling the Utah legislation was held to be free from attack on Constitutional grounds.

In adding to the powers of Utah corporations, the State Legislature has very wisely responded to a felt public need for corporate support of eleemosynary activities. The record in this case demonstrates that private eleemosynary institutions in the United States, including those in the State of Utah, can no longer operate effectively and indeed may be in danger of complete collapse unless supported financially by corporate giving. The private resources of charitably minded individuals are,

⁵⁷ *Erie RR Co. v. Williams*, 233 U. S. 685 (1914).

⁵⁸ *Sutton v. New Jersey*, 244 U. S. 258 (1917).

⁵⁹ *St. Louis, Iron Mountain & Railway v. Paul*, 173 U. S. 404 (1899).

under current taxation, no longer sufficient for the purpose. These were the circumstances under which the Legislature of Utah passed the enabling legislation here in question. To state that this well-considered and timely legislation infringes Constitutional guarantees is to look backward instead of forward and to substitute a narrow legalism for a broad gauge legislative policy. In determining whether the Legislature of Utah has violated the State and Federal Constitutions, it is not the function of this Court to substitute its judgment of what is good for the public welfare for that of the elected legislators. The legislative exercise must be upheld unless it is so arbitrary, capricious or lacking in judgment as to constitute a basic interference with the compact between state and people. This is obviously not so in the case at bar.

II

The contribution represents a valid exercise by the appellant corporation of an implied corporate power.

In *Zion's Savings Bk. & Tr. Co. v. Tropic & East Fork Irr. Co.*⁶⁰ this Court held that Article XII, Section 10 of the Utah Constitution, which provides that "No corporation shall engage in any business other than that expressly authorized in its charter or articles of incorporation", requires that a strict interpretation be given to the Articles of Incorporation. However, this Court has also long recognized the existence of implied corporate powers. In the *Zion's Savings* case, this Court quoted its dictum in *Tracy Loan and Trust Co. v. Merchants Bank*,⁶¹ wherein it was stated that:

⁶⁰ 102 Utah 101 (1942).

⁶¹ 50 Utah 196, 202-203 (1917).

Implied powers of a bank or of any corporation for that matter are those incidental to and connected with the carrying into effect or the accomplishing of the general purposes of the corporation as expressed in the object clauses of its Articles.

In *Hadlock, State Bank Commissioner v. Callister*,⁶² this Court stated that "a corporation may be said to possess such implied powers as are necessary, usual or incidental to its business".⁶³ The necessity for the exercise of implied or incidental powers was foreseen in 1897, by the framers of the original Articles of Association of the appellant corporation, as evidenced by the following language of Article 8:⁶⁴

... in exercising its corporate powers (the corporation) may do such acts as the directors may deem necessary or expedient not inconsistent with these Articles or with the Constitution and laws of the State of Utah.

One of the prime duties of the board of directors of any corporation is, of course, to preserve, maintain, and, to the extent dictated by the requirements of the business, add to the corporate business property. It is no less the duty of any board of directors to preserve the existence of the corporation itself. The testimony of each of the directors who testified in the appellants' behalf clearly indicates that each deems it "necessary or expedient" to embark on the program in issue in this case. This was succinctly stated, with respect to educational grants, by Mr. Mullendore:⁶⁵

⁶² 85 Utah 510, 518 (1935).

⁶³ *Id.* at p. 518.

⁶⁴ Article 8 of Appellants' Articles of Association, R. following p. 26.

⁶⁵ Mullendore Dep., p. 7.

... we feel that it is just as much the obligation of the corporate management to use some of its resources in helping to educate the youth of a country and of our community in the principles and traditions of our free institutions, as it is to use our resources in the construction and maintenance of our physical equipment. . . .

With respect to charitable contributions in the communities served by plaintiff corporation, Mr. Harriman testified that:⁶⁶

... If the communities were not there, we certainly would not be able to serve them, and in a like manner, if they are not in a good condition, mentally, morally and physically, they would not be as good customers. We really believe the existence of this atmosphere of healthy environment I speak of, is as much of a must in the maintenance of it by our company as the maintenance of our physical property, using reasonable judgment throughout.

It is under the principle of implied powers that the corporate power to engage in philanthropic activities was first recognized by an English court. In *Hutton v. West Cork Railway Company*,⁶⁷ Lord Justice Bowen by way of dictum made the following statement, which has since become a classic in the early common law on corporate donations:

It seems to me you cannot say the company has only got power to spend the money which it is bound to pay according to law, otherwise the wheels of business would stop, nor can you say that directors ... are always to be limited to the strictest possible view of what the obligations of the company are. They are not to keep their pockets buttoned up and

⁶⁶ R. 60.

⁶⁷ 23 Ch. D. 654, 672 (1883).

defy the world unless they are liable in a way which could be enforced at law or in equity. Most businesses require liberal dealings. The test there again is not whether it is bona fide, but whether, as well as being done bona fide, it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit.

The dictum of the *Hutton* case then, justified corporate charity on the grounds of implied authority where the act performed was within the ordinary scope of company business and a company benefit was reasonably incident thereto. This theory, long known as the direct benefit test, has during the twentieth century been progressively relaxed. At first, questions were raised about corporate pension plans⁶⁸ and other matters involving employee relations, such as relief funds,⁶⁹ hospital funds,⁷⁰ medical care,⁷¹ health plans⁷² and disability plans.⁷³ However in each such case the action of the corporation was sustained and it has now become accepted that such matters are within the implied powers of the corporation. Further expansion of the doctrine of corporate benefit is found in cases holding that where a corporation must rely on a particular university for its

⁶⁸ *Heinz v. National Bank of Commerce*, 237 Fed. 942 (8th Cir., 1916) and *Nemser v. Aviation Corporation*, 47 F. Supp. 515 (D. Del., 1942).

⁶⁹ *Beck v. Pennsylvania R. R. Co.*, 63 N. J. L. 232 (1899).

⁷⁰ *Corning Glass Works v. Lucas*, 37 F. 2d 798 (App. D. C., 1929), cert. denied, 281 U. S. 742 (1930) and *People ex rel. Metropolitan Life Ins. Co. v. Hotchkiss*, 136 App. Div. 150 (3rd Dept., 1909).

⁷¹ *Bedford Belt Railway Company v. McDonald*, 17 Ind. App. 492 (1897).

⁷² *State v. Railway Co.*, 68 Ohio St. 9 (1903).

⁷³ *McAdow v. Railway Co.*, 96 Kan. 423 (1915).

employees, it is within the power of the corporation to contribute to that university.⁷⁴

In *A. P. Smith Manufacturing Co. v. Barlow*, *supra*, the power to make contributions was also sustained, apart from the statute, on common law principles. It was held that corporate contributions in support of academic institutions were, in the terms of the early common law rule, for the "benefit" of the corporation. Moreover, a new common law rationale was advanced to validate the donation, *i. e.*, that of "corporate social responsibility".

In the *A. P. Smith* trial, there was testimony by the President of the Company, by Frank W. Abrams, Chairman of the Board of the Standard Oil Company of New Jersey, and Irving S. Olds, former Chairman of the Board of the United States Steel Corporation, all to the effect that free enterprise owes its survival in some degree to the existence of private, independent universities and that corporations further their own self-interest in contributing to liberal arts institutions by assuring a supply of properly trained personnel for administrative and other corporate employment. Mr. Abrams testified that corporations are expected to acknowledge their responsibilities in support of the essential elements of a free enterprise system, and that it was not "good business" to disappoint "this reasonable and justified public expectation". He further stated that it was not right for corporations "to take substantial benefits from their membership in the economic community while avoiding the normally accepted obligations of citizenship in the social community".⁷⁵

The Supreme Court of New Jersey called attention to the fact, amply demonstrated in the record before this

⁷⁴ *Armstrong Cork Co. v. H. A. Meldrum Co.*, 285 Fed. 58 (D. C. W. D., N. Y., 1922).

⁷⁵ 13 N. J. 2d 145, 157-148, 38 A. 2d 581, 583 (1953).

Court, that individuals were able to donate freely for charitable purposes during the years when individual tax rates were much lower than at present but, with the transfer of wealth to corporate hands, and the increasingly heavy burden of individual taxation, individuals have more and more turned to corporations to “. . . assume the modern obligations of good citizenship in the same manner as humans do”.⁷⁶ The court had no difficulty in finding that the common law could and should expand to justify corporate contributions and made the following pronouncement in upholding the contribution under common law principles:⁷⁷

It seems to us that just as the conditions prevailing when corporations were originally created required that they serve public as well as private interests, modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate. Within this broad concept there is no difficulty in sustaining, as incidental to their proper objects and in aid of the public welfare, the power of corporations to contribute corporate funds within reasonable limits in support of academic institutions. But even if we confine ourselves to the terms of the common law rule in its application to current conditions, such expenditures may likewise readily be justified as being for the benefit of the corporation; indeed, if need be the matter may be viewed strictly in terms of actual survival of the corporation in a free enterprise system. The genius of our common law has been its capacity for growth and its adaptability to the needs of the times. Generally courts have accomplished the desired result indirectly through the molding of old forms. Occa-

⁷⁶ *Id.* at p. 153 (586).

⁷⁷ *Id.* at p. 154 (586).

sionally they have done it directly through frank rejection of the old and recognition of the new. But whichever path the common law has taken it has not been found wanting as the proper tool for the advancement of the general good.

The evidence, contained in the record, reveals that the purpose of the appellant's Board of Directors, in making the contribution involved in this case, or in making contributions for the public welfare or for charitable, scientific, religious or educational purposes, is to enable the corporation and its stockholders to benefit from the favorable economic and social results flowing from such action and to assume its rightful share of the responsibilities of corporate citizenship in the community. The contribution thus represents a valid exercise of a judicially well recognized implied corporate power. Moreover, the evidence indicates the extent to which the Directors of other corporations in the United States have reached similar conclusions and engaged in corporate giving. The record demonstrates the marked upward trend in corporate donations since 1940, as well as the average annual donation per corporation in terms of percentage of net income before taxes.⁷⁸ This growth in corporate donations, resulting in an estimated total for the year 1956 of approximately \$500 million, of which \$100 million went to support higher education, has recently been described as being of "revolutionary proportions" and yet inadequate when measured against educational needs.⁷⁹ The trend is further reflected by the latest statistics from the Internal Revenue Service according to which corpora-

⁷⁸ Watson Dep., p. 10.

⁷⁹ Buder, *College Reliance on Industry Rises*, New York Times, Jan. 13, 1957, Sec. 1, p. 1, col. 2.

tions in the year 1953 gave 1.24% of their net income before taxes to philanthropy.⁸⁰

The passage by the Utah Legislature of the donative power statute is, of course, no indication that the power to make the contribution in issue cannot be sustained on common law grounds. The purpose of the Legislature in passing the statute was to confirm the corporate power to donate in broad terms so as to obviate the slow and painful process of individual adjudications, the alternate method of developing the law governing corporate giving, which is not only productive of uncertainty but is a burden on the courts and litigants. The task of looking to the decisional law for precedent is a difficult one because of the paucity of cases and the several factors considered by the courts in resolving each suit, viz.: the type of corporation, the nature of its business, the nature of the charity, the proposed use to which the funds will be appropriated and the relation of such use to the nature of the donor's business. The absence of clear-cut statutory authority presents a corporation with a choice of either declining to discharge its responsibilities and failing to gain the benefits from corporate giving or engaging in donative activities at the risk of expensive litigation. These are the factors which motivate a legislature to enact the statutory power to donate.

Under the applicable decisions and the evidence submitted herein, the implied power of the appellant corporation to make the contribution in issue must be sustained on common law grounds as an implied corporate power to be exercised for the benefit of the corporation and in discharge of its corporate social responsibilities.

⁸⁰ *Statistics of Income for 1953*, Pt. 2, Preliminary Report, pp. 6-11 (U. S. Treasury Dept., Washington, D. C.).

The fact that the appellant is a Utah railroad corporation does not distinguish it from any other corporation with respect to its power to make donations. The issue of whether the contribution in question, or similar contributions, may be charged to operating expense, with some consequent effect upon the users of the appellant's rail service, is irrelevant to the controversy before this Court, and a question to be decided by the many other tribunals having jurisdiction over rates.⁸¹ The sole issues here are whether the corporation possesses the power to make the contribution involved in this case, and other contributions for the public welfare, or for charitable, scientific, religious or educational purposes.

CONCLUSION

The declaratory judgment in favor of the defendants-respondents entered in the District Court upon written findings of fact and conclusions of law should be reversed and declaratory judgment should be entered in favor of the plaintiff-appellant as prayed for in the complaint.

Respectfully submitted,

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⁸¹ See, *Accounting of N. Y. Teleph. Co.*, 188 I. C. C. 83 (1932) concerning the right of N. Y. Telephone Co. to charge a charitable donation to operating expense.

APPENDIX A

LEGISLATION CONFIRMING THE
POWER OF CORPORATIONS TO
ENGAGE IN PHILANTHROPY.*Arkansas*

Acts 1951, No. 69; Ark. Stat. 1947, 64-112 (Supp.).

California

Stats. 1949, C. 997; Cal. Gen. Corp. Code, Sec. 802(g) (Deering).

Colorado

Laws 1947, C. 161; Colo. Rev. Stat. 1953, Sec. 31-1-28.

Connecticut

L. 1953, Act 56; Conn. Gen. Stat. 1536 amended by 1955 Supp. Sec. 2570d.

Delaware

Laws 1941, C. 132, as amended by Laws 1951, S. 397; 8 Del. Code 1953, Sec. 122.

District of Columbia

Pub. L. No. 389, Sec. 4(m), 83rd Cong., 2d Sess. (effective December 6, 1954). D. C. Code Ann. 1951, Sec. 29-904 (Supp.).

Florida

Laws of 1955, C. 29886, Secs. 5-7; Fla. Stat. 1951, Sec. 608.13.

Georgia

Laws 1953, No. 620, p. 121; Ga. Code Ann. Sec. 22-728 (1955 Supp.).

Hawaii

Laws of 1947, Act 104, Hawaii Rev. L. Sec. 8340.01.

Illinois

Laws 1919, p. 312, reenacted by Laws 1933, p. 310, amended by Laws 1949, p. 605; amended by L. 1955, p. 1421; Ill. Rev. Stat. Ann. 1957, C. 32, Sec. 157.5.

Indiana

Acts 1949, C. 194; Burns Ind. Ann. Stat. 1933, 25-11b (1957 Supp.).

Kansas

Laws 1951, C. 214, Sec. 1; Kan. Gen. Stat. Sec. 17-3009 (1955 Supp.).

Kentucky

Acts 1952, C. 94, Sec. 1; Ky. Rev. Stat. 1953, Sec. 271.125(13).

Louisiana

Laws of 1954, Act 638; 3 La. Rev. Stat. Sec. 9:2271.1.

Maine

R. S. 1951, Sec. 15, C. 4; Me. Rev. Stat. 1954, Ch. 53, Sec. 16.

Maryland

Acts 1945, C. 1018 as amended by Acts 1951, C. 135; Flack's Md. Code Ann. 1951, Revised Art. 23, Sec. 9.

Massachusetts

Laws of 1953, C. 415; Mass. Gen. Stat. Ann. C. 155, Sec. 12c (1956 Supp.).

Michigan

Pub. Acts 1953, Act No. 156; Mich. Stat. Ann. Sec.

Minnesota

Session Laws 1949, C. 156; Minn. Rev. Stat. 1953, Sec. 300.66, (1956 Supp.).

Mississippi

Laws 1952, C. 227; Miss. Code Ann. 1942, recompiled, Sec. 5325.7.

Missouri

Laws Mo. 1937, p. 204 as amended by Laws Mo. 1945, p. 696; Vernon's Mo. Stat. Ann. Sec. 351.385.

Nebraska

Laws 1953, L. B. 159; R. R. S. 1943, Sec. 28-1401.

Nevada

Laws of 1953, C. 160; Nev. Rev. Stat. 1957, Sec. 78.070.

New Hampshire

Laws 1953, C. 71; R. S. Ann. 1955, Sec. 294.4.

New Jersey

Laws 1930, C. 105 as amended Laws 1931, C. 190, reenacted by Laws 1949, C. 171; N. J. S. A. Sec. 14:3-13 and Laws 1950, C. 220; N. J. S. A. Secs. 14:3-13.1, 14:3-13.2, 14:3-13.3, 14:3-13.4.

New Mexico

Laws 1951, C. 105; N. M. Stat. Ann. 1953, Sec. 51-2-2.

New York

Laws 1941, C. 343 as amended by Laws 1951, C. 7, C. 388; N. Y. General Corp. Law, Sec. 34 and Laws 1946, C. 448, N. Y. General Corp. Law, Sec. 35.

North Carolina

Session Laws 1945, C. 775; L. 1951, C. 1240; N. C. Gen. Stat. 1943, Sec. 55-26.12.

Ohio

108 O. L. 1245 as amended by 112 O. L. 52 and 121 O. L. 70; Page's Ohio Rev. Gen. Code 1953, Sec. 1701.13.

Oklahoma

Session Laws 1949, p. 114; 18 Okla. Stat. Ann. 1951, Sec. 1.19.

Oregon

Laws 1953, C. 549; Ore. Rev. Stat. 1953, Sec. 57.030.

Pennsylvania

Act of 1945, P. L. 605 as amended by Act of 1947, P. L. 290; 15 P. S. 2852-302(16) (1956 Supp.) and Act of 1945, P. L. 594 as amended by Act of 1947, P. L. 288; 15 P. S. 716 (1956 Supp.).

Rhode Island

P. L. 1952, C. 2919, Sec. 2.

Tennessee

Pub. Acts 1925, C. 59 as amended by Pub. Acts 1943, C. 88; Tenn. Code Ann. 1956, Sec. 48-705.

Texas

Laws of 1955, C. 64; Tex. Bus. Corp. Act 1955, Art. 2.02.

Utah

L. 1955, Ch. 22, p. 39, Sec. 16-2-14(8), Utah Code Anno. (Pk. Pt. 1957).

Vermont

Acts 1953, H. B. 82 as amended by L. 1955, Act 81, Sec. 1.

Virginia

Acts of Assembly 1954, C. 188 as amended by L. 1956, C. 428; Va. Stock Corp. L. 1956, Sec. 13.1-3.

Washington

Laws 1953, C. 213, Sec. 1-3; Wash. Rev. Code, Sec. 23.46.010.

West Virginia

Acts 1949, H. B. 209; W. Va. Code 1949, Sec. 3015(3).

Wisconsin

Laws 1951, C. 731; Wisc. Stat. 1953, Sec. 180.04.

APPENDIX B

September 1, 1950

MEMORANDUM FROM THE COMMITTEE ON
BUSINESS CORPORATIONS OF THE SEC-
TION OF CORPORATION, BANKING AND
BUSINESS LAW OF THE AMERICAN
BAR ASSOCIATION.

Re: Corporate Donations to Charity

Under date of March 1, 1949, the Committee recommended that business corporations be empowered by statute to make charitable donations without regard to direct corporate benefit and without limitation as to amount. The Committee suggested that the following simple form be used in statutes that enumerate the general powers of corporation:

“() To make donations for the public welfare or for charitable, scientific or educational purposes.”

and that the same form be used as a basis for a new section consistent with the style of other statutes that do not enumerate the general powers in a single section.

At that time donations by business corporations, for various purposes and subject to varying limitations, were authorized by statutes in the States of Colorado, Delaware, Illinois, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas and Virginia, in the Territory of Hawaii, and in the National Banking Act. Subsequently statutes of similar import were enacted by the States of California, Indiana, Minnesota, Oklahoma and West Virginia.

It is the view of the Committee that the current corporate practice of making donations to charitable, scientific

and educational institutions and for the public welfare is supported by public opinion and seldom questioned by stockholders. It is also the view of the Committee that a statutory grant of power to legalize the practice should be broad in its terms, that the exercise of the power should be left to the discretion of corporate management, and that there is no logical reason for prescribing a statutory yardstick for measuring the amount that can be donated.

The Committee therefore renews its recommendation, especially for consideration at the next sessions of the legislatures in those States that have not yet given statutory recognition to the subject.

RAY GARRETT, <i>Chairman</i>	(Chicago, Illinois)
RICHARD F. BABCOCK, <i>Secretary</i> ..	(Chicago, Illinois)
GIBBONS BURKE.....	(New Orleans, Louisiana)
WHITNEY CAMPBELL.....	(Chicago, Illinois)
PAUL CARRINGTON.....	(Dallas, Texas)
JOHN SHAW FIELD.....	(Reno, Nevada)
JOHN A. MORRISON.....	(Kansas City, Missouri)
WILLIAM H. NIEMAN.....	(Cincinnati, Ohio)
KURT F. PANTZER.....	(Indianapolis, Indiana)
FRANCIS T. P. PLIMPTON.....	(New York, New York)
WILLARD P. SCOTT.....	(New York, New York)
GEORGE C. SEWARD.....	(New York, New York)
GREENBERRY SIMMONS.....	(Louisville, Kentucky)
CHARLES W. STEADMAN.....	(Cleveland, Ohio)