

1958

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

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Senior & Senior; Attorneys for Defendants-Respondents;

---

### Recommended Citation

Brief of Respondent, *Union Pacific Railroad Co. v. Trustees Inc.*, No. 8762 (Utah Supreme Court, 1958).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2975](https://digitalcommons.law.byu.edu/uofu_sc1/2975)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

UNION PACIFIC RAILROAD  
COMPANY,

*Plaintiff-Appellant,*

— vs. —

TRUSTEES, INC., and  
JEAN C. CRANMER,  
THOMAS D. BRADEN  
and EDWARD G. KNOWLES,  
*Defendants-Respondents.*

Case  
No. 8762

FILED  
JAN 3 - 1958

Supreme Court, Utah

---

## Respondents' Brief

---

SENIOR & SENIOR  
10 Exchange Place  
Salt Lake City, Utah

*Attorneys for  
Defendants-Respondents*

## TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE.....	1
ARGUMENT .....	7
I. Section 16-2-14(8) Utah Code Annotated (1953) did not invest Appellant corporation with power to make the subject contribution.....	7
a. The statutory power to donate is not applicable to Appellant, a pre-existing corporation.....	8
b. The application to Appellant corporation of the statutory power to donate would constitute a fun- damental change in the shareholders' contract embodied in Appellant's charter. Thus, Constitu- tional objections preclude application of the statu- te to Appellant, a pre-existing corporation.....	15
c. The exercise by Appellant's Directors of the asserted power to donate constitutes a violation and empairment of the corporation-stockholder contract, such power not having been given in the articles of incorporation or by the statutes in effect in 1945 when the life of Appellant corpo- ration was extended.....	24
d. The asserted statutory power to donate operates as a deprivation of the shareholders' property without due process of law.....	35
II. The contribution to the Union Pacific Foundation does not represent a valid exercise by Appellant of an implied corporate power.....	38
CONCLUSION .....	51

## TABLE OF AUTHORITIES

### United States Constitution

Article 1, Sec. 10, Cl. 1.....	15
Amendment XIV, Sec. 1.....	35

### Utah Constitution

Article I, Sec. 7 .....	35
Article I, Sec. 18 .....	15
Article XII, Sec. 1 .....	15
Article XII, Sec. 10 .....	38, 49, 50

<b>Utah Statutes</b>	<b>Page</b>
<b>Compiled Laws of Utah, 1907</b>	
Sections 434 and 434x.....	11
Section 2490 .....	12
<b>Compiled Laws of Utah, 1917</b>	
Section 5840.....	12
<b>Revised Statutes of Utah, 1898</b>	
Section 2490 .....	12
<b>Revised Statutes of Utah, 1933</b>	
Section 18-2-44 .....	21
Section 88-2-3 .....	12
<b>Utah Code Annotated, 1943</b>	
Section 88-2-3 .....	12
<b>Utah Code Annotated, 1953</b>	
Section 16-2-14(8) .....	7, 8, 9, 10, 12
Section 16-2-45 .....	21, 23, 24
Section 56-1-1 .....	11
Section 56-1-5 .....	11
Section 68-3-3 .....	12, 37, 44, 50
<b>Utah Session Laws</b>	
L. 1897, Ch. 1, p. 13 .....	11
L. 1901, Ch. 26, p. 20 .....	11
L. 1903, Ch. 94, p. 80 .....	16
L. 1905, Ch. 30, p. 29.....	17
L. 1907, Ch. 93, p. 104 .....	11

Cases	Page
A. P. Smith Manufacturing Co. v. Barlow, 26 N.J. Super. 106, 97 A. 2d 186; aff'd. 13 N. J. 145, 98 A. 2d 581; appeal dismissed 346 U.S. 861 .....	33, 35, 42, 43, 44, 45, 47, 48, 49
Armstrong Cork Co. v. H. A. Meldrum Co., 285 F. 58.....	42
Cowan et al. v. Salt Lake Hardware Co., 118 Utah 300, 221 P. 2d 625 .....	25, 26
Dodge v. Ford Motor Co., 170 N.W. 668, 3 A.L.R. 413 (Mich.)....	37, 50
Erie R. R. Co. v. Williams, 233 U.S. 685, 34 S. Ct. 761.....	31
Fower et al. v. Provo Bench Canal & Irrigation Co. et al., 99 Utah 267, 101 P. 2d 375, cert. denied 313 U.S. 564.....	20, 21
Garey v. St. Joe Mining Co., 32 Utah 497, 91 P. 369.....	16, 17, 20, 23, 24, 25, 26, 28, 34, 37, 40
Greenwood v. Freight Co., 105 U. S. 13.....	28
Home Building & L. Assn. v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231.....	32
Hutton v. West Cork Railway Company, 23 Ch. D. 654.....	41, 46
Keetch v. Cordner, 90 Utah 423, 62 P. 2d 273.....	25
Looker v. Maynard, 179 U.S. 46, 21 S. Ct. 21.....	28
Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S. Ct. 465.....	36
McCarrey v. Utah State Teachers Retirement Board et al., 111 Utah 251, 177 P. 2d 725.....	14
Miller v. The State, 15 Wall. 478.....	26, 27
Peterson v. State Tax Commission, 106 Utah 337, 148 P. 2d 340....	12
Polk v. Mutual Reserve Fund, 207 U.S. 310, 28 S. Ct. 65.....	29
Salt Lake Automobile Co. v. Keith O'Brien Co. et al., 45 Utah 218, 143 P. 1015.....	19, 20
St. Louis, Iron Mountain Ry. v. Paul, 173 U.S. 404, 19 S. Ct. 419	31
Stockholders v. Sterling, 300 U.S. 175, 57 S. Ct. 386.....	30
Summit Range & Livestock Co. v. Rees, 1 U. 2d 195, 265 P. 2d 381 .....	38
Sutton v. New Jersey, 244 U.S. 258, 37 S. Ct. 508.....	32
Veix v. Sixth Ward Assn., 310 U.S. 32, 60 S. Ct. 792.....	30
Weede v. Emma Copper Co., 58 Utah 524, 200 P. 517.....	18
Zabriskie v. The Hackensack and New York Railroad Company, 18 N. J. Eq. 178.....	27, 34
Zion's Savings Bank & Trust Company v. Tropic & East Fork Irrigation Co., 102 Utah 101, 126 P. 2d 1053.....	38

#### Other Authorities

Fletcher Cyclopedia Corporations (Perm. Ed.) Sec. 2939, p. 667	10
Note, 3 A.L.R. 443.....	41

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

UNION PACIFIC RAILROAD  
COMPANY,

*Plaintiff-Appellant,*

— vs. —

TRUSTEES, INC., and  
JEAN C. CRANMER,  
THOMAS D. BRADEN  
and EDWARD G. KNOWLES,

*Defendants-Respondents.*

Case  
No. 8762

---

## Respondents' Brief

---

### STATEMENT OF THE CASE

The fundamental facts of this case may be simply and briefly summarized as follows :

1. The Plaintiff-Appellant, Union Pacific Railroad Company, was organized July 1, 1897, at a time when there was no statutory provision relating to the making of charitable contributions and under articles which made no reference to the making of such contributions.

2. The Appellant corporation was formed, as epitomized in Appellant's Brief (Appl. Br. 3), "for the purpose of operating and maintaining a railroad" and "the business of the corporation is the transportation of freight and passengers by rail and activities incident thereto."

3. On May 13, 1955, Appellant incorporated under the laws of the State of Utah the Union Pacific Railroad Foundation, as a charitable foundation.

4. On May 26, 1955, Appellant's Directors adopted a resolution authorizing a contribution of \$5,000.00 to the Union Pacific Railroad Foundation, which for purposes of this proceeding, and the prevailing circumstances, may be conceded to be a charitable donation.

5. Defendants-Respondents challenged the authority of Appellant's Directors to use corporate funds in the making of such a donation, and Appellant brought this suit for a Declaratory Judgment as to said Director's power to use corporate funds in the making of such a donation. The trial court upheld Respondents' challenge and found on all issues in favor of Respondents and against Appellant.

Respondents contend that the foregoing summary of facts constitutes all of the salient points involved in this controversy and maintain that Appellant's so-called "Statement of the Case" (Appl. Br. 3-12) insofar as it contains any material not included in the above summary is argumentative surplusage and subject to the eviden-

tiary objections of immateriality and irrelevancy. Objections to this effect were made at the time such additional material contained in Appellant's "Statement of the Case" was offered in evidence (R. 51).

The issue involved in this case is whether it is within the powers of the Appellant corporation to make the contribution involved in this case or similar contributions, and not whether this contribution of the Appellant corporation was intended to serve or would tend to serve the admittedly laudable objectives of charitable giving. Accordingly, Respondents are willing to concede that the eleemosynary action taken by the Directors of the Appellant would have been worthy of commendation had they been donating their own funds rather than the corporate income or assets. If the owners of the corporation, its stockholders, had agreed in their articles to permit such contributions or did now agree by amending such articles or ratifying such acts, there would be no dispute. But such is not the case. Respondents, as some of the owners of Appellant corporation, contest the right and authority of Appellant's Directors to make such contributions upon the ground that they cannot be justified on legal principles, notwithstanding the merits of charity and the national importance of education. To permit said Directors to make such contribution and similar contributions is to disregard the contract between the Appellant corporation and its stockholder-owners.

Respondents contend that all of the evidence introduced by way of platitudes as to the public service aspects



(2) of giving have nothing to do with legal issues involved in this matter, which issues relate to the purposes of Appellant corporation. Respondents further contend that all of said evidentiary matter could more properly be presented at a meeting of the owners of Appellant corporation to persuade them to amend the articles of contract so as to permit the subject contribution to be made without the contest on constitutional and other grounds of the right of the Directors to use income and assets of the Appellant corporation for donations to good causes. Can it be doubted that the stockholders, if so perused, would circumscribe their grant of authority by limitations other than the Directors' discretion as what share of the corporate assets would constitute a "reasonable share" to be given, as Appellant asserts, to preserve "a favorable economic and social environment"?

(3) Respondents submit that to uphold the action of the Directors in making such contribution would effectively modify the contract between the Appellant corporation and the shareholders which originally was formed for the purpose of operating and maintaining a railroad, and for the transportation of freight and passengers by rail and activities incident thereto into a contract including the foregoing purposes but adding thereto "the giving away of corporate assets." In other words the contract which originally was to make a profit for the owners would be changed into a contract to make a profit and give to charities such part thereof as the Directors specify. Is it not possible that the stockholders as recipients of dividends would prefer to select the objects and be praised for their

individual acts of charity made possible by greater dividends?

Appellant's "Statement of the Case," it is submitted, contains a basic *non sequitur*. Appellant reasons that: (1) To make a charitable contribution is good, in fact, plausibly needful for society or some elements thereof, (2) Appellant's Directors have made a charitable contribution; therefore Appellant's Directors have authority to make such charitable contribution. Assuming the major premise of the syllogism and conceding the minor premise, it, nonetheless, does not follow that the action of Appellant's Directors in the making of a charitable contribution was within the scope of their legal authority.

Before discussing the real issues which this case presents, and those issues are legal issues, it appears appropriate to comment on certain matters which may relate to the "public interest" involved in the making of donations in view of Appellant's emphasis upon "public interest."

Appellant's witnesses asserted their faith in and their desire to maintain our free enterprise system, a faith and desire shared by Respondents. A basic part of that system is investment for profit. Another basic element of that system is the integrity of contractual relationships.

Much was said by Appellant's witnesses as to the importance of education and public welfare in our free enterprise system. However, in the field of education, our

tax supported public institutions are the very foundation of education. Much state and federal tax revenue goes to other public welfare functions of government. The record in this case amply shows that one of the inducing factors for gifts to the Union Pacific Foundation would be that the corporate income so given would not be subjected to taxation. The major portion of the donated funds would, except for donation, have become tax revenue, the use of which would serve the public interest.

Mr. John H. Watson, one of Appellant's witnesses, stated (Appl. Br. 6 and 40) that corporate gifts now aggregate over \$500 million annually. A conservative estimate would be that such donations result in a reduction of over a quarter of a billion dollars annually in tax revenues from corporations. Had this corporate income not been so donated and had the funds remaining after the payment of corporate taxes been distributed to the stockholders as dividends, there would have been still further tax revenue. Reduction in tax revenue means either reduced funds for education, welfare or other functions of government or new or higher taxes to replace the lost revenue. New taxes or higher taxes mean that the burden of the gifts is in substantial part imposed upon others, including corporation stockholders.

Appellant is a public utility whose rates are fixed by regulation so as to produce a fair return upon its investment. Appellant has sought and is seeking rate increases to that end. Appellant states (Appl. Br. 50) that the issue of whether the contribution in question or similar contri-

butions may be charged to operating expense with some consequent effect upon the users of Appellant's rail service is irrelevant. Respondents concede that irrelevancy as far as the legal issues in this case are concerned but maintain that such circumstance along with other circumstances are not irrelevant to the portrayal which Appellant would make as to the public interest in, and fundamental good of, the giving away of corporate income. If railroad rates are to be fixed to give a fair return on the investment, then does it not follow that the stockholders of Appellant corporation, who are the real investors, are entitled to that fair return upon their investments. 7)

Appellant states that a corporation should bear its reasonable share of the cost of preserving a favorable economic and social environment. The share of corporate income which is paid in state and federal taxes represents in and of itself a considerable contribution toward our national economic and social environment. 2)

## ARGUMENT

It will be the purpose of Respondents hereinafter to parallel, insofar as feasible, the organization of the Brief of Appellant.

### I

*Section 16-2-14(8) Utah Code Annotated (1953) did not invest Appellant corporation with power to make the subject contribution.*

a. *The statutory power to donate is not applicable to Appellant, a pre-existing corporation.*

Appellant's discussion under I(a) at pages 13-21 of its Brief involves and must necessarily involve the proposition that Section 16-2-14(8) was intended to have and does have and could constitutionally have restrospective application to Appellant corporation which was formed long prior to such 1955 enactment.

Appellant points out (Appl. Br. 13) that in addition to Utah thirty-eight states, the District of Columbia and Hawaii have enacted statutes granting to corporations power to engage in philanthropy. Appellant also points out that in seventeen of these states the power was granted without limitation as to amount. It would thus appear that the majority of these states passing such enactments have prescribed limitations and have not agreed with the "blank check" recommendation of the American Bar Association committee to which Appellant refers.

Appellant also contends (Appl. Br. 42-50) that the Utah statutory enactment was but a legislative recognition of an inherent and implied corporate power. If such be the case, it is strange that these many states have felt legislation to be necessary and if such be the case, then it would seem to follow that the twenty-three instances where the statutes prescribe limitations should be said to be enactments in restriction of otherwise existing corporate power and not acknowledgments thereof.

The answer to these absurdities is that no such implied corporate power exists.

Although there are these numerous states where enactments have been passed to "legalize the practice" of corporate giving, as the American Bar Association committee report states, Appellant points to only one state, New Jersey, where the power was held to apply retrospectively to a pre-existing corporation and in the decision in that case, which will hereinafter be discussed at some length, the court held that under the law of New Jersey the power existed independently of the statute.

Completely understandable is the justification for a broad and unlimited power to donate when, but only when, a statute is given prospective application for under such circumstances it lies within the power of the incorporators and stockholders to prescribe in their articles of incorporation those limitations and restrictions which they deem to be advisable and proper in their stockholder-corporation and stockholder *inter se* contract.

The language of the Section 16-2-14(8) specifying corporate power

"To make donations for the public welfare or for charitable, scientific, religious or educational purposes"

is wholly lacking in any declaration that it is to be applied to pre-existing corporations just as its broad language is silent and expresses no limitation whatsoever which would preclude directors from making donations of

10 per cent or 50 per cent or any other per cent of the corporate income or assets.

Appellant states (Appl. Br. 15) that "every exercise of the donative power is subject to the rule of 'reasonable business judgment.'" What is the standard by which "business judgment" is to be measured? If it is to have any meaning whatsoever it must mean that any action taken by the corporation must have a reasonable and reasonably identifiable relation to the furtherance and accomplishment of the objects and purposes for which the corporation was formed. It has been the application of this very standard of "reasonable business judgment" which has been the basis for the recognition of the rule that

"A gift of its property by a corporation not created for charitable purposes is in violation of the rights of its stockholders and is ultra vires however worthy of encouragement or aid the object of the gift may be." Fletcher Cyclopedia Corporations Perm. Ed. Section 2939, p. 667.

If it be said that what Appellant refers to as the "donative power" has become, as a result of the enactment of Section 16-2-14(8), one of the corporate objects and purposes, then wherein would be found the limitation upon an enthusiastic sponsoring of that newly added corporate object of charity and general (not stockholder) welfare? If as Appellant contends that statutory enactment can convert a business corporation into a partly business and partly eleemosynary corporation, and if such a conversion does not constitute a fundamental change in the

corporate objects and purposes as Appellant appears to contend, then what could constitute a fundamental change.

Appellant points out (Appl. Br. 16-18) that Appellant corporation was originally incorporated under the Act of January 22, 1897 (L. 1897, Ch. 1, p. 13) and refers to an enactment (L. 1901, Ch. 26) revising the Utah statutes as to railroad corporations and to Sections 434 and 434x of the Compiled Laws of Utah 1907 which have, in substance, been carried forward into Sections 56-1-5 and 56-1-1 of Utah Code Annotated, 1953. In reference to these laws Appellant states

“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 association and they thus form a part of the contract between the appellant and its stockholders embodied in such articles.”

Respondents fully agree with the premise that statutes in force at the time of an extension of corporate existence become a part of the corporation-stockholder contract at that time. It appears to be Appellant’s contention that because the Act (L. 1907, Ch. 93) declared an express legislative intent to give to that particular enactment retrospective application and because that specific railroad corporation enactment has been carried forward into present law, the legislative intent so there expressed in 1907 is to be carried over as constituting an expression of legislative intent in respect to a 1955 enactment modifying the general corporation laws. If there could be, and Respondents submit that there cannot be, any merit in



such a contention then it would appear that Appellant must contend that Section 16-2-14(8) should be construed as having a retrospective effect in relation to railroad corporations because of the provision in the said railroad corporation act although there is no justification whatever for giving any such a retrospective effect to that section as to corporations other than railroad corporations.

Our Utah Legislature has left no room for doubt as to the manner in which statutes are to be construed in relation to prospective or retrospective application. Section 68-3-3 U.C.A., 1953, definitively and concisely states,

“No part of these revised statutes is retroactive, unless expressly so declared.”

The same language is found in the Utah Code Annotated, 1943, Section 88-2-3; and in the Revised Statutes of Utah, 1933, Section 88-2-3; and in the Compiled Laws of Utah, 1917, Section 5840; and in the Compiled Laws of Utah, 1907, Section 2490; and in the Revised Statutes of Utah 1898, Section 2490.

The case of *Petersen v. State Tax Commission*, 106 Utah 337, 148 P. 2d 340 (1944) involved a question of whether a statute amending a section of the 1943 Utah Code Annotated was to be applied retroactively. The appellant therein sought, through reference to another existing section of the same title of the Code, to attribute to the Legislature an intention to give retrospective application to the amendment in question — just as in the case at bar Appellant seeks to attribute such an intention to the Legislature by reason of other existing statu-

tory provisions. This Court rejected the contention and, after quoting our Utah Code provision that:

“No part of these revised statutes is retroactive, unless expressly so declared”

stated (106 Utah 339-341, 148 P. 2d 341-342):

“That this court is committed to the general rule can not be questioned, for in the case of *Mercur Gold Mining & Milling Co. v. Spry*, County Collector, 16 Utah 222, 52 P. 382, 384, Judge Miner said:

‘Constitutions, as well as statutes, should operate prospectively only, unless the words employed show a clear intention that they should have a retroactive effect. This rule of construction should always be adhered to, unless there be something on the face of the statute putting it beyond doubt that the legislature meant it to operate retrospectively, *Cooley, Const. Lim.*, p. 73; *Suth. St. Const.*, §§ 463-465.’

\* \* \* \* \*

“Had the legislature intended Sec. 80-12-7, Laws of Utah 1943, to have a retroactive effect, it is reasonable to suppose they would have made such a declaration in the amendment. The force of this is more apparent in view of the holding by this court in the case above cited, and by reason of Sec. 88-2-3, U.C.A. 1943. In view of the decision of this court heretofore mentioned and the existence of the statute cited above, both of which were in existence when this enactment was passed by the legislature, and the failure of that body to expressly declare in said enactment that it should have a retroactive application, can it be said without doubt and conjecture what the legislature intended respecting the retroactive effect of the amendment in question?

“We are forced to the conclusion that the intention of the legislature is doubtful and that Judge Miner’s pronouncement of the law, above mentioned, is applicable to the situation before us. With this in mind and the positive wording of Sec. 88-2-3, U.C.A. 1943, the general rule of construction of statutes must apply and we come to the conclusion that Sec. 80-12-7, Laws of Utah 1943, is not retroactive, but was intended by the legislature to be effective on and after the 11th day of May, 1943, and only those estates whose creators die on and after said date are entitled to the deduction provided therein.”

In *McCarrey v. Utah State Teachers Retirement Board et al*, 177 P. 2d 725, 726; 111 Utah 251, 253-254 (1947), this Court stated:

“Ordinarily legislative enactments are intended to operate prospectively and not retrospectively. As said in 50 Am. Jr. 494, Statutes, Section 478: ‘The question whether a statute operates retrospectively, or prospectively only, is one of legislative intent. In determining such intent, the courts have evolved a strict rule of construction against a retrospective operation, and indulge in the presumption that the legislature intended statutes, or amendments thereof, enacted by it to operate prospectively only, and not retroactively. Indeed, the general rule is that they are to be so construed, where they are susceptible of such interpretation and the intention of the legislature can be satisfied thereby, where such interpretation does not produce results which the legislature may be presumed not to have intended, and where the intention of the legislature to make the statute retroactive is not stated in express terms, or clearly, explicitly, positively, unequivocally, unmistakably, and unambiguously shown by neces-

sary implication or terms which permit no other meaning to be annexed to them, preclude all question in regard thereto, and leave no reasonable doubt thereof. Ordinarily, an intention to give a statute a retroactive operation will not be inferred. If it is doubtful whether the statute or amendment was intended to operate retrospectively, the doubt would be resolved against such operation. \* \* \* ”

Appellant's argument as to the applicability of the 1955 enactment to the Union Pacific Railroad Company does violence to the rule of construction which this Court has announced.

The very doubts as to the constitutionality of any attempt to apply the statute retroactively (which doubts were in part the basis of this lawsuit) further argue against attributing to the legislature an intention that the enactment have retrospective application.

- b. *The application to Appellant corporation of the statutory power to donate would constitute a fundamental change in the shareholders' contract embodied in Appellant's charter. Thus, Constitutional objections (U. S. Const., Art. I, Sec. 10, Cl. 1; Utah Const., Art. I, Sec. 18) preclude application of the statute to Appellant, a pre-existing corporation.*

The tri-partite nature of the contract embodied in a corporate charter ([1] between state and corporation, [2] between corporation and its shareholders, and [3] between shareholders *inter se*) and the historical background of Section 1 of Article XII of the Utah Constitu-

tion, relating to the rights thereunder reserved to the legislature to alter, amend or repeal laws relating to corporations, were discussed at length by this Court in *Garey v. St. Joe Mining Co.*, 32 Utah 497, 91 P. 367 (1907).

That case is the only case which has decided the question of the scope of the reserved power of the legislature under Article XII of the Utah Constitution, although several later Utah cases made reference to such reserved power without having to base decision thereupon. The decision in each such later case was based upon the fact that the statute involved was in effect when the corporate charter was granted, or extended, and that such statute therefore constituted a part of the corporation-stockholder contract.

The decision in the *Garey* case (the thoroughness of the consideration of which is amply demonstrated in the decision on appeal written by Justice Straup and the decision on rehearing written by Justice Frick) clearly and directly sets out that the reserved power of the Utah legislature "is not without limit" (32 Utah 523, 91 P. 378) and that the Court's holding "is supported by the great weight of authority and is founded upon well established legal principles." (32 Utah 523, 91 P. 378.) The Utah law in effect in 1897, when *St. Joe Mining Co.*, the company involved in the *Garey* case, was incorporated, prohibited amendments in corporate articles to make non-assessable stock assessable "without the consent of all the stockholders in writing." Subsequently, in 1903 (L. 1903, Ch. 94, p. 80) the Utah Legislature changed that law

to permit such an amendment by a vote of "at least two-thirds of the outstanding capital stock," and in 1905 (L. 1905, Ch. 30, p. 29) the Legislature changed the required vote to "a majority of the outstanding stock." It can hardly be doubted that the Legislature in making these changes had concluded that broad public interest warranted modification of the Utah corporation laws by liberalizing the right of charter amendment. Unfounded is Appellant's assertion (Appl. Br. 35) that said statutory enactments "did not purport to be for the benefit of the public." It was urged in the *Garey* case that there was a public interest in "having the resources of the state developed" and "in promulgating wholesome laws" and, toward those ends, of permitting assessments in view of protection which might thereby be afforded to the corporate enterprise and to stockholders and creditors — considerations which, among others, doubtless induced the legislatures to adopt the liberalizing amendments. However, in holding that the amendments did not apply to pre-existing corporations, the Court, in its decision on rehearing, said *inter alia*:

"We held that the Legislature, under the reservation, may alter or amend the contract with reference to the state and in which it is interested, but that it may not make a material or fundamental change of the contract which alone concerns the corporation and its members." (32 Utah 523, 91 P. 378)

\* \* \*

"If any one thing pertinent to the question under consideration is well settled by the authorities, it is that the power which may be exercised under the reservation is not without limit, and that there

is a strong tendency in the decisions to limit the power of the Legislature to amend the charter under the reservation." (32 Utah 523, 91 P. 378)

\* \* \*

"It is of the utmost importance in this connection to keep in mind the fact that this limitation is not merely to prevent the confiscation of property, or to affect or destroy vested rights without due process of law (as these matters are controlled by other constitutional provisions), but the limitation is expressly based upon the narrower ground, namely, the impairment of contractual rights and obligations." (32 Utah 524, 91 P. 379)

Appellant asserts (Appl. Br. 24) that investing a corporation with power to use corporate income and assets "to make donations for the public welfare or for charitable, scientific, religious or for educational purposes" is not a fundamental change in the corporate charter. Appellant cites no supporting authority for this assertion. It is indeed strange that the Utah Legislature (and 40 other legislatures) would have passed a special enactment to add that give-away power to the statutory enumeration of permissible exercises of corporate power if there was not considered to be some basic and fundamental alteration through its addition. An analogous observation is made in *Weede v. Emma Copper Co.*, 58 Utah 524 at 531, 200 P. 517 at 520 (1921).

Appellant's argument (Appl. Br. 24-27) as to the right of stockholders to amend articles of incorporation so as to add to the corporate purposes or extend the corporate powers is wholly without relevancy since the Union Pacific stockholders have not acted to add to

Appellant's purposes eleemosynary activity or to extend the corporate powers and business to the giving away of corporate assets. Appellant's stockholders have not amended Appellant's articles to include among its objects the formation and financing, with Railroad Company funds, of "a company-established charitable foundation." Just how fundamentally the objects and purposes of the Foundation depart from those of Appellant will stand out by comparison of the respective articles. Appellant contends that, without stockholder action but with corporate funds, the financing of the Foundation is within the scope of the Union Pacific corporation - stockholder contract.

The question in this case is not what the stockholders can do through amendment of the corporation-stockholder contract but, rather, whether the Legislature by its 1955 enactment, and independent of stockholder action, intended to retrospectively alter the corporation-stockholder contract, and whether, if any such unexpressed intention be imputed to the Legislature, the legislative attempt to alter the corporation-stockholder contract could be constitutional.

Appellant cites (Appl. Br. 27) *Salt Lake City Automobile Co. v. Keith O'Brien Co., et al*, 45 Utah 218, 143 P. 1015 (1914), in support of its contention. That case involved the validity of an amendment of the Automobile Company's articles of incorporation increasing the capitalization and providing for preferred stock. The Court pointed out that the section of the Utah corporation law



respecting the authority to amend articles of incorporation was "in force at the time the company was organized" and that the section of the Utah corporation law conferring authority upon corporations to classify their capital stock "was in force when the company was organized," and stated:

"It would seem, therefore, that not only is the Legislature by the Constitution authorized to amend all laws relating to corporations within the limits pointed out by this court in *Garey v. St. Joe Mining Co.*, 32 Utah 497, 91 Pac. 369, 12 L.R.A. (N.S.) 554, but the right to amend the articles of incorporation by the majority of the stockholders, with the exceptions stated in section 338, *supra*, is expressly given. *That section is as much a part of the articles of incorporation as though it were specifically referred to or set forth at large therein.*" (45 Utah 222, 143 P. 1016-17) (Emphasis supplied)

It is clear that in the *Salt Lake Automobile Co.* case there was not involved (as there is in the case at bar and as there was in the *Garey* case) an attempt to give retrospective application to a legislative modification of the corporation law. It is likewise clear that the Court recognized that any legislative amendment of the corporation laws could only be sustained "within the limits pointed out by" this Court in the *Garey* case.

Appellant cites (Appl. Br. 25, 27) *Fower v. Provo Bench Canal & Irrigation Co.*, 99 Utah 267, 101 P. 2d 375 (1940). Said case has no relevancy to the issues in this case. The corporate life of the Irrigation Company involved in that case would have expired in 1937 except for

an extension of the corporate life effected through an amendment of its articles adopted by its stockholders in 1937. Referring to these circumstances, the Court said:

“Hence, the laws in force at the time of the extension of the corporate life (1937) formed a part of the contract between the corporation and its stockholders.” (99 Utah 272, 101 P. 2d 377)

The question involved in the *Flower* case was the validity of certain amendments to the articles of incorporation of the Irrigation Company which had been adapted by its stockholders after 1937 and which empowered the Irrigation Company to acquire additional water distribution facilities, to enter into water acquisition contracts, to encumber its property, to pay its debts, to purchase stock in other corporations, to purchase its own stock and to assess its stock for corporate purposes.

The Court pointed out that Section 18-2-44, R.S.U. 1933 (now Section 16-2-45, U.C.A. 1953, referred to in Appellant's Brief page 25) was in effect when the corporate life was extended as above mentioned, and as to the controversial amendments of the articles stated:

“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 \* \* \* ” (99 Utah 274, 101 P. 2d 378)

That the case had no application whatever to the question of an attempt, such as is involved in the instant

case, to give retrospective effect to legislation is clearly set forth in the following statement by the Court:

“The holding hereinabove to the effect that the laws in force in 1937 at the time of the extension of the corporate life formed a part of the contract between the corporation and its stockholders renders unnecessary a discussion of respondents’ contention, and the lower court’s conclusion, that the amendments to the articles constitute an impairment of contract in violation of Article I, Section 18, of the Constitution of the state of Utah, and of Article I, Section 10, of the Constitution of the United States. No contention is made that legislation subsequent to 1937 is involved in this controversy.” (99 Utah 278, 101 P. 2d 380)

Novel and unsupported is Appellant’s contention (Appl. Br. 24) that power to make gifts “could have been engrafted on the Appellant’s charter by shareholder amendment” and that therefore it could be inserted in the charter by “legislative amendment” and without stockholder action.

Appellant’s proposition (Appl. Br. 27) is in substance this:

(1) Since Appellant’s Articles of Association authorized extension of the corporate powers through the filing of amended Articles of Association; and

(2) Since the Utah statutes (which became a part of Appellant’s charter in 1945 when its corporate existence was extended) contain broad provisions

(Section 16-2-45) permitting amendments by action of a majority of the stockholders; therefore (3) It follows that the Legislature can itself insert into Appellant's charter any new powers which its stockholders could add through their own and voluntary action.

Said Section 16-2-45 related solely to stockholder amendments of articles of incorporation and the fact that the 1905 legislature, in providing an exception to the requirement of unanimous consent for changes in corporate purposes, used the rather awkward medium of stating that certain permitted changes should not be deemed changes cannot alter the fact that that section applies only to stockholder amendments and that, under any other circumstances, including legislative action, a change is a change. In each Utah case where an amendment to corporate articles has been upheld under the provisions of Section 16-2-45, or its predecessor section, the provisions permitting the amendment were in effect when the corporate charter was granted or extended and were therefore a part of the corporation-stockholder contract. The addition of the power to donate would represent a change and alteration in the corporation-stockholder contract of the Union Pacific Railroad Company.

In the *Garey* case this Court held that an amendment of corporate articles to provide power to assess corporate stock could only be made with the unanimous consent of the stockholders required under the law in effect when the company was incorporated; and that subsequent leg-

islative action could not obviate the necessity of consent by all of the stockholders. Exercise of the power of amendment of corporate articles permitted under the present Section 16-2-45 requires consent and approval by a majority of the stockholders yet Appellant contends that the Legislature may not only retrospectively obviate the necessity for that consent but may itself write into the articles an amendment without the consent of any of the stockholders.

Appellant's witnesses testified that indirect benefits would accrue to Appellant from philanthropic donations of corporate funds since such contributions would contribute to the preservation of what the Appellant refers to as "a favorable economic and social environment." In the *Garey* case, it was claimed that the corporation would benefit through an assessment and that its creditors, stockholders and the public would benefit from the financial fortification of the corporation. Nevertheless, this Court declared that the integrity of the corporation-stockholder contract could not be impaired through retrospective application of legislation to a pre-existing corporation.

- c. *The exercise by Appellant's Directors of the asserted power to donate constitutes a violation and impairment of the corporation-stockholder contract, such power not having been given in the articles of incorporation or by the statutes in effect in 1945 when the life of Appellant corporation was extended.*

COW  
RESERVED  
POWER  
CLASS OF EQUITY

In its effort to avoid the controlling effect of this Court's decision in the *Garey* case Appellant asserts (Appl. Br. 29) that this Court in *Cowan et al v. Salt Lake Hardware Co.*, 118 Utah 300, 221 P. 2d 625 (1950), recognized "the broad scope of the state's reserved power under the Massachusetts rule." Respondents submit that the *Cowan* case does not mention the *Garey* case or indicate any departure from its rule. Neither does the *Cowan* case make any reference to any "Massachusetts rule."

The *Cowan* case involved an amendment of the articles of Salt Lake Hardware Co. whereby non-callable preferred stock was made callable. At the time Salt Lake Hardware Co. was incorporated the Utah statutes permitted amendment by a vote of "at least two-thirds of the outstanding capital stock." Subsequently, but prior to the amendment there in question, the statute was modified to permit amendment by "at least a majority of the outstanding stock." However, the Court pointed out that the amendment in question was made "with more than two-thirds of its outstanding stock voting in its favor."

Immediately following the quotation from the *Cowan* case decision set out on pages 29-30 of Appellant's Brief, this Court in said decision (quoting from *Keetch v. Corder*, 90 Utah 423, 62 P. 2d 273, 275) reasserted the established principle that:

"The law which was in existence at the time the articles of agreement were entered into became a part thereof." (118 Utah 304, 221 P. 2d 627)

In its quotation from the *Cowan* case, Appellant gave italicized emphasis to the following sentence:

“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 as to the relationship between the state and the corporation, but pertain to the rights between the corporation and its stockholders.” (118 Utah 304, 221 P. 2d 627)

But there is nothing in the *Cowan* case, including the last above quoted extract from its decision, which is in conflict with the rule of the *Garey* case wherein this Court said:

“Is it an answer to say that, the reserved power of the state being general, therefore it applies to all changes of every kind and nature that may affect the powers, rights and privileges of the corporation and of the stockholders with regard to their relation with one another? The law no doubt can be changed with regard to all these matters; but it does not follow that it may be done so as to affect past transactions or vested rights.” (32 Utah 527, 91 P. 380) (Emphasis supplied)

This Court in the *Cowan* case did not and had no occasion to include in its statement any reference to retrospective application of legislation for the simple reason that it was not confronted with any attempt to give retrospective application to any statute.

In support of its contention Appellant cites (Appl. Br. 36) *Miller v. The State*, 15 Wall 478 (1873). That case involved a special statute which authorized the City of

Rochester to invest \$300,000 in stock of Genesee Valley Railroad Company with provision that the City was to appoint one director for each \$75,000 so invested. It was contemplated that others who had subscribed \$977,500 would elect the remaining nine of the specified thirteen directors. Such other subscribers defaulted on their subscriptions to the extent that only \$255,200 was subscribed by them. The legislature then amended such special statute to provide for City appointment of one director for each \$42,855.57 subscribed and paid by the City.

The United States Supreme Court pointed out in the *Miller* case that the result of the amendment was only to carry into effect the purpose of the original legislation and that the proportion of City directors and City contribution to total directors and total contribution had not been altered by the subject legislation. Said Court further stated in the *Miller* case with respect to the reserved power of the legislature that:

“Such a reservation, it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, *or to divert the fund of the donors to any new use inconsistent with the intent and purpose of the charter*, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract.” (15 Wall 498) (Emphasis supplied)

In support of this statement the said Court cited (among other authorities) the *Zabriskie* case which this Court cited in the *Garey* case.



Appellant also cites (Appl. Br. 36) *Looker v. Maynard*, 179 U. S. 46, 21 S. Ct. 21 (1900). It should be enough to say that this Court in the *Garey* case found nothing inconsistent between the rule of the *Looker* case and its own decision in the *Garey* case, because in the *Garey* case it cited and relied in part upon the *Looker* case (32 Utah 510, 91 P. 373).

Appellant cites (Appl. Br. 36) *Greenwood v. Freight Co.*, 105 U. S. 13 (1881). That case involved a special statute expressly repealing a charter (and therefore relating expressly to the state-corporation contract) which had been granted to Marginal Freight Railroad Co. by an earlier special statute. At the time such earlier special grant of corporate existence had been made the Massachusetts statute expressly provided that:

“ ‘Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature.’ ” (105 U. S. 17)

The United States Supreme Court in the *Greenwood* case said:

“ ‘This expression, ‘the pleasure of the legislature,’ is significant, and is not found in many of the similar statutes in other States.

“ ‘This statute having been the settled law of Massachusetts, and representing her policy on an important subject for nearly fifty years before the incorporation of the Marginal Company, we cannot doubt the authority of the legislature of Massachusetts to *repeal that charter*. Nor is this serious-

ly questioned by counsel for appellant; and it may, therefore, be assumed that if the repealing clause of the act of May 6, 1872, stood alone, its validity must be conceded." (105 U. S. 17-18) (Emphasis supplied)

Said Court then discussed at some length the provision of said special 1872 statute which related to the taking of possession of the trackage of the Company whose charter had been so repealed upon payment of compensation therefor.

Appellant cites (Appl. Br. 36) *Polk v. Mutual Reserve Fund*, 207 U. S. 310, 28 S. Ct. 65 (1907). In that case an insurance company, incorporated upon a "co-operative or assessment plan," made a reorganization under an insurance company act which permitted it to write life insurance of every kind. The complainants were holders of policies issued prior to such reorganization and as such were members of the association.

In holding that constitutional rights were not violated in the amendment the United States Supreme Court said:

"The corporation was not changed to a stock, but continued as a mutual, company. The change of name cannot control the significance of these facts. We answer this and the other questions upon the assumption, therefore, that the old corporation was still in existence, under a new name, and with added powers, but with unchanged membership, *and bound to perform all its existing obligations. Upon this view it is impossible to say that any of the contract obligations of the association to the*

*complainants have been impaired by the reorganization.*” (28 S. Ct. 70) (Emphasis supplied)

That case dealt with rights and obligations under insurance policies which were not altered by the amendment there in question.

Appellant cites (Appl. Br. 36) *Stockholders v. Sterling*, 300 U. S. 175, 57 S. Ct. 386 (1937). That case involved an amendment in a banking corporation act imposing a liability upon stockholders and directors. The act had as a part of the very sentence which imposed the liability the specific “condition that this Act and every part of it may be altered from time to time, or repealed by the legislature.” As to the question of whether the legislative amendment was unconstitutional the United States Supreme Court said:

“The answer must be ‘no,’ and this for two reasons, first, because the changes are directed to the implementing remedies rather than the substantive liability, and, second, because a change of substantive liability was made permissible by the reservation of a power of alteration or repeal.” (57 S. Ct. 389)

Appellant cites (Appl. Br. 36) *Veix v. Sixth Ward Assoc.*, 310 U. S. 32, 60 S. Ct. 792 (1940). That case involved a legislative amendment of an enactment expressly relating to withdrawal of shares in a building and loan association. The United States Supreme Court said:

“We are dealing here with financial institutions of major importance to the credit system of the State.

“With institutions of such importance to its economy, the State retains police powers adequate to authorize the enactment of statutes regulating the withdrawal of shares.” (60 S. Ct. 794)

Appellant cites (Appl. Br. 37) *St. Louis, Iron Mountain & Railway v. Paul*, 173 U. S. 404, 19 S. Ct. 419 (1899). This is another case involving a specific enactment in regulation of a public utility. This case involved an act which required (under certain penalties) that a discharged railroad employee be paid, on the day of discharge, unpaid wages then earned. Mere statement of the case should show its inapplicability. The United States Supreme Court said:

“This act was purely prospective in its operation.”

\* \* \*

“In this case the act was passed ‘for the protection of servants and employees of railroads,’ and was upheld as an amendment of railroad charters, such exercise of the power reserved being justified on public considerations, and a duty was specially imposed, for the failure to discharge which the penalty was inflicted.” (19 S. Ct. 421)

*Erie RR Co. v. Williams*, 233 U. S. 685, 34 S. Ct. 761 (1914), (Appl. Br. 37) is another case involving railroad regulation in which the Court upheld a statute which required semi-monthly payment of railroad employees. In this case the Court said, “Plaintiff now pays monthly. The extent of its grievance, therefore, is two payments a month instead of one.” The Court concluded that considerations of public interest permitted the state, in the exer-

cise of its police and reserve powers, to impose this railway labor regulation.

In *Sutton v. New Jersey*, 244 U. S. 258, 37 S. Ct. 508 (1917), which Appellant cites in its Brief at page 37, the question presented was the validity of a statute requiring street railway companies to grant free transportation to police officers while engaged in the performance of their public duties. The Court held that the act was not "an arbitrary or unreasonable exercise of the police power" and concluded its opinion with the following statement:

"The statute is broad in scope, extending also to all 'uniformed public officers;' but the court below expressly confined its decision to the case presented, sustaining the law 'in so far as it applies to police officers;' and our decision is likewise so limited." (37 S. Ct. 508)

How can that case dealing with an express obligation imposed "upon street-using corporations" have relevancy to the issues in the case at bar?

Also relied upon by Appellant (Appl. Br. 37) is *Home Building & Loan Assoc. v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231 (1934). That case involved the constitutionality of the Minnesota Mortgage Moratorium Law which was "temporary in operation" and "limited to the exigency which called it forth." The statute applied to natural persons as well as to corporations and in no way involved state reserved powers in reference to amendment of corporation laws. The decision relates to state

retention or “reservation of essential elements of sovereignty” under which the state possesses “authority to safeguard the vital interests of its people.” In upholding the legislation the Court said:

“An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community.”

The Court expressly recognized the existence of an emergency as the foundation for the legislation and said:

“It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends.” (54 S. Ct. 244)

It is of interest to note the extent to which the cases upon which Appellant relies relate to the continued existence or regulation of corporations dealing directly with the public interest. Said cases have reference to public utility franchises or to state regulation of insurance, banking or other financial institutions where there was a direct and clear interest in the protection of the public through the enfranchisement, disenfranchisement or regulatory aspects of the legislation.

Throughout Appellant’s Brief repeated reference is made to *A. P. Smith Manufacturing Co. v. Barlow*, 13 N.J. 145, 98 A. 2d 581 (1953). That repeated reference is understandable for the *Smith* case represents a departure from established law and such a departure is necessary to the sustaining of Appellant’s contentions. That the *Smith* case did represent a departure from established law in

general, and from established New Jersey law in particular, is clear from the decision of the New Jersey Supreme Court wherein it is said that “the later cases in New Jersey have not disavowed the doctrine of the *Zabriskie* case.” In brushing aside the New Jersey Court’s decision in the *Zabriskie* case, the New Jersey Court in the *Smith* case said :

“Unfortunately, the court did not consider whether it was not 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.” (98 A. 2d 588)

This Court in the *Garey* case discussed the express question of “whether the legislature had the authority to confer such a power (of amending articles to make non-assessable stock assessable) upon *any number of stockholders less than the whole*,” and held that the Utah Legislature did *not* have such power as to “corporations existing when the law was passed.” (32 Utah 505, 91 P. 371)

One of the fundamental principles of law is protection of an individual and of a minority against action by a majority. Constitutions are written to circumscribe what a legislature may do.

The case at bar involves no principle of sovereign exercise of power to prohibit acts or to impose obligations in the public interest. It involves the question of whether

the Legislature may enact legislation which will *permit* a corporation as one party to an existing corporation-stockholder contract, *at its election* and not by imposed requirements, to disregard the contractual rights of the other party, the stockholders. If vital public interest were involved, there would be no more justification for permitting 51 per cent of the stockholders, or a majority of the directors, to defeat that public purpose than there would be for permitting one per cent of the stockholders or one director from defeating public purposes. The answer is that the Utah Legislature did not require anything. All it did (assuming that, contrary to established construction principles, we impute to the Legislature an intention of retrospective application) was to attempt to permit corporate exercise of a power not permitted under the corporation-stockholder contract — a power to give away corporate assets.

d. *The asserted statutory power to donate operates as a deprivation of the shareholders' property without due process of law. (U. S. Const., 14th Amend., Sec. 1; Utah Const., Art. I, Sec. 7.)*

In support of its contention that the giving away by Appellant's Directors of corporate income and assets — under circumstances where neither the corporate charter nor the laws in effect in 1945 when Appellant's corporate life was extended authorized the donation — did not operate as deprivation of stockholders' property without due process of law, Appellant cites (Appl. Br. 41) *A. P. Smith Manufacturing Co. v. Barlow*, 26 N. J. Super. 106, 97 A. 2d 186 (1953). In this case (which has been above



referred to and which will be hereinafter more fully discussed), the New Jersey Superior Court baldly asserted:

“Nor does the legislation in question offend the Fourteenth Amendment of the Federal Constitution.” (97 A. 2d 194)

citing for its assertion only the cases discussed in the preceding section of this Brief and *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170, 41 S. Ct. 465 (1921). The *Marcus Brown* case, like the other cited cases, not only fails to support the proposition for which cited but is wholly irrelevant.

In the *Marcus Brown* case the United States Supreme Court upheld an emergency enactment prohibiting for a specified time the dispossession of tenants. The decision in the *Marcus Brown* case is brief and Respondents urge that this Court read that decision in order to observe how completely it fails to give any support to the constitutionality of retrospective application of the 1955 Utah enactment which is involved in the instant case.

Any reference in this Brief to retrospective application of the 1955 donation enactment should not be read as indicating that Respondents concede that such enactment has or was intended to have retrospective application. The enactment makes no provision for retrospective application and a construction of its general terms as imputing such an intent to the Legislature violates not only the express rule of statutory construction written by the Legislature into our Utah Code (Section

68-3-3 U.C.A., 1953) but also long established common law rules of statutory construction as hereinabove pointed out.

To the extent that Appellant's corporate income and assets are given away by the Directors, the corporate assets, which constitute the basic value of the stock, the property right of Appellant's stockholders, are reduced and funds available for corporate capital or dividend distribution are decreased.

The interest of the stockholder-owners of a corporation in the underlying assets of the corporation was described in the *Garey* case as follows:

“Every stockholder has a vested equity in and to the assets of the corporation.” (32 Utah 520, 91 P. 377)

This same fundamental concept was expressed in *Dodge v. Ford Motor Co.*, 170 N.W. 668, 3 A.L.R. 413, 434 (1919) by the Michigan Supreme Court as follows:

“The capital stock of a corporation is always representative of the net assets of the corporation, whatever they may be, \* \* \*, because it is representative of an aliquot part of the net assets of the corporation.” (3 A.L.R. 434)

A reduction and decrease of corporate assets through gifts is not authorized under Appellant's corporation-stockholder contract. Appellant's stockholders have never acted nor have they ever been consulted as to the donation power alteration of the corporation-stockholder contract to which they are party. Such procedure is wholly wanting in any respect of due process.

## II

*The contribution to the Union Pacific Foundation does not represent a valid exercise by Appellant of an implied corporate power.*

“In *Zion’s Savings Bk. & Tr. Co. v. Tropic & East Fork Irr. Co.* 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.”

Respondents fully concur in this foregoing statement made by Appellant on page 42 of its Brief. As recently as 1953 this Court in *Summit Range & Livestock Co. v. Rees*, 1 U. 2d 195, 198, 265 P. 2d 381, 383, reaffirmed “the general rule that the corporate powers as outlined in the charter are subject to strict interpretation” citing the *Zion’s Savings Bank* case.

This Court has, of course, recognized that corporations have such implied powers, but only such implied powers, as are incidental to “the accomplishing of the general purposes of the corporation as expressed in the object clause of its articles.” Since the Utah Constitution requires that “strict interpretation” be given the powers and objects expressly set out in the articles of incorporation, it can hardly be rationally urged that implied powers enlarge expressed powers. So-called implied powers are, and of necessity must be, but recognition that expressed powers are usually general in their terms and embrace

the detailed powers necessary for the effectuation of the expressed powers.

The instant case presents the question of whether or not it is necessary to the accomplishment of the objects expressed in the articles of incorporation of Appellant corporation that Appellant have power to give away corporate income and assets in order to promote the general welfare by creating what Appellant refers to as a "favorable social and economic environment." There exists a trust relationship between a corporation and its stockholders defined by the corporation-stockholder contract. Respondents submit that among the most favorable and important elements of the social and economic environment which have made this nation grow and prosper in strength and the well-being of its citizens are those constitutional safeguards which were erected to preserve the integrity of contracts and the protection of property and property rights. The ultimate objective of our corporate system is to permit the aggregation of investments of many stockholders to be utilized in a system of production and marketing which would not otherwise be possible.

See  
Circuit  
Office  
1964

Appellant in its Brief argues that the power to donate corporate funds which the 1955 enactment expressed was a power which existed and exists as an implied power independent of the enactment. In other words, Appellant argues that the 1955 enactment added nothing to the corporate powers other than to protect directors from "giving or engaging in donative activities at the risk of expensive litigation" (Appl. Br. 49).

Wherein resides the risk of litigation, if, as Appellant asserts (Appl. Br. 48), a corporate donation "represents a valid exercise of a judicially well recognized implied corporate power."

In this connection it will be observed that Appellant asserts (Appl. Br. 13) that thirty-eight states (in addition to Utah) and the District of Columbia and the Territory of Hawaii have enacted legislation intended to permit corporate donations. If, as Appellant contends, the fundamental common law as to the scope of implied corporate powers permitted such action, Respondents again ask why forty-one legislative bodies have enacted such legislation.

Appellant in its Brief at page 43 states:

"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."

With these assertions Respondents agree. However, in the *Garey* case it was argued that corporate assessments might be needed to preserve the existence of the corporation, and as to this contention this Court said:

"But that is something which the corporators should consider when they make their contracts. Courts are organized to enforce contracts as made, unless they contravene good morals or public policy." (32 Utah 521, 91 P. 377)

In its Brief on pages 45 and 46 Appellant cites a group of cases which have reference to pension, relief, hospital, medical, health and disability funds which corporations had created for the benefit of their employees. The clear relationship of these matters to the employer-employee relations and direct corporate interest can hardly be more patently illustrated than by the fact that such matters are an inherent part of labor contracts in many industries. It is one thing to recognize the direct interest of a corporation in its labor relations and a completely different thing to assert that the corporation has implied power to provide pension, relief, hospital, medical, health and disability funds for the benefit of those who have no relation to the corporation other than as being a part of the general public. (See Note, 3 A.L.R. 443)

Appellant, for some inexplicable reason, cites *Hutton v. West Cork Railway Co.*, 23 Ch. D. 654, at page 44 of its Brief. The *Hutton* case involved an attempted donation of corporate funds, derived from a sale of the Company's undertaking, to officials of the Company who as a result of the sale lost employment and to directors for past services rendered when there was no agreement that they should be compensated. Even after the donation resolution had been approved by a "large majority" of the stockholders, the English court enjoined the making of the donations. While the dictum of that case inferred that corporate funds might be expended for other than strictly legal obligations "as an inducement to (employees) to exert themselves in the future, or as an act

done reasonably for the purpose of getting the greatest profit in the business of the company" (page 666), the English court said "charity has no place to sit at boards of directors" (page 673). It is difficult to conceive of Appellant finding any comfort in the *Hutton* case.

Appellant also cites (Appl. Br. 46) *Armstrong Cork Co. v. H. A. Meldrum Co.* 285 Fed. 58 (1922), in support of its position. This case is a decision of a federal district court. The case involved donations, by "a so-called family corporation" whose capital stock "was owned by a few persons, all relatives," to colleges near the Company's place of business, made with contemplation that those colleges would engage competent teachers and instruct students in business and industrial affairs, there being no collegiate institution in the vicinity which presented such opportunity for education. In applying the rule of permitting acts "done for the purpose of serving corporate ends," the court said:

"I think the advantage derived was tantamount to a personal benefit . . . .

"This rule, it is thought, may be fittingly applied, *especially as neither stockholder nor creditor challenges the right exercised by the officers to make the contributions.*" (285 Fed. 59) (Emphasis supplied)

Throughout Appellant's Brief reference is made, as above mentioned, to the case of *A. P. Smith Manufacturing Co. v. Barlow*, 13 N.J. 145, 98 A. 2d 581, 39 A.L.R. 2d 1179 (1953), wherein the New Jersey Supreme Court upheld a \$1,500 donation made by the Smith Company to

Princeton University. The case involved a New Jersey statute enacted in 1953 which authorized every New Jersey corporation "unless otherwise provided in its certificate of incorporation or other certificate filed pursuant to law or its by-laws" to make donations for philanthropic, educational and other specified purposes. The New Jersey statute prescribed certain definite limitations upon the amount which could be given without stockholder approval.

Two important distinctions are apparent between that New Jersey legislation and the 1955 Utah donation statute: *First*, there was in the New Jersey statute language from which there could be attributed to the New Jersey legislature an intention of retrospective application while the Utah statute contains no such language. *Second*, the permissive donation power under the New Jersey statute was circumscribed by limitations for the protection of the stockholders while the Utah statute purports to grant an unrestricted donation power.

Respondents concede that the broad language of the *Smith* case appears to justify and support in some measure Appellant's contentions as to the validity of the Utah enactment. In fact, this proceeding and the nature of the proceeding and the evidence introduced herein reflect an effort to present parallelism with the *Smith* case.

In reading the New Jersey Courts' philosophical discourses, sight must not be lost, however, of the fact that the New Jersey Courts were cognizant of and gave ex-



press recognition to the protective limitations which the New Jersey enactment prescribed.

The New Jersey Superior Court in its decision (referred to by the New Jersey Supreme Court as “well reasoned”) stated:

“Limitations are however imposed upon this granted power of contribution.” (97 A. 2d 188)

“It cannot be earnestly suggested that the *limited* contribution allowed by the statutes in question ‘defeats or substantially impairs’ the object of the grant of corporate power to Plaintiff. Even if it were assumed that the diversion of a corporate sum *within the limits of the statutes* does in some mathematical measure impair the rights of stockholders, it is not a *substantial* impairment.” (97 A. 2d 194) (Emphasis supplied except that the word “substantial” was italicized in the opinion.)

The emphasis which Appellant places upon the *Smith* case is readily understandable for the case represents a striking and startling departure from well established legal principles. Abrupt departure from established law and disregard of the rule of construction prescribed in Section 68-3-3, U.C.A. 1953, is necessary to an upholding of retrospective application of a statute permitting corporate directors to give away corporate assets without authority in the charter or the statutes in existence at the time of creation or extension of the corporate existence.

An example of one of the high-sounding platitudes of the New Jersey Superior Court will be found in its assertion that:

“What promotes the general good will inescapably advance the corporate weal.” (97 A. 2d 190)

The vice which inheres in such reasoning upon which the *Smith* case is grounded can be shown by a simple analogy : The State of Utah needs a new building for offices of State branches of government. A gift of an office building to the State would no doubt promote the general good, but would the gift of such a building by its corporate owner advance that corporation's good will? The New Jersey Superior Court's concept of corporate weal is illustrated in the second sentence following the above quotation where the New Jersey Court says, "The benefits derived from such contributions are nation-wide and promote the welfare of everyone anywhere in the land." No doubt the benefits derived from tax impositions are nation-wide and promote the welfare of everyone anywhere in the land, but does it follow that corporation directors should pay undue taxes, and would it be said of such overpayments that because the increased government revenue promotes the general good will, the corporate weal is thereby inescapably advanced? How long could the corporation endure if directors operated its corporate business on the premise that whatever promotes the general good inescapably advances the corporate weal? The platitude could convert any corporation for profit into a non-profit corporation. If giving a little promotes the general good and advances the corporate weal, the greater the giving the greater the corporate weal.

That the New Jersey Supreme Court was aware of the departure of its decision from established law is indicated by its statement that :

“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. Occasionally they have done it directly through frank rejection of the old and recognition of the new.” (98 A. 2d 581, 586, 39 A.L.R. 2d 1179 at 1188)

That the New Jersey Court did what it did through the rejection of the old and the creation of the new stands out in an analysis of its decision and the cases therein referred to. However, the decision lacked complete frankness because cases were cited for propositions which they do not support, as shown by the hereinabove discussion of those cases.

That the New Jersey Court has chosen to declare that the integrity of contracts and the protection of constitutional rights were subservient to public approval of the diversion of corporate funds to charity does not require that this Court adopt a like philosophy. This Court has unequivocally spoken in respect to the law of this State as to retrospective application of amendments of our Utah corporation statutes.

Respondents say, as did Lord Justice Bowen in the *Hutton* case:

“As soon as a question is raised by a dissentient shareholder, or by a person standing in the position of a dissentient shareholder, sympathy must be cut adrift, and we have simply to consider what the law is.”

If the law is that corporations can, without regard to their charters and the laws which became a part of them and without action of the stockholders, make contributions from corporate assets merely because the benefits derived from such contribution are nation-wide and promote the welfare of everyone anywhere in the land, then that law must be found in the *Smith* case for nowhere else in the many cases on the subject has its existence been recognized. To the contrary, it has been repeatedly recognized that there must be some identifiable direct or indirect benefit to the corporation.

The *Smith* case decision gave much emphasis to the importance of private institutions of learning. Despite the broad dicta of the case, what the decision in that case upheld was a donation of \$1,500 made by the Smith Company to Princeton University. As to that donation the New Jersey Supreme Court said:

“It was made to a pre-eminent 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.” (98 A. 2d 581, 39 A.L.R. 2d 1179, 1191-2)

What the New Jersey Court did was to affirm a decision which held that a particular gift by a particular company to a particular university of the community in which the corporation operated was, under the New Jersey law, within the implied powers of that company.

There was presented to the United States Supreme Court upon the appeal (which appeal was dismissed for "want of a substantial federal question") only what the New Jersey Court did, not what it said.

A state holding as to the law of that state with respect to the implied powers of a corporation of that state presents no federal question. Far from upholding the New Jersey enactment as granting retrospectively a new power, the New Jersey Supreme Court said:

"... its enactments simply constitute helpful and confirmatory declaration of such (implied corporate) power, accompanied by limiting safeguards." (39 A.L.R. 2d 1191)

In the case at bar Appellant did not, as in the *Smith* case, make a gift to an institution of higher learning in the community in which it operates. Appellant made a gift of \$5,000 to the company-established Union Pacific Foundation. The Foundation, and not Appellant, determined that, from thus supplied Foundation funds, the Foundation would give \$4,000 to Brigham Young University. It was within the power of the Foundation to give it for any charitable, educational or scientific project selected by it. The recipient, had the Foundation so chosen, could have been anywhere within or without the United States. When the donation was made to the Union Pacific Foundation, Appellant had no say as to how or where the money would be used.

It is inescapably clear that the New Jersey Courts in the *Smith* case gave broad interpretation to corporate

powers. It is equally inescapably clear that this Court in recognition of the provisions of Section 10 of Article XII of the Utah Constitution has declared that in Utah corporate powers must be given "strict interpretation."

The New Jersey Court made clear its philosophy ~~that constitutional barriers were subordinate to current~~ concepts of general welfare. Expressive of this new philosophy is the following statement of the New Jersey Supreme Court:

"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 structures." (39 A.L.R. 2d 1192)

In sharp contrast to that new concept is the established law as expressed by the Supreme Court of Michi-

gan in *Dodge v. Ford Motor Co.*, 170 N.W. 668, 3 A.L.R. 440 (1919), where that court said:

“The difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employees, like the building of a hospital for their use and the employment of agencies for the betterment of their condition, and a general purpose and plan to benefit mankind at the expense of others, is obvious. There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public, and the duties which in the law he and his codirectors owe to protesting, minority stockholders. A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.” (3 A.L.R. 440-1)

In making the choice of following declared law of this State which finds support through the decided cases of many decades, or the alternative choice of following the dictum discourse of the New Jersey Court in discarding established law as an old and obsolete form, this Court will, no doubt, consider Section 10 of Article XII of the Utah Constitution prescribing “strict interpretation” of corporate powers and Section 68-3-3 of our Code prescribing that “no part of these revised statutes is retroactive, unless expressly so declared” — considerations not before the New Jersey Court.

## CONCLUSION

It is submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

SENIOR & SENIOR

10 Exchange Place

Salt Lake City, Utah

*Attorneys for*

*Defendants-Respondents*