1968

E.J. Garn v. Salt Lake City Corporation, A Municipal Corporation of The State of Utah, and Union Street Railway Corporation, a Corporation of The State of Massachusetts : Memorandum In Response To Order To Show Cause and In Support of Defendants' Motion To Dismiss Petition For Writ of Prohibition

IN THE SUPREME COURT

of the

STATE OF UTAH

. J. GARN,

Plaintiff-Appellant,

vs.

ALT LAKE CITY CORPORA-
TION, a municipal corpora-
tion of the State of Utah,
and UNION STREET RAILWAY
CORPORATION, a corporation
of the State of Massachu-
setts,

Defendants- Respondents.

Case No. 11333

MEMORANDUM IN RESPONSE TO ORDER TO SHOW CAUSE AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PETITION FOR WRIT OF PROHIBITION

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E. J. GARN,)

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SALT LAKE CITY CORPORATION, a municipal corporation of the State of Utah, and UNION STREET RAILWAY CORPORATION, a corporation of the State of Massachusetts,) Case No. 11333

Defendants.)

MEMORANDUM IN RESPONSE TO ORDER TO SHOW CAUSE AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PETITION FOR WRIT OF PROHIBITION

Defendants submit this Memorandum in response to the Court's Order to Show Cause dated July 22, 1968, as their showing why plaintiff's Petition for Writ of Prohibition herein should be denied and in support of their Motion to Dismiss the Petition for Writ of Prohibition upon the grounds

that the Petition fails to state a claim upon which relief can be granted.

STATEMENT OF THE NATURE OF THE CASE

This is an original proceeding instituted in this Court by plaintiff, a taxpayer of Salt Lake City, praying for a Writ to prevent defendant Salt Lake City Corporation from performing an Agreement of July 18, 1968, between the defendant City and the defendant Union Street Railway Corporation relating to bus transportation in Salt Lake City. Plaintiff alleges the City is without legal authority or power to perform such agreement

STATEMENT OF FACTS

The facts are not in dispute. They appear from the recitals contained in the Agreement between Salt Lake City Corporation and Union Street Railway Company dated July 16, 1968, copy of which is attached to the Petition for Writ of Prohibition.

The Agreement was made after this Court's

decision in Rich v. Salt Lake City Corporation, 20 Utah 2d 339, 437 P. 2d 690 (February 20, 1968). In that case, as this, it appears Salt Lake City Lines, Inc. for many years operated the public bus transportation system in Salt Lake City and metropolitan area. City Lines indicated that due to increasing deficits incurred by it, it intended to discontinue its business and wind up its operations. The Board of Commissioner of Salt Lake City resolved that the City, being the only entity capable of operating a transportation system, would operate a bus transportation system and that the City would enter into negotiations with Salt Lake City Lines, Inc. for the purchase of its facilities and property. This Court, in the Rich case, held the City, under the constitution and statutes of Utah, has the power to acquire and operate the bus transportation system as proposed by it, and particularly

under Section 10-8-14, U.C.A. 1953, which provides

> "They (the cities) may construct, maintain and operate water works, gas works, electric light works, telephone lines or street railways, or authorize the construction, maintenance and operation of the same by others, or purchase or lease such works from any person or corporation, and they may sell and deliver the surplus product or service of any such works, not required by the city or its inhabitants, to others beyond the limits of the City."

This Court held the words "street railways" includes motor buses.

After the Rich decision, the situation for City Lines became more critical, for its union voted to strike unless its demands for wage increases were met, but continued to work only upon assurances from the City that attempts would be made to increase wages. City Lines, Inc. maintained it could not grant a wage increase and that it had no alternative other than to go out of business and cease operating its bus line system. The Board of Commissioners of the City

determined that loss of the bus system would amount to a major catastrophe causing great loss to the business community and great handicap and inconvenience to its residents in moving about the City and its environs. Hence, the Board conducted extensive investigation and found no prospect whatever of any private enterprise permanently taking over and operating the bus line system. As authorized by the Rich case, the City negotiated with City Lines for the purchase of its facilities and property. City Lines offered to either (1) sell the assets of the bus line to the City for more than $500,000 or (2) to lease the assets to the City for which City Lines would manage the bus line for one year for a certain consideration, provided the City would obligate itself to purchase the equipment at the end of one year, and provided the City furnished the labor for operating the bus line. For the City to furnish the labor meant not only negotiati

with the Union but also bringing the bus employees into the City's higher existing wage scale. The City did not have the funds to meet City Lines' purchase price and lacked the operating experience in the bus business to know whether it was even wise to presently obligate itself to make such purchase in one year. The City desired further time to investigate the desirability of making the purchase itself and to investigate the possibilities and practicalities of obtaining financial grants or loans from the Federal Government under enabling federal legislation. If such federal plan appears desirable and practical, the City may establish a transit authority with the federal funds to purchase and operate the bus line which may obviate the necessity of the City even purchasing and operating the bus line at all. More than one year would be required for the City to determine whether it should purchase the bus lines, or should apply for federal funds,

or should establish a mass transit authority to purchase and operate it.

With the City in that situation, then appeared defendant Union Street. Under the Agreement now attacked, it agreed to purchase the same assets from City Lines and to give the City the four things the City immediately needed, being: (1) a bus line operating in and about Salt Lake City for two years on fixed schedules at fixed rates so that service could be maintained (2) a two year option to purchase the bus line assets and not a requirement that the city purchase them for $500,000 plus interest, less depreciation plus the value of any additions and less the value of any deletions in bus line assets during the two years; (3) management assistance from experienced bus operators to help the City to determine whether to ultimately purchase the bus line or whether to apply for federal aid, and assistance in applying for federa

grants or loans if that appears desirable, assistance in establishing a public transit authority and full financial information to give the city two years actual operating experience in bus operations, all designed to provide a smooth transition into whatever new plan might be worked out on the most prudent basis after the two years without interruption of scheduled bus service; and (4) most important, two years time for the City to determine the best basis for working out a permanent, prudent solution to the problem of insuring adequate bus transportation in the City without interruption of bus service before or during the two year period. In return, the City agreed to pay Union Street $6,200 per month for the first 12 months and $11,250 per month for the next 12 months, payable at the end of each month of operation provided Union Street has not defaulted in the preceding month. The Board of Commissioners of the City

determined that such payment would be less expensive than if, after purchasing or leasing the bus line from City Lines, it contracted with City Lines for management or managed it itself. The Board of Commissioners expressly found that the Agreement would enhance the general welfare of the inhabitants of the City and that the payments provided would be in the public interest.

ARGUMENT

Plaintiff attacks the Agreement, saying the City has no power to make such payments under the Constitution and statutes of Utah for three reasons:

1. The City does not own the bus line, contrary to Section 10-8-14, U.C.A. 1953.

2. The City is lending its credit to or subsidizing a private corporation, contrary to Article VII, Section 31, Utah Constitution.

3. The City is benefiting and subsidizing

persons out of Salt Lake City by providing them bus service contrary to 10-8-14, U.C.A. 1953.

Plaintiff, in effect, would have the City follow the more expensive course. Defendants submit the City has the power to make such payments under the Agreement and is not in violation of law in so doing.

POINT I. THE CITY HAS THE POWER TO MAKE PAYMENTS UNDER THE CONTRACT EVEN THOUGH THE CITY DOES NOT PRESENTLY OWN THE BUS LINE.

Plaintiff in substance complains that City has no proprietary interest in Union Street, has only an option to purchase the bus assets, that the money paid to Union Street over the two year period will not be credited to the option purchase price, that the City has no control or interest in the assets or actions of Union Street, in no way participates in the operation of Union Street, and asserts an option to purchase is not a lease

as permitted under 10-8-14, U.C.A. 1953.

Consider first that Salt Lake City is not paying just for bus service, as plaintiff asserts; instead, it is also paying for and receiving valuable management experience and expertise in learing to operate a bus line to be used if the City elects to purchase and operate it, to be used in deciding whether to purchase and operate it, to be used in determining whether to apply for federal funds and if such appears to be desirable, to be used in applying for and obtaining the federal funds. Further, the City is paying for and receiving an option to purchase the assets to insure that at the end of two years those bus line assets still will be available, not as disorganized pieces of equipment, but as part of a going concern.

Plaintiff ignores the fact that the City will receive value through the management experience and the option to purchase for its monthly

payments. These standing by themselves support the City's power to enter into the agreement and to make the payments, for under Section 10-7-1, U.C.A. 1953, cities may "make contracts and acquire and hold real and personal property for corporate purposes" and Section 10-8-2, U.C.A. 1953 provides:

> "They (the cities) may appropriate money for corporate purposes only ...; may purchase, receive, hold, sell, lease, convey and dispose of property, real and personal, for the benefit of the City, both within and without its corporate boundaries, improve and protect such property and may do all other things in relation thereto as natural persons.... It shall be deemed a corporate purpose to appropriate money for any purpose which in the judgment of the Board of Commissioners or City Council will provide for the safety, preserve the health, promote the prosperity and improve the morals, peace, order, comfort and convenience of the inhabitants of the City."

The Board of Commissioners of Salt Lake City expressly found that the Agreement will provide for the general welfare of the inhabitants of the City in the statutory language, thereby

making such payment a proper appropriation for corporate purposes within Section 10-8-2 and a proper contract for corporate purposes within Section 10-7-1. The wisdom and practicality of the City so contracting for the management experience and option to purchase is an undertaking solely for the people of the City through their elected city government to determine and is not a concern of the courts whose function is to pass on questions of law. See concurring opinion of Chief Justice Crockett in Rich v. Salt Lake City Corporation, supra.

There can be no question that City has the power to purchase the option to purchase. Under Section 10-8-2, the City "may purchase and receive ...property..., and may do all things in relation thereto as natural persons...." An option itself is property. Lawrence v. O'Connell (D.C.R.I.) 141 F. Supp. 316, Affd. 1st Cir., 238 F. 2d 476. The word "purchase" means all lawful acquisitions

of property by any means whatever, except descent. 73 CJS, p. 1255. It is well settled that power of a city to acquire property by purchase includes the lesser power to acquire propert by lease. Anno., 11 ALR 2d 168. In Borough of East Rutherford v. Sterling Paper Converting Co. (N.J.) 32 A. 2d 855, it was held where the city has the power to lease property, it has the implied power to grant an option to lease as an incident of the specifically granted power. Bohn v. Salt Lake City, 79 Utah 121, 8 P.2d 591 (1932) approved language from Dillon, Municipal Corporations, that the grant of power to a city carries with it such power as is necessarily and fairly implied or incident thereto; that implied and incidental powers include those necessary to give effect to the powers expressly granted; and that the rule of strict construction of powers granted municipal corporations does not apply to the mode adopted by the municipality to carry into effect

powers expressly or plainly granted where the mode is not limited or prescribed by the legislature and is left to the discretion of municipal authorities, and in such cases the usual test of the validity of the act is whether it is reasonable and there is no presumption against the municipal action in such cases.

In light of such authorities, there can be no question that the city here has power to purchase an option to purchase.

Section 10-7-20, U.C.A. 1953, says:

> "Nothing in this article shall be construed to require bids to be called for or contracts let for the conduct or management of any of the departments, business or property of such city...."

That section clearly grants City the power to contract for management experience in operating the bus lines, first since the operation of a bus line is a proper business of the City and second, because it is contracting for the management of the property over which it holds an

option to purchase.

Now, then, taking plaintiff's position that the City is paying only for bus service when it does not own the property, we submit that the City still has the power to make the payment.

Obviously, under Section 10-8-2, the City could have purchased the bus line and managed it itself, or could have purchased it and leased it to Union Street, or could have leased the bus line from City Lines and under 10-8-2 and 10-7-20 could have hired Union Street to manage it for a management fee. However, here the Board of Commissioners specifically found that it did not have the funds to purchase the assets, and whether it purchased or leased the assets, operating the bus line itself or hiring City Lines to operate it would have been more expensive than paying the payments provided under the Agreement in issue. That the City would have otherwise incurred greater expense, even if it purchased

the line for over $500,000, answers plaintiff's argument that the money paid by the City over the two year period will not be credited to the purchase prive for the assets if the City exercise the option. That also answers plaintiff's argument that the City has no control over the actions of Union Street and no proprietary interest in the corporation, for by the terms of the contract, Union Street takes all of the risk of loss in operating the bus line. The Board of Commissioner of Salt Lake City expressly found it to be one of the advantages in entering into the Agreement that the City would not incur the risk of loss. Finally, the fact that the City has the option to purchase the bus line assets, which certainly is an equitable right, destroys the argument that the City has no interest or control over the assets.

It is true Section 10-8-14 provides only that cities may "maintain and operate...street

railways (read "Bus Line", Rich v. Salt Lake City, supra), or authorize the construction, maintenance and operation of the same by others, or purchase of lease such works from any person." and does not expressly say the City may pay for the operation of the bus line of another.

It is submitted, however, that since the City has the option to purchase the bus line and it is a proper business of the City, the City may contract for the management thereof pursuant to Section 10-7-20, U.C.A. 1953.

Further, there is ample authority to support the proposition that the City does have the implied power to pay for the operation of a bus line by another, even though the City does not own the bus line.

In Bair v. Layton City Corporation, 6 Utah 2d 138, 307 P.2d 895 (1957) Layton City contracted with North Davis County Sewer District to make monthly payments to the sewer district for

operating expenses of the District's sewer system in return for the District providing the services of disposal and treatment of sewage. Plaintiff taxpayers sought a writ to enjoin payment upon the grounds, among others, that the City had no constitutional or statutory power to make the payments. This Court held:

> "The general powers conferred on the city and its officers as governing body clearly authorize the city to enter into this kind of contract. See Article 11, Section 5, Subdivision (5) Constitution of Utah; Sections 10-7-1, 10-8-2, 10-8-61, 10-8-38, U.C.A. 1953 and Laws of Utah, 1955, Chapter 26, Section 2."

The case here is stronger on its facts than in Bair. Layton City did not own the sewer district's property, as here, but here Salt Lake City does have an option to purchase the property. Sections 10-7-1 and 10-8-2 have been cited above; they each were held sufficient in Bair to authorize Layton City to make the payments objected to. Section 10-8-61 is a general statute providing

cities may make regulations to secure the general health of the city, etc.

Section 10-8-38 cited in Bair is important; it provides cities "may construct, reconstruct, maintain and operate, sewer systems, sewage treatment plants,..." It does not provide cities may pay another to maintain and operate sewage treatment plants which the City does not own; yet this Court sustained Layton City's implied power to do so under that Section. So here, though Section 10-8-14 does not provide cities may pay another to operate bus lines it does not own, the Court should here sustain the city's power to do so.

Laws of Utah, 1955, Chapter 26, Section 2, cited in Bair, is now Section 17-6-22 of the Utah Code Annotated 1953, and that Section and Section 17-6-3.8(c) provide only that sewer districts may contract with "municipal corporation for sewer services,but do not provide municipal

corporations may pay for such service.

This Court's citation of Article XI, Section 5, subdivision (5), Constitution of Utah, in Bair is significant. Article XI provides:

> "Each city forming its charter under this section shall have, and is hereby granted, the authority to exercise all powers relating to municipal affairs,...and no enumeration of powers in this constitution or any law shall be deemed to limit or restrict the general authority hereby conferred; but this grant of authority shall not...be deemed to limit or restrict the power of the legislature in matters relating to State Affairs to enact general laws applicable to all cities of the State.
>
> "The power to be conferred upon the cities by this section shall include the following:
>
> *****
>
> "(b) To furnish all local public services, to purchase, hire, construct, own, maintain or operate, or lease, public utilities, local in extent and use;" (emphasis add

Does that article confer on Salt Lake City the power to hire public utilities? Its citation in Bair v. Layton City Corporation would seem to

indicate it does, since Layton City is a legislative city, and not a charter city. Rich v. Salt Lake City Corporation, supra, held:

> "Salt Lake City being a legislative city as contrasted with a charter city, we must look at the acts of the legislature in determining what powers may be exercised by the City."

Utah Rapid Transit Co. v. Ogden City, 89 Utah 2d 546, 58 P.2d 1, held to the same effect as Rich but was overruled by this Court in Rich on other grounds. Utah Rapid Transit Co. relied for authority upon Wadsworth v. Santa Quin City, 83 Utah 321, 28 P.2d 161. There, this Court said:

> "The question there is, Are the powers enumerated in the amendment (Article XI) equally available to cities operating under legislative enactment? The answer we think must be in the affirmative, at least to the extent that the legislature has conferred any such powers on the cities.... The reservoir of power is the same, and we can perceive of no reason to distinguish between the charter adopted by the people of a city and one enacted by general law of the Legislature based

> merely on the origin of the legislation.... We think the enumeration of the power to borrow money on the security of a utility or its income, or both, was intended by the people in adopting the constitutional amendment to place such power within the scope of municipal action, and was clearly intended to be available to chartered cities informing their own charters, and in addition thereto by use of the language, 'power to be conferred upon the cities by this section,' just as clearly was intended to enumerate a power which the Legislature might, if it chose, confer on cities depending on general law for their organization and authority."

While the Wadsworth case held that all cities do not have all the powers enumerated in the amendment because the amendment is not self-executing, it did hold that all the powers enumerated in the amendment are equally available to cities operating under legislative enactment, "at least to the extent that the Legislature has conferred any such powers on the cities." Here the Legislature has conferred on cities the powers to maintain and operate bus lines or to authorize the maintenance and operation of the same by

others under Section 10-8-14; the Legislature has to that extent conferred "any such powers on the cities." Did the Legislature also intend to confer on cities the power to hire public utilities? As in Wadsworth, there is "no reason to distinguish between a charter adopted by the people of a city and one enacted by the general law of the Legislature. Thus, it would seem the Legislature did impliedly confer on legislative cities the power to hire public utilities.

City of Mill Valley v. Saxton (Cal. 1940) 106 P.2d 455 where the Court said:

> "Amicus curiae advance the point that the constitutional section is not self-executing and that hence the city is without the power to act in the absence of a legislative enabling act. It is then contended that, since certain sections of the Municipal Corporations Act fail to mention bus lines specifically, the city is without power to establish them. Both the premise and the conclusion are erroneous. The Constitution expressly authorizes 'any' city to establish and operate public works for 'transportation'. It expressly authorizes such city to furnish 'such

> services to inhabitants outside its boundaries'. Here is the grant of power. If the legislature should attempt by statutory enactment to deny or withhold the power as to any special class of cities its act would be clearly unconstitutional. If it attempted the same result indirectly by failing to mention the power in some corollary legislation, its act to that extent would have no effect on the constitutional grant." (Emphasis added.)

Even if the City's power to make the payments to Union Street is not found by implication under Section 10-8-14, it is clearly available under Section 10-8-2 and 10-7-1 as an appropriation of money for corporate purposes. Muir v. Murray City, 55 Utah 368, 186 P. 433, sustained the power of the city to establish an electric light plant and transmission lines beyond its boundaries under Section 10-8-2 and said of the section:

> "(I)t is pertinent to remark that perhaps no State in the Union confers greater powe s upon its municipal corporations than does the State of Utah."

In point is Admiral Realty Co. v. City of

New York (N.Y. 1920) 99 NE 241. There New York City owned and operated a subway system and a private company owned and operated an adjoining system in an adjoining town. A contract was made for the adjoining company to construct and equip new subways both in and out of New York at their joint expense and for joint operation by the adjoining company of the entire new system, including the new construction as well as the systems formerly operated separately by the City and the adjoining company. The contract provided that from the earnings of the entire consolidated unit, payment would be made first to the adjoining company of its operating expense for the new entire system, next to the adjoining company principal and interest on the money spent by it for new construction and equipment, next to the adjoining company an annual sum equal to the earnings of its present operations on its pre-construction system, next, payment to New York

City on account of its investment, and finally, a division of the remainder equally between the city and the adjoining company. The New York Court found the City had the implied power to perform the agreement. The Court relied upon prior authority for the propositions that the construction of subways by the City is a city purpose and that the City need not itself operate its own subway but might provide for its operation by lease to someone else. The Court sustained the City's implied power under general statutory provisions to perform the contract despite objections that the city was guaranteeing earnings to the adjoining company of the latter's former system and that the city was contributing money to the private company to improve the private company's own subway system. The only difference between the Admiral Realty case and the case at bar is that New York City already owned the subway system in its own city which is not the case

here; however, the cases are identical as respects the portion of the subway system owned by the adjoining company outside of the City.

It is submitted that in light of the foregoing, plaintiff's contention that the City has no power to perform the Agreement in issue because the City does not own, but has only an option to purchase, the bus line is without merit.

POINT II. THE CITY IS NOT LENDING ITS CREDIT TO OR SUBSIDIZING A PRIVATE CORPORATION CONTRARY TO ARTICLE VII, SECTION 31 OF THE UTAH CONSTITUTION.

Article VII, Section 31, of the Utah Constitution provides:

> "The Legislature shall not authorize ...any...city...to lend its credit or subscribe to stock or bonds in aid of any railroad, telegraph or other private individual or corporate enterprise or undertaking."

It is clear that operating a bus line is a

proper public service and municipal purpose. Rich v. Salt Lake City Corporation; 10-8-14, U.C.A. 1953.

In State Road Commission of Utah v. Utah Power & Light Co., 10 Utah 2d 333, 353 P.2d 171, against the contention that the State could not pay the Power Company for relocation of utility poles under the Utility Relocation Act by virtue of Article VII, Section 31, of the Constitution, this Court said:

> "Public welfare demands that the public be served with water, sewer systems, electricity, gas, telephone and telegraph, as well as transportation and means of travel. These services are vital to the well-being of our various communities. It would be almost impossible to meet these urgent requirements without making use of public property. The presence of the utility facilities on the streets constitute a use in the public interest...
>
> "We said that Article VI, Section 31, of our Constitution is not violated even when direct gifts and loans of state funds are made to people in need under our Public Welfare Program because

> of a public purpose served in discharging, not the legal, but the moral obligation, of the State to care for its poor...."

In Bailey v. Van Dyke, 66 Utah 184, 240 p. 454, it was claimed that the County's payment for agricultural extension work in conducting field studies and demonstrations on farms to assist in stimulating better business methods on the farms violated this article of the Constitution. This Court held to the contrary, saying:

> "If the appropriation of County funds authorized is for a public purpose, the statute (under which the payment is made) is clearly not prohibited by the Constitution."

Bair v. Layton City Corporation, supra, held the contract did not violate this Article of the Constitution and it is identical on its facts to this case.

In Utah State Land Board v. Utah State Finance Commission, 12 Utah 2d 265, 365 P. 2d 213,

the State Land Board sought to purchase private securities for investment purposes pursuant to statute; the State Finance Commission contended such contravened this Article of the Constitution. This Court held:

> "The provision 'in aid of any railroad' etc., was expressly intended to prevent the use of the finances of the State to give support to private interests or enterprises, but unless the element of aiding such enterprise is present, there is no indication in the language of the Constitutional provision itself, nor in the background of its origin, that the State or its agency should be prohibited from the purchase of well established corporate securities in the interest of prudent handling of the funds defendant is required to manage. The activating purpose makes the difference.
>
> "When the underlying purpose is to invest for the benefit of the State or a political subdivision thereof, there is no lending of credit or expenditure of funds 'in aid of' such enterprise or undertaking....
>
> "'When the underlying and activating purpose of the transaction and the financial obligation incurred are for the State's benefit,

> there is no lending of its credit though it may have expended its funds or incurred an obligation that benefits another. Merely because the State incurs an indebtedness or expends its funds for its benefit and others may incidentally profit thereby, does not bring the transaction within the letter or the spirit of the credit clause prohibition.'"

Here the Board of Commissioners of Salt Lake City expressly found the Agreement to be for the general welfare and hence for the benefit of the City. The City is to pay the monthly payments only after each month's services are rendered. Assuming the payments to be for a "corporate purpose", the payments are no more made "in aid of" private enterprise than would be payment to a private contractor for painting the City and County Building.

Cases such as Cinncinati v. Harth (Ohio 1920) 128 N.E. 263, 13 ALR 309 and Anno. at 313, which held unconstitutional a statute authorizing

cities to pay for the reconstruction of railroad tracks, are distinguishable. In that case, the Ohio constitution provided that a city could not "raise money for, or loan its credit to, or in aid of, any such company". Here, our Constitution does not prohibit raising money for or loans to private corporations; it prohibits only lending credit to or subscribing to the stock or bonds in aid of private corporations, and this Agreement is neither a lending of credit nor a subscription. Further, there is a distinct beneficial necessary reason for Salt Lake City to make this Agreement; the payments are made to obviate the necessity of City immediately purchasing the bus line, to minimize the expense of the City's operating the bus line or hiring another to do it, and to preserve a going business for a limited period while the City determines, with management assistance it has

purchased under the Agreement, whether to exercise the purchase option the City purchases under the Agreement. This is in distinct contrast to the situation in Cincinnati v. Harth where the payment was made solely to benefit the railroad and only indirectly to help the City. Finally, it is submitted that this Court should simply decline to follow the reasoning of Cincinnati v. Harth as its views do not state the law of Utah.

Plaintiff's Memorandum terms the payment to Union Street as a "subsidy". This is clearly inaccurate. A subsidy is a gift or donation from the government. Kennecott Copper Corporation v. State Tax Commission (D.C. Utah 1944), 60 F.Supp. 181. Here, the City is receiving full value and minimizing the expenses it would otherwise face for the reasons indicated.

POINT III. THE CITY HAS POWER TO PERFORM THE AGREEMENT EVEN THOUGH IT ALSO PROVIDES FOR

BUS SERVICE OUTSIDE SALT LAKE CITY.

Plaintiff claims the City does not have power to spend its funds for the benefit of persons other than its own citizens and that it is so doing because City Lines now operates in metropolitan Salt Lake and Union Street will similarly operate.

Section 10-8-14, U.C.A. 1953, at its conclusion, provides:

> "...(T)hey (the cities) may sell and deliver the surplus product or service of any such works, not required by the city or its inhabitants, to others beyond the limits of the city."

Provo City v. Department of Business Regulation, 118 Utah 1, 218 P.2d 675 (1950), held:

> "The term "street railways' as used in that section (10-8-14) has been interpreted to mean transit companies operating within the city limits or within the municipal area."

In Muir v. Murray City, supra, the contention was made that the City was without power to raise funds to construct an electric transmission

line to furnish power to a community 7 miles beyond the municipal boundaries. This Court held to the contrary, saying:

> "In the case at bar the City had the power to establish an electric light plant and transmission line, beyond its boundaries, if necessary, for the purpose of supplying light for itself and inhabitants. Comp. Laws Utah 1917, Sec. 570-12 (now 10-8-2, U.C.A. 1953).
> ...
>
> "...The investment (for which the money was raised and to which plaintiff objected) proved to be a profitable one, and while, as before stated, cities are not organized primarily as profit-making concerns, yet when it is incidental, as in the instant case, to a proper exercise of its legitimate powers, the making of the enterprise a profitable one was highly commendable." (Emphasis added.)

In City of Mill Valley v. Saxton, supra, the California Court said:

> "The respondent attacks the installation of the system on the grounds that it would require the taxpayers of the city to support the transportation system not only for its own inhabitants but also of those of the traveling public outside its boundaries. This it is said might be a gift of public funds for private purposes and hence contrary to the

provisions of ... the Constitution. ...Here we have a case where public service is exchanged for a compensation and it will not be assumed that the city will misuse the power by giving the transportation free. On the contrary, it will be presumed that the city will exercise the power fairly and in accordance with the purposes of the statutes. That non-taxpayers living outside the boundaries of the city may thus obtain an advantage at the risk of the taxpayers within the city is no more serious obstacle to the validity of the scheme than that non-taxpayers living within the city limits may enjoy the same advantage. But if this feature of the general scheme is objectionable on the grounds stated, it goes to the entire public utility service based within and without the municipal boundaries. If the plan is economically sound for this reason, the objections raised are administrative and legislative, rather than judicial. Here we have to consider only that the Constitution and the statute has conferred the power upon the city and the wisdom of the legislature is not a matter for us to decide."

See the Annotation, 98 ALR 1001, in which the annotator says:

"Although the later cases tend to support a more liberal rule, the majority of thecases collected in a present and earlier annotations support the view that a municipal corporation authorized to

> own and opera e a public service utility has no power, in the absence of statutory authority, to furnish service beyond corporate limits."

The annotation, based on Muir v. Murray City, supra, places Utah in the class of cases following the growing minority view that cities may sell their product outside of corporate limits.

In Wisconsin Power & Light Company v. Public Service Commission (Wisc. 1939), 286 N.W. 588, the city desired to buy a power line which was an entirely integrated unit and a section of it was located outside the city limits. When the transaction was challenged the court held that when the legislature allowed the city to take over a power line, it must have intended the power to include the whole even though portions of the whole were outside the city limits.

These cases support the opposition that Salt Lake City has the power to make the payments to Union Street even though Union Street operates out of city limits. Certainly, it has that

power by statute to the extent of the surplus service, and whether or not there is surplus service available is an administrative and legislative decision to be made by the Board of Commissioners of Salt Lake City in the exercise of its judgment, and such judgment is not subject to judicial review.

Further, City Lines is required by its certificate of convenience and necessity to furnish common carrier service on the lines it is now operating under. It cannot simply cease operating outside of Salt Lake City without the approval of the Public Service Commission. It could not sell its operating equipment to Union Street and still provide service to areas out of Salt Lake City. In selling, it must require its purchaser to agree to operate all of the system, in and out of Salt Lake City, that it is required to serve. If the City purchased or leased the system from City Lines, the City would

be obligated to serve metropolitan Salt Lake in order to provide service to the City itself. Ergo, so must Union Street.

Further, any benefit occurring to citizens out of Salt Lake City is indirect and merely incidental. No more direct benefit and indivisible benefit is conferred on County residents than would be conferred when Salt Lake City pays for air polution control programs in Salt Lake City which may also keep the air clean out of Salt Lake City.

Finally, the fact that the bus line does operate out of Salt Lake City is a direct benefit to the residents of Salt Lake City. City residents do need transportation to the metropolitan area out of the Salt Lake City limits. The Board of Commissioners of Salt Lake City expressly found, in entering into the Agreement:

"The loss of such transportation

> system to the residents of Salt Lake City would amount to a major catastrophe causing great loss to the business community of the city and great handicap and great inconvenience to the residents of Salt Lake City in moving about the City and its environs."

Hence even if a portion of the City's payment could be segregated into "x" for city transportation and "y" for county transportation, the payment for "y" has still been found by the Board of Commissioners to be for a corporate purpose for the citizens of the City.

CONCLUSION

It is respectfully submitted that as a matter of law defendant Salt Lake City Corporation does have power to perform the Agreement with defendant Union Street Railway Corporation, that plaintiff's Petition for Writ of Prohibition should be denied and this action should be dismissed with prejudice.

DATED this 26th day of July, 1968.

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