

1960

State Road Commission of Utah v. Utah Power & Light Co. et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE ROAD COMMISSION
OF UTAH,

Plaintiff and Appellant,

— vs. —

UTAH POWER & LIGHT COM-
PANY, a corporation; MOUNTAIN
FUEL SUPPLY COMPANY, a
corporation; and THE MOUNTAIN
STATES TELEPHONE AND
TELEGRAPH COMPANY, a cor-
poration,

Defendants and Respondents.

F I L E D

JAN 14 1960

Clerk, Supreme Court, Utah
Case

No. 9163—

9136

BRIEF OF RESPONDENTS

UNIVERSITY OF UTAH

GERALD IRVINE JUL 10 1967

B. Z. KASTLER, JR.

S. N. CORNWALL **LAW LIBRARY**

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UTAH POWER & LIGHT COM-
PANY, a corporation; MOUNTAIN
FUEL SUPPLY COMPANY, a
corporation; and THE MOUNTAIN
STATES TELEPHONE AND
TELEGRAPH COMPANY, a cor-
poration,

Defendants and Respondents.

Case
No. 9163

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The statement of facts contained in Appellant's Brief is correct. However, Respondents wish to amplify the Statement of Facts in the following respects.

The Federal-Aid Highway Act of 1956 provides that on the National System of Interstate and Defense High-

ways the Federal government will reimburse the state for 90% of the cost of construction and such additional percentage of the remaining 10% of such cost in any state containing unappropriated and unreserved public lands and non-taxable Indian lands, exceeding 5% of the total area of all lands therein, equal to the percentage that the area of such lands in such State is of its total area.

Chapter 53, Laws of Utah, 1957, Section 27-2-7 (22), UCA 1953, provides not only that the appellant will pay the costs incurred by a utility incident to relocating its facilities when the same becomes necessary by reason of Federal-Aid highway construction, but also provides that such payment shall be limited to those cases where "proportionate reimbursement of such cost may be obtained by the State of Utah from the United States pursuant to the Federal-Aid Highway Act of 1956." This statute further provides that the term "cost of relocation" shall include "the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility."

POINT I.

SECTION 27-2-7(22), UTAH CODE ANNOTATED, 1953, AS AMENDED BY CHAPTER 53, LAWS OF UTAH 1957, WAS INTENDED TO REIMBURSE PUBLICLY, PRIVATELY AND COOPERATIVELY OWNED UTILITIES, INCLUDING DRAINAGE AND IRRIGATION SYSTEMS AND UTILITIES OWNED BY ALL POLITICAL SUBDIVISIONS FOR THE COST OF RELOCATING THEIR FACILITIES ON

FEDERAL-AID HIGHWAY PROJECTS AND TO ALLOW THE STATE OF UTAH TO ACCEPT FEDERAL AID AVAILABLE FOR SUCH PURPOSES.

POINT II.

REIMBURSEMENT BY THE STATE TO PUBLICLY, PRIVATELY AND COOPERATIVELY OWNED UTILITIES, INCLUDING DRAINAGE AND IRRIGATION SYSTEMS AND UTILITIES OWNED BY ALL POLITICAL SUBDIVISIONS FOR RELOCATION OF FACILITIES AS AUTHORIZED BY CHAPTER 53, LAWS OF UTAH 1957, IS A CONSTITUTIONAL EXERCISE OF THE POLICE POWER BY THE STATE OF UTAH.

POINT III.

REIMBURSEMENT BY THE STATE TO PUBLICLY, PRIVATELY AND COOPERATIVELY OWNED UTILITIES, INCLUDING DRAINAGE AND IRRIGATION SYSTEMS AND UTILITIES OWNED BY ALL POLITICAL SUBDIVISIONS, FOR RELOCATION OF FACILITIES AS AUTHORIZED BY CHAPTER 53, LAWS OF UTAH 1957, DOES NOT CONSTITUTE A LENDING OF THE CREDIT OF THE STATE IN VIOLATION OF ARTICLE VI, SECTION 31 OF THE CONSTITUTION OF UTAH.

POINT IV.

REIMBURSEMENT BY THE STATE TO PUBLICLY, PRIVATELY AND COOPERATIVELY OWNED UTILITIES, INCLUDING DRAINAGE AND IRRIGATION SYSTEMS AND UTILITIES OWNED BY ALL POLITICAL SUBDIVISIONS FOR RELOCATION OF FACILITIES AS AUTHORIZED BY CHAPTER

53, LAWS OF UTAH 1957, DOES NOT RELEASE OR EXTINGUISH AN INDEBTEDNESS, LIABILITY OR OBLIGATION IN VIOLATION OF ARTICLE VI, SECTION 27 OF THE CONSTITUTION OF UTAH.

ARGUMENT

I.

SECTION 27-2-7(22), UTAH CODE ANNOTATED, 1953, AS AMENDED BY CHAPTER 53, LAWS OF UTAH 1957, WAS INTENDED TO REIMBURSE PUBLICLY, PRIVATELY AND COOPERATIVELY OWNED UTILITIES, INCLUDING DRAINAGE AND IRRIGATION SYSTEMS AND UTILITIES OWNED BY ALL POLITICAL SUBDIVISIONS FOR THE COST OF RELOCATING THEIR FACILITIES ON FEDERAL-AID HIGHWAY PROJECTS AND TO ALLOW THE STATE OF UTAH TO ACCEPT FEDERAL AID AVAILABLE FOR SUCH PURPOSES.

Under the Federal-Aid Highway Act of 1956, 23 U.S.C.A., § 101, et seq., the scope and nature of the Federal-Aid highway program was drastically changed. "A crash program of unprecedented scale was inaugurated." S. Rep. No. 1407, 85th Cong., 2d Sess. 53.

Recognizing the impact which the greatly expanded highway program was having upon utilities and the fact that neither the utilities nor their subscribers, as such, were receiving any benefit therefrom, the Congress over seven years ago began a series of hearings on the problem with the result that in the Federal-Aid Highway Act of 1956 there was included an express provision that, when permitted under state law, utility relocation costs are allowable as a part of the cost of the highway project and federal funds may be used to reimburse the states for

the payment of those costs in the same proportion as federal funds are expended on the rest of the project.

This provision is found at 23 U.S.C.A., § 123, and provides that:

“When a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal-Aid primary or secondary systems or on the Interstate System, including extensions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State. . . .”

In order to qualify for federal participation, the Federal Bureau of Public Roads requires that “the State certifies that payment for the utility relocation is not in violation of the laws of the State or any legal contract between the utility and the State. If there should be any question as to the State’s authority to pay for such relocation, the State may be required to cite or establish its authority to pay for such relocation.” U. S. Department of Commerce, Bureau of Public Roads, Policy and Procedure Memorandum 30-4, Sec. 3 (2).

At common law, the courts have held that the utility’s easement in the highway, like all property rights, is always subject to the reasonable exercise of the state’s police power, and that therefore utilities can be required to relocate at their own expense, any facilities located within the right of way of a public highway whenever the necessities of highway improvement require.

Whether, even absent statutory modification, this common law rule would apply to relocations necessitated by projects on the Federal-Aid system is not entirely free from doubt. In view of the magnitude of these projects and the enormous expense involved, cases dealing with the local type of relocation known to the common law do not necessarily furnish support for the proposition that requiring utilities to relocate at their own expense on the Interstate, Primary or Secondary Systems would be a reasonable exercise of the police power. In order to remove any doubt and fully meet federal requirements, the legislatures of sixteen states, including Utah, have since 1956 enacted statutes expressly making the old common law rule inapplicable to the Federal-Aid highway system and providing for payment of relocation expenses by the state.

The legislative history of the Federal-Aid Highway Act of 1956 establishes that it was intended to authorize the federal government to participate in the cost of relocating utilities' facilities necessitated by highway construction whenever a state allows and pays such cost to the utility. The Report of the Conference of the House and Senate verifies this fact and recognizes the equity of reimbursing utilities. In Conference Report No. 2436, the conferees said:

“... the Bill as passed by the House and recommended and accepted by the conferees recognizes the equity of reimbursing utilities for the cost of relocating facilities when required for Federal-Aid highway projects. Further, this Section makes it clear that it is the intention of the federal government to assume its proportionate share of utility relocation cost whenever a state allows such costs.” United States Code Congressional

and Administrative News, Vol. II, 84th Cong., 2d Sess. 2899 (1956).

Chapter 53, Laws of Utah, 1957 (sometimes hereinafter referred to as the "Relocation Law") and similar statutes were expected by Congress, as shown by the following statement made by Congressman McGregor of Ohio, in speaking on the Conference Report on the Federal-Aid Highway Bill (102 Cong. Rec. 9930, June 26, 1956) :

"... Under the existing practice, Mr. Speaker, of the Bureau of Public Roads, federal funds may participate in utility relocation costs to the same extent as other construction costs without percentage limitations based on the state's apportionment. *This legislation encourages the states to review their contemporary status and take objective action in accordance with such review.*" (Emphasis added)

The Legislature of Utah reviewed its "contemporary status" and took "objective action in accordance with such review" by passing Chapter 53, Laws of Utah 1957, 27-2-7(22) UCA, 1953.

II.

REIMBURSEMENT BY THE STATE TO PUBLICLY, PRIVATELY AND COOPERATIVELY OWNED UTILITIES, INCLUDING DRAINAGE AND IRRIGATION SYSTEMS AND UTILITIES OWNED BY ALL POLITICAL SUBDIVISIONS FOR RELOCATION OF FACILITIES AS AUTHORIZED BY CHAPTER 53, LAWS OF UTAH 1957, IS A CONSTITUTIONAL EXERCISE OF THE POLICE POWER BY THE STATE OF UTAH.

Before taking up in detail the Appellant's specific attacks on the constitutionality of Chapter 53, we wish to point out that the cardinal factor in this case, which must be kept in mind in deciding the constitutional question, is that the Relocation Law was adopted in the exercise of the State's police power vested in the Legislature. It is universally recognized that the control of highways is a proper subject for the exercise of the police power and that this includes the regulation of the location and relocation of utility facilities on the highways. Thus, in *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U.S. 58, 72, the Supreme Court held that a reservation in an ordinance, granting to a telephone company an easement to occupy the streets, of the power to amend the ordinance as the necessities of the city may demand was

“... no more than a reservation of the police control of the streets and of the mode and manner of placing and maintaining the poles and wires incident to the unabridgeable police power of the city.”

In *Minneapolis Gas Co. v. Zimmerman*, 91 N.W. 2d 642, the Supreme Court of Minnesota said (at p. 656):

“... The relocation, construction, or reconstruction of highways clearly relates to the safety, security, and general welfare of the citizens of the state, and all steps taken in furtherance of these objects—inclusive of the relocation of utility facilities upon rights-of-way—are matters within the police power of the state.”

Furthermore, it appears on the face of the statute that the exercise of the police power here involved has

taken the form of substantive legislation. Section 27-2-7, Utah Code Annotated 1953, deals with the duties and powers of the State Road Commission. Subsection 22 of Section 27-2-7 confers upon the Commission the power, *inter alia*, to make reasonable regulations for the relocation of utility facilities on Federal-Aid highways projects. It provides that the Commission may order such relocation, but expressly provides for the payment of cost of relocation as defined in the Act.

The question before this Court thus concerns the validity of provisions of the substantive law, enacted by the Legislature in the exercise of the police power of the State. Its effect is clearly limited to relocations ordered by the Commission *after* the effective date of the Act. It does not purport to release any obligations which utilities may have had in connection with past relocations of facilities.

It follows that the only questions involved in this case are whether Chapter 53 constitutes a reasonable exercise of the police power and is constitutional.

It is elementary that the Legislature has the power to fix the public policy of the state and that it possesses a wide range of discretion in the exercise of that power. It is equally well settled that the Legislature has control over public roads and highways in this state.

In the instant statute, the Legislature has declared the public policy of the state by changing, *for the future*, the rule of law governing liability for the expense of relocating utility facilities necessitated by Federal-Aid highway construction.

Every exercise by the Legislature of its power to establish the public policy and law of the state necessarily changes the pre-existing law and the rights and obligations arising thereunder. That is the very essence of the legislative power. Appellant's position is that because prior to the enactment of Chapter 53, public utilities had the common law duty to relocate their facilities at their own expense, the Legislature is powerless to change this rule of law for the future. Acceptance of this argument would, in effect, drastically curtail the power of the Legislature to legislate, and all rights and obligations existing under public law would remain permanently frozen in their present form. The Constitution does not compel so absurd a conclusion. On the contrary, it is well established that the police power, i.e., the power to make new laws and change or abolish old rules of law, can never be abdicated or bargained away, and is inalienable even by express grant.

While the exercise of the police power, like all legislative action, must be reasonable, there is a very strong presumption in favor of its constitutionality. Under familiar principles of law, a statute must be sustained unless its invalidity is apparent beyond a reasonable doubt. Where there exists any doubt as to the validity of a statute, the legislative action must be upheld and a decision of the Legislature accepted by the judicial department.

This presumption of constitutionality of the Legislature's exercise of the police power is so well established in Utah and in all other jurisdictions generally that no citations of authority are necessary. Consequently, Chapter 53 must be upheld unless it is without rational basis. Every doubt must be resolved in favor of its

constitutionality . . . in no doubtful case will the judiciary pronounce a legislative act to be contrary to the Constitution; to doubt the constitutionality of a law is to resolve the doubt in favor of its validity. 11 Am. Jur., Constitutional Law, § 92.

“ . . . the rule is fixed that a party who alleges the unconstitutionality of a statute normally has the burden of substantiating his claim and must overcome the strong presumption in favor of its validity. It has been said that the party who wishes to pronounce a law unconstitutional takes on himself the burden of proving this conclusion beyond all doubt, and that a party who asserts that the legislature . . . has violated the Constitution must affirmatively and clearly establish his position. . . . It is insufficient merely to raise a doubt or show that the legislation is unwise.” 11 Am. Jur., Constitutional Law, § 132 and cases cited there.

Reimbursement of utilities for relocation expenses in connection with complex and costly highway projects antedates the Federal-Aid Highway Act of 1956 which first officially sanctioned Federal participation in the reimbursement of such costs. Thus, for many years, statutes in California (Deering's California Codes, 1952, "Streets and Highways," §§ 700, et seq.), Connecticut (Gen. Stats., 1949 Revision, Cum. Supp. 1953, Ch. 107, § 971(c)), and New Jersey (Stats. Ann. 1940 Cum. Supp. 1953, § 27:7A-7) have provided for payment by the state of relocation costs on express ways. The constitutionality of reimbursement under these statutes has apparently never been doubted. In addition, with one exception, all turnpike statutes expressly provide for reimbursement of utility relocation costs.

Alabama Code 1940 (1955 Supp.), Tit. 23, Sec. 124(16)e;
California Streets and Highways Code, Sec. 703;
Connecticut Public Acts of 1957, Ch. 576;
Florida Statutes 1957, Ch. 340, Sec. 340.07(5);
Illinois Smith-Hurd Stat. Anno. (1957 Supp.), Ch. 121; Sec. 314a 34;
Indiana Statutes (1957 Supp.), Sec. 36-3206;
Kansas General Statutes (1957 Supp.), Ch. 68, Sec. 68-2005;
Kentucky Rev. Stat., Sec. 177.430(5) and *Laws 1954*, S.B. 137, Sec. 15;
Louisiana Rev. Stat. (1957 Supp.), Tit. 48, Sec. 1256;
Maryland Anno. Code, Art. 89B, Sec. 145;
Michigan Stat. Anno. (1957 Supp.), Tit. 9, Sec. 9.1095(5);
New Jersey Stat. Anno., Tit. 27, Sec. 12B-6;
New York Highway Law, Sec. 346;
North Carolina General Stat., Ch. 136, Sec. 136-89.18;
Ohio Page's Rev. Code Anno., Ch. 5537, Sec. 5537.05;
Oklahoma Stat. (1957 Supp.), Tit. 69, Sec. 674;
Rhode Island General Laws 1956, Ch. 12, Secs. 24-12-9(q);
Texas Vernon's Civil Stat. (1957 Supp.), Art. 6674v, Sec. 6;
Vermont Laws 1955, No. 270, H. B. 414, Sec. 4;
Virginia Code of 1950, Tit. 33, Sec. 33-255.6;
Wisconsin Stat. 1957, Sec. 59.965(5)(h) 3.

Thus, when Congress recognized the equity of reimbursing utilities for the cost of relocating facilities when required for Federal-Aid highway projects, there was not even a suggestion that any constitutional question might be involved. Indeed, Conference Report No. 2436, 84th Cong., 2d Sess. makes it clear that the Congress did not make a new departure, but merely affirmed the long established practice of the Bureau of Roads in reimbursing states which paid utility relocation expenses on Federal-Aid highways.

By the same token, when 16 states adopted reimbursement provisions designed to cooperate with the Federal government in expediting the National System of Interstate and Defense Highways without imposing inequitable and in some instances unbearable burdens on utility users, they were merely following an established public policy applicable to complex and costly limited access highway projects, the propriety of which had never been successfully challenged. In an exhaustive study published by the National Academy of Sciences—Highway Research Board in 1955 as Special Report 21, entitled “Relocation of Public Utilities Due to Highway Improvement—An Analysis of Legal Aspects,” the Board not only failed even to suggest that a constitutional question might be involved, but unequivocally stated on page 40 that the common law doctrine, under which utilities had to relocate at their own expense, specifically admits of legislative change.

It follows that at the time of the enactment of Chapter 53 and similar statutes, their propriety seemed established beyond question. It is not surprising, therefore, that when shortly after the passage of the Federal-Aid

Highway Act of 1956 the Legislatures of Maine and New Hampshire requested advisory opinions from their respective Supreme Courts, the Justices had not the slightest difficulty in advising that the State could validly reimburse utilities for relocation expenses.

Following the Maine and New Hampshire opinions, the constitutionality of such statutes was nevertheless challenged in seven jurisdictions besides Utah. In four, it has been upheld. In Minnesota and Texas by the Supreme Court, and in Montana and North Dakota by the District Courts. In addition, the constitutionality of reimbursement for utility relocation costs was upheld by the Supreme Court of New Jersey in connection with urban renewal projects in *Wilson v. Long Branch*, 142 A. 2d 837, 847 (1958). The Supreme Court of Pennsylvania has recently stated with respect to reimbursement that the common law rule . . . can and may be abrogated by a specific statutory mandate directing the payment of relocation costs . . . *Delaware River Port Authority v. Pennsylvania Public Service Commission*, 145 A. 2d 172 (1958). In Maryland, the Court of Appeals has held that a statute providing for compensation for damages caused by the construction of a tunnel in Baltimore Harbor required the State Road Commission to reimburse utilities for relocation expenses. *Baltimore Gas & Electric Co. v. State Roads Commission*, 134 A. 2d 312 (1957).

Summarizing, we find that since 1957 reimbursement of utilities for relocation expenses has been approved by the highest courts of the following states: Maine, Maryland, Minnesota, New Hampshire, New Jersey, Pennsylvania and Texas. Its constitutionality has

been upheld by the lower courts of Montana and North Dakota. In addition, in Florida, Georgia, Nebraska and Oklahoma, the Attorneys General have ruled to the same effect.

Unless the conclusion is accepted that all the legislative bodies and courts acted unreasonably, it is impossible for the Appellant to sustain the burden of establishing that a legislative determination made by so many legislators and sustained by so many courts is invalid beyond a reasonable doubt. Viewed in the most favorable light, Appellant's arguments at best do no more than raise a doubt as to the constitutionality and wisdom of Chapter 53. But even if Appellant is successful in raising such doubts, it cannot prevail here under the elementary rules discussed, *supra*.

It is submitted that the Appellant has not and cannot sustain the burden of overcoming this presumption. Nevertheless, we shall show that it was eminently reasonable for the Legislature to adopt Chapter 53.

It is well established that the use of public highways by utilities for the location of their facilities is not only proper, but is required by the public interest. This court has stated that under Utah laws highways are devoted to the public use and are useful not only for surface transportation but also for utility purposes essential to the public welfare. In *White v. Salt Lake City* (1952), 121 U. 134, 239 P. 2d 210, 214, the Court quoted with approval the following language of the Ohio Court:

“ ‘ . . . Some of the highways of our state were originally Indian paths or paths established by wild animals. By a process of evolution they successively became foot-paths of the settlers, bridle

paths, ways for pack animals, ways for horse-drawn vehicles, ways for motor-propelled vehicles and electric street cars, ways for wires for telephone and telegraph service and for the transmission of electric energy, ways for pipes for water, sewage, gas, steam, hot water, and other utilities.

* * * * *

“ ‘The evolution of public utilities and the widespread and ever-increasing use of public utility service throughout the state have greatly varied the uses of streets and highways. It is doubtful whether this great variety of uses has really increased the burdens. The increased burdens upon the highways are caused primarily by the largely increased population, and the demands of the people for necessities, conveniences, and luxuries of modern living conditions. . . . It is hardly correct to say that by such new adaptations the streets and highways are subjected to uses not contemplated when highways were laid out many years ago. *It would be more correct to say that present uses are the progression and modern development of the same uses and purposes.* The new appliances are but rapid transit methods of supplying the modern wants of the people, the wires supplanting the messenger, the carrier and the postman, and the rails and pipe lines supplanting in part the vehicular traffic.’ ” (Emphasis added by court)

The principle is further stated in the recent case of *Minneapolis Gas Co. v. Zimmerman*, 91 N.W. 2d 642, 648 (Minn. 1958) as follows:

“ . . . The concept of the functional uses or purposes of a highway has constantly expanded with the advancement of civilization until today a highway no longer exists for the limited though principal, purpose of vehicular travel or transportation of persons and property over its surface. . . .

“... The soundness of the view that the placing of utility facilities upon a right-of-way is one of the proper uses of a highway benefiting the public is emphasized by the fact that convenience and economy result therefrom to utility users, who are usually located near highways, and by the further fact that, it is in the interest of the public welfare—in the view of our ever-increasing population—to make full and efficient use of the land surface occupied by public roads.”

Direct recognition of the public interest in the use of the highways for utility facilities is found in Sections 10-8-21 and 17-5-39, UCA, 1953, authorizing cities and counties to allow public utility corporations to use the streets and highways for their facilities.

For many years, the joint use of the highways by vehicular traffic and the newer methods of communication caused no problem. Even though the invention of the automobile revolutionized the transportation of persons and property, there was no real conflict of interest between this mode of transportation and utility facilities until after World War II, when an explosive increase in automobile traffic occurred. It was soon realized that this required a network of widened, high-speed, safe highways, which is now being constructed with the aid of the Federal government. This expanded construction of Federal-Aid highways, with the consequent necessity of relocating utility facilities brought about *not* for utility purposes, but solely to accommodate the demands of vehicular traffic, imposed a financial burden on utility companies that was beyond anybody's imagination at the time the common law rule requiring uncompensated relocation was developed. It is not too much to say that when applied to the requirements of the vastly expanded Fed-

eral-Aid highway system of today, as contrasted with the purely local roads of the past, such rule has become unreasonable. It is for this reason that the Congress decided to encourage and facilitate reimbursement for relocation expenses.

Let us briefly consider the alternatives which faced the 1957 Legislature. The cost of relocation caused by the construction of Federal-Aid highways had to be borne by someone, either the highway users through taxes or the utilities' users through higher rates. The rule that uncompensated relocation could be required flowed from the police power of the state over public highways and as we have pointed out, *supra*, the Legislature has the power to change any such rule in the exercise of the police power. There were very strong reasons why it would be not only equitable but in the public interest, to change such rule of non-compensation for relocation expenses.

A statement of some of these reasons is found in Senate Report No. 1407, 85th Cong. 2d Sess.:

"It is submitted that there was valid reason for the States to amend their laws. The conditions under which utilities agreed to bear the burden of relocation costs disappeared, or at the very least were radically and substantially changed, with the enactment of Federal-Aid Highway Act of 1956.

"In the old days, such relocation costs were encountered on a gradual and small scale. They embraced relatively minor operations in type. Their sum total was within the reach of the utilities' ability to fund same, whether the utility was publicly, privately, or cooperatively owned.

"Under the act of 1956 all of this was heavily

changed. A crash program of unprecedented scale was inaugurated. Federal funds available for highway construction rocketed from \$875,000 to \$2 billion within a single year. Greater increases are scheduled for following years. In addition, the type of construction changed. The modern, multilane, high speed traffic ways require rights-of-way of spectacular width; cloverleaves, over-passes, and under-passes, and long distances thereof through urban areas, bringing expressways to the heart of metropolitan centers.

“These changes brought about inordinate expenditures for moving vast amounts of facilities at a great cost to the users of the utilities. They bring about a tremendously different treatment than when highway improvement was a local convenience and local cost, relatively speaking.” U. S. Code Congressional and Administrative News, Vol. 2, 85th Cong., 2nd Sess., P. 2396 (1958)

In considering these factors, the Legislature was not concerned with the protection of stockholders or owners of public utility companies. Regulated utilities have no revenues other than the rates paid by their subscribers from which to pay relocation expenses. Under the law of Utah, utilities are entitled to a fair return on the value of the property devoted to the public service. Relocation costs are an expense item chargeable to operating expenses or are capital expenses and thus increase the rate base on which utilities are entitled to earn. These factors have found express judicial recognition. Thus, the Minnesota Supreme Court said in *Minneapolis Gas Co. v. Zimmerman*, supra, (91 N.W. 2d at p. 652) :

“ . . . If the utilities located in this state must undertake relocation of their facilities without a right to reimbursement their costs will be substantially increased and this in turn will be reflected in higher utility rates in Minnesota communities.”

In *Department of Highways v. Pennsylvania Public Utility Commission*, 136 A. 2d 473, 477 (1957), reversed on other grounds, 145 A. 2d 538, the Court said:

“The cost of relocating the utilities enters into the rate structure of the public utility companies, and is paid for by the companies’ rate payers. It is error to intimate or suggest that such cost is borne by the officials or even the stockholders of the companies. The question of whether the cost of the required relocation of telephone poles erected upon the rights-of-way with authority of the Commonwealth, should be paid on the telephone bills or at the gasoline pumps has been a matter of governmental concern for some years.
. . .”

See also *Delaware Port Authority v. Public Service Commission*, 180 Pa. Super. 318, 119 A. 2d 855, 858 (1956), where the Court said:

“ . . . If the Electric Company were obliged to pay these and like costs at other crossings which will amount to a total of about \$320,000, that utility would be entitled to add the amount to its rate base, to be recovered from its rate payers in addition to a fair return on the total expenditure over the life of the new facilities. The rate payers of the Electric Company as such will receive no benefit from the relocation of its facilities nor from the completion of the project and there is no reason why they should contribute to its cost. The bridge is an interstate link in a system of national highways. Tolls paid by those who use the bridge will be adequate to meet the entire costs incident to its construction. They will be the direct beneficiaries of the completed project and it is they alone who shall pay.”

Thus, the Legislature had to make a decision regarding the equitable allocation of these costs, arising out of the construction of Federal-Aid highways, between

the users and rate payers of the local utility companies and the highway users. In making this decision, it found that the utility users would receive no improvement in service for the higher rates imposed on them and, in addition, they would be compelled to make a double contribution to the Federal-Aid highway program, once in their federal taxes, and a second time in higher utility rates.

It can hardly be seriously argued that the Legislature is without power to choose a fair and equitable allocation of relocation costs rather than an unfair and inequitable one.

In view of the foregoing, the real question in this case is whether the Utah Constitution places the Legislature in a position which would prevent it from changing the law not only in accordance with justice and equity, but also for compelling economic reasons. We submit that merely to state this question is to answer it. Nevertheless, we will now direct our attention to the specific constitutional objections raised in the Appellant's Brief to which we now turn.

III.

REIMBURSEMENT BY THE STATE TO PUBLICLY, PRIVATELY AND COOPERATIVELY OWNED UTILITIES, INCLUDING DRAINAGE AND IRRIGATION SYSTEMS AND UTILITIES OWNED BY ALL POLITICAL SUBDIVISIONS, FOR RELOCATION OF FACILITIES AS AUTHORIZED BY CHAPTER 53, LAWS OF UTAH 1957, DOES NOT CONSTITUTE A LENDING OF THE CREDIT OF THE STATE IN VIOLATION OF ARTICLE VI, SECTION 31 OF THE CONSTITUTION OF UTAH.

The Appellant contends that the Relocation Law violates Article VI, Section 31 of the Utah Constitution which provides:

“The Legislature shall not authorize the State, or any county, city, town, township, district or other political subdivision of the State 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.”

The purpose and effect of Article VI, Section 31 is to prohibit a business partnership between the state and individuals or private corporations. The basic test in determining whether a statute violates this section of the Constitution is whether the purported expenditure is for a private or public purpose. *Wallberg v. Utah Public Welfare Commission*, 115 U. 242, 203 P. 2d 935.

Thus, the question for decision is whether expenditures for the costs of relocation of utility facilities are expenditures for a public purpose. That the answer must be in the affirmative is clear for a number of reasons.

At the outset, we wish to point out that the weight of authority is to the effect that payment of relocation expenses serves a valid public purpose. The following jurisdictions uphold reimbursement of relocation expenses as against attacks based on constitutional provisions similar to Article VI, Section 31 of the Utah Constitution: Maine, Maryland, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania and Texas.

We have shown, *supra*, that the Relocation Law was enacted by the Legislature, in the exercise of the police power, to prescribe a substantive rule of law for the

future. Thus, it is clear that if the Legislature repeals taxes for the future, this does not result in a gift, whereas the forgiving of past due taxes would be a gift. Another example may be mentioned. Every citizen, with certain statutory exceptions, is under a duty to render jury service. This duty could be compelled without compensation. Nevertheless, Section 78-46-5, UCA 1953, prescribes certain fees for jurors. These payments have been increased, the last increase to eight dollars per day being found in Chapter 59, Laws of Utah 1949. Under the Appellant's view, the 1949 statute would be unconstitutional because the state could have compelled jury service at the lower fee scale then in effect. But, of course, the 1949 statute created enforceable legal rights for the future, and payment of the increased fees and mileage is not a gift of public funds. A different situation would be presented if a statute attempted to authorize additional payments for jury service rendered prior to the effective date of the statute.

It is clear, therefore, that the Legislature could validly create a legal right of reimbursement for the future and that payment of such legal claim cannot constitute a gift. Indeed, the courts have expressly held that the common law rule governing relocation expenses is subject to statutory change. The most recent statement to this effect is found in the decision of the Supreme Court of Pennsylvania in *Delaware River Port Authority v. Pennsylvania Public Service Commission*, 145 A. 2d 172, 175. The Court said:

“This common law rule, however, can and may be abrogated by a specific statutory mandate directing the payment of relocation costs to the non-transportation utilities involved.”

In *Opinion of the Justices*, 132 A. 2d 613, 615, the Supreme Court of New Hampshire said:

“The common-law rule which places the costs of relocating utility facilities on the owner ‘specifically admits of legislative change.’ ”

To the same effect is *Westchester Electric R. Co. v. Westchester County Park Commission*, 174 N.E. 660 (N. Y. Ct. of App.). The Court said:

“At common law, holders of franchises take the risk of the location of their structures in public highways and are bound to make such changes at their own charge as public convenience or security requires, *but this common-law rule is subject to alteration by statute*. Public security demands that the driveway of a great park over which millions of motor vehicles proceed at a high rate of speed shall not cross city and village streets at grade. A statute imposing the expense of changes necessarily incidental to the elevation of such highways, upon the public body directing such changes *would not conflict with any constitutional prohibition*. The inquiry is, therefore, directed to the existence of such a statute.” (Emphasis added)

Thus, if the Relocation Law is viewed as what it is, a prospective modification of a substantive rule of the common law, it becomes apparent that the allegation that it involves a gift of public funds is without substance.

In Utah, as well as in almost every other state, utilities have long had authority to occupy public highways for the purpose of providing necessary utility services to the public. There are no judicial decisions holding that such grants are donations or gifts, but to the contrary such grants have been specifically upheld.

In *State ex inf. McKittrick v. Southwestern Bell Telephone Company*, 92 S.W. 2d 612 (Mo.), it was alleged that a statute giving telephone and telegraph companies the right to place their facilities on the highways without payment was in violation of a constitutional provision similar to Article VI, Section 31.

The Court said:

“... The respondent is a public utility engaged in furnishing telephone service to the general public. The General Assembly no doubt considered that the benefit to the general public arising from the promotion of the extension of such service justified the granting of the privilege of the use of the highways. While that benefit may not be said to be a formal consideration, as that term is generally understood, yet it is that benefit and that consideration which takes this grant out of the class of grants prohibited by the Constitution.”

And the theory thus followed in connection with these grants and their constitutional validity was reiterated in *State ex rel. State Highway Commission v. Union Electric Co. of Missouri*, 142 S.W. 2d 1099 (1940); *Arkansas State Highway Commission v. Southwestern Bell Telephone Co.* (Arkansas), 178 S.W. 2d 1002 (1944) and *Los Angeles County v. Southern California Telephone Company*, 196 P. 2d 773.

In *Minneapolis Gas Co. v. Zimmerman*, supra, the Minnesota Supreme Court reaffirmed the rule that “the use of highway rights of way for the transmission of public intelligence and public utility services confers important and direct benefits upon the public and . . . such use is not solely for the benefit and convenience of the utilities.”

These cases illustrate that the ban of constitutional provisions similar to Article VI, Section 31 does not fall upon the grant by the state, counties or cities to utilities of the use of public ways. The benefits flowing to the public from such uses of highway rights of way are apparent from an examination of Respondents' status. Respondents are utility companies engaged in the business of furnishing communications, fuel and electric power to the public at just and reasonable rates; they are under a legal duty to serve the public; their business is affected with a public interest and results in public benefit. Use of highways for the location of Respondents' facilities promotes the extension of such service to the greatest number of people at the lowest reasonable cost. In *Utah Light & Traction Co. v. Public Service Comm.*, 101 U. 99, 118 P. 2d 683, 689, this Court said:

"Thus the right to lay rail or pipes, or string wires or set poles along a public street is not an ordinary business in which everyone may engage, or a use everyone may make of the street, but is a special privilege, a franchise to be granted for the accomplishment of public objects."

If permitting a utility to *use and occupy* portions of the rights of way of public highways is not a prohibited lending of the credit of the state because of the public benefits which will result from the operation of such utility, why is it any less true that no prohibited lending of the credit of the state is involved when the state reimburses the utility for the cost of *relocating* its facilities, and thereby insures the continuance of service at reasonable rates. The cases, we respectfully urge, establish that the latter is permissible and, thus, we do not find how it is debatable that the same public purpose

which supports the original grant also supports Chapter 53.

In Maine, the 1957 Legislature passed an act similar to Chapter 53. Article 9, Section 14 of the Maine Constitution provides that “the credit of the State shall not be directly nor indirectly loaned in any case. . . .” In *Opinion of the Justices*, 132 A. 2d 440 (1957), the Court held that the Act did not violate this section of the Constitution, saying at page 443:

“. . . At common law there is no obligation to pay for the removal or relocation of public utility facilities required by changes in highways. (Citing cases) The State, however, may in our view, pay for the cost of relocating such facilities, if it chooses to do so. *The purpose of such expenditures is public in nature, and the extent and conditions under which the State may meet such costs are for the Legislature to determine.*” (Emphasis supplied)

The New Hampshire Supreme Court likewise rendered an opinion upholding the constitutionality of a statute similar to Chapter 53 in *Opinion of the Justices*, 132 A. 2d 613 (1957). The Court held that conceding that in absence of statute, utilities are obligated to relocate at their own expense, the Legislature has the power to relieve them of that burden and such legislative action did not violate the New Hampshire Constitution. The Court said at page 614:

“While the obligation to remove or relocate utility facilities is placed on the owner by the common law, the Legislature may change this rule. (Citing cases) This principle was expressed in the recent *Opinion of the Justices*, Me. 132 A. 2d 440 (decided May 6, 1957) as follows: ‘The State, however, may, in our view, pay for the cost

of relocating such facilities, if it chooses to do so. The purpose of such expenditures is public in nature and the extent and conditions under which the State may meet such costs are for the Legislature to determine.' The common-law rule which places the costs of relocating utility facilities on the owner 'specifically admits of legislative change.' Relocation of Public Utilities Due to Highway Improvement — An Analysis of Legal Aspects, Highway Research Board Special Report 21, p. 40 (1955). *If the Legislature decides to make such a change it would not be a violation of our Constitution, Part II, Article 5th or Part I, Article 10th.* (Citing cases)" (Emphasis supplied)

Contrary to the statement of Appellant on page 14 of its Brief, both the Maine and New Hampshire Supreme Courts considered constitutional provisions similar to Article VI, Section 31.

The Maine Constitution provides that "the credit of the state shall not be directly nor indirectly loaned in any case" and, as noted above, the Court held that the Relocation Law did not violate the Constitution.

In New Hampshire the Court referred to Part II, Article 5th and Part I, Article 10th of the New Hampshire Constitution. Both of these provisions relate to the giving or loaning of the credit of the state and in *Opinion of the Justices* (New Hampshire), 190 Atl. 425, the Court adopted the universal view that "money raised by taxation can be used only for public purposes and not for the advantage of private individuals." In quoting from *Cooley, Taxation*, page 90, the Court said:

"... Taxation for the purpose of raising money from the public to be given or even loaned to private parties, in order that they may use it in

their individual business enterprises, is not recognized as for public use.”

With this clear cut precedent in mind regarding the use of public funds, the New Hampshire Supreme Court nevertheless held that the statute allowing reimbursement to utilities of their relocation expenses was not a gift or a lending of the credit of the state.

In *Minneapolis Gas Co. v. L. P. Zimmerman*, supra, the Supreme Court of Minnesota upheld a statute identical in legal effect to Chapter 53. The Minnesota statute was passed by the Legislature in 1957 and its purpose was to take advantage of the Federal-Aid Highway Act of 1956 which had been recently enacted by Congress.

The Minnesota Constitution, Article IX, Section 10, almost identical with Article VI, Section 31 of the Utah Constitution, provides that “the credit of the state shall never be given or loaned in aid of any individual, association or corporation, . . .”

In construing this provision of the Constitution, the Court said (page 651):

“In short, public funds shall be used solely for public purposes and shall never be used, or encumbered by pledging the state’s credit, in the furtherance of any private purpose or in the aid of any private individual or entity.”

The Court further said:

“We have already pointed out that the use of rights of way by utilities for locating their facilities is one of the primary purposes for which highways are designed, even though their principle use is for public travel and transportation of

persons and property. It follows that where it becomes reasonably necessary to relocate such utility facilities in order to improve the highway for public travel . . . *an expenditure of funds to effect such relocation is properly a governmental function exercised for a public purpose of primary benefit to the entire community.* It is primary for a public purpose not only because the relocation is made necessary in order to expedite public travel and transportation, but also for other substantial reasons.” (Emphasis supplied)

The Court further stated at page 652:

“It is argued, however, that since plaintiff utility at common law and under the terms of the occupancy permits issued to it by the state, was entitled to no reimbursement and was solely responsible for all costs of relocating its facilities on the highway, the reimbursement act, in authorizing payment of such relocation costs from the highway fund, confers upon the plaintiff a gratuity of public monies in violation of Minnesota Constitution, Article IX, Sections 1 and 10. This argument ignores the well established principle—followed by other jurisdictions with identical or similar constitutional provisions—that, although gratuities and benevolences of public monies in aid of private undertaking are prohibited, the state Constitution does not prohibit the legislature from by prospective action (that is by an enactment prior to the ordering of a relocation of utility facilities or prior to the commencement of a great public work requiring such relocation), fixing the conditions of performance and making provisions for the future recognition of claims for damages founded on equity and justice, although such claims would otherwise be *damnum absque injuria* and unenforceable against the state.”

The Appellant has attempted to discount the soundness of the Minnesota decision by arguing that the Court

was influenced solely by the economic consequences of its decision. We submit that such is not the case. The Court took notice of the economic factors which had been considered by the legislature and discussed the "realities of the situation" but prior to that point in its opinion it had answered affirmatively the question of whether reimbursement to utilities for relocation of their facilities was an expenditure for a public purpose which was of benefit to the community and which was related to the functions of government.

On January 6, 1960, the Supreme Court of Texas in the *State of Texas v. City of Dallas, Southwestern Bell Telephone Co., Dallas Power and Light Co. and Lone Star Gas Co.*,S.W. 2d (see Appendix) upheld the constitutionality of the Texas Relocation Law against the attack that it was a lending of the credit of the State in violation of Article III, Sections 50 and 51 of the Texas Constitution. The Court said:

"Respondents benefit from the statute only in the sense that they are relieved of a financial burden which they could be required to bear. The question to be decided then is whether the use of public funds to pay part or all of the loss or expense to which an individual or corporation is subjected by the state in the exercise of its police power is an unconstitutional donation for a private purpose. We think not provided the statute creating the right of reimbursement operates prospectively, deals with the matter in which the public has a real and legitimate interest, and is not fraudulent, arbitrary or capricious."

The Maine, New Hampshire, Minnesota and Texas decisions are well-reasoned and logical opinions substan-

tiated by sound legal precedent and authorities and should be followed by this Court.

There are many authorities which, while dealing with somewhat different statutes, hold that a Legislature can constitutionally relieve a utility of the cost of effecting changes in its facilities to accommodate public improvements. These decisions support the same legal principles that sustain the validity of Chapter 53.

The most recent of these cases is *Wilson v. Long Branch*, 142 A. 2d 837, where the Supreme Court of New Jersey upheld the constitutionality of the provision in the Blighted Area Act pursuant to which the expense of utility relocation necessitated by an urban redevelopment plan was to be paid as a part of the cost of the municipal project. The Court said (142 A. 2d at 847) :

“Utilities are necessary adjuncts of the public welfare. Their business operations and their property have been subject to special legislative treatment for many years. . . . In the present context, uninterrupted service during and after completion of the redevelopment project is vital. Where removal of the facilities is necessary, it is important that the relocation be as expeditious and as controversy-free as possible. That end is intimately related to the achievement of the overall public purpose. . . .”

A leading case is *Oswego and S. R. Co. v. State*, 124 N. E. 8 (N.Y. Ct. of App.). In that case, the railroad had built its bridge pursuant to a permit issued by the state which required the railroad to remove the bridge at its own expense. Subsequently, the river was improved for navigation and a statute was passed which provided for the state to pay the cost of constructing a

new bridge, notwithstanding the agreement which the railroad had made and the fact that in New York the state could, in the exercise of its police power, improve navigation and require uncompensated relocation of the bridge. The Court held that, in the Legislature's discretion, it could assume that burden without contravening Article 8, Section 9 of the New York Constitution, which provided that "*neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation, or private undertaking.*"

In rendering the opinion of the Court, Justice Cardozo made the following statement:

"The state was about to execute a great public work. It saw that in the doing of that work there would be destruction of private property. Much of the damage would be *damnum absque injuria*. None the less it would be damage. The result would be inequality in the distribution of public burdens. Some would pay more dearly than others in proportion to benefits received. This inequality the Legislature, fixing in advance the conditions of the undertaking, had the power to correct. It might refuse to launch an enterprise at the price of hardship and oppression. There was power to destroy, and leave the loss where it might fall. There was also power to pay for the destruction, and thereby re-establish some uniformity of proportion between benefits and burdens. The question was for the Legislature whether the equity of compensation was strong enough to merit recognition. We cannot hold it to be illusory."

In discussing the foregoing case on page 9 of its Brief, the Appellant has stated that "the New York Courts have dealt with this problem as a statutory one only and have reached different conclusions depending

upon the statute involved.” This is not entirely correct. In the *Oswego* case, the Court dealt specifically with a constitutional provision almost identical with Article VI, Section 31 of the Utah Constitution. In *Westchester Electric R. R. Co. vs. Westchester County Park Commission*, supra, the Court clearly stated that a statute imposing the expense of utility relocation upon the public body directing such changes “did not conflict with any constitutional prohibition.”

In *Transit Commission vs. Long Island R. R. Co.*, 171 N. E. 565 and *New York Tunnel Authority vs. Consolidated Edison Co.*, 68 N.E. 2d 445, the New York Court of Appeals reaffirmed its previous rulings that the common law rule could be changed by statutory enactment, but held that the Legislature had not expressly provided in the statutory provisions under consideration that the cost of relocation should be borne by the state.

On page 10 of its Brief, Appellant has quoted from *New Orleans Gaslight Co. vs. Drainage Commission of New Orleans*, 197 U.S. 453, in support of the proposition that a utility is required to pay its own relocation costs and that the grant of rights in the subsurface are held subject to such reasonable regulation as the public health and safety may require. We accept the reasoning of the *New Orleans* case and the decision which required the utility to relocate at its own expense. However, we wish to point out that the utility in the *New Orleans* case was not allowed reimbursement for relocating its facilities because the common law rule, requiring uncompensated relocations, *had not been changed by statute*. There is nothing in the *New Orleans* case to substantiate Appel-

lant's position that a statutory enactment changing the common law rule would be unconstitutional.

In *City of Beaumont v. Priddie*, 65 S.W. 2d 434 (Tex. Civ. App.), *dismissed as moot*, 95 S.W. 2d 1290, an agreement had been made between the city and the railroad for sharing expenses in the elimination of grade crossings. The Court held that the contract did not violate a constitutional provision similar to Article VI, Section 31, and stated:

"But, although the state may compel the railroad to bear the entire expense of grade separation, nevertheless it is not required to do so, but may bear the entire expense itself, or apportion it between itself and the railroad. While this power is generally recognized, the cases in which it has been challenged as violative of constitutional provisions similar to those in this state inhibiting the state or its subdivisions from making donations to private corporations or individuals appear to be rare. Those in which the question has been considered uniformly held that state or municipal contribution to the expense does not come within such inhibition. Lehigh Valley Ry. v. Canal Board, 204 N.Y. 471, 97 N.E. 964, Ann. Cas. 1913C, 1228; Brooke v Philadelphia, 162 Pa. 123, 29 A. 387, 24 L.R.A. 781. We think the soundness of this holding cannot seriously be questioned. While the paramount duty rests upon the railroad to provide originally and thereafter to maintain the safety of the crossing, regardless of the requirements in that regard brought about by changes in conditions, still the interest therein of the state as representative of the public is such that the expenditure of public funds in this regard is a legitimate governmental function, and does not properly fall within the designation of a donation of public funds to a private enterprise. In the

infinite variety of situations which present themselves, the state may properly make an adjustment of the expense, as the peculiar equities of each situation may in its judgment dictate. In this matter the judgment of the state is supreme, subject to judicial review only in case of fraudulent or arbitrary abuse of power." (Emphasis supplied)

In *Brooke v. City of Philadelphia*, 29 Atl. 387 (Pa. 1894), the city desired to eliminate a grade crossing and agreed with the railroad that each would bear one-half of the expense. It was contended that this agreement violated the provision of the Pennsylvania Constitution prohibiting the lending of the credit of municipalities to corporations or individuals. The Court rejected this contention, and added the observation that the city could even have borne the entire expense if it had seen fit to do so, saying:

"As to the second averment of the bill, —that the debt to be created, to the extent of one-half, is practically a loan of the city's credit to the Philadelphia & Reading Railroad Company, a private corporation, —we are of the opinion it cannot be sustained. The avoidance of grade crossing is not only desirable, but, with the growth of the city in business and population, may be considered absolutely necessary. . . . And the city has the power to assume the entire expense of the municipal improvement."

In *Baltimore Gas and Electric Co. v. State Roads Commission*, 134 A. 2d 312 (Md. 1957), the Court of Appeals of Maryland held that under a statute providing that all private property damaged or destroyed in constructing a tunnel in Baltimore Harbor should be restored or adequate compensation made therefor, the utility company was entitled to be reimbursed for the cost

of the removal, relocation, and reconstruction of its facilities located in, on, or under public highways. The Court recognized that the statute "puts an obligation on the Commission, as an agency to whom the State has delegated the police power necessary for the doing of the work authorized, that it would not bear otherwise." (p. 315) In rejecting the Commission's attack, it said that the statute "does not take from the Commission the right or the power to decide what project is to be built, or how; no more does it shackle its right and power to make a public utility move its facilities if they are in the path of construction. It merely says that policy of the State is to pay for the cost of removal and relocation. . . ." (p. 317) See also *Mayor and City Council of Baltimore vs. Baltimore Gas and Electric Company* A. 2d (Dec. 11, 1959).

Thus, in cases where a similar constitutional question was raised, the courts have been almost unanimous in their rejection of contentions of the character advanced by Appellant and have held that State expenditures for relocation costs are for a proper public purpose.

We believe it pertinent to point out that in 1917 the State of Utah enacted legislation which provided that the Public Service Commission of Utah should have authority to prescribe the terms and conditions for the elimination of railroad grade crossings and "the proportions in which the expense of the alterations or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected, or between such corporations and the state, county, municipality or other public authority in interest." Chapter 47, Laws of Utah 1917. Section 54-4-15, UCA 1953.

This statutory provision has been in effect for 43 years and although it is impossible to tell in how many instances cost sharing under this statute has been accomplished, it may reasonably be assumed that such have been made and that public monies have been used to defray the state, county or municipal share thereof. This statute has been reviewed by this Court in *Denver and Rio Grande R. Co. v. Public Utilities Commission of Utah*, 51 U. 623, 172 Pac. 479; *Union Pacific R. Co. v. Public Service Commission*, 103 U. 186, 134 P. 2d 469; and *Provo City vs. Department of Business Regulation*, 118 U. 1, 218 P. 2d 675, and the authority of the Public Service Commission to prescribe the manner and terms upon which railroad tracks may be constructed and maintained across a public street has been affirmed in each case. We respectfully submit that this statutory provision is the same in principle as the Relocation Law and that the use of public funds for railroad grade separations or utility relocations does not contravene Article VI, Section 31 of the Constitution.

And why is it that there is no difference between the railroad grade separation cases and the case before the Court? That reason, to us, seems obvious. In the railroad cases, the railroad may be compelled at common law to stand all the cost of changing the grade or its bridges where this is necessary to accommodate a superior public need. *Erie Railroad Co. v. Board of Public Utility Commissioners*, 254 U.S. 394; *Missouri Pacific R. R. Co. v. City of Omaha*, 235 U.S. 121; *Chicago, Milwaukee and St. Paul R. R. Co. vs. City of Minneapolis*, 232 U.S. 430. As the United States Supreme Court in the last cited case said:

“It is well settled that railroad corporations

may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways.”

In the case before the Court and assuming the validity of the common law rule, a utility may also be compelled to adjust or relocate its facilities at its expense in response to the necessities of the public. If, then, it is valid for a state to relieve all or a part of a burden which it may place entirely upon a railroad without violating constitutional provisions like Article VI, Section 31, then certainly a legislative effort to relieve non-railroad utilities from a like or similar burden is also valid.

We also direct the Court's attention to Section 10-7-19, UCA 1953, wherein cities and towns are permitted to “aid and encourage the building of railroads” by grants of real property owned by the City. This statute was adopted in 1901, has been reviewed by the Supreme Court in *Knight v. Thomas*, 35 U. 470, 101 Pac. 383; and its constitutionality never questioned even though the prohibitions of Article VI, Section 31 apply to cities and towns as well as to the state.

Appellant in arguing that Chapter 53 contravenes Article VI, Section 31, relies solely on decisions by the Supreme Courts of New Mexico, Tennessee and Idaho. We respectfully submit that these decisions are contrary to the weight of authority and that the cases heretofore cited should be followed by this Honorable Court.

In *State of Tennessee ex rel. Leach v. Southern Bell Tel. & Tel. Co.*, 319 S.W. 2d 90 (1958), a closely divided court held that the Tennessee Relocation Law was uncon-

stitutional in that it was a lending of the credit of the state.

The basic premise of the majority opinion was that a utility's right on the highway was a mere gratuitous privilege and that *therefore* there is no equity in reimbursing it for relocation expenses. It is apparent that the Tennessee Court had been led into a misconception of the utility's right, which is directly contrary to the generally accepted rule of law, including the law of Tennessee. *Chattanooga v. Tennessee Electric Power Co.*, 112 S.W. 2d 385.*

However, even assuming that the Tennessee Court's characterization of a utility's right of occupancy is correct, its decision should not be followed because its sole basis is not relevant to the constitutional issue here involved. The lawmaking power of the Legislature is obviously not dependent on the technical nature of the utilities' right. Even if they had a mere privilege the Legislature could provide for reimbursement of relocation expenses on Federal-Aid highways.

This misconception of the issues by the Tennessee Court necessarily led to further errors. Thus, in failing to recognize that the property rights of the utilities could be burdened or curtailed only in the proper exercise of the police power and therefore the issue before it was the reasonableness of the exercise of the police

* It should be noted that the franchises granted by the cities or counties to the Respondents herein vest in the franchise holder a property right which is protected by both the State and Federal Constitution. *Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U.S. 58; *Boise Artesian H. & C. Water Co. v. Boise City*, 230 U.S. 67; *Russell v. Sebastian*, 233 U.S. 195; *Louisville v. Cumberland Tel. & Tel. Co.*, 224 U.S. 649; *Knoxville v. Africa*, 77 Fed. 501, 507; *City of Lansing v. Michigan Power Co.*, 150 N.W. 250; *City of Summerville v. Georgia Power Co.*, 55 S.E. 2d 540.

power by the Legislature in prescribing rules of law for the future, the Court necessarily failed to give effect to the presumption of the constitutionality of legislative action. An examination of the majority opinion clearly shows that the court substituted its judgment as to the *wisdom* of the legislation for that of the Legislature.

The majority opinion makes a brief reference to the case of *Oswego & S. R. Co., et al. v. State*, supra, in which it does not take issue with Mr. Justice Cardozo's opinion, but attempts to distinguish it by the statement that:

“The whole basis of Justice Cardozo's' opinion is that the legislature may enact acts when equity demands. The facts in the Oswego case showed that equity did demand that the state step in and do equity. We have no question of equity in the present case. The user of the defendants was only permissive.”

This is not a valid distinction. The railroad in the *Oswego* case constructed its bridge over a navigable stream under an express agreement that it would reconstruct it at its own expense. Certainly the use made by the railroad of a location within the confines of a navigable stream was no less permissive than is the use of the utilities in Tennessee. In *Minneapolis Gas Co. v. Zimmerman*, supra, the Court held that it was equitable and just to pay a gas company for relocating its lines which had been originally constructed under a permit issued by the Commissioner of Highways in which the company agreed to bear that expense, and expressly relied on the *Oswego* case. There were no facts to be found in the *Oswego* case (or the Minnesota case) giving rise to any “equity” not equally present in the Tennessee case or in the case at bar.

Finally, the majority of the Tennessee Court failed to even mention the numerous authorities directly in point. Instead, it relied exclusively on a Kentucky case, *Southern Bell Tel. & Tel. Co. v. Commonwealth*, 266 S.W. 2d 308, and a Georgia case, *Mulkey v. Quillian*, 100 S.E. 2d 268. Neither case supports the decision of the Tennessee Court.

In the Kentucky case, there was no statute, such as Chapter 53, expressly directing reimbursement for utility relocation, but the utility nevertheless claimed reimbursement even in absence of such a statute. In denying reimbursement, the Court found that the company's franchise imposed on it the duty to relocate at its own expense.

Having thus held that the company was required to relocate without compensation under the provisions of its franchise (there being no contrary statute) the opinion then contains the following which is obiter dictum:

“... *If construed* as requiring removal and relocation at the expense of the state, the franchise was in violation of Article II, Section 33, of our Third Constitution, which was carried over into Section 177 of our present Constitution, and provided:

‘The credit of this Commonwealth shall not be given or loaned in aid of any person, association, municipality, or corporation.’ ”

That this statement was not necessary to the decision was recognized by the Court itself as shown by the underscored words. The Court had already held that the franchise could *not* be “construed as requiring removal and relocation at the expense of the state.” Therefore,

what might be its opinion *if* it had construed the franchise otherwise could be nothing but dictum.

Furthermore, the Kentucky Court was not passing upon the constitutionality of a statute (such as Chapter 53) which changed the existing Kentucky common law and declared a changed future public policy applicable to *all utilities*. On the contrary, there was involved in the Kentucky case a special act granting a franchise to a single utility.

If the Kentucky dictum were to be applied to a general statute like Chapter 53 which lays down a changed public policy for the future, then it would be irreconcilable with and directly opposed to the many adjudications directly on the point which have been heretofore cited and neither could it be supported in the light of previous Kentucky decisions. *Guthrie v. Curlin*, 263 S.W. 2d 240 (Ky.).

In Kentucky, as in Utah, the grade crossing elimination acts provide for reimbursing the railroads out of tax funds which is the same thing in principle as Chapter 53. In *Union Light, Heat and Power Company v. Railroad*, 79 S.W. 2d 199 (Ky.), the Court held that there is no *compulsion* on the state to make compensation to railroad companies for relocating their facilities when necessitated by grade crossing eliminations, but indicated that an express direction by the Legislature to that effect would be unobjectionable. The Court there stated:

“ . . . The reasonable construction of the Elimination Act under these circumstances is to assume that the people are not to be burdened with any heavier expense than necessity requires, and that

to relieve the public service corporations having franchises in the streets of their common-law liabilities and to pass them over to the taxpayer can only be accomplished by the express direction of the Legislature.

* * * * *

“... We think, as did the Court of Appeals of New York in *Transit Commission v. Long Island Railroad Co.*, *supra*, that *an express direction of the Legislature would be required before appellant could recover the expenses here involved.*” (pp. 201-202) (Emphasis added)

The dictum contained in *Southern Bell v. Commonwealth*, *supra*, is entitled to little consideration since the constitutional issue was neither raised nor briefed and since there was no statute in that case which bears any resemblance to the statute here in issue.

The Georgia case of *Mulkey v. Quillian*, *supra*, dealt with an entirely different type of statute and has no application to the case at bar. Chapter 53 shifts the burden of paying relocation expenses from the utilities to the state. The Georgia statute expressly presupposed that the cost of relocation was chargeable to the utility and provided that the Highway Department may make loans to municipally-owned utilities for all or part of the cost of relocation, such loans to be repaid over a period not to exceed fifteen years. The Georgia Court held the statute to be unconstitutional on the sole ground that its Constitution does not permit “the using of public funds for the purpose of engaging in the money lending business.” Thus, none of the questions here involved were before the Georgia court, and the Tennessee Court was incorrect

in stating that the *Mulkey* case is authority for holding invalid the Tennessee statute.

The New Mexico case of *State Highway Commission v. Southern Union Gas Co.*, 332 P. 2d 1007, was in no small measure based on the foregoing Tennessee decision. Indeed, the opinion in the New Mexico case makes it even plainer that the court misconceived the basic issue. As its only New Mexico authorities, it relied on two cases, *Hutcheson v. Atherton*, 99 P. 2d 462, and *Harrington v. Atteberry*, 153 Pac. 1041. These cases involved appropriations by the Legislature, without any substantive legislation, to private corporations engaged, respectively, in the holding of county fairs and of a celebration to commemorate the initial exploration of New Mexico. In neither case had the Legislature exercised the police power of the state in prescribing general rules of law for the future.

Moreover, the New Mexico decision is clearly not applicable in Utah. It appears from the opinion that in New Mexico, a public purpose is not enough to support an expenditure of public funds, but that such funds can be paid only to subordinate governmental agencies or persons under the control of the state. This rule does not seem to pertain in any other jurisdiction, and it certainly is not the law in Utah. In *Bailey v. Van Dyke*, 66 U. 184, 240 Pac. 454, 457, this Court discussed *Harrington v. Atteberry*, supra, and pointed out that the New Mexico constitutional provision prohibits grants to any person or corporation "not under the absolute control of the state." The Utah Court stated: "There is no such provision in the Utah Constitution."

The recent decision in *State of Idaho vs. Idaho Power Company, et al.*, 346 P. 2d 596, is, we submit, based on a misunderstanding of the purpose and effect of the Idaho Relocation Law.

The Idaho Court, evidenced by the quotation on page 20 of Appellant's Brief, viewed the Relocation Law as giving the utilities a property right on the public streets and highways and determined that the granting of such a property right would result in a diminution of the quantum of ownership of the public in its public thoroughfares.

This analysis of the statute is incorrect in that the Court misconstrued the effect of the Relocation Law.

The Relocation Law of Idaho, as well as Utah, does not give or attempt to give the utilities a property right of any kind or character and certainly succeeding legislatures could repeal or amend the law without depriving the utilities of any property right.

As we have heretofore pointed out, the Relocation Law is an exercise of the police power by the state. What type of legal right the utility has once it has placed its facilities on the public thoroughfare is not changed or altered by the Relocation Law, and whether such right is a property right and called an easement, license, incorporeal hereditament or corporeal hereditament or a permissive right is not pertinent to the question here at issue.

We are at a loss to understand how the Idaho Court permitted itself to become enmeshed in the question of

property rights when called upon to construe a statute which authorized the state to make payments for relocation of utility facilities that had been put in place pursuant to statutory authorization.

The Idaho Court also was mistaken in determining what the legal rights of the utilities were after placing their facilities on the highways pursuant to statute or franchise. Although it is not pertinent to the issues here before the Court, we wish to point out again that a utility, once it has placed its facilities on the highways, has a property right protected by both the federal and state constitutions (see footnote, page 40), even though the state, in the exercise of its police power, can require the utility to relocate its facilities without liability for the cost of relocation, and with liability for the cost of relocation when the legislature has so provided.

In attempting to distinguish the decision of *Minneapolis Gas Co. v. Zimmerman*, *supra*, the Idaho Court held that inasmuch as the utilities acquired no property right upon placing their facilities in the public thoroughfares that the state could not pay for their relocation because there was no taking, only damages, and therefore the injury would be *damnum absque injuria*. Here again the Court was incorrect in that it is clear that in Idaho the legislature has the right to provide, as it did in the Relocation Law, for the payment of damages to property even though there be no taking, but only damages resulting from the construction of Federal-Aid highways. *Idaho-Western Ry. Co. vs. Columbian Conference*, 119 Pac. 60, *Crane vs. City of Harrison*, 232 Pac. 578.

If the issue of whether or not the constitution provides for damages as well as taking of property is pertinent, then there is no question but that in Utah the Legislature has the authority to enact Chapter 53 and provide for the payment of damages. Article I, Section 22, Utah Constitution and Section 78-34-10, UCA, 1953. Therefore, we respectfully submit that the Court should not adopt the rationale and decision of the Idaho Court.

We now turn to some of the Utah cases construing Article VI, Section 31. This section of the Constitution was construed in *Bailey vs. Van Dyke*, supra, as not prohibiting a county from appropriating money for agricultural extension work in the face of allegations that the funds appropriated enured to the benefit of the Farm Bureau, a private association.

In *Lehi City vs. Meiling*, 87 U. 234, 48 P. 2d 530, 551, Mr. Justice Wolfe in referring to Article VI, Section 31, said:

“In other words, this section is directed against the practice which was prevalent at the time our Constitution was drafted amongst states and municipalities, to-wit, that of aiding private ventures, instituted for private profit but which it was thought would indirectly benefit and develop the particular local division loaning its credit.”

In *Wallberg v. Utah Public Welfare Commission*, 115 U. 242, 203 P. 2d 935, the Utah Public Assistance Act was held not to violate Article VI, Section 31. The act provided that the Welfare Commission might “loan”

money to needy aged persons upon pledge of their real property as security. The Court upheld the Act stating:

“Respondents advance the argument that this act is a loan of credit forbidden by Article VI, Section 31, of the Utah Constitution. With this we cannot agree. See: State ex rel. Nielson et al. v. Lindstrom, Idaho 1948, 191 P. 2d 1009; City and County of San Francisco v. Collins, 216 Cal. 187, 13 P. 2d 912; Bowman v. Frost 1942, 289 Ky. 826, 158 S.W. 2d 945. The object to be realized by the act is aid to needy persons over the age of 65 years, and the lien provision provides a means to equalize that aid in the best possible manner. If money can be *given* to the aged in the interest of public welfare, it is hard to see how doing less than that—loaning it to them, is bad. The purpose of the act is to uphold the State’s moral obligation to look after its needy. This is its public purpose. The following quotation from 21 R.C.L. 701, quoted with approval in Bowman v. Frost, supra, is illustrative of this moral obligation and public duty:

“ ‘The care of the state for its dependent classes is considered by all enlightened people as a measure of its civilization, and the care of the poor is generally recognized as among the unquestioned object of public duty, but in spite of this, the duty under the common law was purely moral and not legal. There is therefore no *legal obligation at common law* on any of the instrumentalities of government to furnish relief to paupers. The obligation to support such persons *results only from statute. . . .*’ ” (Emphasis supplied)

Similarly, the obligation of the State to assume utility relocation costs results only from statute. If the State may by statute assume financial burdens which at common law it was not obliged to assume, then certainly it may recognize and alleviate burdens cast upon utilities by the common law.

In *Barlow v. Clearfield City Corporation*, 1 U. 2d 419, 268 P. 2d 682, this Court upheld a contract between a municipality and a water conservancy district where the city was obligated to take, or failing to take, nevertheless pay for certain quantities of water. The Court held the contract was not a loan of the city's credit to the district.

If the State or its agencies and instrumentalities can give or loan money to indigents and contract its credit for water, it does so because it is for public purpose. Such a function embraces expenditures made for those activities of government in which the State has a legitimate interest.

The cases from other jurisdictions holding that reimbursement of relocation expenses is a proper governmental expenditure present the most persuasive authority that the standards set out in the Utah case are met.

It appears well settled in Utah that if the Legislature adopts legislation in furtherance of a public purpose and exercises a governmental function tending to promote the public welfare, then such legislation is not in conflict with Article VI, Section 31. *Thomas v. Daughters of Utah Pioneers*, 114 U. 108, 197 P. 2d 477. The legislature, in adopting Chapter 53, exercised its inherent and constitutional powers to determine how the burdens imposed by the expanding highway program should be distributed. When the state, through its State Road Commission engages in the construction, maintenance and repair of highways it exercises a public governmental function and the legislature has now determined that utility relocation expense is a proper expenditure in connection with this activity of the state.

IV.

REIMBURSEMENT BY THE STATE TO PUBLICLY, PRIVATELY AND COOPERATIVELY OWNED UTILITIES, INCLUDING DRAINAGE AND IRRIGATION SYSTEMS AND UTILITIES OWNED BY ALL POLITICAL SUBDIVISIONS FOR RELOCATION OF FACILITIES AS AUTHORIZED BY CHAPTER 53, LAWS OF UTAH 1957, DOES NOT RELEASE OR EXTINGUISH AN INDEBTEDNESS, LIABILITY OR OBLIGATION IN VIOLATION OF ARTICLE VI, SECTION 27 OF THE CONSTITUTION OF UTAH.

The Appellant has alleged in its Brief that Chapter 53 is repugnant to Article VI, Section 27, of the Utah Constitution which provides that:

“The Legislature shall have no power to release or extinguish, in whole or in part, the indebtedness, liability or obligation of any corporation or person to the state, or to any municipal corporation therein.”

However, Appellant has failed to cite any legal authority or decision of any Court which would substantiate its position. Therefore, we submit that inasmuch as “every presumption must be indulged in favor of the constitutionality of an act, and every reasonable doubt resolved in favor of its validity” that the Appellant has failed to sustain the burden which “lies on him who denies the constitutionality of a legislative enactment” *Thomas v. Daughters of Utah Pioneers*, supra.

Even though Appellant has failed to discuss this provision of the Constitution, we nevertheless shall

affirmatively show that Chapter 53 does not violate Article VI, Section 27.

Any argument based on the aforementioned provision of the Constitution must, we assume, rest on the proposition that when the utility facilities of the Respondents were placed on the streets and roads, an obligation to remove arose which became fixed and certain and thereafter the Legislature had no authority to change the law for the future.

Implicit in the argument is the proposition that whatever duty rested upon the utility to relocate at its own expense under the common law was such a responsibility or duty which constituted an obligation, indebtedness or liability within the meaning of Article VI, Section 27.

Examination of this duty or responsibility and its comparison with obligations and liabilities which have, by decision, been held as within and without the constitutional ban under this type of provision proves the assumption false and unwarranted. First, the duty to relocate at the utility's expense under the common law was a contingent one. The duty and responsibility arose when and if the existing utility facilities interfered with the rearrangement of a highway and, further, when and if notice was given by the State to the utility to move.

Second, it cannot be reasonably or logically contended that the duty under the common law created any fixed or certain money obligation to the State. Viewing the duty or responsibility most rigidly it is, at best, a contingent duty not consisting, nor with the possibility

of ever consisting, of a definite fixed money obligation of which the State could ever become the beneficiary.

This constitutional provision has no application whatever to liabilities, indebtedness or obligations which are in any way contingent, inchoate or not due and owing until some future time.

A principle which seems to permeate all decisions construing constitutional provisions identical or similar to Article VI, Section 27, is that such constitutional provisions apply only to fixed and liquidated claims owing the State or municipal corporations. Indeed, constitutional provisions of this character are applicable only to taxes and other monetary obligations owed to the State. *State v. Montoya*, 255 Pac. 634 (N.M.) ; *State ex rel. Tharel v. Board of Commissioners of Creek County*, 107 P. 2d 542 (Okla.).

An examination of the various cases decided by the Utah Supreme Court relating to Article VI, Section 27, fails to disclose any case in point. The only type of cases that have been before the Utah Supreme Court have involved contractual or tax liabilities where the obligation, if any, was susceptible of being discharged by the payment of money. *City of St. George v. Public Utility Commission*, 62 U. 453, 220 Pac. 720 ; *Chez v. Industrial Commission of Utah*, 90 U. 447, 62 P. 2d 549 ; *In re Ingraham's Estate. Petersen v. State Tax Commission*, 106 U. 337, 148 P. 2d 340 ; *Odgen City v. Public Service Commission*, 123 U. 427, 260 P. 2d 751.

In the very recent case of *State of Texas v. City of Dallas, et al.*, supra, the Court held that the Relocation Law was not "a release of the obligations of corporations and individuals" and said:

“Although petitioner argues otherwise, it cannot be said that respondents are under an absolute and continuing legal obligation to relocate at their own expense any utility installments owned by them and situated in public ways whenever such relocation is made necessary by highway improvements. Their use of streets and highways for this purpose is simply subject at all times to a valid exercise of the police power of the state. It is only when the full measure of that power is exerted that they are obligated to make the installations conform to highway improvements at their own expense. This duty would arise upon, and not before, the making of a lawful demand for relocation of the facilities. Here the Legislature has empowered the State Highway Commission to construct interstate and defense highways and to direct municipalities and utility companies to relocate their facilities. That grant of authority is conditioned, however, by the requirement that the utilities be reimbursed for the expense which they incur. In our opinion this does not constitute the release of an obligation to the state within the meaning of Article III, Section 55 of the Constitution.”

The Montana Constitution, Article V, Section 39, is substantially the same as Article VI, Section 27, of the Utah Constitution. In determining whether the Montana Relocation Law was in contravention of the Montana Constitution, the District Judge in the case of *V. L. (Pat) Jones v. Harry L. Burns, et al.* said:

“Also this opinion has heretofore held that even though the liabilities or obligations for relocation were assumed by the utilities under their permit from the Highway Commission, the Legislature was within its constitutional authority to amend this agreement to provide for these payments of relocation costs.

“Therefore, this Court holds that Article V,

Section 39 of the Montana Constitution has no application to Chapter 254, and that the passage of said law was not in violation of said constitutional provision.”

For other cases construing similar constitutional provisions, which decisions support our position herein, see *Louisville Home Telephone Company v. City of Louisville*, 113 S.W. 855; *Cole v. Burton*, 232 S.W. 2d 838; *Roberts v. The Fiscal Court*, 51 S.W. 2d 897; *State v. Sparks*, 253 P. 2d 1070.

A most persuasive precedent is *State v. Chariton Drainage District No. 1*, 158 S.W. 633 (Mo.). This case concerned a Missouri Act under which drainage companies were empowered to cut their ditches through highway rights of way and a duty was placed upon the counties to build and construct bridges over such ditches at the expense of the counties. Prior to the adoption of the statute, the drainage companies had to bear the expense.

An attack was made on the statute upon the ground that it released or remitted a liability in contravention of Article IV, Section 51 of the Missouri Constitution, which is similar to Article VI, Section 27. This attack was based on the fact that the drainage company, absent the legislation placing the burden of the expense of building bridges over the company's ditches on the counties, was under an obligation or liability to build the bridges at its own expense and that this burden having been shifted to the county was a release or remittance prohibited by the Constitution. In disposing of this contention and sustaining the constitutionality of the statute, the Court said:

“The second contention is: That such construc-

tion by this court would violate section 51 of article 4 of the Constitution, which prohibits the Legislature from releasing, extinguishing, or authorizing the releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual in this state, etc.

“Counsel have clearly misconceived the meaning and purpose of this constitutional provision. It is self-evident that before that provision can have any application or can be called into operation, it must first be established that said corporation or individual is liable or indebted to some one, and that the act of the Legislature undertakes to release that liability or indebtedness; but in the case at bar no liability or indebtedness exists on the part of the defendant corporation to Macon county, nor does article 1 of chapter 41, R. S. 1909, undertake or attempt to release any such obligation.” (158 S.W. at 639)

The *Chariton* case clearly holds that the shifting of this burden to the county by the statute was not a remittance or a release of liability within the meaning of the constitutional provision. This case presents the strongest parallel possible to the case before this Court, in connection with a constitutional provision touching the release of obligations and liabilities and we submit that it is decisive on the issue raised herein by Appellant.

We respectfully submit that Chapter 53, Laws of Utah 1957, does not violate Article VI, Section 27, and that the Legislature could constitutionally change the burden of utility relocation in connection with relocations occurring after the passage of said Act.

CONCLUSION

It is respectfully submitted that the judgment of the lower court, holding and finding that Chapter 53, Laws of Utah 1957 is constitutional, be affirmed and that the Appellant is obligated thereby to reimburse Respondents for their relocation expenses.

Respectfully submitted,

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IN THE SUPREME COURT OF TEXAS

NO. A-7173

The State of Texas,
Petitioner,
v.

City of Austin, et al,
Respondents.

From Travis County

Third District

NO. A-7174

The State of Texas,
Petitioner,
v.

City of Dallas, et al,
Respondents.

These declaratory judgment actions place in issue the constitutionality of Article 6674w-4, Vernon's Ann. Tex. Civ. Stat., which was enacted by the Legislature in 1957 as part of House Bill 179. Acts 1957, 55th Leg., p. 724, ch. 300, § 4A. The statute provides that the relocation of utility facilities necessitated by the improvement of highways established as part of the National System of Interstate and Defense Highways shall be made by the utility at the cost and expense of the state provided such relocation is eligible for Federal participation. It evidently was adopted for the purpose of securing the benefits of the Federal-Aid Highway Act of 1956, which authorizes the use of Federal funds to reimburse the state for the cost of relocating utility facilities in the same proportion as such funds are expended on a given project, with the proviso that Federal money shall not be used for that purpose when payment

to the utility violates either state law or a legal contract between the utility and the state. See 23 U. S. C. A. § 123.

The two suits, which have been consolidated for submission on appeal, were instituted by the Attorney General in the name of the State of Texas, petitioner, one against the City of Dallas, Southwestern Bell Telephone Company, Dallas Power & Light Company, and Lone Star Gas Company, respondents, and the other against the City of Austin, Southwestern Bell Telephone Company, and Southern Union Gas Company, respondents. These municipalities and companies have various utility facilities located within the rights of way of city streets, alleys and other public places in the corporate limits of Austin and Dallas, and it will be necessary to relocate the same in connection with the improvement and construction of designated interstate highways. Respondents have taken the position that they are entitled to be reimbursed for the cost of doing this as provided in Article 6674w-4, while petitioner insists that the statute is unconstitutional. The law was upheld by the trial court, and the Court of Civil Appeals affirmed. 319 S. W. 2d 767. We affirm the judgment of the Court of Civil Appeals.

Petitioner's first four points of error in this Court assert that Article 6674w-4, to the extent that it authorizes the use of public funds to pay part of the cost of relocating utility facilities now situated in public ways and owned either by a municipality in its proprietary capacity or by a utility company, contravenes the Texas Constitution in that such payment would constitute: (1) a grant of public moneys to corporations and individuals

in violation of Article III, Section 51; (2) a gift or loan of the credit of the state in violation of Article III, Section 50; (3) a release of the obligations of corporations and individuals in violation of Article III, Section 55; and (4) an appropriation for private or individual purposes in violation of Article XVI, Section 6. These four points are closely related and have been grouped by petitioner for purposes of argument.

In the absence of assumption by the state of part of the expense, it is clear that respondents could be required to remove at their own expense any installations owned by them and located in public rights of way whenever such relocation is made necessary by highway improvements. See *City of San Antonio v. Bexar Metropolitan Water District*, Tex. Civ. App., 309 S. W. 2d 491 (wr. ref.); *City of San Antonio v. San Antonio St. Ry. Co.*, Tex. Civ. App., 39 S. W. 136 (wr. ref.); *State of Tennessee v. United States*, 6th Cir., 256 F. 2d 244. As pointed out in the *Bexar Metropolitan Water District* case, the main purposes of roads and streets are for travel and transportation. While public utilities may use the same for laying their lines, such use is subject to reasonable regulation by either the state, the county or the city, as the case may be. The utility may always be required, in the valid exercise of the police power by proper governmental authority, to remove or adjust its installations to meet the needs of the public for travel and transportation.

There is no material difference in this respect between a utility company and a municipal corporation. For many years the cities and towns of Texas have enjoyed exclusive dominion and control over the streets,

alleys and other public places within their respective corporate limits, but this was pursuant to a statutory delegation of authority. See Articles 1016, 1146 and 1175, Vernon's Ann. Tex. Civ. Stat. The Legislature acting for the state has primary and plenary power to control and regulate public roads and streets. It may delegate that power to counties or municipal corporations, but such a grant of authority may be revoked or modified at any time. See *Robbins v. Limestone County*, 114 Tex. 345, 268 S.W. 915; *West v. City of Waco*, 116 Tex. 472, 294 S.W. 832; 64 C.J.S. Municipal Corporations §§ 1686, 1689. The statutory power of cities and towns over public ways within their corporate limits has now been abridged by Sections 2 and 5 of House Bill 179. See Articles 6674w-1 and 6674w-5, Vernon's Ann. Tex. Civ. Stat. It is there provided that the State Highway Commission shall have the power to construct, maintain and operate designated state highways in any area of the state, whether in or outside the limits of any municipal corporation, and that the exercise of such power shall qualify and render inconclusive the dominion of any city or town with respect to the specific streets, alleys or other public ways affected thereby.

The Legislature, if it had decided to do so, could also have provided that any utility facilities standing in the way must be moved at the owner's cost. Respondents recognize that such a requirement would be valid and enforceable. Many city ordinances as well as several of our statutes authorizing utility companies and municipal corporations to erect their lines along and upon public roads and streets stipulate that the owner of the facility may be required to relocate the same at its own expense so as to permit road and street improvements. See

Articles 1433, 1433a, 1436a, and 1436b, Vernon's Ann. Tex. Civ. Stat. These statutes and ordinances express the public policy of the state as it existed at the time of their adoption. Subject to constitutional limitations, however, that policy may be changed by the Legislature at any time. See *McCain v. Yost*, 155 Tex. 174, 284 S.W. 2d 898; *Scarborough v. Payne*, Tex. Civ. App., 198 S.W. 2d 917 (wr. ref.).

After the occurrence of events which under the law then existing give rise to an obligation on the part of an individual or corporation to the state, the Legislature has no power to release or diminish that obligation without consideration. *Empire Gas & Fuel Co. v. State*, 121 Tex. 138, 47 S.W. 2d 265. See also *Delta County v. Blackburn*, 100 Tex. 51, 93 S.W. 419. Moreover, the use of public money to pay a claim predicated on facts which generate no state liability constitutes a gift or donation in violation of our Constitution. See *Tompkins v. Williams*, Com. App., 62 S.W. 2d 70. Respondents could not, therefore, be reimbursed for all or any part of the expense incurred by them in relocating their lines prior to the adoption of House Bill 179. But the statute does not operate retrospectively, and respondents claim no right to reimbursement for costs incurred before it became effective.

Although petitioner argues otherwise, it cannot be said that respondents are under an absolute and continuing legal obligation to relocate at their own expense any utility installments owned by them and situated in public ways whenever such relocation is made necessary by highway improvements. Their use of streets and highways for this purpose is simply subject at all times to a valid exercise of the police power of the state. It is only

when the full measure of that power is exerted that they are obligated to make the installations conform to highway improvements at their own expense. This duty would arise upon, and not before, the making of a lawful demand for relocation of the facilities. Here the Legislature has empowered the State Highway Commission to construct interstate and defense highways and to direct municipalities and utility companies to relocate their facilities. That grant of authority is conditioned, however, by the requirement that the utilities be reimbursed for the expense which they incur. In our opinion this does not constitute the release of an obligation to the state within the meaning of Article III, Section 55 of the Constitution. See *State v. Chariton Drainage District No. 1*, 252 Mo. 345, 158 S.W. 633.

Article 6674w-4 obviously does not involve a gift or loan of the credit of the state unless it can be said that payment of relocation costs amounts to a grant of public money in violation of Article III, Section 51. The purpose of this section and of Article XVI, Section 6, of the Constitution is to prevent the application of public funds to private purposes; in other words, to prevent the gratuitous grant of such funds to any individual or corporation whatsoever. See *Byrd v. City of Dallas*, 118 Tex. 28, 6 S.W. 2d 738. Statutes analogous to House Bill 179 have been upheld against this or similar constitutional attacks by the appellate courts of at least five other jurisdictions. *Minneapolis Gas Co. v. Zimmerman*, Minn., 91 N.W. 2d 642; *Opinion of the Justices*, N.H., 132 A. 2d 613; *Opinion of the Justices*, Me., 132 A. 2d 440; *Department of Highways v. Pennsylvania Public Utility Commission*, 185 Pa. Super. 1, 136 A. 2d 473 (reversed on other grounds, 394 Pa. 31, 145 A. 2d

538) ; Oswego & S.R. Co. v. State, 226 N.Y. 351, 124 N.E. 8. See also Delaware River Port Authority v. Pennsylvania Public Utility Commission, 393 Pa. 639, 145 A. 2d 172. On the other hand, the Tennessee statute was struck down by a closely divided court on the ground that the expenditure authorized thereby is not for a public purpose, State v. Southern Bell Telephone and Telegraph Co., Tenn., 319 S.W. 2d 90, and the same conclusion was reached by the Supreme Court of New Mexico. State Highway Commission v. Southern Union Gas Co., 65 N.M. 84, 332 P. 2d 1007. See also Southern Bell Tel. & Tel. Co. v. Commonwealth, Ky., 266 S.W. 2d 308; Mulkey v. Quillian, 213 Ga. 507, 100 S.E. 2d 268.

In considering this question, it should be noted that no net gain accrues to the utility from the relocation of its facilities in the manner and under the conditions prescribed by the statute. "Cost of relocation" is defined as including the entire amount paid by the utility properly attributable to such relocation after deducting any increase in value of the new facility and any salvage value derived from the old facility. As pointed out by the Supreme Court of Minnesota, the reimbursement merely restores the utilities to the position in which they were prior to the relocation of their facilities. Minneapolis Gas Co. v. Zimmerman, *supra*. It also is clear that if not reimbursed for their non-betterment costs, respondents will be subjected to substantial expense as a direct result of the highway improvement program.

Respondents benefit from the statute only in the sense that they are relieved of a financial burden which they could be required to bear. The question to be de-

cided then is whether the use of public funds to pay part or all of the loss or expense to which an individual or corporation is subjected by the state in the exercise of its police power is an unconstitutional donation for a private purpose. We think not provided the statute creating the right of reimbursement operates prospectively, deals with the matter in which the public has a real and legitimate interest, and is not fraudulent, arbitrary or capricious.

This question has not arisen frequently, because it is rather unusual for a legislative body to ameliorate an exercise of the police power. In most cases the courts are concerned only with whether the lawmakers have gone beyond the extreme limits of such power. When that is the issue, the judgment of the Legislature is supreme provided there is any reasonable basis for the action taken. It has often been said that the lawmakers have considerable discretion in determining not only what the interests of the public require but also what measures are necessary for the protection of those interests. If there is room for a fair difference of opinion as to the necessity for and reasonableness of an enactment which lies within the domain of the police power, the courts will not hold it void. See *City of Bellaire v. Lamkin*, Tex., 317 S.W. 2d 43.

Compensation is not required to be made for damage or loss resulting from a valid exercise of the police power. See *State v. Richards*, 157 Tex. 166, 301 S.W. 2d 597, and authorities there cited. The absence of a cause of action does not, however, reduce the loss which individuals are often required to bear or make their injuries any less real. When the benefits to be gained by the public are

not commensurate with the burdens imposed upon private persons, the law will not be permitted to stand. See *Houston & T.C. Ry. Co. v. City of Dallas*, 98 Tex. 396, 84 S.W. 648, 70 L.R.A. 850; *Missouri-Kansas-Texas R. Co. v. Rockwall County L. I. Dist. No. 3*, 117 Tex. 34, 297 S.W. 206. Individual hardship is thus to be weighed by the courts against the public advantages of a measure in determining whether the statute is a valid exercise of the police power. These factors are also to be considered by the Legislature in making its determination as to the manner in which such power may and should be exercised. It would be quite strange then to say that the lawmakers have no choice except to act not at all when they conclude that a particular measure is essential to the public welfare but will be unduly burdensome to private citizens. If they decide to reimburse the latter for part or all of their actual loss or expense, the payment is not transformed into a mere gratuity simply because it may appear to the courts that the Legislature has not exerted the full measure of its power. Our fundamental law does not contemplate or require that every private injury and loss which may be necessary to protect or promote the public health, safety, comfort and convenience must always be borne by individuals and corporations.

If the statute involved in the Richards case had provided that the innocent owner might recover the value of his vehicle from the state, we certainly would not say that the payment amounted to a mere gratuity. Animals and buildings may be destroyed without compensation to the owner where such action is necessary to prevent the spread of disease or fire, but legislation authorizing such destruction upon condition that the owner is paid the

value of his property does not contravene Article III, Sections 51 and 52 of our Constitution. *Chambers v. Gilbert Tex. Civ. App.*, 42 S.W. 630 (wr. ref.). More nearly like the question involved in the present case was the one considered in *City of Beaumont v. Priddie, Tex. Civ. App.*, 65 S.W. 2d 434 (judgments of lower courts reversed and cause dismissed for mootness, *Texas & N. O. R. Co. v. Priddie*, 127 Tex. 629, 95 S.W. 2d 1290), which involved the validity of a contract whereby the city agreed to pay part of the expense incurred by a railroad in constructing underpasses where its tracks crossed public streets at grade. The judgment of the trial court enjoining the city from carrying out the agreement was affirmed on grounds which are not material here. It was also contended by the appellees that the city's contribution to the cost of construction came within the inhibition of Article XI, Section 3, of the Constitution, which prohibits a municipal corporation from making any appropriation or donation to a private corporation. In disposing of this question, the Court of Civil Appeals at Austin, speaking through Chief Justice McClendon, said:

“But, although the state may compel the railroad to bear the entire expense of grade separation, nevertheless it is not required to do so, but may bear the entire expense itself, or apportion it between itself and the railroad. While this power is generally recognized, the cases in which it has been challenged as violative of constitutional provisions similar to those in this state inhibiting the state or its subdivisions from making donations to private corporations or individuals appear to be rare. Those in which the question has been considered uniformly hold that state or municipal contribution to the expense does not come within such inhibition. *Lehigh Valley Ry. v. Canal*

Board, 204 N.Y. 471, 97 N.E. 964, Ann. Cas. 1913C, 1228; Brooke v. Philadelphia, 162 Pa. 123, 29 A. 387, 24 L. R. A. 781. We think the soundness of this holding cannot seriously be questioned. While the paramount duty rests upon the railroad to provide originally and thereafter to maintain the safety of the crossing, regardless of the requirements in that regard brought about by changes in conditions, still the interest therein of the state as representative of the public is such that the expenditure of public funds in this regard is a legitimate governmental function, and does not properly fall within the designation of a donation of public funds to a private enterprise. In the infinite variety of situations which present themselves, the state may properly make an adjustment of the expense, as the peculiar equities of each situation may in its judgment dictate. In this matter the judgment of the state is supreme, subject to judicial review only in case of fraudulent or arbitrary abuse of the power."

It is important to remember that utility facilities are not placed in public streets merely for the convenience of private stockholders. As stated in Jones v. Carter, Tex. Civ. App., 101 S.W. 514 (wr. ref.), "light, sewers, gas and water works are among the common necessities of modern cities, and it is a matter of common knowledge that such plants cannot be constructed and operated without running the lines and mains along or across the streets. They are some of the common uses to which streets are necessarily devoted." It is the interest of the public in receiving utility services which supports the right of utilities to use streets and highways for that purpose in the first place. See State v. Southwestern Bell Telephone Co., 338 Mo. 617, 92 S.W. 2d 612.

Highway construction is clearly a governmental

purpose for which public funds may properly be expended. See Texas Constitution, Article XVI, Section 24; Robbins v. Limestone County, *supra*. The removal of utility facilities which stand in the way is as necessary to the accomplishment of that purpose as the removal of trees and hills. Unlike trees and hills, however, the utility lines must be moved and restored at another location if the people are to receive services that are essential to the protection of their health and safety. The public thus has a direct and immediate interest in the relocation of utility facilities which would otherwise interfere with highway improvements, and payment of the non-betterment cost thereof does not constitute a donation of public funds or an appropriation for a private purpose. As pointed out in Wilson v. City of Long Branch, 27 N. J. 360, 142 A. 2d 837, "Utilities are necessary adjuncts of the public welfare. Their business operations and their property have been subject to special legislative treatment for many years. * * In the present context, uninterrupted service during and after the completion of the * * project is vital. Where removal of facilities is necessary, it is important that relocation be as expeditious and controversy-free as possible. That end is intimately related to the achievement of the overall public purpose * *."

If the non-betterment cost of doing this is not paid by the state, the same must be borne initially by the utilities. In most instances the burden would ultimately fall upon local tax payers and rate payers, who must also provide part of the taxes used for highway construction. These individuals, who receive no special benefit from the highways, would thus be required to contribute twice to the overall cost of the undertaking. Under these

circumstances, it was for the Legislature to determine whether to equalize the burden by paying the entire expense from state funds. In the words of Mr. Justice Cardozo, "this is a case where the Legislature, by action looking to the future, has defined the terms of equity and justice upon which it will go into an enterprise. In fixing these conditions, the Legislature has a wide discretion. * * Courts will not revise its judgment unless there has been manifest abuse. * * The state was about to execute a great public work. It saw that in the doing of that work there would be destruction of private property. Much of the damage would be *damnum absque injuria*. Nonetheless it would be damage. The result would be inequality in the distribution of public burdens. Some would pay more dearly than others in proportion to benefits received. This inequality the Legislature, fixing in advance the conditions of the undertaking, had the power to correct. It might refuse to launch an enterprise at the price of hardship and oppression. There was power to destroy and leave the loss where it might fall. There was also power to pay for the destruction, and thereby reestablish some uniformity of proportion between benefits and burdens. The question was for the Legislature whether the equity of compensation was strong enough to merit recognition. We cannot hold it to be illusory." *Oswego & S. R. Co. v. State*, *supra*.¹ In our opinion, Article 6674w-4 is a reasonable exercise by the state of its power to assume the financial burdens

¹ In citing and quoting from this case, we are not to be understood as approving the New York rule that the legislature may recognize claims founded on equity and justice even though the same could not have been enforced in a court of law if the state were subject to suit. See *Lehigh Valley R. Co. v. Canal Board*, 204 N. Y. 471, 97 N.E. 964.

of public improvements, and does not violate any of the constitutional provisions mentioned above.

The statute does not grant an irrevocable or uncontrollable special privilege, because the law can be repealed at any time and in that event there will be no right to reimbursement for relocation expenses thereafter incurred. It should be noted, however, that if the relocated lines are placed on right of way owned by the utility, the cost of acquiring said right of way is not properly attributable to such relocation within the meaning of the Act. If the state should pay this cost, it would be in the position of buying for the utility that which it would be required to take under the power of eminent domain in the event the land where the relocated lines are placed were ever needed for a different and superior public use. This would be an unconstitutional gift for a private purpose, and the statute should, if reasonably possible, be given a construction that will not render it invalid. *County of Cameron v. Wilson*, Tex., 326 S.W. 2d 162.

By the terms of Article 6674w-4, reimbursement for relocation costs is conditioned upon the eligibility of such relocation for Federal participation. Petitioner argues that a change in the conditions and extent of Federal participation would modify the legal obligation of the State of Texas to utility owners, both private and municipal, and that the statute is therefore an unconstitutional delegation of legislative power to the United States, its Congress and agencies. Respondents insist that the statute is merely contingent legislation similar to that which was considered in *The Brig Aurora*, 11 U.S. (7 Cranch) 382, and *City of San Antonio v. Jones*, 28

Tex. 19. We do not agree with either of these contentions.

The law was complete when it left the hands of the Legislature and was not to become operative upon the happening of some contingency or future event. A change in the percentage of Federal participation will naturally affect the amount which the state receives by way of reimbursement, but will not alter in any way the obligation of the state to the utilities. No part of the expense will be paid by the state, of course, if the relocation is not eligible for Federal participation, but in making this provision the Legislature was simply establishing a class of relocation projects for which the utilities will be entitled to reimbursement. It is our opinion that the classification is reasonable and that the law is not unconstitutional as a delegation of legislative power.

The cost of relocation is to be paid out of the State Highway Fund, which is derived, in part, from motor vehicle registration fees and motor fuel taxes. See Articles 6675a-10, 6694, and 7065b-25, Vernon's Ann. Tex. Civ. Stat. Under the provisions of Article VIII, Section 7a, of the Constitution, revenues received from these sources may be used only for constructing public roadways and for other designated purposes which are not material here. Petitioner argues that utility relocation expense is not part of the cost of highway construction within the meaning of this provision. The courts of other jurisdictions are rather evenly divided on that question. Two have expressed the view that costs of relocation cannot be paid with funds that are authorized to be used for highway construction. Opinion of the Justices, Me., 132 A. 2d 440; *Mulkey v. Quillian*,

supra. An equal number have held that the language of the Constitution should not be given such a narrow construction. *Minneapolis Gas Co. v. Zimmerman*, supra; Opinion of the Justices, N.H., 132 A. 2d 613. It seems to us that the latter conclusion is sound in principle and supported by the better reasoning. Article VIII, Section 7a, does not define or restrict the meaning of "constructing" in any way. The term obviously does not embrace merely the clearing and grading of the road-bed and the pouring of concrete, but includes "everything appropriately connected with, and necessarily incidental to, the complete accomplishment of the general purpose for which the fund exists." See 40 C.J.S. Highways § 176 h (2) (a). In *Bell County v. Lightfoot*, 104 Tex. 346, 138 S.W. 381, it was held that the power given a governmental agency to issue bonds for constructing a public improvement carried with it the further authority to obtain funds in that manner for repairing and maintaining the completed improvement.

The constitutionality of a statute must be sustained by the courts unless its invalidity is apparent beyond a reasonable doubt. See *Trapp v. Shell Oil Co.*, 145 Tex. 323, 198 S.W. 2d 424. It has already been pointed out that the use of public ways for the installation of utility lines and mains is one of the proper and common purposes to which roads and streets are necessarily devoted, although their principal and primary use is for travel and transportation. The relocation of such facilities is made necessary by and is an integral part of the highway improvement program. If the Legislature determines, as it has in this instance, that the non-betterment cost

thereof should be paid by the state, it is our opinion that the same is properly attributable to highway construction within the meaning of the Constitution.

The judgment of the Court of Civil Appeals is affirmed.

Ruel C. Walker
Associate Justice

RCW/fa

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