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Jesse B. Stone v. SALT LAKE CITY, a jinunicipal corporation, J. BRACKEN L£E, JOE L. CHRISTENSON, L. C. ROMNEY, T. I. GEURTS and J. K. PIERCEY, its Commissioners, CHAMBER OF COMMERCE OF SALT LAKE CITY, and GUS P. BACKMAN, its Secretary, ZIONS SECURITIES CORPORATION, a corporation, and THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a corporation sole : Reply Brief

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Elias Hansen; Burton W. Musser; Attorneys for Appellant.
Unknown.

SUPREME COURT

BRIEF

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of the State of Utah

JESSE B. STONE,

Plaintiff and Appellant,

vs.

SALT LAKE CITY, a municipal corporation, J. BRACKEN LEE, JOE L. CHRISTENSON, L. C. ROMNEY, T. I. GEURTS and J. K. PIERCEY, its Commissioners, CHAMBER OF COMMERCE OF SALT LAKE CITY, and GUS P. BACKMAN, its Secretary, ZIONS SECURITIES CORPORATION, a corporation, and THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a corporation sole,

Defendants and Respondents.

LYNN FAUSETT and FIAMETTA FAUSETT,

Petitioners in Intervention and Appellants.

Case No. 9268

REPLY BRIEF OF APPELLANTS

ELIAS HANSEN
BURTON W. MUSSER
Attorneys for Appellant and Petitioners in Intervention and Appellants

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REPLY BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

This Reply Brief is intended to be a reply to the four Briefs filed by the Respondents. Before taking up a discussion of the Points raised by Respondents there are some questions of law and of facts which Respondents claim to exist which deserve a brief mention. It will be observed that there are two questions raised in Appellants' original Brief that are not mentioned in either the Brief of the Corporation of the President or Zions Securities. It is in effect alleged in paragraphs 16, 17, 18, 19, 20 and 21 of the Complaint that the purported sale of the property at First South and State Streets is null and void pursuant to and under the provisions of *U.C.A.* 1953, 10-6-38, in that, four members of the City Commission who participated in the purported sale were members of the Church of Jesus Christ of Latter-day Saints, and as such interested in the trust fund of defendant Corporation of the President and of Zions Securities, and also that one of the cardinal principles of the Church of Jesus Christ of Latter-day Saints is that its members shall comply with the announced desires of its leaders, and particularly its President and his Counselors; that the leaders of such Church secured the assistance of Gus P. Backman to secure the consent of the City Commissioners to sell the property at First South and State Streets. In our original Brief we have cited numerous cases which hold that where a conflict of interests exists between the commissioners of a city and a prospective purchaser of City property any contract had under such circumstances is void, especially where there is in existence a law such as *U.C.A.* 1953, 10-6-38. It should be kept in mind that not only do the members of the city commission who voted in favor of the

purported sale have a monetary interest in the property of the Corporation of the President and Zions Securities, but, as alleged in the Complaint their religion requires them to comply with the wishes of the officers of the Church, one of whom is the Corporation of the President, who in turn owns Zions Securities. These allegations must be taken as true at this stage of the proceedings. Neither defendant, Corporation of the President, nor defendant Zions Securities cite any cases or other authorities in their Brief where a contrary doctrine is announced. What has just been said about the sale of the City property at First South and State Streets applies to the Forest Dale Park property.

Nor does the Corporation of the President nor Zions Securities question the soundness of the law announced by this Court in the case of *Rawley v. Milford City,* 352 Pac.(2d) 225.

In their original Brief, paragraph 13, Appellants have set out the proceedings had in the attempted sale of the property here involved, and to further clarify the proceedings of the attempted sale of both the First South and State Street property and the Forest Dale Park Appellants sought to amend the Complaint by adding thereto the language set out on page 14 of their original Brief.

From a reading of the Briefs of Counsel for the Corporation of the President, Zions Securities, and of Salt Lake City and its Commissioners, it will be seen that they digress from the allegations of the Complaint by stating purported facts foreign to the allegations of the Complaint, and then cite law which they claim applies to the assumed facts.

Thus, on page 35 of the Brief of the Corporation of the

President it is stated that over the years the L.D.S. Church has made contributions to various funds of charities which are not confined to its members. It is difficult to see how such fact, if it be a fact, has any bearing on this case. We again direct the attention of the Court to the provisions of the Articles of the Corporation of the President which provide: That the assets of the Corporation of the President are held in trust "for the benefit of the members of the Church of Jesus Christ of Latter-day Saints, *a religious society for the benefit of religion, for works of charity and for public worship.*"

The only function served by the words "a religious society for the benefit of religion, for works of charity and for public worship" is to define the nature of the Church of Jesus Christ of Latter-day Saints, which is not being sued. Moreover, neither the L.D.S. Church nor the Corporation of the President has any authority under the guise of charity to use its assets in the purchase of a Federal Building. Our search fails to find a case so holding. The authorities are to the contrary. See 76 *C.J.S.* 780, and 45 *Am. Jur., pages* 760-761, Sec. 49-50, and cases there cited. We have examined the cited cases, none of which lend any color to the claim that the property of a religious society may be used to aid in the purchase of a Federal Building. Nor is there any language in the Complaint from which it may be inferred that the money which is to be advanced toward the purchase of a Federal Building is intended as a charity. Thus it is alleged in paragraph 13 of the Complaint that $750,000.00 is to be paid for the property at First South and State Streets, and that if possession is not given on or before March 23, 1960, the price shall be reduced to $725,000.00. A check for $15,000.00 which accompanied the bid was, at the

option of the holders, to be returned if an action were brought to set aside the sale, or an election called to question its validity.

It is further alleged in paragraph 20(c) and (d) of the Complaint that neither defendant, Corporation of the President, nor defendant, Zions Securities, had at the time complained of any right or authority to purchase or select a site for a Federal Building. If defendants, Corporation of the President, or Zions Securities, are about to give money as an act of charity as defined by the authorities, that is a matter peculiarly within their knowledge, and therefore, required to assert such a claim in their Answer. If we are not misinformed, the proposed advancement of several hundred thousand dollars toward the purchase of a site for a Federal Building has none of the characteristics of a charity. We shall have more to say about this phase of the case later in this Brief.

Apparently defendant City and its Commissioners believed that there were allegations in the Complaint which required an Answer, otherwise, they would not have done so. However, in their Brief they seek to establish their defense to the judgment dismissing the First Cause of Action by stating what they claim to be the facts without the necessity of offering proof in support thereof. Thus it is alleged on page 20 of the City Brief that the City property was sold for a fair price, that at a public hearing held on December 29, 1929, the adequacy of the structure was fairly and carefully discussed, and it was the general consensus that such buildings were inadequate and obsolete.

What we have already said requires a reversal of the Judgment appealed from. *Richards v. Anderson,* 337 Pac. (2d)

59, 9 Utah (2d) 17. *Welchman v. Wood,* 337 Pac. 410, 353 Pac. (2d) 165.

We quote the following from the opinion written by Justice Wade in the case of *Welchman v. Wood,* supra:

> "Since the court did not hear all the evidence and did not make any findings of fact, this decision, the same as a summary judgment, should be reversed if defendants have failed to show that 'there is no genuine issue as to any material facts, and that the moving party is entitled to a judgment as a matter of law.' "

In the case of *Pender v. Alix, et al.,* not yet reported, Chief Justice Crockett, in a dissent, said:

> "It should be kept uppermost in mind that this is a review of a summary judgment, that it is a drastic remedy which deprives the party of the opportunity to present his evidence, and which the courts, therefore should be extremely reluctant to grant."

However, in light of the following provision of Rule 76, we deem it proper to discuss the other points raised by the Respondent. It is there provided that:

> "If a new trial is granted, the court shall pass upon and determine all questions of law involved in the case presented upon the appeal and necessary to the final determination of the case."

We shall, therefore, discuss the various points raised by Respondents.

POINT ONE

THE PROPERTY OWNED BY THE CORPORATION OF THE PRESIDENT AND ZIONS SECURITIES CON-

STITUTE A PRIVATE TRUST AND NOT A PUBLIC CHARITABLE TRUST.

We again direct the attention of the Court to the law of Utah pursuant to which the Corporation of the President was created. *U.C.A.* 1953, 16-7-1, Corporations Sole may be formed for acquiring, holding or disposing of church or religious society property "for the benefit of religion, for works of charity and for public worship in the manner hereinafter provided."

U.C.A. 1953, 16-7-2, provides for the manner in which a corporation sole may be organized and the persons who may become a corporation sole.

U.C.A. 1953, 16-7-3, provides for what shall be provided for in the Articles of Incorporation, among which provisions is (2) The object of the corporation.

U.C.A. 1953, 16-7-6, provides for the power that such a corporation may exercise, among which are: (1) To acquire and possess by donation, gift, bequest, devise or purchase, and to hold and maintain property, real and personal and mixed, and to grant, sell, convey, rent or otherwise dispose of the same as may be necessary to carry on or promote the objects of the corporation. (4) To sue and be sued.

The law seems to be uniformly settled that the powers of a corporation are such and only such as are provided for in its Articles of Incorporation. *North Point C.I. Co. v. Utah S.L.C. Co.,* 16 Utah 246, 52 Pac. 168; *Getzhoffen v. Hospital,* 32 Utah 46, 88 Pac. 691; *Carey, et al., v. St. Joe Mining Co.,* 32 Utah 49, 91 Pac. 369; *Miller v. Peruvian Consol. Min. Co.,*

et al., 79 Utah 401, 11 Pac. (2d) 291. That is the law generally. 18 *C.J.S., Sec.* 22, *page* 400, *et seq.*

It is apparently the contention of Counsel for both the Corporation of the President and Zions Securities that the money which is to be used to assist in the purchase of a Federal Building is money which may properly be used for a public charity by the Corporation of the President and/or Zions Securities, and that the plan is to expend the money as an act of charity to the United States. There are various reasons why such a claim must fail. Among which are: There is nothing in the allegation of the Complaint which shows or tends to show that either the Corporation of the President or Zions Securities intend to assist in the purchase of a site for a Federal Building as an act of charity. The provisions of the Articles of Incorporation of the President heretofore cited are to the contrary. While nothing is alleged in the Complaint as to the provisions of the Articles of Incorporation of Zions Securities, it is in substance stated in the Brief filed herein, that it is an ordinary corporation organized for profit. That being so it is without authority to use its assets for charitable purposes. Of course, the Court may not take judicial notice of the contents of the Articles of Incorporation of Zions Securities. If the Court could take judicial notice of such Articles, it would find no difficulty in concluding that Zions is without authority to use its funds for acts of charity.

In our original Brief we stated that it appears that the L.D.S. Church, the Corporation of the President and Zions Securities are so interwoven that in effect they are one organization. Counsel for the Corporation of the President and Zions Securities contend to the contrary.

It is alleged in paragraph 20(b) and 21(g) that Zions Securities is without authority to use its assets for charitable purposes or to otherwise assist in the purchase of a site for a Federal Building. How stands the case with respect to the Corporation of the President?

One of the divisions into which the authorities divide express Trusts are: Private Trusts and Public Charitable Trusts. Among the essential elements of an express trust, whether private of charitable, are: that there be property to which the trust applies, a trustee and a beneficiary. In this case the property is that held by the Corporation of the President, which includes the assets of Zions Securities because the former owns the latter. The Trustee is the Corporation of the President who is the successor in title and interest of property formerly held by the President of the L.D.S. Church as trustee in trust of its funds. The beneficiaries are the members of the L.D.S. Church. It is so provided in the Articles of Incorporation of the President. There is no basis for a controversy as to the fact that the Corporation of the President is the trustee of the funds here involved, or, if there is such a controversy, it cannot be resolved on a mere motion to dismiss the Complaint. In light of a number of the cases cited in the Briefs of some of the Respondents, there seems to be a controversy as to what the trustee may lawfully do with the funds which he holds in trust. It is, of course, of the very essence of a trust that the trustee must apply the trust fund to the purposes for which he holds the fund. That if he fails to do so, recourse may be had by the proper parties to secure compliance with the terms of the document creating or acknowledging the trust. 54 *Am. Jur., Sec.* 36, *page* 47, in which it is said:

> "No trust can exist in respect of property where the holder of the legal title can under its present disposition withdraw it from the trust and apply it unqualifiedly to his own use or to any object that he chooses. In other words, there is no property or fund which can be the subject matter of a trust where its application to the purpose of the trust depends upon the absolute and unconditional discretion of the person in control of the property or fund. Unbridled discretion in a trustee not only negatives the necessary separation of legal and equitable ownership, but is also objectionable insofar as the existence of a trust is concerned by reason of the uncertainty that it involves."

Numerous state and federal cases are cited in footnotes to the text. We shall not undertake a review of the cases there cited because we believe the law to be as therein stated so well settled that its soundness is not open to serious doubt.

Cases are cited in the Brief of Counsel for Zions Securities and the Corporation of the President wherein it is held that conveyance made to a trustee to be used for various kinds of public purposes have been sustained on the ground that the same are charitable acts. We have no quarrel with such cases or the law there announced. It will, however, be noted that in those cases the instrument creating the trust directs the purposes for which the trust property is to be used. Indeed, in the absence of some expressed or reasonably inferred direction in the instrument creating the trust fund, there would be no way of either the trustee or the courts to determine the purposes for which the trust fund is to be used.

A charitable trust has been variously defined. That matter is discussed at length in 14 *C.J.S., Sec.* 37, *page* 470; *Boquist*

on Trusts and Trustees, Vol. 2A, Secs. 361 *to* 390, *pages* 3, *et seq.;* 10 *Am. Jur.* 584 *to* 590. Numerous cases are cited in the footnotes to the text, but it would prolong this Brief beyond reasonable limits and would serve no useful purpose to review those cases. The distinction made by the authorities and cases is thus stated in 10 *Am. Jur.* 589:

> "The requisites of a valid private trust and of one for a charitable use are materially different. In the former there must be not only a certain trustee who holds the legal title, but a certain specified cestue que trust clearly identified, or made capable of identification by the terms of the instrument creating the trust, while it is an essential feature of the latter that the beneficiaries are uncertain, a class of persons described in some general language, often fluctuating, changing in their individual members and partaking of a quasi-public character."

The facts in this case as alleged in the Complaint clearly bring the funds which Respondents, Corporation of the President, or its owned Zions Securities, propose to use to assist in the purchase of a Federal Building within the class of a Private Trust as defined by the authorities. The cases cited, in which the L.D.S. Church and the United States were involved, on page 40 of Appellants' original Brief support the view that the funds here brought in question are in the nature of a private trust in which only members of the L.D.S. Church may participate. Moreover, it is argued by some of the Respondents that defendant, Zions Securities, is a corporation organized for profit. If that be so, it may not dispose of its property for charity.

There are cases such as *Sales v. Southern Trust Company,*

185 S.W. (2d) 623, 182 Tenn. 270, and *Stainer v. Burton,* 17 Utah 331, 52 Pac. 1015, which hold that a religious society has such implied powers as are necessarily to be inferred from those expressly granted. To say that the Corporation of the President or Zions Securities has an implied power to do what it is alleged in the Complaint, they are attempting to do is stretching the language of the Articles of the Corporation of the President far beyond the breaking point. It is argued on pages 34 and 35 of the Brief of the Corporation of the President that its Articles permit it to use its funds for four purposes, namely:

"1. For the benefit of its members.

2. For the benefit of religion.

3. For works of charity.

4. For purpose of worship."

If the four purposes just mentioned may be said to be for the sole benefit of the members of the L.D.S. Church, there is no conflict with that provision of the Articles of the Corporation of the President which provides that its funds are to be used "for the benefit of the members of the Church of Jesus Christ of Latter-day Saints." Doubtless Counsel for the Corporation of the President will not contend that the Corporation of the President may lawfully use the assets held by it for the benefit of any other religion, or for purposes of worship other than for members of the L.D.S. Church. If such a contention were made, according to our search no authority can be found to support such a novel contention. If the words "for the benefit of religion" and for purposes of charity is not limited to the members of the L.D.S. Church it necessarily

follows that the words "For works of charity" are also so limited.

Moreover, if the fund which it is proposed to be used in the purchase of a Federal Building is a trust fund as alleged in Appellant's pleadings, and as apparently conceded in the Briefs of the Corporation of the President, and as found by the Supreme Courts of both the United States and this Court in the cases cited on page 40 of Appellant's Brief, it necessarily follows that the works of charity must be confined to the members of the L.D.S. Church. The authorities teach that if the person who has control of property has unbridled discretion to dispose of such property to such purposes as he pleases, there is no trust. Thus if the Corporation of the President may lawfully use such property, which he holds for the benefit of the members of the L.D.S. Church, to aid any religious organization or work of charity that he chooses, then and if that be so, the words for the benefit of the members of the L.D.S. Church is rendered meaningless, and the fund may not be said to be a trust fund. See 54 *Am. Jur., Sec.* 36, *page* 47, and the cases there cited, heretofore called to the attention of the Court in this Brief.

POINT TWO

PLAINTIFF'S FIRST CAUSE OF ACTION STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED AGAINST DEFENDANT CORPORATION OF THE PRESIDENT.

Under Points One, Two and Four of the *Brief of the Corporation of the President it is argued that plaintiff's Com-*

plaint fails to state facts sufficient to constitute a claim upon which relief can be granted because the plaintiff is not a member of the L.D.S. Church.

In our original Brief we have discussed various grounds which preclude the Corporation of the President from participating in the purchase of both the First South and State Street property and the Forest Dale property. One of such grounds common to the transactions is that the members of the City Commission are interested in the Corporation of the President, and as such are disqualified from participating in a sale or contract to sell City property, and any agreement to dispose of city property under such conditions is void as provided by *U.C.A.* 1953, 10-6-38. We have discussed that phase of the case under Point Four, pages 31 to 42, of our original Brief.

In order to keep within reasonable limits we confined our quotations from only a few of the numerous cases and authorities, but have cited a long list of cases and other authorities on pages 38, 39 and 40 of the Brief.

It should be kept in mind that the plaintiff brings this action for himself and all other persons similarly situated, which in legal effect is an action by all the taxpayers of Salt Lake City. It will be seen that the numerous cases cited in our original Brief are prosecuted by taxpayers and so far as we are able to ascertain no action has been dismissed on the ground that the taxpayer may not maintain such an action because they are not parties in interest. Indeed, if the taxpayers may not maintain such an action, then it would seem to necessarily follow that in most cases no one could maintain such an

action, with the result that city officers would have unlimited authority to do as they choose with city property. Surely that cannot be the law. In his Complaint plaintiff also alleges that compliance was not had with the provisions of *U.C.A.* 1953, 10-7-2 and 10-8-8 of the laws of Utah. We have discussed that phase of the case under Point One of Appellant's Brief. The Corporation of the President apparently concedes that to be the law, because it does not cite any authorities to the contrary. If it agrees that such is the law, its remedy is to consent to a judgment to the effect that it claims no interest in either a contract to purchase the Forest Dale Park or in the purported sale of the property at First South and State Streets. If neither the Corporation of the President nor its owned Zions Securities claim any personal interest in the matter of the disposal of the properties here involved, and do not intend to contribute to the purchase of a site for a Federal Building, then and under such circumstances there would be merit to their claim that plaintiff and other taxpayers of Salt Lake City have no just cause to complain against them.

There are a number of other allegations in the Complaint which, if true, entitles plaintiff to the relief sought. We shall defer discussing those until later in this Brief. During the discussion of this case in the court below Counsel for plaintiff conceded that it is doubtful if he may be heard to complain as to the manner in which the funds of the Corporation of the President and Zions Securities are being expended so long as such expenditure does not affect the rights of the taxpayers. However, if city property is being disposed of contrary to law with the use of trust funds and by persons who are disqualified from acting, plaintiff has a right to complain without regard

to whether or not the taxpayers will suffer. *U.C.A.* 1953, 10-6-38, so provides, as do the adjudicated cases cited in our original Brief.

POINT THREE

A CORPORATION IS BOUND BY ITS ARTICLES OF INCORPORATION.

Under Point Five of the Brief of the Corporation of the President cases are cited to the effect that gifts to a religious or charitable corporation for the purpose of carrying out the purposes for which the corporation was organized does not create a trust in any legal sense. The law announced in those cases does not apply to the facts alleged in the Complaint. The L.D.S. Church is not being sued. The Articles of the Corporation of the President expressly provide that its property is held for the benefit of the members. A corporation is bound by the terms of its Articles of Incorporation, not by what is said in its Brief, especially where there is no evidence to support what is there said. The cases decided by the Supreme Court of the United States and by this Court involving the property of the L.D.S. Church cited on page 40 of Appellant's original Brief, hold that the funds given to the Church are trust funds to be used solely for the benefit of members of the L.D.S. Church. The cases cited by Respondent under its Point Five are not to the contrary. In our somewhat extended search of the authorities we have not found a case which supports or tends to support a religious organization using funds contributed by its members for the purchase of a site for a Federal Building, or any building other than those used for religious purposes of the Church of the donor.

POINT FOUR

THE CORPORATION OF THE PRESIDENT MAY NOT ACQUIRE TITLE TO PUBLIC PROPERTY UNDER THE PRETEXT THAT IT IS TO BE USED AS A SITE FOR A FEDERAL BUILDING AND THEN SEEK TO ACQUIRE OTHER PUBLIC PROPERTY FOR THE SAME PURPOSE.

Under Point Three of the Brief of the Corporation of the President it is asserted that it "is wholly specious and frivilous" to contend that such Corporation is estopped from seeking to secure two sites for a Federal Building when only one such building is to be constructed. Needless to say, such characterization does not serve any useful purpose. On page 50 of our original Brief we have cited 19 *Am. Jur., Page* 650, *Sec.* 50, where it is in effect said that a party may not take an inconsistent position, and that he is estopped from so doing. On page 14 and 15 of the Brief of the Corporation of the President is cited 19 *Am. Jur., pages* 732 *to* 735, which is to the effect that one claiming an estoppel must show that he has changed his position on account of the acts complained of, and that estoppel rests largely upon injury or prejudice to the rights of him who asserts it. There are various acts that constitute an estoppel, one of which is that relied upon by Appellants. If the Corporation of the President and Zions Securities have a right, contrary to appellants' contention, to contribute to the purchase of a site for a Federal Building, the most rudimentary practice of business requires them to ascertain what property is acceptable for such purpose. They should not be permitted to acquire one site for such purpose and then proceed without surrendering the first site to seek to secure another site. If that

may be done, as to two sites, there is no good reason why it may not be done as to three or more. The fact that the taxpayers of the school district and of the City of Salt Lake may be charged by the Corporation of the President with blowing hot and cold by resisting such procedure does not change the fact that the Corporation of the President and Zions Securities should not be permitted to cast the burden of resisting such unwarranted actions upon the taxpayers of the city and of the school district.

It is also argued in the Brief of the Corporation of the President that the appellants may not maintain this action, that only the Attorney General may maintain the same. In this proceeding appellants are not attempting to prevent any corporation from performing its proper functions as a corporation. Appellants are merely seeking redress against the Respondent Corporations for the invasion of appellants' property rights, and upon the ground that the transaction complained of is not authorized by law. See 13 *Am. Jur., page* 791, *Sec.* 761, where numerous cases, both state and federal, are cited in footnotes to the text. It would indeed be a strange doctrine to hold that if and when the rights of the taxpayers of Salt Lake City and/or the rights of a beneficiary of the Trust Fund held by the Corporation of the President are invaded, the injured party could not bring an action to redress the wrong. It is not the function of the Attorney General to prosecute unlawful acts of individuals or corporations which merely result in injury to individuals. The cases cited by Respondents are not to the contrary.

It is further argued under Point Three of the Brief of the Corporation of the President that the word "state" used in

Section 4 of Article One of the Constitution of Utah is limited in its provision to the State of Utah, and has no application to Salt Lake City. The cities of Utah are an integral part of or an arm of the state. The cities are creatures of the State. The means whereby the State carries on many of its functions of government. To permit a Church to dominate an arm of the State or interfere with its functions might well result in the domination of and interference with the entire state. The state is divided into counties, which together with the cities, conduct the major part of the government of the state. Thus if it should be held as contended for in the Brief of the Corporation of the President, a church is free to dominate the various counties and cities, and interfere with their functions, there would be but little governmental function left to be performed by the other departments of the state. It is a function of the state acting through its cities and counties to provide for buildings for the officers of the cities and counties, and for the education of its children. If the provisions of Section 4 of Article One of the Constitution of Utah is not to be emasculated such provision must apply to the cities and counties of the state.

If time and space permitted it may well be profitable to review the history of the struggle to bring about the concept in America of the separation of church and state. Suffice it to say that one of the principal purposes sought to be accomplished by such struggle was to limit the ownership and control of real estate by the church. A number of the states continue to limit the amount of real property that a church may own. See *Boquist on Trusts and Trutsees, Vol.* 2, *Chapter* 17.

POINT FIVE

THE CORPORATION OF THE PRESIDENT AND/OR ZIONS SECURITIES AND THE FAUSETTS HAVE AN INTEREST IN THE FUND THAT IS INTENDED TO BE USED TO PURCHASE A FEDERAL BUILDING, AND THEREFORE PROPER, IF NOT INDISPENSABLE PARTIES TO THIS ACTION.

It is argued under Point Four of the Brief of the Corporation of the President that plaintiff has no interest in the funds of the Corporation of the President, and that by the plan alleged in the Complaint the Corporation of the President and/or its owned corporation, Zions Securities, are the mere conduit through which the property is conveyed to the United States.

We concede that it is doubtful if plaintiff has a right to complain solely upon the ground that trust funds are to be used in the selection of a site for a Federal Building. That is the reason the Fausetts should be permitted to intervene. The contention that the Corporation of the President and Zions Securities are merely the conduit through which the property here involved is to be conveyed to the United States ignores the allegations of the Complaint. It is alleged in the Complaint that they are to advance several hundred thousand dollars to assist in the purchase of a site for a Federal Building. They are thus more than a conduit, and having an interest in the subject matter of this litigation are necessary parties. It is so held by the authorities heretofore cited in this Brief. Moreover, there is no allegation in the Complaint that justifies an inference

that either the Corporation of the President or Zions Securities may lawfully act as a real estate broker.

POINT SIX

THE FAUSETTS SHOULD HAVE BEEN PERMITTED TO INTERVENE IN THIS CASE.

On page 42 of Appellants' original Brief we have discussed the right of the Fausetts to intervene. Attention is there called to Rule 24 of the Utah Rules of Civil Procedure. It is said on page 28 of the Brief of the Corporation of the President that "To permit the Fausetts to intervene would be the equivalent of bringing in a new cause of action based upon issues of law and fact not involved in the main action." It is in effect alleged in the Complaint that under the agreement complained of assets which are held in trust are to be used for the purchase of a site for a Federal Building, and that neither the Corporation of the President nor Zions Securities have any right to use such funds for such purpose. See paragraphs 7 and 20(b) of the Complaint. Such allegations, if denied, constitute an issue, and if admitted, entitle plaintiff to prevail.

Cases are cited in the Brief of the Corporation of the President construing the provisions of Rule 24 of the Federal Rules and Procedure. As we read the case cited by Respondent on pages 28 and 29, they do not support the contentions of Respondents in this action. The correct rule is stated in *Pure Oil Co. v. Ross,* 170 Fed. (2d) 651, where it is held that all persons materially interested, either legally or beneficially, in the subject matter of a suit should be parties so that there may be a complete decree that will bind all interested parties.

A number of United States Supreme Court and other Federal cases are there cited which support such view. Tested by the foregoing Rule the Fausetts are not only proper but necessary parties to this action. In light of the fact that Respondents have indicated their desire to have an early decision of this action, we are at a loss to understand why they seek to prevent the Fausetts from intervening unless they believe that neither the Fausetts or any other member of the L.D.S. Church will bring an action against the Corporation of the President.

POINT SEVEN

IT IS NOT OF CONTROLLING IMPORTANCE AS TO WHETHER OR NOT ZIONS SECURITIES IS THE ALTER EGO OF THE CORPORATION OF THE PRESIDENT.

In answer to Point Seven of the Corporation of the President, it is of little, if indeed any, importance as to whether or not Zions Securities is the Alter Ego of the Corporation of the President, so far as this action is concerned.

Even if the allegations of the Complaint should be held to fail to show that Zions Securities is the alter ego of the Corporation of the President, such fact would not aid Respondents or justify a dismissal of this action as to them, or any of the Respondents. As alleged in the Complaint, the two corporations seem to be one organization. Zions Securities is the mere means whereby the Corporation of the President can carry out its business activities. But even if the two corporations are separate entites, neither of them has, according

to the allegations of the Complaint, authority to use their funds to assist in the purchase of a site for a Federal Building.

POINT EIGHT

THE ALLEGATIONS OF THE COMPLAINT SHOW THAT IT IS A BREACH OF TRUST TO USE THE FUNDS THAT ARE HELD FOR THE BENEFIT OF THE MEMBERS OF THE L.D.S. CHURCH FOR THE PURCHASE OF A FEDERAL BUILDING.

We have discussed this phase of the case at some length in our original Brief, and shall attempt to avoid a repetition of what we have heretofore said. It may again be observed that there is recited in the Brief of the Corporation of the President what is claimed to be facts which, if material at all, belong in an Answer and not in support of a Motion to Dismiss a Complaint. It is argued that the L.D.S. Church has done much to aid in the development of Utah. Even so, does that justify the use of trust funds to assist in the purchase of a site for a Federal Building? The Congress of the United States has appropriated the necessary money to purchase a site and construct a Federal Building. It is true that a Federal Building will be a benefit to the citizens of Salt Lake without regard to their religious affiliations. That was true when it was suggested that money formerly held in trust by the same Church might be used for the support of the common schools. However, both the United States Supreme Court and this Court held in the cases cited on page 40 of our original Brief that such money may not be so used. The case of *Stainer v. Burton,* 17 Utah 331, 53 Pac. 1015, is cited as authority for the claim

that the funds which are held in trust for the members of the L.D.S. Church may be used to assist in the purchase of a Federal Building. That case makes against rather than supports Respondents' contention. In that case Stainer made a Will wherein he directed that after the death of his wife the Presiding Bishop should receive one-half of his estate in trust for the benefit of the members of the L.D.S. Church, whether it be for public schools, parks, watering cities, acclimatizing foreign plants, or anything else whereby the members may be benefitted. It was held that the clause "anything else whereby the members may be benefitted" was meant that the uses to which the estate might be put were similar to those expressed. The Court there recognized the rule that if a charitable trust is to be sustained, the purposes for which the trust property shall be used must be designated. In this case the property held by the Corporation of the President was to be used for the benefit of the members of the L.D.S. Church. There is no language in the Articles of Incorporation of the President which even remotely authorize it to use its funds for any purpose other than for the benefit of the members of the L.D.S. Church.

We have a statue, *U.C.A.* 1953, 68-3-11, which provides that words and phrases are to be construed according to the context and the approved uses of language except as to technical words and phrases and others which have acquired a peculiar and appropriate meaning in law, etc.

As ordinarily used the word charity may not be said to apply to the expenditure of money for the purchase of a site for a public building. Indeed counsel for Respondents have

not so contended until they filed their Brief in this case. It will also be noted that in the complaint filed herein, it is alleged that the tarnsactions were sales. In the city's Brief it is argued that the transaction touching the property at First South and State Street was a sale. See *Cache Auto Co. vs. Central Garage,* 63 Utah 10; 221 Pac. 862, for a discussion of that provision.

POINT NINE

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S SECOND CAUSE OF ACTION AS TO DEFENDANT, CORPORATION OF THE PRESIDENT.

It will be seen in Point Nine of the Brief of the Corporation of the President a statement is made of facts which may have some bearing on the case if set out in an Answer, but serve no proper function in support of a Motion to Dismiss the Complaint. Nothing is said about the law as construed by this Court that the enactment of an ordinance is a prerequisite to the sale of real property belonging to a city. Likewise, the Brief is silent as to Appellant's claim that the agreement is void because the City Commissioners were disqualified from voting to sell city property in which they had an interest as members of the L.D.S. Church, and likewise the Brief is silent as to the law which makes the Corporation of the President an indispensable party to a suit involving the sale of the Forest Dale property.

POINT TEN

BOTH THE PLAINTIFF AND THE FAUSETTS HAVE A STANDING IN COURT TO SUE ZIONS SECURITIES.

Much of what has been said in this Brief in answer to the contention of the Corporation of the President applies to Point One of the Brief of Zions Securities. While the claim that plaintiff being a non-member of the L.D.S. Church may, under some circumstances, preclude him from complaining of the manner in which the funds of Zions Securities are being used, that is not so under facts such as are alleged in the Complaint, and the proposed Complaint In Intervention.

Plaintiff being a taxpayer in Salt Lake City has a right to attack both transactions affecting the First South and State Streets property and the Forest Dale Park because of the conflict of interest as a member of the City Commission and as beneficiaries of the Corporation of the President, a part of which is Zions Securities. As we have heretofore pointed out, a beneficiary of a trust fund has an interest in such trust fund. Many of th cases cited by Respondent, Zions Securities, hold that the beneficiaries may maintain an action to force compliance by the trustee with the terms under which he holds such funds. Such is the law announced by the authorities generally. *Boquist on Trusts and Trustees, Vol.* 1, *page* 274, and the cases cited on page 48 of Appellants' original Brief. Indeed, if no one may be heard to complain because a trustee fails to carry out the terms of the trust, the trustee could do as may suit his fancy with the funds entrusted to him. In this case the Fausetts seek to enforce the terms of the trust for and on behalf of all the beneficiaries. That being so, the case stands the same as if all the beneficiaries, that is, all members of the L.D.S. Church, were here seeking the relief which the Fausetts seek.

It is the contention of some of the Respondents that if the Corporation of the President is to be compelled to carry out the terms of the trust, it must be by the Attorney General. If the trust is what the authorities define as a Public Charitable Trust, the cases hold that the Attorney General is a proper party to bring an action to enforce the same. The facts in this case do not bring it within that class of cases. A trust for the benefit of the members of the L.D.S. Church is not a public charitable trust. The only persons who have an interest in such a trust are the members of the L.D.S. Church. A trust for them is in no sense a public trust. The public generally is not interested in such a trust. We have heretofore discussed this phase of the case and shall not enlarge on what is there said except to observe that there are a number of cases cited in the Brief of Respondent which deal with the question of who owns the property of a church where the church divides into two or more factions. Counsel for Zions Securities have also cited a number of cases where the Courts refuse to pass upon controversies as to purely ecclesiastical matters, such as matters relating to discipline of its members, whether one has been properly excommunicated, what is the established doctrine of the church, etc. None of these matters are here involved. The courts, however, uniformly hold that they will hear and determine civil rights, such as to who is the owner of the property used by the church. A number of the cases cited by Counsel for Zions Securities so hold. We have found no case holding to the contrary.

POINT ELEVEN

THE ALLEGATIONS OF THE COMPLAINT SHOW THAT THE FAUSETTS AND ZIONS SECURITIES ARE PROPER PARTIES TO PLAINTIFFS' SECOND CAUSE OF ACTION.

Under Point Two of the Brief of Zions Securities it is argued that the Complaint fails to allege facts which show a cause of action against it as to the Second Cause of Action. We again direct the attention of the Court to the allegations of the Complaint to the effect that the Corporation of the President and Zions Securities is one organization, that no ordinance or proper Resolution was passed as by law required to sell Forest Dale Park, that because of the City Commissioners being beneficiaries of the trust fund held by the Corporation of the President and/or Zions Securities, the Commissioners were disqualified from participation in a contract to sell Forest Dale.

Under Point Two it is argued that a donor of a trust loses his rights to the property so donated. We do not contend to the contrary, but we do contend that he does not lose the right to maintain an action on behalf of himself and all other beneficiaries of the trust to enforce the performance of the trust. Cases are cited in the Brief of Zions Securities where gifts to construct various kinds of public improvements have been sustained on the ground that such gifts may be sustained in an attack by the heirs of the donors on the ground that the same is a public charity. Such cases do not aid the contention of Counsel for Zions Securities under the facts alleged in the pleadings in this case.

It is fundamental in the law of trusts that it is the donor and not the trustee who determines the purposes for which the donated property shall be used. Of course, the assets of the Corporation of the President may be used for the purchase of property to be used for religious purposes. The Fausetts adopt all of the allegations of the Complaint, and, therefore, what we have said in reply to the Brief of the Corporation of the President is applicable to and adopted as a reply to the Brief of Zions Securities.

POINT TWELVE

SALT LAKE CITY MAY NOT SELL CITY PROPERTY IN THE MANNER ALLEGED IN THE COMPLAINT.

Under Point One of the Brief of defendant City and its Commissioners it is argued that the sale of the First South and State Street property and the Forest Dale Park may be made in any manner that suits their fancy. Cases are cited which it is claimed support such contention. We have heretofore in this Brief discussed that phase of the case and adopt what has heretofore been said in support of Appellants' reply to Point One of the Brief of the City and its Commissioners. None of the cases cited in support of the contention of the City and its Commissioners involve any statutory provisions such as we have in Utah. The Brief of the City and its Commissioners recites what they claim to be the facts in support of the Motion to Dismiss the First Cause of Action. Obviously it may not be assumed that the mere recital of claimed facts in a Brief establish the existence of the same.

It is argued that the Complaint is defective in that it is not alleged that plaintiff will sustain a loss if the sale of the City property is consummated. Cases are cited, which they claim support such contention. The authorities generally are to the contrary where, as here, the sale is declared void or where compliance is not had with law. We have cited numerous cases and authorities in our original Brief on pages 38 and 39 thereof, which announced the law in such particular.

It is said on page 19 of the Brief of the City and its Commissioners that "They (Commissioners) can be members of churches and have dealings with those churches. Otherwise only atheists who were complete social outcasts and owed allegiance to no one could hold public office." No one contends that people who belong to a religion may not hold office, but we do contend that whether a city officer be an atheist or belongs to a religion, he must comply with the law and may not use his public office in aid of his religion or enter into a contract wherein his interests as a member of the church to which he belongs conflicts with his duties as a public officer. It is so provided in our statutory law, and that is the uniform holding of the court under the common law.

The foregoing contention made on page 19 of the Brief of the City and its Commissioners to the effect that the City Commissioners who are members of the L.DS.. Church should not be precluded from complying with the desires of their church while performing their duties as Commissioners would be familiar argument if the clock could be turned back a few centuries to the time of the struggle between the Church and the State as to which should be in control of temporal matters

with the result that the Church usually prevailed. However, that doctrine has never prevailed in the United States since the adoption of the First Amendment to the Constitution of the United States. Such doctrine is also condemned by Section 4 of Article One of the Constitution of Utah, and the provisions of *U.C.A.* 1953, 10-6-38. The former provides that there be no union of Church and State, and no church shall dominate the state or interfere with its functions. The latter provides that no officer of any municipal corporation shall be directly or indirectly interested in a contract made by the city of which he is an officer and any such contract shall be void. It will be unfortunate for the State of Utah if it ever departs from that doctrine.

Counsel for the City seems to be laboring under the false impression that Stone is the sole plaintiff in the main action, and that the Fausetts are the sole persons seeking to intervene. Under the pleadings the action stands as if all the taxpayers of Salt Lake City are parties to the action brought by Stone, and all of the members of the L.D.S. Church as well as the taxpayers of Salt Lake City are parties to the attempt of the Fausetts to intervene.

POINT THIRTEEN

BOTH THE PLAINTIFF AND THE FAUSETTS HAVE A RIGHT TO QUESTION THE SALE OF CITY PROPERTY.

Under Point Three of the Brief of the City and its Commissioners it is argued that plaintiff is without right to question the method by which the Commissioners sell city property.

The attention of the Court is again directed to the fact that in legal effect this is an action brought by all of the taxpayers of Salt Lake City. It is said in the Brief of the City and its Commissioners that the remedy of the taxpayers is at the ballot box. Obviously any action that the taxpayers may take at the next election will not aid them in the relief which they are seeking in this action. The numerous cases we have cited in our original Brief show that they are entilted to the relief which they seek in this action.

POINT FOURTEEN

THE COURT ERRED IN DISMISSING PLAINTIFF'S FIRST CAUSE OF ACTION AS TO THE CHAMBER OF COMMERCE AND IN REFUSING THE PETITION OF THE FAUSETTS TO INTERVENE.

It is contended in the Brief of the Chamber of Commerce and Gus P. Backman, its Secretary, that neither Stone nor the Fausetts possess any interest in the Chamber of Commerce, and, therefore, may not prosecute this action against them. We have heretofore discussed this phase of the case at some length and shall not repeat what is there said, except to state that we adopt what has already been said as a reply to the contention of the Chamber of Commerce and its Secretary. If the contention of the Chamber of Commerce to the effect that neither plaintiff nor the Fausetts may be heard to complain because of the actions of the Chamber of Commerce because they were not members thereof, then it follows that the only ones that may question the unlawful acts of the Chamber of Commerce are its members. We do not understand

that to be the law, and the cases cited in the Brief of those Respondents do not support or tend to support such view.

The real parties in interest, as we have pointed out, are the taxpayers of Salt Lake City and the beneficiaries of the trust fund which is to be used to assist in the purchase of a site for a Federal Building. The Respondents, Chamber of Commerce and Gus P. Backman, are, according to the allegations of the Complaint and the proposed Complaint in Intervention, assisting in the unlawful usese of trust funds, and in seeking to consummate a deal whereby the property of Salt Lake City may be disposed of by a City Commission whose members are disqualified from participating in an unlawful sale of city property. It is the taxpayers and the beneficiaries of the trust fund who are, through Stone and the Fausetts, prosecuting this action. Respondents concede that there are no allegations in the Complaint or the proposed Complaint in Intervention showing that the Chamber of Commerce took any part in the transaction for the sale of Forest Dale.

CONCLUSION

Appellants claim that the trial court was in error in dismissing the First Cause of Action, and in dismissing the Second Cause of Action as to defendants other than the Chamber of Commerce and Gus P. Backman, and in refusing to permit the Fausetts to file their complaint in intervention, and in failing to permit Appellants to file their Amendment to the Complaint for the following reasons:

1. That the attempted sale of both the First South and State Street property and the Forest Dale Park was invalid

for the reason that no Ordinance or proper Resolution was passed permitting said sale.

2. That the proceedings had in the attempted sale of the property at First South and State Streets were so irregular in the matter of giving notice in the terms of the attempted sale and in the persons to whom the sale was to be made, that the same is a nullity.

3. That the attempted sale of both of the City properties here involvel are void under the provisions of *U.C.A.* 1953, 10-6-38, in that, all, or a majority, of the members of the City Commission who participated in the attempted sale were disqualified from participating in the sale of the City property.

4. That the Respondents, Corporation of the President and Zions Securities, may not lawfully use their assets to assist in the purchase of a Federal Building because such funds are held in trust for the benefit and use of the members of the L.D.S. Church.

5. That Respondents, Corporation of the President and Zions Securities, are estopped from seeking to purchase the site at First South and State Streets for a Federal Building because they have secured title to the Lafayette School site upon the pretext that the same is to be used as a site for a Federal Building, and only one such building is presently contemplated by the United States.

6. That to permit the Corporation of the President and Zions Securities by the payment of several hundred thousand dollars to induce an officer of the United States to select a site for a Federal Building which is satisfactory to the Corporation

of the President and Zions Securities, constitute an invasion of the provisions of Section 4 of Article I of the Constitution of Utah.

7. That to permit the Corporation of the President and Zions Securities to divert the trust fund held by them to enrich the United States will constitute the taking of the property of the beneficiaries of such fund, contrary to the Fifth Amendment of the Constitution of the United States and Sections 7 and 22 of Article I of the Constitution of Utah.

8. That to permit the dismissal of the Second Cause of Action as to the Corporation of the President will render it impossible to try such cause.

9. That to permit the dismissal of the First Cause of Action as to the Chamber of Commerce and Gus P. Backman will render it impossible to try that action.

10. That to deny the Petition of the Fausetts to intervene will render it impossible to secure a complete determination of the rights of the parties to this action.

Appellants are entitled to be heard, if need be, to offer evidence in support of each and all of the foregoing matters, and if the evidence supports the same, to have judgment entered in their favor as prayed for in their pleadings.

Respectfully submitted,

ELIAS HANSEN
BURTON W. MUSSER
Attorneys for Appellant and Petitioners in Intervention and Appellants