No. 16316

IN THE

Supreme Court

OF THE

State of Colorado

THE CITY OF ENGLEWOOD, COLORADO, a municipal corporation of the second class,
Plaintiff in Error,

vs.

THE CITY AND COUNTY OF DENVER, COLORADO, a municipal corporation of the first class; A. P. GUMLICK, President of the Board of Water Commissioners of the City and County of Denver, Colorado; A. P. GUMLICK, KARL C. BRAUNS, RAYMOND W. JOHNSON, and NICHOLAS R. PETRY, as THE BOARD OF WATER COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, COLORADO,
Defendants in Error.

Error to the District Court of the Second Judicial District

Honorable Francis J. Knauss Judge

BRIEF OF AMICUS CURIAE

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SENTINEL PRINTERS, GRAND JUNCTION, COLO.

SUBJECT INDEX

COLORADO MUNICIPAL LEAGUE

BOULDER, COLORADO

CONSTITUTION CITED:

STATUTES CITED:

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I. FOREWORD

The Colorado Municipal League is a non-profit corporation of the State of Colorado consisting of approximately 175 municipal corporations. Both the

City of Englewood and the City and County of Denver are members of our organization. The Municipal League therefore does not enter into this controversy on a partisan basis. However, all municipalities are vitally concerned with their rights in and to their municipal water systems. These systems have been built up over a long period of years at the expense of the city taxpayers. Practically all municipalities have permitted outside users to obtain water either by tapping trunk lines leading to the city or by the users establishing their own distribution systems. In doing this, the municipalities have kept in mind the fact that the water and water works system is held in trust for the citizens of the municipality; that this outside use could be terminated whenever the city requirements necessitated it; and practically all of the cities have sold the water under contracts reserving the right to discontinue service, as Denver has done.

The question of whether the Public Utilities Commission has jurisdiction over the sale of surplus water by a municipality to users living outside of the city is therefore of vital importance to our municipal corporations. The Municipal League on June 18, 1949, unanimously adopted a resolution opposing regulation by the Public Utilities Commission and authorizing the League to present its views to the Colorado Supreme Court at the earliest opportunity. This Court has given the Municipal League permission to file this brief herein as **amicus curiae** and we join with the Attorney General in the hope that this Court will give a complete and final answer to the questions raised herein.

II. DESIGNATION OF POINTS

1. Cities Have the Power to Sell Water to Outside Users.

2. The Special Statute of 1911 Was Not Repealed by the Later Public Utilities Act.

3. Sale of Surplus Water is a Municipal Affair and the Constitution Prohibits Regulation Thereof by the Public Utilities Commission.

4. Sale of Surplus Water Outside of City Limits Does Not Make a City a Public Utility Subject to the Public Utilities Commission.

5. The Equities.

III. ARGUMENT

I. CITIES HAVE THE POWER TO SELL WATER TO OUTSIDE USERS.

While it is stated in the Englewood brief that there can be no doubt that a municipality may supply water service to consumers outside the territorial limits of the municipality, it seems important to us to look at the constitutional and statutory provisions giving this power.

Article XX, §1, of the State Constitution gives Home Rule Cities the power "within or without its territorial limits, to construct, * * * acquire, * * * maintain, conduct and operate, water works, * * * and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, * * *." Since the sale of surplus

water to persons outside of the city is incidental to the main purpose of supplying water to those persons within the city, the Home Rule Cities are by this provision of the Constitution given the power to furnish water to outside users.

As stated in Durant vs. City of Beverly Hills, 39 Calif. App. (2d) 133, 102 Pac. (2d) 759:

> "There are certain legal principles applicable to this controversy which should be stated at this time. 'A grant of power to provide and supply water to a city and its inhabitants, authorizes a city to carry on a system and supply water to persons outside its limits, whenever it becomes necessary or convenient to do so in order to accomplish the main purpose of supplying water to those within.' South Pasadena vs. Pasadena L. & W. Co., 152 Cal. 579, 93 P. 490 * * *
>
> "The power of the city to fix rates to be charged those customers residing within its boundaries is incidental to the power to 'establish and operate' public utility systems conferred by section 19 of article XI of the Constitution. This power to fix the charges for service by the municipality when operating a municipally owned public utility is not controlled by section 23 of article XII of the Constitution. City of Pasadena v. Railroad Comm. 183 Cal. 526, 534, 192 P. 25, 10 A.L.R. 1925; Jochimsen v. Los Angeles, 54 Cal. App. 715, 716, 202 P. 902. The power of the city to furnish services to inhabitants outside its boundaries is a part of the constitutional grant found in

> section 19 of article XI, wherein the city is authorized to establish and operate the utility; and since the operation of the system in the outside territory is but incidental to the main purpose of service to the inhabitants of the city, it follows as of course that the municipal authorities enjoy the same right to fix the charges to be paid by those served in the outside territory as it has to fix those charged its own inhabitants."

In addition to the general powers given to Home Rule Cities by the Constitution and the general powers to construct and maintain water works given to other cities by general statute, the legislature in 1911 enacted a statute on this special subject (Laws of 1911, Page 522) which applies to all cities and towns in the State. This statute appears as Section 22, Chapter 163, '35 C.S.A. as follows:

> "22. Supply water to outside consumers.—The incorporated towns and cities of the state of Colorado are hereby empowered to supply water from their water systems to consumers outside of the corporate limits of the said cities and towns; and to collect therefor such charges and upon such conditions and limitations as said towns and cities may impose by ordinance. (L. '11, p. 522, Sec. 1; C.L., Sec. 8999.)"

This statute expressly and unambiguously gives to all cities and towns the power and authority to supply water to outside consumers on such terms and conditions as the towns and cities **may impose by Ordinance.** It is a clear and positive statement of the legislature on a special subject of particular and

peculiar interest to cities and towns as well as the persons residing adjacent thereto who desire to avail themselves of city water. Even a casual reading of this statute will at once disclose its purpose and the intent of the legislature in enacting the same.

2. THE SPECIAL STATUTE WAS NOT REPEALED BY THE LATER PUBLIC UTILITIES ACT.

In 1913, the legislature passed a general statute relating to the regulation of public utilities in the State of Colorado and creating the Public Utilities Commission (Chapter 137 '35 C.S.A.). This act which we will refer to herein as the Public Utilities Act did not expressly repeal Section 22, Chapter 163 '35 C.S.A. The argument and proposition that the general law embodied in the Public Utilities Act of 1913 repealed by implication the special law of 1911 relating to outside water service by towns and cities, has been presented to this Court by Englewood in its Reply Brief at Page 23 thereof. In this part of its brief, Englewood without even considering the fundamental question involved summarily disposes of the proposition with the bold statement that the subsequent enactment (the Public Utilities Act) takes precedence over the prior enactment (Section 22, Chapter 163 '35 C.S.A.). Such, we submit, is not the law. The constitution of Colorado and the reported decisions of this Court support our contention. The question before the Court on this particular phase of the case and which we as friends of the Court wish to discuss thoroughly because of its vital interest to all cities and towns of the State can be stated briefly to be: Does the general statute of 1913 relating to

public utilities and the regulation thereof repeal by implication the prior special act of 1911 empowering towns and cities to sell water to outside consumers on terms and conditions to be fixed by Ordinance of the towns and cities?

A consideration of this question requires an inquiry into the purpose of the Public Utilities Act to determine what mischief it sought to remedy, and what the legislature intended to accomplish by that law as well as a review of the well established principle found in many of the Colorado decisions relating to repeals by implication and repeals of special statutes by subsequent general enactments.

The Public Utilities Act of 1913 was not passed because of any general public need to regulate the cities and towns of this State in their operation of selling water to outside consumers. It was not adopted to remedy any evil then apparent or objectionable to the public welfare which existed in 1913 because of the operation of any municipality. To argue otherwise is to ignore the history of the requirements and demands of the people that privately owned (not municipally owned) utilities be regulated and controlled in their activities by some governmental agency. Had the selling of water to outside consumers by cities and towns under the special act of 1911 reached such a stage by 1913 that the public welfare demanded a state agency, commission, or authority to supervise the activities of the municipalities so engaged? The answer is found in any practical common sense observation of the desire and need for such water by adjacent users and the universal recognition by all cities and towns that such users although technically outside city corporate limits are nevertheless a part of the same family,

the same trade territory, the same school district, and have the same common municipal problems as the users within the City limits. No, there was no demand, there was no request, there was no supplication for aid from that 1913 legislature by people obtaining water from cities and towns. The Public Utilities Act was not adopted to remedy any evil of which they complained. It was not the response of their representatives in the legislature to any petition of theirs. Rather the Public Utilities Act was the answer of the legislature to a growing demand that privately owned utilities (not municipally owned) who were rendering public service but who were operating for the profit of the stockholders be supervised and regulated by some State Commission to the end that the service rendered by them and needed by the public would be satisfactory and at a price consistent with good public service and a reasonable return to the owners of the property.

The purpose, intent, need for and reason back of the Public Utilities Act of 1913 is mentioned herein because it is important in determining the basic question stated above.

Having established that the Public Utilities Act was not to eliminate any mischief or remedy any evil existing in the sale of water by towns and cities to outside consumers, we turn to a review of the Colorado cases directly in point on this question. It must be kept in mind that the Act of 1911 which gave to towns and cities authority to sell water to outside users, is a special act. Also that the Public Utilities Act of 1913 is a general act and contains no express repeal of the 1911 law.

In People v. Commissioners, 86 Colo. 249, 281

Pac. 117; this Court considered whether a special act relating to an election for the removal of County seats was repealed by a later general election law and at Page 257 of 86 Colo., the Court said:

> "The above does not repeal the 1881 act, either expressly or impliedly. As we have pointed out, the 1881 and 1917 acts are not inconsistent. Repeals by implication are not favored. In re Funding of County Indebtedness, 15 Colo. 421, 430, 24 Pac. 877; Lovelace v. Tabor Mines & Mills Co., 29 Colo. 62, 65, 66 Pac. 892; Dunton v. People, 36 Colo. 128, 87 Pac. 540; Harrington v. Harrington, 58 Colo. 154, 159, 144 Pac. 20; Hewitt v. Landis, 75 Colo. 277, 281, 225 Pac. 842.
>
> If the provisions of two statutes can be construed as to stand together, it will be done. Dunton v. People, supra; Schwenke v. Union Depot and R. R. Co., 7 Colo. 512, 516, 4 Pac. 905; Kollenberger v. People, 9 Colo. 233, 235, 11 Pac. 101. We are not disposed to hold that when the legislature obeyed the constitutional direction to provide by law for the removal of county seats, it thereafter repealed by implication the only specific statute on the subject, and left in the air the manner of determining the qualifications of those entitled to vote on the subject, or relegated it to inferences under the general election laws. The common rule is that general statutes do not repeal special statutes by implication. Rice v. Goodwin, 2 Colo. App. 267, 269, 30 Pac. 330."

Commissioners v. Davis, 94 Colo. 330, 30 Pac.

(2d) 266; involved the question of whether a special statute providing for the appointment of deputy assessors was repealed by implication by a subsequent general statute providing for the appointment of deputy county officials. At Page 336 of 94 Colo., the Court ruled:

> "Section 7940 is a general statute providing for and regulating the appointment of deputy county officials. Section 8820 is a special statute relating to the appointment of deputy assessors under certain conditions. Section 7940 was enacted in 1919, and section 8820 was enacted in 1913. A later general statute will not repeal by implication an earlier special statute if the two statutes are not inconsistent and can be read together. People v. Commissioners, 86 Colo. 249, 281 Pac. 117."

There is no inconsistency in permitting towns and cities to sell water to outside consumers on terms fixed by the towns and cities and at the same time providing for and permitting public utilities to be regulated, supervised and controlled by the Public Utilities Commission. The special act of 1911 can be given full force and effect along with the Public Utilities Act of 1913 and it is apparent that that is what the legislature intended to do because it did not expressly repeal the earlier act at the time the Public Utilities Act was adopted.

Other late cases decided by this Court again announcing the well settled doctrine that repeals by implication are not favored are Ferch v. People, 101 Colo. 471, 74 Pac. (2d) 712 and People ex rel Wade v. Downer, 106 Colo. 557, 108 Pac. (2d) 224.

The later cases do not explore the question at length and for that reason we wish to call the Court's attention to a few of the earlier decisions in the State.

In re Funding of County Indebtedness, 15 Colo. 421, 24 Pac. 877 was one of the early and leading cases in this jurisdiction and in that case the Court stated that the repeal of a statute by implication is only recognized where a conflict clearly and definitely exists between it and a constitutional provision or subsequent statute relied on. There two legislative acts existed which provided different methods for disposing of county bonds. The constitution was amended to recognize the procedure prescribed in one of the acts and the Court held that such an amendment was no indication of an intent to abrogate the procedure described in the other acts. The Court stated at Page 428 of 15 Colo.:

> "When this amendment was adopted, two statutory methods of issuing and disposing of county bonds co-existed. Gen. St. 671 et seq.; Sess. Laws 1885, p. 232. One of these methods was evidently intended to effectuate the constitutional provision authorizing debts by loan for the construction of public buildings, roads and bridges; the other constituted an act to enable counties "to fund their floating indebtedness." Though the leading features of the procedure prescribed in these statutes are quite similar, yet important differences appear therein; for instance, the one relating to public buildings, etc., requires the sale of bonds at not less than eighty-five per cent of their par value; the funding act, on the

> other hand, directs the exchange of bonds for outstanding warrants at a rate of exchange specified in the notice of election; and it is only when bonds are not thus exchanged that permission is given to sell them at par, and apply the proceeds to the redemption of warrants. The co-existence of these statutes must be received as evidence that the legislature regarded both as necessary, and that according to the legislative view, neither would supply the place of the other; nor has any one, so far as we are advised, ever contended that the latter (the funding act) repealed the former by implication."

If two different procedures for disposing of county bonds are not so inconsistent that the existence of the earlier statute is not repugnant to the validity of the later, then surely two different regulatory controls, one of the municipalities over their own water and the other of the Public Utilities Commission over the privately owned utilities are clearly consistent, can stand together, and evidence no intent of the legislature that the earlier law should be repealed.

The Supreme Court in Lovelace v. The Tabor Mines and Mills Co., 29 Colo. 62, 66 Pac. 892 at Page 65 of 29 Colo. ruled:

> "As section 3888 was passed subsequent to section 3900, the material question to determine is, whether or not the provisions of the former with respect to the assignment of tax certificates issued to a county repealed the provisions of the latter on the

> same subject. If such a repeal was effected, it is only by implication that such is the result. Repeals of this character are not favored. Where there is an apparent conflict between two statutes, the latter in the absence of a clear legislative intent to substitute the new for the old law, will not be adjudged to effect a repeal of the previous statute on the same subject, unless there is such a positive repugnancy that the two cannot consistently stand together. Schwenke v. Union Depot, 7 Colo., 512; County of Saguache v. Decker, 10 Colo., 149; Rathvon v. White, 16 Colo., 41; Canfield v. City of Leadville, 7 Colo., App. 453."

The most that Englewood can say of the matter in this case is that there may be an inconsistency between the special act of 1911 and the general public utilities act of 1913. However there is certainly no positive repugnancy between the two and they can easily stand consistently together.

Dunton v. People, 36 Colo. 128, 87 Pac. 540; presented the question of whether a subsequent law regarding elections, repealed an earlier enactment and the Court said, Page 132 of 36 Colo.:

> "To determine the intention of the legislature, it is necessary to consider the conditions which demanded the enactment of the law and its consequent purpose.—State ex rel. v. Kelly (Kans.), 81 Pac. 450; Sedgwick on Constr. of Statutory and Constitutional Law, page 202, et seq.; First Blackstone, 61; Potter's Dwarris on Statutes and Constitutions, p. 144, rule 7.

Acting well within the doctrine above stated, this Court has said:

> "The rule is that 'effect shall be given to the intention, whenever such intention can be indubitably ascertained by permitted legal means.' Another statement of the rule is 'so to construe statutes as to meet the mischief, to advance the remedy, and not to violate fundamental principles.' Dwar. St. 181, 184 and note. Vattel says: That must be the truest exposition of the law which best harmonizes with its design, its objects, and its general structure. Among other well established rules of construction are these: That statutes are to be construed with reference to the objects to be accomplished by them, and with reference to the circumstances existing at the time of their passage, and the necessity for their enactment. Where a statute would operate unjustly or absurd consequences would result from a literal interpretation of the terms and words used, the intention of the framers, if it can fairly be gathered from the whole act, will prevail." —Murray v. Hobson, 10 Colo. 73.

Again at Page 135:

> "Repeals by implication are not looked upon with favor.—Rathvon et al. v. White, 16 Colo. 41; Denver v. Hart, 10 C.A. 452."

> "It is doubtful whether the clause of the act of 1901 repealing all inconsistent acts or parts of such acts adds any force to the repealing properties of the other pro-

visions of the law.—District of Columbia v. Sisters of Visitation, 15 App. Cases D. C. 308; The Hickory Tree Road, 43 Pa. St. 139.

Under the rules of construction, if a former act or part of an act is inconsistent with the provisions of a later one, the former must give way, under the repealing clause, it is only such acts or parts of acts as are inconsistent with the later that are repealed. If the provisions of the two statutes can be so construed as to stand together, that construction must be given them, and the former is not repealed because they are consistent, and the repealing clause only purports to repeal the inconsistent parts of the act; if they cannot be so construed as to stand together, they are inconsistent and the former must fall because of the inconsistency, and its overthrow is not rendered more forcible or complete by reason of the repealing clause. The repealing clause does not make that consistent which is inconsistent, nor render that inconsistent which is consistent."

In Harrington v. Harrington, 58 Colo. 134, 144 Pac. 20 at Page 158 of 58 Colo., we find:

"In other words, since it has been held that the primary purpose and effect of the act of 1911 was to repeal and amend the civil code, it could repeal no provision outside of the code except by express reference. In Lewis' Sutherlands Statutory Construction these general rules are stated concerning repeals by implication:

'If, by fair and reasonable interpretation, acts which are seemingly incompatible or contradictory may be enforced and made to operate in harmony and without absurdity, both will be upheld, and the later one will not be regarded as repealing the others by construction or intendment. **As laws are presumed to be passed with deliberation and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. In the endeavor to harmonize statutes seemingly incompatible, to avoid repeal by implication, a court will reject absurdity as not enacted, and accept with favorable consideration what is reasonable and convenient.** * * * The act being silent as to repeal and affirmative, it will not be held to abrogate any prior law which can reasonably and justly operate without antagonism. * * * **"It is a reasonable presumption that all laws are passed with a knowledge of those already existing, and that the legislature does not intend to repeal a statute without so declaring."** Vol. 1, 2nd ed., sec. 267. (Bold face ours.)

"Thus it will be observed with what high degree of disfavor repeals by implication are regarded. An application of these rules to the present case can result in no other conclusion than that no repeal of Section 2123, **supra,** in so far as it relates to

writs of error in divorce proceedings, has been effected."

To the same effect is Hewitt vs. Landis, 75 Colo. 277, 225 Pac. 842.

The Legislature in 1911 very wisely empowered the cities and towns to fix their own terms on the selling of water to outside consumers. This was an express recognition of the practical problems involved in such a situation. A city water system is **one unit** from the point of diversion on a stream through the filter plant and unto the ultimate consumer on the end of the line. It is an **indivisible unit.** Every municipal water system in this State has been acquired, extended, operated and maintained by pledge of the city's own credit through the issuance and sale of water bonds. Only a City or Town through its elected officers can determine the problems of financing, managing, operating and extending such a water system.

To argue that a City can operate its water system only within its city limits and that the Public Utilities Commission has authority to regulate and can operate the city owned system outside the city limits is to assert the ridiculous, to divide the indivisible, to ignore the self evident, and to ask the impossible. Let's be specific. A City now serving some twenty outside users is asked to extend its system at a cost of several thousand dollars to serve an additional area which has developed adjacent to the twenty old users. Can the Public Utilities Commission direct and command that City to issue its own municipal bonds to finance such an extension? Can the Public Utilities Commission direct and command that City as to how those bonds will be retired by

fixing the amount of revenue to be charged for water service? Can the Public Utilities Commission direct and command that City regarding the size, location and quality of material to be bought, paid for and owned by the City on such a project? An affirmative answer cannot be given to any one of these questions without completely surrendering to the Public Utilities Commission the power and authority to directy control and directly operate the City's entire water system. Being an indivisible unit, a water system cannot be partially supervised, controlled and regulated by the Public Utilities Commission without being wholly and directly controlled, regulated and supervised. Supervision of any part of a water system is supervision of the whole system. The 1913 Legislature certainly did not intend when it passed the Public Utilities Act to wipe out the fundamental policy of local self-government which this country has cherished from the beginning. It certainly did not do so expressly and this Court should not impute to that Legislature an intention to do so by implication. This Court should not sanction any such far reaching departure from the fundamental and vital principle that the people themselves in any community can control their own local affairs (and a City water system is a local affair) through their own elected officials.

3. SALE OF SURPLUS WATER IS A MUNICIPAL AFFAIR AND THE CONSTITUTION PROHIBITS REGULATION THEREOF BY THE PUBLIC UTILITIES COMMISSION.

There is another and more compelling reason why the 1913 legislature did not intend that the Public Utilities Act should repeal by implication the special statute of 1911. Laws are presumed to be passed with deliberation and with full knowledge of the constitution as well as existing laws. It is not reasonable to conclude that the legislature would intentionally violate an express provision of the constitution. Section 35, Article V, of the Colorado Constitution provides:

> "The general assembly shall not delegate to any special commission, private corporation or association, **any power to** make, **supervise or interfere with any municipal improvement,** money, **property or effects,** whether held in trust or otherwise, **or to** levy taxes or **perform any municipal function whatever."** (Bold face supplied.)

The Public Utilities Commission is a **special commission.** Holyoke v. Smith, 75 Colo. 286. The water system owned by any city in this State is **municipal property.** Our Supreme Court has said: "When the Public Utilities Commission fixes rates to be charged by a lighting plant owned and operated by a municipality, it performs a municipal function." Holyoke v. Smith, **Id.** Likewise, the California Court has said that the supplying of water to outside territory, being incidental to the main purpose, is a mu-

nicipal affair. Durant v. City of Beverly Hills, **supra.**

Whether the water and water works system be considered to be a municipal improvement or municipal property, or the furnishing of water be considered to be a municipal function or a municipal affair, the legislature could not delegate to the Public Utilities Commission the right to supervise or interfere with it.

4. SALE OF SURPLUS WATER OUTSIDE OF CITY LIMITS DOES NOT MAKE A CITY A PUBLIC UTILITY SUBJECT TO THE PUBLIC UTILITIES COMMISSION.

The City of Denver has ably presented the law showing that Denver is not a public utility. To its citations of authority we would like to add City of Phoenix v. Wright, (Ariz. 1938) 80 Pac. (2d) 390, wherein the Court says:

> "We come then to the question on the merits, which is, Has the Arizona Corporation Commission jurisdiction over the acts of a municipal corporation owning and operating its own water plant while it is furnishing water for public purposes outside of its own limits. * * * We think it too clear for extended discussion that the Constitution not only does not expressly authorize the Corporation Commission to regulate municipal corporations which are operating public utilities, but that it, by necessary implication, forbids such regulation."

The sale of surplus water to outside users has been under a limited contract, subject to termination. This would certainly show that the City did not intend to dedicate its property to public use. While it is true, as stated in the Englewood brief, the number of users is not controlling upon the question of whether or not a company is a public utility, the definitions of a public utility do require a company to hold itself out to the public as ready to serve every one of the public alike to the limit of his capacity. Denver and other cities do not hold themselves out as ready to serve every one of the public up to the limit of their capacity. They only sell surplus water not needed for the immediate use of the city, with the contract right to cut off the outside users when the needs of the city require it. Many other cities have denied additional taps on many occasions because of the shortage of water.

Even in the case of a private individual, a Court will require strong evidence in order to establish a business as a public utility. In Trask v. Moore (Calif. 1944) 149 Pac. (2d) 854, the Court says:

> "The trial court, in rendering a judgment in favor of the plaintiff, impliedly found from the meager evidence on the issue that Ealey's operation of his water plant for the purpose of supplying water to his neighbors in the residential tract did not establish its dedication to a public use, and therefore any property negotiations affecting such water system was wholly a matter for private contract and of no concern to the Railroad Commission. The record is entirely consistent with such conclusion. The mere fact that a person furnishes within a

> limited area a portion of his water supply to a certain number of consumers, each individually receiving the use and benefit of the same and paying an agreed sum as a monthly rate, does not of itself prove the water works to be a public utility. While such conduct shows the enterprise to be a business proposition, rather than a mere accommodation or a neighborly act, in the sense that there is a monetary consideration for the service, it does not necessarily establish a dedication of property to public use. * * * 'To hold that property has been dedicated to a public use is not a trivial thing,' * * * and such dedication is never presumed without evidence of unequivocal intention. * * * In the condition of the evidence as hereinabove outlined, the trial court's determination of the point in the plaintiff's favor is not open to attack."

Our Supreme Court has ruled that a city does not constitute a public utility coming within the jurisdiction of the Public Utilities Commission in the sale of water to persons inside its boundaries. There is no reason for a different rule in the sale of water to outside users. While Englewood and the Attorney General contend that Lamar v. Wiley lays down a different rule in regard to sales to outside users, we feel that the Denver brief adequately distinguishes the Lamar case. The fact that the City itself invoked the jurisdiction of the Public Utilities Commission and did not raise the question of its jurisdiction makes the statements of the Court **dictum** which was not necessary to a decision in the case. Also, the fact that electricity was involved in the Lamar case instead of water, seems to us a

ground for distinction because there is no limit to the amount of electricity that can be produced whereas there is certainly a limit to the amount of water that can be obtained.

There is no reason for one rule as to water users within the city limits and another rule as to outside users. If the constitutional provision prohibits interference by the Public Utilities Commission in cases involving water users inside the city, it should likewise prevent interference by the Public Utilities Commission in cases involving outside water users. As said by the court in Phoenix v. Wright, **supra:**

> "The limitation placed by the constitution on the power of the corporation commission over municipal corporations is not predicated upon the place where they do business, but upon the fact that they are municipal corporations. Such being the case, if a municipal corporation may lawfully furnish water for public purposes to consumers outside of its boundaries, it is no more subject to regulation by the corporation commission in so doing than it is in the furnishing of water to those inside of its boundaries."

If the Public Utilities Commission has jurisdiction over the sale of water to outside users, it would not only have jurisdiction over the rates to be charged, but permission of the Commission would have to be obtained before present users could be cut off, and the city would be obligated to sell water to all new users who applied. This would in effect destroy the working of the city water system as a unit and would hamstring the cities in their planning and financing for the future.

We submit that the Lamar case can and should be distinguished from the present case and that it is not binding because the statements therein are **dictum**; that there is no reason for a different rule as to inside users and outside users; and that if the Lamar case cannot be distinguished by this Court, that it must be overruled as being in conflict with the clear and unambiguous language of the Colorado constitution.

5. THE EQUITIES.

Much stress is made by the attorney general that the outside water users need state protection from the designs of the cities. The cities are aware of the importance of their surrounding territory to the economic welfare of the cities. They do not desire to take unfair advantage or to make excessive charges for water sold to these outside users. But cities do want a fair return which will protect them in the management of the water system which they hold in trust for their citizens and which will enable them to financially handle the program which they have planned for the future and which their citizens are bonded to pay. Even if the Public Utilities Commission has no jurisdiction over these sales to outside users, the users are not without their remedy in a Court of competent jurisdiction, and the cities cannot charge unreasonable rates nor practice undue discrimination. This explanation is made in City of Phoenix v. Wright, **supra,** wherein the Court says:

> "It is urged with great vehemence that unless this jurisdiction is given to the corporation commission, there are many thousands of citizens of Arizona who will be most grievously oppressed and without remedy. We think defendants are unduly

alarmed as to the lack of remedy if such oppression does exist. As is pointed out by plaintiff in its brief, there are at least three remedies for those who may be dissatisfied with the rates, rules and regulations for the use of water from its plant, as fixed by plaintiff. In the first place, it must be remembered that plaintiff is not operating outside of its boundaries by an exclusive franchise prohibiting any competition. * * * In the second place, as we have indicated previously, if it be deemed advisable to regulate the rates to be charged by municipal corporations from consumers of water outside of their corporate boundaries, the legislature has plenary power, except as limited by the constitution, to make such regulations as it may see fit in the premises. But, should all these means fail, and should it appear that the corporation commission is the only branch of government which is both willing and able to protect the rights of private citizens against the oppression of adjacent municipalities, and the people of Arizona are satisfied that this is so, the constitution may be amended at any time to confer upon that commission the jurisdiction which they now seek to exercise in violation of its express language. We conclude, therefore, that under the constitution of Arizona, as it now stands, the corporation commission has no jurisdiction to regulate the actions of a municipal corporation engaged in the service and delivery of water for public purposes to consumers either inside or outside of its corporate limits."

IV. CONCLUSION.

There can be no doubt that a municipality may supply water to consumers outside the territorial limits of the municipality. This right is given to Home Rule cities as an incident of the general power given by the constitution to establish and maintain waterworks systems; it is given to other towns and cities as an incident of the general power given by the statutes to establish and maintain waterworks systems; and it is expressly given to all cities by the special statute of 1911. This special statute was not repealed expressly nor by implication by the general statute of 1913 creating the Public Utilities Commission.

A waterworks system is a municipal improvement and municipal property. The fixing of rates for users living either inside or outside of the city limits is a municipal function. Under the Colorado Constitution the Public Utilities Commission, which is a special commission, cannot be given power to supervise or interfere with any municipal improvement or property, nor to perform any municipal function whatever.

In the sale of surplus water outside of the city limits, a municipality does not become a public utility which is subject to the Commission. This Court has ruled that a city selling water to users within its boundaries is not subject to the jurisdiction of the Public Utilities Commission. There is no good reason for a different rule in the sale of water to outside users. The rule stated in the Lamar case was **dictum** and the case can and should be distinguished from the present case; if not, it should be overruled.

Cities have no desire to take advantage of water

users living in adjacent territory. If they should do so, these water users can provide their own water systems or they can resort to the Courts. They are not without a remedy. On the other hand, if the Public Utilities Commission has jurisdiction over the sale of water to outside users, many cities will have to attempt to cut off these outside users as a matter of self protection and in order to secure their future growth. The financial structure of many water systems has been based upon the sale of water to outside users and a change in these plans would cause a great hardship on many municipalities.

We submit that both the law and the public interest require that the decision of the trial court be affirmed.

Respectfully submitted,

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