

REAL ESTATE MEN ON WATER PROBLEM

Issue an Address to the Public
Upon Points Involved in
Discussion.

ALSO HAVE LEGAL OPINION.

Latter is in Relation to Contract Be-
tween City and One of the Canal
Companies.

to the Citizens and Taxpayers of Salt
Lake City.

The undersigned committee, appointed by the Salt Lake Real Estate association to present to the public some of the various reasons why this bond issue, for \$1,000,000 should be voted down at this time, beg to submit the following:

In considering this matter there are three things that we would ask you to keep constantly in mind:

First—That the Real Estate association has given this matter very close study since the intention of the city council was first made public.

Second—That there is no body of business men who would be as directly or as greatly benefited by a proper improvement to the water supply of our city as the members of the Real Estate association.

Third—If these bonds are voted, and the money expended without gaining in full the desired increased water supply, the city will then be in the position of not being able to make any further effort along that line, unless the taxpayer is willing to stand direct taxation, as this issue of bonds will practically bring the city to its financial limit.

Fourth—The contract is unfair, and decidedly unbusinesslike, and beyond a question of a doubt the city will not be able to carry out its part, and no end of suits will be filed against the city for damages if it is entered into.

Fifth—The council committee informs the public that they expect to get the whole flow of Big Cottonwood creek, but claim that measurements on their own ground, and on the measurements on one-half the flow.

Under the contract the creek is to be measured the first day of April, the 15th day of April, the 1st day of May, the 15th day of May, the 1st day of June, the 15th day of June, the 1st day of July, the 15th day of July, the 1st day of August, the 15th day of August, and the 1st day of September.

Now half of the flow of Big Cottonwood creek for 1904, according to the official measurements made by the city engineer (which is the latest measurement that could be secured by the committee) is as follows:

On May 15, 1904, half of the flow of water from the creek for 24 hours amounted to 87,892,720 gallons, which with 25 per cent added would make a total of 109,865,900 gallons to be delivered daily by the city to the farmers.

June 15 half the flow of the creek for 24 hours amounted to 63,657,585 gallons, and with 25 per cent added makes a total of 79,571,981 gallons.

July 15 half the flow of water from the creek for 24 hours amounted to 20,680,440 gallons, which with 25 per cent added amounts to 25,850,550 gallons.

Aug. 15 half the flow of water from the creek for 24 hours amounted to 11,397,725 gallons, with 25 per cent added amounts to 14,247,156 gallons.

Sept. 15 half the flow of water from the creek amounted to 17,734,645 gallons, with 25 per cent added amounts to 22,168,306 gallons.

It will be noted that the first measurement of the creek is to be made every two weeks until the 15th day of May, then, mark you, it is measured but once each month, this measurement holding good for thirty days on a rapidly decreasing supply. For instance, take the measurement of June 15. We furnish 79,571,981 gallons of water daily until the 15th of July, when on the 15th day of July the creek only measured 25,850,550 gallons, showing a shrinkage of the flow of 53,721,431 gallons in 30 days, from which shrinkage the city receives no benefit, as we have to furnish from the measurement made on June 15, 79,571,981 gallons of water per day.

The above should illustrate the unfairness of the contract as far as the measurements are concerned. In our opinion the measurements should be made weekly, or else the city should have the same privilege as the farmer of demanding a re-measurement at any time.

Sixth—This amount of water is to be furnished from Utah Lake, and the proposed improvements to be made by the government, Utah lake will furnish 500 second feet of water, of which 18 second feet is primary water right, which leaves 482 second feet, 48 second feet added for seepage into the canal.

Pain Weakens And Destroys the Nerves.

Do you know that pain is simply the nerves crying for help?

Has it ever occurred to you that pain weakens and destroys the nervous system?

For this reason you should act promptly in every case of headache, backache, neuralgia, toothache, and all other pain. Dr. Miles' Anti-Pain Pills will relieve pain almost instantly, because they act in a natural and harmless manner upon the nerve tissues, and relieve the conditions which cause the pain.

While every prompt and effective in their action, they do not affect the bowels in the least, are perfectly harmless, and leave no disagreeable after-effects.

Delicate women who suffer from headache, bearing-down and periodical pains, can use them with impunity. You may also give them to children with the assurance that while they will relieve, they cannot possibly harm.

"Dr. Miles' Anti-Pain Pills never fail to cure headache, pain in back of neck, neuralgia, neuritis, or in fact any pain. I have taken them with best results, and have given them to others; they never disappoint."

GIFFERT R. ROBERT, Milford Center, Ohio.

25 doses for 25 cents. Never sold in bulk. If first package fails to benefit, your money back.

FREE Write to us for Free Trial Package of Dr. Miles' Anti-Pain Pills. The New Scientific Remedy for Pain. Also Symptom Blank. Our specialist will diagnose your case, tell you what is wrong, and how to right it. Free. 132, MILLS, NEW YORK, N. Y. LABORATORIES, ELKHART, IND.

Don't Quake and Shake Over the Holiday Baked Husler's Flour THAT NEVER FAILS.

makes a total of 457 second feet, divided by five ownerships, giving the city 91 second feet, or a total of 56,225,900 gallons, which is 23,464,500 gallons short of meeting this proposed contract on June 15, to say nothing of the amount of water the city is to furnish under its Parley's canyon contract.

Sovereign the contract is perpetual, and should Salt Lake City fail to supply the water, it would be subject to endless damage suits, as is clearly indicated by the opinion of Messrs. Henderson, Placer, Critchlow & Barrette, which is hereto attached.

We were led to believe that this proposed contract was similar to the one made for the exchange of the Parley's canyon water. Now note the difference: The Parley's canyon contract with the farmers calls for an equal exchange of water. This contract calls for 25 per cent more, to say nothing about the unfair measurements, which will in times require the city to furnish fully 75 per cent more water than she receives.

There is a clause in the Parley's canyon contract which reads as follows: "Providing that if such default should continue, that is to say, if the city should fail to supply said canal water to the farmers for a period of six months, then this agreement shall be null and void, and the city shall not be liable for any damages resulting from such default, or failure to furnish said canal water." There is no such agreement in this contract.

Under it, should the city fail to carry out its agreement, the farmer may at his will, annul the contract, or go along collecting damages for such failure on the city's part, he has the option, the city has not. Then again, under this contract the farmers get \$10 an acre bonus, and there is no such bonus called for in the Parley's creek contract, with it all the farmers do not agree to furnish the city one gallon of water, but it is very specifically provided what amount is to be delivered by the city.

Eighth—It is proposed by the mayor and city council committee, if this bond issue shall carry, to build the proposed conduit high enough so as to give 150 feet fall for power purposes, which would certainly be an unnecessary expense, if such power is to be used, as we are led to suppose, for the sole purpose of pumping sewerage. The city has a contract with the street railway company, entered into some seven years ago, whereby they agreed to furnish without expense to the city 30 horsepower for pumping plant, or for light or heating, why not use this power, which does not cost the city anything, instead of building a power plant at a cost of \$40,000, together with the heavy annual expense of operating such a plant.

Ninth—The additional expense incurred through building the conduit at an elevation sufficiently high to gain power for the operation of this plant will be at least \$15,000. And further, experience has shown that water power plants are not to be relied upon, for the reason that at certain times of the year the water is low, and at other periods the streams are frozen, which necessitates a steam plant for any certainty of operation. For example, one of the largest power consumers in the west, the Utah Light & Railway Power company, has recently appropriated \$100,000 for a steam plant to be erected in this city, notwithstanding they have several water power plants, which fact should prove them to be very unreliable.

Tenth—It will be readily seen that the measurements which the farmer bases the supply he shall receive from the city, is for a certain portion of Big Cottonwood creek, measured at the mouth of the creek, which would forfeit his right to condemn the city for the right to develop or purchase any water from the creek, under contract, would still be entitled to it.

Eleventh—We cannot understand why the mayor and city council recommend borrowing \$200,000 for the purposes as they set forth, in the proposed government Salt Lake City's portion for improving Utah Lake. It is not certain that the government will carry out the work, but should they do so, the \$200,000 which we would owe the government, would be payable as follows: Not one dollar to be paid until one year after the work is completed, then 10 per cent of the \$200,000 is to be paid, and like amount each year for 10 years, without interest, extending the time of payment over a period of not less than 14 to 15 years from this date, as the government engineer states that it will take at least three years from the time it is started, to complete the work.

As business proposition, is it reasonable for this city to borrow \$200,000, and pay \$3,000 per year interest on the same for 20 years, a total of \$100,000 in interest money, not one dollar of which will be needed inside of four years, at least, and at that time it will be necessary to raise only \$20,000 per year to fulfill our agreement with the government. Can you afford to throw away \$100,000? Would you do it in your own business, borrow \$200,000 four years before you had use for any part of it? We guess not.

We want water and waterworks improvements, but we do not want these things under such a plan as proposed by the city council's special committee.

Signed by, EDGAR S. DARLING, THOS. HOMER, W. J. HALLORAN, Committee Salt Lake Real Estate Association.

OPINION OF LAWYERS.

Salt Lake Real Estate Association: Gentlemen—In response to your request that we give to you our opinion upon paragraph 5 of the agreement proposed between Salt Lake City upon the one part, and the Big Cottonwood Lower canal, a corporation, of the other part, we have this to say:

We have before us the text of the proposed agreement, as the same appears in the issue of the Salt Lake Tribune of Nov. 24, 1904. It appears therefrom that it is proposed to enter into an agreement by which the Big Cottonwood Lower Canal company (which we shall speak of as the canal company), is to sell, assign and transfer to the city all its right to the use of the canal company's portion of the water flowing in Big Cottonwood creek, Salt Lake county, Utah. The amount or extent of the interest of the canal company in the waters of Big Cottonwood creek is not stated in the agreement, nor is there any guarantee on the part of the canal company as to the minimum amount of water to which it is, or in the future may become, entitled.

The contract in brief provides for the payment by the city to the canal company for this interest, whatever the same may be, by the transfer from the city to the canal company of a certain amount of water taken from another source, equal in volume to twenty-one

two hundred and fortieth (21-240) of all the waters flowing in Big Cottonwood creek, between Oct. 15 and October 15, and one-sixtieth (1-60) of the amount of such waters flowing in the creek between Oct. 15 and April 15.

The agreement further provides a method of determining the quantity of water flowing in Big Cottonwood creek by means of measurements taken on the 15th day of each month from April to September, which measurements shall determine the amount of water which the city is to deliver to the canal company, irrespective of the amount which the city may obtain from the creek under its purchases. The agreement further provides for the appointment of commissioners, whose duty it shall be to measure the waters flowing in Big Cottonwood creek, with a view to the determination of the quantity to be furnished by the city to the canal company, and who shall also at any time, at the request of the canal company, make measurements of the quantity of water furnished by the city, under the agreement.

The seventh and eighth paragraphs of the proposed agreement provide for the construction at the expense of the city at several points upon Big Cottonwood creek, and at the point where the city is to deliver its water to the canal company, of weirs, and for the keeping of the same in repair, all of which, together with the making of the measurements, from time to time, and the compensation of the commissioners, and the defense of any and all suits which may be brought against the canal company by any person, in respect to the title of the canal company to the waters, shall be at the expense of the city.

The ninth paragraph of the agreement is the one to which you have directed our particular attention and have requested our opinion as to the legal effect of the same. This paragraph provides that if the city shall at any time fail to deliver to the canal company the full quantity of water agreed upon, to-wit: 21-240ths of the flow of Big Cottonwood creek, and if such default shall continue for a period of twelve hours, then the canal company shall have the right to immediately retake the waters of Big Cottonwood creek which are being used by the city, under the terms of the agreement, and for this purpose, shall have the right to immediately return the waters of Big Cottonwood creek to the canal company, and shall have the right to the use of the waters so returned into their original channel during all the time that the default shall continue, and the right to retake the waters may be exercised by the canal company as often as the city shall be in default. It is further provided that upon a failure on the part of the city to deliver to the canal company the full quantity of the flow of Big Cottonwood creek for a period of six months, then all the rights of the city to the use of the waters of Big Cottonwood creek, belonging to the canal company, immediately cease and terminate, and the canal company shall be immediately re-vested with its rights to the use of said waters as fully and completely as though the agreement had never been made.

It is further expressly stated that the right of the city to retake the waters of Big Cottonwood creek and the right of the canal company to terminate the rights of the city are declared to be cumulative remedies, and shall in no wise be construed to deprive the canal company of any remedy at law in equity, which it might otherwise have to enforce its rights under the agreement.

The question submitted to us is as to whether under this paragraph, in the event that the city should either voluntarily or through neglect, fail to deliver to the canal company, or for any other reason, default in its covenants to supply to the canal company the quantity of water stipulated for, and in default should continue for a period of six months, and if by reason of such default the canal company should retake and use the Big Cottonwood waters, the city would thereby be absolved from all further liability to the canal company, or whether, on the other hand, it might still be liable to a suit at law for damages on account of the violation of the condition of equity to compel a specific performance of its contract.

Treating the contract as one which the parties have the power to make, and as being voluntarily executed, and binding in all respects, the agreement would seem, upon its face, to be one by which the canal company "grants, bargains and sells" to the city "all of the right" of the canal company to the use of all its portion of the water flowing in Big Cottonwood creek, to the use of the second part shall be entitled to retake the waters of Big Cottonwood creek, under the terms of the agreement, and shall have the right to the use of the waters so returned upon the "failure" of the city to keep its covenants.

In form and effect this instrument seems to provide for grant upon a condition subsequent, that is to say, a transfer of the title to the waters of Big Cottonwood creek from the canal company to the city subject to being defeated by a failure in the future on the part of the city to comply with the condition upon which it holds its title, viz., the delivery to the canal company of a volume of water at all times equivalent to 21-240ths of the entire flow of the creek. The condition upon which the grant seems to be an agreement, executory in its nature, that is to say, one to be carried out in the future. It is also a continuing agreement in that it is to be performed in each and every year for all time.

This agreement takes the form of a covenant upon the part of the city, and the faithful performance of this covenant is the condition upon which it retains the right to the use of the Big Cottonwood waters.

When this condition is broken, according to the express terms of paragraph 5, the title reverts in the canal company, at its option. Such reversion of the title in the grantor is in the nature of a forfeiture.

It is undoubtedly true that forfeitures are not favored in the law, and where the court can construe the words of the conveyance as a covenant rather than as words of condition it will do so, and by remitting the grantor to his right to recover damages for breach of the covenant will save the estate from forfeiture, through breach of the condition.

But we know of no reason why by express words the title should be deemed to be in this agreement, the same terms

of the agreement, as the same appears in the issue of the Salt Lake Tribune of Nov. 24, 1904. It appears therefrom that it is proposed to enter into an agreement by which the Big Cottonwood Lower Canal company (which we shall speak of as the canal company), is to sell, assign and transfer to the city all its right to the use of the canal company's portion of the water flowing in Big Cottonwood creek, Salt Lake county, Utah. The amount or extent of the interest of the canal company in the waters of Big Cottonwood creek is not stated in the agreement, nor is there any guarantee on the part of the canal company as to the minimum amount of water to which it is, or in the future may become, entitled.

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This Day In History.

DECEMBER 26th.

1776—Battle of Trenton.

1821—Stephen Girard, eccentric millionaire and philanthropist, died in Philadelphia. Girard was born in France 1750. Girard passed his early life at sea and settled in Philadelphia as a trader and vessel owner in 1776. A fortune of \$500,000 remained at his death, \$2,000,000 of which he directed to the founding and maintenance of a college for orphan boys.

1894—Dr. William Dismold, eminent German-American surgeon, died in New York City.

1901—Sir Noel Paton, eminent born in Hanover 1868. British painter, died in Edinburgh; born 1821.

Don't Let This Day In

Your History

Pass without subscribing for the Deseret News.

may not be used to measure the duty of the grantee, and to limit the quality of estate granted. In other words, we see no reason why the parties may not provide as they have provided in this agreement, that when the grantor fails in his promise to perform, his title to the thing granted as a consideration for such promise shall fail.

This view is strengthened and any other construction of this instrument seems to be precluded by a consideration of the final sentence of paragraph 9, which provides that the right of the canal company to retake the waters of Big Cottonwood creek and terminate the city's title, shall be regarded as cumulative and shall not deprive it, the canal company, of any remedy in law or equity under the contract.

If, therefore, the city should fail to deliver to the canal company the water which it has covenanted to deliver, and thereby the condition should arise giving the canal company the right to retake the waters of Big Cottonwood creek, the exercise of this right would not absolve the city from its obligations to carry out its promise. A right of action would arise in favor of the canal company for damages, if actual and substantial damages could be shown. Doubtless the recovery would be substantial. In any event nominal damages would accrue. As to whether action could be brought every year, or whether the canal company would be limited to one recovery for its entire damages, we are not now called upon to say.

It is proper to say further that in all probability the fact that the canal company had retained the waters of Big Cottonwood creek, would be considered in mitigation of the damages suffered by it from a breach of the covenant.

As to whether under these circumstances the damages could be other than merely nominal, or whether they could in any event exceed the difference in value between the waters retaken and the waters of Big Cottonwood creek, we express no opinion.

If the city should fail to deliver to the canal company the water which it has covenanted to deliver, and such default should continue for a period of six months, then, under the provisions of paragraph 9, the canal company would have the right to immediately retake and would be immediately restored to the waters of Big Cottonwood creek, which had been used by the city under the terms of the contract "and shall have the right to the use of said water during all the time that said default shall continue." Under the condition of affairs the canal company might not elect to exercise its option to retake itself permanently the title to the waters of Big Cottonwood creek, but might continue, under this provision, to hold and use such waters temporarily, awaiting the time when the city would again begin to deliver water to the canal company. Under these circumstances, it would seem quite clear that the canal company would have the right to treat the contract as still in force for every purpose, and its use of the waters of Big Cottonwood creek as a mitigation of the damages suffered by it from the default of the city. It could under these circumstances maintain its action against the city for the damages suffered by it by reason of the default of the city, treating the Big Cottonwood waters as being still vested in the city under the grant contained in this agreement.

If upon default of the city, continued for a period of six months, the canal company should exercise its option to retake the waters of Big Cottonwood creek and thereby re-vest itself with the title thereto, we do not believe it could thereafter maintain an action against the city for specific performance. Its election to re-vest itself with the title to the waters of the creek would be inconsistent with its demand for further performance of the contract.

The foregoing, we think, covers the matters upon which our opinion was asked.

Very respectfully,
HENDERSON, PIERCE, CRITCHLOW & BARRETTE.

TOKIO MILITARY CAMP.

Famous City is Once More Alive With Recruits and Reservists.

Tokio, Dec. 25, 5 p. m.—Tokio is again a great military camp and the scenes of last spring when the first armies were mobilized and dispatched, are duplicated. Thousands of recruits and reservists are assembling, are drilling and equipping preparatory to taking the field. The permanent and temporary barracks are filled and it is necessary to billet the soldiers brought to the city. Oyamada is the center of activity where infantry, cavalry and artillery are constantly drilling. The batteries fire blank charges for the purpose of breaking in the new horses. The general muster is a scene of enormous numbers. It is planned to give Field Marshal Oyama a rough total of half a million men, with a heavily increased artillery arm, besides providing a defense for Formosa, and the southern islands in anticipation of the Russian Second Pacific squadron's attempt to seize a base.

The port of Kelung in Formosa has been declared a state of siege and other positions in Formosa and the Pescadores are progressing. Winter is not interfering with the Japanese transport service. The railway between Daini and Yenchow is working well and the running time between Tokio and Liao Yang is six days.

TOO HONEST FOR OFFICE.

Secy. Hitchcock Says There is a Man of that Kind in Oregon.

Washington, Dec. 25.—Secy. of the Interior Hitchcock, when talking to the president and the cabinet members about the land fraud cases, spoke eloquently of the honesty of a man who has been identified with their prosecution. The question was asked why the man had never been elected to office. "He's too honest," asserted Secy. Hitchcock.

Secy. Hay, Secy. Morton and Post-

master-General Wynne, who have been elected to office, nodded approval. As Secy. Hitchcock looked around he met the reproving eyes of the president and the amazed expressions of Atty.-Gen. Moody, Secy. Wilson, Secy. Taft, Secy. McLean, carrying seal bags, all of whom in their time have been elected to office.

Secy. Hitchcock began to explain, but he was informed that the explanation would have to be clear to grant him immunity from the charge of malicious institution. He was reminded that in France he might get a challenge for such a remark. He took refuge in silence. Before the cabinet meeting ended, however, he had re-established himself in the friendly graces of his colleagues, as was shown by the fact that he rode away with Atty.-Gen. Moody, Senator Atchafal, and Representative Binger Hermann remain to be heard from.

Riot Follows Midnight Mass.

Bacon, Russian Poland, Dec. 25.—After the midnight mass at the Roman Catholic cathedral a crowd composed of workmen, Poles, and Jews, carrying red flags. The military authorities in trying to disperse it were received with shots and a serious encounter followed in which the commander of the Twenty-sixth regiment was killed and a grenade was wounded. One of the demonstrators was killed.

Russians Must Not Retreat.

Mukden, Dec. 25.—Gen. Kuropatkin, addressing the troops, said today: "You must never allow yourselves to retreat. Even in the case of the smallest detachment having once formed a plan, it must be carried out to the end."

Two Killed in Riot in Poland.

Bacon, Russian Poland, Dec. 25.—After the midnight mass at the Roman Catholic cathedral a crowd, composed

of workmen, Poles, and Jews, carrying red flags. The military authorities in trying to disperse it were received with shots and a serious encounter followed in which the commander of the Twenty-sixth regiment was killed and a grenade was wounded. One of the demonstrators was killed.

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