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Utah Court of Appeals
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IN THE COURT OF APPEALS, STATE OF UTAH

BOYD NELSON, LORRAINE NELSON, ,
STEPHEN WHITLOCK AND SHEILA
WHITLOCK,

Plaintiffs/Appellants,

vs.

PROVO CITY, a Municipal
Corporation, ALBERT KANAHELE,
In Capacity as Project Manager
of East Bay Business Center,
GARY GOLIGHTLY, In Capacity
as Head of Provo City
Redevelopment Department,
and ALL OTHER PERSONS
CLAIMING AN INTEREST ADVERSE
TO PLAINTIFFS' IN 900 SOUTH
UNIVERSITY AVENUE,
and JOHN DOES 1 through 10,

Defendants/Appellees.

Case No. 910400527

Court of Appeals No.

Category No. 16

93-0227-CA

REPLY BRIEF OF APPELLANT

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Ct of Appeals No. 930227-CA

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REPLY BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This action concerns a small parcel of real property which was part of a larger tract derived from a U.S. Patent in 1871. 900 South Street, in Provo, proceeded east from University Avenue and existed as a public highway since before 1869 and it continued as such until 1989. The highway was never dedicated as a public street and existed only as a public easement. The parcel of property constituting 900 South existed on the County Recorder's records as an unowned parcel situated between Plaintiffs' properties and Defendant's property.

Plaintiffs and appellants own property bounded on the south side by this public easement. Defendants own property bounded on

the north side by this public easement.

Defendants Provo City, et al, voted to vacate this street without notice or an opportunity to be heard. Upon vacating the street, Provo City seized the street, joined it with land previously owned to the South for the purpose of gleaning a commercial building lot. This action by Provo City deprived Plaintiffs of street front property which had existed in the Provo business district for over 100 years and landlocked a parcel of land owned by Plaintiff Stephen Whitlock. The trial court quieted title in Defendants. The issues presented for this Court's review involve the interests Plaintiffs have in the real property claimed by Provo City.

SUMMARY OF ARGUMENTS

1. Utah statutory law and common law provide that the transfer of any real property bounded by a roadway passes title of the person whose title is passed to the center of the road. Upon the city vacating the roadway, the title reverts to the abutting landowners. Utah authority is clear and on point.

2. Defendant Provo City makes an improper assumptions, the improper assumption is that Provo City held title to the roadway pursuant to the Patent from the United States. The patent did not vest title in Provo City, it vested title in a trustee. The entity Provo City was never intended to hold title pursuant to federal law. Even if Provo City retained fee simple title to this property, the conveyance by the U.S. government's trustee to Plaintiffs' predecessors in interest would have conveyed the

property to the centerline of the roadway pursuant to common law and statutory principles.

3. Defendant's constitutional argument that "The Utah Township Act cannot be interpreted to burden the absolute power of Congress to dispose of public lands by patent," is raised for the first time on appeal and should not be considered. Even if considered, the Utah Supreme Court held as early as 1875 that the Utah Township act was in compliance with the Federal Townsite act.

4. In the alternative, Plaintiffs pled and proved that Defendant failed to comply the statutory requirements prior to vacating the roadway. Provo City's Council met and passed an ordinance vacating the roadway. There was no notice, no fair hearing or consideration of any substantial rights involved. Even if Due Process requirements were met, and the public easement was vacated, Plaintiffs private easement would have persisted. Boskovich et al. v. Midvale City Corp. et al., 243 P.2d 435 (Utah 1952). By taking the land and selling it, Defendant has deprived Plaintiffs of property or a property right without just compensation and in violation of Due Process rights.

5. The rule that a Municipality acquires a "limited fee," a "determinable fee," or public easement in streets in platted subdivisions is well established in Utah and is not a "narrow exception" to the general rule.

LAW DETERMANATIVE TO ISSUES

Plaintiffs cite the following law to this court as determanative of the issues involved in this action:

Public Highways. When Deemed Dedicated

A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.

(C.L. 17, 2801.)

Sec. 36-1-2, Revised Statutes of Utah, 1933

FEDERAL TOWNSITE ACT, ch. 177, 14 Stat 541 (1867). The act is attached hereto as appendix 1.

UTAH TOWNSHIP ACT, U.C.A. 57-7-1, et seq. The act is attached hereto as appendix exhibit 2.

SEARS v. OGDEN CITY, 572 P.2d 1359 (Utah 1977). The case is attached hereto as appendix exhibit 3.

BOSKOVICH v. MIDVALE CITY CORP., 243 P.2d 435 (Utah 1952). The case is attached hereto as appendix exhitit 4.

ARGUMENT

POINT I
PLAINTIFFS AND THEIR PREDECESSORS IN INTEREST OWNED TITLE AND REVERSIONARY INTEREST TO THE CENTER OF THE ROAD.

The propriety of Provo City obtaining fee simple title as a result of the government patent is dealt with elsewhere, and it would be improper. For the sake of argument, Plaintiffs adopt the position of Provo City that it retained fee simple title to the property constituting the roadway 900 South. Provo City obtained fee simple title to the subject property pursuant to the U.S. government's patent. The Plaintiffs' and Defendant's parcels were conveyed from that patent pursuant to the Federal Townsite Act and the State Township Act. Those conveyance were pursuant to statutory and common law principles.

It is an admitted fact, stated in Defendants' brief and uncontested in this action that the roadway 900 South existed prior to 1869 when the first conveyances took place under the patent from

the United State Government.

Under common law, the conveyance of real property bounded by the roadway passes title of the person whose estate is transferred to the center of the roadway. Many states, including Utah, have adopted this principle as a statutory law. The Utah Legislature and Supreme Court have adopted both common law and statutory approaches incorporating this law.

> A transfer of land bounded by a highway on a right-of-way for which the public has only an easement passes the title of the person whose estate is transferred to the middle of the highway.

§27-12-101, Utah Code Ann. (1953 as amended 1991).

"When the Board acquired the fee for the land abutting the street, there was an presumption that the conveyance included the fee to the highway center line subject to the public right of way (determinable fee). Sears v. Ogden City, 572 P.2d 1359 (Utah 1977), quoting Fenton v. Ceder Lumber and Hardware Co., 17 Utah 2d 99, 404 P.2d 966 (Utah 1965). "Section 27-1-7, UCA 1953, [fn 4] provided in part:

> "* * * a transfer of land bounded by a highway passes the title of the persons whose estate is transferred to the middle of the highway." In Hummel v. Young,[fn5] this court pointed out that this statute was declaratory of the common law, and that a private conveyance of land bounded by or abutting on a highway, the fee to which belongs to the abutting owners, is presumed to convey the fee to the highway to the center line thereof. This presumption is rebutted only by clear evidence that the grantor did not intend to convey his interest in the highway (notes omitted)

Fenton, supra at 968.

> " . . . Midvale's council enacted an ordinance vacating the shaded area, which has been used by vehicular travel. The school board owned property

abutting on both sides of the shaded area, and it took possession thereof as owner to the middle of the vacated street, fenced it off and made it part of the school yard,. . ."

Boskovich v. Midvale City Corp, 243 P.2d 435 (Utah 1952)

A number of other jurisdictions have adopted the rule that a conveyance is presumed to carry title to the center of the street. Many of these included cases where the street appeared to be excluded by the description in the deed. In Champlain v. Pendleton, 13 Conn 23 (Conn. 1838) the description in the deed described the south line of the land conveyed as the same as the north line of the highway. The highway was not mentioned or referred to in the deed. It was held that the fee passed to the center of the highway. In Gear v. Barnum, 37 Conn 229 (Conn. 1870), the Court held that a deed conveying "a store building and the land on which it stands," passes title and fee to the middle of the highway abutting the store and real property.

In 1887 the Florida Supreme Court decided the case of Florida Southern Rye. Co. v. Brown, 23 Fla 104, 1 South 512 (Fla. 1887). The deed described the conveyance by words and figures but did not specifically mention a street or highway. It was held that the grantee takes to the center line of the street upon which he abuts. In 1886 the Massachusetts Supreme Court decided the case of Hamlin v. Pairpoint Manfg. Co., 141 Mass 51, 6 E. 531 (Mass. 1886). The court held that where deeded land is bounded on a street, or its boundary runs to the street and thence by the street, the grantee takes to the middle of the street unless the deed indicates a clear intent to exclude the street.

Provo City has cited New York law for the proposition that Defendant retained the street. However, the Court's attention is drawn to the case of Sizer v. Devereaux, 16 Barb 160 (N.Y. 1853) wherein it was held that where a parcel of land is described by courses and distances and no road is named but on proof at trial it is established that one line must be on a road, the land to the center of the road is included in the conveyance.

B. DEFENDANTS' THEORY THAT THE ROADWAY WAS EXPRESSLY EXCLUDED BY METES AND BOUNDS DESCRIPTION WAS RAISED FOR THE FIRST TIME ON APPEAL BUT SHOULD FAIL UNDER UTAH AND COMMON LAW.

Respondent Provo City argues in its brief that the metes and bounds descriptions in the deeds issued to Dunn and First Ward Pasture Company (respectively Plaintiffs' and Defendants' predecessors in interest) expressly excluded 900 South Street. This argument is being raised for the first time on appeal and did not constitute any element of the underlying trial or the Findings of Fact, Conclusions of Law, or Judgment issued by the Trial Court in this case. Issues not raised before the trial court, nor decided by the trial court, should not be raised or determined by the appellant court.

> "It is axiomatic that matters not presented to the trial court may not be raised for the first time on appeal" Franklin Fin v. New Empire Dev. Co., 659 P.2d 1040, 1044 (Utah 1983).

Progressive Acquisition, Inc. v. Lytle, 806 P.2d 239 (Utah App. 1991)

In addition, Plaintiffs believe the case to have been properly framed by Defendants in the trial proceedings. Defendants' counsel stated

". . .we would state the issue more broadly, and that is that Provo City owns this property in fee simple or do we merely have a right-of-way.

I think the law will indicate and show that, if in fact, we own the parcel in fee simple, then we have the right to sell that parcel. If we have only a right-of-way then we concur and agree with Plaintiffs' counsel that then Plaintiffs' would take to the center of the street. (transcript of trial p. 16 lines 11-20).

The issue was never raised, argued, or briefed that Provo City had created an express reservation or express exclusion pursuant to a metes and bounds description. In fact, as previously provided to this Court, the common law has not been so interpreted.

Should this Court consider this matter, it should still fail. Many cases appear to be directly on point to the case presently before the court. In 1855 Wisconsin held that a grantee of a lot situated in a village platted and recorded according to law, described by metes and bounds, takes to the center of the street on which the lot abuts subject to the public easement. Kimball v. Kenosha, 4 Wis 321 (Wis. 1855). In 1895 the U.S. Supreme Court held that a deed describing lots conveyed by reference to a plat, which showed them bounded by a street, carried the fee in the land to the middle of the street opposite the lots, even though the statutory dedication of the street had been vacated. The dimensions of the lots did not include the street. Paine v. Consumers' Forwarding and Storage Co., 71 Fed 626 (1895). Other cites have been previously briefed to this Court.

The case of Fenton v. Ceder Lumber and Hardware Co., supra is illustrative. The Court provided: ". . . that a private conveyance of land bounded by or abutting on a highway, the fee to which

belongs to the abutting owners, is presumed to convey the fee to the highway to the center line thereof. **This presumption is rebutted only by clear evidence that the grant did not intend to convey his interest in the highway**" Id. at 968 (emphasis added).

The conveyance to Plaintiffs in this case satisfies the common law requirements, as Plaintiffs derive their fee interest in the real property from one who had the right to dispose of the fee interest in the roadway. In addition, the fact that the roadway was never separately platted, nor conveyed or recorded for a period in excess of 120 years, is further evidence that the grantor intended to convey by common law principles.

C. KNIGHT V. THOMAS DID NOT PROVIDE THAT FEE SIMPLE TITLE VESTS IN CITY UPON VACATION OR ABANDONMENT.

Provo City cites Knight v. Thomas for the proposition that the city owns the roadway in fee. In that case, Jesse Knight sued to enjoin Provo City from granting a street to the Rio Grande Western Railroad. A statute specifically required any such conveyance to be authorized by the general electorate. The Complaint specifically alleged fee simple absolute title to the roadway in Provo City. Appeal was taken from a demurrer. The Utah Supreme Court provided:

> The theory . . . is that the words "real property of such city or incorporated town," contained in §313 do not include, nor refer to streets of such city or town. We think that is true so far as the question pertains to a mere street in the city . . . but it is, in effect alleged in the Complaint that the city is the owner in fee of the land described in the Complaint and occupied by the street, . . . for the purposes of the demurrer the truth of these facts is admitted.

Knight v. Thomas, 101 P. 383, 384 (Utah 1909).

Contrary to the position of Defendants in the present case, Knight v. Thomas does not hold that a city may have fee simple title to a roadway.

POINT II

THE ENTITY PROVO CITY DID NOT OWN FEE SIMPLE ABSOLUTE TITLE

Provo maintains throughout its brief that it owned fee simple title pursuant to the U.S. Patent. A copy of that patent was attached to Plaintiffs' brief as exhibit 1. The court should note that the patent did not convey fee simple absolute title to Provo City. The patent conveyed the real property to Abraham O. Smoot as trustee "for the several use and benefit of the occupants thereof according to their respective interests by virtue of an act of congress . . ."

The authority cited by Defendant in its brief is illustrative of the improper assumption made by Provo. Provo claims that the corporate authorities of the Town of Provo became the purchasers of the patent pursuant to the patent issued by the U. S. Government. They further claim that they maintained their fee simple absolute ownership by failing to convey the land constituting 900 South. This is exactly the type of conduct that was prohibited by the federal legislature in passing the Townsite Act, as evidenced by the following exchange which occurred on the senate floor between Senator Howard of Michigan and Senator Coness of California (as provided in Defendant and Respondent's brief at 10):

> MR. HOWARD. Does the Senator from California mean to be understood that this bill provides that the corporate authorities of the town may become the purchasers? Is that the scheme here?

MR. CONESS. No, Sir.

MR. HOWARD. I so understood him

MR. CONESS. They simply enter the land as agents in trust for the occupants, those in possession.

MR. HOWARD. Do they get a title?

MR. CONESS. A title for the occupants from the United States.

MR. HOWARD. Then they become the owners in trust.

MR. CONESS. In trust. That is it exactly.

Congressional Globe, 39 Cong., 2nd Sess. 1109 (1867). (emphasis added)

In effect, Provo City is attempting to do exactly that which was opposed and intended to be avoided pursuant to the legislative history provided.

In fact, Provo's claim that it retains fee simple ownership in the roadway is directly opposed to the obligation imposed under the trust. Under the government patent, the public had only an easement and was entitled to no more.

> "These cases hold that the trustee under the Townsite Act holds the legal title to the lands for the use and benefit of the occupants according to their respective interests. That the respective interests of the occupants was to use and occupy the lands in the manner they had previously done. That the lands which had previously been used for streets and alleys and for other public purposes must be held by the trustee for the use of the occupants for the continuation of such use, . . ."

Hall v. North Ogden City, 175 P.2d 703, 709 (Utah 1946). The vacating of the roadway to obtain a commercial building lot, resulting in land-locking one lot and depriving two others of access to 900 South, would not be a continuation of the easement.

The question arises what happens when the continuation of such

use is no longer appropriate, such as in this case where the street had been vacated. In Hall, the Supreme Court held that the underlying interest must revert to the owner of the underlying fee or the equitable owner. In this case, common law and equity existing at the time of the initial grant indicated that the underlying fee belonged in the abutter.

POINT III

THE CONSTITUTIONALITY OF THE UTAH TOWNSHIP ACT IS RAISED ON APPEAL FOR THE FIRST TIME, BUT IT FAILS ON ITS MERITS

Respondent raises for the first time on appeal the idea that the Utah Township is unconstitutional pursuant to U.S. Constitution Article 4, Section 3. That issue is raised for the first time on appeal and was neither briefed, argued, nor decided below. It is well established that issues which are raised for the first time on appeal should not be considered by the appellate court.

> "It is axiomatic that matters not presented to the trial court may not be raised for the first time on appeal" Franklin Fin v. New Empire Dev. Co., 659 P.2d 1040, 1044 (Utah 1983).

Progressive Acquisition, Inc. v. Lytle, 806 P.2d 239 (Utah App. 1991)

Notwithstanding the original nature of this argument, this Court has previously held that the Township Act "was in harmony with the act of congress, and within the authority conferred by the act of congress upon the territorial legislature and the instruction given by the legislature to the act of congress in this particular is adopted by the court." Pratt v. Young, 1 Utah 347, 354, (Utah 1876) The Federal Townsite Act is included as an addendum to this brief as Exhibit 1 and the State Township Act is

included as Exhibit 2.

POINT IV

DEFENDANT PROVO CITY IMPROPERLY VACATED 900 SOUTH AND THE SALE OF THE PROPERTY VIOLATED PROPERTY AND DUE PROCESS RIGHTS.

Provo City has failed to even address the improper actions of vacating and selling the easement. The facts are undisputed that the mechanism whereby Provo City vacated the roadway 900 South consisted of "the regular Provo Municipal Council meeting of August 22, 1989, the council passed ordinance number 0-89-055. This is an ordinance vacating and setting aside a part of 900 South Street near the intersection of 900 South and 100 East." The notice of vacation was published one time in the Provo Daily Herald on August 31, 1989. (Trial exhibit no. 7, exhibit 7 to Plaintiffs' brief, appendix A to Respondents' brief).

Plaintiffs had complained in paragraph 19 of the First Amended Complaint that "900 South University Avenue was never properly vacated pursuant to the ordinances of the city of Provo, and the laws of the state of Utah." (R. 12, ¶19). In addition, Plaintiffs complained in paragraph 17 "the Defendants' intent to seize and convey the land . . .is a seizure or taking of their property without due process of law . . ." (R.13, ¶17). These issues were briefed by Plaintiffs in their trial memorandum of February, 1992 (R.44, Point VIII).

The memorandum decision by the trial court failed to address these issues and on March 25, 1992, Plaintiffs filed a motion to alter or amend findings and request for findings on alternate

causes of action. Plaintiffs specifically sought a ruling on these issues (R.85) Although a subsequent hearing was held, the Court failed and refused to address those issues.

A.

PROVO CITY FAILED TO PROPERLY VACATE THE STREET 900 SOUTH

In addition, or in the alternative, the vacating of a public street requires certain formalities. Utah Supreme Court confirmed the necessity of adherence by county to the procedural requirements for vacation of a county road to occur. Ercanbrack v. Judd, 524 P.2d 595 (Utah 1974). The doctrine should extend with equal persuasive effect to the vacation of a city roadway by a municipality pursuant to §10-8-8.4. The proof of publication provided by the City recorder of the City of Provo shows that an ordinance vacating the roadway was published one time on August 31, 1989. The statute requires a notice of the pendency of a petition or intent of the governing body to be published once a week for four consecutive weeks. Since the City has failed to comply with statutory requirements, the vacating is ineffective.

Plaintiffs believe the case of Boskovich et al v. Midvale City Corp et al 243 P.2d 435 (Utah 1952) to be exactly identical and on point. In that case, the Midvale City Counsel, without notice to, application by, or hearing of any kind afforded any property owner, enacted an ordinance vacating a portion of Jordan Avenue and an alley which had been used by vehicular travel. The school board owned property abutting on both sides of the street and alley, and it took possession thereof as the owner to the middle of the

vacated street, fenced it off and made it part of the schoolyard, creating a cul-de-sac as to Plaintiffs' property on Jordan Avenue and as to the property of Cox and Draper on the alley. Plaintiffs complained and the Supreme Court held:

> There are a number of ways that streets may be opened or closed. If by ordinance, there must be something more than its mere enactment. We believe and hold that the procedure followed by Midvale in this case, sans notice, petition or hearing, was an unquestioned departure from the elementary principle that property cannot be taken without due process of law and without just compensation.
>
> Furthermore, even if the city had satisfied the requirements of due process by giving requirements of due process by giving reasonable notice and conducting a fair hearing, still it could have vacated no more that the public easement or right which the city had in the shaded area, which would in turn have the effect of relieving it from further responsibility for maintenance and control. The private easement which Mr. B, plaintiff herein had, would have persisted.
>
> *　　　*　　　*
>
> Defendants are not remediless. Midvale might have ended the public easement by ordinance so long as pertinent statutory and due process requirements were satisfied. The school board might have eliminated the private easement by orderly employment of the statutory provisions and fundamental principles relating to eminent domain, but neither could take from Mr. B his private easement without fair compensation.

Boskovich v. Midvale City Corp. 243 P.2d 435 (Utah 1952)

Provo City failed to comply with the statutory scheme required to vacate a public roadway, and as such Plaintiffs are entitled to set aside the vacating ordinance, or are entitled to just compensation for their loss.

POINT B

UPON VACATING THE STREET, PLAINTIFFS WERE ENTITLED TO A PRIVATE EASEMENT OR COMPENSATION.

Plaintiffs, and their predecessors in interest, have had passage over 900 South in Provo. That easement has been in existence for over 120 years. Section 10-8-8.5 provides that "any lot owner shall retain his right of way and easement in any street which has been vacated by the municipality." Therefore, these Plaintiffs maintain a right of passage over the roadway.

It has also been held that when a public easement has been laid out and a right-to-use has arisen, a private easement arises therein which constitutes a vested proprietory interest in the lot owners, which easement survives extinquishment of any co-existing public easement calling for just compensation. Boskovich, Id. at 437; Tuttle v. Sowadzki, 41 Utah 501, 126 P 959 (Utah 1912).

In this case the elimination of 900 SOuth Street was of significant importance to Plaintiffs. Plaintiffs Nelson had commercial property on a corner in the business district of Provo. Their establishment was available to traffic moving north and south on University Avenue or east and west on 900 South.

As previously discussed, Stephen Whitlock owns a parcel of property which is now landlocked as a result of closing 900 South. Plaintiffs Stephen and Sheila Whitlock have been deprived of valuable corner property and 100 East and 900 South, with traffic only able to enter their establishment from 100 East. No due process was accorded these parties prior to vacating the road and no offer of compensation has ever been made.

POINT V

THE RULE THAT A MUNICIPALITY ACQUIRES A LIMITED FEE IS NOT A NARROW EXCEPTION TO THE GENERAL RULE

Defendant claims in its brief that "the rule that a municipality acquires a determinable fee in the streets of a platted subdivision is a narrow exception to the common law." To the contrary, the rule is well established in Utah by statute as well as by common law. Plaintiff again cites Knight v. Thomas, supra., for the proposition. That has been previously briefed in Point I C. Defendants argument fails to address the 1884 laws of Utah cited by Appellant in its opening brief, which limits the right of a municipality to take real property in fee simple title. The municipality was not entitled to do that under the laws in existance at that time. Section 2071. S 7. CLU 1888, provided "by taking or accepting land for a highway, the public acquire only the right-of-way, and incidents necessary to enjoin and maintaining it. A transfer of land bounded by a highway, passes the title of the person whose estate is transferred, to the center of the highway."

In addition, this Court should note that in Justice Crockett's opinion in Sears v. Ogden City, 537 P.2d 1029, 1030, Knight v. Thomas, supra., is cited for the proposition "that the board of education is the abutting landowner, and thus the land occupied by the street would revert to the board of education." Justice Maughn cites favorably in Sears v. Ogden City, 572 P.2d 1359,1363 to Payne v. City of Laremy, Wyo, 398 P.2d 557, 562 (1965) for the proposition "upon passage of the ordinance vacating the street, the city no longer had any title or interest in the premises; and

therefore the city had nothing to sell or convey and the quitclaim deed was a nullity as to any interests in the roadway dedicated in the Argonne Park Plat."

Chief Justice Wolfe, concurring in Boskovich, supra., stated "this Court referred to the interest of the county in a platted subdivision as both a determinable or a limited fee and a public easement using the terms interchangably."

Provo City then goes on to state that a rule requiring the City to obtain a deed to property it claimed to own in fee simple absolute would be unreasonable as the City would have to get a deed for a every street it reserved for public use. This is not Plaintiffs' position at all. Plaintiffs' position clearly is that any street laid out and platted, or upon which the public had an easment, would continue in such capacity until the easement or determinable fee were vacated. At which point it would revert to the abutting landowners subject to the equitable principles and private easement rules specified herein. Under Plaintiffs' view, the City would be required to get a deed for every street which it claimed to own in fee simple absolute and which it later intended to vacate, convert to a commercial building cite, and sell without any regard to the public or private easements contained therein. This position is supported by the express lanquage of the State Township Act.

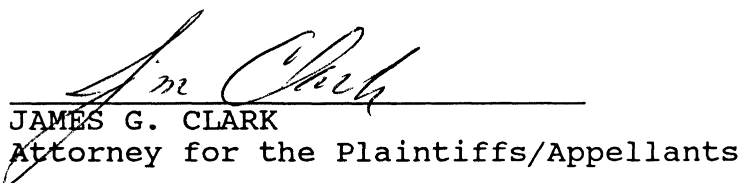
CONCLUSION

When this action was initiated it was Plaintiffs' desires to have clear title to the property at issue in this action. Since

the property has now been converted to a commercial building site and conveyed, Plaintiffs request that title be quieted in Plaintiffs to the center of the road, and that the case be remanded for a determination of damages.

In the alternative, Plaintiffs request the Court to hold that the act of vacating the street was improper and the vacation is invalid. Plaintiffs request the case be remanded to the trial court for a determination of Plaintiffs' private easement rights and/or the issue of just compensation for the loss of that easement.

DATED AND SIGNED this 29th day of April, 1993.



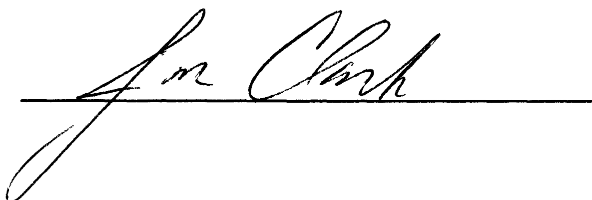
JAMES G. CLARK
Attorney for the Plaintiffs/Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Appellants Reply Brief, postage prepaid, addressed as follows:

GARY GREGERSON
DAVID C. DIXON
PROVO CITY ATTORNEY'S OFFICE
351 W. Center Street
Provo, Utah 84603

DATED AND SIGNED this 29 day of April, 1993.



nelsbo.rly

APPENDIX EXHIBIT 1

last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

Jurisdiction of United States courts in the District of Columbia and Territories.

Sec. 49. *And be it further enacted*, That all the jurisdiction, power, and authority conferred upon and vested in the District Court of the United States by this act in cases in bankruptcy are hereby conferred upon and vested in the Supreme Court of the District of Columbia, and in and upon the supreme courts of the several Territories of the United States, when the bankrupt resides in the said District of Columbia or in either of the said Territories. And in those judicial districts which are not within any organized circuit of the United States, the power and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.

In districts not in organized circuits, judge to exercise power of circuit court.

When act to take effect.

Sec. 50. *And be it further enacted*, That this act shall commence and take effect as to the appointment of the officers created hereby, and the promulgation of rules and general orders, from and after the date of its approval: *Provided*, That no petition or other proceeding under this act shall be filed, received, or commenced before the first day of June, anno Domini, eighteen hundred and sixty-seven.

Proviso.

Approved, March 2, 1867.

March 2, 1867.

CHAP. CLXXVII. — *An Act for the Relief of the Inhabitants of Cities and Towns upon the Public Lands.*

Town authorities, &c. may enter public lands occupied as town sites, at minimum price, in trust, &c.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever any portion of the public lands of the United States have been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the agricultural pre-emption laws, it shall be lawful, in case such town shall be incorporated, for the corporate authorities thereof, and if not incorporated, for the judge of the county court for the county in which such town may be situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated: *Provided*, That the entry of the land intended by this act to be made shall be made, or a declaratory statement of the purpose of the inhabitants to enter it as a town site under this act shall be filed with the register of the proper land office, prior to the commencement of the public sale of the body of land in which it is included, and that the entry or declaratory statement shall include only such lands as is actually occupied by the town and the title to which is in the United States. If upon surveyed lands the entry shall in its exterior limit be made in conformity to the legal subdivisions of the public lands authorized by the act of twenty-fourth April, one thousand eight hundred and twenty; and where the inhabitants are in number one hundred and less than two hundred, shall embrace not exceeding three hundred and twenty acres; and in cases where the inhabitants of such town are more than two hundred and less than one thousand, shall embrace not exceeding six hundred and forty acres; and where the number of inhabitants is one thousand and over one thousand, shall embrace not exceeding twelve hundred and eighty acres: *Provided*, That for each additional one thousand inhabitants, not exceeding five thousand in all, a further grant of three hundred and twenty acres shall be allowed: *And provided further*, That in any Territory in which a land office may not have been established, declaratory statements as hereinbefore provided

Trust, how executed.

Entry, &c. when to be made;

to include what;

upon surveyed lands.

1820, ch. 51. Vol. iii. p. 566

Amount of land that may be entered.

Proviso.

Where there is no land office, statements to be filed where.

may be filed with the surveyor-general of the surveying district in which the lands are situate, who shall transmit said declaratory statement to the general land office: *And provided, further,* That any act of said trustees not made in conformity to the rules and regulations herein alluded to shall be void; effect to be given to the foregoing provisions according to such regulations as may be prescribed by the Secretary of the Interior: *And provided further,* That the provisions of this act shall not apply to military or other reservations heretofore made by the United States, nor to reservations for lighthouses, custom-houses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the land office by title derived from the Crown of Spain, or otherwise: *And provided further,* That no title shall be acquired, under the provisions of this act, to any mine of gold, silver, cinnabar, or copper.

Certain acts of trustees to be void.

Regulations.

This act not to apply to certain reservations;

nor to mines of gold, &c.

Approved, March 2, 1867.

March 2, 1867.

CHAP. CLXXVIII. — *An Act allowing the Duties on foreign Merchandise imported into the Port of Albany to be secured and paid at that Place.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Albany, in the State of New York, and within the collection district of New York, be, and is hereby, declared to be a port of delivery within the aforesaid district; and there shall be appointed a surveyor of customs, to reside at said port, who shall, in addition to the customary duties performed by that officer in other places, perform the duties prescribed in an act entitled "An act allowing the foreign merchandise imported into Pittsburg, Wheeling, Cincinnati, Louisville, Saint Louis, Nashville, and Natchez, to be secured and paid at those places," approved March two, eighteen hundred and thirty-one. The said surveyor, before taking the oath of office, shall give security to the United States for the faithful performance of his duties in the sum of ten thousand dollars, and shall receive, in addition to the customary fees and emoluments of his office, an annual salary of six hundred dollars.

Albany, New York, made a port of delivery.

Surveyor.

1831, ch. 87. Vol. iv. p. 480.

Bond, fees, and salary.

Sec. 2. *And be it further enacted,* That the same privileges granted to the ports of delivery mentioned in the first section of this act, and the restrictions created by the said act, are hereby extended and made applicable to all goods, wares, and merchandise imported into the United States at any port of entry and destined to said port of Albany.

Privileges and restrictions applicable.

Sec. 3. *And be it further enacted,* That the Secretary of the Treasury shall be, and he is hereby, authorized to extend the privileges of the warehouse acts of August six, eighteen hundred and forty-six, and March twenty-eight, eighteen hundred and fifty-four, and the regulations of the Treasury Department relating thereto, to the said port of Albany.

Privileges of former acts, &c. extended to this port.

1846, ch. 84. Vol. ix. p. 53. 1854, ch. 30. Vol. x. p. 270.

Approved, March 2, 1867.

March 2, 1867.

CHAP. CLXXIX. — *An Act to create the Office of Surveyor-General in the Territory of Montana, and establish a Land Office in the Territories of Montana and Arizona.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, by the advice and consent of the Senate, shall be, and he is hereby, authorized to appoint a surveyor-general for Montana, whose annual salary shall be three thousand dollars, and whose power, authority, and duties shall be the same as those provided by law for the surveyor-general of Oregon. He shall have proper allowances for clerk hire, office rent and fuel, what is now allowed by law to the surveyor-general of Oregon.

Surveyor-general for Montana.

Salary and duties.

Clerk hire, office rent, and fuel.

Sec. 2. *And be it further enacted,* That the public lands within the Territories of Montana and Arizona, to which the Indian title is or shall be extinguished, shall each respectively constitute a new land district to

Montana and Arizona land districts established.

APPENDIX EXHIBIT 2

clusive of the improvements thereon made by the claimant or his grantors, and the value of such improvements The issues joined thereon must be tried as in law actions and the value of the real estate and of such improvements must be separately ascertained on the trial 1953

57-6-3 *Rights of parties — Acquiring other's interest or hold as tenants in common*

The plaintiff in the main action may thereupon pay the appraised value of the improvements and take the property but should he fail to do so after a reasonable time to be fixed by the court the defendant may take the property upon paying its value exclusive of the improvements If this is not done within a reasonable time to be fixed by the court the parties will be held to be tenants in common of all the real estate including the improvements each holding an interest proportionate to the values ascertained on the trial 1953

57-6-4. Certain persons deemed to hold under color of title.

A purchaser in good faith at any judicial or tax sale made by the proper person or officer has color of title within the meaning of this chapter whether such person or officer has sufficient authority to sell or not unless such want of authority was known to such purchaser at the time of the sale and any person has color of title who has occupied a tract of real estate by himself or by those under whom he claims for the term of five years or who has thus occupied it for less time if he or those under whom he claims, have at *any time during such occupancy with the knowledge* or consent express or implied, of the real owner made any valuable improvements thereon, or if he or those under whom he claims have at any time during such occupancy paid the ordinary county taxes thereon for any one year and two years have elapsed without a repayment of the same by the owner thereof and such occupancy is continued up to the time at which the action is brought by which the recovery of the real estate is obtained and his rights shall pass to his assignees or representatives but nothing in this chapter shall be construed to give tenants color of title against their landlords 1953

57-6-5 Settlers under state or federal law or contract deemed occupying claimants

When any person has settled upon any real estate and occupied the same for three years under or by virtue of any law or contract with the proper officers of the state for the purchase thereof or under any law of or by virtue of any purchase from the United States and shall have made valuable improvements thereon and shall be found not to be the owner thereof or not to have acquired a right to purchase the same from the state or the United States such person shall be an occupying claimant within the meaning of this chapter 1953

57-6-6 Setoff against claim for improvements.

In the cases above provided for if the occupying claimant has committed any injury to the real estate by cutting timber or otherwise the plaintiff may set the same off against any claim for improvements made by the claimant 1953

57-6-7. When execution on judgment of possession may issue.

The plaintiff in the main action is entitled to an execution to put him in possession of his property in accordance with the provisions of this chapter, but not otherwise 1953

57-6-8. Improvements made by occupants of land granted to state

Any person having improvements on any real estate granted to the state in aid of any work of internal improvement, whose title thereto is questioned by another, may remove such improvements without injury otherwise to such real estate, at any time before he is evicted therefrom, or he may claim and have the benefit of this chapter by proceeding as herein directed 1953

CHAPTER 7

TOWNSITES

Section
57-7-1 Disposition of lots to persons entitled after entry
57-7-2 Notice of entry
57-7-3 Claims to lots to be filed — Time and place
57-7-4 Adverse claims — Determination
57-7-5 Proof of claims when no adverse claim advanced
57-7-6 Conveyance and deed to proper claimant
57-7-7 When judge is claimant of lands
57-7-8 When city or town officer is claimant of lands
57-7-9 Change of venue
57-7-10 Statement of expenses
57-7-11 Payment to be made before conveyance
57-7-12 Full payment to be made within six months — Lien for nonpayment Sale to satisfy
57-7-13 Errors in measurement or computation
57-7-14 Death of officer — Authority to complete trust vests in successor
57-7-15 Disposition of unclaimed lands
57-7-16 Sale of unclaimed lands
57-7-17 Reservation of lands for public uses
57-7-18 Disposition of proceeds of sales
57-7-19 Possession for ten years entitles claimant to conveyance

57-7-1. Disposition of lots to persons entitled after entry.

When the corporate authorities of any city or town or the district judge of any county in which any city or town may be situated, shall have entered at the proper land office the land or any part of the land settled and occupied as the site of such city or town pursuant to and by virtue of the provisions of the Act of Congress entitled "An act for the relief of the inhabitants of cities and towns upon the public lands approved March 2, 1867, and acts amendatory thereof and supplementary thereto, it shall be the duty of such corporate authorities or judge, as the case may be, to dispose of and convey the title to such land or to the several blocks, lots, parcels or shares thereof to the persons entitled thereto, who shall be ascertained as hereinafter prescribed 1953

57-7-2. Notice of entry

Within thirty days after the entry of any such land the corporate authorities or judge entering the same shall give public notice of the entry in at least five public places within such city or town, and shall publish the notice in some newspaper printed and published in this state and having a general circulation

in such city or town. The notice shall be published once a week for at least three successive months, and shall contain an accurate description of the lands so entered as stated in the certificate of entry or the duplicate receipt received from the officer of the land office. 1953

57-7-3. Claims to lots to be filed — Time and place.

Every person claiming any lot or parcel of such land shall, within six months after the first publication of the notice, in person or by his agent or attorney, sign a statement in writing containing an accurate description of the particular lot or parcel of land in which he claims to have an interest and the specific right, interest or estate therein which he claims to be entitled to receive, and he shall deliver the same to the clerk of the district court of the county in which such city or town is situated. Such clerk shall enter the statements in a book to be kept for that purpose, and shall file and preserve them in his office, noting the day of filing. The filing of each statement shall be considered notice to all persons claiming any interest in the lands described therein of the claim of the party filing the same, and any person failing to make and deliver a statement within the time limited in this section shall be forever barred of the right of claiming or recovering such land, or any interest or estate therein or in any part thereof, in any court; provided, that when good cause is shown why such statement could not be filed within the time herein specified the judge may extend the time, not exceeding one year from the first publication of such notice. 1953

57-7-4. Adverse claims — Determination.

If at the expiration of six months after the first publication of such notice it shall be found by the statements filed that there are adverse claimants to any lot or parcel of land, it shall be the duty of the district judge, taking up each case in the order of filing, to cause notice to be served upon the claimants thereto, or their agents or attorneys, to appear before the district court and prosecute their claims upon a day to be appointed by the court, not less than five nor more than thirty days from the service of such notice. The statements filed as aforesaid shall stand in the place of pleadings, and an issue may be made thereon. On the day set for the hearing the court shall proceed to hear the evidence adduced in support of the allegations of the parties and shall decide according to the justice of the case. 1953

57-7-5. Proof of claims when no adverse claim advanced.

After the expiration of the six months for filing statements, if there are no adverse claimants, the court, taking up the cases in the order of filing, shall cause a summons to be issued and served upon each party filing a statement, or his agent, requiring him to appear before the court upon a day designated, not less than three nor more than ten days from the service of such summons and make proof of his statement. 1953

57-7-6. Conveyance and deed to proper claimant.

Where the entry of the townsite shall have been made by the district judge the conveyance shall be made by him in accordance with the judgment entered. Where the corporate authorities shall have made the entry the court shall certify its judgment to the city commissioners or mayor of the city, or to the president of the board of trustees of the town, who shall accordingly make to the party claimant the proper deed. 1953

57-7-7. When judge is claimant of lands.

If the district judge shall be a claimant of lands in any city or town in his county, he may file the statement required in Section 57-7-3 in the district court of an adjoining district, and a copy of the statement in that of his own county. The judge of the district court of the adjoining county shall then proceed as provided for in Section 57-7-4 or 57-7-5, as the case may be; and he shall, moreover, give notice to the city commissioners or mayor of such city or the president of the board of trustees of such town, or, in case of an unincorporated town, to the justice court judge of the precinct in which such town may be situated. The court shall thereafter proceed as in other cases provided for in this title, and a deed to the land shall be made to the party entitled thereto. 1990

57-7-8. When city or town officer is claimant of lands.

If a city commissioner or the mayor of any city or the president of the board of trustees of any town shall be a claimant of lands in such city or town, the recorder or the clerk thereof, as the case may be, shall, upon the certificate of the district court made as in the case of other claimants, execute a deed of conveyance to such claimant for the lands finally adjudged to him by the court. 1953

57-7-9. Change of venue.

A change of venue as in actions at law shall be allowed in all cases arising under this title. 1953

57-7-10. Statement of expenses.

Within thirty days after the expiration of the six months prescribed in Section 57-7-3 for filing statements the corporate authorities, or the judge, and the board of county commissioners shall render in writing a true account of all moneys expended in the acquisition of the title to the land and in the administration or execution of the trust up to that time, including purchase money, necessary traveling expenses, and the costs for posting and publishing notices. Such account shall be filed in the office of the clerk of the district court of the county in which such city or town may be situated, and shall during ordinary business hours be open for inspection to all persons interested. 1953

57-7-11. Payment to be made before conveyance.

Before the corporate authorities or judge shall be required to execute, acknowledge or deliver any deed of conveyance to any person adjudged to be entitled thereto such person shall pay or tender to the city commissioners, the mayor, the president of the board of trustees or the judge, as the case may be, the sum of money chargeable on the land to be conveyed by such deed. To ascertain the sum chargeable, streets and public grounds must be deducted from all the land entered, and then such sum shall be the proportionate costs of the land conveyed and the proportionate expenses thereof, with interest together with a reasonable charge for the preparation, execution and acknowledgment of the deed. 1953

57-7-12. Full payment to be made within six months — Lien for nonpayment — Sale to satisfy.

Full payment for land shall be made to the district judge, the city commissioners, the mayor or the presi-

dent of the board of trustees, as the case may be, within six months after the certificate is issued to the claimant. In case of nonpayment within the time herein specified, the amount due shall be deemed a judgment lien upon the land claimed, and the judge, the city commissioners, the mayor or the president of the board of trustees, as the case may be, shall proceed to sell it by sheriff's sale in the same manner as land is sold under execution, subject, however, to redemption as provided by law. 1953

57-7-13. Errors in measurement or computation.

Errors in measurement or computation shall not invalidate any proceedings under this title. 1953

57-7-14. Death of officer — Authority to complete trust vests in successor.

In case of death or disability of the district judge, the city commissioners, the mayor or the president of the board of trustees before the complete execution of the trust, the same shall vest in their successors in office. 1953

57-7-15. Disposition of unclaimed lands.

If there shall remain any unclaimed lands within such city or town after the expiration of six months from the publication of the notice provided for in Section 57-7-2, the city commissioners, the mayor or the president of the board of trustees, in cases where lands have been entered for a municipal corporation, or the district judge, in cases where lands have been entered in trust by him, shall cause the same to be surveyed and platted into suitable blocks, lots, streets and alleys. A certified plat of such surveyed lands shall be filed for record in the office of the county recorder of the county. 1953

57-7-16. Sale of unclaimed lands.

The city commissioners, the mayor, the president of the board of trustees or district judge may sell or cause to be sold such blocks or lots at public auction to the highest bidder for cash, after public notice of the time and place of such sale published at least forty days in some newspaper published in the county, if there is any, otherwise in a newspaper having general circulation in the county. If any of such lands remain unsold for want of a bidder, the city commissioners, the mayor, the president of the board of trustees or district judge may sell or cause the same to be sold at public or private sale, on such terms as may be deemed for the best interest of the city or town; provided, that none of such lands shall be sold for less than $5 per acre. 1953

57-7-17. Reservation of lands for public uses.

Lots or parcels of land necessary for streets, public squares, parks, schoolhouses, hospitals, asylums, fire engine and hose houses, pesthouses, state or other public buildings, or public use, may be reserved by the city commissioners, the mayor, the president of the board of trustees or the district judge, as the case may be; and he may execute and deliver to the proper party a deed for any property set aside for such purposes. 1953

57-7-18. Disposition of proceeds of sales.

All moneys arising from the sale of lands, after deducting the costs and charges of such sales, shall be paid into the city or town treasury in cases where such lands have been entered in trust by corporate authority, or into the county treasury in cases where such lands have been entered in trust by the district judge; and the same shall be set apart and applied by the city commissioners or city council, or by the board of trustees of an incorporated town, or by the board of county commissioners in case of an unincorporated town, for the improvement of public squares and streets, the construction of sewers or procuring a supply of water for the use and benefit of the inhabitants of the city or town. 1953

57-7-19. Possession for ten years entitles claimant to conveyance.

Whenever any lot, piece or parcel of land shall have passed from the United States to the district judge of any county in this state or to the probate judge of any county in the late territory of Utah, under and by virtue of the provisions of an Act of Congress entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867, or any amendments thereto, and there is no record of any conveyance from such judge or his successor in office to the claimants thereof, any person, who by himself or by or through his predecessors in interest shall have had continuous and exclusive possession of such lot, piece or parcel of land for the period of ten years before the filing of the petition hereinafter mentioned and who shall have paid the taxes thereon during said time, shall be deemed the rightful owner of such land, and it shall be conclusively presumed that he has complied with all of the provisions of law for obtaining title thereto; and such person may at any time apply to the judge of the district court of the county wherein said land may be situated for a conveyance of the legal title to such land to him, and such judge of the district court is hereby vested with power and authority to execute such conveyance and carry out the trust, and he shall execute a conveyance to such person of such lot, piece or parcel of land without any expense to such person, except the ordinary costs of court. Such conveyance, when so executed by any judge of the district court, shall pass to such person all the right, title and interest so held in trust to such lot, piece or parcel of land to all intents and purposes and with the same effect as if a proper conveyance had been executed after proper proceedings in the manner provided by law. 1953

CHAPTER 8

CONDOMINIUM OWNERSHIP ACT

Section

57-8-1. Short title.
57-8-2. Applicability of chapter.
57-8-3. Definitions.
57-8-4. Status of the units.
57-8-5. Recognized tenancy relationships.
57-8-6. Ownership and possession rights.
57-8-7. Common areas and facilities.
57-8-8. Compliance with covenants, bylaws and/or house rules and administrative provisions.
57-8-9. Certain work prohibited.
57-8-10. Contents of declaration.
57-8-11. Contents of deeds of units.
57-8-12. Recording.
57-8-13. Record of survey map to be recorded.
57-8-13.2. Conversion of convertible land — Amendment to declaration — Limitations.
57-8-13.4. Conversion of convertible space — Amendment to declaration — Limitations.
57-8-13.6. Expansion of project.

APPENDIX EXHIBIT 3

movement following him, including Lydia M. Child's, Against Capital Punishment, of 1842,[15] has continued to the present day.

Twelve of our sister states have abolished capital punishment. Their names and dates of abolition are: Alaska (1957); Hawaii (1957); Iowa (1965); Maine (1887); Michigan (1847); Minnesota (1911); North Dakota (1915); Oregon (1964); Rhode Island (1852); Vermont (1965); West Virginia (1965); and Wisconsin (1853).[16]

Numerous statistical studies have been made comparing contiguous states with similar populations, and comparable political, social and economic structures. Some of these states have lacked, some have retained capital punishment; but the homicide rates remain the same and have sustained trends over long periods of time; irrespective of the use or non-use of the capital sanction.[17] If it is deterrence we look for, we do not find it in the death penalty. Are we in Utah more in need of a death penalty than the citizens of the sister states mentioned above?

Although great discretion is conferred on the legislative body to determine what measures and means are reasonably necessary for the protection of the interests of the public, the reasonableness of the means selected must be judged within the context of the uniqueness of the penalty prescribed. The death penalty attains a degree of arbitrariness, because it has no real and substantial relation to the objects sought to be attained, viz., deterrence and protection of society. In contrast, there is no doubt life is an inherent and fundamental right. The only rationalization to support the power of the state to exact the death penalty is vengeance. Revenge is not a function of the law.

The legitimate and substantial purpose of the state to protect society and deter homicide can be achieved by restraint, a narrower means than obliteration of a human life. Therefore, the death penalty violates due process of law, as an arbitrary, unreasonable, and ineffectual method to achieve the desired purpose.

Were there some way to restore the bereaved and wounded survivors, and the victims, to what was once theirs; there could then be justification for the capital sanction. Sadly, such is not available to us.

M. L. SEARS, Joseph Behling, Frank A. Salimeno, Robert G. Hartmann, and James L. Lavender, on behalf of themselves and all other taxpayers similarly situated, Plaintiffs and Appellants,

v.

OGDEN CITY, a body politic, Mayor A. Stephen Dirks, Council of Ogden City, and Donna Adams, Ogden City Recorder, Defendants and Respondents.

M. L. SEARS et al., Plaintiffs,

v.

The BOARD OF EDUCATION OF OGDEN CITY, Defendant.

No. 14986.

Supreme Court of Utah.

Dec. 8, 1977.

Actions brought by taxpayers and property owners against city and board of

15. Annals of America, Vol. 7, p. 66.

16. Of these states Rhode Island and Vermont retain the death penalty for first degree murder only in specifically restricted situations, viz., while in confinement (Rhode Island); for a second unrelated offense, prison personnel, law enforcement officer in performance of duty (Vermont). In Vermont the penalty may be death or life imprisonment. See: CBS Almanac 1976.

17. Encyc. Brit., Note 10, supra.

education for declaration that ordinance vacating street was invalid and to enjoin closing of street were consolidated for trial. The Second District Court, Weber County, G. Hal Taylor, J., rendered judgment of no cause for action against plaintiffs, and plaintiffs appealed. The Supreme Court, Maughan, J., held that plaintiffs, who did not allege or show fraud or collusion and who had not suffered special injury different in kind from that suffered by the public, had no standing to challenge ordinance and (2) upon termination of city's interest, underlying fee reverted to board as sole abutting property owner along vacated street.

Affirmed.

1. Municipal Corporations ⟹657(2)

Authority to vacate streets, when exercised in the general public interest, is a legislative power vested in municipal corporations. U.C.A.1953, 10–8–8.1.

2. Municipal Corporations ⟹657(5), 1000(5)

In a proceeding to set aside a street vacation order, a complainant should allege that by reason of closing street he has suffered special damage different in kind from damage to general public; however, a taxpayer is not required to show special damage or injury where right to relief is grounded on illegal acts claimed to operate as constructive fraud affecting city and its citizens.

3. Municipal Corporations ⟹1000(4)

Where there was no allegation or evidence of fraud or collusion, and none of plaintiff taxpayers and property owners had suffered special injury different in kind from that of public in general since their property did not abut on street to be vacated nor was their access substantially impaired, plaintiffs had no standing to challenge ordinance of city, which performed legislative function in weighing public benefit of ordinance, that vacated street, title and interest to which was conveyed by quitclaim deed to city board of education, the sole abutting property owner. U.C.A.1953, 10–8–8.1.

4. Municipal Corporations ⟹663(2)

Where board of education was sole abutting property owner along vacated street, fee interest in street reverted to board without deed from city upon vacation and any private easements other property owners had were not reversionary interests entitling them to the underlying fee. U.C.A.1953, 10–8–8.5.

5. Municipal Corporations ⟹871

City, which did not own underlying fee in vacated street, had no proprietary interest in property and was not entitled to compensation, and thus city's giving of quitclaim deed to vacated street, which had been appraised at $13,300, to board of education, which as consideration undertook to construct storm sewer along vacated street at estimated cost of $36,200, was not subject to challenge as a sham or gift of public property to board.

Pete N. Vlahos, Ogden, for plaintiffs and appellants.

Timothy W. Blackburn, Richard W. Campbell, Ogden, for defendants and respondents.

MAUGHAN, Justice:

Plaintiffs appeal from a judgment in favor of defendants concerning the vacation of a street in Ogden, Utah. Plaintiffs are taxpayers, and two are owners of real property in the Argonne Park subdivision. We affirm. Costs to respondents. All statutory references are to U.C.A.1953.

The inception of this conflict was a petition in which the defendant, Board of Education of Ogden, as the sole abutting property owner, along 29th Street between Har-

rison Boulevard and Tyler Avenue, requested vacation of the street by defendant, Ogden City. The street bisects the campus of Ogden High School, and the students to move from one area to the other must cross the street.

The City Council accepted the petition and referred it to the Planning Commission for study. After considering the reports and recommendations from the administrative personnel, the council adopted a proposed ordinance vacating the street. The matter was set for a public hearing, and the council ordered publication of notice of the hearing and the proposed ordinance. Subsequently, a public hearing was held, where the opponents and proponents expressed their views. After consideration of all the issues, the council passed the ordinance vacating the street. The ordinance was thereafter published and became effective April 20, 1976.

The city and board entered into an agreement for the purchase of the vacated street. As consideration, the board undertook to construct a storm sewer along the vacated street; the estimated cost of this work was $36,200. The value of the vacated area was appraised at $13,300. Thereafter, the city conveyed by quit claim deed whatever right, title, or interest it had in the vacated street to the board.

Plaintiffs then filed a complaint against the city seeking a declaration that the ordinance was invalid and enjoining the closing of the street. Thereafter, plaintiffs filed an action against the board seeking similar relief. The two actions were consolidated for trial, and a judgment of no cause for action was rendered against plaintiffs.

The city's interest in the vacated street was derived from three sources. Only the northern third of its width was part of the platted subdivision of Argonne Park, the streets of which were dedicated to the public. Of the remaining width, the western half of the length was platted and dedicated as Corbett's Addition. The eastern half was quit claimed to the city by Ralph E. Hoag Company for perpetual use as a street. Corbett's Addition consisted of the block between 29th and 30th streets, which is completely owned by the board; this addition was vacated in 1904. The Hoag property was not part of a platted subdivision.

The Argonne Park subdivision was dedicated in 1921 and consisted of five blocks. Blocks 1 and 4 were located in the area between 28th and 29th streets, these are owned by the board and are occupied by the northern half of the campus. Blocks 2 and 5 are divided by Kershaw Street and are located in the block east of the school. Block 3 is situated on the west of Polk Avenue. There are sixty-five homes on blocks 2, and 3, and 5. Thus the two plaintiffs who own property in Argonne Park are neither abutting property owners on the vacated street nor are they deprived of access to their property by the vacation.

Plaintiffs challenge the validity of the ordinance on the ground the city did not comply with the notice provisions in Sec. 10–8–8.4, U.C.A.1953, and that the vacation was not in the best interest of the general public.

[1] There are certain basic principles to be applied in assessing plaintiffs' claim. The authority to vacate streets, when exercised in the general public interest, is a legislative power vested in municipal corporations.[1]

Section 10–8–8.1, U.C.A.1953, provides:

> On petition by a person owning a lot in the city, praying that a street . . . be vacated . . . the governing body of such a city, upon hearing, and upon being satisfied that there is good cause for such . . . vacation . . . that it will not be detrimental to the general interest, and that it should be

1. 11 McQuillin, Municipal Corporations (3rd Ed. Revised) § 30.185, p. 97.

made, may declare by ordinance such street . . . vacated . . . .

When such legislative authority is challenged, the applicable principle is:

> Apart from arbitrary action or clear abuse of discretion, or fraud or collusion, or unless there occurs an invasion of property rights, the propriety or necessity of vacating a street, are matters within the discretion of the municipal authorities, which will not be inquired into by the courts. Faithfulness to the public trust reposed in the members of the legislative body will be presumed. . . . [2]

> One who will be specially injured, but not others may sue to enjoin the vacation of a street or alley, where unlawful, but not if the proceedings are regular and the remedy at law by an action for damages is adequate. . . . [3]

> If the street directly in front of one's property is not vacated but the portion vacated is in another block, so that he may use an intersecting cross street, it is almost universally held that he does not suffer a special injury as entitles him to damages. And this is so notwithstanding the new route is less convenient or the diversion of travel depreciates the value of his property. The inconvenience to the lot owner in having to adopt a less direct route to reach certain points, it has frequently been said, is an injury of the same kind as that suffered by the general public. If means of ingress and egress are not cut off or lessened in the block of the abutting owner, but only rendered less convenient because of being less direct to other points in the city, and made so by the vacation of the street in another block, such consequence is damnum absque injuria. . . . [4]

2. Id. § 30.187, p. 116.

3. Id. § 30.200, p. 142.

4. Id. § 30.194, pp. 129–130.

5. Id. § 30.207, p. 157.

[2] In a proceeding to set aside a vacation order, a complainant should allege that by reason of closing the street he has suffered special damages different in kind from the damage to the general public. However, a taxpayer is not required to show special damage or injury where the right to relief is grounded on illegal acts of the council claimed to operate as a constructive fraud affecting the city and its citizens.[5]

[3] In applying the foregoing principles to this action, the trial court ruled correctly, for the plaintiffs had no standing to challenge the ordinance. There was no allegation or evidence of fraud or collusion. The city performed a legislative function when they weighed the public benefit of the ordinance. The courts may not delve into the wisdom of a legislative act; it is only where there is no possible benefit to the public that the courts will review such a legislative determination. In *Tuttle v. Sowadzki*,[6] this court stated:

> . . . It is elementary, however, that a person cannot object to the vacation of a highway if he has no other interest therein save as one of the public. . . .

None of the plaintiffs has suffered a special injury different in kind to the public in general, and, therefore, none has standing to challenge the vacation, viz., those whose property does not abut on the street to be vacated or whose access is not substantially impaired have no standing to challenge a procedurally correct vacation.[7]

Plaintiffs' claim of procedural infirmity is predicated on the provision in Sec. 10–8–8.4, requiring publication for four consecutive weeks prior to an action on a petition or

6. 41 Utah 501, 514, 126 P. 959, 964 (1912).

7. *Banchero v. City Council of the City of Seattle*, 2 Wash.App. 519, 468 P.2d 724 (1970); *Hoskins v. Kirkland*, 7 Wash.App. 957, 503 P.2d 1117 (1972); *Clifford v. City of Cheyenne*, Wyo., 487 P.2d 1325 (1971).

intention to vacate. The notice provisions of section 8.4 are specifically declared inapplicable in the situation set forth in Sec. 10–8–8.3. The latter section states that the notice of the intention of the governing body to vacate is not required, where there is written consent by the owners of the property abutting the part of the street proposed to be vacated.

The plaintiffs, who are owners of property in Argonne Park subdivision, claim the city's quit claim deed to the board was null and void and was an attempt to deprive them of their "reversionary interests" in the vacated street.

[4] This court has held that the interest a municipal body acquires in the streets in a platted subdivision is a determinable fee. Upon vacation by the governing authorities, the fee reverts to the abutting property owner.[8] Since the board was the sole abutting property owner along the vacated street, the fee interest would revert thereto without a deed from the city.

Section 10–8–8.5, U.C.A.1953, provides that the action of the governing body vacating a street, which has been dedicated to the public use by the proprietor, shall operate to the extent to which it is vacated as a revocation of the acceptance thereof and the relinquishment of the city's fee therein by the governing body.

Thus the acceptance of dedication of the northern third of the street to the public use by the platting of the Argonne Park Subdivision was revoked by the ordinance. When the board acquired the fee to the land abutting the street, there was a presumption that the conveyance included the fee to the highway center line subject to the public right of way (determinable fee).[9] Upon passage of the ordinance vacating the street, the city no longer had any title or interest in the premises; and, therefore, the city had nothing to sell or convey and the quit claim deed was a nullity as to any interest in the roadway dedicated in the Argonne Park plat.[10] However, these consequences are of no benefit to plaintiffs, since the fee interest reverted to the abutting property owner, the board.

Plaintiffs further urge that the quit claim deed constituted a gift of public property to the board and that the alleged consideration was a sham.

[5] When a street is vacated and the municipality does not own the underlying fee, the municipality has no proprietary interest in the property and is not entitled to compensation.[11]

The asserted "reversionary interests" claimed by the two plaintiffs, who are property owners in Argonne Park, are predicated on certain language in *Boskovich v. Midvale City Corp.*[12]

> . . . We have held . . . that if the dedicated streets of a subdivision are laid out and right to the use thereof has arisen, a private easement arises therein which constitutes a vested proprietary interest in the lot owners, which easement survives extinguishment of any co-existing public easement calling for just compensation. . . .

Section 10–8–8.5, U.C.A.1953, expressly provides that the action of a governing

8. *White v. Salt Lake City*, 121 Utah 134, 239 P.2d 210 (1952).

9. *Fenton v. Ceder Lumber & Hardware Company*, 17 Utah 2d 99, 404 P.2d 966 (1965).

10. *Payne v. City of Laramie*, Wyo., 398 P.2d 557, 562 (1965).

11. *Puget Sound Alumni of Kappa Sigma v. City of Seattle*, 70 Wash.2d 222, 422 P.2d 799 (1967); 11 McQuillin, Municipal Corporations (3rd Ed. Rev.) § 30.189, p. 123.

12. 121 Utah 445, 243 P.2d 435, 437 (1952).

body vacating a street shall not impair the right of way and easements therein, if any, of any lot owner.

The board has made no attempt to close the vacated street and thus interfere with any private easements.[13] The trial court concluded as a matter of law:

> "The private rights, if any, of the owners of property in the Argonne Subdivision are not concluded or determined by these Findings, Conclusions or Judgment."

Whatever private easements the property owners of Argonne Park might have, they are certainly not the type of reversionary interests which plaintiffs claim. The claim was that upon termination of the city's determinable fee, the underlying fee reverted to the owners in Argonne Park rather than the abutting fee holder, the board. The asserted consequence thereof was to deprive them of property without due process of law and to condemn property without a proceeding in eminent domain. This claim is without merit.

ELLETT, C. J., and CROCKETT, WILKINS and HALL, JJ., concur.

13. This court has never expressly ruled on the extent of the easement acquired when one receives a conveyance which describes the property sold by reference to a plat or map upon which the streets and alleys are shown. There are three divergent views as to the extent of this right and to the granting of relief against obstruction. See 7 A.L.R.2d 607, Anno.: Conveyance of lot with reference to plat or map as giving purchaser rights in indicated streets, alleys, or areas not abutting his lot, § 2, p. 612. Also see 2 Thompson On Real Property (1961 Replacement) § 371, pp. 488–489.

Margaret S. MINEÉR, Plaintiff,

v.

The BOARD OF REVIEW OF the INDUSTRIAL COMMISSION of Utah, Defendant.

Robert W. ROSKELLEY, Plaintiff,

v.

DEPARTMENT OF EMPLOYMENT SECURITY, Defendant.

Nos. 14696 and 14728.

Supreme Court of Utah.

Dec. 12, 1977.

In two cases it was found by the Industrial Commission that unemployment compensation claimants had knowingly failed to report work and earnings during times they claimed to be unemployed and without earnings. Claimants were assessed disqualification and repayment of benefits. In an original proceeding for review; the Supreme Court, Hall, J., held that: (1) intention to defraud was shown by the claims themselves; (2) the statutory disqualification period was to be retroactive, and (3) the provisions for disqualification and repayment did not offend due process or equal protection.

Affirmed.

Crockett, J., filed a concurring opinion.

Maughan, J., dissented and filed statement.

1. Social Security and Public Welfare ⚷731

Intention to obtain unemployment compensation benefits fraudulently was shown

APPENDIX EXHIBIT 4

spondent's which parked safely behind him; under those conditions Park could not reasonably anticipate that his car was in danger of being injured as it was. We conclude as a matter of law that Park was not guilty of contributory negligence. No person could reasonably find that he failed to act as a reasonably prudent person would act under those circumstances.

We have not found any case directly in point, but in the following cases the facts were similar: Webb v. Smith, 176 Va. 235, 10 S.E.2d 503, 131 A.L.R. 558; Conrey v. Abramson, 294 Mass. 431, 2 N.E.2d 203. Each of those cases involve the stopping of a car on a road under what we think were more dangerous conditions than involved in this case, yet the court held as a matter of law that such driver was not guilty of negligence.

Judgment reversed with directions to proceed in accordance with this opinion. Costs to appellant.

WOLFE, C. J., and McDONOUGH, CROCKETT, and HENRIOD, JJ., concur.

BOSKOVICH et al. v. MIDVALE CITY CORP. et al.

No. 7756.

Supreme Court of Utah.

April 17, 1952.

Milan Boskovich and Frieda M. Boskovich brought suit against Midvale City Corporation, and others, for an injunction and for damages because of the closing of a street and alley by city ordinance. The 3rd Judicial District Court of Salt Lake County, David T. Lewis, J., entered judgment for defendants, and plaintiffs appealed. The Supreme Court, Henriod, J., held that the vacating of the portion of the street and alley was a denial of due process.

Judgment reversed and cause remanded.

1. Municipal Corporations ⚷657(2, 4)

*Statute requiring petition by all land*owners directed to proper public authority for approval of vacating of city streets should normally be followed, but a city by ordinance may vacate or abandon streets even in a subdivision if public exigency requires and if a procedure is followed satisfying statutory requirements and requirements of due process, including reasonable notice, fair hearing, and consideration of any substantial rights involved. U.C.A. 1943, 15-8-8, 78-5-6 to 78-5-8.

2. Constitutional Law ⚷278(1)
Eminent Domain ⚷106

Where city without notice to, application by, or hearing of any kind afforded any owner of realty in platted subdivision of city enacted ordinance vacating part of street and alley where school board owned realty abutting on both sides of street, so that a cul-de-sac was created as to lots of certain landowners, there was a taking of property without due process of law and without just compensation. U.C.A.1943, 15-8-8, 78-5-6 to 78-5-8; U.S.C.A.Const. Amends. 5, 14; Const. art. 1, §§ 7, 22.[1]

3. Municipal Corporations ⚷657(7)

Even if city, in vacating portion of street on both sides of which property of school board abutted, had satisfied requirements of due process by giving reasonable notice and conducting a fair hearing, still city could have vacated no more than the public easement or right which the city had in the street, which would have effect of relieving city from further responsibility for maintenance and control, but private easement of landowner would have persisted.[2]

Pugsley, Hayes & Rampton, Salt Lake City, for appellants.

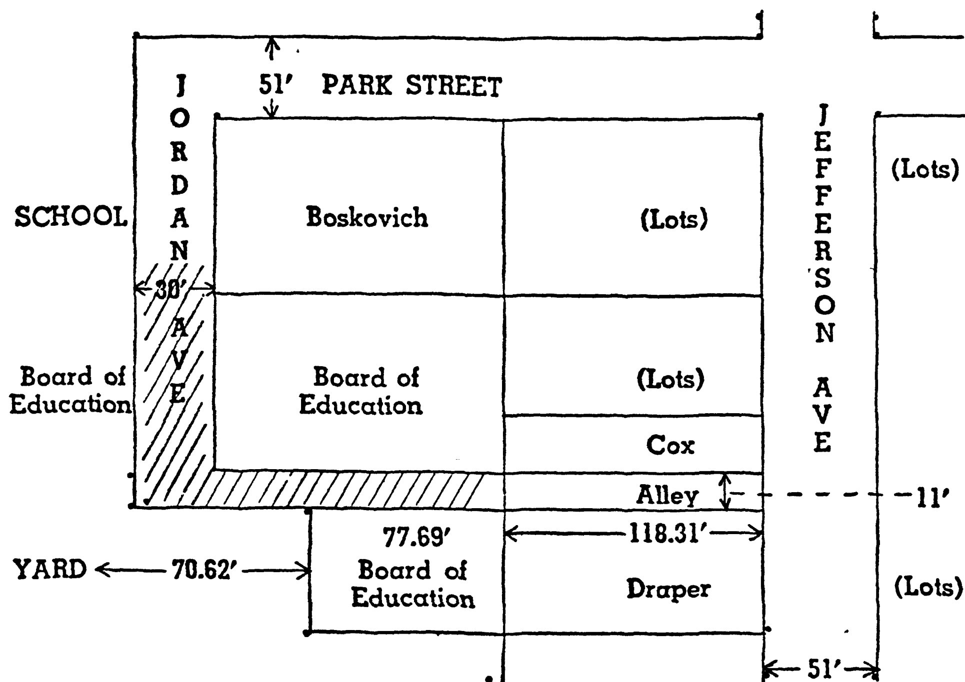
1. Hall v. North Ogden, 109 Utah 304, 166 P.2d 221; Wall v. Salt Lake City, 50 Utah 593, 168 P. 766; Sowadzki v. Salt Lake County, 36 Utah 127, 1C1 P. 111; Tuttle v. Sowadzki, 41 Utah 501, 126 P. 959.
2. Tuttle v. Sowadzki, 41 Utah 501, 126 P. 959.

Ben G. Bagley, Midvale, Grant Macfarlane, Salt Lake City, for respondents.

HENRIOD, Justice.

Appeal from a no cause of action judgment. Plaintiffs sought an injunction and damages against defendants, where a portion of a street and alley was closed by city ordinance. The judgment is reversed and remanded, with costs on appeal to plaintiffs.

Plaintiffs own lots in Eastvale Addition, a platted, recorded and accepted subdivision in Midvale. The street and alley in question are included therein, and the shaded area of the subjoined sketch represents the closed portion.



Without notice to, application by, or hearing of any kind afforded any property owner, Midvale's council enacted an ordinance vacating the shaded area, which had been used for vehicular travel. The school board owned property abutting on both sides of the shaded area, and it took possession thereof as owner to the middle of a vacated street, fenced it off and made it a part of the school yard, creating a cul-de-sac as to plaintiffs' property on Jordan Avenue and as to the property of Cox and Draper on the alley.

[1] The city justifies its action under general statutory authority granting cities power to create and vacate streets and alleys by ordinance.[1] Plaintiffs challenge the procedure pursued as being in excess of that authority, and urge that where a platted subdivision is involved, the authority claimed by the city is interdicted and preempted by special statutes,[2] requiring petition by all owners directed to the proper public authority for approval. We believe this latter statute normally should be followed, but recognize the fact that a city, by ordinance, might vacate or abandon streets even in a subdivision, if public exigency requires and if a procedure is followed satisfying statutory requirements and requirements of due process, including reasonable notice, a fair hearing and consideration of any substantial rights involved. Plaintiffs complain that no such procedure was fol-

1. Title 15-8-8, U.C.A.1943: "They may lay out, establish, open * * * streets, alleys * * * and may vacate the same or parts thereof, by ordinance."

2. Title 78-5-6, 7 and 8, U.C.A.1943.

lowed here, and we are constrained to agree.

[2] There are a number of ways that streets may be opened or closed.[3] If by ordinance, there must be something more than its mere enactment. We believe and hold that the procedure followed by Midvale in this case, sans notice, petition or hearing, was an unquestioned departure from the elementary principle that property cannot be taken without due process of law and without just compensation.[4]

[3] Furthermore, even if the city had satisfied the requirements of due process by giving reasonable notice and conducting a fair hearing, still it could have vacated no more than the *public* easement or right which the city had in the shaded area,[5] which would in turn have the effect of relieving it from further responsibility for maintenance and control.[6] The private easement which Mr. B, plaintiff herein had, would have persisted.

This case involves a duly platted subdivision containing streets and alleys and is thus distinguishable from the authority cited by defendants.[7] We have held, in a case cited even by defendants, that if the dedicated streets of a subdivision are laid out and right to the use thereof has arisen, a private easement arises therein which constitutes a vested proprietary interest in the lot owners, which easement survives extinguishment of any co-existing public easement calling for just compensation.[8] Hence, Mr. B cannot be cul-de-sacked by the city or the school board without due process of law, and a respect for any loss of use proven to have been enjoyed by him theretofore,—though such loss may not be great. This is as it should be, since people customarily buy property in subdivisions, part of the consideration for which is paid *on the representation and assumption* that the platted streets, dedicated and duly accepted, shall continue as a means of travel until public exigency otherwise demands,—in which latter event due process and just compensation must enter the picture.

Defendants are not remediless. Midvale might have ended the public easement by ordinance so long as pertinent statutory and due process requirements were satisfied. The school board might have eliminated the private easement by orderly employment of the statutory provisions and fundamental principles relating to eminent domain,[9] but neither could take from Mr. B his private easement without fair compensation.

In remanding this case, the trial court is instructed to enter an order requiring removal of any obstruction on the property described, unless the parties by stipulation amicably agree to maintain the status quo until such time as their differences may be resolved. There seems to be little reason in this case, where it appears obvious that *the school children need the space, and the* damage to Mr. B does not appear to be very great, why the parties by stipulation and amendment of their pleadings to conform with principles here announced, and after a hearing, cannot arrive at a fair adjustment in the interest of these children.

WADE, McDONOUGH and CROCKETT, JJ., concur.

WOLFE, Chief Justice (concurring).

I concur, but make the following observation. In the main opinion, reference is made to the "public easement" of Midvale City in the street which was closed. Under Sec. 78-5-4, U.C.A.1943, the City has a determinable or limited fee which is a higher right than an easement. That section provides that the filing and recordation of maps and plats of a subdivision "* * * shall operate as a dedication of all streets,

3. Hall v. North Ogden, 109 Utah 304, 166 P.2d 221; Wall v. Salt Lake City, 50 Utah 593, 168 P. 766; Sowadzki v. Salt Lake County, 36 Utah 127, 104 P. 111; Title 78-5, supra; Title 15-8-8, supra.

4. Utah Const., Art. I, Secs. 7 and 22; U.S. Const., V and XIV Amendments; Tuttle v. Sowadzki, 41 Utah 501, 126 P. 959.

5. Tuttle v. Sowadzki, supra; 150 A.L.R. 652, 658.

6. 150 A.L.R. 644.

7. Robinett v. Price, 74 Utah 512, 280 P. 736.

8. Tuttle v. Sowadzki, supra.

9. Title 104-61, U.C.A.1943.

alleys and other public places, and shall *vest the fee* of such parcels of land as are therein expressed, named or intended *for public uses in such county, city or town for the public for the uses therein named or intended*." (Emphasis added.) It is true that in the cases of Sowadzki v. Salt Lake County, 36 Utah 127, 104 P. 111, and Tuttle v. Sowadzki, 41 Utah 501, 126 P. 959, this court referred to the interest of the county in a platted subdivision as both a determinable or a limited fee and a public easement, using the terms interchangeably. But the terms are not synonymous. The confusion may have stemmed from Sec. 36-1-7, U.C.A. 1943, providing that "By taking or accepting land for a highway the public acquires only the right of way and incidents necessary to enjoying and maintaining it. A transfer of land bounded by a highway passes the title of the person whose estate is transferred to the middle of the highway." Sec. 36-1-7 is found in our code in the title on Highways, whereas Sec. 78-5-4 is found under the title on Real Property and under the section thereof dealing with Plats and Subdivisions. Clearly, Sec. 78-5-4 governs the rights of a county, city or town in the streets of a platted subdivision. While it makes no difference in the instant case whether the City has a determinable fee or a public easement, the distinction is pointed out because there may be cases where the difference is vital. See White v. Salt Lake City, Utah, 239 P.2d 210.

HOLTON v. HOLTON.

No. 7791.

Supreme Court of Utah.

April 21, 1952.

Action by Virginia B. Holton against Parley P. Holton. The Third Judicial District Court, Salt Lake County, Clarence E. Baker, J., rendered an adverse decision, and plaintiff appealed. The respondent moved to dismiss the appeal. The Supreme Court, Per Curiam, held that there was no sufficient showing of injustice or excuse to relieve appellant from failure to comply with rule requiring timely service of a designation of record.

Appeal dismissed.

1. Courts ⟹85(4)

Although new Rules of Civil Procedure were intended to provide liberality in procedure, it is expected that they will be followed, and unless reasons satisfactory to court are advanced as basis for relief from complying with them, parties will not be excused from so doing.

2. Courts ⟹85(4)

Parties will be relieved from failure to comply with new Rules of Civil Procedure only when showing is made that some inadvertence, surprise, excusable neglect or mistake has occurred and that substantial injustice will be done.

3. Appeal and Error ⟹607(1)

Record disclosed no sufficient showing that injustice would result and that failure to serve designation of record within time and as required by Rule of Civil Procedure occurred because of excusable neglect or other cause which would require court in interests of justice to relieve appellant from failure to comply, and hence appeal would be dismissed. Rules of Civil Procedure, rules 73(a), 75(a).

D. Ray Owen, Jr., Lyle McLean Ward, and Charles L. Ovard, all of Salt Lake City, for appellant.

Ned Warnock, George A. Critchlow, and A. W. Watson, all of Salt Lake City, for respondent.

PER CURIAM.

In this case the respondent has moved to dismiss the appeal because the appellant failed to serve upon respondent a designation of record within the time and as required by Rule 75(a) U.R.C.P., although the designation of record was filed with the district court.

Rule 73(a) makes this failure to serve a designation of record on the respondent non-jurisdictional, but also gives this court