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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CLYDE B. FREEMAN,

Plaintiff-Appellant,

vs.

CENTERVILLE CITY, Golden L. Allen, Mayor; and CENTERVILLE PLANNING COMMISSION, E. Lee Hawkes, Chairman; and ROBERT B. HANSEN, Attorney General, State of Utah.

Defendants-Respondents.

BRIEF OF [illegible]

Appeal from a Judgment [illegible]
Honorable [illegible]

KEITH L. STAHLE
Centerville City Attorney
84 South Main
Bountiful, Utah 84010

JACK L. CRELLIN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondents

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TABLE OF CONTENTS

NATURE OF CASE 1

DISPOSITION IN THE LOWER COURT 1

RELIEF SOUGHT ON REVIEW 1

STATEMENT OF THE FACTS 2

ARGUMENT 2

POINT I 2

Sec. 10-2-401, Utah Code Annotated 1953, as ammended is unconstitutional because it denies to property owners the basic, fundamental, equal, and sovereign right to the procedural and substantive due process of law in derogation of Art. I, Sec. 2, Sec. 7, Sec. 24, and Sec. 27; and Art. IV, Sec. 1 and Sec. 8, Constitution of Utah, in that:

A. Property owners are denied the right of legal notice. 5

B. The right to an election by secret ballot is disregarded. 7

POINT II 8

The Constitution of Utah is the law of this state, not a legislative enactment.

CONCLUSION 10

CASES CITED

Blanding v. Burr, 13 Cal. 343 9

Graham v. Fresno, 151 Cal. 465, 91 Pac. 147 9

Helena Cons. Water Co. v. Steel, 49 Pac. 382 (Mont.) 9

Jensen v. Bountiful City, 20 Utah 2d 189, 281 Pac. 2d 216 7

People ex rel. v. Detroit, 29 Mich. 108 9

People v. Hurlbut, 24 Mich. 44 9

People ex rel. v. Barker, 89 N.W. 204 (Ia.) 9

State v. Eldredge, 27 Utah 477, 76 Pac. 337 3

Taylor v. Porter, 4 Hill, 140 10

Texas & Pac. Ry. v. Inter-State Com., 162 U.S. 197, 16 S. Ct. 666, 40 L. Ed. 940 4

Wolff v. New Orleans, 103 U.S. 358 9

CONSTITUTIONAL PROVISIONS

Article I, Section 2 .... 6, 10

Article I, Section 7 2

Article I, Section 24 6

Article I, Section 27 .... 3, 8

Article IV, Section 1 8

Article IV, Section 8 8

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STATUTES

Sec. 10-2-401, UCA 1953 (1977) 2

Sec. 10-2-102, 10-2-501, 10-2-606, 10-2-703, 11-14-2, UCA 1953 (1977) 5

Chapter XI, Compiled Laws of Utah 1888 4

Sec. 761 and 764, Title 17, Compiled Laws of Utah 1898 5

#1448, Laws of Nebraska 1895 4

Sec. 50-222, Title 50, Chap. 2, Idaho Code (1978) 5

Sec. 31-12-108 Colorado Revised Statutes (1973) 6

Sec. 31-12-112 and Sec. 31-12-107 Colorado Revised Statutes (1973) 7

Sec. 15-106 and Chapters 14, 15, 16, 17, 18 Revised Statutes of Nebraska (1977) 6

Sec. 268.586 and 268.654, Title 21, Chap. 268, Nevada Revised Statutes (1977) 5

Sec. 15-1-501, Wyoming Statutes Annotated (1977) 5

AUTHORITIES

16 Am. Jur. 2d, #548, p. 940 3

16 Am. Jur. 2d, #357, p. 683 3

16 Am. Jur. 2d, #488, p. 849 6

56 Am. Jur. 2d, Part B, #57, p. 113 9

56 Am. Jur. 2d, Part B, #55, p. 111 9

56 Am. Jur. 2d, Part A, #50, p. 108 9

16A Corpus Juris Sec. #567, p. 539 3

16A Corpus Juris Sec. #574, p. 603-604 3

16A Corpus Juris Sec. #567, p. 540 9

16A Corpus Juris Sec. #568, p. 545 9

Cooley's Const. Lim. 6th Ed. p. 760 8

Cooley's Const. Lim. 6th Ed. p. 436 10

I McQuillin Mun. Corp. 2d Ed. #188, p. 545-546 9

Proceedings of the Constitutional Convention Vol. II, p. 996 8

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IN THE SUPREME COURT OF THE STATE OF UTAH

CLYDE B. FREEMAN,

Plaintiff-Appellant,

vs.

CENTERVILLE CITY, Golden L. Allen, Mayor; and CENTERVILLE PLANNING COMMISSION, E. Lee Hawkes, Chairman; and ROBERT B. HANSEN, Attorney General, State of Utah.

Defendants-Respondents.

Case No. 2-24508

BRIEF OF APPELLANT

NATURE OF CASE

This action was brought in the Second District Court in and for Davis County under the Declaratory Judgments Act. Plaintiff asked for a declaration of his constitutional right as a taxpayer which he claims is denied by proceedings of Centerville City in annexing plaintiff's property.

DISPOSITION BY THE LOWER COURT

From the District Court's ruling, the honorable J. Duffy Palmer, Judge, that plaintiff's complaint be dismissed with prejudice, no cause of action, plaintiff has appealed.

RELIEF SOUGHT ON REVIEW

Appellant desires a declaration of his constitutional, self evident, due process, and sovereign right to legal notice and election when his property is placed under the jurisdiction of a corporate entity wielding the political power to tax and create debt.

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STATEMENT OF FACTS

The parties are agreed that Centerville City has proceeded pursuant to Sec. 10-2-40[illegible] UCA 1953, as amended, to annex appellant's property and that appellant's property will be su[illegible] jected to tax assessments, liens, and encumbrances by said city which are the basic fa[illegible] necessary for a determination of the issue in this appeal. (Answer to Complaint, Second D[illegible] fense, Para. 1)

ARGUMENT

The case will be argued in the order set forth in the points:

POINT I, establishes the basis of the argument.

SUB POINT A, the right to legal notice specifically.

SUB POINT B, the right to elective choice specifically.

POINT II, emphasizes the basic law.

POINT I

SEC. 10-2-401, UTAH CODE ANNOTATED 1953, AS AMENDED, IS UNCONSTITUTIONAL BECAUSE IT DENIES TO PROPERTY OWNERS THE BASIC, FUNDAMENTAL, EQUAL, AND SOVEREIGN RIGHT TO DUE PROCESS OF LAW IN DEROGATION OF ART. I, SEC. 2, SEC, 7, SEC. 24, AND SEC. 27; AND ART. IV, SEC. 1 AND SEC. 8, CONSTITUTION OF UTAH —

The basic and fundamental due process right to legal notice and elective choice is n[illegible] provided in Sec. 10-2-401, UCA '53, the annexation statute. Said statute permits appellan[illegible] property to be placed under the jurisdiction of a corporate entity which wields the politic[illegible] police power to tax, bond, encumber, indebt, and control property without giving legal noti[illegible] and election by the secret ballot which violates the due process clause of Art. I, Sec. 7, Con[illegible] of Utah, which states:

> "No person shall be deprived of life, liberty or property, without due process of law."

Sec. 10-2-401, UCA '53, provides:

> "Whenever a majority of the owners of real property . . . shall cause an accurate plat or map . . . to be filed in the office of the recorder of the municipality, together with a written petition; . . . and the governing body of the municipality, at a regular meeting . . . may by resolution . . . accept the petition for annexation, subject to the terms and conditions as they deem reasonable and the territory shall then and there be annexed and within the boundaries of the municipality . . ."

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The right to legal notice and elective choice is both a procedural and substantive due process right.

16 Am. Jur., #548, p. 940, states:

> "Procedural due process may be defined as the aspect of due process which relates to the requisite characteristics of proceedings looking toward a deprivation of life, liberty, or property; . . ."

And at #357, p. 683:

> "The words 'life, liberty, and property' as used in constitutions are representative terms, and are intended to cover every right to which a member of the body politic is entitled under the law. These terms include . . . the right to all liberties, personal, civil, and political . . ."

16A Corpus Juris Sec., #567, p. 539, states:

> "In the course of developing its meaning the courts have gone beyond its literal meaning of due procedure and have brought within it substantive as well as procedural rights. When applied to substantive rights, it is interpreted to mean that the government is without right to deprive a person of life, liberty or property . . ."

And at #574, p. 603-604:

> "The life and liberty of which a person may not be deprived without due process of law are not limited to freedom from mere physical harms or restraint, but include all personal rights and the enjoyment thereof . . . The terms 'life' and 'liberty' are used in the constitutional guarantees in a broad sense as including all personal as distinguished from property rights . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

By looking into the laws pertaining to municipal corporations at the time Utah became a state, it is evident that the right to legal notice and elective choice, when one's property is placed under the jurisdiction of a municipal corporation with the power to create debt for city services, is a basic and fundamental principle of liberty.

Art. I, Sec. 27, Const. of Utah, says:

> "Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."

In *State v. Eldredge*, 27 Utah 477, 76 Pac. 337, this court said at page 483 of 27 Utah:

> "In construing the supreme law, the meaning of the framers must be ascertained from the whole purview of the instrument, and, in construing a particular section, the court may refer to any other section or provision to ascertain what was the object, purpose, and intention of the constitution makers in adopting such section. In a case like this the court will also consider the system of government in vogue prior

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to and at the time of the framing of the constitution, and the political history of the country, and, out of the different constructions possible, will adopt and apply that which is most in accord with the genius of our institutions, the most likely intended by the framers of the instrument. Texas & Pac. Ry. v. Inter-State Com., 162 U.S. 197, 218; 16 Sup. Ct. 666; 40 L. Ed. 940."

When Utah became a state every municipal corporation with the political power to issu long term notes and create debt upon property had as a requirement the basic and fundament due process right to legal notice and election including the extending of city boundaries. Leg notice and election were required in Chapter XI, Compiled Laws of Utah 1888, An Act Pr viding for the Incorporation of Cities, in the following articles:

Art. I	Creation
Art. XV	Local Tax Assessments for Improvements
Art. XVI	Elections
Art. XVII	How Corporate Limits May Be Extended (Quoted immediately below.)
Art. XVIII	Restriction of Corporate Limits
Art. XIX	How Cities May Disincorporate

Art. XVII, the annexation statute, provided:

"The boundaries of any municipal corporation may be altered and new territory included therein after proceedings had as required in this section. The council of such corporation shall, upon receiving a petition signed by not less than two-fifths of the property owners . . . give notice thereof by publication . . . (including notice of an election) . . . The votes cast in such territory so proposed to be annexed shall be canvassed separately, and if it shall show upon such canvass that the majority of all the votes cast in such territory, and majority of the votes cast in such corporation, shall be for annexation, such council shall . . . make a certified abstract of such vote . . . and . . . file with the secretary of the territory . . ."

If this law were in force today, the existing inhabitants of cities would have a voic as to whether promoters of subdivisions could have annexed into the cities farming propert that must have expensive municipal services. Profits to promoters of such enterprises woul not be so attractive if the properties so annexed carried the full tax burden of the munici pal needs, but when all city taxpayers share the burden, debt and taxes in the city must inevi tably increase. A recent item in a Salt Lake daily newspaper stated that cities in Californi have found that it would be cheaper to buy proposed subdivision land and retire it, than t provide the necessary and expensive municipal services which require expanded water an sewer systems, public parks, etc.

Probably because our first legislature had to write all the new statutes for the new stat some statutes were borrowed from other states. Our annexation statute was copied fro Nebraska (#1448, Laws of Nebr. 1895.) The situation faced by most all legisatures by log-jam of bills at adjournment time could have contributed to the necessity. Said statut

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contains no provision for legal notice nor election and is basicly our same statute of today (10-2-401 UCA *supra.*) However, the first Drainage District Act (Laws p. 593, 1896) which was created by the first legislature, contained provisions for legal notice and election (Sec. 761 and 764, Title 17, CLU 1898.)

SUB POINT A

PROPERTY OWNERS ARE DENIED THE RIGHT TO LEGAL NOTICE.

As stated hereinabove, at the time our constitution was approved by the people, every municipal corporation with power to issue long term notes and create debt had the requirement of legal notice to affected property owners including the extending of city boundaries (*supra.*) This legal notice feature was incorporated into the new statutes in every instance except the annexation law. The due process right to legal notice when extending city boundaries must have been inadvertently overlooked and has lain unchallenged in the courts. This oversight of a fundamental due process of law is not so differentf rom the daily oversight most of us make of things plainly evident before our eyes.

Our present day Utah Annotated Statutes (1953 as amended) provide for the basic and fundamental due process of legal notice: (a) Incorporation of cities (10-2-102), (b) Disconnection of territory (10-2-501), (c) Consolidation (10-2-606), (d) Disincorporation (10-2-703), (e) Bonding (11-14-2), in fact most all special district taxing, bonding, and encumbrances upon property. However this due process right is ignored when property is annexed into a city.

States surrounding Utah recognize the right to legal notice when property is annexed into cities unless all affected property owners have signed the petition:

Nevada (Title 21, Chap. 268, Nev. Rev. Stat. 1977)

> Sec. 268.654 Counties less than 200,000 population:
> ". . . shall cause to be published in a newspaper . . . and . . . shall send a copy . . . to each owner of real property."
>
> Sec. 268.586 Counties 200,000 and over:
> "The notice . . . shall fix date, hour, and place . . . describe the territory to be annexed, contain a list of names and addresses of all record owners . . . and . . . published in newspaper."

Idaho (50-222, Title 50, Chap. 2, Idaho Code 1978):

> "Whenever any land lying contiguous or adjacent . . . by or with the owner's authority or acquiescence laid off into blocks containing not more than five (5) acres of land each . . . requests annexation in writing . . . it shall be competent for the council, by ordinance, to declare the same . . . a part of such city."

Wyoming (15-1-501, Wyo. Stat. Ann. 1977):

> 15-1-503 "The clerk shall give notice . . . by publishing . . . at least twice in a newspaper . . . and by mailing a copy . . . to the property owners. The notice shall contain a legal description of the area and the names of the persons owning property within the area."

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Colorado (31-12-101, Colo. Rev. Stat. 1973):

> 31-12-108 "Said notice shall be published once a week for four successive weeks . . ."

Nebraska has amended its annexation statute considerably to cover the different classes o[f] cities (Chapters 14, 15, 16, 17, 18 Rev. Stat. of Nebr. 1977).

For example, Sec. 15-106, is similar to Idaho:

> The proprietor of any land within the corporate limits or contiguous thereto may lay out such land into lots, blocks, public ways . . . , file plat and . . . the city council may include . . . within the boundaries of the city."

Each of the different classes have a provision as follows:

> "This grant of power shall not be construed as conferring power upon the council to extend the lines of a city over agriculture lands which are rural in character."

In the instant case many farms of more than five (5) acres are included and practicall[y] the entire area is rural in character.

Art. I, Sec. 24, Const. of Utah, states:

> "All laws of a general nature shall have uniform operation."

The basic right to due process of legal notice in the instant case cannot be classified an[d] said to apply to a group of people whose property is placed under the jurisdiction of a municipal corporation with the political power to tax, bond, encumber, indebt, and control sai[d] property when the city is created; and then deny it to other property owners when thei[r] property is so placed under identical circumstances, conditions, and situations by annexation. The basic and fundamental due process right to legal notice is one of the political right[s] which is inherent in the people and cannot be taken away.

Art. I, Sec. 2, Const. of Utah, states:

> "All political power is inherent in the people, and all free governments are founded on their authority for their equal protection and benefit..."

16 Am. Jur. 2d, #488, p. 849, says:

> "The guilding principle most often stated by the courts is that the constitutional guaranty of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in the privilege conferred and in the liabilities imposed.
>
> > Footnote: The decisions supporting this proposition are virtually limitless in number. The following is a small sampling: . . . " (Cases cited in small print occupy the two columns three fourths of the page.)

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Our annexation statute remained practically unchanged until 1977 when the words "at the next regular meeting" were amended to 'at a regular meeting" because of an adverse opinion in *Jensen v. Bountiful City*, 20 Utah 2d 189, 281 Pac 2d 216 (1975). With this revision the statute has become even more unconstitutional and unjust. Promoters of subdivisions can now include property in their annexation plats at the last moment, and cities can annex immediately upon presentation of the petition without notice of any kind whatsoever to interested and affected parties as in the instant case which leaves no opportunity to build a def ense.

Respondents asserted in the lower court that appellant did in fact appear at the hearing in the instant case (See transcript). Appellant had been advised approximately one month prior to said hearing that there was insufficient support for annexation of his particular section and that it had been abandoned. He was surprised by an urgent call from a neighbor on the very day of a hearing before the planning board on the annexation petition.

After steps were taken to counter the petition, the proponents changed the boundaries of the plat. Appellant felt that he was in a situation like a mouse under the paw of a cat which left him no recourse but to look into the laws and statutes where he discovered the glaring oversight of a basic and fundamental due process right to legal notice. If legal notice describing the boundaries were published such a miscarriage of justice could not occur.

Appellant asks this court for a declaration of his right to legal notice when his property is placed under the jurisdiction of a corporate entity wielding the political power to tax and create debt.

SUB POINT B

THE RIGHT TO AN ELECTIVE CHOICE BY BALLOT IS DENIED.

The basic right to election was also part of every act pertaining to municipal corporations at the time of statehood and was incorporated into all the new statutes of the new state except the extending of city boundaries. That the elective process is a basic tenant of liberty is evident in that this due process right is provided in our statutes today for incorporation of cities, consolidation, disincorporation, bonding, etc. (See ref. hereinabove.)

The Colorado statute (31-12-112 CRS 1973) provides:

> "The municipality shall forthwith petition the district court of the county . . . to hold such election."

Sec. 31-12-107 of the Colorado statute provides for annexation by ordinance:

> "PROVIDED, the ordinance annexing such area shall include a statement that the owners of one hundred percent of the area have petitioned for such annexation."

This leaves inviolate the due process right of election by the secret ballot even though 99% of the property owners sign the petition. Election in such and similar circumstances is an inherent right which cannot be taken away from the people.

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Art. IV, Sec. 1, Const. of Utah, states:

> 'The rights of citizens of the state of Utah to vote . . . shall not be denied or abridged . . ."

And Sec. 8, states:

> "All elections shall be by secret ballot . . ."

This due process right to election by the secret ballot is a basic and fundamental principl to a free people and has long been recognized as the only method whereby the expression o public sentiment can be honestly ascertained.

Cooley's Const. Lim. 6th, Ed., p. 760, says:

> "The distinguishing feature of this mode (secret ballot) of voting is, that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy . . . and thus escape the influence which may be brought to bear upon him with a view to overbear and intimidate, and thus prevent the real expression of public sentiment."

Appellant had intended to call witnesses and present evidence at the trial of this cas to show that besides using men of popular and official civic and church stature, pecuniar considerations were used to influence the petition drive by the proponents of said annexation However, such evidence could only bring embarrassment to some and delay the adjudica tion of the basic, vital, and important constitional question involved and could not effec the correcting of the continuing wrongs being perpetuated by a city extending its boundaries, lik an insatiable octopus, to supposedly increase its "tax base" and enhance its importance by pro viding ever growing and expanding economic needs for some people at the expense of others which leads to despotism unless held under control by constitutional limitations.

POINT II

THE CONSTITUTION IS THE LAW OF THIS STATE, NOT A LEGISLATIVE ENACTMENT.

The fundamental principles "essential to the security of individual rights and the per petuity of free government" expressed in Art. I, Sec. 27, *supra,* permeate the entire two vol umes of the Proceedings of our Constitutional Convention. The "conservative" and "liberal" arguments of today were all expressed at that time. The minority wanted the new legislatur to have a free hand to decide and provide for the wants and needs of the people. In other word they wanted a democracy instead of rule by constitutional law, a republic.

The fundamental principle of rule by constitutional law was well expressed on the floo of our Constitutional Convention by Mr. Varian, Proceedings, Vol. II, p. 996:

> "There have been . . . propositions, which some of us thought might well have been left to the decision of the people . . . which in the opinion of the majority on this floor, have not been permitted to prevail. What is the object of a constitution? It is not alone to declare what everybody knows to be *self evident facts concerning life, liberty, and property*. It is also to include prohibitions against future mistakes and wrongs that may be committed by the people." (Emphasis added)

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The minority view at the said convention was expressed by respondents at the hearing of this case in the lower court. Respondents quoted 56 Am. Jur. 2d, Part B, #57, p. 113, (See transcript):

> "The power to annex contiguous territory to municipal corporations is a legislative power, existing exclusively in the legislature as an incident to the power to create and abolish municipal corporation at will."

However, the first sentence of Part B, #55, p. 111, says:

> "*In the absence of constitutional limitations* the legislature has full power in its discretion . . ." (Emphasis added)

As a matter of fact, Part A, #50, p. 108, Extension of Boundaries, General, says:

> "*In the absence of any constitutional restriction* the legislature has full power in its discretion . . ." (Emphasis added)

Mr. McQuillin even questions the right to unlimited control in the absence of constitutional restrictions. 1 McQuillin Mun. Corp. 2d Ed., #188, p. 545-6, says:

> "It is difficult to accept in its entirety the doctrine of absolute unlimited legislative control, if the view should be adopted which is undoubtedly historically correct, that local self-government of the municipal corporation does not spring from, nor exist by virtue of, written constitutions, nor is it a mere privilege conferred by the central authority. The fact is, as repeatedly pointed out, that the people of the various organized communities exercised their rights of local self-government under the protection of these fundamental principles which were accepted, without doubt or question, when the several constitutions were promulgated.
>
> "Therefore, it appears clear that in a government in which the legislative power of a state is not omnipotent, and in which it is axiomatic that local self-government is not a mere privilege, but a matter of absolute political right, the existence of unlimited authority in the state does not exist. *Graham v. Fresno,* 151 Cal. 465, 91 Pac. 147; ***Blanding v. Burr,*** 13 Cal. 343; *State ex rel. v. Barker,* 89 N.W. 204 (Ia.): *People ev rel v. Detroit,* 29 Mich. 108; *People v. Hurlbut,* 24 Mich. 44; *Helena Cons. Water Co. v. Steel,* 49 Pac. 382 (Mont.); *Wolff v. New Orleans,* 103 U.S. 358."

Sec. 10-2-401, UCA, *supra,* denies to appellant a basic and fundamental due process right to life, liberty, and property which is "essential to the orderly pursuit of happiness by free men."

16A Corpus Juris Sec., #567, p. 540, states:

> "The term 'due process of law' is synonymous or interchangeable with or equivalent to 'law of the land,' a phrase appearing in many state constitutions, due process of law being said to mean in brief, the law of the land, including the unwritten law."

And at #568, p. 545:

> "Certainly 'due process of law,' or 'the law of the land,' does not mean merely an act of the legislature, for such a construction would abrogate all restrictions on legislative power."

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Cooley's Const. Lim. 6th Ed., p. 436, says:

> "It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. The words 'by the law of the hand' as used in the constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses; 'You shall be vested with the legislative power of the state, but no one shall be disfranchised or deprived of any the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words you shall not do the wrong unless you choose to do it.' *Taylor v. Porter,* 4 Hill, 140."

Because the basic and fundamental due process right to legal notice and election b secret ballot is a "self evident fact concerning life, liberty, and property," appellant ask this court to declare his constitutional, self evident, due process, and sovereign right thereto when his property is annexed into a city. These rights have been and are now granted t and enjoyed by other property owners in like and similar circumstances, and as stated in Ar I, Sec. 2, *supra,* "all free governments are founded by the people for their equal protectio and benefit."

CONCLUSION

Appellant is attorney for himself (1) because of financial considerations, and (2) becau he hesitates to place this vital and important issue into the hands of someone who might b affected by possible harrassment for taking an unpopular stand in defense of principles invol ing local self-government and less centralized control by government; for less centralized contr is contrary to the marshalled and pushed plans to municipally incorporate entire counti to provide municipal services for subdivision property in unincorporated areas which wi expand the "municipal tax base" and aid and abet our ever mounting debt, inflation, and taxe but which experience teaches enhances the fortunes of certain special interest groups an private individuals.

Appellant has set his pen and voice in defense of the constitutional form of our republ which is a government ruled by the constitutional law rather than by regulations, resolution and fancies of men which is prelude to dictatorship and slavery. A godless philosophy i moving to engulf us and the existence of our Judeo-Christian, free enterprise western civi zation is in grave jeopardy.

Appellant asks this court to stand in the dignity of their duty as watchmen on the towe guarding our constitutional freedoms and, thus, keep alive the affirmation in the preamble o our state constitution: "Grateful to Almighty God for life and liberty."

Respectfully submitted,

Clyde B. Freeman
Appellant

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