

1951

# M. Kenneth White v. Salt Lake City : Brief of Respondent

Utah Supreme Court

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E. R. Christensen; Homer Holmgren; A. Pratt Kesler; Attorneys for Respondent;

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Case No. 7652

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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M. KENNETH WHITE,  
*Plaintiff and Appellant,*

— vs. —

SALT LAKE CITY, a Municipal  
Corporation,  
*Defendant and Respondent.*

**FILED**

MAY 11 1951

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BRIEF OF RESPONDENT

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Clerk, Supreme Court, Utah

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City Attorney

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# IN THE SUPREME COURT of the STATE OF UTAH

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M. KENNETH WHITE,

*Plaintiff and Appellant,*

— vs. —

SALT LAKE CITY, a Municipal  
Corporation,

*Defendant and Respondent.*

} Case No. 7652

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## BRIEF OF RESPONDENT

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### STATEMENT OF FACTS

The judgment appealed from in this case is a judgment of dismissal on the merits pursuant to a motion to dismiss Plaintiff's amended complaint. The Plaintiff's property is described in his complaint as being certain lots in two subdivisions situated in Salt Lake County outside the limits of Salt Lake City. These lots abut on both sides of a dedicated avenue and street, namely Marie Avenue and Valley Street. It is alleged, as a conclusion, that Plaintiff's ownership of these lots includes the Avenue and Street, subject only to a dedication of said

streets for street purposes, a width of sixty-six feet. It is alleged that Defendant City installed a forty-eight inch water main in these streets to serve its inhabitants without Plaintiff's consent, which main will not benefit Plaintiff, and that Plaintiff is damaged thereby because he will have to lay two sets of water pipes and gas pipes to serve the property. It is further alleged that the property as a residential subdivision will be materially retarded. Just what is meant by this latter statement is not clear. Plaintiff prayed for a decree compelling Defendant to remove the main and for damages in the sum of \$30,000.00 for the unlawful appropriation and trespass. It is not alleged that the use of these streets by the City for its main was without the consent of the Board of County Commissioners.

Plaintiff relies on two points for a reversal. In answer thereto, Defendant relies upon the following propositions:

## STATEMENT OF POINTS

### POINT I

UNDER CHAPTER 5, TITLE 78, U. C. A. 1943, AND RELATED STATUTES, THE FEE TO THESE DEDICATED STREETS, BOTH SURFACE AND SUBSURFACE, IS IN SALT LAKE COUNTY FOR THE BENEFIT OF THE PUBLIC FOR PUBLIC PURPOSES, SUBJECT TO DEFEASANCE UPON BEING VACATED THROUGH PROPER PROCEEDINGS AS IN SAID CHAPTER PROVIDED.

### 3

#### POINT II

THE LAYING OF THE WATER MAIN BY DEFENDANT IN THESE STREETS DOES NOT CONSTITUTE AN ADDITIONAL SERVITUDE WHICH PLAINTIFF IS ENTITLED TO PREVENT OR FOR WHICH HE IS ENTITLED TO COMPENSATION.

#### POINT III

EVEN THOUGH THE ABUTTING OWNER OWNS TO THE CENTER OF THE STREET, STILL THE LAYING OF THE WATER MAIN IN THE STREET DOES NOT GIVE HIM A RIGHT TO RECOVER DAMAGES OR TO REQUIRE ITS REMOVAL.

#### ARGUMENT

##### POINT I

UNDER CHAPTER 5, TITLE 78, U. C. A. 1943, AND RELATED STATUTES, THE FEE TO THESE DEDICATED STREETS, BOTH SURFACE AND SUBSURFACE, IS IN SALT LAKE COUNTY FOR THE BENEFIT OF THE PUBLIC FOR PUBLIC PURPOSES, SUBJECT TO DEFEASANCE UPON BEING VACATED THROUGH PROPER PROCEEDINGS AS IN SAID CHAPTER PROVIDED.

The subject of public highways or streets located in an area in the county outside incorporated cities and towns is covered, so far as here material, in three different places in our present code. Because of this segregated treatment of the matter, some confusion and some apparent inconsistencies may be thought to exist. The three places in the code dealing with this subject are (1) Chap-



ter 1, Title 36 and Chapter 3, Title 36, covering the subject of "Highways," (2) Chapter 5, Title 78, covering "Plats and Subdivisions," and (3) Sections 19 to 42, Chapter 5, Title 19, covering the powers of County Commissioners.

Plaintiff has chosen to rely entirely on Sections 36-1-1 and 36-1-7, under the title "Highways." These same sections, and Section 36-1-2, are first found in Chapter XIII C. L. 1888, where they read, respectively, as follows:

"Section 2065. That all roads, streets, alleys, and bridges laid out or erected by the public are, highways."

"Section 2066. All roads, streets, alleys and bridges laid out by others than the public and dedicated and abandoned to the use of the public are, highways. A highway shall be deemed and taken as dedicated and abandoned to the use of the public when it has been continuously and uninterruptedly used as a public thoroughfare for a period of ten years."

"Section 2071. By taking or accepting land for a highway the public acquires only the right of way, and incidents necessary to enjoy and maintain it. A transfer of land bounded by highway passes the title of the person whose estate is transferred to the center of the highway."

Section 2065 and 2066, above quoted, were combined in the 1898 Compiled Laws in the language now contained in Section 36-1-1 U. C. A., 1943.

The legislation dealing with "Plats and Subdivisions" was not enacted until 1890, Laws of Utah 1890,



page 76, and then only related to platting of lands in towns and did not provide for approval of the plat by the town officials. It made it lawful for an owner to lay out and plat land into lots, streets, alleys, public places. The owner was required to make an accurate map or plat showing the areas intended for avenues, streets, lanes, alleys, commons or other public places, also the lots intended for sale by number and the precise length and width. The map or plat was to be acknowledged by the owners and certified by the surveyor making such plat, and was to be filed and recorded in the office of the County Recorder. All these provisions, with only minor changes, are now contained in Chapter 5, Title 78, U. C. A., 1943, the present law adding the requirement that the plat be approved by the city, town or county authorities, depending upon the location of the platted lands. Section 4 of the 1890 act provided:

“Section IV. Such maps and plats when made, acknowledged, filed and recorded with the county recorder shall be a dedication of all such avenues, streets, lanes, alleys, commons or other public places or blocks, and sufficient to vest the fee of such parcels of land as are therein expressed, named or intended for public uses for the inhabitants of such town and for the public for the uses therein named, or intended.”

This same section, Section 78-5-4, now reads as follows:

“Such maps and plats, when made, acknowledged, filed and recorded, shall operate as a dedi-

cation of all such streets, 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."

The act of 1890 did not provide for vacating any plat or portion or street therein. This was enacted in Laws of Utah, 1894, page 14, and provided for vacating by petition of the owners of the land contiguous or adjacent to any street or alley sought to be vacated presented to the city council or to the county commissioners. These provisions are found in Sections 78-5-6, 7 and 8, U. C. A., 1943.

Under these statutory provisions no distinction is made between dedicated streets in the city, on the one hand, and dedicated streets in counties outside cities, on the other hand; as to each the fee passes one to the city, the other to the county and both continue until vacated by the city or county legislative body upon petition. The rights of abutting owners of each of such streets must be the same. If, under these provisions, an abutting owner in a city has no present ownership in the street, such as would entitle him to prevent the laying of a water main in the street, then an abutting owner in a county must be also in the same position. So that any distinction which some of the cases seem to draw between the rights of abutting owners in the street in a city and a street in a county outside of a city has no application in this case.

The approval of the plat by the city or town authorities, if in a city or town, or by the county authorities, if in the county, was first enacted in the 1898 Compiled Laws, Section 2013. This is the first time that land in the county is mentioned for platting. But Section 2014, C. L. 1898, continues Section IV, Laws of 1890, page 76 in its identical language as above quoted, saying nothing about the vesting of the title for the inhabitants of the county, stating only that it vests for the "inhabitants of such town and by the public."

Section 1116, C. L. 1907, provided, "That a road not used or worked for a period of five years ceases to be a highway." This is the provision which was involved in the case of *Sowadzki v. Salt Lake County*, Section 36 Utah 127, 104 P. 111, cited and relied upon by Plaintiff. This provision was eliminated in the Laws of 1911, page 287. This amendment indicates that a highway is not something limited to mere passage over its surface and that a failure to use it or work it works an abandonment of the county's interest in the street.

Since 1888, there have also been some changes made in the powers given to the County Commissioners over highways. In C. L. 1888, Section 187 (5) their powers over roads were expressed as follows:

"To lay out, maintain, control, and manage public roads, turnpikes, ferries and bridges within the county."

In the 1896 Laws, page 521 and following pages, the Board of County Commissioners was given power, in addition to the powers stated in the 1888 Compiled Laws above quoted, the power (p. 530) "To grant franchises along and over the public roads and highways for all lawful purposes," and to "enact all laws, ordinances, and regulations not in conflict with the laws of the state, for the control, construction, alteration, repair, and use of all public roads and highways in the county." These two provisions have been continued as Sections 19-5-39 and 42, U. C. A. 1943.

The power to permit the laying of water pipes in highways was given to the county commissioners in the 1909 Laws, page 219 (Sec. 5) in the following language:

"Water mains, sewers and sewer pipes may be laid by permission or upon the order of the board of county commissioners, and shall be located in the roadway section of the highway, at a sufficient depth to keep the roadway secure and to prevent a nuisance thereon; but no excavation for such purposes shall be made in any public highway etc., without first obtaining consent of the board of county commissioners."

Practically the same language is now contained in Section 36-3-3, U. C. A. 1943. The 1909 act also grants power to county commissioners to permit telephone, telegraph, electric light and railway trolley or other poles along curb lines of public highways. This provision is now found in Section 36-3-4, U. C. A. 1943.

This history clearly indicates an ever expanding legislative consciousness that the purpose of public highways, either in incorporated cities or towns or in the county, is to meet the ever increasing public uses as our civilization and mode of living change in form. No longer is a public highway confined to mere convenience for passage over its surface by persons, vehicles and animals. The air above and the subsurface are now to be utilized in the transporting of the various facilities and agencies that form a part of our economical, social and political life.

Furthermore an important distinction has grown up in this legislation, judging by the language used, between ordinary county roads or highways and streets and avenues created by platting a subdivision. Although the legislature has seen fit to retain the old language "by taking or accepting land for a highway the public acquires only the right of way and incidents necessary to enjoy and maintain it," (Sec. 36-1-7) claimed by Plaintiff to be a mere right of passage over the surface, it has, nevertheless, by other express provisions, enlarged the uses that may be made of a highway, as above outlined. In addition it has made specific and special provisions as to the kind of title which is acquired by the municipal authorities, including a county, over or in streets in accepting a platted subdivision. When the whole of Chapter 5, Title 78, is considered it is apparent that the legis-



lature intended that the city or county acquires more than a mere surface right, a right of passage over the surface of the streets, when a subdivision is platted.

When the language of Section 78-5-4, U. C. A. 1943, above quoted, is analyzed it is apparent that regardless of where the fee to the corpus of the street may be said to vest, the county is vested with a fee title to the street for all the public purposes which a street is intended to serve, and, such fee vesting in the county, the abutting owner is precluded from asserting any right to object to such uses or to collect compensation or damages because of such uses. The foregoing proposition is supported and amplified in the case of *Smith v. Central Power Company*, 103 Ohio 681, 137 N. E. 159 where the court says:

“The title, rights, and uses of a municipal corporation in streets, alleys, and other public places rest in part at least in legislative provisions. This is more especially true of dedications of streets and alleys made by persons laying out subdivisions or additions to municipal corporations. Sections 3580 to 3592, General Code, both inclusive, make full provision for such additions and subdivisions, and it is provided in section 3585 as follows:

“The map or plat so recorded shall thereupon be a sufficient conveyance to vest in the municipal corporation the fee of the parcel or parcels of land designated or intended for streets, alleys, ways, commons, or other public uses, to be

held in the corporate name in trust to and for the uses and purposes in the instrument set forth and expressed, designated, or intended.' ”

The case of *Edison Illumination Company v. Michigan*, 200 Mich. 114, 166 N.W. 944 also supports this proposition. In this case the Plaintiff brought suit to recover damages to its gas pipes laid in a public alley. Defendant, in excavating for a building, damaged these pipes. We quote from the opinion as follows:

“The last clause of Section 28, of Article 8, (constitution) reads as follows:

“ ‘The right of all cities, villages, and townships to the reasonable control of their streets, alleys, and public places is hereby reserved to such villages, cities and townships.’

“The present statute relating to town plats vests the fee of streets and alleys in the city or village within the corporate limits of which the land platted is included, or if not included within the limits of any incorporated village or town, then in the township within the limits of which it is included, in trust to and for the uses and purposes therein designated. It has been held by this court that whatever the nature of the title of the municipality in streets and alleys (whether a fee simple or only a conditional fee, or a perpetual easement), it is such as to entitle the public authorities to devote them to public purposes. Upon the vacation of the street or alley the title reverts to the abutting owners.

“We are dealing here with an existing public alley. Before the vacating of an alley, what the interest of the abutting owners may be, whether



more than that of a possibility of reverter, we do not decide. He has the right of ingress and egress to and from his lot. Manifestly, the fee is in the municipality in trust for the public.

“The dedication must be understood as made and accepted with the expectation that the street or alley may be required for other purposes than those of passage and travel merely, and that under the direction and control of the public authorities it is subject to be appropriated to all the uses to which city streets or alleys are usually devoted, as the wants or conveniences of the public may render necessary or important. In *Village of Manchester v. Clarks*, 162 N.W. 115, Justice said:

“ ‘That public alleys involve easements in the nature of ways for the installation of water pipes, sewers and other urban services for the general welfare, under municipal regulation is well settled.’

“We are clearly of the opinion that the Defendant had no right to interfere with any structure rightfully in the alley. That the mains and conduits in question have been lawfully and properly placed in the alley by authority of the city is, we think, too clear for controversy. The Defendant made excavation into the alley at his peril.”

*McWethy v. Aurora Electric Light & Power Co.*, 202 Ill. 218, 67 N. E. 9, is also in point here.

This was an action to enjoin Defendant from erecting and maintaining its system of electrical conductors above and under the ground in the streets and alleys of the City of Aurora. Plaintiffs were abutting property owners. They contended they were entitled to enjoin a

construction and use of the street for purely private commercial purposes, as distinguished from a construction or a use of the street to facilitate public travel, such as for street railways, hacks, steam railroads, etc. The court dismissed the petition, saying:

“That it (use for conducting electricity) is a different use (from travel) is true, but that it is, in principle, distinguishable from the other obstruction mentioned, or that it is for purely private commercial purposes is not true. That the Company would derive gain from their use in no way distinguishes them from street railways or other means of public travel. In all such uses private gain accrues to the individual or corporation operating them. Since the discovery and use of electricity for lighting purposes, it has generally if not universally, been held that, the fee to public streets being in a municipality, with general power to regulate the use of the same, such municipality may lawfully authorize private corporations or individuals to erect electric light poles on its streets, and stretch wires upon them, in order to provide lights for its own use, and that of its citizens, provided that in doing so they do not materially obstruct the ordinary use of the streets for public travel.

“In *State v. Murphy*, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L.R.A. 369, the supreme court of that state uses the following clear and comprehensive language:

“‘The power to regulate the use of streets is very comprehensive. The word ‘regulate’ is one of very broad import. Under the power thus delegated it cannot now be questioned but that

the municipal authorities can permit the use of the surface for stringing electric wires, for the transmission of messages, and the creation of light, and may also permit the laying of water and gas pipes and sewers beneath the surface. These uses are all of a public nature, and are not inconsistent with the public use to which the streets were dedicated. Under its general power to regulate the use of streets the City has authority to authorize corporations or persons for the purpose of serving the public, to string telegraph, telephone, or electric wires upon poles above the surface of the streets, provided such construction and mechanical appliances do not materially interfere with the ordinary uses of the street and public travel thereon.'

"Nor does the right of an abutting property holder to maintain a bill for injunction in such cases depend upon the question whether or not the new use of the street has been legally authorized by the municipality. It is also to be observed that an obstruction in the nature of a public improvement placed in the streets of a city by the permission of the city, either expressed or implied, is strictly a matter between the city and the private corporation constructing the improvement, so that any action to test the right to obstruct the street should be brought by the city, or by some public officer on behalf of the city.

"The fee of the streets is in the city. Cities are given exclusive control over the streets and alleys within their corporate limits. It follows, as a general rule, that a court of equity will not interfere with the city's control over the use of its streets, unless the exercise of such powers by the city is abused to the oppression of persons or

corporations having rights in the street, or unless the action of the city in such respect is fraudulent, or grossly wrong or unjust. The reason upon which this doctrine rests is so apparent and has been so frequently pointed out by this and other courts, that to repeat it now is wholly unnecessary."

In arguing point two hereinafter, we will cite and quote from cases which we feel also sustain our position under point one.

Plaintiff quotes certain language from *Sowadzki v. Salt Lake County*, Supra. The only question before the court in that case was, as stated later in the case of *Tuttle v. Sowadzki*, 41 Utah 501, 126 P. 959, by the same judge who wrote the opinion: "Whether the alleged highway had been abandoned as a public easement or highway \* \* \* It was there held that by virtue of Compiled Laws of 1907, Section 1116, the alleged highway had been abandoned as a public easement or highway." The statute then provided that a road not used or worked for a period of five years ceases to be a highway. The language of the court in *Sowadzki v. Salt Lake County*, quoted by Plaintiff, that "only the fee to the surface passed" was wholly gratuitous, and was made without any reference to, or consideration of, the other statutes above referred to providing for subsurface use of highways for water mains and sewers and for telephone and telegraph poles and other uses that would necessarily occupy the subsurface of the highway. Furthermore, the court did not have before it, and was not considering,

any question as to the purposes for which a highway may be used or what would constitute a servitude which an abutting owner could prevent and for which he would be entitled to damages. And finally, the statutes, Section 36-3-3, U. C. A. 1943, authorizing the laying of water mains in highways was not enacted at the time the case was tried, being enacted in 1909.

## POINT II

THE LAYING OF THE WATER MAIN BY DEFENDANT IN THESE STREETS DOES NOT CONSTITUTE AN ADDITIONAL SERVITUDE WHICH PLAINTIFF IS ENTITLED TO PREVENT OR FOR WHICH HE IS ENTITLED TO COMPENSATION.

In support of this proposition, we cite and rely upon the following authorities in addition to those already cited.

*Smith v. Central Power Company*, 103 Ohio 681, 137 N. E. 159, heretofore quoted from.

Here Plaintiff brought action against the City of Bucyrus and the Power Company to enjoin the placing of high voltage electric pole lines along Southern Avenue on which Plaintiff's property abutted. It was claimed that the use of the street for high voltage wires was an added burden upon Plaintiff's enjoyment of his property and that it was a menace to the lives and property of the residents along this Avenue. The franchise given to the Power Company by the City was not confined to those facilities for rendering service to the City and its in-



habitants, but by the terms of the Ordinance the lines for the distribution of electric energy could be used to service persons, firms, and corporations beyond the limits of the City. The court dismissed the action. We quote extensively from the opinion.

“The title, rights, and uses of a municipal corporation in streets, alleys, and other public places rest in part at least in legislative provisions. This is more especially true of dedications of streets and alleys made by persons laying out subdivisions or additions to municipal corporations. Sections 3580 to 3592, General Code, both inclusive, make full provisions for such additions and subdivisions, and it is provided in section 3585 as follows:

“‘The map or plat so recorded shall thereupon be a sufficient conveyance to vest in the municipal corporation the fee of the parcel or parcels of land designated or intended for streets, alleys, ways, commons, or other public uses, to be held in the corporate name in trust to and for the uses and purposes in the instrument set forth and expressed, designated, or intended.’

“Nowhere in the record in this cause does it appear in what manner Southern Avenue was dedicated to the public use, or whether it was acquired by condemnation proceedings, neither are we put in possession of any particular conditions or reservations to such dedication, and it will therefore have to be presumed that the public has such rights in Southern Avenue as are provided in section 3585, as said section has been construed by former decisions of this court.

“Further statutory provision is found in section 3714, General Code, which provides :

“ ‘The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance.’

“Still further provision is found in the chapter of enumeration of powers of municipalities, relating more especially to electric wires and equipment, in section 3637, General Code, which reads in part as follows :

“ ‘And \* \* \* to regulate the construction and repair of wires, poles, plants and all equipment to be used for the generation and application of electricity,’ etc.

“In Section 3809, General Code, it is provided that a city council may :

“ ‘contract with any person, firm or company for lighting the streets, alleys, lanes, squares and public places in the municipal corporation,’ etc.

“Practically the same provision is found in section 3994, General Code, which reads :

“ ‘A municipal corporation may contract with any company for supplying, with electric light, natural or artificial gas, for the purpose of lighting or heating the streets, squares and other public places and buildings in the corporation limits.’

“In the case at bar the city of Bucyrus cannot be supplied with electric energy without the set-



ting of poles for the purpose of stringing the trunk lines thereon, and also for the purpose of stringing the distributing wires over the streets and alleys throughout the city. In order to have the convenience of electricity throughout cities generally, it is necessary that the electric energy should be transported by means of wires over the streets, alleys, and public places. It would be manifestly impossible to keep entirely on private property.

“It must be admitted that the decisions heretofore have not been uniform. The earlier decisions did not have to deal with the complex and modern uses to which streets and highways are now subjected, and with the expanding civilization there must necessarily be some expansion of the rules which have been heretofore laid down. In some of the decisions it is stated that streets and highways are for the purpose of public travel. This restricted view is natural, because in primitive time nothing beyond individual travel was even contemplated. As civilization progressed, transportation, communication, of messages, and many municipal uses, including the product and service of the many public utilities which are now recognized by Ohio statutes, began to utilize our highways.

“Some distinction is sought to be made between those uses which were under contemplation at the time the highways were established, and those uses which have come into vogue long after such establishment, and some distinction is made by some of the cases between public and private uses. But it is difficult to see how either of such distinctions has the sanction of sound reasoning. Some of the highways of our state were originally Indian paths or paths established

by wild animals. By a process of evolution they successively became footpaths of the settlers, bridle paths, ways for pack animals, ways for horse-drawn vehicles, ways for motor-propelled vehicles and electric street cars, ways for wires for telephone and telegraph service and for the transmission of electric energy, ways for pipes for water, sewage, gas, steam, hot water, and other utilities.

“Some of the streets of some of our cities have been so recently laid out that it can fairly be stated that many and all of these uses might well have been contemplated. Others of the streets of our older cities are established along the lines of the original highways, and were laid out at a time when none of the modern uses and utilities was in vogue, or even known.

“Can it be said that a different rule should be applied to the streets which were formerly the early highways, and that as to those streets only those uses be authorized which were fairly under contemplation at the time they were laid out? Under such a rule it would be necessary first to ascertain the date of the establishment of such a road and to make a study of the progress of civilization up to that time, the result of which would be to have a different rule for each street and highway. Endless confusion would necessarily arise by drawing a distinction between public and private use and between those uses which were in contemplation at the time the highways were established and those which have come into vogue by the later evolution of civilization.

“The evolution of public utilities and the widespread and ever-increasing use of public utility service throughout the state have greatly

varied the uses of the streets and highways. It is doubtful whether this great variety of uses has really increased the burdens. The increased burdens upon the highways are caused primarily by the largely increased population, and the demands of the people for necessities, conveniences, and luxuries of modern living conditions. It has been found more economical as well as more speedy to transport merchandise and passengers by rail, to convey electrical energy for light, heat, and power and to transmit messages and information by wires, and to convey gas for fuel and lighting and water for municipal purposes by pipe lines, and other utilities by still other and different methods. It is hardly correct to say that by such new adaptations the streets and highways are subjected to uses not contemplated when highways were laid out many years ago. It would be more correct to say that present uses are the progression and modern development of the same uses and purposes. The new appliances are but rapid transit methods of supplying the modern wants of the people, the wires supplanting the messenger, the carrier and the postman, and the rails and pipe lines supplanting in part the vehicular traffic.

“Inasmuch as one of the elements of this controversy involves the use of trunk-line wires along Southern Avenue, and also involves the fact that electric energy is transported through the city of Bucyrus for the use of patrons living outside and beyond the city, two authorities having a bearing upon that question are cited. In the case of *Cheney v. Barker*, 84 N. E. 492 (198 Mass. 356, 16 L.R.A. (N.S.) 436) decided by the Supreme Judicial Court of Massachusetts in 1908, the fol-

lowing is found in the second paragraph of the syllabus:

“‘Since highways are established by state authority for the general good, since laws of Massachusetts make no distinction between them as to rural ways or urban streets or otherwise, and since the Legislature has supreme authority respecting public rights in streets and highways, the Legislature may provide for the use of highways, as well for through travel as for the through transmission of gas, water, or other commodities from one place to another, regardless of the question whether any municipality through which the ways may pass, or those who own the soil of the ways subject to the public easement therein, are served or in any way benefited by such use.’

“In the opinion (84 N. E. on page 494) this syllabus is amplified, and the court cites cases decided by the courts of New York, Indiana, Kentucky, Pennsylvania, and Massachusetts.”

In *Huddleston v. Eugene*, 34 Ore. 343, 55 P. 868, 43 L.R.A. 444, the court quotes Elliott on Roads and Streets, page 315 as follows:

“If we have not reasoned ill, a suburban servitude may not only be greatly argued, but in a measure, transformed by the demand of the public welfare. This conclusion has for its ultimate foundation the old maxium ‘that regard be had for the public welfare is the highest law,’ and it receives support from the principle that men are presumed, when they do an act, to contemplate the natural consequences which may result. It is



also true that the benefit which the owner of the servient estate receives from the increase in population and the building up of the city far more than compensates him for the increased burden of the servitude, which these things produce so that he suffers no damages and without damages there can be no right of action."

*Empire Natural Gas Company v. Stone*, 121 Kan. 1119, 245 P. 1058. The case involved the right of Plaintiff to lay a gas pipe line in a public highway in the county, on which highway Defendant's eight acres abutted, without Defendant's consent. The court refers to *McCann v. Telephone Company*, 69 Kan. 210, 76 P. 870, 66 L.R.A. 171, and *State v. Natural Gas Company*, 71 Kan. 508, 80 Pac. 962, and says:

"They (these cases) establish the legal right of the Wichita Natural Gas Company to lay its pipe line in the public highway without the consent of the Defendants."

*Nazworthy v. Illinois Oil Company*, 176 Okl. 37, 54 P. 2d 642. The State widened a highway six feet running along Plaintiff's property and obtained the six feet from Plaintiff. The State permitted Defendant to place a six inch oil pipe line in this six feet. Then the State widened the highway again and took ten feet of Plaintiff's land by condemnation, defendant refusing to give the land up. The State then ordered Defendant to move its pipe lines over onto this ten foot strip. Plaintiff then brought suit for damages as he had not consented to the taking of the ten feet or the laying of the pipe line therein.

Judgment for Defendant was affirmed. The court refers to and relies upon *McCann v. Johnson County Telephone Company*, 69 Kan. 210, 76 P. 870, and *Cater v. Northwestern Tel. Exch. Company*, 60 Minn. 539, 63 N. W. 111, quoting from the *McCann* case as follows:

“The purpose of the highway is the controlling factor. It is variously defined or held to be for passage, travel, traffic, transportation, transmission, and communication. It is a thoroughfare by which people in different places may reach and communicate with each other. The use is not to be measured by the means employed by our ancestors, nor by the conditions which existed when highways were first devised. The design of a highway is broad and elastic enough to include the newest and best facilities of travel and communication which the genius of man can invent and supply.”

The court quotes from the *Cater* case as follows:

“If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals—constituting, respectively, the *iter*, the *actus*, and the *via* of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until today our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when

the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use.

“The conclusion reached is that: ‘The construction and maintenance of a telephone line upon a rural highway is not an additional servitude for which compensation must be made to the owner of the land over which the highway is laid.’”

The court then says :

“These cases may be said to present in general the theory or reasoning upon which the cases holding generally against the contention of plaintiff herein are based. This line of authority holds that the rights of the owner of lands in rural communities over and along which highways are established must yield to the needs of the public generally with the expansion and growth of civilization as new methods and means of travel, transportation of persons, commodities, etc., and transmission of messages, intelligence, etc., are devised, developed, and expanded, notwithstanding that the use is more onerous than were the means and methods in use at the time the highway was laid out, and notwithstanding that the new uses include, not only new methods of travel, transportation, and transmission by moving vehicles,



etc., but the right to conduct and maintain permanent structures in and along the highway for improved methods of transportation, etc., by and for the benefit of the public in general, limited only to the extent that the improved or other methods of use do not interfere with the use of such highway for general, legitimate use of the highway by footmen, horsemen, and vehicles; and notwithstanding that such structures are erected and maintained by private corporations for private gain. This has been referred to by some as the 'March of Progress' theory."

The court then refers to certain statutes to show highways may be freely used for oil pipe lines, said statutes giving the right to use highways for transporting oil by pipe lines, the right to condemn for a right of way for such use and making oil lines common carriers and says:

"and those statutes would seem to declare that it is the policy of the State that such use of highways, is in furtherance of the general policy of the State, to use the highways for the convenience of the citizens of the State in travel and transportation."

The court then summarizes the rule which it states is the weight of authority and supported by the better reasoning as follows:

"That is, in substance, that the new or different use of the highway, or new or different method of transmission or transportation, is but a further proper use of the highway in line with the general purpose of highways; that general purpose of highways being that subject to proper

supervision, they may be used by the public and by common carriers for such form of travel, transportation, and transmission as may be in keeping with the declared policy of the state; a chief restriction being that each such use of the highway shall not improperly interfere with the rights of others in the use of the same highways. The proper use of the highways by oil pipe lines located, laid, and maintained under proper supervision does not interfere with the various other uses of the highways."

The Plaintiff has cited and placed great reliance on the case of *Hofius v. Carnegie-Illinois Steel Co.*, 146 Ohio St. 574, 67 N. E. 2d 429. This case, together with prior Ohio cases, *Smith v. Central Power Company*, *Supra*, and *State v. Board of Commissioners of Summit County*, 123 Ohio St. 362, 175 N. E. 390, should be considered together and illustrate the greater rights which the city or county has in streets created by dedication through the platting of a subdivision. The case of *Smith v. Central Power Company*, involved a platting statute very nearly identical with our Section 78-5-4, the court holding that the abutting owner had no right to object to subsurface use of the street for laying a gas main. The case of *State v. Board of Commissioners of Summit County*, involved the laying of a sixteen inch water main in a highway outside the city of Akron to transport water for a sewer district. The court there said:

"We are not unmindful of the fact that the weight of authority, both text and judicial decision, makes a distinction between the character

of the title of the municipality to its public streets and the character of the title of the state to public highways outside municipalities; that theoretically a municipality owns the fee to its streets, in trust for the use of the public, and the abutting property owners outside municipalities own the fee to the highway, subject to the easement of the state or the public to use the highway for the purpose of travel. *The distinction so made is an artificial one and not based upon sound logic.*"

The *Hofius* case involved the construction of a water main along a county road on which plaintiff's eighty acre farm abutted. The court refers to the statement contained in the above quotation which reads, "The distinction so made is an artificial one and not based upon sound logic." As to that statement the court then says:

"In refering to the distinction between municipal and rural highways, the writer may have had in mind the fact that under the fee theory, the abutting proprietor's rights were equitable, while under the easement theory such rights were legal. But we are of the opinion that there is the further distinction that the legal rights are broader.

"Had the statutory law of the state been examined it would have disclosed that since the year 1800 there has been in effect the substance of Section 3585 of the General Code (the same Section which we quoted from the case of *Smith v. Central Power Company*) which provides: 'The map or plat so recorded shall thereupon be a sufficient conveyance to vest in the municipal corporation the fee of the parcel or parcels of land designated or intended for streets, alleys, ways, commons,

or other public uses, to be held in trust to and for the uses and purposes in the instrument set forth and expressed, designated or intended.' ”

The court then held that the fee to county highways is in the abutting owner and overrules *State v. Board of Commissioners* on that point. The court does not refer to the *Smith v. Central Power Company* case, but it affirms the holding in that case by holding that under the platting statute the municipality acquires such a fee in the platted streets as distinguishes the rights of the public in such streets from the rights of the public in a mere county road. The *Hofius* case is, therefore, authority for our contention that under Section 78-5-4 the county is vested with a defeasable fee in the streets shown in the plat of a subdivision in the county, recorded as provided in said section.

### POINT III

EVEN THOUGH THE ABUTTING OWNER OWNS TO THE CENTER OF THE STREET, STILL THE LAYING OF THE WATER MAIN IN THE STREET DOES NOT GIVE HIM A RIGHT TO RECOVER DAMAGES OR TO REQUIRE ITS REMOVAL.

In support of this proposition we cite and rely upon the following authorities.

*Wood v. McGrath*, 150 Pa. 451, 24 A 682, 16 L.R.A. 715. Defendant obtained permission to lay a private drain in a street past the premises of Plaintiff an abutting owner, without his consent. Plaintiff brought suit

for injunction to restrain the use of the drain, complaining that it was a nuisance. The court held for Defendant saying:

“But the least consideration will show that the right of a private abutting owner has nothing to do with the question. It is the extent of the municipal authority to grant the use of the street for a private purpose that is alone in question, and that authority does not depend in any degree upon the \* \* \* abutting owner. \* \* \* The conclusion, both of the master and court below, was based upon the idea that the abutting owner is the owner of the fee of the land occupied by the street, and the laying of a drain pipe under the street without his consent is an invasion of his right as owner of the land. How falacious this proposition is, is at once apparent when it is considered that the right of the public in the streets of cities, boroughs, and towns is far more extensive than the mere right to use the surface of the land for the purpose of passage. \* \* \* It may undoubtedly, either by itself, or by its delegated authority to others, dig up the soil to lay water pipes, gas pipes, sewers, drains, electric wires, telegraph and telephone wires, cables, and doubtless subterranean railways, every one of which uses is in direct and exclusive hostility to the abutting owners’ right in the fee. \* \* \* The streets and alleys of cities, towns, and boroughs are under the control and direction of these municipalities, and they have all the power over them that can lawfully exist. They are the universally recognized channels of communication between the different parts of the municipal territory, and no private interest in, or ownership of, the subsoil is permitted to interfere with the free use of both



the surface and the subsoil by the municipal authorities, or by their delegated substitutes. Any other doctrine would entirely frustrate all beneficial uses of the public streets and alleys of the cities, towns, and boroughs of the commonwealth. It is clear, therefore, that the adjoining owners have no interest in the subsoil of the street which will enable them to demand that their consent must be obtained before any uses of the subsoil of the streets can be made."

*Cleveland v. City of Detroit*, 324 Mich. 527, 37 N. W. 2nd 625. This case involved the right of the city to construct an underground auto parking garage under the boulevard without compensating the abutting owners for such additional use. The court quotes with approval from *Detroit City Railroad v. Mills and Breitmeyer*, 85 Mich. 634, 48 N. W. 1007:

"Whatever may have been the ancient adjudication limiting the rights of the public in the streets to passage and repassage, and whatever now may be the rule with regard to highways in the county, with the growth of population in our city have come increased needs for heating, lighting, drainage, sewage, water, etc., and with these has come also a corresponding extension of the public rights in the streets. Immense sewers and water mains may be dug and the soil removed, culverts and drains constructed, without compensating the abutting owners. It may now be considered the well settled rule that the streets of a city may be used for any purpose which is a necessary public one and the abutting owner will not be entitled to a new compensation in the absence of a statute giving it. So far then as these Defend-



ants are concerned, it is immaterial whether they or the city own the fee in the street. Their rights are the same in either case. So long as they are unobstructed in the use and enjoyment of their property having convenient ingress and egress and the use of the street is an authorized and proper public use, they have no legal cause for complaint."

*Beale v. Town of Takoma Park*, 130 Md. 297, 100 A 379. The court says:

"The use of streets for supplying the inhabitants of a town with water is not an additional servitude, and the adjoining owner, although he holds the fee to the center of the street, is not entitled to compensation as for a new servitude, for it is not such, but only a proper or necessary use incidental to a street in a populace place. Three Dillon on Municipal Corporations (5th Ed.) Section 1212; Three McQuillin on Municipal Corporations, Section 1344. 'The condemnation or dedication of land for use as a street or highway in a city or town, or in close proximity thereto, carries with it the right to use the highway for the laying of gas and water pipes, since that is one of the purposes for which such highways are used, and is within the scope of the easement.'"

*Stout v. Frick*, 62 S. W. 2nd 1057. The court quotes from *Gaus and Sons Mfg. Co. v. St. Louis, K. & M. Ry. Co.*, 113 Mo. 308, 20 S. W. 658, 18 L.R.A. 339 as follows:

"I think it may be safely affirmed that all the authorities to which we have been cited by counsel on both sides of this case agree that when the public acquires a street, it may be applied to all uses consistent with and not subversive of,

the proper uses of a street and not inconsistent with the uses contemplated in the dedication, grant or condemnation; and it is only when the street is subjected to a new servitude, inconsistent with or subversive to its use as a street, that the abutting property owner can complain."

*Gaus & Sons Mfg. Co. v. St. Louis K. & N. Ry. Co.* 113 Mo. 308, 20 S. W. 658, 18 L.R.A. 339. This was an action to enjoin Defendant from laying a double track in Main Street in St. Louis and operating the same along in front of Plaintiff's property. Plaintiff had a mill, sash and door manufacturing plant facing Main Street, the only access to which was over main street to haul in and haul out materials. It was alleged that the double tracks to be laid by Defendant would not leave sufficient space to permit standing wagons to load and unload without danger of collision with Defendant's engines and cars, that the street would be destroyed as a public thoroughfare, and there was danger of fire, and the smoke, noise, and vibration damaged Plaintiff's property. The court said:

"The inquiry to be made is whether the damages thus inflicted are such as are contemplated by Sec. 21, Article 2, of the State Constitution, which ordains that, 'private property shall not be taken or damaged for public use without just compensation.' The question is whether laying the railroad track in the street on grade under municipal authority, and operating the road in the usual manner, was applying the street to a new public use, which requires payment of compensation for damages to the property, or whether

doing so was merely exercising by authority a right which had resided with the public since the dedication of the land to public uses. When land is dedicated generally, and without restrictions, or condemned, for a public street in a town or city, the street, and persons who purchase and improve the property thereon, hold their property rights subject to all the uses to which the street can be lawfully subjected by the public. New uses in the improvement in the mode of travel and transportation are constantly arising. When there is no restriction of the public use, new modes of use may be adopted which are consistent with the proper use of the street, without the consent of abutting owners, though such new uses may interfere somewhat with their own convenient use of the street.

“The public use was fixed when the street was granted or dedicated. The License granted by the city to the Defendant to lay its track upon the streets and run engines and cars thereon in the transportation of passengers and property, was not a re-dedication to a new and distinct public use, but was a mere License to use it in a way contemplated by the owner of the land when he subjected it to such uses. The lots were purchased, held and improved, not only in view of the advantages of the street, but also subject to the burdens of all consistent public uses which the increasing wants of the public might thereafter demand. Plaintiff has shown no ground for injunction.”

*People v. Kewanee Light & Power Co.* 104 N. E. 680, 262 Ill. 255. This was an action filed by the Attorney General on relation of the City of Kewanee and a number of its citizens and real estate owners, seeking to

enjoin Defendant from maintaining various gas mains and pipes now in the streets of the city. The city had granted a franchise to Defendant's predecessor in interest. A statute was enacted prior to the granting of the franchise, providing that the city's right to permit laying of gas mains in streets was subject to the owners of more than one-half the frontage on the street petitioning for such permission. Such petition has not been filed. By its demurrer the Defendant raised the constitutionality of this statute. The court held the statute unconstitutional as being discriminatory between persons installing water pipes and other pipes and gas pipes. The court says:

"The subject of legislation involved in the act under consideration was the power of city councils over the streets. Prior to the passage of the Act the Legislature had given to city councils power to establish streets and regulate their use, and the openings therein, for the laying of gas and water mains and pipes. The City Council might grant the use of the streets, alleys and public grounds of the city for the laying of gas or water mains, or the erection and maintenance of electric wires for lighting, or for telegraphs or telephones, without regard to the consent or wishes of abutting property owners."

*Ober v. City of Minneapolis*, 179 Minn. 495, 229 N.W. 794. Defendant brewing company owned two buildings facing on a public alley and separated by Plaintiff's vacant lot. The brewing company had obtained the right, through an ordinance of the city, to convey heat, light,

steam, and other utilities under the alley, the city to receive five per cent of the gross receipts. The brewing company did not put in pipes but made a tunnel under the alley to connect the two buildings and put in a conveyor to convey bottles from one building to the other. At the time Plaintiff brought this action to recover possession of the tunnel in front of her property the brewing company had ceased to use the tunnel. The court held for Defendant brewing company and city, saying:

“The ordinance on its face amounts to no more than a license to subject the subsurface of the alley to the ordinary street uses. Conduits for light, heat, and power, like sewers and water pipes, are now generally placed under the surface of public streets and are not considered as imposing additional servitude or burdens on the fee than those intended by the dedication. The public easement is not confined to the mere surface of the land dedicated as an alley or street. Appellant truly says: ‘Water mains, sewers, gas pipes, play their part as an auxiliary to the one time wagon supplying those needs; and the use of such for public service are embedded as closely to the surface as reasonably practicable. \* \* \* Use varies with form. The essence of travel in locomotion.’ But we cannot agree to this claim or conclusion: ‘Manifold as to mode, manner and method is its use; fixedly unalterable is its place—the highway, upon and not under or above it.’ *Cater v. Northwestern Telephone Exch. Co.*, 60 Minn. 539, 63 N. W. 111, 28 L.R.A. 310, 51 Am. St. Rep. 543, supports the first statement quoted, but rejects the last, and so does *Coburn v. New Telephone Co.*, 156 Ind. 90, 59 N. E. 324, 52 L.R.A. 671; *Pea-*



body v. Boston, 220 Mass. 376, 107 N. E. 952, L. R. A. 1915F, 1005; McQuillin, Municipal Corporations (2d Ed.) Sec. 1448, and authorities there cited.”

While it is true the cases cited above involve city streets, we wish to reiterate that under Section 78-5-4, the rights held by the public in the streets dedicated by the filing of the plat of a subdivision are identical whether the street is in a city or in a county outside an incorporated city or town. The statute says the fee shall vest in the county, city or town for the public uses named or intended. The title and rights of the county in the streets are precisely the same as the title and rights of the city in the streets. We feel, therefore, that the authorities cited, though they involve city streets, are pertinent and controlling.

## CONCLUSION

When the subdivisions herein involved were platted and the plat filed of record, the owners passed the fee to the streets to the county for all public uses. So far as this case is concerned, the public uses are defined by statutory provisions, that is to say, the legislature has said that “water mains, sewers and sewer pipes may be laid” in the highways, by permission of the county commissioners. In a limited sense that was a legislative declaration of what the courts had already decided—that



the uses to which highways may be put must be allowed to expand as the demands and needs of the public require.

The Plaintiff in this case has no vested right to put water or gas mains in these two streets. He too must secure the consent of the county commissioners to install such facilities. He stands in the same position as the Defendant City. He simply owns certain lots of specified dimensions, length and width, which dimensions do not include any part of the street. He acquired these lots by lot number. The statute requires that the plat must show the exact dimensions of each lot. His use of the street as an abutting owner or as a member of the public is in no wise interfered with, as the water main, under the statute, must be buried deep enough to keep the roadway secure.

When the owner of land creates a street in a platted subdivision, he knows he is giving the county the streets that are therein shown and that such streets can be used for any purpose authorized by law. He accepts that result and, presumably, accepts it on the theory that the benefits accruing from the subdividing will afford full compensation. To permit him, or his successor in interest, to prevent a lawful use of the street, except upon

penalty of paying compensation, is to unjustly enrich him at the expense of the public. We respectfully submit that the judgment of the lower court is correct and should be affirmed.

Respectfully submitted,

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.....copies received this..... day of May, 1951.

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