

1951

# Milan Boskovich and Frieda M. Boskovich v. Midvale City Corporation et al : Brief of Appellant

Utah Supreme Court

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Pugsley, Hayes & Rampton; Attorneys for Defendants and Appellants;

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## Recommended Citation

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Case No. 7756

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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MILAN BOSKOVICH and FRIEDA  
M. BOSKOVICH,

*Plaintiffs and Appellants,*

-VS-

MIDVALE CITY CORPORATION,  
BOARD OF EDUCATION OF  
THE JORDAN SCHOOL DIS-  
TRICT, and F. A. ORTON, REX  
J. TRIPP, ORLON NEWBOLD,  
WENDELL VAWDREY, and DR.  
J. C. JONES, as members of said  
Board of Education,

*Defendants and Respondents.*

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BRIEF OF APPELLANT

**FILED**

DEC 6 - 1951

PUGSLEY, HAYES & RAMPTON

Attorneys for Defendants  
and Appellants  
Clerk, Supreme Court, Utah

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MILAN BOSKOVICH and FRIEDA  
M. BOSKOVICH,  
*Plaintiffs and Appellants,*

-vs-

MIDVALE CITY CORPORATION,  
BOARD OF EDUCATION OF  
THE JORDAN SCHOOL DISTRICT, and F. A. ORTON, REX  
J. TRIPP, ORLON NEWBOLD,  
WENDELL VAWDREY, and DR.  
J. C. JONES, as members of said  
Board of Education,  
*Defendants and Respondents.*

Case No.  
7756

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BRIEF OF APPELLANT

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STATEMENT OF FACTS

The parties hereto have stipulated as to the facts at issue herein, the stipulation therein being made a part of the record on appeal which is as follows, being pages 18 to 22 of the record:

1. That the plaintiffs are husband and wife and are residents and tax payers of Midvale City, Salt Lake

County, Utah, which said City is within the Jordan School District.

2. That the plaintiffs are the owners of Lots 11, 12, 13, 14, 15, 16 and 18 of Eastvale Addition in Midvale City, Utah; that they acquired title to the said lots at the times and in the manner shown in the abstract of title and tax deed which is filed herewith as plaintiffs' Exhibit "A", and have been in possession of said lots since their acquisition.

3. That adjacent to the said property on the west side thereof is a street known as "Jordan Avenue" which runs from Park Street at the north end a distance of approximately 287 feet south to a 12 foot alleyway. That Park Street is a 51 foot street running from the north terminus of Jordan Avenue easterly to and across Jefferson Street, a 50 foot improved street running north and south parallel with Jordan Avenue, and the said 12 foot alleyway runs from the south terminus of Jordan Avenue east to the west line of Jefferson Street.

4. That these said streets and said alleyway are part of the dedicated public right-of-way as shown by the plat filed with the Salt Lake County Recorder in May of 1917 creating said subdivision, and were dedicated by the owners thereof for the perpetual use of the public.

5. That under date of September 21, 1950, the Midvale City Council passed an Ordinance (R. 22) declaring the part of Jordan Avenue from a point opposite

the south line of Lot 11 to the south end thereof, and the said alley from a point due south of the east line of Lot 11 to the west end thereof, to be abandoned and vacated, a copy of which said Ordinance is filed herewith.

6. That Jordan School District is the owner of property abutting the portion of Jordan Avenue and the portion of the said 12-foot alleyway declared by the said Ordinance to be abandoned on both sides thereof, and by reason of the ownership of the said abutting property now declares and contends that it is the owner of the portion of the said street and alleyway so abandoned, and that it intends to fence off and close the said Jordan Avenue and 12-foot alleyway along the lines designated in the ordinance of abandonment.

7. That neither of the plaintiffs petitioned for, were notified of or consented to the adoption of such ordinance, or to the vacating of said alleyway or Jordan Avenue.

8. That no petition has ever been made in writing by anyone to Midvale City or the Council thereof for vacating either the alleyway or Jordan Avenue, or any parts thereof.

9. That the alleyway and Jordan Avenue have not been improved as streets; that a water line, which is a part of Midvale City's water system, runs from Jefferson Street west along Park Street to Jordan Avenue, thence south on Jordan Avenue to about the center of the plaintiff's property, thence west to and

along the entire length of another street designated as "Second Avenue", lying west of the said property and connected with the principal Midvale City water system.

10. That the entire property owned by the plaintiffs which abuts Jordan Avenue is occupied by chicken coops and fenced runs in between and connected with the said chicken coops.

11. That the plaintiffs have used Jordan Avenue as a means of access to the west end of their property, particularly as a means of access to the property for delivery of feed to the chicken coops there upon.

12. That all of the property abutting Jordan Avenue on the west for the entire length thereof, and running west from the west line of Jordan Avenue approximately 400 feet and south from the north end of Jordan Avenue approximately 1600 feet, is owned by Jordan School District and is, and for many years next preceding the commencement of this action has been used as a school ground in connection with and as a part of the Midvale combined elementary and junior high schools.

13. That none of the streets or alleys mentioned herein has been obstructed to the date hereof so as to prevent persons or vehicles from travelling thereupon; that the said streets and also the open school grounds adjacent to the said streets bear the marks of automobile wheels.

14. That the said property is zoned for residential





#### IV.

THAT THE BOARD OF EDUCATION HAS NO RIGHT TO ERECT A FENCE ACROSS THE SAID JEFFERSON STREET AND ALLEY.

#### V.

THAT THE JUDGMENT IS CONTRARY TO LAW.

### ARGUMENT

#### I.

THE UTAH STATUTE CHAPTER 5 OF TITLE 78 PROVIDES THE ONLY METHOD FOR ABANDONMENT OF A RIGHT OF WAY CREATED AS PART OF A SUBDIVISION.

#### II.

THAT THE MIDVALE CITY CORPORATION WAS WITHOUT AUTHORITY TO ABANDON OR VACATE THE PORTION OF THE JORDAN AVENUE AND ALLEY.

Let us direct your attention first to the Plat which has been prepared by Caldwell, Richards and Sorensen under date of April 26, 1951, showing the location of Block 3, Eastvale Addition Subdivision. The portion outlined in red is the section that they desire to vacate. The portion outlined in yellow is the property owned and occupied by Mr. and Mrs. Boskovich. The abstracts of title which are filed herewith for examination show the ownership interest of Mr. and Mrs. Boskovich in and to this property.

As shown by the Abstracts and by paragraph 4 of the Stipulation of Facts, the streets being Jordan Avenue, Park Street and Jefferson Street which abut upon the Boskovich property as well as the alleyway running between Jordan Avenue and Jefferson Street which is sought to be vacated, were all dedicated to the public as rights-of-way as shown by the subdivider's

plat filed with the Salt Lake County Recorder in May of 1917. The dedication thereof by the owner was for the "perpetual use of the public."

It seems to be admitted by the pleadings as well as by the facts before the Court that the only basis upon which either Midvale City or the Board of Education of Jordan School District assert an abandonment and vacation of the portion of Jordan Avenue and the alleyway, is that the same was abandoned and vacated by ordinance adopted by the Midvale City Council under date of September 21, 1950, said Ordinance having been adopted without any prior notice by any publication and without any notice to or consent by plaintiffs herein as abutting property owners.

Our law relating to the creation of plats and subdivisions is set out specifically in Chapter 5 of Title 78, Utah Code Annotated, 1943. It is to be observed that the same statutory provisions were in force in 1917 at the time that this Eastvale Addition was filed as a Subdivision here in Salt Lake County. Section 78-5-4 provides that the dedication of such streets, alleys and public places shall vest the fee in such county, city or town for the public *for the uses therein named or intended, to-wit:*

"Such maps and plats, when made, acknowledged, filed and recorded, shall operate as a dedication 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 subdivision having been established in pursuance of statutory authority and filed with the county recorder to comply with that, we assert that the only method by which such subdivision may be altered is in pursuance in of the same statutory authority. We wish to direct the court's attention at this time particularly to Section 78-5-6, 78-5-7 and 78-5-8.

78-5-6 "Any owner of land that has been laid out and platted as hereinbefore provided may, upon application to the governing body of the city or town, or to the board of county commissioners of any county, wherein said land is situated, have such plat, or any portion thereof, or any street or alley therein contained, vacated, altered or changed as hereinafter provided."

78-5-7 "If it is desired to vacate a portion only, or the entire plat, application in writing, signed by all the owners of the land contained in the entire plat and the owners of the land contiguous or adjacent to any street or alley therein to vacate or alter which application is made, shall be made to the governing body of the city or town wherein such land is situated, if the land is situated in an incorporated city or town; in all other cases the application shall be made to the board of commissioners of the county wherein it is situated."

78-5-8 "The city or town governing body or board of county commissioners shall at its next regular meeting after the filing of such application consider the same, and, if satisfied that neither the public nor any person will be materially injured thereby, it shall order such portion or the entire plat to be vacated as prayed for in the petition, which order shall be recorded

in the office of the recorder of the county wherein such land is situated.”

Let us see whether or not the requisites of the statute have been complied with in this case by either the Board of Education or the Midvale City Council. There was no application in writing made to the council or Mayor for the vacating of this portion of the subdivision, and there being no petition or application in writing for that purpose, obviously it was not signed by *all owners* of the land contiguous or adjacent to any street or alley therein to be vacated.

We are here faced with a program whereby the School Board has for their own reasons decided to amplify the size of the playgrounds and arbitrarily elected to take over the Jordan Avenue and the alleyway as part of such playground. It is only recently that the Board of Education of the Jordan School District acquired the portion of Lots 1 to 10 that are referred to on the plat. The balance of the Midvale school grounds that has been used for many years as a substantial playground for the boys and girls is shown directly to the west of the lots in question and to the north of the school building designated upon the plat.

The so-called ordinance vacating a part of a street, a copy of which is filed connected to the plat herein, had absolutely no legal effect as the same was not had in pursuance of the authority provided by Sec. 78-5-8 wherein the city or town governing body or board “after the filing of such application” may if satis-

fied make an order that a portion or all of the plat be vacated as prayed for in the petition. The absolute condition precedent to such an order is the filing of the application and the consideration of the same. Such has not been done nor accomplished in this matter.

In proceeding with this brief, we are aware of the provisions of Section 15-8-8 relating to the powers in a general way of cities and towns. This general power statute gives to cities and towns the right to lay out, establish, open, alter, etc. streets, alleys, avenues, boulevards, "and may vacate the same or parts thereof, by ordinance."

In dealing with this statute our Supreme Court in the case of *Tooele City v. Elkington*, 100 Ut. 485, 116 Pac. (2d) 406 held that where the city quit-claimed an alley to a private party but such was for only a nominal consideration that there could be no estoppel in pais as against the city's right where the action of the city in attempting to so convey the property was in contravention of the statutes. At page 408 it was stated "the powers of municipal corporations are delegated and a municipal corporation may exercise only the powers granted and in the manner prescribed." The court then proceeded to outline the history of this section 15-8-8 showing that substantially the same provisions were contained in the statute of 1888. We would like to refer the court to this decision as it rather carefully considers the law and also cites and considers the case of *Wall v. Salt Lake City*, 50 Ut. 593, 168 Pac. 766.

A more recent case decided by our Court is that of *Hall v. North Ogden City*, 166 Pac. 2(d) 221 and the judgment was set aside on re-hearing 175 Pac. (2d) 703. In the first case at page 225, the court reviewed the decision in *Tooele City v. Elkington* stating that the officials of the municipality themselves could not convey the title without compliance with the statutes. It is necessary to find statutory authority for divesting a municipality or the public official holding title to the streets in trust for the town of such title to the streets, in order for the appellants to prevail in that case. "Any abandonment or vacation of the land for street purposes, to discharge it of the public trust, would have to be in the manner provided by statute." The subsequent reversal of the decision in this case was not upon the law and was not in any manner at variance with the law as stated above but was upon a review of the evidentiary status of the case.

The decision in the *Tooele City v. Elkington* and the *Hall v. North Ogden City* cases were considered and affirmed with approval in the federal case of *Provo City v. Denver & Rio Grande Western Railroad Company*, 156 Fed. (2d) 710. Therein they held that the Provo City Counsel having failed to pass a proper ordinance for the vacating of a street, notwithstanding an agreement with the railroad which was relied upon by the railroad, could not be stopped from reopening the street that had been closed by the railroad in reliance upon the agreement. This case was taken to the United States Supreme Court but certiorari was denied. They affirmed

in this Provo City case the rule that the basis of authority for the vacating of a street is the statutory right given by the Utah Legislature or no authority for vacating can exist.

We earnestly urge that the matter now before this court must be weighed upon which of the statutes is applicable where there is vacating of a dedicated subdivision street. The defendants assert that the adoption of the ordinance was in pursuance of the general power given by Section 15-8-8. Therein the city or town is authorized to lay out and establish streets and alleys and "may vacate the same or parts thereof by ordinance." Chapter 5 of Title 78 deals with the plats and subdivisions and sets up the procedure for the vacating or changing of the plat. The subdivision and the streets and alleyways now before this court were not laid out or established by the town of Midvale or the City of Midvale, but the same were laid out and established and set forth in the plat of Eastvale Addition by the Russon Investment Company acting through the President and Secretary by dedication, acknowledged May 2, 1917. The streets and alleyways together with the occupying areas between the same have been established and in constant use since that time and there is no power granted to the city with reference to these *except* as set out in Sec. 78-5-6, 78-5-7 and 78-5-8 referred to above.

This creation of the street by an individual with the proviso that such shall be for the perpetual use of the public places the streets and alleyways now before



us in an entirely different category than those referred to in Section 15-8-8 under the general power wherein the street or the alleyway itself is established by the city. The private rights of the owners of the property in the subdivision must be considered and to permit the city in such an arbitrary manner as has been exercised here to deprive these owners of their property rights in and to the streets and alleyways is taking property without due process of law contrary to both the Constitution of the State of Utah and of the Constitution of the United States.

The basic rules of statutory construction, that full meaning should be given to all parts of a statute and that *expressio unius exclusio alterius*, apply here. The Jordan Avenue and alleyway came into existence only by voluntary dedication by the owner of the land while creating a subdivision. That statute under which the right of way was conceived and born also provides for its extinction. By such provision it excludes all other methods of abandonment, "Any owner of land that has been laid out" may apply to the board of commissioners to have a street or alley therein contained vacated, altered or changed, (78-5-6 U.C.A. 1943).

The legislature then in particularity provided the steps essential to such a petition and the obligation of the public board to which the petition is addressed. One establishing a subdivision and one purchasing realty therein could do so knowing that the statutes had established a procedure by which his streets would not be taken unless all of the owners of "land contiguous or



adjacent to any street or alley therein'' had first petitioned for the same. Other statutes may apply to other streets, road and highways, but not to the subdivision's dedicated streets and alleys.

We strongly urge that the said statutory procedure is mandatory and exclusive:

*San Diego County v. Calif. Water & Telephone Co.*, 186 Pac. (2d) 124. This is a decision by the Supreme Court of California wherein the abandonment of a highway was under consideration. The issue was raised was as to the right of the County to enjoin the defendant public utility from construction of a dam that when completed and full would flood a portion of a county highway. The defendant utility claimed that the highway had been abandoned through non-user and that a new permanent road has superceded the road in question.

*Page 128* "The cases are apparently uniform to the effect that, if the Legislature has provided a method by which a county or city may abandon or vacate roads, that method is exclusive. See *People v. County of Marin*, 103 Cal. 223, 226, 35 P. 203, 26 L.R.A. 659; *Hensley v. Lewis*, 278 Ky. 510, 128 S. W. 2d 917, 920, 921, 123 A.L.R. 537; *McHenry v. Foutty*, Ind. Sup., 60 N. E. 2d 781, 782, 158 A.L.R. 537; *Hillsdale v. Zorn*, 187 Okl. 38, 100 P. 2d 436, 438. An analogous line of decisions holds that a municipality must follow that statutory procedure prescribed for the sale of public property, and an attempt to dispose of the property by contract will not be enforced. *Cimpher v. City of Oakland*, 162 Cal. 87, 121 P. 374; *Hughes v. City of Torrance*, Cal. App., 175 P. 2d 290; *City of Pasadena v. Estrin*,

212 Cal. 231, 235, 298 P. 14; San Francisco & O. R. R. Co. v. Oakland, 43 Cal. 502; Grogan v. San Francisco, 18 Cal. 590, 608-612; see 3 McQuillin, Municipal Corporations (2d Ed., 1943), Sections 1243, 1249."

A similar rule is found in the rather recent case from the Supreme Court of Oklahoma, *Town of Chouteau et al. v. Blankenship et al.* 152 Pac. (2) 379, page 382:

"The burden of showing that a street or highway laid out according to law or created by dedication has been discontinued, vacated or abandoned is on the one so claiming. McQuillin, Municipal Corporations, 2nd Ed. Revised, Section 1534.4; Elliott, Roads and Streets, 3rd Ed., p. 749, Section 1173; 39 C.J.S., Highways, Section 131, p. 1066; 29 C.J. 534; 13 R.C.L. 62.

"Where the statutes prescribe the procedure to be followed in vacating a highway, street or alley, the statutory method is exclusive and must be substantially complied with. 25 Am. Jur. 409; 39 C.J.S., Highways, Section 117, p. 1053; 13 R.C.L. 62-63; Elliott, Roads and Streets, 3rd Ed., Sections 1184, 1185; McQuillin, Municipal Corporations, 2d Ed. Revised, Section 1529."

25 Am. Jur. 419 — Sec. 121, *Methods and Procedure.*

"Subject to constitutional limitations, the vacation of a highway may be effected by a direct act of the legislature, or the legislature may ratify an agreement by a subordinate governmental agency whereby a street is vacated subject to the condition that it may be reopened when needed. Where the power is not thus exercised directly by the legislature, the procedure prescribed by statute must be followed. The various statutes

vacation of the streets and alleys is intrusted to the property owners. It is provided in the ordinance that the property owners may, by a majority vote, make such vacation. Provision is also made for the adoption of a preliminary resolution declaring the necessity for the vacation. The approval of the electors or a petition or consent by the property owners is sometimes made a condition precedent to vacation. (See, for example, Ordinance No. 10,000, City of Chicago, Ill., 1900.)

The nature of the rights acquired by the purchaser of a lot in a subdivision is largely contractual. The owner who created the subdivision owes to the lot purchaser a duty to maintain the streets and alleys in a condition suitable for travel. This duty is a part of the contract between the owner and the purchaser. The owner who created the subdivision is bound to maintain the streets and alleys in a condition suitable for travel. This duty is a part of the contract between the owner and the purchaser.

The nature of the rights acquired by the purchaser of a lot in a subdivision is largely contractual. The owner who created the subdivision owes to the lot purchaser a duty to maintain the streets and alleys in a condition suitable for travel. This duty is a part of the contract between the owner and the purchaser. The owner who created the subdivision is bound to maintain the streets and alleys in a condition suitable for travel. This duty is a part of the contract between the owner and the purchaser.

The streets and alleyways, though not described in detail in the conveyances to Mr. and Mrs. Boskovich, went with the conveyances. An ownership interest passed to them as an appurtenance to the designated lots purchased. In *George v. George*, 263 Pac. 485, 131 Utah 445, this court was required to determine the boundary of Lot 1, Block 23, Lakeview Add., in Ogden, Utah. Plaintiff, by mesne conveyance, had obtained title to Lot 1, a triangular tract abutting upon an alley to the east as shown by the plat on file with the Recorder.

“It is well settled law that where, as here land is conveyed and described with reference to a map or plat, such map or plat is regarded as incorporated in the deed . . . . It will thus be seen that the extent and location of the lots and alley involved in this suit must be determined from the plat of the Lakeview addition to Ogden City . . . . The public or private character of the alley is not involved in this proceeding, except as it may have had a bearing upon the plaintiffs claim of adverse possession, and regardless of any right the public may or may not have in the alley, *it is clear that the alley is appurtenant to the lots and fractions of lots abutting thereon.*” (emphasis ours)

The ownership interest being present in the alley and Jordan Ave. in Mr. and Mrs. Boskovich they may not be deprived thereof without due process of law. The constitutional guarantees need not be quoted on so fundamental a matter. Sec. 15-8-8 provides no protection for one situated like the appellants. All that the general public acquired by the dedication of the streets and alleys in a subdivision is an easement to pass over the same, but owners of land abutting the street and alley have an appurtenant ownership interest therein.

The statutory procedure for establishing such contains a procedure for releasing the street and alley from the easement and vesting title, not back in the original owner, but in the then abutting property owners. To permit the City of Midvale to put in force such a reversion without the consent of the owners of the appurtenant interest is taking property without due process. Perhaps by condemnation, if a proper public need

is proven, this can be taken, but to appropriate it away from appellants is unconstitutional.

#### IV.

THAT THE BOARD OF EDUCATION HAS NO RIGHT TO ERECT A FENCE ACROSS THE SAID JEFFERSON STREET AND ALLEY.

#### V.

THAT THE JUDGMENT IS CONTRARY TO LAW.

The basic premise that the city has not the authority to abandon Jordan Ave. or the alley without the written consent of all abutting property owners applies to the Board of Education's rights. The Board's ownership of and right to close off parts of the street is predicated upon an abandonment or vacating by Midvale City.

Inasmuch as the Board of Education can have no ownership interest in the street and alley, except that of an appurtenance to the realty which they own and a right of way thereon, they have no authority or right to erect a fence across the same, thereby barring the plaintiffs and others from free ingress and egress over the said street and alley. It is admitted that the Board of Education has no deed to the area of the street and alley and any attempt on their part to cross off the same would constitute a breach of plaintiffs' rights as abutting property owners and as members of the public.

In consequence of the matters discussed above, appellants contend that the judgment of the District Court is contrary to law and that this Court upon re-



view of the matters should reverse the order of the District Court and enjoin the closing of the said street and alley. We submit that the failure of the Court to protect the interest of the plaintiffs and appellants herein leaves them in a position where not only the marketable value of their property can be destroyed through the closing of the street and alley, but also that their normal access to and from the property is seriously hampered if the fence is erected as proposed.

Respectfully submitted,

PUGSLEY, HAYES & RAMPTON,  
By HARRY D. PUGSLEY,  
*Attorneys for Plaintiff and Appellant.*