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

Utah Supreme Court

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In the Supreme Court of the State of Utah

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. O. JONES,
as members of said Board of Edu-
cation,

Defendants and Respondents.

FILED

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Clerk, Supreme Court, Utah

Case No. 7756

BRIEF OF RESPONDENTS

BEN G. BAGLEY and
GRANT MACFARLANE,

*Attorneys for Defendants and
Respondents*

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Case No. 7756

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

This case was submitted to the District Court and is here on appeal on an agreed Statement of Facts, which is contained in the record on appeal, and which has been stated in the appellants' brief. Accordingly, there are no issues of fact.

ANSWERS TO POINTS
STATED IN BEHALF OF APPELLANTS

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.

We wish to here direct the attention of the court to the fact, as shown by the statement of fact and the plat prepared by Caldwell, Richards and Sorenson, that the part of a street and alley which has been vacated by Midvale City does not directly abut upon the property of the appellants' and the further fact that appellants have all of the frontage upon Jordan Avenue which they had prior to the passage of the ordinance of abandonment, and that their most convenient and most generally used means of access to the principal system of streets in Midvale City remains unimpaired. It is contended by the appellants that Midvale City was without authority to abandon or vacate that portion of Jordan Avenue and an unnamed alley which is shown to have been vacated, by reason of the fact that the provisions of Chapter 5 of Title 78, Utah Code Annotated, 1943, provide the only method for abandonment of a right of way created as a part of a sub-

division. This contention is not supported by the language or context of the statute itself, by the force of the appellants' argument, or by the cases and authorities cited in appellants' brief.

Section 78-5-6, Utah Code Annotated, 1943, provides "that *any owner of land* that has been laid out and platted, as heretofore 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." (Emphasis ours.)

Section 78-5-7 and Section 78-5-8 are as follows:

"78-5-7. Id. Petition for.

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." (Emphasis ours.)

"78-5-8. Id. Order of.

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 por-*

tion 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." (Emphasis ours.)

It is earnestly contended by appellants that these provisions of law are exclusive and mandatory and provide the only means by which streets created as a part of a subdivision may be abandoned. A search of the language of these sections fails to disclose any word, phrase or other indication that they were so intended by the legislature. On the contrary, the language of these sections is clearly permissive and provides a means by which abandonment of streets created as a part of a subdivision may be initiated by the owners of property in the subdivision rather than by legislative action of the governing body having jurisdiction over the property in question. It is clearly shown and can be freely admitted here that the provisions of Chapter 5, Title 78, were not complied with. There is nothing in the quoted sections to indicate that the intent thereof is to set up a procedure for cities, towns, counties or other municipal governments to follow.

There are instances in our law where interested persons are permitted to institute proceedings requiring only legal sanction by designated authorities to achieve an ultimate result which would be the same as though the proceedings had been instituted by the governmental agency itself. As an example of this, we cite Sections 78-5-1 to 78-5-4, Utah Code Annotated, 1943, inclusive. These sections provide a means by which owners of property may, if they so desire, lay out and plat such property into blocks, lots, streets, alleys and public places,

submit the plat prepared and certified as in the statute provided, to the proper governing body, and upon approval, record the same in the office of the Recorder of the county wherein the property is situated. Section 78-5-4 provides as follows:

“78-5-4. Id. Operate as Dedication of Streets, etc.

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 reasoning of the appellants would lead to the conclusion that the legislation permitting owners of property to plat the same into streets and other public places acts as a limitation upon the authority of cities and towns to lay out and establish streets.

Another example is contained in the provisions of Section 25-10-21 to 25-10-25, both inclusive, Utah Code Annotated, 1943, which provide that the voters of a city or town may initiate legislation. The reasoning of the appellants would lead to the conclusion that the provisions for direct legislation constitute a limitation upon the legislative authority of the governing body of a city or town. This conclusion is, of course, not warranted in the examples cited, and by the same token is not warranted in the instant case.

The authority of cities relative to streets is set out clearly and without ambiguity in Section 15-8-8, Utah Code Annotated, 1943, which provides as follows:

"15-8-8. Streets, Parks, Airports.

They may lay out, establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks, airports and public grounds, and may vacate the same or parts thereof by ordinance."

There is no conflict between the provisions of this section and those of Chapter 5, Title 78. Section 15-8-8 is contained in the chapter and title relating to cities and towns and definitely prescribes their powers, duties and limitations. The power is given to lay out, establish, open, alter, etc., streets, alleys, avenues, boulevards and to "vacate the same or parts thereof by ordinance." It would seem that if the legislature had intended any limitation upon this power, it would be clearly stated. It is not contended by the appellants that the street and alley which are the subject of this case are not streets and alleys within the meaning of the sections quoted. On the contrary, it is admitted, as a fact, that we are here dealing with a public street and a public alley. Title 78 deals entirely with real estate and with the rights, powers and obligations of individual persons with respect to real estate. Chapter 5 of Title 78, according to its language and context, deals only with the general subject of the chapter, which is methods by which individuals may deal with real estate. Certainly it would be taking Chapter 5 of Title 78 entirely out of context to construe it as a limitation upon the powers of cities and towns. The rules of statutory construction cited in appellants' brief support the respondents' position herein.

It is contended also by the appellants that the creation of a street by an individual places the street in a different cate-

gory than those referred to in Section 15-8-8. We believe that no such distinction exists. Section 78-5-3 provides that a person desiring to subdivide property shall prepare a plat and that the plat shall be approved by the governing body of the city or town wherein the property is located. Section 78-5-4 provides that such plat, when so accepted and recorded "shall vest the fee of such parcels of land * * * in such * * * city or town for the public uses therein named or intended." In the present case, the street and alley in question were platted as a part of a subdivision and became streets by reason of the dedication as such by the owners of the underlying property and by reason of the acceptance by Midvale City on behalf of the public. It is conceded that streets may be laid out, established and created in cities by other means—for example, many of our streets have been acquired by a direct conveyance of property for street purposes, by condemnation for street purposes or simply by use over a long period of time for such purposes. In each of these cases, the property interest in the street is acquired by the governing body on behalf of the public, and its use is expressly limited to the purpose for which it is created. No differentiation is made as to the rights, duties and liabilities of the governing body with respect to streets acquired by dedication as a part of a subdivision or by some other means. All such streets are treated the same in law and in fact insofar as the city's rights and obligations to maintain the same, to improve the same and assess the cost of improvements to the butting property owners; to prevent obstructions and nuisances thereupon and to exercise general governmental control thereover are concerned.

We have many instances in our state where property was deeded to the Mayor of a townsite for the purpose of platting and subdividing the same into lots, blocks, and streets and selling the lots so platted to individuals. We can see no distinction between a situation where the Mayor of a townsite acquires the legal title to a parcel of land, plats it, sells lots to individuals and dedicates portions of such property to the use of the public, as represented by the municipal government, for streets and other public purposes, and the situation here where Russon Investment Company acquires a tract of land, plats it into lots, blocks and streets, dedicates the portion designated for streets to the public, as represented by the municipal government, and sells the lots to individuals. Regardless of how a street or public area is created or dedicated, the rights of the public are exactly the same, and these rights are represented by the governing body having jurisdiction over the area. These rights, including the authority to vacate streets and the manner in which this authority is to be exercised, as clearly and concisely set forth in Section 15-8-8, *supra*.

In the case of *Tooele City v. Elkington*, 100 Ut., 485; 116 Pac. (2d), 406, cited in appellants' brief, the situation was the converse of that here presented. In that case, property had been platted by the Mayor into lots, blocks and streets, and lots had been sold to the defendant's predecessors in interest abutting a platted right of way designated as an alley. Within a relatively short time prior to the commencement of the action, Tooele City had made a quit claim deed for a nominal consideration conveying to the defendant all of the right, title and interest of the city in and to the alley abutting the defendant's property. In the action the city sought to set aside the

quit-claim deed and quiet title in the city to the property described therein. The court held that the quit-claim deed was not effective because the provisions of Section 15-8-8, Utah Code Annotated, had not been complied with. In making a rather exhaustive comment on the provisions of Section 15-8-8, the court points out that it is there provided that cities may vacate streets by ordinance, and that the giving of a quit-claim deed without an ordinance of abandonment does not comply with the provisions of that section. The question of estoppel is also discussed, and the case of *Wall vs. Salt Lake City*, 50 Ut., 593; 168 Pac., 766, is cited. In the case of *Wall v. Salt Lake City* it was found by the court that Salt Lake City had abandoned a part of the street by estoppel. Also cited in *Tooele City v. Elkington* is the case of *Houghton v. Barton*, 49 Ut., 611; 165 Pac., 471, wherein it is also held that the city had abandoned a part of a street by estoppel. In the case of *Tooele City v. Elkington*, the Court held that there was no estoppel in pais against the city because the time element was short and the consideration paid the city for a quit-claim deed was small. There is no support for the position taken by the appellants in the case of *Tooele City v. Elkington*, and as pointed out, it is distinguishable from the present case on the facts. However, it is interesting to note that, contrary to the contention of the appellants herein that the provisions of Title 78, Chapter 5, Utah Code Annotated are mandatory and exclusive, the court, in *Tooele City v. Elkington*, points out the two other methods by which streets may be abandoned. In the first place the court indicates rather clearly that its ruling would have been otherwise had the provisions of Section 15-8-8 been complied with by the passage of an ordinance,

and in the second place, it is pointed out that under different circumstances the court would have held that the city had abandoned the street by estoppel.

The case of *Hall v. North Ogden City*, 166 Pac. (2d), 221, is also a case where the city is seeking the right to open a street and is resisted in its effort to do so by abutting property owners who claim the area included within the street is their individual property. In this case, the property had been deeded to the Probate Judge under the provisions of the Territorial Townsite Act, in trust, for the purpose of platting the same into lots, blocks and streets "for the several use and benefit of the occupants thereof according to their interests." Later, the town of North Ogden was incorporated, and after a lapse of some time, attempted to open a street over an area which had been platted by the Probate Judge for that purpose, and which had been dedicated by the Probate Judge for the use of the public. Meanwhile, before and after the incorporation of the town of North Ogden, the various owners of property abutting the property platted as a street, had occupied and used this property in connection with their own properties for residential purposes. It was held in this case that the city had the right to open the street, notwithstanding the objection of the abutting property owners, but on rehearing in the case of *Hall v. North Ogden City*, 175 Pac. (2d), 703, the court reversed its previous ruling and held that under the language of the applicable statute, the abutting property owners had occupied the property platted as a street, and therefore were the beneficiaries of the trust. This points out still a third manner in which a street can be, and has been, abandon-

ed without reference to the provisions of Title 78, Chapter 5, Utah Code Annotated, 1943.

The case of *Sowadzki v. Salt Lake County*, 36 Ut., 127; 104 Pac., 117, is directly in point. There the owners of property in Salt Lake County had subdivided it and platted it into lots and streets under the provisions of a statute which was similar, if not identical, to the provisions of Title 78, Chapter 5. After the filing of the subdivision, the street remained unopened and unimproved for many years, and Section 1116, Compiled Laws of Utah, 1907, provided that "a road not used or worked for a period of five years ceases to be a highway." In that case, against the contention that the street had been abandoned, it was contended that the owners of property in a subdivision had some private rights in streets created as a part of a subdivision which distinguished such streets as to method of abandonment from streets created by other means. The court there held that the general statute relative to abandonment of streets applied to streets created as a part of a subdivision in precisely the same manner as those created by other methods. The case of *Tuttle v. Sowadzki*, 41 Ut., 501, 126 Pac. 959, arose out of the same situation as the previous case of *Sowadzki v. Salt Lake County*. At page 514 of 41 Utah, the court makes the following observation:

"Nothing is better settled in this country than that a public street or highway may be vacated against the wish of the abutting owners, provided just compensation is made to such owners. When no private rights exist in the highway sought to be vacated, such vacation may be made as a matter of course. (*West Chicago, etc. v. McMullen*, 134 Ill. 178, 25 N. E. 676, 10 L.R.A.

215). If the owner's property may be taken against his will, so may his easements constituting property rights be destroyed if just compensation be made therefor. In order to be entitled to compensation in case a public highway is vacated, the claimant must show a special interest in the highway."

It is noted that in the latter quotation, the court raises the question of damages. It is well settled by several cases in the State of Utah that no damages can be awarded where the street to be abandoned does not abut the property of the claimant, unless the damage of the claimant is different, not in degree but in kind, from that of the general public. A case particularly in point and one which supports the position of the respondents in this action, is *Robinette v. Price*, 74 Ut., 512, 280 Pac., 736. See also annotation at 49 A.L.R., 330, and 93 A.L.R., 639.

The appellants cite numerous cases to the effect that where cities are authorized by law to abandon streets and the method of abandonment is prescribed by statute, the statutory method so prescribed must be strictly complied with. This is fundamental in municipal law and we agree. Section 15-8-8 prescribes that streets may be vacated by ordinance. As pointed out in the case at *Tooele City v. Elkington*, *supra*, the attempt to vacate a street by other means failed because the statute had not been complied with. In the present case, there is no contention that the ordinance vacating a street, a copy of which appears in the record, does not constitute compliance with the provisions of 15-8-8, but only that the vacation of the street does not comply with the provisions of an entirely un-

related statute. We respectfully submit, therefore, that the cases cited do not substantiate the appellants' position.

III.

THAT THE STATUTE SECTION 15-8-8 IS UNCONSTITUTIONAL IF APPLIED TO THE VACATING OF A DEDICATED STREET AND ALLEY AS IN THIS CASE.

The appellants contend in their argument under point number III of the appellants' brief, that purchasers of property in a subdivision acquire property interest in a street in contradistinction to interests of owners of property abutting a street created by other means. It is clearly pointed out in the cases which have been cited, and particularly in the case of *Sowadzki v. Salt Lake County*, *supra*, that whenever a street is created by any means, the public acquires the title only to the surface of the street for the use of the public as a right of way. Subject only to the rights which the public acquire, the owners of property abutting the street retain the ownership of property to the center of the street. In this case, the ordinance of abandonment has no effect upon the private property rights of any individual. The only rights which have been abandoned are the rights of the public to the use of the area in question as a public street. If the appellants have any private property rights in the area of the street, then those rights have not been impaired but have rather been enlarged by the abandonment of the public rights in the same area. There is nothing in the statement of facts to show whether or not the appellants have such private rights, and of course these rights, if they

do exist, could not be properly litigated in this action. The appellants, as private property owners, are here merely contesting the right of the public, as represented by its governing body, to abandon and vacate the rights of the public in and to a particular area. If Mr. and Mrs. Boskovich acquired rights in the property underlying the alley and Jordan Avenue by reason of the fact that they owned property abutting the part of Jordan Avenue which has not been vacated, then those rights still exist. Nothing has been taken from them as private property owners by the passage of the ordinance of abandonment and no private property rights could be taken from them by any ordinance passed by Midvale City. The question as to the ownership of the fee title to the property underlying the street which has been vacated is not here before the court, and has no place in this controversy. The law on this question is contained in statutes and cases relative to creation and existence of private property rights, and has no bearing upon the powers of cities and towns, as representatives of the public. The case of *Coop v. George A. Lowe Co.*, 263 Pac. 485, 71 Ut. 145, cited in appellants' brief, is clearly distinguishable from the case here at hand in that the public or private character of the alley there under consideration and the rights of the public thereto are not in question.

IV

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

THAT THE JUDGMENT IS CONTRARY TO LAW.

In the second paragraph of the appellants' argument under points IV and V, it is stated that "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." The appellants, in seeking to appear in this court as owners of abutting property and as members of the public, place themselves in entirely opposite positions. They appear before this court as the owners of property abutting the street in which the public's rights have been abandoned, and have stated that their private property rights are such that the public is barred from abandoning its rights. As members of the public, the appellants have no justifiable complaint. In the authorities heretofore cited in this brief, to-wit: Tuttle v. Sowadzki; Robinette v. Price, 49 A.L.R., 330 and 93 A.L.R. 639, it is clearly pointed out that a person whose property abuts a street has no recourse in the event of the abandonment of such street, unless his damage is different, not in degree but in kind, from that of the general public. The statement of the appellants that their normal access to and from their property is seriously hampered by the abandonment of these streets is not true and is not in accordance with the statement of facts. They are left with all of the frontage and their best and most generally used means of access to their property unimpaired and, as hereinbefore pointed out, their private property rights remain precisely the same as those which they held prior to the passage of the ordinance of abandonment except that those property rights, if any exist, are not now encumbered

by the interests of the public. If they have been injured by this abandonment, it is only as members of the public and as shown by the authorities above quoted, the fact, if it be a fact, that their injury as members of the public is different in degree than those of the general public, makes no difference and is not actionable. Their remedy as members of the public lies primarily at the polls.

It is mentioned in the appellants' brief that they claim injury because of the fact that upon abandonment, the property occupied by the street prior to abandonment becomes the property of Jordan School District. This is, of course, correct, and clearly gives the school district, as the owner of the property abutting the portion of the street and alley abandoned, the right to enclose the property with a fence and to occupy it as the owner thereof. This effect is not, however, created by the fact that Midvale City has abandoned the street. It is created, on the other hand, by the fact that these property rights are now and have always been in existence, and have been transferred to successive owners of the abutting property up to the present time. If the street directly abutting the appellants' property were vacated, they would be entitled to exactly the same rights in the property underlying the street. No property rights are created or extinguished by the abandonment of the streets in question, except the rights of the public.

We urge and contend that we have controverted all of the points raised in the appellants' brief, and all of the arguments in support thereof. We further contend that we have shown that the authorities and statutes cited by the appellants do not support their contention, and that the contention of

the appellants is contrary to the law of this state, as shown by the additional authorities cited herein. Accordingly, we respectfully pray that the judgment of the District Court in this case be affirmed.

Respectfully submitted,

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