

1953

State of Utah et al v. Fred Tedesco et al : Brief of Appellant

Utah Supreme Court

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E. R. Callister; Robert B. Porter, Jr.; John W. Horsley;

Recommended Citation

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In the Supreme Court of the State of Utah

STATE OF UTAH, by and through its
ENGINEERING COMMISSION, D.
H. WHITTENBURG, Chairman, H.
J. CORLEISSEN and LAYTON
MAXFIELD, Members of the Engi-
neering Commission,

Plaintiff and Appellant,

vs.

FRED TEDESCO and KLEA B.
TEDESCO, his wife, et al.,

Defendants,

and

BIRD & EVANS, Inc.,

Defendant and Respondent.

Case No.
7939

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

This case comes to the Court upon plaintiff's petition for an intermediate appeal. Stated generally, the problem is one of construing the statute which forms the basis for

the creation of the state park known as the "This Is The Place" Monument. The present appeal is one phase of the suit to condemn the park lands brought against a number of land-owners whose separate claims for just compensation have been litigated or settled one by one.

Among these separate claims is that presented herein by defendant. The theory is that, in law, damage was done to land lying entirely outside park boundaries because, it is said, the legal effect of the statute creating the park was the closure of Kennedy Drive, a road passing through the park which is the only connection of defendant's land with the state highway. The trial court adopted defendant's theory. It is the correctness of that basic ruling that is challenged here.

The parties to the appeal are referred to in this brief as they were in the proceedings below. A map of the park and defendant's adjoining land, showing the course of Kennedy Drive, is attached at the end of the brief. References to the record are to the numbers stamped in red at the bottom of each page, and not the reporter's type-written numbers.

STATEMENT OF FACTS

In 1951 the legislature passed an act authorizing the creation of "This Is The Place" Monument. The act, now Sec. 63-11-10, U. C. A. 1953, has been twice amended. The course of the legislation is traced below.

At the general session, 1951, the legislature enacted Sec. 8, Ch. 75, Laws of Utah 1951, which read:

“The engineering commission is hereby granted the power to condemn for state park purposes any and all lands in the vicinity of the ‘This Is the Place’ monument as shall be deemed necessary to preserve the historical significance of said monument and the natural beauty of the area surrounding the same and including all of the following described tract:

“Commencing 2 rods north from the center of Section 11, Township 1 south, range 1 east, Salt Lake Meridian, and running thence West, 2,205 feet; thence north $0^{\circ} 54'$ east 300 feet; thence north $89^{\circ} 6'$ west 437.7 feet; thence north 202.02 feet more or less to the Wasatch Bonneville Boulevard; thence northerly along said boulevard to the U. S. Military Reservation; thence north 86 rods; thence east 228 rods; thence south 524 feet; thence east 416 feet; thence south 361 feet; thence south 52° West 528 feet; thence northwesterly to a point 1,497 feet north of the point of beginning; thence south 1,497 feet to the place of beginning; less a tract sold to the American Telephone and Telegraph Company containing approximately .1147 acres, and less a tract sold to Salt Lake City Corporation containing approximately 7.63 acres.”

An amendment to the act was passed at the first special session. The amended act, Sec. 1, Ch. 13, Laws of Utah 1951, First Special Session, reads as follows:

“The engineering commission is authorized and directed to forthwith condemn, in behalf of the State of Utah, for state park purposes the following described lands:

“a. Commencing 2 rods north from the center of Section 11, Township 1 south, range 1 east, Salt Lake Meridian, and running thence west 2,205 feet;

thence north 0°54' east 300 feet; thence north 89°06' west 437.7 feet; thence north 202.02 feet more or less to the Wasatch Bonneville Boulevard; thence northerly along said boulevard to the U. S. Military Reservation; thence north 86 rods; thence east 228 rods; thence south 524 feet; thence east 416 feet; thence south 361 feet; thence south 52° west 528 feet; thence northwesterly to a point 1,497 feet north of the point of beginning; thence south 1,497 feet to the place of beginning, less a tract sold to the American Telephone and Telegraph Company containing approximately .1147 acres, and less a tract sold to Salt Lake City Corporation containing approximately 7.63 acres.

“b. Any additional land in the vicinity of said monument, as the engineering commission shall deem necessary to preserve the historical significance of same.”

The legislature in 1953 passed S. B. No. 86, which expressly excludes from condemnation the easement held for State Route 65 (which is the main highway to Henefer), and Kennedy Drive. The act now reads:

“The engineering commission is authorized and directed to forthwith condemn, in behalf of the State of Utah, for state park purposes the following described lands:

“a. Commencing 2 rods north from the center of Section 11, Township 1 south, range 1 east, Salt Lake Meridian, and running thence west 2,205 feet; thence north 0°54' east 300 feet; thence north 89°06' west 437.7 feet; thence north 202.02 feet more or less to the Wasatch Bonneville Boulevard; thence northerly along said boulevard to the U. S. Military Reservation; thence north 86 rods; thence east 228 rods; thence south 524 feet; thence east 416 feet;

thence south 361 feet; thence south 52° west 528 feet; thence northwesterly to a point 1,497 feet north of the point of beginning; thence south 1,497 feet to the place of beginning, less a tract sold to the American Telephone and Telegraph Company containing approximately .1147 acres and less a tract sold to Salt Lake City Corporation containing approximately 7.63 acres, and less a tract known as Kennedy Drive, containing approximately 3.29 acres, near the south side of the above described tract running in a southerly and easterly direction from a City street to the southeast corner of the above described tract of land. Nothing herein provided shall be construed so as to require the closing or abandonment of that part of State Route 65 which lies within the boundaries hereinabove described, or so as to affect the present easement held by the State Road Commission of Utah for purposes of maintaining State Route 65.

“b. Any additional land in the vicinity of said monument, as the engineering commission shall deem necessary to preserve the historical significance of same.

“Section 2. This act shall take effect upon approval.”

On July 10, 1951, the Engineering Commission adopted a resolution instructing the Attorney General to proceed with condemnation of the land described in the statute (R. 4-17). The resolution, which was incorporated into the Attorney General's complaint, divided the tract into 28 parcels held by different owners, all of whom were named as defendants.

Defendant Bird & Evans, Inc., was named a party to the original complaint because of its ownership of Parcel No. 7, lying within park boundaries. But it should be noted

that Parcel 7 is not involved here. After a trial, a jury made its award of \$66,000 for the taking of Parcel 7 (R. 26-27); that judgment has been paid, and the final order of condemnation was entered by the court as to that tract on March 21, 1952 (R. 29-30). The land which is the subject of this action is an entirely separate tract lying outside the park; it is not Parcel 7, and is not contiguous with Parcel 7.

On April 1, 1952, the trial court permitted defendant to file a cross-complaint (R. 20-22). It is there alleged that the taking of the park lands does damage to a tract which lies outside park boundaries. The theory is that plaintiff, by the condemnation of Parcel 28, will close Kennedy Drive, which is described in paragraph 3 of the cross-complaint as "the only practical access road to" defendant's land. Alternatively, it was pleaded that if Kennedy Drive were to remain open, damage to a lesser degree would nevertheless be inflicted upon defendant's land. The latter theory has been abandoned, however (R. 79).

Pursuing its first theory, defendant moved to make parties of Salt Lake City and Salt Lake County, because the fee simple in Kennedy Drive was held by one or the other (R. 31). The motion was granted (R. 32-34) and those two parties appeared, the County filing a disclaimer (R. 38) and the City answering (R. 35-37). It appears from the City's unchallenged answer, and the Court knows judicially, that City boundaries now extend east sufficiently far to include the land in question, and that Kennedy Drive is a city street the fee simple to which is held by the City.

Two hearings before the lower court have been had on defendant's claim. The first hearing, on October 28, 1952, was devoted to oral argument upon defendant's motion to make co-defendants of Salt Lake City and Salt Lake County. A transcript of the argument was designated as part of the record on appeal (R. 41-66). As indicated above, defendant's motion was granted, the trial court indicating its acceptance of defendant's theory that the statute itself was an act of condemnation and that the Engineering Commission had no discretion to leave Kennedy Drive untouched and uncondemned. (See particularly the trial court's remarks at R. 64-65.)

The cause came on for trial on December 1, 1952. A jury was selected and sworn (R. 68), and then excused during arguments on motion (R. 71). The court denied a motion to dismiss (R. 79) and defendant then made its election as to the theory on which it intended to proceed. The words of counsel are:

"MR. RAMPTON: * * * So we are electing, as we have to elect, to go to trial on the theory that Kennedy Drive is closed; that is, the right to go over it is taken away from us and we proceed to trial on that theory and ask damages on that basis."

Plaintiff then moved to dismiss on the ground that the statute was not an act of condemnation and that Kennedy Drive remained open (R. 79). After argument the motion was denied (R. 90).

The following passages have been extracted from the transcript as being indicative of the ruling of the court as

to the basis upon which the matter was to have been submitted.

“THE COURT: Let’s see, the motion is made to dismiss on the ground that the legislative act is not an act of condemnation? (R. 90).

“MR. ALSTON: That is right, Your Honor.

“THE COURT: The motion will be denied.

“MR. ALSTON: Having denied that motion I assume that the Court has now, or will make, an order that the act itself is an act of condemnation.

“THE COURT: Well, I think that would be the natural following of such a ruling” (R. 91).

* * * * *

“MR. ALSTON: May I ask Your Honor for a clarification as to when the order of condemnation is effective? Is it, is the effective date the date of the act or the effective date of the resolution?” (R. 91, 92).

* * * * *

“THE COURT: As indicated by Mr. Rampton of course you have the two statutes of our state.

“MR. ALSTON: Chapter 75 and then Chapter 13.

“THE COURT: Well, you have the one passing the legislative act condemning the property. Then you have the procedural act which indicates the date of the service of summons is the effective date of the condemnation. I think the law requires that I, if possible, give effect and force to both statutes and I see nothing in the 1952 session that would repeal our general condemnation law, that the effective date is the date of the service of summons. So I

would say for that reason and giving effect to both statutes that July 12, 1951 would be that date.

"MR. ALSTON: Is that for the determination of damages?

"THE COURT: Yes. That would be for the determination of damages and I presume that is really the only thing that is at issue here.

"MR. ALSTON: Well, I hate to labor the issue. Your Honor. I am trying to find out if Your Honor is giving an order that the act, Chapter 75, Laws of 1951, as amended by Chapter 13, Laws of 1951, Special Session, is an act of condemnation?

"THE COURT: Yes, I have so ruled on that. Now you have asked me when did it take effect and my answer as to that is that July 12, 1951, would be the effective date.

"MR. ALSTON: May the record show that the plaintiff takes exception to the order of the Court?

"THE COURT: Yes. The record may so show."

This Court should be aware of two further facts. It clearly appears from the record that the Engineering Commission does not intend physically to close Kennedy Drive unless ordered to by the courts (R. 86). It is fair to say that all parties made arguments on that assumption and that the lower court made its ruling on that assumption.

It also appears that during the trial of the damage issue for the taking of Parcel 28, owned by the Deere Estate, it was stipulated between counsel for the trustees of Deere Estate and counsel for the Engineering Commission that for purposes of that trial Kennedy Drive would not be con-

sidered closed, the right of the trustees to proceed for further damages in the event of such closure being reserved (R. 75).

STATEMENT OF POINTS

POINT I.

DEFENDANT'S CLAIM IS ACTUALLY A COMPULSORY COUNTERCLAIM AND AS SUCH IS BARRED BY RULE 13(a), U. R. C. P.

POINT II.

THE STATUTE WAS NOT, IN AND OF ITSELF, A LEGISLATIVE CONDEMNATION OF KENNEDY DRIVE BECAUSE

(A) THE LANGUAGE USED AND THE CIRCUMSTANCES NEGATE ANY SUCH INTENT.

(B) THERE NEVER HAS BEEN A DETERMINATION THAT PARK USE IS A MORE NECESSARY PUBLIC USE THAN USE AS A PUBLIC WAY.

ARGUMENT

POINT I.

DEFENDANT'S CLAIM IS ACTUALLY A COMPULSORY COUNTERCLAIM AND AS SUCH IS BARRED BY RULE 13(a), U. R. C. P.

The record shows that this case was commenced and summons served on July 11, 1951, and that defendant, Bird

& Evans, Inc., was one of the original defendants. Bird & Evans, Inc., owned the tract designated Parcel 7 in the complaint. As defendant, it filed an answer to the complaint and thereafter a trial before a jury was had on November 26 and 27, 1951. A verdict for \$66,000 was rendered and judgment entered thereon; the judgment was paid and a final order of condemnation was entered on March 21, 1952. Not until April 1, 1952, did defendant file the pleading entitled "cross-complaint" which is the subject matter of the intermediate appeal now before this court.

Although this document is entitled cross-complaint, it is no more than an ordinary counterclaim subject to the new Rules of Civil Procedure as to counterclaims. Plaintiff's contention is that it was filed too late.

Rule 13(a) reads as follows:

"A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

We believe that the cross-complaint filed by defendant is squarely covered by this rule. Under defendant's theory of the case, the taking of all monument lands was effectuated by the passage of the statute. That was the "transac-

tion or occurrence" which was the subject matter of plaintiff's complaint; all of defendant's claims arose at that time. The adjudication of the claim does not require the presence of third parties over whom the court cannot acquire jurisdiction, defendant having demonstrated this by its insistence that Salt Lake City and Salt Lake County be joined. And there was no other action pending. The Rule is drafted in broad language, so as to include "any claim," and defendant does not escape the operation of the Rule simply by mis-labelling its pleading as something other than a counterclaim. It plainly is not a cross-complaint.

Since adoption of the New Rules, one case has dealt with Rule 13(a), *Slim Olson, Inc. v. Winegar*, (Utah 1952) 246 P. 2d 609. That was a suit on open account for gas, oil and supplies delivered over a four-month period. The defendant invoked Rule 13(a) because of a prior separate action instituted by Winegar against the plaintiff therein for negligence in installing an oil sump. This court said:

"Anent defendant's contention that all items of the open account should have been pleaded as a compulsory counterclaim under Rule 13(a) in defendant's negligence suit against Olson, it is obvious that the \$11.06 charged for parts used in installing the oil sump is the only item that arose 'out of the transaction or occurrence' the subject matter of defendant's negligence claim against Olson. *The latter having failed to plead the item as a counter claim in such action is precluded from including it here, or in any other action, as is held by the authorities interpreting the rule*⁶ (Italics added).

(Footnote 6 of the court's opinion reads: "Ake v. Chancey, 5 Cir., 149 F. 2d 310; Pennsylvania R. Co. v. Musante-Phillips, Inc., D. C., 42 F. Supp. 340; 1 Barron & Holtzoff, Fed. Prac. and Procedure, Sec. 394.")

Plaintiff therefore urges that, under defendant's theory of the case, the claim herein arose out of the same transaction or occurrence which gave rise to its claim on account of the taking of Parcel 7. This claim, not having been pleaded at the time of the answer claiming damages for Parcel 7, is therefore barred.

POINT II (A)

THE STATUTE WAS NOT, IN AND OF ITSELF, A LEGISLATIVE CONDEMNATION OF KENNEDY DRIVE BECAUSE

(A) THE LANGUAGE USED AND THE CIRCUMSTANCES NEGATE ANY SUCH INTENT.

The lower court ruled that the statute (Sec. 63-11-10, U. C. A. 1953) by its own operation and without any further proceedings, constituted a condemnation of Kennedy Drive. The result, the court held, was that the fee simple underlying this street was taken from the City and that the public easement for passage was extinguished.

It may be admitted that proceedings taken by state officers pursuant to a statute may so hamper a land-owner in his enjoyment of property that a "taking" is the result. 2

Nichols on Eminent Domain, 3rd Ed., § 6.1 [1]. It appears from the record however that there never has been in fact any physical closure of the road. Defendant does not base its claim upon an actual appropriation or upon any physical dealings with the Drive or with defendant's land. The taking of Kennedy Drive, defendant says, occurred as soon as the statute became law. The taking was by operation of law, entirely on paper. Plaintiff contends that the statute alone could not possibly so have operated.

It is said in a recent text, 2 Nichols on Eminent Domain, 3rd Ed., §6.13:

“The mere passage of legislation authorizing the acquisition of property by eminent domain is ordinarily not sufficient in and of itself to constitute a taking [Citations]. Where, however, the provisions of the statute and the circumstances under which the appropriation is to take place are such as to indicate that the purpose of the law was to effect a taking by virtue of the statute itself, it has been held that a statute may be so construed as to vest title in the condemnor upon the mere passage of the law” [Citations].

The reason why legislation alone does not ordinarily operate as a taking has been set forth by the U. S. Supreme Court in *Danforth v. United States*, 308 U. S. 271, 84 L. Ed. 240, 60 S. Ct. 231. In that case, land was taken for a flood-way to relieve pressure on levees along the Mississippi River in high-water times. The legislation involved was the Flood Control Act of 1928 (33 U. S. C. A. §§ 702a - 702m, 704), which, in effect, put Congressional approval upon plans and maps submitted by the Army Engineers. Among

the points in the case was a contention by Danforth that the taking occurred at the time the Act was passed. The similarity of Danforth's arguments with those advanced by defendant herein should be noted. The court said (84 L. Ed., at 246 and 247) :

"Petitioner seeks interest on the judgment from the time of the taking or appropriation of the flowage easement. Petitioner fixes this appropriation at the time of the enactment of the Flood Control Act of May 15, 1928, on the theory that the passage of that act diminished immediately the value of this property because the plan contemplated the ultimate use of the floodway. Alternatively the date of the taking is fixed by petitioner as of October 21, 1929, when work began on the set-back levee or October 31, 1952, when the set-back levee was completed."

* * * * *

"This leaves for consideration the contention that there was a taking by the enactment of the legislation, when work began on the set-back levee or when that levee was completed. The mere enactment of legislation which authorizes a condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail."²²

(The Court's footnote 22 reads: "Willink v. United States, 240 U. S. 572, 60 L. Ed. 808, 36 S. Ct. 422; Bauman v. Ross, 167 U. S. 548, 596, 42 L. Ed. 270, 290, 17 S. Ct. 966; United States v. Sponenbarger, this day decided [308 U. S. 256, 60 L. Ed. 230, 60 S. Ct. 225].")

The soundness of the rule laid down in the Danforth case is most aptly illustrated by the action of the 1953 legislature in expressly declaring Kennedy Drive and State

Route 65 not to be included as lands which the Engineering Commission was instructed to condemn.

It is to be noted that the language of the U. S. Supreme Court is that legislation authorizing condemnation "cannot be a taking." The present case does not, of course, require a holding that a legislative act of condemnation is an impossibility; the only holding required on these facts is that this particular enactment did not operate as such. A reading of the statutes pursuant to which the complaint herein was filed shows it to be very unlikely that the legislature thought of its action as constituting a taking.

The act of the general session (Sec. 8, Ch. 75, L. '51) "granted the power" to proceed, the commission being instructed to include all of a described tract plus whatever other land in the vicinity it should deem appropriate. Amended language inserted at the special session (Sec. 1, Ch. 13, L. '51, 1st S. S.) altered the enactment from a mere grant of power to an explicit command to proceed "forthwith." The land described in the amendment remains the same: the described tract plus whatever other land should be deemed appropriate. Presumably, the lower court read the change of language as constituting a change of legislative attitude from one of permission to one of command, and it must be admitted that the general tone of the language in the two statutes differs. But a reading of the altered language as expressing a legislative determination to appropriate Kennedy Drive back to its former wild state as park land so as to deny the existing public easement for travel, is somewhat extravagant; and defendant must go

even further so as to contend that the legislative intent was that the transformation occur right at the time of the passage of the act.

The first act was merely a grant of power to proceed, which implies discretion in the commission as to the period of time within which action had to be taken. The second statute became an explicit instruction to proceed "forthwith." That word means: "Immediately; without delay; hence, within a reasonable time; promptly and with reasonable dispatch." (Webster's New International Dictionary, 2d Ed., unabridged.) If any legislative intention is evidenced by the change of language, it is that the legislature did not want any delay about the setting up of the park. The altered language is indicative only of an intent to get the project moving. The commission was directed, in effect, to make up its mind as to what lands should be included within the park boundaries and then to proceed promptly to acquire them.

There are obvious difficulties standing in the way of the interpretation which defendant would put upon the statute. Delegated to the commission was a discretionary power to condemn additional appropriate land in the vicinity of the park. It is puzzling to conceive how these additional lands, the whereabouts of which were not decided upon when the act was passed, could have been taken by the legislature. Defendant's position is such that it must assert the theory that the legislative intent was to effectuate a taking at that time of land even though the legislature did not know where the land was. The unlikelihood of the notion appears from a mere statement of it.

There is another difficulty with defendant's concept: Whatever the legislature intended with respect to Kennedy Drive was also necessarily intended for the main state highway to Henefer, Route 65. The highway, as appears from the map, passes through the center of the park. The described tract includes a segment of the highway as well as a segment of Kennedy Drive, and it clearly appears from the later passage of S. B. No. 86 that the two roads have always been thought of alike. If the statute closed Kennedy Drive then it also closed the main state highway. No other conclusion is possible. To argue that the legislature intended to close up the state highway and to forbid motorists to drive through it is to attribute to the legislature intentional folly. Legislative intent is often elusive, but plaintiff feels that at least it is safe to attribute to the legislature the lack of any intent to deny the public right to pass along a main state highway.

There is much authority holding that courts will not impose upon a statute a construction which yields an unreasonable or absurd result. 50 Am. Jur., Statutes, §§ 377, 378. The statute here involved is silent as to whether it was intended to be presently operative as a taking, and such intention ought not to be read in by implication, as was done below.

POINT II (B)

THE STATUTE WAS NOT, IN AND OF ITSELF, A LEGISLATIVE CONDEMNATION OF KENNEDY DRIVE BECAUSE

(B) THERE NEVER HAS BEEN A DETERMINATION THAT PARK USE IS A

MORE NECESSARY PUBLIC USE THAN USE AS A PUBLIC WAY.

A familiar principle in the law of eminent domain is that land already in public use cannot be condemned and put to a different public use unless the new use is more necessary. The rule has been incorporated into the law of our state by Sec. 78-34-4 (3), U. C. A. 1953, which reads:

“Before property can be taken it must appear:
* * * (3) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.”

Another basic principle is that the question of what constitutes a public use is judicial and not legislative.

“Although the legislature *in the first instance* has the power to determine the question of public use [citations], it has no power to determine *finally* the extent of its own authority over private property, and the question whether a use for which the legislature has authorized the taking of property by eminent domain is really public is ultimately a judicial one” [citations]. 2 Nichols on Eminent Domain, § 7.4.

The latter principle is expressed by Utah statute, see Sec. 78-34-8 (1), U. C. A. 1953, and by case law. In *Town of Perry v. Thomas*, 82 Utah 159, 22 P. 2d 343, this court said:

“Comp. Laws Utah 1917, Sec. 7333, provides, ‘Before property can be taken it must appear; 1. That the use to which it is to be applied is a use authorized by law; 2. That the taking is necessary to such use.’ And in section 7338, ‘The court or

judge thereof shall have power: 1. To determine the conditions specified in Sec. 7333.' Whether the property is being taken for a use authorized by law, that is, a public use, is by statute in this state, and by the general rule of law, a judicial question and may be inquired into by the courts." 4 McQuillin on Municipal Corporations (2d Ed.) 366; 10 R. C. L. 29.

It follows from reading these two principles together that it is a judicial problem to determine which of two public uses is more necessary. This conclusion is expressed in our statutes. 78-34-8 (1) U. C. A. 1953 provides:

"The court or judge thereof shall have power:
(1) to determine the conditions specified in Sec. 78-34-4; * * *."

Section 78-34-4, subsection 3, is the statute which provides that land devoted to a public use cannot be appropriated for a different public use unless the new use is more necessary.

In other words, the assertion that one public use is more necessary than another is one that can be made with legal finality only by the courts. As a consequence the legislature was simply without power to pass a statute having the final legal effect of appropriating Kennedy Drive from a public street and making it over into a portion of a public park. Even had the statute contained express language so asserting, the taking could not have occurred when defendant says it did.

A holding that the legislature was entirely without power to appropriate Kennedy Drive is not the only way for this court to dispose of this case. Such a holding would

be sound legally. But an alternative solution of the problem would be the recognition that, entirely aside from any question of power, there was no actual intent by anyone involved to taken Kennedy Drive.

The Engineering Commission's resolution contained no declaration that park use is more necessary than road use; the complaint, and even the cross-complaint, contained no such allegation; the lower court made no such finding. And the legislature was silent with respect to any declaration that park use is the more necessary (at least there was silence until S. B. No. 86 declared to the contrary). To attempt to distill out of that silence an implied, conscious, "legislative intention" so to declare (as defendant must in order to succeed) is to pursue an illusion. For, in simple fact, there was not a "legislative intention" with respect to Kennedy Drive one way or another. The existence of the roads involved in this case and the effect upon them of the passage of the act was something that the legislature, or the legislators, just did not think about, until 1953.

If that is so, and plaintiff respectfully urges that any other conclusion would not be realistic, then the error of the lower court becomes obvious. The legislature not only lacked power to assert with finality that Kennedy Drive was taken for a more necessary public use; the legislature did not even attempt to make the assertion.

CONCLUSION

Plaintiff rests its case on these deductions from principles of law set forth in the argument :

Defendant came to court too late, its claim being one which under the Rules had to be pleaded as a compulsory counterclaim in the original answer demanding compensation for the taking of Parcel 7.

If the case be treated on the merits, defendant is also barred. The theory upon which defendant proceeded is unsound because there is ascribed to the legislature an "intent" it never had, and because the "intent" was one which the legislature was powerless to effectuate even had it desired to. The legislature did not consciously intend, by the statute alone, to take Kennedy Drive. And it did not intend any declaration that park use of the land under the street is more necessary than use as a public way. Finally, even had the legislature so intended, and so declared, there is no legislative power to do what defendants says has been done. The legislature did not want to take Kennedy Drive and, acting alone, could not have done so had it wanted to.

The lower court's ruling should be reversed, and the case should be remanded with instructions to dismiss.

Respectfully submitted,

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