2017

John Fenley, Plaintiff/Appellant vs. Provo City, Defendant/ Appellee

Utah Court of Appeals

No. 20170405-CA

IN THE
COURT OF APPEALS OF THE STATE OF UTAH

JOHN FENLEY,
Plaintiff and Appellant,

v.

PROVO CITY,
Defendant and Appellee.

BRIEF OF THE APPELLANT

On appeal from the Fourth Judicial District Court, Utah County, *Hon.* James Brady, Case No. 170400320

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ORAL ARGUMENT REQUESTED

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F. Black's Law Dictionary definition of "Person."

TABLE OF AUTHORITIES

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Others

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this case pursuant to Utah Code Ann. § 78A-4-103(2)(j) and a Pourover Order entered by the Utah Supreme Court on May 19, 2017. The trial court entered its Ruling on Defendant's Motion to Dismiss on April 18, 2017, attached as Addendum A. Appellant John Fenley ("Mr. Fenley") filed his Notice of Appeal on May 16, 2017. By letter dated June 12, 2017, the Court set a deadline of July 25, 2017 for the filing of the Appellant's Brief, which was subsequently extended by stipulation to August 24, 2017.

STATEMENT OF THE ISSUES

Issue 1: Whether the trial court erred when it dismissed Mr. Fenley's Complaint for failure to state a claim for relief, on the grounds that an individual may not acquire property by eminent domain as a matter of law.

Standard of Review: Conclusions of law are reviewed de novo, without deference to the decision of the trial court. *In re Adoption of Baby B.*, 2012 UT 35, ¶ 41, 308 P. 3d 382 ("No deference is given to the lower court's analysis of abstract legal questions. This is because the lower court has no comparative advantage in resolving legal questions and settled appellate precedent is of crucial importance in establishing a clear, uniform body of law. Our review of conclusions of law is accordingly de novo. We take a fresh look at questions of law decided by a lower court, according no deference to its resolution of such issues.").

Preservation: This issue is preserved through the arguments presented by Mr. Fenley in his Opposition to Motion to Dismiss, filed April 10, 2017. (R.0092-0160, and especially R.0095.)

DETERMINATIVE PROVISIONS

Utah Code Ann. § 78B-6-505(3), attached as Addendum B.

"A person, other than a political subdivision of the state, that seeks to acquire property by eminent domain or that intends to use eminent domain to acquire property if the property cannot be acquired in a voluntary transaction shall . . . [and then listing preconditions to filing suit.]"

Utah Code Ann. § 78B-6-507(1)(a), attached as Addendum C.

"The complaint shall contain: (a) the name of the corporation, association, commission or person in charge of the public use for which the property is sought, who must be styled plaintiff[.]"

***Nash v. Clark*, 75 P. 371 (Utah 1904), *affirmed on appeal in Clark v. Nash*, 198 U.S. 361 (1905)** (affirming a judgment in favor of an individual who used the power of eminent domain to condemn a portion of his neighbors' property), attached as Addendum D.

STATEMENT OF THE CASE

I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS.

Mr. Fenley filed the Complaint in this action on March 7, 2017, seeking to obtain through the power of eminent domain ownership and possession of certain real property along with any structures thereon (the "Property"). R. 0001-0002. Mr. Fenley also requested prejudgment relief in the form of an order permitting immediate occupancy, a temporary restraining order, and a preliminary injunction to prevent Appellant Provo City ("Provo City") from destroying the building on the Property or from otherwise transferring ownership of the Property during the pendency of the proceedings. *See* R. 0008 (Motion for Temporary Restraining Order); R. 0009 (Motion for Preliminary Injunction and Request for Hearing); R. 0010 (Motion for Immediate Occupancy); R. 0010-0026 (Affidavit in Support of Immediate Occupancy Order); R. 0027 (Affidavit for Temporary Restraining Order). The trial court denied the request for a temporary restraining order on March 27, 2017. R. 0053.[1]

Thereafter, Provo City filed a Motion to Dismiss on April 3, 2017 (the "Motion to Dismiss"), arguing that the Complaint failed to state a claim for relief under Rule 12(b)(6) both because Mr. Fenley advanced an impermissible use for the Property under the eminent domain statute, and that Mr. Fenley lacked standing to assert a claim for eminent domain. R. 0068-0081.

[1] Upon information and belief, Provo City has subsequently demolished the building in question. The effect, if any, of that action on this case should be addressed at the trial court upon remand.

Mr. Fenley filed an Opposition to Motion to Dismiss on April 10, 2017. R. 0092-0160. As it pertains to this appeal, in that Opposition Mr. Fenley argued that:

> *Nash v. Clark* (1904) is a great example of a taking initiated by a person against their neighbor. No question of the right of an individual to exercise eminent domain was even brought up. The only question before the court in that matter was whether the intended taking could be considered a "public use." In the end, even though the taking was used directly only by the Plaintiff in that case, the use was deemed a public one because it advanced agendas that the state had decided were priorities.

R.0095. Provo City then replied on April 17, 2017. R.0163-0167.

The trial court granted the Motion to Dismiss on April 18, 2017. R. 0168-0170 (Ruling on Defendant's Motion to Dismiss), attached as Addendum A. In that decision, the trial court characterized Mr. Fenley's complaint as "seeking a declaration of his right to eminent domain over property owned by Provo City," and then listed the requirements for a declaratory judgment action. *Id.* R. 0169. The trial court went on to hold that because Mr. Fenley "has not demonstrated that he has authority under the constitution, statute, rule, regulation or case law to exercise eminent domain as an individual," he therefore could not meet the requirement to show that there is a "justiciable controversy" or that "he has a legally protectible interest in the controversy." *Id.* R. 0169. In finding that Mr. Fenley lacked standing to pursue a declaratory judgment action, the trial court held that "[w]ithout a legal right to bring a claim for eminent domain, Fenley has no legally protectible interest in doing so." *Id.* R. 0169. It therefore dismissed the case with prejudice. *See* Order of Dismissal, entered June 9, 2017, R. 0218-0220, attached as

Addendum E; *see also id.* R. 0219 ("[Mr. Fenley] has failed to show authority under the Constitution, statute, rule, regulation, or any case permitting the exercise of eminent domain by an individual.").

Mr. Fenley also filed several post-judgment motions which are not relevant to this appeal.

Mr. Fenley now appeals.

II. STATEMENT OF FACTS.

1. Mr. Fenley filed the Complaint in this action on March 7, 2017. R. 0001-0002.

2. Provo City filed a Motion to Dismiss on April 3, 2017. R. 0068-0081.

3. Mr. Fenley filed an Opposition to Motion to Dismiss on April 10, 2017. R. 0092-0160.

4. Provo City replied on April 17, 2017. R.0163-0167.

5. The trial court granted the Motion to Dismiss on April 18, 2017. R. 0168-0170.

SUMMARY OF THE ARGUMENT

The trial court is in error because it ruled that as a matter of law, an individual may not exercise the power of eminent domain under Utah Code Ann. § 78B-6-501, et seq. To the contrary, the applicable statutes specifically state that "a person" may "seek[] to acquire property by eminent domain" if that person completes certain conditions

precedent and is using the property for an appropriate purpose. Utah Code Ann. § 78B-6-505(3). Thus, the trial court was in error and the order granting the Motion to Dismiss should be reversed.

ARGUMENT

I. APPLICABLE LAW.

On appeal, "[c]onclusions of law are accorded no particular deference and are reviewed for correctness." *Kendall Ins., Inc. v. R & R Group, Inc.*, 2008 UT App 235, ¶ 8, 189 P.3d 114. When interpreting a statute, "it is axiomatic that this court's primary goal 'is to give effect to the legislature's intent in light of the purpose that the statute was meant to achieve.'" *Monarrez v. Utah Dep't of Transp.*, 2016 UT 10, ¶ 11, 368 P.3d 846 (quoting *Dahl v. Dahl*, 2015 UT 23, ¶ 159, 345 P.3d 566). The "best evidence of the legislature's intent is the plain language of the statute itself" and "[w]hen examining the statutory language, we assume the legislature used each term advisedly and in accordance with its ordinary meaning." *State v. Miller*, 2008 UT 61, ¶ 18, 193 P.3d 92 (citations and quotations omitted, alteration in original). Of course, the Court does not interpret the "plain meaning of a statutory term in isolation," but rather considers the "relevant context of the statute," with the goal of interpreting the "provisions in harmony with other statutes in the same chapter and related chapters." *Monarrez*, 2016 UT at ¶ 11 (citations and quotations omitted).

II. THE PLAIN LANGUAGE OF THE EMINENT DOMAIN STATUTE PERMITS PERSONS TO ACQUIRE PROPERTY THROUGH EMINENT DOMAIN.

Nowhere in the eminent domain statute does it specifically list the types of plaintiffs that may bring a claim thereunder. Instead, the code first lists out the permissible uses of property sought to be obtained through the power of eminent domain. *See* Utah Code Ann. § 78B-6-501 (titled "Uses for which right may be exercised"). Then, the code lists the types of "estates and rights in lands" which may be taken. *See id.* § 78B-6-502. Then, it lists the types of private property which may be taken, including but not limited to "lands belonging to the state, or to any county, city or incorporated town, not appropriated to some public use." *Id.* § 78B-6-503(2). The statute then goes on to list some conditions precedent to the filing of a lawsuit to acquire property through eminent domain. *Id.* §§ 78B-6-504, 505.

In Utah Code Ann. § 78B-6-505, the statute lists certain conditions precedent applicable when a "political subdivision of the state" wishes to obtain property through an eminent domain action. *See* Utah Code Ann. § 78B-6-505(1). Two subsections later, the statute lists different conditions precedent for when "**[a] person**, other than a political subdivision of the state," wishes to obtain property through an eminent domain action. *Id.* § 78B-6-505(3) (emphasis added).

The statute makes other references to a "person" being able to bring a claim for eminent domain, as well. For example, in Utah Code Ann. § 78B-6-507, which lists the

requirements for a complaint, the code states that "[t]he complaint shall contain . . . the name of the corporation, association, commission **or person** in charge of the public use for which the property is sought, who must be styled plaintiff[.]" Utah Code Ann. § 78B-6-507(1)(a) (emphasis added). In the provision concerning inspection of property subject to an eminent domain action, the code states that "[i]f land is required for public use, the person . . . in charge of the use may survey and locate the property," and also permits that such a "person . . . may, at reasonable times and upon reasonable notice, enter upon the land and make examinations, surveys, and maps of the land." *Id.* § 78B-6-507(1), (2)(a). Later on, the code defines "condemnor" as "a person who acquires property by purchase from a condemnee under threat of condemnation." *Id.* § 78B-6-520.3(1)(d).

Although the term "person" is not defined in the eminent domain statute, it strains credulity to think that the word would exclude an individual human being. *Cf. Kramer v. State Retirement Bd.*, 2008 UT App 351, ¶ 14, 195 P.3d 925 ("Thus, while the term 'person' is not defined in title 49, UAPA [Utah Administrative Procedures Act] defines this term as 'an individual, group of individuals, partnership, corporation, association, political subdivision or its units, governmental subdivision or its units, public or private organization or entity of any character, or another agency.'" (quoting Utah Code Ann. § 63G-4-103(1)(g))); *see also* Black's Law Dictionary at 1142-43 (Deluxe 6th ed. 1990) (defining "Person" as: "In the general usage, a human being (*i.e.* natural person), though

by statute term may include labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."), attached hereto as Addendum F.

The legislative intent of the above-cited references to a "person" having certain rights and obligations in connection with an action to condemn property under the eminent domain statute is clear: individuals may bring condemnation actions in their personal capacity. As such, the trial court made an error of law holding that an individual cannot bring an action under the eminent domain statute, and the ruling dismissing the case with prejudice should be reversed.

III. THE UTAH SUPREME COURT HAS PERMITTED INDIVIDUALS TO PURSUE CONDEMNATION ACTIONS IN THE PAST.

Nash v. Clark is an example of a Utah Supreme Court case in which an individual was permitted to obtain, through the power of eminent domain, a property interest in property owned by his neighbors, also private citizens. 75 P. 371 (Utah 1904), *affirmed on appeal in Clark v. Nash*, 198 U.S. 361 (1905). In that case, "Plaintiff [Mr. E.J. Nash] brought this action to condemn a right of way in a ditch owned by the defendants," who were individuals Lee Clark, Robert Bennett, T.F. Carlisle, Lincoln Carlisle, and Richard Carlisle. *Id.* 371-72. Mr. Nash brought the action, relying upon a section of the eminent domain code existing at the time which stated:

> When any person or corporation desires to convey water for irrigation, or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person or corporation, or the owner or owners of the lands through

> which a new canal or ditch would have to be constructed to convey the quantity of water necessary shall have the right to enlarge said canal or ditch already constructed by compensating the owner of the canal or ditch to be enlarged for the damage, if any, caused by said enlargement . . . .

Id. at 372 (citing Section 1278 Rev. Stat. 1898). The appellants in that case contended that since Mr. Nash would be using the canal only to water his own property, that it was not an appropriate taking due the the purely private use. *Id.* at 373 ("Appellants contend that the order of the district court overruling the demurrer was erroneous for the reason that the complaint on its face shows that the use to be made of the property sought to be condemned is strictly private, and in no sense a public use."). The Utah Supreme Court rejected that argument, holding that irrigation of lands was a public use. *Id.* at 373-74.

In reaching this conclusion, the Utah Supreme Court reviewed the "two lines of authorities" concerning what constituted a public use. *Id.* at 373. As explained by the Utah Supreme Court, the first line of authorities "holds that by public use is meant a use by the public or its agencies--that is, the public must have the right to the actual use in some way of the property appropriated[.]" *Id.* The second line "holds that it is a public use within the meaning of the law when the taking is for a use that will promote the public interest, and which use tends to develop the great natural resources of the commonwealth." *Id.* The Supreme Court ultimately held that:

> [T]he class of decisions last mentioned is more in harmony with enlightened public policy and that the liberal interpretation given the term "public use" which the Legislature has in effect, declared shall be followed in this State is far more conducive to individual and public advancement

> than the restricted construction adopted and followed by the line of decisions first referred to.

Id.

The issue of whether Mr. Nash, as an individual, could exercise the power of eminent domain was not specifically addressed in the *Nash* decision; the question was whether his use constituted a public use. It is telling that the exercise of eminent domain by an individual was not even raised. Indeed, the statute in question used the term "person" in reference to the parties who may bring an eminent domain action, just like the language in today's statute.

Notwithstanding the fact that the use of eminent domain by an individual was not specifically addressed, the Utah Supreme Court's decision to follow the second line of cases referenced above is consistent with the position advocated here by Mr. Fenley, and specifically: the eminent domain statute does not list or limit the ability to use that power to a particular set of plaintiffs. Rather, courts are to examine the use to which a plaintiff is intending for the property in dispute, and whether it is consistent with the liberal understanding of the term "public use" in eminent domain proceedings. *See Utah Dep't of Transp. v. Coalt Inc.*, 2016 UT App 169, ¶ 17, 382 P.3d 602 ("'The phrase "public use," as used in the eminent domain statute, has been given a liberal interpretation by this court.'" (quoting *Town of Perry v. Thomas*, 82 Utah 159, 22 P.2d 343, 346 (Utah 1933))).

Admittedly, the public use in *Nash*, i.e., use of water, differs from the public use to which Mr. Fenley would put the Property. However, Mr. Fenley was deprived of the

opportunity to present his case for public use to the trial court because the trial court dismissed his complaint in error on the grounds that he, as an individual, may not exercise the power of eminent domain. Accordingly, the Court should reverse the decision of the trial court.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the trial court.

DATED this 24th day of August, 2017.

NONPROFIT LEGAL SERVICES OF UTAH

/s/ Aaron C. Garrett
AARON C. GARRETT
Attorneys for Appellant John Fenley

Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains no more than 3718 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Google Docs in size 13 point Times New Roman.

DATED this 24th day of August, 2017.

NONPROFIT LEGAL SERVICES OF UTAH

/s/ Aaron C. Garrett
AARON C. GARRETT
Attorneys for Appellant John Fenley

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2017, true and correct copies of the foregoing **BRIEF OF THE APPELLANT** was served on the following individuals in the manner indicated below:

___ US MAIL ___ CERTIFIED MAIL ___ OVERNIGHT MAIL ___ FACSIMILE ___ GREEN FILING/ECF _x_ EMAIL	PROVO CITY ATTORNEY'S OFFICE J. Brian Jones, #11816 Gary D. Millward, #12170 351 West Center St. Provo, Utah 84603 Tel: (801) 852-6140 jbjones@provo.utah.gov gmillward@provo.org *Attorneys for Defendant Provo City*
___ US MAIL ___ CERTIFIED MAIL ___ OVERNIGHT MAIL ___ FACSIMILE ___ GREEN FILING/ECF _x_ EMAIL	Robert D. West, #4769 720 East Hyde Park Court Provo, Utah 84604 Tel: (210) 901-9378 rwest.provo@gmail.com *Attorneys for Defendant Provo City*

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format will be filed with the Court and served on Appellees within 14 days of filing, unless waived.

/s/ Aaron C. Garrett
Aaron C. Garrett

ADDENDUM A

FOURTH DISTRICT COURT, STATE OF UTAH
UTAH COUNTY, PROVO DEPARTMENT

JOHN FENLEY, Plaintiff, vs. PROVO CITY, Defendant.	RULING ON DEFENDANT'S MOTION TO DISMISS Case No. 170400320 Judge James Brady

This matter comes before the court on Provo City's motion to dismiss pursuant to Rule 12(b) for failure to state a cause of action. Fenley opposes the motion to dismiss, believing his complaint states a legally cognizable claim for private condemnation of Provo City owned real property by Fenley so he can put it to a public use. Fenely alleges that eminent domain is an appropriate solution. The Court disagrees with Fenley's claim. Provo City's motion to dismiss is GRANTED for the reasons stated below.

Rule 12(b)(6) URCivP allows for the filing of a motion to determine if the plaintiff's complaint fails to state a cause of action upon which relief can be granted. In ruling on a motion to dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor. *Mounteer v Utah Power & Light Co.*, 823 P.2d 1055 (Utah 1991); and, *Russell v Standard Corp.*, 898 P.2d 262(Utah 1995). Also, a motion to dismiss is appropriate . . . where it clearly appears that the plaintiff would not be entitled to relief under the facts alleged or under any set of facts they could prove to support their claim." *Baker v. Angus*, 910 P2.d 427, 430 (Utah Ct. App. 1996).

STANDING

John Fenley is an individual seeking a declaration of his right to eminent domain over property owned by Provo City.

> Standing to seek a declaratory judgment requires four elements: "(1) there must be a justiciable controversy; (2) the interests of the parties must be adverse; (3) the parties seeking relief must have a legally protectible interest in the controversy; and (4) the issues between the parties must be ripe for judicial determination." *Jenkins v. Swan,* 675 P.2d 1145, 1148 (Utah 1983) (citation and internal quotation marks omitted). The basic elements of the traditional test for standing are actual or potential injury, causation, and redressability. *Brown v. Division of Water Rights of Dep't of Natural Res.,* 2010 UT 14, ¶¶ 17–18, 228 P.3d 747. In the context of a quiet title action, this means that standing is "limited to parties who could acquire an interest in the property created by the court's judgment or decree." *Holladay Towne Ctr., LLC v. Brown Family Holdings, LLC,* 2011 UT 9, ¶¶ 43, 54, 248 P.3d 452 (citation and internal quotation marks omitted).

Kemp v. Wells Fargo Bank, NA, 2013 UT App 88, ¶ 5, 301 P.3d 23, 24

In response to Provo City's motion, Fenely has a duty to demonstrate that he has standing to seek a declaratory judgement. Fenley has failed to do so. He does not demonstrate that there is a justiciable controversy, and that he has a legally protectible interest in the controversy.

Fenley claims his purpose is to put the property to a public use. However, he has not demonstrated that he has authority under the constitution, statute, rule, regulation or case law to exercise eminent domain as an individual. Based on the information provided by the parties the Court finds Fenley lacks standing to bring this action. Without a legal right to bring a claim for eminent domain, Fenley has no legally protectible interest in doing so. The Court finds Fenley lacks standing and grants Provo City's order to dismiss this case.

April 18, 2017

Judge James Brady

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST. COURT • UTAH COUNTY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 170400320 by the method and on the date specified.

MAIL: JOHN FENLEY 1985 N 360 E PROVO, UT 84604

MANUAL EMAIL: J B JONES jbjones@provo.utah.gov
MANUAL EMAIL: GARY D MILLWARD gmillward@provo.org
MANUAL EMAIL: ROBERT D WEST rwest.provo@gmail.com

Date: 04/19/2017 /s/ MIKE TRONIER

Deputy Court Clerk

ADDENDUM B

Effective 5/13/2014

78B-6-505 Negotiation and disclosure required before filing an eminent domain action.

(1) A political subdivision of the state that seeks to acquire property by eminent domain or that intends to use eminent domain to acquire property if the property cannot be acquired in a voluntary transaction shall:

(a) before the governing body, as defined in Subsection 78B-6-504(2)(a), of the political subdivision takes a final vote to approve the filing of an eminent domain action, make a reasonable effort to negotiate with the property owner for the purchase of the property; and

(b) except as provided in Subsection (4), as early in the negotiation process described in Subsection (1)(a) as practicable, but no later than 14 days before the day on which a final vote is taken to approve the filing of an eminent domain action:

(i) provide the property owner a complete printed copy of the materials provided on the Office of the Property Rights Ombudsman website in accordance with Section 13-43-203 regarding the acquisition of property for a public purpose and a property owner's right to just compensation; and

(ii) provide the property owner a written statement in substantially the following form:

"Although this letter is provided as part of an attempt to negotiate with you for the sale of your property or an interest in your property without using the power of eminent domain, [name of political subdivision] may use that power if it is not able to acquire the property by negotiation. Because of that potential, the person negotiating on behalf of the entity is required to provide the following disclosures to you.

1. You are entitled to receive just compensation for your property.

2. You are entitled to an opportunity to negotiate with [name of political subdivision] over the amount of just compensation before any legal action will be filed.

a. You are entitled to an explanation of how the compensation offered for your property was calculated.

b. If an appraiser is asked to value your property, you are entitled to accompany the appraiser during an inspection of the property.

3. You are entitled to discuss this case with the attorneys at the Office of the Property Rights Ombudsman. The office may be reached at [provide the current contact information for the Office of the Property Rights Ombudsman].

4. The Office of the Property Rights Ombudsman is a neutral state office staffed by attorneys experienced in eminent domain. Their purpose is to assist citizens in understanding and protecting their property rights. You are entitled to ask questions and request an explanation of your legal options.

5. If you have a dispute with [name of political subdivision] over the amount of just compensation due to you, you are entitled to request free mediation or arbitration of the dispute from the Office of the Property Rights Ombudsman. As part of mediation or arbitration, you are entitled to request a free independent valuation of the property.

6. Oral representations or promises made during the negotiation process are not binding upon the entity seeking to acquire the property by eminent domain."

(2) Except as provided in Subsection (4), the entity involved in the acquisition of property may not bring a legal action to acquire the property under this chapter until 30 days after the day on which the disclosure and materials required in Subsection (1)(b)(ii) are provided to the property owner.

(3) A person, other than a political subdivision of the state, that seeks to acquire property by eminent domain or that intends to use eminent domain to acquire property if the property cannot be acquired in a voluntary transaction shall:

(a) before filing an eminent domain action, make a reasonable effort to negotiate with the property owner for the purchase of the property; and

(b) except as provided in Subsection (4), as early in the negotiation process described in Subsection (3)(a) as practicable, but no later than 30 days before the day on which the person files an eminent domain action:

(i) provide the property owner a complete printed copy of the materials provided on the Office of the Property Rights Ombudsman website in accordance with Section 13-43-203 regarding the acquisition of property for a public purpose and a property owner's right to just compensation; and

(ii) provide the property owner a written statement in substantially the following form:

"Although this letter is provided as part of an attempt to negotiate with you for the sale of your property or an interest in your property without using the power of eminent domain, [name of entity] may use that power if it is not able to acquire the property by negotiation. Because of that potential, the person negotiating on behalf of the entity is required to provide the following disclosures to you.

1. You are entitled to receive just compensation for your property.

2. You are entitled to an opportunity to negotiate with [name of entity] over the amount of just compensation before any legal action will be filed.

a. You are entitled to an explanation of how the compensation offered for your property was calculated.

b. If an appraiser is asked to value your property, you are entitled to accompany the appraiser during an inspection of the property.

3. You are entitled to discuss this case with the attorneys at the Office of the Property Rights Ombudsman. The office may be reached at [provide the current contact information for the Office of the Property Rights Ombudsman].

4. The Office of the Property Rights Ombudsman is a neutral state office staffed by attorneys experienced in eminent domain. Their purpose is to assist citizens in understanding and protecting their property rights. You are entitled to ask questions and request an explanation of your legal options.

5. If you have a dispute with [name of entity] over the amount of just compensation due to you, you are entitled to request free mediation or arbitration of the dispute from the Office of the Property Rights Ombudsman. As part of mediation or arbitration, you are entitled to request a free independent valuation of the property.

6. Oral representations or promises made during the negotiation process are not binding upon the entity seeking to acquire the property by eminent domain."

(4) The court may, upon a showing of exigent circumstances and for good cause, shorten the 14-day period described in Subsection (1)(b) or the 30-day period described in Subsection (2) or (3)(b).

Amended by Chapter 59, 2014 General Session

ADDENDUM C

78B-6-507 Complaint -- Contents.

(1) The complaint shall contain:

(a) the name of the corporation, association, commission or person in charge of the public use for which the property is sought, who must be styled plaintiff;

(b) the names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants;

(c) a statement of the right of the plaintiff;

(d) if a right of way is sought, its location, general route, beginning and ending, and be accompanied by a map of the proposed right of way, as it is involved in the action or proceeding;

(e) if any interest in land is sought for a right of way or associated facilities for a subject activity as defined in Section 19-3-318:

(i) the permission of the governor with the concurrence of the Legislature authorizing:

(A) use of the site for the subject activity; and

(B) use of the proposed route for the subject activity; and

(ii) the proposed route as required by Subsection (1)(d); and

(f) a description of each piece of land sought to be taken, and whether it includes the whole or only part of an entire parcel or tract.

(2) All parcels lying in the county and required for the same public use may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties.

Renumbered and Amended by Chapter 3, 2008 General Session

ADDENDUM D

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75 P. 371 (Utah 1904)

27 Utah 158

E. J. NASH, Respondent,

v.

LEE L. CLARK, ROBERT N. BENNETT, T. F. CARLISLE, LINCOLN CARLISLE and RICHARD CARLISLE, Appellants

No. 1406

Supreme Court of Utah

January 23, 1904

Appeal from the Fourth District Court, Utah County.--Hon. J. E. Booth, Judge.

Action to condemn a right of way in a ditch owned by the defendants. From a judgment in favor of the plaintiff, the defendants appealed.

AFFIRMED.

J. W. N. Whitecotton, Esq., for appellants.

Messrs. Warner, Houtz, Prentiss & Warner for respondent.

McCARTY, J., delivered the opinion of the court. BARTCH, J., concurs. BASKIN, C. J., dissents.

OPINION

McCARTY, J.

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[27 Utah 159] STATEMENT OF FACTS.

Plaintiff brought this action to condemn a right of way in a ditch owned by the defendants. The provisions of the statute upon which he bases his right of action, so far as material to this case, are as follows: Rev. St. 1898, section 3588, in part provides: "Subject to the provisions of this chapter the right of eminent domain may be exercised in behalf of the following public uses: . . . (5) Reservoirs, dams, water-gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for supplying persons, mines, mills, smelters, or other works for the reduction of ores, with water for domestic or other uses, or for irrigating purposes, or for draining and reclaiming lands, or for floating logs and lumber on streams not navigable. (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse, or water from mills, smelters or other works for the reduction of ores, or from mines; mill dams; . . . also an occupancy in common by the owners or possessors of different mines, mills, smelters, or other places for the reduction of ores, of any place for the flow, deposit, or conduct of tailings or refuse matter . . . . (10) Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light, or heat." Section 1277, Rev. Stat. 1898, is as follows: "Any person or corporation shall have the right of way across and upon public, private, and corporate lands, or other right of way, for the construction, maintenance, repair, and use of all necessary reservoirs, dams, water-gates, canals, ditches, flumes, tunnels, or other means of securing, storing, and conveying water for irrigation, or for any necessary public use, or for drainage, upon payment of just compensation therefor,

[27 Utah 160] but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway, or public or private road, nor to unnecessarily injure any public or private property. Such right may be acquired in the manner provided by law for the taking of private property for public use."

Section 1278 provides: "When any person or corporation desires to convey water for irrigation, or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person or corporation, or the owner or owners of the lands through which a new canal or ditch would have to be constructed to convey the quantity of water necessary shall have the right to enlarge said canal or ditch already constructed by compensating the owner of the canal or ditch to be enlarged for the damage, if any, caused by said enlargement: provided, that said enlargement is to be done at any time from the first day of October to the first day of March, or at any other time that may be agreed upon with the owner of said canal or ditch."

The complaint herein in substance alleges that plaintiff is the owner of 80 acres of land situated in Utah county, this State, which land, without irrigation, is arid, barren, and unproductive, but with irrigation would produce in abundance, hay, grain, and other agricultural crops; that Ft.

Canyon creek is a natural stream of water in Utah county, flowing from the mountains north of plaintiff's land in a southerly direction to and near plaintiff's land, that the defendants own a tract of land contiguous to and adjoining plaintiff's land on the north, and are also the owners of a certain ditch leading from Ft. Canyon creek over and across their land to a point within 100 feet of plaintiff's land, which ditch is a mile and a quarter in length, 18 inches wide, and 12 inches deep; that plaintiff owns water in Ft. Canyon creek sufficient to irrigate his land above mentioned; that there is no other convenient or practicable

[27 Utah 161] way in which to divert the waters of said creek and convey the same onto plaintiff's land except by and through the ditch of defendants; that, in order to irrigate his land, it is necessary that plaintiff have a right of way through defendants' ditch; that for plaintiff to enter upon defendants' land to enlarge their ditch will not injure them; that plaintiff requested of defendants that they allow him to go onto their land and enlarge their ditch, and use it for conducting his water to and on his land, and offered to contribute his share of the expense of maintaining the ditch and all damages; that the defendants refused to permit him to do so.

Plaintiff asks that he be permitted to enlarge defendants' ditch to the extent of widening it one foot more; that he have a perpetual right of way through said ditch when so widened, and constructed for the purpose of diverting and carrying his water from Ft. Canyon creek to his land for irrigation purposes; that the damages for such right of way and use of the ditch by plaintiff be fixed and determined, and that upon payment by the plaintiff of such damages he have such ditch condemned to the extent of and to the use and for the purposes above set forth, and that defendants be enjoined from in any way or manner asserting any right antagonistic

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to this right of plaintiff; that, if plaintiff is permitted by decree of this court to enlarge and use the ditch as aforesaid, his land can be made productive and the use of the water to which plaintiff is entitled can and will be put to a beneficial and public use in the irrigation of plaintiff's said land, and for no other purpose. Defendants interposed a general demurrer to plaintiff's complaint, alleging that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled. The defendants elected to stand upon their demurrer, and the plaintiff introduced evidence in support of the allegations of his complaint, and the court entered judgment and decree in favor of plaintiff, condemning defendants' land as prayed for in the

[27 Utah 162] complaint; and for a reversal of this judgment the defendants have appealed to this court.

McCARTY, J., after a statement of the foregoing facts, delivered the opinion of the court.

Appellants contend that the order of the district court overruling the demurrer was erroneous for the reason that the complaint on its face shows that the use to be made of the property sought to be condemned is strictly private, and in no sense a public use. Both the Constitution of the United States and the Constitution of this State provide that "private property shall not be taken or damaged for public use without just compensation." This provision is construed to mean that private property can not be taken for strictly a private use, which counsel for respondent concede to be the true and proper construction. This brings us to the only question presented by this appeal, to-wit: Was the condemnation of appellants' land in this case in law and in fact for a public use? There is no fixed rule of law by which this question can be determined. In other words, what is a public use can not always be determined by the application of purely legal principles. This is evident from the fact that there are two lines of authorities, neither of which attempt to lay down any fixed rule as a guide to be followed in all cases. One class of authorities, in a general way, holds that by public use is meant a use by the public or its agencies--that is, the public must have the right to the actual use in some way of the property appropriated; whereas the other line of decisions holds that it is a public use within the meaning of the law when the taking is for a use that will promote the public interest, and which use tends to develop the great natural resources of the commonwealth. After a careful examination of the leading cases on this subject, we are of the opinion that the class of decisions last mentioned is more in harmony with enlightened public policy and that the liberal interpretation given the term "public

[27 Utah 163] use" which the Legislature has in effect, declared shall be followed in this State is far more conducive to individual and public advancement than the restricted construction adopted and followed by the line of decisions first referred to.

The question of the manner of appropriation and use of water for domestic, irrigation, mining and manufacturing purposes is, and ever since the advent of the early pioneers has been, the most important and vital of all industrial questions with which the people within this arid region have been confronted. Their requirements, and, we might add, their absolute necessities, impelled the Legislatures and courts at an early date in the history of the States and Territories strictly arid in character to depart from and lay aside as impracticable some legal doctrines and rules relating to the control and use of water which had therefore been adhered to and followed for ages, and to adopt and put in operation a new system of acquiring title in and to the

streams which are within the arid belt, the use of which was found to be indispensable in agricultural pursuits, in mining, in the establishment of industries, and in the general development of the arid States and Territories. By an examination of the records of the early cases in this State (then Territory) wherein the court declined to follow and be governed by the common-law doctrine or riparian rights in its entirety, the same arguments were advanced by those claiming title to water under and by virtue of this doctrine as are advanced by appellants in this case, to-wit, that fundamental rights were being interfered with, and the property of one citizen was being taken and given to another. We very much doubt whether either advocate or layman, who has witnessed the magnificent results wrought by the change, would now contend that the Constitution was overridden, or any natural or legal right of the citizens invaded and their property confiscated, when the common-law doctrine of riparian rights was modified for the purposes of irrigation and mining, and a system for appropriating

[27 Utah 164] and acquiring title to water adopted that made it possible for populous and flourishing common wealths to grow up where the country otherwise would have remained a desert, uninhabited, with the possible exception perhaps of an occasional cattle or sheep ranch. The question of how to increase the water supply in the arid region has steadily grown in magnitude and importance until it has become national as well as local. Congress realizing the great public necessity for an increased water supply, and appreciating the great possibilities that may be accomplished in this and other States and Territories within the arid belt by conserving and storing the high and surplus waters caused by the melting snows which in the spring months come down from the mountains in torrents, and are either wasted in the deserts or find their way into box canyons, where

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they can never be made available for irrigation or other useful purposes, by a provision in the enabling act (section 12) granted to this State 500,000 acres of public lands lying within the State, with which to create a fund to be used for the purpose of building reservoirs; and later on, by an act known as the "Irrigation Bill," created a fund from the public revenues, which is swelling into the millions of dollars, for the purpose of aiding in this most important of all enterprises of a public character in the arid west, and upon the success of which its future growth and prosperity largely depends. The large expenditure of public funds in this direction is not to be made for the purpose of enabling the States and Territories directly benefited thereby, in their sovereign capacity, to engage in farming and other lines of industry, which are dependent upon the water supply, but to ultimately enable the citizens, as individuals, to provide themselves with homes, and to furnish additional opportunities for the further development of the great natural resources with which the arid region abounds. These questions, which are the most important with which the arid States and Territories have had to deal, and the successive steps that have been taken in

[27 Utah 165] advancing our system of irrigation, are referred to for the purpose of showing the interest that the public have always had and must of necessity continue to have in the question of irrigation. The natural physical conditions of this State are such that in the great majority of cases the only possible way the farmer can supply his land with water is by conveying it by means of ditches across his neighbor's lands which intervene between his own and the source from which he obtains his supply. The question before us not only involves the right of the farmer to invoke the law of eminent domain, when necessary, to enable him to convey water to his farm, but that of the miner, manufacturer, and persons engaged in other industrial pursuits to build canals, flumes, and lay pipe lines over adjoining and intervening lands, when necessary for the purpose of conveying water necessary for the successful prosecution of their respective enterprises. The future growth, prosperity, upbuilding, and industrial expansion of the State not only depend upon the storing and holding back the high and surplus waters so they can be used in times of scarcity, but also in a careful and judicious husbandry of the supply now available; and it is entirely within the province of the Legislature to enact such laws respecting the appropriation and distribution thereof as will tend to prevent unnecessary loss and waste, so long as vested rights are upheld and maintained. Experience has shown that, the greater the amount of water flowing in a ditch of a given size and grade, the less the percentage of seepage and evaporation. Therefore, as a general rule, the owners of canals and ditches, instead of being damaged by their enlargement and the turning therein of an additional quantity of water, as is proposed in this case, will at least in times of scarcity during the hot summer months, and especially during the periods of protracted drouths, which have become so common of late years in this State, be benefited thereby, besides receiving the market value of the land condemned. In view of the physical and climatic

[27 Utah 166] conditions in this State, and in the light of the history of the arid west, which shows the marvelous results accomplished by irrigation, to hold that the use of water for irrigation is not in any sense a public use, and thereby place it within the power of a few individuals to place insurmountable barriers in the way of the future welfare and prosperity of the State would be giving to the term "public use" altogether too strict and narrow an interpretation, and one we do not think is contemplated by the Constitution.

The foregoing conclusions are supported by abundant authority. 10 Am. and Eng. Ency. of Law (2 Ed.), 1064, and cases cited. In the case of *Dayton Mining Co. v. Seawell,* 11 Nev. 394, the plaintiff sought to condemn a right of way over certain lands to a mining claim owned by plaintiff, to be used for the purpose of transporting wood, lumber, timbers, and other material to enable it to conduct and carry on its business of mining. The claim was made in that case, as it is in this that the statute under which the action was brought was unconstitutional for the same reasons as are urged in the case before us. Mr. Chief Justice Hawley, speaking for the court says: "That mining is the paramount interest of the State is not questioned. That anything which tends directly to encourage mineral developments and increase the mineral resources of the State is for the benefit of the public, and is calculated to advance the general welfare and prosperity of the people of this State, is a self-evident proposition. Hence, it necessarily follows that, if the position contended for by the petitioner is correct--and I believe it is--then the act is constitutional, and should be upheld. Although other and weaker reasons have been more frequently assigned, it seems to me that this is the true interpretation upon which courts have really acted in sustaining the right of eminent domain in favor of railroads and other objects, and in several of the decided cases this reason is expressly given. . . . Now, it happens, or at least is liable to happen, that individuals, by receiving the title

[27 Utah 167] to barren lands adjacent to the mines, mills, or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation . . . . to greatly embarrass, if not entirely defeat, the business of mining in such localities. In my opinion, the mineral wealth of this State ought not to be left undeveloped for any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining. Nature has

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denied to this State many of the advantages which other States possess, but by way of compensation to the citizens has placed at her doors the richest and most extensive silver deposits ever yet discovered. The present prosperity of the State is entirely due to the mining developments already made, and the entire people of the State are directly interested in having the future development unobstructed by the obstinate action of any individual or individuals. In the case of *Oury v. Goodwin,* 26 P. 376, practically the same question was involved as is presented here, and the Supreme Court of Arizona, in an elaborate and exhaustive opinion, in which many cases are cited and reviewed, held that the use of water for irrigation is a public use, and that an act of the Arizona Legislature, providing for the condemnation of lands for canal purposes, was constitutional. *DeGraffenried v. Savage,* 9 Colo. App. 131, 47 P. 902; *Yunker v. Nichols,* 1 Colo. 551; *Schilling v. Rominger,* 4 Colo. 100. In the case of *Fallbrook Irr. Dist. v. Bradley,* 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369, the court, in the course of the opinion, says: "On the other hand, in a State like California, which confessedly embraces millions of acres of arid lands, an act of the Legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. . . . To irrigate, and thus to bring into possible cultivation, these large masses of otherwise worthless lands, would seem to be a public purpose, and a matter of public interest, not confined to the landowners,

[27 Utah 168] or even to any one section of the State. The fact that the use of the water is limited to the landowner is not therefore, a fatal objection to this legislation. In conclusion the court on this point further says: "We have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use." *Ellinghouse v. Taylor,* 19 Mont. 462, 48 P. 757. There are many other well-considered cases which declare the same general doctrine as those referred to, but we deem it unnecessary to make further citations.

The judgment of the district court is affirmed; the costs of this appeal to be taxed against the appellants.

BARTCH, J., concurs. BASKIN, C. J., dissents.

ADDENDUM E

The Order of the Court is stated below:
Dated: June 09, 2017 10:28:09 PM
/s/ JAMES BRADY
District Court Judge

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IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

JOHN FENLEY, Plaintiff, vs. PROVO CITY, Defendant.	**ORDER OF DISMISSAL** Case No. 170400320 Judge James Brady

The Court, having considered the arguments of the parties as submitted in Defendant Provo City's Motion to Dismiss, and for good cause appearing, the Court now makes the following:

Findings of Fact:

Plaintiff John Fenley is an individual who seeks to exercise eminent domain over property owned by Defendant Provo City, purportedly for a public use.

Conclusions of Law:

Utah Rule of Civil Procedure 12(b)(6) allows for the filing of a motion to determine if the plaintiff's complaint fails to state a cause of action upon which relief can be granted. In ruling on a motion to dismiss for failure to state a claim, the Court must construe the

complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor. *Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055 (Utah 1991); *Russel v. Standard Corp.*, 898 P.2d 262 (Utah 1995). Also, "[a] motion to dismiss is appropriate . . . where it clearly appears that the plaintiff would not be entitled to relief under the facts alleged or under any set of facts they could prove to support their claim." *Baker v. Angus*, 910 P.2d 427, 430 (Utah Ct. App. 1996).

Fenley's Complaint seeks a declaratory judgment, but fails to meet the elements required. "Standing to seek a declaratory judgment requires four elements: "(1) there must be a justiciable controversy; (2) the interests of the parties must be adverse; (3) the parties seeking relief must have a legally protectible interest in the controversy; and (4) the issues between the parties must be ripe for judicial determination." *Kemp v. Wells Fargo Bank, NA*, 2013 UT App 88, ¶ 5, 301 P.3d 23. Fenley has failed to meet this standard. He has not demonstrated a justiciable controversy or a legally protectable interest in the controversy. He has failed to show authority under the Constitution, statute, rule, regulation, or any case permitting the exercise of eminent domain by an individual. Accordingly, Fenley lacks standing to bring this suit.

Order

Based on the foregoing, this case is ordered dismissed with prejudice.

Approved as to form:

_____

John Fenley [Refused: objection on file]

- - - - End of document (the date and Court's signature appear at the top of the first page) - - - -

ADDENDUM F

BLACK'S LAW DICTIONARY®

Definitions of the Terms and Phrases of
American and English Jurisprudence,
Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.

SIXTH EDITION

BY

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béysh(iy)ow èst/. It is in the nature of things that he who denies a fact is not bound to give proof.

Per saltum /pàr sóltəm/. Lat. By a leap or bound; by a sudden movement; passing over certain proceedings.

Per sample /pàr sǽmpəl/. By sample. A purchase so made is a collateral engagement that the goods shall be of a particular quality. U.C.C. § 2-313(1)(c).

Per se /pər síy/ˈséy/. Lat. By itself; in itself; taken alone; by means of itself; through itself; inherently; in isolation; unconnected with other matters; simply as such; in its own nature without reference to its relation.

In law of defamation, certain words and phrases that are actionable as slander or libel in and of themselves without proof of special damages, *e.g.* accusation of crime. Used in contrast to defamation per quod which requires proof of special damage. *See* Actionable per se; Libelous per se; Slanderous per se.

See also Negligence per se; Per se doctrine; Per se violations.

Persecutio /pàrsəkyúwsh(iy)ow/. Lat. In the civil law, a following after; a pursuing at law; a suit or prosecution. Properly that kind of judicial proceeding before the prætor which was called "extraordinary." In a general sense, any judicial proceeding, including not only "actions" *(actiones)*, properly so called, but other proceedings also.

Per se doctrine. Under the "per se doctrine," if an activity is blatant in its intent and pernicious in its effect, a court need not inquire into the reasonableness of the same before determining that it is a violation of the antitrust laws. Connecticut Ass'n of Clinical Laboratories v. Connecticut Blue Cross, Inc., 31 Conn.Sup. 10, 324 A.2d 288, 291. *See* Per se violations.

Persequi /pərsəkwày/. Lat. In the civil law, to follow after; to pursue or claim in form of law. An action is called a *"jus persequendi."*

Per se violations. In anti-trust law, term that implies that certain types of business agreements, such as price-fixing, are considered inherently anti-competitive and injurious to the public without any need to determine if the agreement has actually injured market competition. *See* Per se doctrine; Rule *(Rule of reason)*.

Person. In general usage, a human being (*i.e.* natural person), though by statute term may include labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers. See *e.g.* National Labor Relations Act, § 2(1), 29 U.S.C.A. § 152; Uniform Partnership Act, § 2.

Scope and delineation of term is necessary for determining those to whom Fourteenth Amendment of Constitution affords protection since this Amendment expressly applies to "person."

Aliens. Aliens are "persons" within meaning of Fourteenth Amendment and are thus protected by equal protection clause against discriminatory state action. Foley v. Connelie, D.C.N.Y., 419 F.Supp. 889, 891.

Bankruptcy Code. "Person" includes individual, partnership, and corporation, but not governmental unit. 11 U.S.C.A. § 101.

Commercial law. An individual or organization. U.C.C. § 1-201(30).

Corporation. A corporation is a "person" within meaning of Fourteenth Amendment equal protection and due process provisions of United States Constitution. Metropolitan Life Ins. Co. v. Ward, Ala., 470 U.S. 869, 105 S.Ct. 1676, 1683, 84 L.Ed.2d 751. The term "persons" in statute relating to conspiracy to commit offense against United States, or to defraud United States, or any agency, includes corporation. Alamo Fence Co. of Houston v. U.S., C.A.Tex., 240 F.2d 179, 181.

In corporate law, "person" includes individual and entity. Rev.Model Bus.Corp.Act, § 1.40.

Foreign government. Foreign governments otherwise eligible to sue in U.S. courts are "persons" entitled to bring treble-damage suit for alleged antitrust violations under Clayton Act, Section 4. Pfizer, Inc. v. Government of India, C.A.Minn., 550 F.2d 396.

Illegitimate child. Illegitimate children are "persons" within meaning of the Equal Protection Clause of the Fourteenth Amendment, Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 1511, 20 L.Ed.2d 436; and scope of wrongful death statute, Jordan v. Delta Drilling Co., Wyo., 541 P.2d 39, 48.

Interested person. Includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding. Uniform Probate Code, § 1-201(20).

Labor unions. Labor unions are "persons" under the Sherman Act and the Clayton Act, Casey v. F.T.C., C.A.Wash., 578 F.2d 793, 797, and also under Bankruptcy Code, Highway and City Freight Drivers, Dockmen and Helpers, Local Union No. 600 v. Gordon Transports, Inc., C.A.Mo., 576 F.2d 1285, 1287.

Minors. Minors are "persons" under the United States Constitution, possessed of rights that governments must respect. In re Scott K., 24 C.3d 395, 155 Cal.Rptr. 671, 674, 595 P.2d 105.

Municipalities. Municipalities and other government units are "persons" within meaning of 42 U.S.C.A. § 1983. Local government officials sued in their official capacities are "persons" for purposes of Section 1983 in those cases in which a local government would be suable in its own name. Monell v. N. Y. City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611. *See* Color of law.

Definition of "person" or "persons" covered by antitrust laws includes cities, whether as municipal utility operators suing as plaintiffs seeking damages for antitrust violations or as operators being sued as defendants. City of Lafayette, La. v. Louisiana Power & Light Co., La., 435 U.S. 389, 98 S.Ct. 1123, 1128, 55 L.Ed.2d 364.

Protected person. One for whom a conservator has been appointed or other protective order has been made. Uniform Probate Code, § 5-103(18).

Resident alien. A resident alien is a "person" within the meaning of the due process and equal protection clauses of the Fourteenth Amendment. C. D. R. Enterprises, Ltd. v. Board of Ed. of City of New York, D.C. N.Y., 412 F.Supp. 1164, 1168.

Unborn child. Word "person" as used in the Fourteenth Amendment does not include the unborn. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 729, 35 L.Ed.2d 147. Unborn child is a "person" for purpose of remedies given for personal injuries, and child may sue after his birth. Weaks v. Mounter, 88 Nev. 118, 493 P.2d 1307, 1309. In some jurisdictions a viable fetus is considered a person within the meaning of the state's wrongful death statute, *e.g.* Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712, and within the meaning of the state's vehicular homicide statute, *e.g.* Comm. v. Cass, 392 Mass. 799, 467 N.E.2d 1324. *See also* Child; Children *(Rights of unborn child)*; Unborn child; Viable child.

University. A state university is a "person", within meaning of § 1983. 42 U.S.C.A. § 1983. Uberoi v. University of Colorado, Colo., 713 P.2d 894, 900.

Persona /pərsównə/. Lat. In the civil law, character in virtue of which certain rights belong to a man and certain duties are imposed upon him. Thus one man may unite many characters *(personæ)*, as, for example, the characters of father and son, of master and servant.

Personable /pə́rsənəbəl/. Having the rights and powers of a person; able to hold or maintain a plea in court; also capacity to take anything granted or given.

Persona conjuncta æquiparatur interesse proprio /pərsównə kənjáŋktə èkwəpəréytər ìntərésiy prówpriyow/. A personal connection [literally, a united person, union with a person] is equivalent to one's own interest; nearness of blood is as good a consideration as one's own interest.

Persona designata /pərsównə dèzəgnéytə/. A person pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character.

Persona ecclesiæ /pərsównə əklíyziyiy/. The parson or personation of the church.

Persona est homo cum statu quodam consideratus /pərsównə èst hówmow kàm stétyuw kwówdəm kənsidəréytəs/. A person is a man considered with reference to a certain *status*.

Person aggrieved. To have standing as a "person aggrieved" under equal employment opportunities provisions of Civil Rights Act, or to assert rights under any federal regulatory statute, a plaintiff must show (1) that he has actually suffered an injury, and (2) that the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute in question. Foust v. Transamerica Corp., D.C.Cal., 391 F.Supp. 312, 314.

As contemplated by federal rule governing standing to object to alleged illegal search and seizure is one who is the victim of the search and seizure, as distinguished from one who claims prejudice only through the use of evidence gathered in a search directed at someone else. Cochran v. U.S., C.A.Colo., 389 F.2d 326, 327.

Test of whether a petitioner is a "person aggrieved" and thereby entitled to seek review of an order of referee in bankruptcy is whether his property may be diminished, his burden increased or his rights detrimentally affected by order sought to be reviewed. In re Capitano, D.C.La., 315 F.Supp. 105, 107, 108.

See also Aggrieved party; Standing to sue doctrine.

Personal. Appertaining to the person; belonging to an individual; limited to the person; having the nature or partaking of the qualities of human beings, or of movable property. In re Steimes' Estate, 150 Misc. 279, 270 N.Y.S. 339.

As to *personal* Action; Assets; Chattel; Contract; Covenant; Credit; Demand; Disability; Franchise; Injury; Judgment; Knowledge; Liberty; Notice; Obligation; Property; Replevin; Representative; Right; Security; Service; Servitude; Statute; Tax; Tithes; Tort; and Warranty, see those titles.

Personal belongings. In probate law, term is a broad classification and in absence of restriction may include most or all of the testator's personal property. Goggans v. Simmons, Tex.Civ.App., 319 S.W.2d 442, 445. *See also* Personal effects.

Personal defenses. In commercial law, term usually refers to defenses that cannot be asserted against a holder in due course in enforcing an instrument. Also refers to defenses of a principal debtor against a creditor that cannot be asserted derivatively by a surety.

Personal effects. Articles associated with person, as property having more or less intimate relation to person of possessor; "effects" meaning movable or chattel property of any kind. Usual reference is to such items as the following owned by a decedent at the time of death: clothing, furniture, jewelry, stamp and coin collections, silverware, china, crystal, cooking utensils, books, cars, televisions, radios, etc.

Term "personal effects" when employed in a will enjoys no settled technical meaning and, when used in its primary sense, without any qualifying words, ordinarily embraces such tangible property as is worn or carried about the person, or tangible property having some intimate relation to the person of the testator or testatrix; where it is required by the context within which the term appears, it may enjoy a broader meaning. In re Stengel's Estate, Mo.App., 557 S.W.2d 255, 260.