

1995

Marden R. Kohler and Joy J. Kohler v. Stephen C. Martin : Brief of Appellant

Utah Court of Appeals

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A. Dean Jeffs Attorney for Appellees.

Robert Felton; Attorney for Appellant.

Recommended Citation

Brief of Appellant, *Kohler v. Martin*, No. 950345 (Utah Court of Appeals, 1995).

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IN THE UTAH COURT OF APPEALS

MARDEN R. KOHLER and :
JOY J. KOHLER, :

Plaintiffs/Respondents :
and Cross-Appellants, :

vs. :

CASE NO. 950345-CA
priority no. 15

STEPHEN C. MARTIN, :

Defendant/Appellant :
and Cross-Appellee. :

ADDENDUM TO BRIEF OF APPELLANT

Appeal From the Fourth Judicial District Court
of Wasatch County, State of Utah, The
Honorable Guy Burningham, District Judge
Presiding

Robert Felton
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Salt Lake City, Utah 84111
Attorney for Appellant

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Provo, Utah 84603
Attorney for Appellees

UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 950345-CA

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

MARDEN R. KOHLER and	:	
JOY J. KOHLER,	:	
Plaintiffs/Respondents	:	
and Cross-Appellants,	:	
vs.	:	CASE NO. 950345-CA
	:	priority no. 15
STEPHEN C. MARTIN,	:	
Defendant/Appellant	:	
and Cross-Appellee.	:	

ADDENDUM TO BRIEF OF APPELLANT

Appeal From the Fourth Judicial District Court
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FILED
IN THE DISTRICT COURT
WASATCH COUNTY, UTAH
4-14-95
Date
Clerk
Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

MARDEN R. KOHLER and JOY J.
KOHLER,

Plaintiffs,

vs.

STEPHEN C. MARTIN,

Defendant.

:

**AMENDED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

:

:

:

Civil No: 7122

:

Judge: Guy R. Burningham

This matter came on regularly for trial before the Honorable Guy R. Burningham, Judge in the above entitled court sitting without a jury on the 12th, 13th and 14th of October, 1994. The Court, having heard all the evidence and arguments of counsel and being fully advised in the premises, now makes and enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Plaintiffs are the owners of a residence and real property in Midway City, Wasatch County, State of Utah, more particularly described as follows:

Beginning 660 feet North and 15.25 chains West of the Southeast corner of the Northeast quarter of Section 34, Township 3 South, Range 4 East, Salt Lake Meridian; and running thence West 132 feet; thence South 137 feet; thence East 132 feet; thence North 137 feet to the point of beginning.

2. The Defendant is a resident of Midway City, Wasatch County, State of Utah, and the owner of a residence and real property therein, more particularly described as follows:

Beginning at a point North 5.68 chains and West 17.25 chains from the Southeast corner of the Northeast quarter of Section 34, Township 3 South, Range 4 East, Salt Lake Base and Meridian; thence North 89 degrees 12 minutes West 56.1 feet; thence North 648.6 feet to the South line of the Eugene Probst property; thence Easterly 319.44 feet to a point 362.34 feet North of the Northeast corner of Harold Fabian's property; thence South 362.34 feet; thence North 89 degrees 12 minutes West 132.1 feet, thence South 11.5 feet; thence West 132 feet; thence South to the point of beginning.

3. The real property of the Plaintiffs and that of the Defendant are adjacent to each other and abut along the West and North boundaries of the Plaintiffs' land. Defendant's deed includes title to a substantial portion of a roadway lying to the West and extending Southward from the Plaintiffs' land which connects with Second North Street. The relationship of Plaintiffs' and Defendant's properties and the roadway are illustrated by Plaintiffs' Exhibit 15(A), a copy of which is attached hereto marked "Exhibit A" and made a part hereof by reference.

4. The Court finds from clear and convincing evidence that the roadway adjacent to Plaintiffs' real property and extending northward from the intersection of Second North Street and Second West Street of Midway City to a line extended westerly from the north side of Plaintiffs' asphalt driveway where it enters the Plaintiffs' property was historically and continuously used by the general public as a public thoroughfare for far in excess of a 10 year period of time. The width of the thoroughfare area extended from fences along its west side and east side which are still in their historic locations. The entire thoroughfare area was used by the general public both for passage of people and animals and for the travel and parking of vehicles.

The use of the thoroughfare by the public was not only in connection with the use of the land now owned by the Plaintiffs, but also for access by the public to the lands north of the properties of these parties. The thoroughfare area was always open for the free and unobstructed passage of people and vehicles from its south end northward past the Plaintiffs' land from before 1922 to at least 1948. The said thoroughfare area is now used and claimed by Plaintiffs for access to and the use of their property.

5. The public thoroughfare which lies upon the land of Defendant is described as follows:

Beginning at a point North 5.68 chains and West 17.23 chains from the Southeast corner of the Northeast Quarter of Section 34, Township 3 South, Range 4 East, Salt Lake Base & Meridian (recorded as the point of beginning for property owned by Stephen C. Martin as recorded in Entry #144387, Book 196, Page 324 of Wasatch County Records);

Thence N 89°12'00" W a distance of 56.10 feet to Paul Wilson property line; thence North along said property line a distance of 277 feet more or less to a point at the intersection of a line extended westerly along the North side of an Asphalt driveway entering the Marden Kohler property; thence West along said extended line a distance of 56.09 feet to the West property line of Marden Kohler; thence South partially along Kohler property boundary a distance of 277 feet more or less to the point of beginning.

6. The roadway thoroughfare established by public usage has never been abandoned or vacated by order of any highway authorities having jurisdiction over the roadway, or by other competent authority.

7. The Court finds by clear and convincing evidence that the Plaintiffs predecessors in title, the Buhler family, operated a commercial swimming facility with two pools and a store

upon the land now owned and occupied by the Plaintiffs' residence. The Buhler's facilities were known as the Buhler's Hot Pots, and although they never owned the land upon which the roadway is located, the roadway was used for many years, far in excess of 10 years, by the general public as a thoroughfare for access and egress and parking of vehicles going to the Buhler facilities and also for access to the land north of those facilities which was a popular geologic and thermal spring area known as the "Mound". The entire roadway was used for such purposes and is the same roadway as is now used by the Plaintiffs for access to their property. The roadway has been regularly used by Plaintiffs' and their parents, Reed and Elda Kohler for access to their property since the summer of 1966. The roadway was always open without obstruction to the free passage of the public and vehicles.

8. The Court finds by a preponderance of evidence that in the summer of 1966, prior to purchasing the land where they built their home, Plaintiffs' parents, Reed and Elda Kohler approached William Ferrin Whitaker and Martha B. Whitaker (who were then the owners of the land now owned by Defendant) and sought their permission to use the roadway for access to what is now Plaintiff's land if they were to buy it and build their home there. That land formerly occupied by Buhler's Hot Pots, would otherwise have been landlocked. The Whitakers were aware of all the material facts and agreed and gave their permission intending it to be permanent and without restriction or limitation. Reed and Elda Kohler then bought the land in August 1966 and immediately thereafter built their home on it in reasonable reliance upon the permission and easement that had been granted by the Whitakers. The Kohlers had the continuous, regular and uninterrupted use of the roadway from the summer of 1966 until July 29, 1992, when Defendant put a padlock on a gate he had recently installed near the South end of the roadway. Until Defendant locked the gate there had been no effort by Defendant or any of his predecessors in title to withdraw permission for use of the roadway. Defendant's action in installing and locking the gate, caused significant detriment to Plaintiffs and if allowed to resume or continue, would cause Plaintiffs and their tenants irreparable harm, including harm

to health and safety and this court entered a preliminary injunction in this action on September 21, 1992 requiring Defendant to unlock the gate and cease interfering with Plaintiffs' and their tenants use of the roadway.

9. The Whitakers had asphalted and improved the road before granting Kohlers permission to use it. After the Kohlers had built and were occupying their home, the Whitakers first communicated to Reed Kohler a demand that he pay the Whitakers for a percentage of the value of the land in the roadway, a percentage of the cost of the improvements the Whitakers had installed, and to share in the future maintenance. Elda Kohler was not a party to that conversation and never agreed to make the payment demanded. Reed Kohler never made payment and died on June 9, 1969. The Whitakers thereafter continued to repeatedly make demands upon Elda Kohler for payment for the land and improvements, thereby manifesting that her continued use of the roadway was adverse to their interests.

10. In April of 1972 the Whitakers presented to Elda Kohler a formal written proposal for an agreement for payment for and use of the roadway. Elda Kohler never agreed to the proposal but continued the regular use of the roadway. The Whitakers never interrupted or objected to her use of the roadway although they continued to demand payment during the entire time they owned the land now owned by Defendant. Elda Kohler's use of the roadway was open, notorious, adverse, continuous and uninterrupted from April of 1972. The Whitakers failure to pursue their claim for payment effectively waived any rights they may have had to collect payment for the land and improvements.

11. On December 9, 1980, the Whitakers deeded their land to their brother and sister-in-law Richard Fred Bassett and Karen E. Bassett, who had knowledge of the use of the roadway and easement by the Kohlers. The lay of the land, the asphalt surfacing and improvements made it apparent that the roadway was the means of access to the Kohler residence and had been used over a long number of years. The location of the Kohlers attached garage facing onto the roadway and the asphalt driveways extending from the asphalt of the roadway to the Kohler

garage contributed to make the Kohler use open, visible, notorious and adverse. Their use was regular, continuous, unobstructed and uninterrupted during the ownership of the land by Bassetts. The Bassetts never gave permission for the use of the roadway by Elda Kohler or the Plaintiffs which use was clearly adverse as to the Bassetts.

12. On April 10, 1980, Elda Kohler deeded her land and residence to the Plaintiffs although she continued to live in the home and use the roadway until 1992. Elda Kohler and Plaintiffs continued to have the uninterrupted and unobstructed regular and continuous use of the roadway thereafter.

13. At the end of 1987, the Bassetts deeded the land and roadway to the Defendant, Stephen C. Martin, who likewise had knowledge of the use of the roadway and easement by the Kohlers. The circumstances were unchanged from what they were during the ownership by the Bassetts. Defendant never gave permission for use by the Plaintiffs. The Plaintiffs use of the roadway continued regularly, continuously and uninterrupted and unobstructed and was also open, visible, notorious and adverse to the Defendant until he locked the gate on July 29, 1992.

14. Plaintiffs and their parents had the open and unrestricted use of the roadway adversely to Defendant and his predecessors in title for over 20 years (from April 1972 when Whitakers first demanded payment for the land and improvements until July 29, 1992 when Defendant locked the metal gate he installed near the south end of the roadway). Defendant installed the gate in April 1992, but the Kohlers and their tenants continued unrestricted use of the roadway until Defendant locked it with a padlock on July 29, 1992.

15. The Court finds that Defendant has harassed the Plaintiffs and their tenants and invitees in the use of the roadway and thoroughfare, that his actions in installing and locking the metal gate causing the necessity for the Preliminary Injunction to be entered in this action was in violation of Plaintiff's rights and give rise to the necessity that this Court enter its order and a permanent injunction requiring that Defendant forthwith remove the gate and its metal posts, from in any way obstructing the free and open usage by persons and vehicles of the roadway as

described herein and from interfering in any way with the use by Plaintiffs, their successors and assigns and their tenants, guests, friends, relatives, visitors, invitees and others from the free and open use of the roadway for access, egress and parking in connection with the use of Plaintiffs' property and this Court should enter its order to restore them to their free and open usage of the roadway and thoroughfare. Defendant should likewise be restrained from harassing in any way or causing problems for Plaintiffs and such other persons in the use of the roadway and thoroughfare.

16. There have been feelings generated between the parties such that the Plaintiffs should also be restrained from harassing, belittling or causing problems with the Defendants' use of his land so long as his use does not interfere with their rights and Plaintiffs should exercise their influence to prevent any such actions by their tenants and family members.

17. The parties have in the past shared in the care and maintenance of the portion of the roadway from its north boundary described in paragraph 5 of these findings down to the north boundary of Second North Street of Midway City. The Plaintiffs and their predecessors have in the past done the care by way of mowing and watering on the east side of the asphalt surfacing and the Defendant has done it on the West side. There is a need that the parties should continue to share in the care and maintenance in that way. As to any need for maintenance or repair of the asphalt surfacing, when Defendant determines there is such a need, he should be ordered to determine a time frame for the work and obtain a bid and submit it to Plaintiffs for approval a reasonable time before the proposed work is to begin. If Plaintiffs do not approve of the bid or if Defendant fails to obtain a bid for work Plaintiffs deem necessary, Plaintiffs shall obtain a bid and submit it to Defendant. The work shall be let to the lowest responsible bidder and the parties shall share equally in the cost.

18. The Court does not find that Defendant's defense of this action was without merit and entered in bad faith as to the substance of the case, however, the Court should reserve for later determination the issues raised in the Order to Show Cause for Contempt of Court

heretofore entered in this action as well as the question of the award of attorney fees in connection therewith.

CONCLUSIONS OF LAW

1. The roadway which is the subject of this action and that portion of Defendant's land as described in paragraph 5 of the Court's Findings of Fact in this action became and still is a public thoroughfare under the provisions of Section 27-12-89, Utah Code Annotated, 1953 as amended; and as such the Plaintiffs, and their successors in interest in their land are entitled to the free and unobstructed permanent use of the roadway for access and egress and vehicular travel and parking in connection with the use of Plaintiffs' residence and real property which land is more particularly described in Paragraph 1 of the Findings of Fact.

2. Plaintiffs are the owners of an easement and right of way over and upon the roadway described in paragraph 5 of the Court's Findings of Fact. William Ferrin Whitaker and Martha B. Whitaker, the then owners of the fee title to the roadway granted the easement, by oral agreement which was acted and relied upon by Reed and Elda Kohler and established a permanent and unrestricted easement for use of the roadway. The Kohlers reliance upon that grant of easement by their use of the roadway and constructing their substantial home made that grant of easement irrevocable. They and the Plaintiffs have continued to use the roadway for over 27 years in reliance upon that grant of easement. The Kohler land is the dominant estate and the Defendant's land the servient estate in relation to that easement. Plaintiffs and their successors have the right to that permanent easement which is a right which runs with their land for the continued permanent use of the easement and roadway.

3. The Court also concludes as a matter of law that the doctrines of promissory estoppel and equity apply to the facts of this case to prevent Defendant from withdrawal of the promise and agreement of his predecessors, the Whitakers, granting the Kohlers the permanent use of the roadway by reason of the following elements:

a. The promise and agreement was reasonable expected to induce reliance by the Kohlers.

b. The Kohlers reasonably relied upon and took action in reliance upon the promise and agreement by buying their land, building their home and using the roadway.

c. There would be significant and substantial detriment to the Plaintiffs for the Defendant to be allowed to withdraw the permission and agreement.

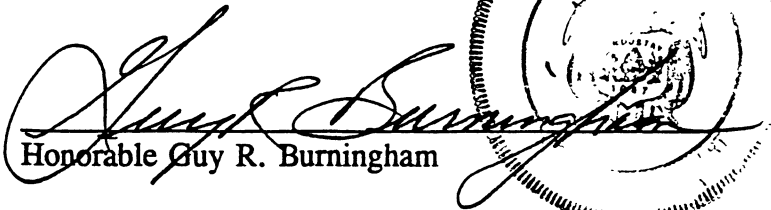
d. The promissors, the Whitakers, were aware of all material facts.

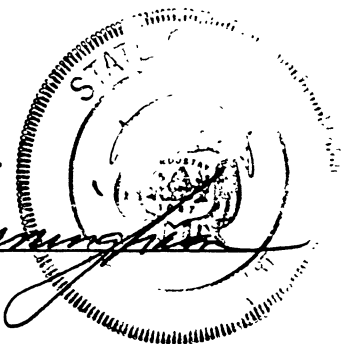
4. The Court further finds as a matter of law that Plaintiffs have established that they also own a prescriptive easement for the permanent and unrestricted use of that portion of the roadway upon Defendant's land as described in Paragraph 5 of the Findings of Fact for the continued use for access and egress and vehicular travel and parking in connection with the use of their residence and real property which perscriptive easement is a right which runs with the land.

5. The Court should enter its permanent restraining order and order for the care and maintenance for the roadway and thoroughfare as set forth in paragraphs 15, 16 and 17 of the Findings of Fact.

DATED and signed this 12 day of April, 1995.

BY THE COURT:

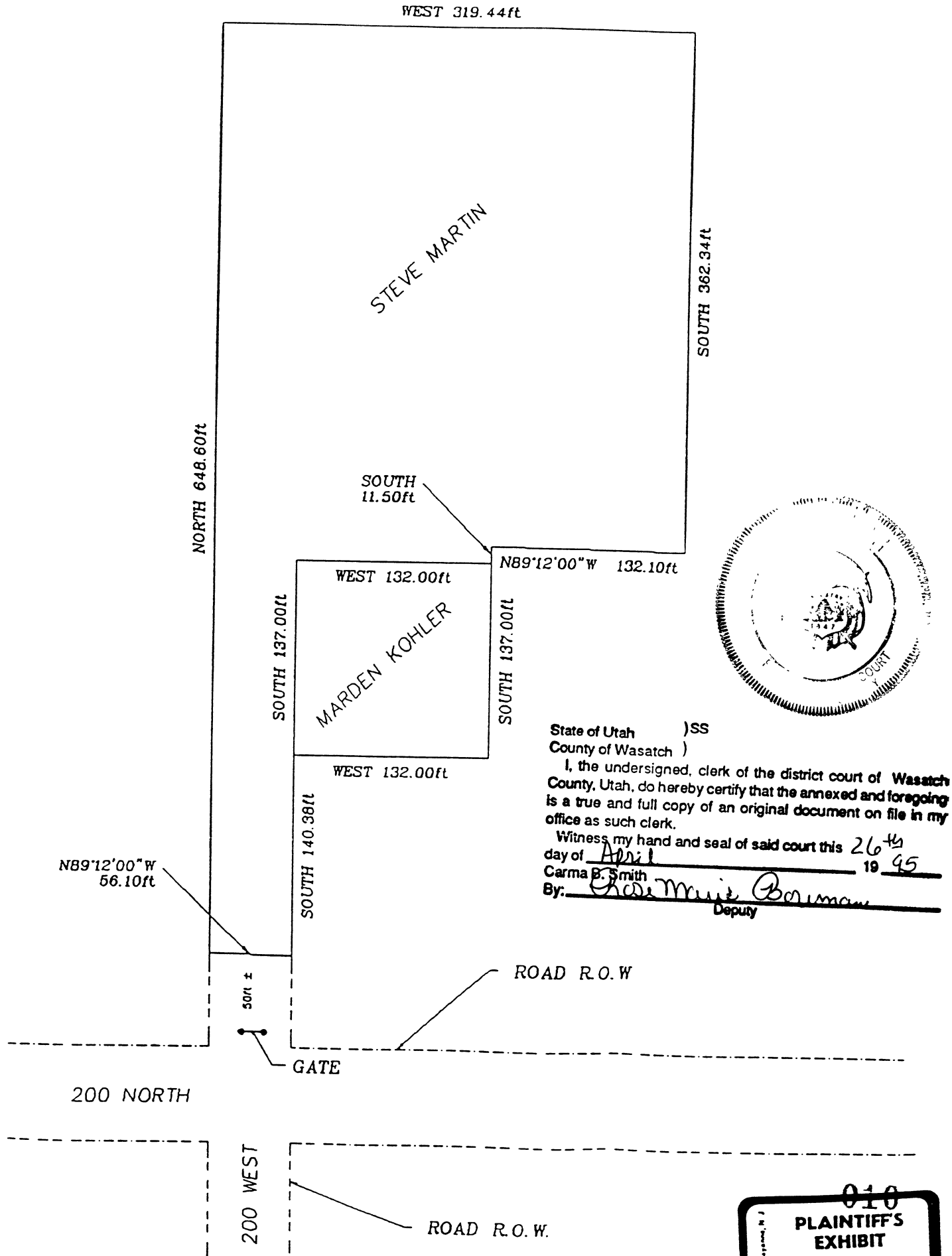

Honorable Guy R. Burningham



Approved as to form:

Robert Felton

009



FILED
IN THE DISTRICT COURT
WASATCH COUNTY, UTAH
1-17-94 Date
RMB Clerk
Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY
STATE OF UTAH

MARDEN R. KOHLER and JOY J.
KOHLER,

Plaintiffs,

vs.

STEPHEN C. MARTIN,

Defendant.

:

:

:

:

:

:

**JUDGMENT AND ORDER OF
PERMANENT INJUNCTION**

Civil No: 7122

Judge: Guy R. Burningham

This matter came on regularly for trial before the Honorable Guy R. Burningham, Judge of the above entitled court sitting without a jury on the 12th, 13th and 14th of October, 1994. The Court, having heard all the evidence and arguments of counsel and being fully advised in the premises, and having made and entered its Findings of Fact and Conclusions of Law,

IT IS NOW THEREFORE, ORDERED AND ADJUDGED as follows:

1. Plaintiffs are granted judgment that the roadway on the west and adjacent to Plaintiffs' real property is a public thoroughfare extending northward from the intersection of Second North Street and Second West Street of Midway City, Utah to a line extended westerly along the north side of the asphalt driveway where it enters Plaintiffs' real property. That portion of the public thoroughfare which lies upon the land of the Defendant and to which Defendants' land is subject is described as follows:

Beginning at a point North 5.68 chains and West 17.23 chains from the Southeast corner of the Northeast Quarter of Section 34, Township 3 South, Range 4 East, Salt Lake Base & Meridian (recorded as the point of beginning for property owned by Stephen C. Martin as recorded in Entry #144387, Book 196, Page 324 of Wasatch County Records);

Thence N 89°12'00" W a distance of 56.10 feet to Paul Wilson property line; thence North along said property line a distance of 277 feet more or less to a point at the intersection of a line extended westerly along the North side of an Asphalt driveway entering the Marden Kohler property; thence West along said extended line a distance of 56.09 feet to the West property line of Marden Kohler; thence South partially along Kohler property boundary a distance of 277 feet more or less to the point of beginning;

2. Plaintiffs are granted judgment that they are the owners of the right to the free and unobstructed permanent use of the said public thoroughfare for access and egress and vehicular travel and parking in connection with the use of Plaintiffs' residence and real property which is more particularly described as follows:

Beginning 660 feet North and 15.25 chains West of the Southeast corner of the Northeast quarter of Section 34, Township 3 South, Range 4 East, Salt Lake Meridian; and running thence West 132 feet; thence South 137 feet; thence East 132 feet; thence North 137 feet to the point of beginning.

3. Plaintiffs rights to the use of said public thoroughfare are rights that are appurtenant to and run with their land and may be conveyed to their successors in interest.

4. Plaintiffs are granted judgment that they are the owners of a private easement and right of way acquired both by a grant of easement and by prescriptive easement over and upon the said roadway and thoroughfare and specifically that portion of Defendant's land described

in Paragraph 1 above. Said easement and right of way is for the unobstructed and permanent use for access and egress and vehicular travel and parking in connection with Plaintiffs' real property described in Paragraph 2 above. Plaintiffs' right to said easement is hereby quieted in them and is a permanent right that is appurtenant to and runs with their land and can be conveyed to their successors in interest.

5. The Defendant is hereby ordered to forthwith remove the metal gate and gateposts he caused to be installed upon the roadway and thoroughfare that is the subject of this action and is hereby permanently enjoined from in any way obstructing the free and open travel by persons and vehicles upon any portions of the roadway from Second North Street northward to the north line of the land described in Paragraph 1 above. Defendant is further permanently enjoined from interfering with, harassing or otherwise causing problems in any with the use by Plaintiffs, their successors and assigns and their tenants, guests, friends, relatives, visitors, invitees and others from the free and open use of the roadway and thoroughfare for access, egress and parking of vehicles in connection with the use of Plaintiffs' property.

6. The Plaintiffs are hereby restrained from harassing, belittling or causing problems with Defendant's use of the roadway and his land so long as that use does not interfere with their rights. Plaintiffs are further ordered to strive to exercise what influence they can to prevent any such actions by their tenants and family members.

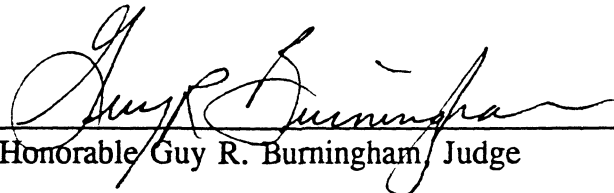
7. It is ordered in relation to the care, maintenance and repairs of the improvements in the roadway and thoroughfare for the area described in Paragraph 1 above the parties shall

continue the practice of sharing in such work, such that Plaintiff will do the care, mowing watering and maintenance on the east side of the asphalt surfacing and Defendant shall do it on the west side. As to repair or maintenance of the asphalt surfacing, when Defendant determines there is such a need, he shall set a reasonable time frame and obtain a bid for the work and submit it to Plaintiffs for their approval a reasonable time before the proposed work is to begin. If Plaintiffs do not approve of the bid or timing for the work or if Defendant fails to obtain a bid for work Plaintiffs deem is necessary, Plaintiffs shall obtain a bid and submit it to Defendant. The work shall be let to the lowest responsible bidder and the parties shall share equally in the cost.

8. Plaintiffs are granted their costs in this action.

9. The Court reserves for later determination in this action the issues raised by the Order to Show Cause for Contempt of Court heretofore entered in this action as well as the question of the award of attorney fees in connection therewith.

DATED and signed this 9 day of January, 1995


Honorable Guy R. Burningham, Judge

Approved as to form:

Robert Felton

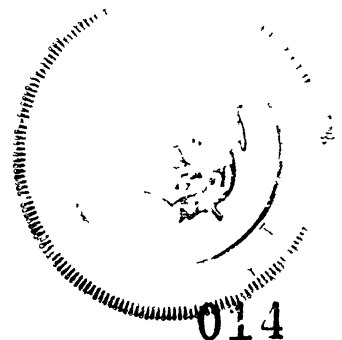
State of Utah)SS
County of Wasatch)

I, the undersigned, clerk of the district court of Wasatch County, Utah, do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office as such clerk.

Witness my hand and seal of said court this 26th day of April, 1995

Carmel B. Smith

By: R. DeMaie Barman
Deputy



ROBERT FELTON, #1056
Attorney for Defendant
39 Exchange Place, #200
Salt Lake City, Utah 84111
Telephone: (801) 532-5835

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llh

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH

MARDEN R. KOHLER and JOY J. KOHLER,	:	MOTION FOR A NEW TRIAL OR TO AMEND JUDGMENT
Plaintiffs,	:	Civil No. 7122
vs.	:	Judge GUY R. BURNINGHAM
STEPHEN C. MARTIN,	:	
Defendant.	:	

ROBERT FELTON, Attorney for the Defendant hereby moves this Court to grant a new trial or to amend the judgment in the above-entitled action. This motion is submitted pursuant to Rule 59 of Utah Rules of Civil Procedure.

1. There was significant irregularity in theses proceedings in allowing the Plaintiffs to amend their complaint after the trial was completed. Said action severely prejudiced the Defendant since he had no knowledge concerning the claim of estoppel and was prevented from eliciting testimony or calling witnesses to meet this issue. This action also surprised the defense.

2. The Court's finding that a public thoroughfare existed constitutes an error in law and was not supported by the evidence.

3. The Court's finding of a prescriptive easement was not

supported by the evidence and was an error in law.

4. The Court's findings that the prior owner had given permission and that permission was binding on Stephen Martin was not supported by the evidence and is error.

5. This motion is based upon the memorandum of law submitted herewith.

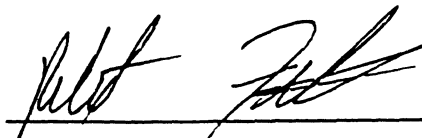
DATED this 17 day of January, 1995.



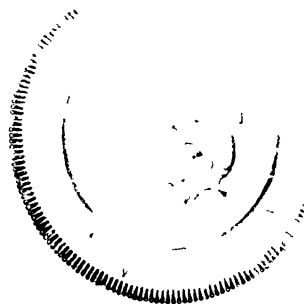
ROBERT FELTON
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on this 17 day of January, 1995, I mailed a true and correct copy of the foregoing MOTION FOR A NEW TRIAL OR TO AMEND JUDGMENT to A. DEAN JEFFS, Attorney at Law, P.O. Box 888, Provo, Utah 84603.



State of Utah 1SS
County of I, the of Wasatch
County, Utah, do hereby certify that the annexed and foregoing
is a true and full copy of an original document on file in my
office as such clerk.
Witness my hand and seal of said court this 26th
day of April 19 95
Carmel B. Smith
By: Rose Marie Borman
Deputy



COPY

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IN THE FOURTH JUDICIAL DISTRICT COURT
WASATCH COUNTY, STATE OF UTAH

=====

MARDEN KOHLER,)	COURT'S FINDINGS
)	
Plaintiff,)	TRIAL
)	
vs.)	CASE #7122
)	
STEPHEN C. MARTIN,)	HON. GUY R. BURNINGHAM
)	
Defendant.))	

BE IT REMEMBERED that on the 12th and 14th
days of October, 1994 this matter came on for trial
before the HONORABLE GUY R. BURNINGHAM, Judge of
the above-named court.

A P P E A R A N C E S

FOR THE PLAINTIFF:

A. DEAN JEFFS, ESQ.
M. DAYLE JEFFS, ESQ.
JEFFS & JEFFS, P.C.
90 NORTH 100 EAST
PROVO UT 84601

FOR THE DEFENDANT:

ROBERT FELTON, ESQ.
39 EXCHANGE PLACE, STE 200
SALT LAKE CITY, UT 84111

1 it clearly on both counts. And we'll submit it.

2 **COURT'S FINDINGS**

3 **THE COURT:** Thank you. Let me ask a
4 couple of questions for you to think about, and
5 I've thought about and are troubling me a little
6 bit, as you prepare to further advise me on the
7 law, not just the estoppel. In doing this I'm
8 going to make some findings.

9 I do find by clear and convincing evidence
10 that a public thoroughfare was created by the
11 general public use from, help me out on the
12 streets, Second North. Excuse me, and is it
13 Second--

14 **MR. FELTON:** West, I believe.

15 **THE COURT:** West. Up to approximately the
16 area that the large tree is now. That seems to be
17 almost parallel to where the pool was. It will
18 include the driveway, a portion of the entire
19 driveway presently being used by the Kohlers.

20 The question I have, and I'm going to make
21 a finding here, that insofar as the public use is
22 concerned, the public abandoned their use of it
23 somewhere around, or shortly after, 1948. I cannot
24 find by clear and convincing evidence that
25 otherwise there's a public thoroughfare created.

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1 Now, the statutes seem quite clear, that
2 in order for the abandonment of that public use by
3 the governmental entity to occur, that some action
4 by competent authority would have to occur. And
5 that has not happened.

6 There's a case footnoted in 27-12-90 that
7 I haven't read yet, but it peaked my interest.

8 **MR. FELTON:** Is it Osguthorpe?

9 **THE COURT:** It's Mallory vs. Taggart.
10 Says: "Corporation was able to give good
11 title to land platted for streets and
12 alleyways but never used as such since
13 under proviso in former law, road not
14 used or worked for five years ceased
15 to be a highway."

16 I'm not sure what that means. I'm not sure
17 what the case says. It's a 1970 case. I don't
18 even know if it's still good law as far as Shepards
19 is concerned. But, it peaked my interest to wonder
20 if there is case law that in some way does allow
21 the public, who created the public way, can then
22 abandon that public way through their discontinuing
23 their public use.

24 So having made those two findings, I'll
25 let you help me out on the law. If the only way

1 it can be abandoned is through competent authority,
2 then it's a public way up to about the tree, but
3 not beyond.

4 I don't see that the uses that I heard
5 about, although they were over a long period of
6 time, they were somewhat sporadic. And for the
7 most part, including the slaughterhouse, were for
8 the benefit of the owner of title of the land.

9 The Abegglen's leased the property to
10 Mr. Kohler who ran the processing plant. And so
11 any use would have been really for the benefit of
12 the property owner anyway, not a public use.

13 That falls within the cases too, that
14 invitees even of, and business dealings with the
15 owner of the property that crossed that property
16 can't create that public use.

17 As to the Buehler property, they never
18 owned this way. And there, the general public did
19 come and brought horses and buggies, there were tie
20 posts there. And when the automobiles became more
21 popular I do find by clear and convincing evidence
22 that they were parked up there right within the
23 right-of-way that we're talking about and as high
24 as the tree and the portion of the driveway
25 presently being used by the Kohlers. The Buehlers

1 never owned that property.

2 These public ways have to have a terminus
3 sometime. And when we say it led nowhere, it led
4 to that point. And they arrived there and parked,
5 not only for swimming but also to go up for their
6 picnics and hiking. And school children came down
7 that way to go to school. Again, I'm not sure that
8 it would have created more than a footpath at that.

9 And maybe it's my poor eyesight, but I
10 can't see from the aerial photographs the evidence,
11 and we didn't go up on the site and look at it.
12 Perhaps being there-- I had a similar case in this
13 county where we went up and the road was apparent.
14 There were still ruts and, although it hadn't been
15 used for a long time.

16 But I do find it was used for vehicular
17 traffic.

18 I guess I have another concern raised by
19 your rebuttal, Mr. Jeffs, where you say these are
20 not mutually exclusive. If it is a public way I'm
21 not sure an individual can adverse the government.
22 And so the things that would apply, either by way
23 of promissory estoppel or by prescriptive easement
24 may not have the same application as against the
25 city or town.

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1 So we're getting into the dilemma that I
2 think, it's beyond the dilemma you were talking
3 about, the one that I'm struggling with now. Let
4 me go on.

5 I find by preponderance of the evidence
6 that the Kohlers, this being Reed and Elda Kohler,
7 approached the Whitakers, Ferrin and Martha, and
8 sought permission to use the right-of-way. The
9 same portion that they ended up using for the
10 driveway to their home.

11 I find they relied upon that, they built
12 their home in reliance upon that and began using
13 the right-of-way upon that reliance.

14 I do find that sometime later Ferrin and
15 Martha Whitaker did present an agreement. I think
16 I've got the wrong exhibit here, I'm not sure.

17 **MR. A. DEAN JEFFS:** I believe that's
18 **EXHIBIT 13.**

19 **THE COURT:** Well, they presented the
20 agreement to Elda Kohler. I think the testimony
21 was that, a verbal agreement. And let me make this
22 finding.

23 I do find that a verbal agreement was
24 presented to Mr. Reed Kohler which sought
25 contribution from him for one half of the costs of

1 the improvements that had already been made to the
2 lane, and an agreement to share costs in future
3 maintenance and improvements.

4 That was a verbal agreement, and was a
5 contract only between Reed and Ferrin Whitaker.
6 They're the two that talked about it.

7 The contract has some of the same legal
8 problems that the permissive easement has, i.e.,
9 it was not in writing at that time. So the Statute
10 of Frauds would have come into play. I think too
11 that there would be a problem in that contract,
12 perhaps failing for want of consideration. The
13 reason being, the original permission was given
14 without limitation. And as I understand, once
15 permission is granted and reliance is made and
16 improvements are made, it becomes irrevocable.

17 I find that the Kohlers did help maintain
18 the lane in watering and mowing and just the
19 general maintenance of their portion, inside I
20 guess, of the lane, during the very early times.
21 And that continued on until Mrs. Kohler, I think,
22 probably became unable to do all of the work that
23 she had done, although she continued to do what she
24 could in watering.

25 To the extent that the verbal contract and

1 later the written contract, which was presented to
2 Elda Kohler by Mr. and Mrs. Whitaker which would
3 have been sometime after, during or after April of
4 1972, I find that Elda Kohler never agreed to the
5 contract. She had knowledge of the verbal contract
6 between her husband and the Whitakers and was not a
7 party to that contract. And she never agreed to
8 the terms and conditions set forth in the written
9 agreement. To that extent, since April of '72 her
10 use, and the use of the owners of the Kohler
11 property, has been adverse to the Whitakers and
12 their successors.

13 And so notwithstanding my very early
14 comments about adversing the government, the
15 Kohlers would be entitled to a prescriptive
16 easement over the same portion I've already
17 indicated, the part that they've used up to and
18 around the tree.

19 (SKIP IN TAPE @ #3321).

20 THE COURT: -- Barretts. Excuse me. Is
21 that the right name?

22 UNIDENTIFIED SPEAKERS: Bassetts.

23 THE COURT: Bassetts, excuse me. As to
24 the Bassetts' and the Martins' permissive use, I'm
25 not sure you can change the status by saying okay,

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1 we'll give you permission to use a right-of-way, or
2 give one permission to do what they are already
3 doing. I don't believe you can change the
4 character of the fact that the Whitakers were
5 seeking compensation for the easement, which
6 compensation was never sought through legal
7 proceedings. So even the verbal contract, had it
8 been enforced in a timely manner, might have been
9 enforced, but I think the Statute of Limitations
10 have long run on that. And I find that the
11 Whitakers waived any, any rights that they may have
12 had to collect on that.

13 I find that all of the successors of the
14 Whitakers had knowledge of the lane and easement
15 and use of the Kohlers. Just by the lay of the
16 land it's apparent that that was the access that
17 had been used over a long number of years. The
18 direction the garage faces, the practicality. It's
19 just very apparent that the knowledge of the use
20 was there. And that even if they were mistaken in
21 their understanding of whether or not that use was
22 permissive, they would not be able to change the
23 character of the prescriptive rights by later
24 giving permission to do what plaintiffs and their
25 predecessors were already doing.

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1 As to the terms of the proposed contract,
2 it provided upon the demise of Elda Kohler, or the
3 sale of the home, that the right-of-way was to be
4 purchased by its terms. And I find that the home
5 was sold back in 1980 from Elda Kohler to Marden
6 Kohler and Joy Kohler. So if that contract,
7 assuming it had any affect, even at the date that
8 that first term came into being, that no action was
9 taken to enforce it at that time either; one of
10 the conditions having then been met, the sale of
11 the home.

12 This is an unfortunate situation between
13 neighbors and a purchaser of a home in an area,
14 with an understanding that he has that this
15 right-of-way is limited. And then when feelings
16 and tempers flared, I think sometimes these
17 feelings get in the way of calm and collective
18 understanding and logic.

19 I don't find any bad faith on the part of
20 the defendant. I think because of those
21 disagreements and misunderstandings between the
22 neighbors that he's doing everything he feels he
23 ought to do legally to protect his rights. His
24 defenses are not without merit, without a sound,
25 reasonable basis. And so I find no bad faith on

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1 his part.

2 And I think we'll put to rest attorney's
3 fees being a part of the damages. They will not be
4 insofar as the damages in the lawsuit.

5 Now, I will reserve attorney's fees
6 regarding the contempt question that is still
7 pending before the Court. That being whether or
8 not he violated an order of the Court, thereby
9 necessitating the Order to Show Cause that came
10 before the Court. And so we may need to carve out
11 that portion of the attorney's fees if contempt is
12 found.

13 I find that because of these feelings that
14 it would be appropriate to grant restraining
15 orders, restraining both parties. And insofar as
16 possible, even members of families who are
17 nonparties to this action, from in anyway
18 harassing, belittling, causing problems with each
19 of the families respectively.

20 The gate should be removed from its
21 present location. If defendant desires to
22 construct it up above the easement that I've
23 granted, he's certainly free and welcome to do
24 that. It would keep traffic that may come up that
25 roadway at least from continuing on up into his

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1 residential, immediate residential area.

2 The trash that I've heard about, I didn't
3 really hear evidence that it's obstructing the use
4 of the right-of-way. It is on property owned by
5 the defendant. And while it may be unsightly and
6 unneighborly, I don't find that it violates any
7 rights or laws, nor does it interfere with the
8 easement.

9 (SKIP IN TAPE @ #4277)

10 THE COURT: -- Whitakers never revoked any
11 permissive use that they gave initially. I find
12 that the use by the plaintiffs was open and
13 visible.

14 I find that the Bassetts never gave
15 permission for the use, which is a further finding
16 that supports that the use has been adverse.

17 MR. FELTON: I'm sorry. I didn't hear
18 you, Your Honor. I--

19 THE COURT: I said I find that Mr. Bassett
20 never gave permission to use the right-of-way.
21 Which again supports the adverse use by the
22 plaintiffs.

23 If I haven't already said it, the
24 Whitakers' permission originally given was without
25 restrictions.

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1 **MR. M. DAYLE JEFFS:** You already voiced
2 that one.

3 **THE COURT:** Thank you.

4 I find there was no interruption in the
5 use from and after the time that the plaintiffs
6 became the owners of the property in 1980.

7 I find too that Elda Kohler was away from
8 the property at least nine months prior to her
9 death and there was no interruption in the use of
10 the right-of-way when she left. It was not
11 restricted, the permission or the, I guess the use
12 was not simply restricted to Elda's use, but it was
13 the plaintiffs and their invitees and others were
14 using it at that time.

15 And again, I may have said this, but I've
16 noted it twice so I'll say it again if I've already
17 said it. That the attempt of the Whitakers to
18 change the terms of their grant as presented both
19 in the verbal agreement and in the later written
20 agreement, I'm not sure that the terms are any
21 different, but there were two different times that
22 it was presented, once to Mr. Reed Kohler and later
23 to Elda Kohler in the written form. To the extent
24 that it attempted to change the terms, the use
25 became adverse

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1 From the testimony of Martha Whitaker, she
2 indicated because Elda couldn't handle it they
3 backed off. And I think by doing that they waived
4 the collection and demand and eviction, or whatever
5 else they might have done. Her words were "we
6 forgot about it".

7 I find too that even the Whitakers were
8 surprised when they purchased the property to
9 learn, after they called for a survey, that the
10 road was on their land. Up until then even they
11 thought it was a public way.

12 While I agree with the statement that a
13 payment of \$933.44 would have been a much more
14 economical way to handle this some years ago, it's
15 not relevant to the respective rights of the
16 parties. I don't know if you want to include that
17 in the finding, but that's an observation I make.

18 Those findings I can make now. But I do
19 feel like more enlightenment might be needed. As
20 is apparent, I've avoided the promissory estoppel
21 because you've got it by prescription, and you've
22 got the public thoroughfare.

23 **MR. FELTON:** Your Honor, might it be
24 appropriate to have the findings prepared, and then
25 when I file my objection we can deal with them? I

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1 mean, that might be the appropriate way. Once
2 they're prepared then we can deal with your
3 findings in light of my objections and various
4 post-trial requests.

5 THE COURT: Okay.

6 MR. FELTON: Is that acceptable?

7 MR. M. DAYLE JEFFS: Yes, it's acceptable.

8 MR. FELTON: I think that's--

9 MR. M. DAYLE JEFFS: It makes good sense.
10 That way if you want to cite case authority or
11 anything else in support of your objections, the
12 promissory estoppel issue, you can do so.

13 THE COURT: Yes.

14 MR. A. DEAN JEFFS: Your Honor, I do have
15 one, two questions. One is you said that the
16 driveway extends up to the tree. The description
17 that was presented goes up past the tree to the
18 north side of the driveway, since the driveway has
19 two sides that go around the tree, one on the right
20 and--

21 THE COURT: When I meant around the tree.
22 There's a Y up there and I would put it to the top
23 of the Y. Is that what the description names?

24 MR. A. DEAN JEFFS: Yes (inaudible).

25 MR. M. DAYLE JEFFS: Yes. That's correct,

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1 Your Honor.

2 THE COURT: For purposes of the findings
3 I'll adopt that description. That's the lower
4 portion. And again, not giving any fee title, but
5 only the right to use that. And I guess I'd like
6 to get away from granting the public the right to
7 use that, although I think the evidence shows clear
8 and convincing evidence that it was established.
9 And definitely the Kohlers have the prescriptive
10 right to use it, as I've indicated.

11 MR. FELTON: Your Honor, I don't know if
12 this is the appropriate time, but since there is a
13 finding that there is an easement I think it would
14 be appropriate for the Court to address the
15 maintenance issue. I do believe if we have
16 co-tenants on an easement, that future maintenance
17 costs should be shared.

18 THE COURT: They should. And I would make
19 that a finding that they ought to be shared and
20 that it ought to be maintained at, at least the
21 level that it's been maintained over the years. So
22 if it's going to need resurfacing, etcetera, those
23 costs should be shared on that portion.

24 MR. A. DEAN JEFFS: I think that would be
25 fine, Your Honor. But the decision as to what

NOTES TO DECISIONS

ANALYSIS

In general.
Appointment of administrator of estate.
Withholding tax.

In general.

No man can have a vested interest in the work or labor of another, nor has he a right to insist that another work for him, since that would violate this section. *McGrew v. Industrial Comm'n*, 96 Utah 203, 85 P.2d 608 (1938).

Appointment of administrator of estate.

This section prohibits the appointment of a person to serve as administrator of a decedent's estate if that person refuses to consent to such appointment. *In re Estate of Cluff*, 587 P.2d 128 (Utah 1978).

Withholding tax.

Provision requiring that a city withhold state income taxes due from employees does not subject the city to involuntary servitude. *Salt Lake City v. State Tax Comm'n*, 11 Utah 2d 359, 359 P.2d 397 (1961).

COLLATERAL REFERENCES

Am. Jur. 2d. — 45 Am. Jur. 2d Involuntary Servitude and Peonage § 1 et seq.

C.J.S. — 70 C.J.S. Peonage § 3; 80 C.J.S. Slaves § 10.

Key Numbers. — Slaves ⇌ 24.

Sec. 22. [Private property for public use.]

Private property shall not be taken or damaged for public use without just compensation.

History: Const. 1896.

Cross-References. — Eminent domain generally, § 78-34-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Advance payment of compensation.
Airplane overflights.
Closing street.
Consequential damages.
—Railroad.
—Road construction.
—School construction.
Defense to condemnation proceeding.
Elements of taking or damage.
Fair market value.
Section self-executing.
Highway easement.
Intangible factors.
Interest in condemnation proceedings.
Inverse condemnation.
Just compensation.
Municipal employment prerequisites.
Removal of personal property.
Services of attorney in defending indigent.
Statute of limitations.
Taxes.
Water rights.
Cited.

Advance payment of compensation.

This section provides merely that the prop-

erty shall not be taken or damaged for public use without just compensation, and does not require compensation to be paid in advance. *Anderson Inv. Corp. v. State*, 28 Utah 2d 379, 503 P.2d 144 (1972).

Airplane overflights.

For discussion of taking issues in an action by landowners alleging that their land has been "taken" by overflights, see *Katsos v. Salt Lake City Corp.*, 634 F. Supp. 100 (D. Utah 1986).

Closing street.

Where city, without notice, petition, or hearing, closes a portion of a street and alley abutting on school board-owned property on both sides and used for vehicular travel, and thus creates a cul-de-sac as to privately owned property, there has been a taking requiring just compensation. *Boskovich v. Midvale City Corp.*, 121 Utah 445, 243 P.2d 435 (1952).

Closing of city street and alleged impairment of access to commercial properties was not a "damaging" or "taking" within the meaning of this section; the alleged damages resulted from a temporary, one-time occurrence and not a permanent, continuous, or inevitably

a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

Compiler's Notes. — This rule is substantially similar to Rule 18, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Joinder of claims.

—Tort, contract and equity.

—Auto accident.

—Same transaction.

—Unrelated claims by assignee.

Joinder of remedies.

—Insurer and tort-feasor.

Cited.

Joinder of claims.

—Tort, contract and equity.

—Auto accident.

Where insurer of a vehicle involved in an auto accident filed a declaratory judgment action seeking to void insurance policy due to misrepresentations by the vehicle's owner in the policy application, and one of the defendants in the declaratory judgment action counterclaimed against the insurer and cross-claimed in tort against the other defendants, in determining whether to dismiss the defendant's counterclaim and cross-claim or permit their joinder, the trial court should have permitted the joinder unless the insurer could show that it would be prejudiced because of bias by the trier of fact if joinder was allowed; trial court should not have dismissed defendant's counterclaim and cross-claim on basis that joinder was of both tort and contract actions. *Dairyland Ins. Corp. v. Smith*, 646 P.2d 737 (Utah 1982).

—Same transaction.

All issues, whether in contract, tort, law or equity, arising out of a transaction between two parties, may be pleaded and proved in a single action. *Smoot v. Lund*, 13 Utah 2d 168, 369 P.2d 933 (1962).

—Unrelated claims by assignee.

Where seven different claimants assigned twelve different causes of action to plaintiff for purpose of collecting on them from a single defendant, and each cause of action arose from facts unrelated to any of the other causes of action so assigned, the single collector-plaintiff was not permitted to join all of the claims against defendant in one action despite the provisions of the rule, since the assignors could not have joined together and asserted their various claims in one action against defendant (Rule 20(a)), and an assignee cannot possess any greater rights than those possessed by his assignor. *Stank v. Jones*, 17 Utah 2d 96, 404 P.2d 964 (1965).

Joinder of remedies.

—Insurer and tort-feasor.

Plaintiff's attempt to join defendant's insurance company as a party defendant in a personal injury action, based on insurance policy providing that the insurance company "has agreed to pay a claim only after another claim has been prosecuted to a conclusion," did not come within the joinder provision of either Subdivision (b) or Rule 20. *Young v. Barney*, 20 Utah 2d 108, 433 P.2d 846 (1967).

Because there is no reason to believe the new rules were intended to change prior practice of not permitting disclosure to a jury of insurance coverage in a personal injury suit, joinder of tort-feasor with plaintiff's uninsured motorist insurer is improper. *Christensen v. Peterson*, 25 Utah 2d 411, 483 P.2d 447 (1971).

Cited in *Givan v. Lambeth*, 10 Utah 2d 287, 351 P.2d 959 (1960).

COLLATERAL REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d Actions § 81 et seq.

C.J.S. — 1 C.J.S. Actions §§ 61 to 101.

Key Numbers. — Action ⇌ 39 to 60.

Rule 19. Joinder of persons needed for just adjudication.

(a) **Persons to be joined if feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) **Determination by court whenever joinder not feasible.** If a person as described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence *might be prejudicial to him or those already parties*; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

(c) **Pleading reasons for nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) **Exception of class actions.** This rule is subject to the provisions of Rule 23.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule is substantially identical to Rule 19, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Discretion of court.
Indispensable parties.
—Failure to join.
—Assertion for first time at trial.
—Assertion for first time on appeal.
—Dismissal not bar to action on merits.
—Partner in joint venture.
—Two-part inquiry.
Joinder not required.
Necessary parties.
—Corporate stock transfers.
—Definition.
—Denial of joinder.
—Failure to intervene.
—Effect upon subsequent suit.
—Failure to join.
—Involuntary plaintiff.
—Relationship or interest.
—Joinder not required.
—Purpose of rule.
Cited.

Discretion of court.

Ordinarily, a trial court's determination properly entered under this rule will not be disturbed absent an abuse of discretion. *Seftel v. Capital City Bank*, 767 P.2d 941 (Utah Ct. App. 1989), *aff'd sub nom. Landes v. Capital City Bank*, 795 P.2d 1127 (Utah 1990).

Indispensable parties.

—Failure to join.

Trial court abused its discretion in dismissing an action with prejudice for failure to join indispensable parties, and not allowing an amendment or granting a continuance, where defendant claimed no surprise but merely relied on the likelihood of increased costs and complexity if the amendment were granted. Inter-mountain Physical Medicine Assocs. v. Micro-Dex Corp., 739 P.2d 1131 (Utah Ct. App. 1987).

—Assertion for first time at trial.

Under Rule 12(h), defense of failure to join an indispensable party asserted for first time at trial was to be disposed of as provided in Rule 15(b) in light of any evidence received; thus where defendants in action to enforce restrictive covenant did not adduce evidence sufficient to establish and identify an interest on part of the alleged "indispensable party," so as to require joinder, it was proper to refuse to dismiss action. *Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs.*, 535 P.2d 1256 (Utah 1975).

—Assertion for first time on appeal.

A party may raise the issue of failure to join an indispensable party at any time in the proceedings, including for the first time on appeal. *Seftel v. Capital City Bank*, 767 P.2d 941 (Utah Ct. App. 1989), *aff'd sub nom. Landes v. Capital City Bank*, 795 P.2d 1127 (Utah 1990).

—Dismissal not bar to action on merits.

Dismissal for failure to join an indispensable party is only an abatement of that particular action and does not bar an action on the merits. Thus, while dismissal on such ground may be proper, dismissal with prejudice would be an abuse of discretion, since the rules of procedure are intended to encourage the adjudication of disputes on their merits. *Bonneville Tower Condominium Mgt. Comm. v. Thompson Michie Assocs.*, 728 P.2d 1017 (Utah 1986).

—Partner in joint venture.

Where a partner in a joint venture sued potential investors in the venture for interference with contract, interference with prospective economic advantage, and breach of agreement, the partner was required to either name the partnership as party in interest or join his partner as an indispensable party in interest. *Kemp v. Murray*, 680 P.2d 758 (Utah 1984).

Co. v. United States, 9 Utah 2d 428, 347 P.2d 184 (1959); Richardson v. Arizona Fuels Corp., 614 P.2d 636 (Utah 1980); State ex rel. Utah

State Dep't of Social Servs. v. Toledo, 699 P.2d 710 (Utah 1985); Hiltzley v. Ryder, 738 P.2d 1024 (Utah 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Parties § 92 et seq.

C.J.S. — 67 C.J.S. Parties §§ 17 to 29, 30 to 32, 41 to 50.

A.L.R. — What constitutes "proper case" within meaning of provision of Rule 19(a) of

Federal Rules of Civil Procedure that when person who should join as plaintiff refuses to do so, he may be made involuntary plaintiff "in a proper case," 20 A.L.R. Fed. 193.

Key Numbers. — Parties ⇐ 13 to 20^{1/2}, 24 to 35.

Rule 20. Permissive joinder of parties.

(a) **Permissive joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) **Separate trials.** The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

Compiler's Notes. — This rule is substantially identical to Rule 20, F.R.C.P.

Cross-References. — Separate trial authorized, U.R.C.P. 42(b).

NOTES TO DECISIONS

ANALYSIS

Insurer.

—Declaratory action as to effect of policy.

—Personal injury action.

Cited.

Insurer.

—Declaratory action as to effect of policy.

One who claims to be damaged by the negligent act of another is not a proper party to an action by the insurer of the latter under a public liability policy, whereby a declaratory judgment is sought declaring the legal effect of the terms of such policy. Utah Farm Bureau Ins.

Co. v. Chugg, 6 Utah 2d 399, 315 P.2d 277 (1957).

—Personal injury action.

Plaintiff's attempt to join defendant's insurance company as a party defendant in a personal injury action, based on insurance policy providing that the insurance company "has agreed to pay a claim only after another claim has been prosecuted to a conclusion," did not come within the joinder provision of either Rule 18(b) or this rule. Young v. Barney, 20 Utah 2d 108, 433 P.2d 846 (1967).

Cited in Stank v. Jones, 17 Utah 2d 96, 404 P.2d 964 (1965); Dairyland Ins. Corp. v. Smith, 646 P.2d 737 (Utah 1982).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Parties § 92 et seq.; 75 Am. Jur. 2d Trial § 12.

C.J.S. — 67 C.J.S. Parties §§ 33 to 55; 88 C.J.S. Trial §§ 7 to 10.

Key Numbers. — Parties ⇐ 13 to 16, 24 to 27; Trial ⇐ 3, 4.

History: R.S. 1898 & C.L. 1907, § 2462; C.L. 1917, § 5812; R.S. 1933 & C. 1943, 33-5-2.

NOTES TO DECISIONS

ANALYSIS

Constructive trust.
Trusts.
—Evidence.
Wills.

Constructive trust.

Equity imposes a constructive trust to prevent one from unjustly profiting through fraud or the violation of a duty imposed under a fiduciary or confidential relationship. *Hawkins v. Perry*, 123 Utah 16, 253 P.2d 372 (1953).

After defendant altered a certificate of sale of land by inserting his own name as purchaser, so that the land was not included in the decedent's estate, there was a constructive trust for the benefit of the decedent's heirs, and the estate could be reopened. *Perry v. McConkie*, 1 Utah 2d 189, 264 P.2d 852 (1953).

Constructive trust to prevent unjust enrichment is not within the statute of frauds. *Carnesecca v. Carnesecca*, 572 P.2d 708 (Utah 1977).

Trusts.

Trusts arising by implication or operation of law are expressly excluded from the effects of the statute; and a deed of conveyance, though absolute in form, if given to secure a debt, is in equity treated as a mortgage — a trust by operation of law. *Wasatch Mining Co. v. Jennings*, 5 Utah 243, 15 P. 65 (1887).

Where defendant verbally agreed with the owner of real estate which was subject to a mortgage to bid the property in at foreclosure sale, and to convey title to plaintiff for a sum certain after he obtained the sheriff's deed, and plaintiff relied on such agreement and paid the specified amount to defendant who asserted ownership to the property and refused to convey, it was held that a trust *ex maleficio* arose, and was enforceable though the contract was

not in writing. *Chadwick v. Arnold*, 34 Utah 48, 95 P. 527 (1908).

A deed given to secure a debt, though absolute in form, was in equity a mortgage, so that a trust was created by operation of law and, under the express language of this section, was not prevented by § 25-5-1. *Taylor v. Turner*, 27 Utah 2d 39, 492 P.2d 1343 (1972).

—Evidence.

One seeking to have rights declared and enforced, founded upon or growing out of trust or a confidential relation, is required to show, with at least reasonable certainty, the terms of agreement and the character and extent of the trust or confidential relation. *Coray v. Holbrook*, 40 Utah 325, 121 P. 572 (1912).

Parol evidence is admissible to show a trust relationship by operation of law. *Barrett v. Vickers*, 100 Utah 534, 116 P.2d 772 (1941).

In an action to impress a trust upon real property, evidence supported a finding that grantor's daughter took the property by warranty deed subject to "oral trust" whereby daughter was to maintain the property as a family home to be used by grantor and her children and grandchildren for as long as any of said persons needed a home, with complete discretion in the daughter as to the time and as to which of said persons should use property. *Haws v. Jensen*, 116 Utah 212, 209 P.2d 229 (1949).

Parol evidence may be introduced to prove a constructive trust or resulting trust since they arise by operation of law and are expressly excluded from the statute of frauds by this section. *In re Estate of Hock*, 655 P.2d 1111 (Utah 1982).

Wills.

When a will is sought to be maintained also as a contract, it must satisfy this and succeeding sections of the statute of frauds. *Ward v. Ward*, 96 Utah 263, 85 P.2d 635 (1938).

25-5-3. Leases and contracts for interest in lands.

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

History: R.S. 1898 & C.L. 1907, § 2463; C.L. 1917, § 5813; R.S. 1933 & C. 1943, 33-5-3.

- (i) the permission shall contain the condition that any installation will be removed from the right-of-way at the request of the city or town; and
- (ii) the city or town shall cause any installation to be removed at the request of the department when the department finds the removal necessary
 - (A) to eliminate a hazard to traffic safety;
 - (B) for the construction and maintenance of the state highway; or
 - (C) to meet the requirements of federal regulations.
- (3) If it is necessary that a utility, as defined in Section 27-12-11, be relocated on federal-aid highways, reimbursement shall be made for the relocation as provided for in Section 27-12-11.
- (4) (a) The department shall construct curbs, gutters, and sidewalks on the state highways when it is found necessary by the department for the proper control of traffic, driveway entrances, or drainage.
 - (b) If a state highway is widened or altered and existing curbs, gutters, and sidewalks are removed, the department shall replace the curbs, gutters, and sidewalks.
- (5) The department may furnish and install street lighting systems for the state highways, but their operation and maintenance is the responsibility of the city or town.
- (6) If new storm sewer facilities are necessary in the construction and maintenance of the state highways, the cost of the storm sewer facilities shall be borne by the state and the city or town in a proportion mutually agreed upon between the department and the highway authorities of the city or town.
- (7) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the department may make rules governing the location and construction of approach roads and driveways entering the state highway, and the department may delegate the administration of the rules to the highway authorities of the city or town.

History: L. 1963, ch. 39, § 88; 1991, ch. 137, § 21; 1994, ch. 120, § 36.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, redivided Subsection (1) into present Subsections (1) to (3), redesignated former Subsections (2) to (5) as present Subsections (3) to (7), substituted "department" for "state road commission" throughout the section, and made changes in punctuation and phraseology

The 1994 amendment, effective May 2, 1994, substituted "for highways" for "with respect to streets" in the introductory language, subdivided Subsection (2), substituted "department" for "commission" in Subsections (6) and (7), added the code citation in Subsection (7); and made stylistic changes

ARTICLE 6

ACQUISITION OF PROPERTY FOR HIGHWAY PURPOSES

27-12-89. Public use constituting dedication.

A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.

78-12-13. Adverse possession of public streets or ways.

No person shall be allowed to acquire any right or title in or to any lands held by any town, city or county, or the corporate authorities thereof, designated for public use as streets, lanes, avenues, alleys, parks or public squares, or for any other public purpose, by adverse possession thereof for any length of time whatsoever, unless it shall affirmatively appear that such town or city or county or the corporate authorities thereof have sold, or otherwise disposed of, and conveyed such real estate to a purchaser for a valuable consideration, and that for more than seven years subsequent to such conveyance the purchaser, his grantees or successors in interest, have been in the exclusive, continuous and adverse possession of such real estate, in which case an adverse title may be acquired

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-13.

Cross-References. — Dedication of streets, § 57-5 4

Disposal of unused rights of way § 27 12 97
Highways continue until abandoned

§ 27 12 90

Vacation of highways § 27-12 102 et seq

NOTES TO DECISIONS

ANALYSIS

Establishment of a holding by city

—Insufficient

Establishment of a holding by drainage district

Estoppel

—Affirmative acts

—Denied

Establishment of a holding by city.

—Insufficient

The city must have some semblance of title possession or right to use, and making a survey, destruction of a fence between the street and adjoining property, and verbal assertion of ownership by the city are not sufficient to establish a holding *Gibbons v Salt Lake City Corp*, 6 Utah 2d 219, 310 P 2d 513 (1957)

Establishment of a holding by drainage district.

The evidence indicated that land held by the Utah County Drainage District Number 1 was *for public use and therefore could not be acquired by adverse possession* *Averett v Utah*

County Drainage Dist No 1, 763 P 2d 428 (Utah Ct App 1988)

Estoppel.

—Affirmative acts.

There is no bar of the statute of limitations against a city, in respect to a public street within its boundaries the city may however be estopped by its affirmative acts to claim land as part of a street *Wall v Salt Lake City*, 50 Utah 593 168 P 766 (1917)

—Denied.

Where city quitclaimed alley to private party in contravention of statute for small consideration, and there was no evidence that property ever was assessed against grantee or his successors in interest and time element was short and there was no replatting or change in whole neighborhood to benefit of all adjacent landowners there was no ground for estoppel in pais as against city's right to quiet title as against parties holding under grantee of quitclaim deed *Tooele City v Elkington*, 100 Utah 485 116 P 2d 406 (1941)

COLLATERAL REFERENCES

Am. Jur. 2d. — 3 Am Jur 2d Adverse Possession §§ 268 269

C.J.S. — 2 C J S Adverse Possession § 14

Key Numbers — Adverse Possession ⇨ 8(1), (2)

COLLATERAL REFERENCES

Am. Jur. 2d. — 66 Am Jur 2d Records and Recording Laws § 98

C.J.S. — 92 C J S Vendor and Purchaser § 324

A.L.R. — Recorded real property instrument

as charging third party with constructive notice of provisions of extrinsic instrument referred to therein, 89 A L R 3d 901

Key Numbers. — Vendor and Purchaser ⇌ 231(1)

57-3-3. Effect of failure to record.

Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if:

- (1) the subsequent purchaser purchased the property in good faith and for a valuable consideration; and
- (2) the subsequent purchaser's document is first duly recorded.

History: R.S. 1898 & C.L. 1907, § 2001; C.L. 1917, § 4901; R.S. 1933 & C. 1943, 78-3-3; L. 1988, ch. 155, § 15; 1989, ch. 88, § 9.

NOTES TO DECISIONS

ANALYSIS

Effect of failure to record

Mortgage

Obligation of grantor

Priorities

—Description of property insufficient

—Prior unrecorded conveyance

Cited

Effect of failure to record.

Where, after mortgage was executed on certain tract of land, owner executed deed to grantee on property not included in mortgage, which deed was not recorded, decree in action to foreclose mortgage on tract of land, including part conveyed to grantee was not binding on grantee who was not party to such action *Federal Land Bank v Pace*, 87 Utah 156, 48 P2d 480, 102 A L R 819 (1935)

A judgment lien is subordinate and inferior to a deed which predated it whether recorded after such judgment or whether not recorded at all *Kartchner v State Tax Comm'n*, 4 Utah 2d 382, 294 P2d 790 (1956), *Garland v Fleischmann*, 831 P2d 107 (Utah 1992)

Mortgage.

This section applies to mortgage liens, mortgagee is purchaser, and law of priority of record applies to mortgages *Federal Land Bank v Pace*, 87 Utah 156, 48 P2d 480, 102 A L R 819 (1935)

Obligation of grantor.

The grantor of property has no implied obligation to protect the grantee's rights by recording the grantee's interest in the property or by informing third parties of the existence of the

interest If the grantee fails to record, he assumes the risk of a subsequent grantee of the same land acquiring superior rights to his by recordation *Horman v Clark*, 744 P2d 1014 (Utah Ct App 1987)

Priorities.**—Description of property insufficient.**

Although defendant's deed was recorded first, failure of deed to adequately describe disputed portion of land resulted in omission of that portion from the deed, so that plaintiff's later-recorded deed, which included the disputed property, voided defendant's claim to the property *Neeley v Kelsch*, 600 P2d 979 (Utah 1979)

—Prior unrecorded conveyance.

Innocent purchaser for value without notice of previous conveyance, who first records his conveyance, takes preference over prior unrecorded conveyance *McGarry v Thompson*, 114 Utah 442, 201 P2d 288 (1948)

Later in time but prior recorded first mortgage took precedence over purchase money mortgage where mortgagee had no notice of the purchase money mortgage *Kemp v Zions First Nat'l Bank*, 24 Utah 2d 288, 470 P2d 390 (1970)

Where buyers did not record their own conveyance, or contract, they did not obtain the statutory protection enjoyed by subsequent purchasers in good faith and for value against unrecorded interests *Gregerson v Jensen*, 669 P2d 396 (Utah 1983)

Cited in *Billings v Cinnamon Ridge, Ltd (In re Granada, Inc)*, 92 Bankr 501 (Bankr D

(3) The rights of any person arising from prescriptive use or a period of adverse possession or user, which was in whole or in part subsequent to the effective date of the root of title

(4) Any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title of record is started, provided, however, that such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of Section 57-9-3

(5) The exceptions stated in Section 57-9-6 as to rights of reversioners in leases, as to apparent easements and interests in the nature of easements, and as to interests of the United States

History: L. 1963, ch. 109, § 2.

NOTES TO DECISIONS

ANALYSIS

Adverse possession
Boundary by acquiescence

Adverse possession.

City's continuous possession and use of canal for over ninety years and use of the land on both sides thereof in the maintenance of the canal established title in such land by adverse possession. Possession was hostile in that it was of such character that ownership could be inferred therefrom, city acquired title despite

nonpayment of taxes due to the acquisition of title prior to the enactment of the statute requiring payment of taxes as a condition of obtaining the title to land. *State ex rel. Rd. Comm'n v. Cox Corp.*, 29 Utah 2d 127, 506 P.2d 54 (1973)

Boundary by acquiescence.

This chapter did not apply to defeat fundamental doctrine of boundary by acquiescence established in the defendants in a quiet title action. *Olsen v. Park Daughters Inv. Co.*, 29 Utah 2d 421, 511 P.2d 145 (1973)

57-9-3. Marketable record title held free and clear of interests, claims and charges.

Subject to the provisions of Section 57-9-2, the marketable record title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims or charges, whatsoever, the existence of which depends upon any act, transaction, event or omission that occurred prior to the effective date of the root of title. All such interests, claims or charges, however denominated, whether legal or equitable, present or future, whether such interests, claims or charges are asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be void.

History: L. 1963, ch. 109, § 3.

57-9-4. Filing of notice of claim of interest authorized — Effect of possession of land by record owner of possessory interest.

(1) Any person claiming an interest in land may preserve and keep effective such interest by filing for record during the forty-year period immediately following the effective date of the root of title of the person whose record title

would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim. No disability or lack of knowledge of any kind on the part of anyone shall suspend the running of the forty-year period. The notice may be filed for record by the claimant or by any other person acting in behalf of any claimant who is

(a) under a disability,

(b) unable to assert a claim on his own behalf, or

(c) one of a class, but whose identity cannot be established or is uncertain at the time of filing the notice of claim for record.

(2) If the same record owner of any possessory interest in land has been in possession of such land continuously for a period of forty years or more, during which period no title transaction with respect to such interest appears of record in his chain of title, and no notice has been filed by him or on his behalf as provided in Subsection (1), and such possession continues to the time when marketability is being determined, such period of possession shall be deemed equivalent to the filing of the notice immediately preceding the termination of the forty-year period described in Subsection (1).

History: L. 1963, ch. 109, § 4.

NOTES TO DECISIONS

ANALYSIS

Adverse possession.

Boundary by acquiescence

Adverse possession.

City's continuous possession and use of canal for over ninety years and use of the land on both sides thereof in the maintenance of the canal established title in such land by adverse possession, possession was hostile in that it was of such a character that ownership could be inferred therefrom; city acquired title despite

nonpayment of taxes due to the acquisition of title prior to the enactment of the statute requiring payment of taxes as a condition of obtaining the title to land. State ex rel. Rd. Comm'n v Cox Corp., 29 Utah 2d 127, 506 P2d 54 (1973).

Boundary by acquiescence.

This chapter did not apply to defeat fundamental doctrine of boundary by acquiescence established in the defendants in a quiet title action Olsen v Park Daughters Inv. Co., 29 Utah 2d 421, 511 P.2d 145 (1973)

COLLATERAL REFERENCES

A.L.R. — Slander of title, sufficiency of plaintiff's interest in real property to maintain action, 86 A.L.R. 4th 738

57-9-5. Notice of claim of interest — Contents — Filing for record.

To be effective and to be entitled to record, the notice referred to above shall contain an accurate and full description of all land affected by such notice which description shall be set forth in particular terms and not by general inclusions; but if the claim is founded upon a recorded instrument, then the description in the notice may be the same as that contained in the recorded instrument. The notice shall be filed for record in the registry of deeds of the county or counties where the land described therein is situated. The recorder of each county shall accept all such notices presented to him which describe land located in the county in which he serves and shall enter and record full copies thereof in the same way that deeds and other instruments are recorded

Section		Section	
27-12-137.6.	Conditions for licensing of junkyard within 1,000 feet of highway.	27-12-145.	Highway authority — Restrictions on highway use — Erection and maintenance of signs designating restrictions — Penalty.
27-12-137.7	Screening of existing junkyards.		
27-12-137.8.	Repealed.	27-12-146.	Loads on vehicles — Confining, securing, and fastening load required — Penalty.
27-12-137.9.	Junkyards not adaptable to screening — Authority of department to acquire land — Compensation.	27-12-147.	Repealed.
27-12-137.10.	Junkyard operated in violation of provisions is public nuisance — Abatement — Correction notice.	27-12-148.	Application of size, weight, and load limitations for vehicles — Exceptions.
27-12-137.11.	Enforcement authority — Agreements with United States.	27-12-149.	Limitations as to vehicle width, height, length, and load extensions.
27-12-137.12.	Present ordinances or regulations saved.	27-12-150.	Towing requirements and limitations on towing.
27-12-137.13.	Violations — Misdemeanor.	27-12-151.	Maximum gross weight limitation for vehicles — Bridge formula for weight limitations — Minimum mandatory fines.
27-12-138.	Obstructing traffic on sidewalks or highways prohibited.	27-12-152.	Repealed.
27-12-138.5.	Gates on B system county highways.	27-12-153.	Measuring vehicles for size and weight compliance — Summary powers of peace officers — Penalty for violations.
27-12-139.	Driving animals over highways — Liability for damages.	27-12-154.	Oversize permits and oversize and overweight permits for vehicles of excessive size or weight — Applications — Restrictions — Fees — Rule-making provisions — Penalty.
27-12-140.	Limited highways — Penalty for driving animals over.		
27-12-141.	Escaping water and other obstructions — Injuring or obstructing highway — Penalty for violations.	27-12-155 to 27-12-157.	Repealed.
27-12-142.	Injury to trees on highways — Penalty for violations.		
27-12-143.	Violations of rules as to use — Damage to signs, warnings, or barriers — Penalty.		
27-12-144.	Liability for damage to highway, highway equipment, or highway sign — Liability for damage to highway from illegal operation or oversize or overweight vehicles — Recovery.		

Article 13

Establishment of Specific Highways

27-12-158, 27-12-159.	Repealed.
27-12-160.	I-15 designated as Veterans' Memorial Highway.
27-12-161.	Legacy Loop Highway.

ARTICLE 1

LEGISLATIVE INTENT AND DEFINITIONS

27-12-1. Repealed.

Repeals. — Section 27-12-1 (L. 1963, ch. 39, § 1), the legislative declaration of intent, was repealed by Laws 1975 (1st S.S.), ch. 9, § 53.

27-12-2. Definitions.

As used in this chapter:

- (1) "Commission" means the Transportation Commission appointed under Section 63-49-10.

(2) "Construction" means the construction, reconstruction, replacement, and improvement of the highways, including the acquisition of rights-of-way and material sites.

(3) "Department" means the Department of Transportation created in Section 63-49-4.

(4) "Executive director" means the executive director of the department appointed under Section 63-49-5.

(5) "Farm tractor" has the meaning set forth in Section 41-1a-102.

(6) "Highway" means any public road, street, alley, lane, court, place, viaduct, tunnel, culvert, bridge, or structure laid out or erected for public use, or dedicated or abandoned to the public, or made public in an action for the partition of real property, including the entire area within the right-of-way.

(7) "Highway authority" means the department or the legislative, executive, or governing body of a county, city, or town.

(8) "Implement of husbandry" has the meaning set forth in Section 41-1a-102.

(9) "Limited-access facility" means a highway especially designated for through traffic, and over, from, or to which neither owners nor occupants of abutting lands nor other persons have any right or easement, or have only a limited right or easement of access, light, air, or view.

(10) (a) "Port-of-entry" means a fixed or temporary facility constructed, operated, and maintained by the department where drivers, vehicles, and vehicle loads are checked or inspected for compliance with state and federal laws as specified in Section 27-12-19

(b) "Port-of-entry" includes inspection and checking stations and weigh stations.

(11) "Port-of-entry agent" means a person employed at a port-of-entry to perform the duties specified in Section 27-12-19.

(12) "Right-of-way" means real property or an interest in real property, usually in a strip, acquired for or devoted to a highway.

(13) "Semitrailer" has the meaning set forth in Section 41-1a-102.

(14) "State highway" means those highways designated as state highways in Title 27, Chapter 12, Article 4, Designation of State Highways, and under Section 27-12-27.

(15) "State highway purposes" has the meaning set forth in Section 27-12-96.

(16) "Trailer" has the meaning set forth in Section 41-1a-102.

(17) "Truck tractor" has the meaning set forth in Section 41-1a-102.

(18) "UDOT" means the Utah Department of Transportation.

History: L. 1963, ch. 39, § 2; 1975 (1st S.S.), ch. 9, § 4; 1990, ch. 88, § 1; 1991, ch. 137, § 1; 1992, ch. 1, § 3; 1994, ch. 7, § 1; 1994, ch. 11, § 1; 1994, ch. 120, § 29.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, rewrote Subsection (1), which read "Commission," "state road commission," or "highway department" means the appropriate division, office, commission, or committee in the Utah Department of Transportation", added Subsections (3), (4) and (13), redesignated former Subsections (3) to (10) as Subsections (5) to (12) and Subsections (11) to

(13) as Subsections (14) to (16); deleted "of Transportation" after "department" and substituted "commission" for "Utah Transportation Commission" and "or" for "and" before "governing body" in Subsection (7), substituted "Implement" for "Implements" at the beginning of Subsection (8), and substituted "real property or an interest in real property" for "land, property, or an interest therein" in Subsection (11)

The 1992 amendment, effective January 30, 1992, substituted the present code citation in Subsections (5), (8), (12), (15), and (16) for "Section 41 1 1" and made stylistic changes

fare. *Petersen v. Combe*, 20 Utah 2d 376, 438 P.2d 545 (1968).

Rights granted to public.

City still owned fee to strip, acquired under Townsite Act (43 U.S.C. § 718 et seq., now repealed), after alleged dedication thereof as public street, so that only right that public could have acquired would be right to easement across strip for traveling purposes, and only additional right contiguous property owners might acquire would be right of ingress to and egress from their property. *Premium Oil Co. v. Cedar City*, 112 Utah 324, 187 P.2d 199 (1947).

Rights of subsequent grantees.

Where land is dedicated by owner as highway and is accepted by public as such, all subsequent grantees of abutting lands are bound by dedication. *Schettler v. Lynch*, 23 Utah 305, 64 P. 955 (1901).

Sufficiency of proof of dedication.

Highway over privately owned ground will be deemed dedicated or abandoned to the public use when the public has continuously used it as a thoroughfare for a period of ten years. *Morris v. Blunt*, 49 Utah 243, 161 P. 1127 (1916).

Mere use by public of private alley in common with owners of alley does not show a dedication thereof to public use, or vest any right in public to the way. *Thompson v. Nelson*, 2 Utah 2d 340, 273 P.2d 720 (1954).

Though dedication of one's land to public use should not be lightly regarded, where a narrow, private dead-end street was used by neighboring residents and the general public without interference for at least 25 years, and where the city had platted it as a public street in 1915 and had thereafter paved it and maintained a public street sign at its entrance, and where plain-

tiff who owned the fee simple interest in the land on which the street was situated had not paid any taxes on the street property for 25 years, this combination of factors was sufficient to justify finding that the street had been dedicated to public use. *Bonner v. Sudbury*, 18 Utah 2d 140, 417 P.2d 646 (1966).

Clear and convincing quantum and quality of proof is required for the establishment of a public thoroughfare or taking of another's property. *Thomson v. Condas*, 27 Utah 2d 129, 493 P.2d 639 (1972).

Where the trial court found that public had used north-south road for 12 years and that during this time, the road was ten feet wide, and the court found that there was insufficient use of an east-west road by the public to make it a public road, these findings of fact, supported by substantial evidence, compelled a holding that the north-south road was a public highway ten feet wide and that no public highway existed on the east-west road. *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376 (Utah 1987).

For cases finding sufficient evidence to support finding of dedication to public use, see *Sullivan v. Condas*, 76 Utah 585, 290 P. 954 (1930); *Jeremy v. Bertagnole*, 101 Utah 1, 116 P.2d 420 (1941); *Boyer v. Clark*, 7 Utah 2d 395, 326 P.2d 107 (1958); *Clark v. Erekson*, 9 Utah 2d 212, 341 P.2d 424 (1959).

"Thoroughfare" and "public thoroughfare" distinguished.

Under identically worded predecessor section, a "thoroughfare" was a place or way through which there is passing or travel. It became a "public thoroughfare" when the public acquired a general right of passage. *Morris v. Blunt*, 49 Utah 243, 161 P. 1127 (1916).

COLLATERAL REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d Highways, Streets, and Bridges § 25 et seq.

C.J.S. — 39A C.J.S. Highways § 15.
Key Numbers. — Highways ☞ 6(1).

27-12-90. Highways once established continue until abandoned.

All public highways once established shall continue to be highways until abandoned or vacated by order of the highway authorities having jurisdiction over any such highway, or by other competent authority.

History: L. 1963, ch. 39, § 90.

27-12-22. County roads — Class B roads — Construction and maintenance by counties — Levy.

- (1) County roads comprise all public roads and streets within the state:
 - (a) not designated as state highways that are situated outside of incorporated municipalities;
 - (b) that have been designated as county roads; and
 - (c) those public roads located within a national forest and constructed or maintained by the county under agreement with the appropriate federal agency.
- (2) County roads are class B roads.
- (3) County roads are under the jurisdiction and control of the county governing bodies of the respective counties and shall be constructed and maintained by or under the authority of the county governing bodies of the respective counties from funds made available for that purpose.
- (4) The county legislative body has authority to expend or by contract cause to be expended the funds allocated to each county from the Transportation Fund under rules made by the department.
- (5) When the county legislative body considers the funds available for county road purposes from sources other than the levy made against tangible property adequate to properly construct and maintain the class B roads, the county may:
 - (a) cease making a levy for county road purposes; or
 - (b) use any portion of the class B road funds provided by this chapter for the construction and maintenance of class A state roads by cooperative agreement with the department.

History: L. 1963, ch. 39, § 22; 1967, ch. 50, § 1; 1991, ch. 137, § 13; 1993, ch. 227, § 296; 1994, ch. 120, § 31.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted “county governing body” and “county governing bodies” for “county commissioners” throughout the section; substituted “department” for “state road commission” at the end of the section, and otherwise rewrote the section to such an extent that a detailed analysis is impracticable.

The 1993 amendment, effective May 3, 1993, substituted “county legislative body” for

“county governing body” in Subsection (5).

The 1994 amendment, effective May 2, 1994, substituted “municipalities” for “cities and towns” in Subsection (1)(a), in Subsection (4), substituted “legislative body” for “governing bodies” and “department” for “commission”, subdivided Subsection (5), and made stylistic changes.

Cross-References. — Counties, power to levy taxes, § 17-5-248

General powers of counties, Title 17, Chapter

4

Special road districts, § 17A-3-1201 et seq

NOTES TO DECISIONS

Cited in J B Ranch, Inc v Grand County,
958 F2d 306 (10th Cir 1992)

27-12-23. City streets — Class C roads — Construction and maintenance — Use of levy.

- (1) City streets comprise:
 - (a) highways within the corporate limits of the municipalities that are not designated as class A state roads or as class B roads; and

- (b) those highways located within a national forest and constructed or maintained by the municipality under agreement with the appropriate federal agency.
- (2) City streets are under the jurisdiction and control of the governing officials of the municipality.
- (3) City streets are class C roads.
- (4) The department shall cooperate with the municipal legislative body in the construction and maintenance of the class C roads within each municipality, and the municipal legislative body shall expend or cause to be expended upon the class C roads the amount allocated to each municipality from the Transportation Fund under rules made by the department.
- (5) Any town or city in the third class may:
 - (a) contract with the county or the department for the construction and maintenance of class C roads within its corporate limits; or
 - (b) transfer, with the consent of the county, its:
 - (i) class C roads to the class B road system; and
 - (ii) funds allocated from the Transportation Fund to the municipality to the county legislative body for use upon the class C roads.
- (6) When the municipal legislative body of any municipality of the third class considers the funds available for road purposes from sources other than the levy made against tangible property adequate to properly construct and maintain the class C roads within any municipality, the municipal legislative body may use any portion of the class C road funds allocated to the municipality for the construction of sidewalks, curbs, and gutters on class A state roads within the municipal limits by cooperative agreement with the department.

History: L. 1963, ch. 39, § 23; 1969, ch. 67, § 1; 1991, ch. 137, § 14; 1993, ch. 227, § 297; 1994, ch. 120, § 32.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, subdivided the section; substituted “department” for “state road commission” and “county governing body” for “county commissioners” where the references appear; substituted “City streets” for “All public roads or streets” at the beginning of Subsection (1); substituted “highways” for “public roads” in Subsection (1)(b); substituted “Transportation Fund” for “state road fund” in Subsections (4) and (5)(b); substituted “made by the commission” for “and regulations mutually adopted by the city officials and the state road commission” in Subsection (4) and for “mutually adopted by the county commissioners and

the state road commission” in Subsection (5)(b); and made changes in phraseology.

The 1993 amendment, effective May 3, 1993, deleted “governing body” after “county” in Subsections (5)(a) and (b) and substituted “county legislative body” for “county governing body” in Subsection (5)(b).

The 1994 amendment, effective May 2, 1994, substituted “municipality” and “municipalities” for the various singular and plural forms of “city and town” throughout; substituted “municipal legislative body” for “governing officials of cities and towns” and “governing officials” throughout; substituted “department” for “commission” at the end of Subsection (4); and made stylistic changes.

Cross-References. — Powers of cities, Title 10, Chapter 8.

27-12-23.5. Jurisdiction over highways leading to and within state parks.

- (1) The department, a county, or a city has jurisdiction over and responsibility for:
 - (a) primary access highways to state parks;
 - (b) highways to the main attraction within each state park; and
 - (c) highways through state parks providing access to land uses beyond state park boundaries.

NOTES TO DECISIONS

Cited in *Katsos v. Salt Lake City Corp.*, 634 F. Supp. 100 (D. Utah 1986); *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 141 (Utah 1990).

63-30-6. Waiver of immunity as to actions involving property.

Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved.

History: L. 1965, ch. 139, § 6.

Quiet title actions, § 78-40-1 et seq.

Cross-References. — Mortgage foreclosure actions, § 78-37-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Construction and application.
Scope of section.

Construction and application.

The waiver of immunity from suit "for the recovery of any property real or personal or for the possession thereof" does not include an action for damages for impairment of access to property caused by construction of highway underpass; this act should be strictly construed to preserve sovereign immunity and to waive it

only as clearly expressed therein *Holt v Utah State Rd Comm*, 30 Utah 2d 4, 511 P 2d 1286 (1973).

Scope of section.

This section waives immunity only for actions to recover property, quiet title, clear title, or resolve disputes over mortgages or liens held by a governmental entity; a claim alleging damage or destruction of private property by a governmental entity does not fall within the grant of immunity in this section *Hansen v. Salt Lake County*, 794 P 2d 838 (Utah 1990)

63-30-7. Repealed.

Repeals. — Laws 1991, ch. 76, § 10 repeals § 63-30-7, as last amended by Laws 1990, ch. 204, § 1, waiving immunity for injury from

negligent operation of motor vehicles, with exceptions, effective April 29, 1991.

63-30-8. Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.

Unless the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10, immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them.

History: L. 1965, ch. 139, § 8; 1991, ch. 76, § 2.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, added "Unless

the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10," and made several stylistic changes

CHAPTER 34

EMINENT DOMAIN

Section		Section	
78-34-1.	Uses for which right may be exercised.	78-34-13.	Payment of award — Bond from railroad to secure fencing.
78-34-2.	Estates and rights that may be taken.	78-34-14.	Distribution of award — Execution — Annulment of proceedings on failure to pay.
78-34-3.	Private property which may be taken.	78-34-15.	Judgment of condemnation — Recordation — Effect.
78-34-4.	Conditions precedent to taking.	78-34-16.	Substitution of bond for deposit paid into court — Abandonment of action by condemner — Conditions of dismissal
78-34-5.	Right of entry for survey and location.	78-34-17.	Rights of cities and towns not affected.
78-34-6.	Complaint — Contents.	78-34-18.	When right of way acquired — Duty of party acquiring.
78-34-7.	Who may appear and defend.	78-34-19.	Action to set aside condemnation for failure to commence or complete construction within reasonable time.
78-34-8.	Powers of court or judge.	78-34-20.	Sale of property acquired by eminent domain.
78-34-9.	Occupancy of premises pending action — Deposit paid into court — Procedure for payment of compensation.		
78-34-10.	Compensation and damages — How assessed.		
78-34-11.	When right to damages deemed to have accrued.		
78-34-12.	When title sought found defective — Another action allowed		

78-34-1. Uses for which right may be exercised.

Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

- (1) All public uses authorized by the Government of the United States.
- (2) Public buildings and grounds for the use of the state, and all other public uses authorized by the Legislature.
- (3) Public buildings and grounds for the use of any county, city or incorporated town, or board of education; reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county or city or incorporated town, or for the draining of any county, city or incorporated town; the raising of the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels; roads, streets and alleys; and all other public uses for the benefit of any county, city or incorporated town, or the inhabitants thereof.
- (4) Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation.
- (5) Reservoirs, dams, watergates, canals, ditches, flumes, tunnels, aqueducts and pipes for the supplying of persons, mines, mills, smelters or other works for the reduction of ores, with water for domestic or other uses, or for irrigation purposes, or for the draining and reclaiming of lands, or for the floating of logs and lumber on streams not navigable, or for solar evaporation ponds and other facilities for the recovery of minerals in solution.

(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, quarries, coal mines or mineral deposits including minerals in solution; 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, quarries, coal mines or mineral deposits including minerals in solution; mill dams; gas, oil or coal pipelines, tanks or reservoirs, including any subsurface stratum or formation in any land for the underground storage of natural gas, and in connection therewith such other interests in property as may be required adequately to examine, prepare, maintain, and operate such underground natural gas storage facilities; and solar evaporation ponds and other facilities for the recovery of minerals in solution; also any occupancy in common by the owners or possessors of different mines, quarries, coal mines, mineral deposits, mills, smelters, or other places for the reduction of ores, or any place for the flow, deposit or conduct of tailings or refuse matter.

(7) Byroads leading from highways to residences and farms.

(8) Telegraph, telephone, electric light and electric power lines, and sites for electric light and power plants.

(9) Sewerage of any city or town, or of any settlement of not less than ten families, or of any public building belonging to the state, or of any college or university.

(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.

(11) Cemeteries and public parks.

(12) Pipe lines for the purpose of conducting any and all liquids connected with the manufacture of beet sugar.

(13) Sites for mills, smelters or other works for the reduction of ores and necessary to the successful operation thereof, including the right to take lands for the discharge and natural distribution of smoke, fumes and dust therefrom, produced by the operation of such works; provided, that the powers granted by this subdivision shall not be exercised in any county where the population exceeds twenty thousand, or within one mile of the limits of any city or incorporated town; nor unless the proposed condemner has the right to operate by purchase, option to purchase or easement, at least seventy-five per cent in value of land acreage owned by persons or corporations situated within a radius of four miles from the mill, smelter or other works for the reduction of ores; nor beyond the limits of said four-mile radius; nor as to lands covered by contracts, easements or agreements existing between the condemner and the owner of land within said limit and providing for the operation of such mill, smelter or other works for the reduction of ores; nor until an action shall have been commenced to restrain the operation of such mill, smelter or other works for the reduction of ores.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-34-1; L. 1957, ch. 174, § 1; 1963, ch. 193, § 1; 1969, ch. 258, § 1; 1973, ch. 206, § 1; 1981, ch. 164, § 1.

Cross-References. — Airports, §§ 2-2-5, 2-2-9, 2-2-10, 2-4-13.

Corporations, property and franchises subject to condemnation, Utah Const., Art. XII, Sec. 11.

County improvement districts, § 17A-2-312.

County service areas, § 17A-2-412.

Ditches, reservoirs, etc., § 73-1-6.

was "incarcerated" since she had not sought release and had she done so, superintendent could obtain court order preventing her release *Emery v State*, 26 Utah 2d 1, 483 P 2d 1296 (1971)

State's immunity from suit was waived under this section in action alleging negligent treatment of suicidal patient by psychiatrist and psychologist at university medical center *Frank v State*, 613 P 2d 517 (Utah 1980)

Trees negligently cut.

City and sidewalk contractor were liable for damage sustained by abutting homeowner when trees were blown down as result of unnecessary and negligent cutting of roots *Morris v Salt Lake City*, 35 Utah 474, 101 P 373 (1909)

Vehicle title certificate.

A lender's complaint against the State Tax Commission, claiming that the commission and its employees negligently failed to advise

the lender that a duplicate vehicle title had been issued and that it had improperly issued to the borrower the title certificate upon which the lender relied in making its loan, was barred by governmental immunity. The issuance of motor vehicle titles and recordkeeping responsibilities are governmental functions and have immunity under § 63-30-3. Further, the statutory waiver of immunity for negligence does not apply, under Subsection (3) of this section, when the alleged injury arises out of the issuance of a title certificate. *Metropolitan Fin Co v State*, 714 P 2d 293 (Utah 1986)

Cited in *Ingram v Salt Lake City*, 733 P 2d 126 (Utah 1987), *Maddocks v Salt Lake City Corp*, 740 P 2d 1337 (Utah 1987), *Loveland v Orem City Corp*, 746 P 2d 763 (Utah 1987), *Birkner v Salt Lake County*, 771 P 2d 1053 (Utah 1989), *Prows v State*, 822 P 2d 764 (Utah 1991), *Bruner v Rasmussen*, 792 F Supp 731 (D Utah 1992)

COLLATERAL REFERENCES

Utah Law Review. — Misapplication of Governmental Immunity — *Epting v Utah*, 1976 Utah L Rev 186

Journal of Energy Law and Policy. — Comment, The Only Way to Manage a Desert Utah's Liability Immunity for Flood Control, 8 J Energy L & Pol'y 95 (1987)

A.L.R. — Liability of municipality for building inspector's negligent performance of duties, 41 A L R 3d 567

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties, 71 A L R 3d 90

Governmental tort liability for failure to provide police protection to specifically threatened crime victim, 46 A L R 4th 948

Failure to restrain drunk driver as ground of

liability of state or local governmental unit or officer, 48 A L R 4th 287

Liability of hospital or sanitarium for negligence of physician or surgeon, 51 A L R 4th 235

Municipal liability for negligent fire inspection and subsequent enforcement, 69 A L R 4th 739

Admissibility of evidence of polygraph test results, or offer or refusal to take test, in action for malicious prosecution, 10 A L R 5th 663

Applicability of libel and slander exception to waiver of sovereign immunity under Federal Tort Claims Act (28 USCS § 2680(h)), 79 A L R Fed 826

Applicability of 28 USCS §§ 2680(a) and 2680(h) to Federal Tort Claims Act liability arising out of government informant's conduct, 85 A L R Fed 848

63-30-10.5. Waiver of immunity for taking private property without compensation.

(1) As provided by Article I, Section 22 of the Utah Constitution, immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation

(2) Compensation and damages shall be assessed according to the requirements of Title 78, Chapter 34, Eminent Domain.

History: C. 1953, 63-30-10.5, enacted by L. 1987, ch. 75, § 3; 1991, ch. 76, § 5.

Amendment Notes. — The 1991 amend-

ment, effective April 29, 1991, added "As provided by Article I, Section 22 of the Utah Constitution," and inserted "for public uses" in

CHAPTER 4

MARKETING WOOL

(Repealed by Laws 1965, ch. 154, § 10-102.)

25-4-1 to 25-4-3. Repealed.

Repeals. — Sections 25-4-1 to 25-4-3 (L. 1931, ch. 54, §§ 1 to 4; R.S. 1933 & C. 1943, 33-4-1 to 33-4-3), relating to the marketing of wool, were repealed by Laws 1965, ch. 154, § 10-102.

CHAPTER 5

STATUTE OF FRAUDS

Section		Section	
25-5-1.	Estate or interest in real property.	25-5-6.	Promise to answer for obligation of another — When not required to be in writing.
25-5-2.	Wills and implied trusts excepted.	25-5-7.	Contracts by telegraph deemed written.
25-5-3.	Leases and contracts for interest in lands.	25-5-8.	Right to specific performance not affected.
25-5-4.	Certain agreements void unless written and signed.	25-5-9.	Agent may sign for principal.
25-5-5.	Representation as to credit of third person.		

25-5-1. Estate or interest in real property.

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

History: R.S. 1898 & C.L. 1907, §§ 1974, 2461; C.L. 1917, §§ 4874, 5811; R.S. 1933 & C. 1943, 33-5-1.

Cross-References. — Contract for sale of goods for \$500 or more unenforceable in absence of some writing, § 70A-2-201.

Enforceability of security interests, § 70A-9-203.

Securities sales, statute of frauds for contracts, § 70A-8-319.

Statute of frauds for kinds of personal property not otherwise covered, § 70A-1-206.

NOTES TO DECISIONS

ANALYSIS

Adjoining landowners.
Agent's authority.
Blank deeds or papers.
Construction and application.
Contents of deed.
Corporate officers.
Custom and usage.
Dedication of land.
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Easements.
Gifts.
Interest in real property.
Leases.
Modifications of contract.
Mortgages.
Nature of required writing.
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Oral contracts to buy or sell land.
— Recovery of money paid.
Parol executed agreement.