

1941

Tooele City v. Lenora Elkington and Glen Elkington : Appellants' Abstract of Record

Utah Supreme Court

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For Plaintiff and Respondent; M. Earl Marshall;

For Defendants and Appellants; M. LeRoy Shields;

Recommended Citation

Abstract of Record, *Tooele City v. Lenora Elkington et al*, No. 6327 (Utah Supreme Court, 1941).

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SUPREME COURT OF THE STATE OF UTAH

TOOELE CITY, a municipal
corporation,

Respondent,

vs.

LENORA ELKINGTON and GLEN
ELKINGTON, joint adminis-
trators of the estate of
ISAAC ELKINGTON, deceased;
also all other persons
unknown claiming any right,
title, estate or interest
in or lien upon the real
estate described in the
complaint, adverse to the
plaintiff's ownership or
clouding plaintiff's title
thereto,

Appellants.

Case No.

6327

APPELLANTS' ABSTRACT OF RECORD

APPEAL FROM THIRD JUDICIAL DISTRICT COURT IN AND FOR
TOOELE COUNTY, STATE OF UTAH
Honorable Clarence E. Baker, Judge, Presiding

APPEARANCES:

For Plaintiff and Respondent:

M. KAHL MARSHALL

For Defendants and Appellants:

E. LEROY SHIELDS

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In the
SUPREME COURT OF THE STATE OF UTAH

TOOELE CITY, a municipal corporation, :

Respondent, :

Va. :

LEORA ELKINGTON and GLEN :

ELKINGTON, joint adminis- :

trators of the estate of :

ISAAC ELKINGTON, deceased; :

also all other persons :

unknown claiming any right, :

title, estate or interest :

in or lien upon the real :

estate described in the :

complaint, adverse to the :

plaintiff's ownership or :

clouding plaintiff's title :

thereto, :

Appellants.

Case No.

6327

APPELLANTS' ABSTRACT OF RECORD

APPEAL FROM THIRD JUDICIAL DISTRICT COURT IN AND FOR

TOOELE COUNTY, STATE OF UTAH

Honorable Clarence E. Baker, Judge, Presiding

(Title of Court and Cause.)

AMENDED COMPLAINT

The above plaintiff complains and alleges:

1-. That the plaintiff is a municipal corporation duly and lawfully organized and existing under and by virtue of the Laws of the State of Utah.

2-. That the defendants who are personally named above are residents of Tooele County, State of Utah.

3-. That the plaintiff herein ever since the year 1872 has been and now is the owner of and entitled to the possession of that certain tract of real property lying and being in Tooele City, Tooele County, State of Utah, which is described as follows;

Commencing at the Northwest corner of Block 52, Plat "A" Tooele City Survey, South 25.48 rods, West 49.50 feet, to the southeast corner of Block 51, North 25.48 rods, East 49.50 feet to the place of beginning, being in Tooele City, Tooele County, State of Utah.

4-. That on the 10th day of July, 1872, the United States of America, by U. S. Grant, President and Z. B. Stargess, Assistant Secretary, granted to Tooele City, plaintiff herein, all of Section 28, the East half of Section 29, and the South half of Section 21, in Township 3 South of Range 4 West Salt Lake Base and Meridian, and that the property above described is a portion of this land.

5-. That sometime prior to on or about the 5th

day of December, 1882, plaintiff City caused the real property within its then corporate limits and townsite entry, including the property set out above, to be sub-divided into Lots, Blocks and Streets, and on or about the said 5th day of December, 1882, caused to be prepared a plat or diagram showing the property so sub-divided; that thereafter and on or about the 1st day of May, 1884, said plaintiff City adopted and approved said plat or diagram, designating the same as Plat of Tooele City, and thereafter caused the same to be duly filed in the Office of the County Recorder of Tooele County, State of Utah, and which plat ever since said time and now is the official map, diagram and plat of said plaintiff, Tooele City.

6-. That by said plat Block 51, Plat "A" of Tooele City Survey was shown to be 20.60 rods in length, east and west, and Block 52 of Plat "A" Tooele City Survey was shown to be 21 rods in length, east and west and by said plat it was also shown that there was an alley way, or street, running north and south between said Blocks 51 and 52,

and described said street or alley way as being

and more details of history and property information are available by the Utah State Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

3 rods in width and that said street or alley way is described as set out in paragraph three above.

7-. That in the year 1873, the Mayor of Tooele City deeded to respective owners of property within Tooele City different tracts of land designated as Lots and Blocks, and that at such time the lands abutting the property set out and described in paragraph three above were designated as Block 51 and Block 52 of Plat "A" Tooele City Survey in accordance with the Official Plat herein above mentioned.

8-. That all of the said property which was not deeded by the Mayor of Tooele City to some grantees was retained by said plaintiff city as streets and alleys, and that the plot set out in paragraph three above was so retained by Tooele City as a street or alley as shown on the official map or plat above mentioned and that said plaintiff city has never at any time, except as hereinafter mentioned, by deed or otherwise transferred to any person or persons the plot of real property set out and described in paragraph three above.

9-. That ever since the date of 1873 each and every owner of lands abutting the property set out in paragraph three above have conveyed their respective interests to the abutting property paying strict attention to the boundaries of the plot set out in paragraph three and have in each and every instance recognized said plat as not belonging to them and in most instances have recognized it as an alley way or street and have never attempted to at any time convey any portion of same or any interest therein and by so doing the defendants are estopped at this time to claim any interest therein or to claim that said tract is not the property of the plaintiff city, and that said Tooele City has at all times herein mentioned since July 10, 1872 regarded the tract of land as set out in paragraph three as being their property and to hold same to such time, if ever, a request was made or it was deemed advisable to open said plot of land for a public street or alley way, but that up to the 7th day of March, 1936, no request has ever been made to have said property opened as a public street or

alley way nor has there been any apparent need for such, but that on or about the 7th day of May, 1938, a request was made by owners of property abutting said tract of land to have same opened as a public street or alleyway.

10-. That the defendants Lenora Elkington and Glen Elkington as joint administrators of the estate of Isaac Elkington, dec., or otherwise, claim to have some property right, title, interest, estate in or lien upon the property set out in paragraph three adverse to the plaintiff's title thereto, but that they, nor their predecessors, do not have nor have they ever had any right, title, interest, estate in or lien upon the property described in paragraph three herein or any part thereof.

11-. That on or about the 7th day of March, 1938, the said Isaac Elkington, now deceased, appeared before the City Council of Tooele City, at a regular meeting thereof and by fraud and misrepresentation obtained a quit claim deed from said plaintiff to the lands described in paragraph three herein; a copy of which deed is hereto attach-

ed, marked "Exhibit "A", and is by reference made a part of this complaint; that said fraud and misrepresentations consisted of the said Isaac Elkington representing to said City Councilmen and Mayor that he had obtained the consent and approval of all landowners abutting said tract as described in paragraph three that the City should convey said land to the said Isaac Elkington for his own use and that they had no desire to have same opened as a public street or alley-way as set out on the official plat herein mentioned, but in truth and in fact the said Isaac Elkington had discussed said matter with the abutting landowners and they had advised him that they intended to petition the City within the very near future to have said tract opened as a public street or alley for their immediate use and benefit; that said Isaac Elkington made such representations to said City Council and Mayor knowing them to be false; that the said body believed such statements to be true and relied upon said statements as being true, executed said deed to the said Isaac Elkington and

he immediately recorded same with the County Recorder of Tooele County where it now appears as a cloud upon plaintiff's title to said land. That the said deed was given without any consideration whatever and the said City Council had no authority to attempt to vacate such public street or alleyway in such a manner.

12-. That there are no other persons known to the plaintiff other than the defendants above named, who have or pretend to have some claim or cloud on the property described in paragraph three herein, but that the plaintiff has no knowledge, information or belief that the above defendants do now have or claim to have any right, title, interest, estate, lien, claim or cloud, pretended or otherwise, in or to the said property, or if the same has passed from said defendants by devise, descent, inheritance, purchase, operation of law, or otherwise, or at all, that the transferees, devisees, heirs at law, or creditors, purchasers or any other person claiming by, through or under said known defendants, or otherwise, or at all,

are unknown to the plaintiff; that the said unknown persons claiming any right, title, estate, interest, lien or cloud in or to the property above described in paragraph three, they or any of them, have no right or claim adverse to the ownership of the plaintiff or any cloud upon the title of the plaintiff thereto, or any part thereof.

WHEREFORE, plaintiff prays judgment as follows:

1-. That the defendants, and each of them, whether known or unknown, may be required to set forth the nature of their claims, and that all adverse claims of said defendants, and each of them, whether known or unknown, be determined by a decree of this court.

2-. That the quit claim deed set out in paragraph 11 of this complaint be cancelled and by the decree of this Court the plaintiff be adjudged the owner of said lands and that the defendants and each of them, known or unknown, have no right, title, interest, estate or lien whatsoever in or

that the plaintiff's title is good and valid.

3-. That the defendants and each of them, whether known or unknown, be forever barred and enjoined from asserting any claim whatsoever in or to said property, or any part thereof, adverse to the plaintiff.

4-. For such other and further relief as is just and equitable in the premises together with costs.

M. EARL MARSHALL,

Attorney for Plaintiff.

Duly verified.

Filed in Clerk's Office February 27, 1940.

QUIT CLAIM DEED

"Exhibit A"

TOOELE CITY, A MUNICIPAL CORPORATION,
by its Mayor, Nelse Blomstrom, Grantor, of Tooele
City, Tooele County, State of Utah, hereby quit
claims to I. J. Elkington, Grantee, of Tooele
City, Tooele County, State of Utah, for the sum
of One Dollar and other good and valuable consid-

eration the following described tract of land in
 Tooele City, Tooele County, State of Utah

Commencing at the Northwest corner of
 Block 52 of Plat "A" Tooele City Survey,
 thence south 25.48 rods, thence west
 49.50 feet, more or less, to the south-
 east corner of Block 51, thence north
 25.48 rods, to the south line of 3rd
 South Street, thence east 49.50 feet,
 more or less to the place of beginning.

This deed is executed under and by
 Virtue of a Resolution of the City Coun-
 cil of Tooele City, Utah duly adopted
 on the 7th day of March A. D. 1938.

WITNESS, the hand of the said grantor this 16th
 day of March A. D. 1938.

(Seal)

Signed Malss Blomstrom.
 Mayor of Tooele City

Attest

Signed. John T. Adams
 City Recorder

(Title of Court and Cause)

ANSWER TO AMENDED COMPLAINT

Comes now the defendants above named, Lenora
 Elkington and Glen Elkington, joint administrators
 of the estate of Isaac Elkington, deceased, and
 in answer to the amended complaint of the plain-

tiff herein, admit, deny and allege as follows:

1. Admit paragraphs 1 and 2 of said amended complaint.

2. Deny the allegations of paragraphs 3, 4, 5, 6, 7, 8, and 9 of said complaint.

3. Admit the allegations of paragraph 10 of said complaint, that these defendants claim some interest in and to the property described in paragraph 3, but deny that the same is without right or that said defendants do not have any right, title, interest, estate or lien upon the property described in paragraph 3.

4. Deny the allegations contained in paragraph 11 of said amended complaint.

5. Answering paragraph 12 of said amended complaint, these defendants allege that they have no definite knowledge or information respecting the matters contained therein and for said reason and upon said ground, said defendants deny the allegations therein contained.

6. These defendants deny both generally and specifically each and every allegation in said

amended complaint, not herein otherwise admitted, denied or modified.

Further answering said complaint and by way of further defense thereto, said defendants allege that they are the owners in fee simple of said property described in paragraph 3 of plaintiff's complaint and that they are now in possession and have the full right to the possession of said premises, and that said plaintiff herein has no right, title, claim or interest in and to said property or any portion thereof; that said defendants and their predecessors in interest have been the owners and in the possession of all of said property described in plaintiff's complaint for more than 50 years last past and that during all of said times, said property has been enclosed in a substantial fence; that these defendants and their predecessors in interest have erected certain buildings upon said tract of land many years ago and have for many years last past, each and every year, been assessed and have paid taxes to Tooele City, Tooele County, Tooele School District and the State of Utah upon said buildings so erected

and standing upon said premises; that said plaintiff herein has never at any time ever claimed or exercised any right of control over said premises, but that the same have at all times been in the possession and under the control and under fence of the defendants herein and their predecessors in interest, ever since the City of Tooele was organized, and that said possession and use has been within the full knowledge of said plaintiff herein, and that by reason of such, said plaintiff is now estopped from claiming any right, title or interest in and to said premises or any part or portion thereof.

Further answering said amended complaint and by way of further defense, said defendants allege that on the 18th day of March, 1938, said Tooele City by resolution duly passed by the City Council thereof and in recognition of the rights of the defendants herein and their predecessors in interest, and in the acknowledgment of the claim and interest of said defendants and their predecessors in interest herein, made, executed and delivered its quit claim deed to all of said property alleged in said plaintiff's

complaint, and that by reason of said transfer, said plaintiff has no right, title, claim or interest in and to said property or any portion thereof and said plaintiff is now estopped from setting up or asserting any claim or interest in and to said premises or any portion thereof.

WHEREFORE, defendants pray that plaintiff take nothing upon its amended complaint, but that the same be hence dismissed and that the defendants recover their costs herein and have such other and further relief as is deemed meet and equitable in the premises.

E. LEROY SHIELDS

Attorney for Defendant

Duly verified.

Filed in Clerk's Office February 27, 1940

(Title of Court and Cause.)

REPLY

Comes now the plaintiff and by way of reply to the answer to the amended complaint of the defendants herein admits, denies and alleges as

follows:

1-. By way of reply to defendants further answer and further defense as set out in their answer to the plaintiff's amended complaint plaintiff denies that the defendants have any right, title, interest, estate in or lien upon the property set out in paragraph three of plaintiff's amended complaint, or that the defendants or their predecessors in interest have ever had any right, title, interest or estate in or lien upon said lands, and alleges that if the defendants have ever constructed any improvements upon said lands that they have been trespassers in so doing and that they have erected said structures without the consent or knowledge of the plaintiff, and further that if the defendants have constructed any improvements on said lands they have not been permanent improvements nor improvements of any material value, and further that if the defendants have had said lands enclosed in a fence that they have fenced said lands without the consent of the plaintiff and such fence has been and now is an encroachment upon the street property as described in paragraph three

of plaintiff's amended complaint, and further plaintiff alleges that they have never at any time levied a tax against the defendant or his predecessors in interest relative to said lands but have at all times in levying taxes in said district have recognized said lands as their lands and have so levied any special improvement or other taxes.

Further replying to said answer and further defense plaintiff alleges that the Quit Claim deed given to Isaac Elkington to said property was given without any consideration; that the same was never approved by the City Council of Tooele City and was not authorized by a resolution of any nature, and further that the plaintiff had no authority to attempt to vacate a public street by such an instrument or by any other method than is provided by the Laws of the State of Utah, and that for these reasons said deed was void and is of no effect.

WHEREFORE, plaintiff prays that the answer and further defense of the defendants be taken for naught and the plaintiff be given judgment according to the demands of its amended complaint.

M. EARL MARSHALL

Duly verified.

Filed in Clerk's Office February 23, 1940.

(Title of Court and Cause)

COURT'S MEMORANDUM OF DECISION

In the above entitled action the court finds the issues in favor of the plaintiff and against the defendants.

Counsel for plaintiff is directed to prepare and serve upon counsel for the defendants proposed findings of fact, conclusions of law and decree.

Dated June 27th, 1940.

CLARENCE E. BAKER

Judge

Filed in Clerk's Office June 23, 1940.

(Title of Court and Cause)

FINDINGS OF FACT AND CONCLUSIONS

OF LAW

This cause having come on regularly for hearing on the 27th day of February, 1940, before the Honorable Clarence E. Baker, one of the Judges of

the above entitled Court and M. Karl Marshall appearing as counsel for the plaintiff corporation and E. LeRoy Shields appearing as counsel for Lenora Elkington and Glen Elkington joint administrators of the estate of Isaac Elkington, deceased, the above named defendants; it appearing to the honorable court that the defendants Lenora Elkington and Glen Elkington, joint administrators of the estate of Isaac Elkington, deceased, had been lawfully and regularly served with process and that they duly filed their answer to the complaint and amended complaint of the plaintiff on file herein; the Court having examined into the plaintiff's title and the claims of the defendants Lenora Elkington and Glen Elkington, joint administrators of the estate of Isaac Elkington, deceased, and evidence having been adduced by the plaintiff in support of its complaint, and the defendants having adduced evidence in support of the allegations of their answer, and the Court having been fully advised in the premises and the matter having been submitted to the Court upon the written briefs of the plaintiff and the defendant and the Court now being fully advised in the premises does now make, adopt and

FINDINGS OF FACT

1-. That the plaintiff is a municipal corporation duly and lawfully organized and existing under and by virtue of the Laws of the State of Utah.

2-. That the defendants above named, to wit, Lenora Elkington and Glen Elkington are residents of Tooele City, Tooele County, State of Utah.

3-. That the plaintiff herein is now the owner of and is entitled to the possession of that certain parcel of real estate lying and being situate in Tooele City, Tooele County, State of Utah, and particularly described as follows, to-wit:

Commencing at the Northwest corner of Block 52, Plat "A" Tooele City Survey, South 25.48 rods, west 49.50 feet, to the southeast corner of Block 51, North 25.48 rods, East 49.50 feet to the point of beginning, being in Tooele City, Tooele County, State of Utah.

4-. That the above named Lenora Elkington and Glen Elkington, joint administrators of the estate of Isaac Elkington, deceased, and Isaac Elkington, deceased, appear of record to have or to claim some right, title, estate or interest in or lien upon the real estate above described or some part thereof ad-

verse to the plaintiff's ownership or clouding the plaintiff's title thereto, but that the defendants Lenora Elkington and Glen Elkington, joint administrators of the estate of Isaac Elkington, deceased, do not have and the said Isaac Elkington, now deceased, never did have any right, title, estate, lien or interest whatsoever in or to the said above described real property or any part thereof adverse to the plaintiff or at all.

5-. That on the 10th day of July, 1872, the United States of America by U. S. Grant, President, and W. B. Sturgess, Assistant Secretary, granted to Tooele City, plaintiff herein all of Section 29 and the South half of Section 21 in Township 3 South of Range 4 West of the Salt Lake Base and Meridian and that the property herein above described in paragraph 3 was and is a portion of this land so conveyed.

6-. That sometime prior to on or about the 5th day of December, 1882, the plaintiff herein caused the real property consisting of the land set out and described in paragraph 5 hereof and then being within the corporate limits of Tooele City to be sub-divided into lots, blocks and streets, and that on or about the

5th day of December, 1882, caused to be prepared a plat or diagram showing the property to be so subdivided and that thereafter on or about the 1st day of May, 1894, said plaintiff adopted and approved said plat or diagram and designated the same as the plat of Tooele City and soon thereafter caused the same to be duly filed in the office of the County Recorder, Tooele County, Utah and which said plat ever since said time has been and now is the official map, diagram or plat of Tooele City, Tooele County, Utah.

7-. That in the said plat, Block 51 thereof in Plat "A" of Tooele City Survey was shown to be 20.60 rods in length east and west and Block 52 of Plat "A" Tooele City Survey was shown to be 21 rods in length, east and west and it was also shown by said plat that there was an alley way, or street, running north and south between said Blocks 51 and 52 and described said street or alley way as being 3 rods in width and that said street or alley way is specifically described as set out in paragraph 3 above;

that at all times since the year 1873 the different

Mayors of Tooele City have decided to the respective owners of property within the corporate limits of Tooele City different tracts of land and that they have in each and every instance conveyed such property in strict accordance with the official map and plat herein above referred to in paragraph 6 and that at the time the lands abutting the property set out and described in paragraph 3 above were conveyed to the respective owners, it was designated as Block 51 and Block 52 of Plat "A", Tooele City Survey, in accordance with the official plat herein above mentioned and in strict accordance with the existence of the alley way and street as specifically described in paragraph 3 above.

8-. That all of said property which was designated on said official plat as streets and alleys was to be reserved as such and that the plot set out and described in paragraph 3 above was so retained by Tooele City as a street or alley way as shown on the official map or plat above mentioned.

9-. That ever since the date of 1873, each and every owner of lands abutting the property set

t in paragraph 3 above, have conveyed their respective interests to the property abutting this tract of land paying strict attention to the boundaries of the plot set out in paragraph 3 and have in every instance recognized said plot as not belonging to them and in some instances have even recognized in the instruments of conveyance said plot was a street or alley way and by so doing the defendants are estopped at this time to claim any interest therein as against the plaintiff.

10-. That said plaintiff has at all times herein mentioned since July 10, 1872 regarded the tract of land set out in paragraph 3 hereof as being their property and to hold same to such time if ever a request was made and it was deemed advisable to open said plot of land for street or alley way, and that up to the 7th day of March, 1938, no request had ever been made to have said property opened as a public street or alley way nor has there been any apparent need for such, but that on or about the 7th day of May, 1938, a request was made by owners of property abutting said tract of land to have same opened as a public street or alley way.

11-. That on or about the 7th day of March, 1938, Isaac Elkington, now deceased, appeared before the City Council of Tooele City at a regular meeting and by fraud and misrepresentation obtained a quit claim deed from said plaintiff to the lands described in paragraph 3 hereof, in which deed the said Isaac Elkington was the grantee; that said fraud and misrepresentation consisted of the said Isaac Elkington reporting to the City Councilman and Mayor of Tooele City that he had obtained consent and approval of all owners of property abutting said tract of land as described in paragraph 3, that the City should convey said lands to Isaac Elkington for his own use and benefit and that they had no desire to have same opened for a public street or alley way, but in truth and in fact, the said Isaac Elkington had discussed this matter of opening said plot of ground as an alley way with the owners of abutting land and that they had advised him that they intended to present a petition to the Mayor and City Council of Tooele City, Utah within the very near future to have said tract opened as a public street for their immediate use and benefit.

and as a means of egress and ingress to their property, that said Isaac Elkington made such representation to the City Council and Mayor knowing them to be false, that said body believed said statements to be true and relied upon them as being true and in reliance thereof executed said quit claim deed to the said Isaac Elkington who recorded same in the office of the County Recorder, Tooele County, Utah, wherein it now appears as a cloud upon the plaintiff's title of said land.

12-. That said plaintiff had no legal authority to attempt to vacate such public street or alley way as described in paragraph 3 hereof and designated on the official plat of Tooele City in any such manner as attempted by the execution of the quit claim deed.

From the foregoing findings of fact the Court now makes and enters the following

CONCLUSIONS OF LAW

1-. That the plaintiff is entitled to judgment decreeing that it is the owner in fee simple, and that the plaintiff is entitled to the possession of that certain piece and parcel of real property more particularly described in paragraph 3 of the foregoing

Findings of Fact as against Lemora Elkington and Glen Elkington, joint administrators of the estate of Isaac Elkington, deceased and as against any persons claiming any right, title, estate, lien or interest in the real property set out in paragraph 3 of the foregoing Findings of Fact, by, through or under the said Lemora Elkington and Glen Elkington, joint administrators of the estate of Isaac Elkington, deceased.

2-. That the quit claim deed specifically referred to in Paragraph 12 of the foregoing Findings of Fact be cancelled by the decree of this Court.

3-. That the Court further concludes that the plaintiff be entitled to recover its costs herein expended, judgment is hereby ordered to be entered accordingly.

Dated the 20th day of July, 1940.

CLARENCE E. BAKER
District Judge

Filed in Clerk's Office July 29, 1940.

(Title of Court and Cause)

DECREE

This cause having come on regularly for hearing on

the 27th day of February, 1940, before the Honorable Clarence W. Baker, one of the Judges of the above entitled Court and M. Earl Marshall appearing as counsel for the plaintiff corporation and E. LeRoy Shields appearing as counsel for Lenora Elkington and Glen Elkington joint administrators of the estate of Isaac Elkington, deceased, the above named defendants; it appearing to the honorable Court that the defendants Lenora Elkington and Glen Elkington, joint administrators of the estate of Isaac Elkington, deceased, had been lawfully and regularly served with process and that they duly filed their answer to the complaint and amended complaint of the plaintiff on file herein; the Court having examined into the plaintiff's title and the claims of the defendants Lenora Elkington and Glen Elkington, joint administrators of the estate of Isaac Elkington, deceased, and evidence having been adduced by the plaintiff in support of its complaint, and the defendants having adduced evidence in support of the allegations of their answer, and the Court having been fully advised

to the Court upon the written briefs of the plaintiff and the defendant and the Court now being fully advised in the premises, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1-. That the plaintiff, Tooele City, a municipal corporation, is the owner in fee simple and is entitled to the possession of the real property hereinafter described as against the named defendants Lamora Elkington and Glen Elkington, joint administrators of the estate of Isaac Elkington, deceased.

2-. That the named defendants, Lamora Elkington and Glen Elkington, joint administrators of the estate of Isaac Elkington, deceased, have no right, title, estate, lien, claim or interest in or to the said hereinafter described real property or any part thereof, and that any and all adverse claims of said defendants are hereby declared null and void and of no effect, and that the title to said property and to each and every part thereof is hereby adjudged to be in the plaintiff and is hereby quieted in said plaintiff as against all of the claims, demands and pretensions of the said named defendants or either

or all of them, and that the plaintiff is the sole, legal and equitable owner of said hereinafter described property and every part thereof, that the said named defendants and all persons claiming by, through or under them be and are hereby severally enjoined, debarred and restrained from asserting any claim whatsoever in or to said property or any part thereof adverse to the plaintiff.

3-. That the quit claim deed executed by the plaintiff to Isaac Elkington, now deceased, to the tract of land hereinafter described be and is hereby cancelled.

4-. That the property herein above referred to and affected by this decree is situate in the City and County of Tooele, State of Utah and is particularly described as follows, to wit:

Commencing at the Northwest corner of Block 52, Plat "A" Tooele City Survey, South 25.48 rods, west 49.50 feet, to the southeast corner of Block 51, North 25.48 rods, East 49.50 feet to the point of beginning, being in Tooele City, Tooele County, State of Utah.

5-. That the plaintiff recover its costs herein ex-

Dated this 20th day of July, 1940.

CLARENCE E. BAKER
District Judge

Filed in Clerk's Office July 29, 1940.

(Title of Court and Cause)

MOTION FOR NEW TRIAL

TO THE ABOVE NAMED PLAINTIFF, TOOELE CITY, A MUNICIPAL CORPORATION, AND TO M. EARL MARSHALL, ATTORNEY FOR SAID PLAINTIFF, NOTICE:

You and each of you will please take notice that the above named Defendants and each of them hereby move the above court for a new trial of said action wherein judgment and decree was entered on the 27th day of July, 1940, for the following reasons and upon the following grounds:

1. Insufficiency of evidence to justify the verdict and decision and that said decision is against law.
2. Error in law occurred at trial and accepted to by the Defendants.
3. Newly discovered evidence material for the

party making the application which he could not with reasonable diligence have discovered and produced at the trial.

E. LEROY SHIELDS

Attorney for Defendants

Copy of the above motion mailed to E. Earl Marshall, Attorney at Law, First National Bank Building, Toledo City, Utah, this 30th day of July, 1940.

E. LEROY SHIELDS

Attorney for Defendants

Filed in Clerk's Office August 1, 1940.

(Title of Court and Cause)

MINUTE ORDER

The within entitled matter having been by the Court taken under advisement, the Court now being fully advised in the matter, Ordered that the Motion for a New Trial be, and it is hereby denied.

(Title of Court and Cause)

ORDER

Upon application of the defendants herein and

court;

ORDERED, that the defendants may have and they are hereby granted an extension of time until January 1, 1941 within which to serve and file their Bill of Exceptions in the above entitled case.

Dated this 23rd day of November, 1940.

CLARENCE E. BAKER

District Judge

Filed in Clerk's Office November 25, 1940.

(Title of Court and Cause)

NOTICE OF APPEAL

TO TOOELE CITY, A MUNICIPAL CORPORATION, PLAINTIFF
ABOVE NAMED, AND TO M. EARL MARSHALL, ATTORNEY FOR
SAID PLAINTIFF:

You, and each of you, will please take notice that the defendants, Lenora Elkington and Glen Elkington, administrators of the estate of Isaac Elkington, deceased, hereby appeal to the Supreme Court of the State of Utah from that certain judgment made and entered in the above entitled action by the above entitled court on the 27th day of July,

prior to that time. That she didn't see the plat more nor executed, Tr. 3, and knows nothing of it except that it was in the office when she took over the office; that she has in her office the deed record known as Book EE and also a register of deeds marked Book L and a register of deeds marked FF, and a deed record marked 3-T and a deed register 3-Y, Tr. 4.

John D. Gollsher, witness for the plaintiff, testified that he is the City Manager of Tooele City and a registered engineer and that he, as such, had made a copy of the original plat of Tooele City and identified plaintiff's Exhibit B as a tracing of the map which he prepared, and that it is an exact duplicate of the original as nearly correct as he can make it, Tr. 5. The witness referred to the plat and identified the property described in the plaintiff's complaint which he refers to as the alley, and that the same is 49½ feet wide; that Block 52 is 5.25 chains and Block 51 east and west is 5.15 chains, Tr. 6. The witness was then requested to make a diagram on the blackboard and on the diagram identified the property described in plaintiff's complaint, stated that he had been City

ager of Tooele City since 1925 and as such has jurisdiction and control over the streets and alleys and such that are opened up. That they had had a request open up the alley by Bevan, Keyser & Shields, Tr. 7, that was the only request; that the property in question had been under fence with a gateway through it that there had been no use for the roadway up to time of the commencement of the action; that within last two years, three houses had been built farther in; that he had attended the council meetings of the City and was in attendance at the meeting on the 10th of March, 1938, Tr. 8. That Mr. Elkington was at the meeting; that he appeared at the council meeting, Tr. 9. That he asked for a deed to the ground described in Plaintiff's complaint, and that one of the councilmen asked him if anybody was interested in opening the alley and he stated there was no other people interested in the alley or the land; that that was all of the testimony, Tr. 10.

On cross examination, the witness testified that the alley to the north was 40½ feet wide; that the alley was the street north is fenced on both sides and

has been for many years, Tr. 11. That the alley to the north is narrower than $49\frac{1}{2}$ feet; that the Elking-ton property is bounded on the north by 3rd South Street and on the east by First West Street; that Second West Street is a street used by the public; that the alley in question had never been opened nor had Second West Street ever been opened farther south than Third South Street; that there has been a fence across the north line of the Elkington property, and across the north end of the purported alley for at least 40 years to the witness's knowledge, Tr. 14. That the Elkingtons owned property east of the alley and west of the alley and that the entire tract including the alley was all in one piece and all under the Elkington fence; that the public have never used the purported alley, Tr. 15, and that the only thing the City ever did with respect to it was to make a plat and indicate on the plat that there was an alley running up through there, and that the same had been true ever since Tooele City was organized; that there was a brick building standing on the property which was purported to be the alley and was one of the buildings

used in connection with the Elkington property; that the Elkingtons had recently built a new home on their property, Tr. 16. That the home was about 20 feet from the alley in the opinion of the witness, the witness having made no measurements; that the witness attended the City Council meeting on March 7, and that there were present the Mayor and the Council and the City Attorney, the Council including 5 members, Tr. 17, and that the City Recorder was also present, and were all present when the conversation took place with Mr. Elkington; that the City Council did not authorize anybody to determine the authenticity of the statements made by Mr. Elkington; that they just ordered a deed to be made, and no investigation was made as to whether or not a deed should be given. That the City Council ordered the City Attorney to draw the deed and ordered the Mayor to sign the deed. That the witness is acquainted with the signature of the Mayor, Nels Blomstrom, and that his signature appears upon the deed, and that the same was attested and signed by the City Recorder pursuant to a resolution passed by the City Council at that meeting, Tr. 18.

On redirect examination, the witness testified that there had never been any request to open the alley; that the alley is between First and Second West Streets in Tooele City, and that the only request that had ever been made to open the alley came from Hevan, Keyser & Shields who owned property farther south up the alleyway; that these parties had built their homes within the last two years, Tr. 21. That at the time these houses were built, the alleyway was closed, the same as it had been for many years; that each of the properties mentioned belonging to the three parties front on First West Street; that there is a building on the property described as the alleyway which the witness estimates to be worth \$50.00 to \$100.00, Tr. 34. That the building is practically all on the strip of land; that as City Manager, it is the witness's duty to lay out districts for special improvements, business districts. That there has been special improvement districts organized in the vicinity of the property in question, Tr. 35. That there is a sewer running past the property in question.

E. M. Evans, a witness on behalf of the plaintiff

testified as follows: That he is a member of the City Council of Tooele City and was such on the 7th day of March, 1933 and attended the Council meeting on that date, at which time there was some business with Isaac Elkington; that Mr. Elkington appeared before the Council pertaining to the alleyway, stated it was city property, but had never been used in the history of the city other than on the plat, Tr. 23. He stated that he intended to build a home; that the property had never been used during the life of Tooele City, and that he thought the city should give him a deed to the alley; that there was no one interested in the alley; that he asked all of the members present if there was anyone opposed to it, Tr. 24. That Mr. Elkington made a statement that no one was interested in the alley, and that the witness figures there was nobody interested, and that it would be better that Mr. Elkington should have it; that he mentioned that no one was interested in the property and that he wanted to build a house there; that on or about May 8, 1933, there was a request made to the City to open the alley by Mr. Stevens and Mr. Shields, Tr. 25.

That Mr. Elkington was present and was asked if he had not made a statement previously that no one was interested in the alley, and that Mr. Elkington denied that he had made such statement; that the City made a request of Mr. Elkington that he deed the property back to the city, and that Mr. Elkington admitted that rather than have any trouble that he would deed it back and told the Council that he wasn't looking for any trouble; that the witness relied upon the statement made by Mr. Elkington on March 2nd in giving his consent to the deed and relied upon the statement as being true.

On cross examination, the witness testified that at the time the statement was made by Mr. Elkington, that he did not know the statement was not true; that he is a business man and had been in business for many years and was also a councilman, Tr. 27; that all of the City Councilmen were present, together with Mr. Callahan, the engineer, Mr. Marshall, the city attorney; that this body of men was representing Tooele City's interests at that time. That with all the experience they had had as business men, they were

as being true; that it never occurred to the witness that it was the duty of the City Council to investigate the statements before they deeded over the land. That he himself didn't consider it was wise to deed the property over, Tr. 29. That the City Council did not authorize the execution of the deed, Tr. 29.

On redirect examination, the witness testified as follows: That when the deed was requested at the meeting, the Council requested the city manager and attorney to investigate the matter and report back to the Council, Tr. 29.

John T. Adams, a witness for the plaintiff, testified as follows: That he is the duly elected, qualified and acting recorder of Tropic City and was such on the 7th day of March, 1938, and was present at the City Council meeting on that date and heard the proceedings which were had there; that Mr. Elkington was present and had come there for the purpose of having the City convey title to a strip of land south from Third South Street, Tr. 30. That Mr. Elkington stated to the Council that if he understood it correctly, the south plat called for an alleyway

running south through the property and that his father had used it for a good many years; that inasmuch as the property had never been used and at this time would be of some value to him and would injure nobody else in particular, he asked the City to convey him a quit claim deed to the strip of land running south through his property; that the property had never been opened since Tooele was a city; that it was of no value to anyone else except the Elkington family, and that he asked for a quit claim deed, Tr. 31.

Ralph Bevans, a witness for the plaintiff testified as follows: That he resides on First West Street between Third and Fourth South Street in Tooele City; that he knew Isaac Elkington in his lifetime; that he never at any time told Isaac Elkington that he was not interested in the alleyway, and that he had made a request of Tooele City that it be opened, Tr. 37. That such request was about the 5th of May; that he had made another request three or four days following the meeting.

Elmer J. Elkington, a witness for the defendant testified as follows: That he was a son of William H.

Elkington, senior, and a brother of Isaac Elkington, deceased; that he is 53 years old and was born in Tooele City. That he is acquainted with the Elkington property on the corner of Third South and First West and had been from his personal recollection since 1892, Tr. 39. That the Elkington property consists of all of Block 51 and the north 8 rods of Block 52 and is known as the original Elkington holdings, Tr. 40. That the property colored with orange is the Elkington property and has always been enclosed in a fence; that he had lived on the property for 35 years; that on the property marked with orange, from his earliest recollection, there was a large barn situated on the property; that the barn occupied the premises from about 1905 to 1930, a period of 25 years; that there was also a brick building standing on the property, Tr. 41; that that building was built by him in 1896 and still remains there; that it was a general utility building, chicken coop and storage room, and that the Elkingtons paid taxes on the property to his personal knowledge, Tr. 42, and that taxes have always been paid on the improvements including those which occupied the land

in question in this action.

On cross examination, the witness testified that the property had been all enclosed in a fence from a time beyond where his memory reaches; that he thinks his father acquired the property in about 1896 and it was acquired from Benjamin P. Howell, Tr. 43; that a deed to a part of the property was from one of the sons of Benjamin P. Howell; that he doesn't know with respect to the payment of taxes while his father occupied the place, but that taxes were assessed against the improvements on the land in question and paid by him after the land was turned over to him; that he had paid taxes on the property since 1929, Tr. 44. That he conveyed a portion of the land to I. J. Elkington, Tr. 45.

On redirect examination, the witness testified that during his recollection there has never been any public use made of the land in question; that the plaintiff nor any other person within his knowledge ever attempted to make any use of the land during the period of his recollection.

Upon recross examination, the witness testified

that no person ever went over the property to reach other lands; that there has been a gate on the north side of the land ever since the witness can remember, and that the gate led to the stack yards and bar and corral, Tr. 46. That the barn mentioned upon the premises was put to general use in connection with the property, Tr. 47.

Glen Elkington, a witness for the defendant testified as follows: That he is the defendant in the action and is acquainted with the land in question; that the brick building on the premises stands on the property colored with orange coloring, Tr. 48. That the building is entirely within the alley; that there is also another building on the property, at least half of the building standing on the property described in the complaint; that the west wall of the new home built by Mr. Elkington is 8 feet east of the east line of the alley and that if an alley were opened through there, it would be within 8 feet of the new home built upon the premises, Tr. 49.

On cross examination, the witness testified as follows: That his father built the residence on the

property and built it to the left of the property described in the complaint; that there was no question about the alley; that the brick building on the property is 10 x 16 feet according to his estimate; that the same was used for a rabbit pen and grainary and has been on the property ever since the witness has any recollection, and that he is now 27 years old, Tr. 50. That a few years ago, some repairs were put upon the building. That he has no estimate of the value of the building; that the other building upon the property was used for a cow barn, Tr. 51; that it was probably built in 1929 or 1930, Tr. 52.

(Title of Court and Cause)

ASSIGNMENTS OF ERROR

Come now the defendants and appellants in the above entitled cause and as grounds for reversal of the judgment appealed from, assign the following errors in the proceedings in the trial court.

1. The court erred in admitting in evidence, over objection of defendants, Exhibit "A", which is the town plat of Tropic City, Utah, for the reason

and upon the grounds that the authenticity of the same was not proven to justify its admission in evidence, and the same was not shown to be a public writing or official document.

2. The court erred in its finding of fact No. 3 wherein said court found that the plaintiff was the owner of and entitled to the possession of the real estate described in said finding, for the reason and upon the grounds that there was no evidence to support such finding, and that such finding is against the evidence adduced at the trial of said action.

3. The court erred in its finding of fact No. 4 wherein the court found that the said defendants do not have and never did have any right, title, estate, lien or interest in or to the property described in finding of fact No. 3, adverse to the plaintiff or at all for the reason and upon the ground that there is no evidence to support such a finding of fact, and that the evidence is contrary to such finding.

4. The court erred in making and entering its finding of fact No. 5 wherein said court found that

U. S. Grant, President of the United States and C. B.

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Sturgeess, Assistant Secretary, granted to Tooele City property of which the property described in finding No. 3 is a portion, for the reason that the same is contrary to the evidence as the evidence shows an abstract of title, page 1, plaintiff's Exhibit "C", that said property was not a grant to Tooele City, but was a trust grant to Hugh S. Cowans as Mayor of Tooele City "in trust for the use and benefit of the inhabitants of Tooele City according to their respective interests therein."

5. The court erred in making and entering its finding of fact No. 6 for the reason and upon the grounds that there is no evidence in the record to support said finding or any part or portion thereof.

6. The court erred in making and entering its finding of fact No. 7 for the reason and upon the ground that there is no evidence in said record to support said finding or any part or portion thereof, but that said evidence is contrary to such finding.

7. The court erred in making and entering its finding of fact No. 8 for the reason and upon the ground that there is no evidence in the record to support said finding or any part or portion thereof, but that the

same is contrary to the evidence adduced at said trial.

8. The court erred in making and entering its finding of fact No. 9 for the reason and upon the ground that there is no evidence in the record in said action to support said finding or any part or portion thereof; that the evidence is contrary to such finding.

9. The court erred in making and entering its finding of fact No. 10 for the reason and upon the ground that said finding is not supported by any evidence contained in the record of said action, but that the same is contrary and in opposition to the evidence adduced at the trial of said action.

10. The court erred in making and entering its finding of fact No. 11 for the reason and upon the ground that said finding is not supported by the evidence in the record and adduced in said action, but that said evidence is contrary and in opposition to said finding.

11. The court erred in making and entering its findings of fact No. 12 for the reason and upon the ground that said finding is not supported by the evidence in the record adduced at the trial of said action

ner by the law with respect to and applicable to said finding.

12. The court erred in making and entering its conclusions of law, for the reason that said conclusions are not supported by the evidence in the record adduced at the trial of said action, nor are the same supported by the law applicable to such cases.

13. The court erred in making and entering its decree in said action for the reason and upon the grounds that the evidence is insufficient to support such judgment as so entered by the court, and that the evidence is contrary to such judgment and the whole thereof.

14. That the judgment appealed from is not supported by the evidence and is contrary to law.

15. The court erred in denying defendants' motion for new trial.

WHEREFORE, defendants pray that the judgment appealed from be reversed and the action dismissed with prejudice and with costs to the appellants.

E. LEROY SHIELDS,
Attorney for Defendants and
Appellants

In the
6327

SUPREME COURT OF THE STATE OF UTAH

TOOELE CITY, a municipal
corporation,

Plaintiff and Respondent,

vs.

LENORA ELKINGTON, and GLEN
ELKINGTON, joint adminis-
trators of the estate of
ISAAC ELKINGTON, deceased;
also all other persons
unknown claiming any right,
title, estate or interest
in or lien upon the real
estate described in the
complaint, adverse to the
plaintiff's ownership or
clouding plaintiff's title
thereto,

Defendants and Appellants.

Case No.

6327

APPELLANTS' BRIEF

E. LEROY SHIELDS,

FILED

Attorney for Appellant

MAR 13 1941

CLERK SUPREME COURT UTAH

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