

1941

# Tooele City v. Lenora Elkington and Glen Elkington : Brief of Appellants

Utah Supreme Court

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In the  
SUPREME COURT OF THE STATE OF UTAH

TOOELE CITY, a municipal corporation, :

Respondent, :

Vs. :

LENORA ELKINGTON, and GLEN :

ELKINGTON, joint administrators of the estate of :

ISAAC ELKINGTON, deceased; :

also all other persons :

Case No.

unknown claiming any right, :

title, estate or interest :

6327

in or lien upon the real :

estate described in the :

complaint, adverse to the :

plaintiff's ownership or :

clouding plaintiff's title :

thereto, :

Appellants.

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APPELLANTS' BRIEF

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STATEMENT OF CASE

The judgment appealed from was entered upon a decision in favor of the respondent in an action brought by it to quiet title against certain property described in the complaint, in the District Court of Tooele County.

## STATEMENT OF FACTS

The record shows, Abstract of Title page 5 and 6, that the predecessors in interest of the above named defendants received a deed from the Mayor of Tooele City on August 9, 1886 to Lot 1 in Block 51, plat A of the Tooele City Survey and that it contained 3.10 acres and to Lot \_\_\_\_, Block 52, containing 3.67 acres. The testimony of Elmer J. Elkington indicates that this property consisted of all of Block 51 and the north 8 rods of Block 52 and is known as the original Elkington holdings. (Tr. 40, Ab. 44) The Abstract of Title indicates on the pages referred to that the said Benjamin Howell, predecessor in interest to the Elkingtons, had, prior to that time, been adjudged by the probate court of Tooele County, Utah Territory, to be the rightful owner and possessor of the parcels of land above set forth. This wording indicates that some time prior to September 3, 1872 when the grant of the United States was made to the Mayor of Tooele City that the said Benjamin Howell had been in possession of the property and as we

or said reason of his occupation, he was adjudged  
 y the probate court to be the owner of the land  
 and entitled to the possession thereof; that on  
 September 3, 1872, the United States made a grant  
 to the Mayor of Tooele City and his successors in  
 office to certain sections and admittedly the land  
 a question in this action is within the property  
 described; that said grant was made in trust for  
 the use and benefit of the inhabitants of said  
 Tooele City according to their respective interests  
 therein (Abstract of Title, page 1); that on May 2,  
 1894, a plat was filed in the office of the County  
 Recorder with respect to the lands referred to, in  
 which the said lands were designated as Blocks 51  
 and 52; that at the time of the filing of said plat,  
 and said lands were occupied by William H. Elking-  
 ton, the successor in interest to Benjamin Howell,  
 and were enclosed within a fence (Tr. 14, Ab. 37);  
 that ever since 1890, February 10th of said year,  
 the Elkington family has been the owner of and in  
 possession of said lands (Abstract of Title); that  
 on the 15th day of October, 1937, Isaac J. Elkington  
 obtained a deed for a portion of this property,

(Abstract of Title, page 4) and that on March 18, 1938, the plaintiff in said action executed and delivered to Isaac J. Elkington a quit claim deed to the land described in said plaintiff's complaint; that the same was executed by virtue of a resolution passed by the City Council of Tooele City, Utah and adopted on the 7th day of March, 1938; that the deed was duly acknowledged so as to entitle the same to be recorded and the same was recorded on March 18, 1938 at 9:00 o'clock A.M. in Book 3-Y of Deeds at page 157 (Abstract of Title, page 3). The plaintiff claims that this deed was obtained by fraud and seeks to set it aside upon such grounds; that Isaac Elkington, deceased, shortly after obtaining the deed, erected a new home upon the property he had acquired, and that the west wall of the same is 8 feet east of the east line of the purported alley; that the plat referred to was found in the office of the County Recorder by Mabel Lougy, the present County Recorder upon her election on January 7, 1935, and that she knows nothing more about the plat, save and except that the same was there at that time, (Tr. 2, 3, Ab.

34, 35); that the plat filed indicates that Block 52 is 5.25 chains east and west and Block 51 is 5.15 chains east and west and that the property described on the plat as the alley is 49½ feet wide (Tr. 6, Ab. 35); that the Elkington property is bounded on the north by Third South Street and on the east by First West Street, and that to the personal knowledge of J. D. Gollaher, City Manager, the property in question had been enclosed within the Elkington fence for a period of 40 years (Tr. 14, Ab. 37); that the public had never used the purported alley, 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 the property, and that the same had been true ever since Tooele City was organized (Tr. 15, Ab. 37) (Tooele City was organized in 1852); that Elmer J. Elkington is a son of William Elkington and a brother of Isaac Elkington, 53 years of age; that he had been acquainted with the property in question as long as he could remember; that his first recollection of it was in 1892 (Tr. 39, Ab. 44); that from his earliest recollection, there had been situated on the property in

question a large barn; that it had occupied the premises for 25 years, from 1905 to 1930, and that there was a brick building also standing on the property, (Tr. 41, Ab. 44); that the brick building was built in 1898 and still stands on the property; that it had been used for a general utility building, a chicken coop and storage room, and that the Elkingtons had paid taxes on this property all of that time within his personal knowledge (Tr. 42, Ab. 44); that the tax he referred to was taxes upon improvements including the buildings which occupied the land in question. Glen Elkington testified that in addition to the brick building, at the present time there is another building on the property, and that about half of the building stands upon the property described in the complaint; that these buildings had been on the property ever since the witness could recall, and that he is now 27 years of age (Tr. 50, Ab. 47); that on March 7, 1938, Isaac Elkington, deceased, went before the City Council, stated that he intended to build a home, and that he had been advised that the property covered by the purported alley on the plat had never been

deeded to the Elkingtons; stated that it had never

been opened as an alley and asked the City Council to give him a deed to the property; that he intended building a new home upon his property (Tr. 23, Ab. 40); that at the time, in answer to a question, stated that no one was interested in the alley, and that he figured there was no one interested, and that he was entitled to a deed to it to clear the title (Tr. 24, Ab. 40); that at the time he asked for the deed, he was asked if anybody was interested in opening the alley and stated that there was no other people interested in the alley or the land, (Tr. 10, Ab. 36). That he stated if he understood it correctly, the south plat called for an alleyway through the property occupied by the Elkingtons for a good many years; that it was of no value to anyone else except the Elkington family (Tr. 31, Ab. 43). That the only time that Isaac Elkington, deceased, was confronted with the statement accredited to him, to-wit: that no one was interested in the property except the Elkingtons, was at a meeting on May 8, 1938, and that at such time and place he denied that he had ever made such statement; that on May 8, 1938



there was a request made by a Mr. Bevan and a Mr. Shields to the City to open the alley (Tr. 25, Ab. 40); that when the statement accredited to Isaac Elkington was made to the City Council, the Council did not know that the statement was not true; that the Council are composed of business men (Tr. 27, Ab. 41). That the City Manager and Engineer and Mr. Marshall, City Attorney, were present, and that the Council nor any officer of Tooele City ever made any investigation with respect to the statement to determine whether or not the same was true (Tr. 28, Ab. 42); that there was a request made of the City Manager and the City Attorney to investigate the matter and report back to the Council (Tr. 29, Ab. 43.).

#### ARGUMENT

The defendant has made and filed 15 assignments of error, the first one going to the proposition of the court's having erred in admitting in evidence the city plat of Tooele City. Assignment 14 and 15 are that the court erred in entering its judgment in said action for the reason that the same is not supported

by the evidence, and is contrary to law, and that the court erred in denying the defendants' motion for new trial. The rest of the assignments of error attack the court's findings of fact, conclusions of law and judgment and decree in said matter for the reason that none of said findings, conclusions or decree are supported by the evidence, and that the same are contrary to law.

DID THE COURT ERR IN ADMITTING IN EVIDENCE THE CITY  
PLAT?

With respect to Assignment No. 1, the admission in evidence of the city plat of Tooele City, the defendants contend that the court erred in the admission of the plat for the reason that the same was not properly identified to entitle it to be admitted in evidence. The only evidence we have with respect to it is the evidence given by Mabel Lougy, the county recorder of Tooele County, and her evidence was to the effect that it was in the office of the County Recorder at the time she took office on January 7, 1935, and that other than the fact that it was in the office, she knows nothing of it. (Tr. 2,3, Ab.

34,35). We do not believe that such testimony justified the admission in evidence of the document. There was no attempt upon the part of the plaintiff to prove its execution or its authenticity, and while we are not unmindful that the law seems to hold that there are certain exceptions to the rule of proving a document when the document is more than 30 years old and comes within the category of ancient documents, we do say that there was no evidence adduced prior to the admission of the Exhibit in evidence that would tend to show that it was an ancient document and entitled to admission upon that ground. Regardless of what the document itself may show, after it was introduced and received in evidence cannot assist the plaintiff in this regard, because the pre-requisites necessary to its introduction and admission were not complied with before it was introduced and received. We, therefore, say that the city plat should not have been received in evidence under the circumstances.

#### DOES THE FILING OF A PLAT DEDICATE A STREET?

The next matter we desire to discuss is whether or not the filing of a plat in and of itself, where it

is admitted that no other action has been taken by the city, can, in and of itself, establish a public street, and whether or not the boundaries of land will be limited by such plat when it is shown definitely by the evidence that there was no limitation with respect to the property when the city deeded the same to Benjamin Howell, the predecessor in interest to the defendants herein, in the first instance. We desire to call the court's attention to pages 5 and 6 of the Abstract of Title which shows the two deeds delivered to Benjamin Howell by Tooele City. It will be noted on page 5 that the deed was given to Lot 1, Block 51 and on page 6 to Lot \_\_\_\_, Block 52, and that there is no limitation with respect to the fact that Block 51 is 5.15 chains in length and that Block 52 is 5.25 chains in length as appears from the city plat which was filed some 8 years after the deed was executed and recorded. We deem this to be significant as going to the proposition as to whether or not Tooele City in the execution of its deeds to Benjamin Howell did not deed to Benjamin Howell all of the lands which he occupied and which were enclosed within his fence, in-

cluding the particular parcel that the plaintiff has attempted to quiet title upon in this action.

It will be noted by the testimony that this land has been under the fence of the defendants and their predecessors in interest ever since Tooele City was organized. This is the testimony of J. D. Gollaher, City Manager and Engineer of Tooele City, (Tr. 16, Ab. 37). We deem that the organization of Tooele City is a matter that the court may and should take judicial knowledge of. The City was shown to have been organized in 1852. At the time the City was organized, the land upon which it stood apparently belonged to the United States, and that the various inhabitants of the City possessed the lands they occupied by virtue of what has been known as squatter's rights. In 1872, the United States of America granted to the Mayor of Tooele City and his successors in office all of the land upon which Tooele City stood. This grant is claimed by the plaintiff in this action to have been a grant of land in fee to the City. However, page 1 of the Abstract of Title which contains the provisions of the grant, burdens it with the following words:

"In trust for the use and benefit of the inhabitants of said Tooele City, according to their respective interests therein."

Now what interests were referred to? The interest, of course, that had been acquired by the various inhabitants under the squatter's right to lands which they occupied at that time, the United States fully recognizing the right and ownership in the squatters to the land which they occupied. Apparently, the transaction was done to establish the record title to these lands in the inhabitants who already owned the equitable title by occupation and use. Later, there appears to have been proceedings in court to establish the inhabitants' rights as the deeds referred to on page 5 and 6 of the abstract recite:

"The said Benjamin Howell having been adjudged by the probate court of Tooele County, Utah Territory, to be the rightful owner and possessor of the above described parcel of land." We submit, therefore, that Tooele City did not at any time have the fee title to this property nor could the City establish a street or alley through these lands merely by filing a city plat which had been made on paper only.

known as the Elkington property, including the purported alley, the land east of the alley and west of the alley, is all in one piece and had been under fence for at least 40 years to the City Manager, J. D. Collaheer's, personal knowledge (Tr. 14, Ab. 37) and that the public had never used the purported alley (Tr. 15, Ab. 37); 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 through the land (Tr. 16, Ab. 37), and that the plat, if considered to be properly in evidence, was not filed until the year 1894.

The question then arises, Can a city establish or dedicate a street or alley by drawing the same on a plat and filing the plat in the office of the County Recorder? The plaintiff maintains that such is a dedication and in support of such contention refers us to Section 78-5-1 and 78-5-4 of the Revised Statutes of Utah of 1933. In a careful reading of these sections it will at once be seen that they merely provide a statutory method of transferring

have been platted and subdivided by some private individual for the purpose of selling lots thereon. The statute seems to contemplate that the filing of the plat and the acceptance thereof by the City constitutes a dedication of the streets and alleys shown on the plat. Of course, such action constitutes a contract of transfer by the owner of the land. We have no such situation in this case as is referred to in the sections of the statute above set out.

Now as to the proposition of the dedication by drawing and filing a plat. In answer to this question, we refer to 44 C.J. page 885 section 3602 which deals with the subject of adopting and filing plats by cities, which reads as follows:

"While the legislature upon the incorporation of a city may establish the public streets therein with reference to a particular plat or plan, and by statute a plan filed upon an annexation of territory to the city may make the streets shown thereon public streets, the mere fact that a street is shown upon a map or plan of the city does not make it an actual street where it has not been opened as such. This is true notwithstanding the city owns in fee simple the land designated in the plan as the place where the street is to be located."

In connection with this matter, we desire to



call the court's attention to the case of City of Syracuse vs. Cook, 130 N. E. 902. This case holds that in 1840 a plat was filed of the City showing Salina Street to be 99 feet wide. The street, however, was never opened except as to 70 feet wide. In 1919 the city brought a suit to eject the defendant from the 29 feet which it claimed was a portion of the street and which it became necessary for the city to open. In the trial of this case, the city was denied the right to open the other 29 feet of the street, and among other things the court held that the filing of a plat of itself does not make a street shown thereon a street.

Another case, that of Commonwealth vs. Phil. & RR Co. 19 Atl. 1051, is a case where a railroad was built in 1893. A plat was confirmed and filed in 1849 under the statute. The records of the Department of Surveys do not show the existence of any of the streets named in the complaint prior to the plan of 1849 and the plan made them only streets on paper, mere plotted lines, to show for the public convenience in the language of Section 16 in the Act of 1847, where and in what manner such streets, roads, lanes and alleys will in

the future run. Such plan did not, of course, acquire for the public any right of use for travel. Proceedings to open were still necessary before there would be any actual streets and before the title of the owners or their exclusive possession and use of the land could be interfered with.

Again the case of Erie RR Co. vs. City of Passaic, 74 Atl. 338 holds that the making and filing a plat is not a dedication of a street. It merely expresses an intention that some day there will be a street there.

The case of Robbins vs. McGehee Mayor, 56 S.E. 461, quoting from the syllabus which expresses the view of the opinion:

"Where a street exists only in the plan of a town or city, and has not been actually opened, worked by the municipal authorities and used by the public, but on the contrary has been in private occupation for 40 years, this mode of procedure (abatement of encroachment) is not available. And this is true notwithstanding the city owns in fee simple the land designated in the plan as the place where the street is to be located."

The evidence in this case shows that the defendants and their predecessors in interest have been in

years and we think more than 80 years, and as the Abstract of Title itself will show, for 12 years by the defendants and their predecessors in interest before the official plat of Tooele City was ever filed, and inasmuch as the City itself did not own this land, but held it in trust for the defendants and their predecessors in interest, and inasmuch as the making and filing of an official plat cannot of itself dedicate a street, we submit that plaintiff's case must fall with respect to such matter.

IS THE PLAINTIFF ESTOPPED FROM CLAIMING THE  
PROPERTY IN QUESTION AS AN ALLEY?

The next question we desire to discuss is whether or not the plaintiff is, at the present time and under the circumstances prevalent in this case, estopped from claiming the lands referred to in the plaintiff's complaint and opening the same for street purposes. When all of the circumstances surrounding the situation are considered, we most earnestly contend that the City is now estopped from asserting any right or claim in and to the property or any portion thereof.

Estoppel is fully pleaded by the defendants in answer to the plaintiff's amended complaint.

As has been shown by the evidence referred to, the people who occupied this property acquired the right therein before the grant from the Government to the plaintiff. Hence the grant was in trust for them as their interests appear. The evidence again shows that practically ever since the property has been occupied by the defendants and their predecessors in interest, the property described in plaintiff's complaint, the purported alleyway, has been occupied by improvements and buildings. Elmer J. Elkington testified that from his earliest recollection that there had been and that there is still now, improvements upon the particular land in question, consisting of a large barn, a brick building used as a general utility building, chicken coop and storage room, and that these buildings have been assessed along with the other improvements upon the parcel of land and the taxes had been paid upon the improvements, and that such matters were within his personal knowledge, (Tr. 41, 42, Ab. 44). Glen Elkington also testified to the

same fact (Tr. 48,49, Ab. 46). Most certainly, the defendants and their predecessors in interest have treated this property as being their own property. With respect to this matter, we desire to call the court's attention to the case of Houghton et al vs. Barton, 49 Utah, 611, wherein the court has this to say at page 623:

"Counsel for appellants in their printed brief say that, because respondent and his predecessors in interest treated and acquiesced in the south line marked by Wahlquist's fence as the south boundary of lot 1, block 19, which was established by Kimball and Wahlquist, and which was used as a starting point by Thomas and Jarvis, he ought not now be permitted to say "that line is further north." The decisive question, however, here involved is the location of the boundary of lot 2 with reference to adjoining properties. As we have pointed out, the evidence shows that lot 2 on the north joins and is contiguous to lot 3; that not later than 1896, Hyrum Barton went into possession of all of the land in block 19 extending from Third North street north to a point on North Main Street 192.12 feet from the southwest corner of the block. The only inference that can be fairly drawn from the evidence is that Hyrum Barton, when he acquired the legal title to the south half of lot 2, either continued to maintain the fence built by Jarvis north of the house, or, about that time, moved the fence and reconstructed it about 6 feet nearer the dwelling. In either event he evidently maintained the fence where he claimed the dividing line between the north half and the south half of lot 2 to be."

This, of course, is particularly applicable to the situation in the case at bar, in the manner in which the defendants and their predecessors in interest have treated the property referred to in the complaint.

Again quoting from the case of Houghton et al vs. Barton:

"Hyrum Barton not only collected rents from the tenants, but he took actual possession of the Jarvis property and made substantial and valuable improvements thereon, consisting in part of a large barn, a watering trough, chicken coops, etc., all of which were erected east and southeast of the house. He also erected a board fence east of the house and extending north and south across the property between the house and the improvements mentioned. He, at his own expense, laid and maintained a pipe line connecting the house and yards with the city's water mains and supplied the house and premises with water. And the evidence shows that from the year 1901 to and including the year 1909, respondent and his predecessors in interest paid all water taxes assessed against the property. The evidence also shows that he constructed water ditches which were used in irrigating trees and shrubbery from year to year planted on the lot by him and members of his family. During several years of this time his plural wife lived in the house. The east end of the lot was used by Barton mainly as a yard for his chickens and domestic animals, and the barn and other improvements (outbuildings about the yard) were used for watering, feeding and sheltering them. The barn later was "turned into a carpet, mattress cleaning factory," and on October 25, 1910, was destroyed by fire. He

think Hyrum Barton's entire course of conduct relating to the Jarvis property from the time he acquired the legal title to the south half of lot 2, as shown by the great weight of the evidence, was not only consistent with the theory that his occupation of the premises was that of a trespasser, or, as counsel for appellants seem to contend, as agent of Evans. In fact, the evidence is undisputed that his claim of ownership and possession of the ground in block 19, from the north side of Third North street to the fence line immediately north of the Jarvis house, was so open and notorious that the entire premises were known, and generally spoken of by his neighbors in that vicinity, as the "Barton property."

The evidence in the case at bar shows that all of the property enclosed in the fence was known and referred to as the Elkington property.

A reading of the case just above referred to will indicate that the cause of action was a suit to quiet title to a portion of Lot 2, Block 19, Plat E of Salt Lake City, Utah; that the land sought to be quieted was a portion of Third North Street as the same was originally surveyed and platted, but was never used by the public as a street; that is, the surplus ground was a part of the street on paper only.

We desire to call the court's attention to 43 C.J. at page 1346 wherein it is said:

"The courts have often applied the doctrine



of estoppel to municipal corporations seeking to repudiate as unauthorized or invalid conveyances made of their property, or releases made by ordinance or by compromise; or to claim title after repeated acts of recognition of title in another, whereby it has received benefits or he has undergone expense."

Again quoting from the same volume, page 1344:

"Lands, taken and held by a municipality under grant, will, gift, or dedication for a specific purpose are subject to the law of trusts, and may not be alienated by the trustee at will without lawful authority, even though the municipality itself is a beneficiary. If the trust is for the public the legislature, as supreme trustee, may authorize its disposition, subject, however, to any private right or trust therein."

In the notes to the case of Michael Maire vs.

August Kruse, a Wisconsin case reported in L.R.A.

Book 26, page 449 at page 461, under the general heading of equitable estoppel, a number of cases are referred to. The general principal is announced as follows:

"In some cases it has been held that although the statute of limitations does not apply as against the public and therefore upon that ground a title by prescription cannot be acquired against it, yet the doctrine of equitable estoppel applies, and it will be bound upon that principle.

Quoting from the case of Lyle vs. Lesia, 64 Mich. 16:



"No principle of equity will sanction or sustain the action of the highway authorities in seeking to rehabilitate an extinguished road with the line it once had, by reason of its user before its abandonment."

Again:

"The doctrine of estoppel in pais is applicable to a municipal corporation in respect of a matter of public right."

This is supported by quite a number of cases from different jurisdictions.

Quoting again from the case of *Hamilton vs. State*

106 Ind. 361, we have the following:

"If the appearances are created by non-user, and show that the acts done by an adjoining, proprietor indicate that he is acting bona fide, claiming as his own that which is in fact a part of the highway, and is expending money on the faith of his claim by adjusting his property to the highway under the supposition or claim that he has such right, the public will be estopped."

Quoting from the case of *Orr vs. O'Brien*, 77 Iowa, 253:

"An entire non-user of a portion of the road for twenty-five years, and actual, open, notorious, and adverse holding for more than ten years, will estop the public from claiming any right, and the defendant will have a right to extend the fences to the hindrance of travel."

Again the case of *Smith vs. Gorrell*, 81 Iowa, 218:

"A highway adjacent to the plaintiff's land

never having been opened, worked, nor traveled, the grantees holding and using the land without actual knowledge of the road's existence; their possession being actual, continuous, open, notorious and adverse; plaintiff's first knowledge of the road claim being acquired only a few weeks before action,—it was held, the public not having asserted any right for nearly thirty years, and the long-continued and adverse use and occupation by the plaintiffs in good faith, estopped the public from asserting a right to the land."

Again:

"There is no question, however, but that the public may lose its right to all or part of a legally established highway by non-use."

Quoting *Larson v. Fitzgerald*, Iowa case; *Gregory v.*

*Knight*, 50 Mich. 61; *Lyle v. Lesia*, 64 Mich. 16; *Box v.*

*Cart*, 11 Ohio, 414.

We desire now to call the court's attention to

13 R. C. L. page 65, Section 59:

"It has been held that a municipality cannot by its acts or conduct be estopped to open or use a street, but the weight of authority is to the contrary. In states where the latter doctrine obtains, an estoppel arises where there is long-continued nonuser by the municipality, together with the possession by private parties in good faith and in the belief that its use as a street has been abandoned, and the erection of valuable improvements thereon without objection from the municipality, which has knowledge thereof, so that to reclaim the land would result in great damage to those in possession. So a

city which has, without objection, permitted a person to occupy land for twenty years and place permanent improvements thereon, is estopped to assert that a portion of the land has been dedicated for a street and to open the alleged street through the tract to his great injury. ----- To work an estoppel in such cases, the party asserting it must have been induced by the acts of the municipality to believe that there was no street, and must have changed his position for the worse in reliance thereon."

The evidence shows that on October 15, 1937, Isaac J. Elkington, deceased, acquired the land adjacent to and over which the purported alley is located; that he very shortly thereafter commenced to erect and did erect a new home, the west wall of which is within 8 feet of the east line of the purported alley (Tr. 49, Ab. 46). This home was built without question on the assumption that there was no alley there and that the same would never be opened, and we submit that if the city were permitted to open an alley there at the present time, the defendants in this action would be subjected to a considerable loss in the depreciation of the value of the Isaac Elkington home which they, as executors, are administering, by the close proximity of the same to an open public thoroughfare.

WAS THE DEED EXECUTED AND DELIVERED BY THE PLAINTIFF TO ISAAC KILKINGTON OBTAINED BY FRAUD  
AND THEREFORE VOID?

In the discussion of this question, the first thing we desire to discuss briefly is whether or not the city can transfer property by deed, and this for the reason that the plaintiff raised some question at the trial of the case as to whether or not the city could vacate a street other than by ordinance. In answer to this contention, we again desire to call the court's attention to the case of Houghton vs. Barton, 49 Utah 611. As has already been stated, the street in this case was laid out by plat, but was never opened and later the city filed another plat which eliminated the portion of the street which had not been opened theretofore, and counsel contended that this was an attempt to vacate a street other than by ordinance, and that the city could do no such act. In our case, the plaintiff contends that the city could not transfer this property by quit claim deed for the reason that it was an attempt to vacate a street other than by ordinance. Of course, it is the defendants' contention that the question of vacating

the street or alley is not involved in this case as the same never was an alley. However, we quote from the above cited case as follows:

"Counsel for appellants contend that the city could not do any such act." If not, why not? As we have pointed out the evidence, without conflict, shows that respondent and his predecessor, Hyrum Barton, for more than fifteen years (the great preponderance of the evidence shows twenty full years) claimed to be the owners, and were in the exclusive possession of the south end of block 19 ..... Under these circumstances we are not prepared to say that the city exceeded or abused its power to the prejudice of appellants by waiving whatever title or right it may have had to the surplus ground."

So it is in the case at bar. Most certainly the City waived whatever right it may have had, if it did have any, by virtue of the filing of the plat when it executed and delivered the quit claim deed to Isaac Elkington, deceased.

The plaintiff attempts to attack the validity of the deed from Tooele City to Isaac Elkington, deceased, and as a basis of the attack sets up by way of complaint that said deed was obtained by fraud. The court will note by examination of the deed that it is regular upon its face and recites that it was executed and delivered by virtue of a resolution duly

passed by the City Council of Tooele City, Utah. In other words, the deed is regular upon its face and expresses all of the necessary legal elements to constitute a valid transfer of the property from the plaintiff to the said Isaac Elkington, deceased.

Let us then go into the matter of the circumstances surrounding the issuance of the deed by the City Council. It will be noted that no action was ever taken by the City except to make and file a plat, (Tr. 18, Ab. 37); that on March 7, 1938, Isaac Elkington appeared before the Council and requested a deed to this property to perfect his title, (Tr. 23, 24, Ab. 40); that on May 8, 1938, two months later, certain individuals appeared before the Council and requested that the alley be opened (Tr. 25, Ab. 40). That the houses owned by the applicants to open the alley had been there for at least two years (Tr. 8, Ab. 26); 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 (Tr. 34, Ab. 39). It will be noted that at the time the deed was given

to Isaac Elkington, deceased, that no one had ever made a request for the opening of the alley.

We further contend that the plaintiff's complaint in this action does not allege facts sufficient to constitute a cause of action in fraud. Where a person is relying upon fraud to nullify a written instrument such as the deed in this case, the law is to the effect that certain allegations are necessary in a pleading to state a cause of action, and in connection therewith, we desire to call the court's attention to a statement from 24 American Jurisprudence, page 79, section 248, under the question of pleading with respect to reliance upon misrepresentation, which is as follows:

"Accordingly, a pleading which asserts a cause of action based upon a fraudulent representation must allege that the representation was material, show that it was of such a nature that the person asserting fraud had a right to rely upon it, and allege that he did in fact rely, and act in reliance upon it to his pecuniary injury."

Nowhere in the amended complaint is this requirement met with respect to allegations of fraud, and particularly there is no allegation in the complaint that the plaintiff sustained any injury, pecuniary or

otherwise by reason of the alleged fraud and the execution of the deed.

It will be noted that the misrepresentation or fraud relied upon is as follows: Mr. Gollaker the City Manager, testified as follows:

Q Do you know the conversation between Isaac Elkington and the City Council on the 7th day of March, 1938?

A As I recall it, he appeared before the council and asked for a deed to this particular piece of ground, and also stated that he had conveyed it, and one of the councilmen asked if there was anybody else interested in this alley, in opening it. One of the councilmen asked if this ground would affect any people in the alley, and he reported that there was no other people interested in the property, or in the land. That is as near as I can remember the conversation that took place.

Q But he did say they were not interested in the alley?

A Well, I don't just recall whether he had visited or contacted the people or not. (Tr. 9, 10 and 11)



E. M. Evans, City Councilman, testified as follows:

Q Will you state the conversation which he had with you and which you had with him?

A Well, Mr. Elkington appeared before the council pertaining to this alleyway, stating that it was City property, but it had never been used in the history of the city, but he admitted it was on the city plat, and that Elkington ----(interruption) Well, I am stating his words. You see, I couldn't state his words -- only he said the alleyway -- that was pertaining to the alleyway -- (interruption) Well, that is what the statement was, and that he intended to build there in that it had not been used during the life of Tooele City, and he thought it should be deeded back, and it would make a better street, and there was no one interested in the alley, and he convinced me, as councilman, and I asked Mr. Gollaher, and I think I asked the city attorney, and the council if anyone there was opposed to it, and I talked to Mr. Gollaher, the city manager, and I think you will find on the city records that this was gone into with the consent of the council, and the council records stated that.

Q Now, was there a statement made by Mr. Elkington, as to the property owners there?

A Yes.

Q What was that?

A Well, there was no one interested. He stated -- he gave me, as city councilman, to understand that there was no one interested. That is the reason I figured if no one was interested, why it would be better for Mr. Elkington to have it.

Q Did he or did he not, say he contacted those parties?

A Yes, he did say that.

Q Do you recall anything else that was said in the conversation?

A Well, I think -- he mentioned that no one was interested, and that he wanted to build, - he was going to improve that street. (Tr. 23, 24, 25)

John T. Adams, a witness for the plaintiff, testified as follows:

Q Were you present on that date at the city council meeting of Tooele City?

A I was

Q Did you hear the statements that were made there?

A Yes sir.

Q Do you remember what Mr. Elkington's conversation was there?

A Well, he came to the city council for the purpose of having them convey him title to a strip of land that laid south from 3rd South.

Q Do you remember the conversation he had with the council at that time?

A Well, he stated to the council that if he understood it correctly, the city plat called for an alleyway running south through the property, and that his father had used it for a good many years. He further stated that inasmuch as that property had never been used, and at this time it would be of some value to him, and would injure nobody else in particular, that he asked the city to convey him a quit claim deed to that strip of land running south through that property.

Q What other representations were made by Mr. Elkington at that time, if any?

A Well, I don't remember exactly, other than that nobody else seemed to be interested in that piece of property there, and it hadn't been open for a good

many years, ever since Tooele was a city, and that it had been used more or less by the— not used, but it would be of great value to him, and more use to the Elkington family than anybody else at this particular time. That was the reason he asked for a quit claim deed.

Q Did he state who the other people were that weren't interested in the property? What names did he give of people who weren't interested in the property?

A Well, I don't recall exactly him mentioning any particular names at that time.

Q Did he mention, at that time, the owners of any abutting property?

A Well, I don't remember particularly of him mentioning anybody.

Q Do you remember, Mr. Adams, whether or not he said either one of these three parties up here were interested in having it remain closed, or open?

A Well, I really don't remember of him mentioning anybody. (Tr. 30, 31 and 32)

On March 8, 1938, Isaac Elkington was again at the council meeting when a request was made to open

the alley, and at that time he was asked if he had not made a statement on March 7th that no one was interested in the alley, and at that time he denied that he had made such statement. This appears to be the only time that Mr. Elkington was ever confronted with statements which are relied upon now as being a misrepresentation. Of course, at the time of the trial Mr. Elkington was deceased, and there was no one in a position to deny that the statements were made.

Further we understand the law to be to the effect that reliance upon a fraud or misrepresentation cannot be pleaded where no diligence was used by the party claiming to have been defrauded to determine whether or not the representations made were true or false. Of course, if the representations that were made were of such nature that the party to whom they were made could not, by investigation, have determined the truth or falsity of such representations, if it were shown that the party making the representations prevented the other party from investigating, then the party to whom the representations were made would

undoubtedly have a right to rely upon the statements but where the same were open to his investigation and the matters represented to him are within his knowledge or within his reach upon an investigation, he will not be heard to say that he was defrauded thereby if he failed and neglected to make the investigation to determine the truth or falsity of the representations. The evidence in this case shows that there was no diligence used to determine the truth or falsity of the representations made at the time by any member of the council, although there is testimony to the effect that when the deed was requested by Isaac Elkington, the council requested the city manager and attorney to investigate the matter and report back to the council, (Tr. 20, Ab. 42). May we not assume that this investigation was made and upon the report the deed was executed and delivered. The evidence shows that this deed was drawn by Mr. Marshall, City Attorney. If the investigation was not made, it is shown that the representations were either within the knowledge of the parties to whom they were made or could have been

readily ascertained upon the slightest inquiry and investigation, and assuming that no investigation was made, Tooele City cannot now be heard to say that they were deceived by the representations. With respect to this matter we desire to quote from 24 American Jurisprudence, page 143, section 296 on the question of reliance which is as follows:

"Accordingly, the question whether a person claiming to have been defrauded by a false representation relied upon the representation or upon his own information derived from an investigation is one of fact for the jury. Likewise, questions of fact are whether a party asserting that he has been defrauded by a false representation had knowledge of its falsity and knew the truth or had means of ascertaining it, and should have known it; whether he exercised due care and was justified in placing confidence in the statement; whether he should have made an investigation, or at least have consulted the sources of information to which the other party referred him."

Again from Volume 23, American Jurisprudence, page 949, section 146:

"According to other decisions, not entirely inconsistent because no emphasis is placed upon the existence of a duty of detection where an express statement may have been made, the party to whom a representation is made must exercise reasonable diligence to detect the truth or falsity thereof where the parties stand on an equal footing and the matter is equally open to the inquiries

of both parties. This is so where no artifice is employed to prevent the defrauded party from ascertaining the truth. The theory of the courts following the latter view is, of course, the broad theory of negligence barring a party not availing himself of equal opportunity for inspection where the means are at hand to inform himself of the nature of the subject matter of the transaction."

This rule is supported by a great many decisions in the footnote and refers to the annotations with respect to the theory employed and is as we have always understood the law to be with respect to these matters.

Again we quote from the same volume, section 147, page 951:

"Where a party to whom representations are made is put upon inquiry by his knowledge of the facts and undertakes to make an investigation of his own, and the other party does nothing to prevent this investigation from being as full as the investigator chooses to make it, and in the transaction the true facts are equally open to both upon investigation, the investigator will not usually be heard to say that he had the right to rely on such representations."

If we understand the law correctly, the court is required to construe the circumstances as adduced by the evidence to give validity and effect to the deed wherever such is possible, as the law is in favor of supporting written instruments duly executed by the parties involved. Furthermore, the court applies the



rule that such must be established by clear and convincing evidence. We desire to quote from the case of Ferrell vs. Wiswell, et al, 45 Utah 202 at page 206:

"We have no right to overlook the wholesome rule that where deeds or contracts are sought to be vacated upon the ground of fraud and deceit, the burden of proving the alleged fraud is upon him who asserts it; moreover, that the fraud must be established by clear and convincing evidence. While fraud need not necessarily be established by direct evidence, yet from all the evidence, whether direct or circumstantial, it must be made to appear with reasonable clearness that the act in question was induced by fraud or deceit in order to authorize relief in an action of this kind."

Again we desire to call the court's attention to the case of Jennie E. Brender et al vs. Anna E. Stratton, a Michigan case, reported in 22 A.L.R. at page 728, quoting from page 730. This case goes to the question of the proposition that there must be an existing fact at the time of the misrepresentation or fraud. We quote from the decision as follows:

"If so, defendant certainly did not thereby induce her to sign the deed by a false representation to her as to an existing fact, which is an essential of a fraudulent representation. Defendant denied this transaction in toto, and asserted she never had a codicil to any of her wills, but frankly

said that after receiving the deed she made provision in her will relative to the property, as her brother had expressed his desires to her."

We submit that at the time this purported misrepresentation and fraud is alleged to have taken place, there was no fact in existence to which the same referred. The evidence clearly shows as has been hereinbefore stated that no application was made for the opening of the alley until two months later. If any interest in this matter existed at all, it existed only in the minds of somebody who was not a party to this transaction and had nothing to do with it. How was anyone to know or what duty was imposed upon anyone, save and except Tooele City to determine the situation with regard to this matter? How could Isaac Elkington have been expected to know that in fact someone was interested in the alley when such interest was not made known to anyone until two months later. We submit that there was no fact in existence upon which the claimed misrepresentation was made.

We desire again to call attention to the quotations from 18 C. J. at page 228 as follows:

"At common law the fraud which could be asserted to avoid the deed must relate to its execution, such as a fraudulent misreading, or the obtaining of such an instrument as the grantor did not intend to give. Hence fraud going to the consideration could not be availed of."

#### Section 148:

"A deed cannot be avoided by reason of fraud subsequent to or independent of the transaction in which it was given. There must be proof of acts or representations on the part of the grantees or their agents which were deceptive and false, and the person seeking relief must have been injured .....And if both parties had equal knowledge or means of information as to the particular fact or facts claimed to have been misrepresented, equity will not interfere."

We are unable to see how, by any analysis of the evidence in this case, that it could be said that there was any fraud or misrepresentation by Isaac Elkington at the time this deed was executed and delivered. If there could be said to be any fraud or misrepresentation in the matter it was not waged against Tooele City or any member of its executive body, but would be a fraud against the three persons who made application some two months later for the opening of the alley. These men were not parties to this transaction at all. We, therefore, are unable

to understand how Tooele City can say that you made a statement which deceived some third party. Therefore, we ask to set the deed aside. Why? Not that we have been defrauded; not that we have been injured, but because of the effect it has had upon some third party. We do not believe the court can uphold any such proposition.

Just one further matter. The deed shows that it was executed by virtue of a resolution of the City Council of Tooele City. The law authorized the City Council of a city such as Tooele to act either by ordinance or resolution and in this particular case, it chose to act by resolution. Before the City Council would have a right to claim any right to a rescission of its action in executing the deed, it would have to do so by the passage of a counter resolution nullifying its act, because until it does so, its act under the former resolution is a good and valid act. In other words, if an ordinance or resolution is duly passed by the governing body, the same can only be repealed or rescinded in the same manner, by ordinance or by resolution, and once either has been enacted,

it remains a valid subsisting order of the Council until it is so nullified or rescinded by an action of the Council of similar dignity and import. Upon this point we desire to call the court's attention to section 889 of 43 C.J. page 564 with reference to the methods of repeal of ordinances and resolutions:

"The act which repeals an ordinance must be of equal dignity with the act which establishes it, and must be enacted in the manner required for passing a valid ordinance. Accordingly an ordinance or by-law can be repealed only by another ordinance or by-law, and not by a mere resolution or motion or by a void ordinance."

and in connection with this matter we desire to call the court's attention to the case of *Buffale vs. Chadeayne*, 134 N.Y. 163, 31 N.E. 443 which holds that a resolution rescinding a former resolution conditionally only is inoperative. Of course, this shows the necessity of rescinding a resolution by a subsequent resolution and as we say, neither the pleading nor the evidence in this case shows that Tooele City Council ever took proper steps to rescind the resolution adopted by it for the execution and delivery of the deed in question, and for said reason, the resolution is still in force and effect and the deed must

be construed to be a good and valid deed and must be by this court upheld.

Then again we desire to call the court's attention to the necessity of a showing by the evidence on the part of the plaintiff that any representation made by the said Isaac Elkington, deceased, to the City Council, as referred to in plaintiff's complaint must have been known by the said Isaac Elkington to have been false and designedly uttered to create a false impression. The pleading has such an allegation, that he knew them to be false, but there is no evidence upon the part of the plaintiff to sustain such allegation, and of course under such circumstances, the allegation must fall.

As we have heretofore stated, if any knowledge was in existence that anyone else was interested in this property prior to May 8, 1938, it existed only in the minds of some individuals and it was impossible for Mr. Elkington to have known of its existence or to have known that the statements which he made, if he made such statements, were not true.

For the reasons herein set forth, we respectfully

fully submit that the judgment of the District Court

should be reversed and remanded, with instructions to the court to enter judgment in favor of the defendants, no cause of action.

Respectfully submitted,

E. LEROY SHIELDS

Attorney for Appellant

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FOR NO. 6327