2001

Ruth S. Olsen v. Morris F. Swapp : Brief of Respondent

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

RUTH S. OLSEN,
Plaintiff and Appellant,

vs.

MORRIS F. SWAPP, et al.,
Defendants and Respondents.

Case No.
13741

BRIEF OF RESPONDENT

An Appeal from the Judgment and Decree of the
Second District Court for Davis County
The Honorable Thornley K. Swan, Judge

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STATEMENT OF THE NATURE OF THE CASE

Appellant commenced an action in the Davis County District Court to enjoin Bountiful City from constructing a sidewalk along the south side of her property without paying compensation therefore.

DISPOSITION BELOW

There was a trial held in the Davis County District Court on October 30, 1971. The Court found issues in

favor of the respondent and signed a Judgment and Decree providing that Bountiful City was the owner of the property and entitled to construct a sidewalk thereon and forever barred the plaintiff from asserting any title or interest thereto. On June 5, 1974, the Court signed an Order denying plaintiff's Motion to Amend Findings, Make New Findings or in the Alternative for a New Trial.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the foregoing Judgment and Decree.

STATEMENT OF FACTS

While appellant's statement of facts is correct in significant portions, respondent will state the facts as found by the Court and supported by the record.

Appellant's home in which she lives is located on the Northwest corner of Third North and Main Street in Bountiful, Utah. Her house faces East. Appellant and respondents dispute the ownership of a five foot strip of property traversing east and west along the south side of appellant's property. The respondents are desirous of constructing a sidewalk along this strip of ground pursuant to a regularly created improvement district and claims the property is included within the boundaries of Third North Street. The appellant claims that the five foot strip of property belongs to her and thus this law suit.

Third North Street is a 3 rod street and is shown

as such in the Bountiful Townsite, Plat "A", which is maintained in the office of the County Recorder of Davis County, Utah, as an official record of said recorder and kept and maintained in the same manner as other original townsite plats (R-42, 51, 52, 75). It is not known when the plat was filed, and also whether recording information was assigned to the plat since none is noted on the plat. This plat includes appellant's property which is designated as Lot 1, Block 53, Plat A, Bountiful Townsite Survey in the Deed to her, dated November 25, 1940 (Ex. Q). The plat sets out numerous blocks and streets including Third North Street.

The first title owner of the property, now owned by the appellants, was William Walton, who received title from the Probate Judge in 1872 (Ex. J). In describing the property reference was made to "Block 53, Plat A, in the town of Bountiful". All subsequent conveyances, including the conveyance made to appellants, describe the property by reference to Block 53, Plat A (Ex. K, L, M, N, O, P, Q, R). It therefore seems evident that the plat was of public record very early as it was repeatedly referred to in instruments of conveyance from the very beginning.

Appellant's father, James Smedley, acquired the property in 1889 (Ex. P). It was apparently some time subsequent to his acquiring ownership that a barbed wire fence, and subsequently a hedge, was located along the south bondary of the property and encroaching upon the disputed 5 foot strip (R-6).

Pertinent and material facts with respect to appellant and her predecessors in interest and their relationship to the property in question, are these:

a. They have never possessed any portion of Third North Street prior to or at the time of the entry of the Bountiful Townsite.

b. They have never had nor do they now have any record title to any portion of Third North Street and particularly of the property in question (Ex. J, K, L, M, N, O, P, Q, R).

c. They have never erected or maintained any improvements within the boundaries of Third North Street except for the maintenance of the hedge along the south boundary of appellant's property which encroaches on the north part of the street (R-6).

d. They have never paid any property taxes covering any portion of Third North Street and the property in question, and no taxes have ever been assessed covering any portion of said street (R-29).

e. Bountiful City has never taken any action of any kind to abandon or vacate any portion of Third North Street and has never taken any affirmative action of any kind which would lead appellant to believe that the city was abandoning, vacating or giving up any interest in Third North Street or any part thereof.

f. Third North is an improved street — there never were any encroachments along the way

and at least was open for passage way as early as 1915 (R-31).

In 1927, a re-survey of the old Plat A, was made. The survey is referred to as the Burningham Survey and establishes monumentations (R-36). Insofar as it relates to Block 53, there is apparently no dispute as to the actual location of the boundaries of Third North Street as it relates to the South boundary of appellant's property. Testimony of appellant's own surveyor and the plat prepared by him, completely supported the facts asserted by the respondents, that the N/S measurements of Block 53, Plat A, as shown by the old Plat A, which hangs in the Recorder's Office, the Burningham re-survey and appellant's own survey, is exactly 330 feet (Ex. 5, R-41). The South boundary of appellant's property is described in the chain of title and is indicated by the Burningham re-survey and the old Plat A; is therefore north of the land in question; clearly excluding that land from the property conveyed to appellant's predecessors in title.

The City of Bountiful properly and regularly created Bountiful Improvement District No. 9, for the purpose of constructing curbs, gutters and sidewalks along certain streets in Bountiful. One of the improvements to be constructed is a sidewalk which as mentioned earlier traverses along the property in question and adjoins appellant's property on the south. The sidewalk to be constructed is entirely within the boundaries of Third North Street and entirely south of plaintiff's property.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN PROHIBITING THE APPELLANT IN TESTIFYING AS TO MATTERS OF FAMILY HISTORY RELATED TO HER BY HER FATHER PERTAINING TO BOUNDARIES, CONDITION AND USE OF THE PREMISES.

The appellant alleges that the Court erred in not allowing testimony by her of statements made by her father (now deceased), relating to bonudaries and improvements on the property (R-5-8).

Appellant argues that this testimony should have been allowed as an exception of the hearsay rule. It is true that declarations of persons since deceased, with regards to location of boundary lines, etc., are usually considered competent evidence even though hearsay. To be admissible, however, the declaration must be made by one who is disinterested at the time of such declaration. It must also be shown that the declarant had peculiar knowledge of the facts, which facts form a part of the res gestae. In the present case, there was no proper foundation made.

Even assuming that the statements and evidence were otherwise admissible, such error was harmless. *Section* 776, 5 *Am. Jur. 2d, Appeal and Error*, provides as follows:

> "To warrant reversal, two elements must be shown: error, and injury to the party appealing. Error is harmless when it is trivial, formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it, in no way, effects the final outcome of the case; it is prejudicial, and ground for reversal, only when it affects the final result of the case and works adversely to a substantial right of the party assigning it."

Even if there was error, such error was cured by the admission of other competent evidence. Exhibit P, which shows a conveyance of portions of Block 53, Plat A, to appellant's father, James Smedley in 1889, was admitted into evidence (R-4). Appellant's surveyor testified as to the location of Block 53, and his survey was admitted into evidence (R-33, Ex. S). The appellant was able to testify to her own knowledge concerning the location of the hedge and various photos were introduced as to its location (Ex. A, B, C). Other testimony concerning improvements on Block 53, were immaterial unless they related to the particular disputed strip of property. After all the evidence was in, appellant was able to establish the location of her south boundary, the location of the disputed strip of property and the extent of improvements thereon. Appellant has failed to show any prejudicial error.

POINT II.

BASED ON THE FACTS IN THE RECORD AND THE LAW APPLICABLE THERETO,

THE COURT DID NOT ERR IN DISMISSING THE COMPLAINT AND IN ADJUDICATING THAT BOUNTIFUL CITY WAS THE RIGHTFUL OWNER OF THE DISPUTED PROPERTY.

Appellant contends that she is entitled to the ownership of the 5 foot strip of property in question. She does not contend that she, through her predecessors in interest, acquired title through some instrument of conveyance; nor does she contend that she could have acquired the strip of land by adverse possession from the city. Such a contention would be of little avail to the appellant in view of *Section* 78-12-13, *Utah Code Annotated,* 1963. Appellant asserts that the City of Bountiful is estopped from claiming any interest in the portion of the street in question because of the non-action of the city in asserting title to this portion of the street which led her to believe the city claimed no interest in the strip of land in question. It is the contention of the respondents that the city can not be estopped under the laws of the State of Utah.

It is doubtful that under the present statutes that a Utah city can ever be estopped in claiming an interest in a dedicated street. The earliest case to be decided under our present statute involving the question of estoppel appears to be the case of *Tooele City* v. *Elkington,* 166 P. 2d 406, 100 Utah 45 (1941). In that case, an alley way abutting the Elkington property was dedicated as an alley in the original Townsite Plat of Tooele City.

The alley was never used as such, however, and was always kept fenced within the Elkington property by Elkington and his predecessor in interest. In 1938, the City Council of Tooele passed a resolution to deed the property to Elkington and pursuant to that resolution, the Mayor of Tooele executed a Quit Claim Deed conveying the property to Elkington. Later, the city of Tooele brought suit against Elkington to acquire title in the alley in the city. The Utah Supreme Court held that under Utah law, the only way the city could vacate a dedicated street or alley, was by ordinance and that therefore, the deed to Elkington from the city was illegal, unauthorized and void. The Supreme Court also held that the city was not estopped to claim title to the alley because of its acts in deeding the alley to Elkington. It noted that the city had been paid little by Elkington for the alley and that there had never been a replatting of the alley, and that the portion of the alley which Elkington claimed had never been assessed for taxes to the defendant. The Court stated:

> "Balancing the justices of the cause, we find there is no ground for estoppel against the city. In so doing, we are mindful of the fact that individuals dealing with officers should be able to rely upon their acts; that officers should act within the authority granted; and that officers should be held to their acts and covenants like individuals. However, the community is interested in the vacating of streets and the legislature has provided that they be vacated by ordinance, in order that the community may have notice of the acts of the commissions and thereby

protect the private property holder and the community against such actions."

The Tenth Circuit Court of Appeals had the opportunity to review the Utah Law on this point in the case of *Provo City* v. *Denver and Rio Grande Railway Company*, 156 F. 2d 710 (1946). In that case, the railroad needed to substantially expand its existing facilities. One method contemplated was to construct new facilities outside of the City of Provo. The other alternative was to enlarge existing facilities in the city but in order to do so, it was necessary to obtain the vacation of an existing street. The Railroad and the Mayor and Commissioners of the city entered into negotiations which resolved in an oral agreement that an ordinance would be passed closing the street. The railroad relying on this oral agreement barricaded the street and construced its enlarged facilities. The agreed upon ordinance was never introduced or passed by the city. Citizens of Provo later protested the vacation of the street and the city in response to such protest, removed the barricade and began work to open the street as a public thoroughfare. The railroad then instituted proceedings to enjoin the city, its Mayor and Commissioners from reopening the street contending that the city was estopped from contending that the land in question was a dedicated street. This contention was rejected by the Tenth Circuit and the Railroad's case was directed to be dismissed. The Court held that under the Utah Statutes, the city of Provo had the power to vacate and close the street only by ordinance;

that in absence of such ordinance, the adoption of equitable estopped could not be invoked against the city. The court reviewed all prior Utah cases dealing with the adoption of the estoppel against the city involving city streets. It stated that the Utah Statutes provided that the streets or parts thereof should be vacated by ordinance. The Court stated,

> "These three cases considered in their composite effect, seem to make it clear that in Utah, the principal of estoppel in pais, is to be applied very narrowly to a city in respect of its right to re-open a street for use as a public thoroughfare and only in cases where the city acted within the ambit of its legal authority but in an irregular way; and that the principal does not have controlling application in a case of this kind where the Mayor and City Commissioners merely agree verbally to pass an ordinance closing the street but never did again attempt to pass it regular or irregular."

The most recent case on this question is to be that of *Cox* v. *Carlisle, Mayor of Manti City*, 359 P. 2d 1049, 11 Utah 2nd 372 (1961). This involved an appeal from a judgment which declared Manti City to be the owner of a 66 foot strip of land platted as a city street. The land in question had been platted as a city street by the original townsite plat of the city of Manti. In 1871, the plaintiffs predecessor in interest, obtained a Mayor's Deed to a lot in Manti which adjoined both sides of the platted street. The street, as platted, was not shown to have even been used as a street. Irrigation improvements were

made on the strip of land in question by the plaintiff commencing prior to 1910. Based upon these facts, the Court held that there could be no estoppel against the city in claiming title to the street in question. The court stated:

> "The proof here commands but one point that we need canvass on appeal: is Manti City estopped to assert title in the strip platted as a street. We believe and hold that this question must be answered in the negative under the facts adduced. . . .
>
> Significant are these: 1) Neither plaintiff nor others ever paid any taxes on the property since or before 1871; 2) No one has challenged the ownership lieniated by the recorded plats 'till here; 3) Manti has claimed no taxes thereon; 4) The evidence conflicts somewhat as to whether the area was used as a roadway at the time or for sometime after the deeds, the Townsite Entry and the establishment of proof by claimants in the Probate Court, but there is ample, competent evidence that easily could lead the arbiter of facts recently to conclude that the strip so had been used; 5) that plaintiff, whose burden it was to show occupancy for her or her predecessors before and at the time of the townsite entry, showed none; 6) that the only affirmative documentary representation as to occupancy at that time, was a County Surveyor's map, which has persisted by recordation to date, reflecting the existence of the city street, and importing notice to all, including plaintiff; and 7) that everyone concedes that the record fee title thereto, has unbroken continuity to date in Manti City.

> "No evidence except perhaps a legitimate silence points to any Manti representation intended to induce a reasonable person to claim title to the strip upon which he acted to his detriment. Recordation of the plat and its persistence sans challenge, inertia on the part of the plaintiff or anyone else to pay or offer to pay taxes on the area, and the use of the land by the plaintiff and predecessors for a long period of time would seem to have been more of a benefit, would not support the luxury of a claim or irreparable damage on termination of such use, but would support an inoculation of the city against any claim of estoppel."

From the foregoing cases, it would appear extremely doubtful that the city would ever be estopped from title to a portion of a dedicated street except in the case where the city has attempted to vacate the street by ordinance.

Actually, *Cox* v. *Carlisle* (the Manti case), seems clear to be controlling here since,

1. Neither plaintiff or others ever paid any taxes on the property.
2. No one has challenged the ownership 'till here.
3. Bountiful has claimed no taxes thereon.
4. The evidence is uncertain as to when the area was used as a roadway, but at least, as early as 1915, it was used as a pathway and the road is presently improved and under use.
5. That the appellant, whose burden it was to

show occupancy for her or her predecessors before and at the time of the Townsite Entry, showed none except the encroachment by a fence and hedge.

6. That everyone concedes that the recorded fee title thereto, has never been held by the appellant or her predecessors.

Appellant relies heavily on *Hall* v. *North Ogden City*, 166 P. 2d 221, *rehearing granted and judgment set aside*, 175 P. 2d 703 (1946). In that case, the plaintiff instituted action to enjoin the town of North Ogden from opening up as a street, certain tracts of land indicated as streets, by the Townsite Plat, but which had never been opened or used as streets and upon which valuable improvements have been erected by the plaintiffs. The thrust of the *Hall* case was, where the land was occupied *prior* to the entry of the townsite by the County Probate Judge, pursuant to the Federal Townsite Act of 1867, the occupant had an equitable interest in such land which became vested when the land was entered by the Probate Judge in the Land office and which was not divested for failure to file a claim as long as the occupant remained in possession. The important distinction between the facts in the *Hall* case and those in the case at bar is in *Hall* case, the early settlers possessed the entire street area prior to the entry of the plat and subsequent title holders continued to use and possess the property in question up to the time of trial.

In the case at bar, at the time of the entry of the plat, the area of Third North was not possessed by any

of the adjoining owners. With the exception of the area in dispute, none of Third North has ever been possesed or claimed by an adjoining landowner. With regards to the area included within Third North, now claimed by appellant, the only improvement is the maintenance of the hedge along the south boundary of appellant's property which encroaches on the north part of the street. This hedge was apparently planted sometime subsequent to appellant's father purchasing the property in 1889 and subsequent to the entry of the plat. Then to, by appellant's own admission, Third North was used as a formal street as early as 1930, and the actual north curb line of the street comes to within approximately five feet of the south boundary of appellant's property.

While the holding of the *Hall* case was reversed on re-hearing, that reversal was based on the fact that the street involved had never been dedicated or used as a public street. It is significant that the Utah Supreme Court has not retreated from the position it took in the first hearing, of the *Hall* case, 166 P. 2d 221, and that is that the city's interest in a dedicated street cannot be lost by adversed possession or estoppel.

The appellant asserts that there was a failure to dedicate the street because apparently, neither the old Plat A, nor the Burningham re-survey had been recorded, in accordance with the current recording procedure. This assertion, if accepted, would mean that not only the streets in Bountiful but according to testimony given at trial, those at Kaysville and Farmington as well,

are subject to ownership claims by contiguous property owners.

This would be clearly an intolerable situation. The better view is, that Plat A, was made of record very early since *all* instruments of conveyance relating to Block 53, made reference to "Block 53, Plat A". The better view is that although the recordation of some of the old plats may not have complied with current recording procedures, there was in essence, substantial compliance which should be recognized as sufficient in the interest of avoiding confusion and further litigations.

CONCLUSION

It is respetfully submitted that under the facts and the applicable law, the appellant has failed to show any right or title to the property in question on the basis of any feasible theory and accordingly, the decision of the lower Court should be affirmed.

Respectfully submitted,

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