

1952

Pleasant Grove City v. Laurence Crease, Retta Crease, Richard L. Bezzant, Angelina Bezzant : Brief of Appellants on Appeal

Utah Supreme Court

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In the Supreme Court of the State of Utah

PLEASANT GROVE CITY,
a municipal corporation,
Plaintiff and Respondent,

vs.

LAURENCE CREASE and
RETTA CREASE, his wife;
RICHARD L. BEZZANT and
ANGELINA BEZZANT, his wife,
Defendants and Appellants.

CASE
NO. 7874

APPELLANTS' BRIEF ON APPEAL

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STATEMENT OF THE CASE

This action was brought by Pleasant Grove City, a municipal corporation, to quiet the city's claimed title for street purposes to a strip of land running through a tract of land occupied by the defendants and appellants named above, together with various other parties (File 4-6).

The Creases and Bezzants owned homes immediately adjoining the tract of land in question and each occupied a portion of the tract up to a common line in connection with their homes. They denied the title of Pleasant Grove City, and in counterclaims asserted title in themselves and alleged affirmatively that the city was estopped to question their titles (File 8-17).

The district court, after hearing the evidence, concluded in a memorandum decision that the plaintiff "failed to establish its ownership of the lands in possession of the defendants" and "the defendants failed to prove an estoppel as alleged in their counterclaims (File 21).

The court made detailed findings of fact setting out the facts relating to this controversy, on the basis of which facts appellants contend that the court should have concluded as a matter of law that plaintiff was estopped from denying defendants' titles and that the defendants as against plaintiff were the owners of the land in controversy (File 22-32). The court, nevertheless, concluded and decreed that while the plaintiff city was not entitled to judgment as against defendants, neither were the defendants entitled to judgment against the plaintiff, and, therefore, entered a judgment of "no cause of action" both on the complaint and on the counterclaims (File 33-34).

Upon the denial of motions for modification of judgment and motion for new trial (File 37) defendants duly filed their notice of appeal (File 38), their designation of record on appeal (File 39-40), wherein the record formerly referred to as the Judgment Roll was specified, and their statement of points (File 41), whereby it was specified that the court's conclusion of law No. 2 was erroneous in that it was not authorized nor supported by the findings, but that

the findings required the court to enter judgment for the defendants on their counterclaims quieting the respective titles for defendants as against the plaintiff; and that paragraph No. 2 of the decree was erroneous in that it was not justified by the findings and that the court should have adjudged and decreed that defendants' respective titles be quieted as against plaintiff as prayed for in the counterclaims; and that the court erred in refusing to modify the conclusions of law and judgment in accordance with the defendants' motion.

Thereafter, plaintiff also filed an abortive appeal (File 46) but designated substantially the same record as defendants had done on their appeal, neither including the transcript. This attempted appeal by plaintiff was dismissed by this Court upon defendants' motion, and the appeal is now from that part of the decree denying defendants relief on their counterclaims and the matter is before the Court on the File which prior to the adoption of URCP was referred to as the Judgment Roll.

STATEMENT OF FACTS

The determinative facts in this case can be perhaps best and most concisely set out in the words of the trial court's findings themselves. First, however, it may be helpful to this Court to explain the general location of the land in dispute with reference to other property of defendants and the established streets of Pleasant Grove City.

The property of the defendants, Laurence Crease, et ux and Richard L. Bezzant, et ux, hereinafter mentioned as parts of Lot 5, Block 8, Plat "A", Pleasant Grove City Survey, and Lot 2, Block 7, Plat "A", Pleasant Grove City Survey, owned by said parties respectively, face on Third South

Street, formerly designated as Second South Street, and the west and east lines of their respective parcels of land join the said disputed area four rods wide; the Creases claiming the east two rods thereof and the Bezzants, the west two rods thereof. Fourth East Street of said Pleasant Grove City joins the said Third South Street immediately north of said disputed area. The Crease home is located a few feet east of the east line of said disputed area and the Bezzant home is located a few feet west of the west line of the said disputed area. There never has been a street or other passageway over or across the disputed area and the disputed area, as far back as the records go, has been treated by defendants and their predecessors in interest as their private property without any objection on the part of the city until shortly before the commencement of the present action.

Omitting the formal findings as to identity, corporate existence, etc., we now set out the findings of the court (File 22-32):

"4. That one W. G. Sterrett was a resident of Pleasant Grove City, Utah Territory, some years prior to the year 1869; but as to the number of years the evidence does not show; and that said Sterrett was in possession of and claimed the title to what was designated as Lot 5, Block 8; Lot 2, Block 7, Plat "A", Pleasant Grove City, and of the 4 rods of land located between said lots embracing the area now in dispute, and he was also in possession of and claimed title to Lot 2, Block 14, Plat "A", of said Pleasant Grove City, and that the same was enclosed by a substantial fence.

"5. That sometime prior to June 26, 1869, the exact time the evidence does not show, said W. G. Sterrett sold and transferred the possession of the said lots to-

gether with said parcel of land now in dispute in this action, and also Lot 2, Block 14 located immediately north of said Lot 5, Block 8, and all of the right and title that the said W. G. Sterrett had thereto to Daniel M. Smith, then a resident of said Pleasant Grove City, Utah, and the said Daniel M. Smith was legally in the possession of the said lots above mentioned on the 26th day of June, 1869, and was the owner of the right to the said parcels of land and to the possession thereof on the 26th day of June, 1869, on which date there was an entry made by John Brown, then Mayor of Pleasant Grove City, Utah, known as Cash Entry No. 297, covering the SE $\frac{1}{4}$ of Section 20, SW $\frac{1}{4}$ of Section 21, NW $\frac{1}{4}$ of Section 28 and NE $\frac{1}{4}$ of Section 29, Township 6 South, Range 2 East, Salt Lake Meridian, in trust, however, for the inhabitants of said city, and especially said residents lawfully in the possession of the said lands.

"6. That at the time of the entry made by said John Brown, Mayor, as above stated, all of the said lots and of the intervening area between said lots were enclosed in one field or area with nothing to indicate by any visual inspection but that the entire area was part and parcel of the said lots.

"7. That at said times hereinabove mentioned no streets had been surveyed or in any way marked indicating the location of any streets over such intervening area between the said lots or across any of said area; that First East Street, as then designated, now Fourth East Street, had not been surveyed or opened until more than five years after the John Brown entry No. 297 as above set out; that at the date of said entry, Second South Street, as then designated or named, and now at the time of the trial designated as Third South Street, had not been surveyed or opened and was not opened until more than five year thereafter, and when

opened the area covered by Second South Street adjoining Daniel M. Smith's property was recognized as being his property by the city officials of said Pleasant Grove City and the same was purchased from the said Daniel M. Smith by Pleasant Grove City and paid for out of the City Treasury; the same situation was true of the area covered by First East Street running north from the said Daniel M. Smith's property, now named Fourth East Street, and the area now embracing said Fourth East Street of Pleasant Grove City was recognized as belonging to various occupants of the same and the said area was either taken by condemnation proceedings as provided by the charter of said city and paid for out of the City Treasury, or was purchased and paid for by said City without condemnation proceedings, payment therefor being made from the City Treasury; that the area, during all the times above mentioned, between Lot 5, Block 8 and Lot 2, Block 7 now claimed by plaintiff herein in this action lies immediately south of Second South Street (now Third South Street) opened and paid for by plaintiff city and the same area is immediately south of said First East Street (now Fourth East Street), and during all of these proceedings culminating in the opening of said First East Street and Second South Street, and particularly all of the area now claimed by the plaintiff as against these answering defendants, was in the possession of said Daniel M. Smith as a part and portion of his enclosed area, and was claimed by him and recognized by Pleasant Grove City as his property.

"8. That during said period prior to 1869, and at the times said adjoining streets were opened by Pleasant Grove City and the land paid for by said city, Daniel M. Smith was growing an orchard on part of this now disputed area. He erected immediately east of the east line of the property now in dispute a substantial home in which he and his family lived and as part of the en-

closure above mentioned, and he had erected upon a portion of the now disputed area corals, chicken coops, machine sheds and maintained a substantial building used as a granary immediately east of what is now claimed as part of the disputed area; he erected and maintained for many years a blacksmith shop on said now disputed area; he had also erected directly east of the said disputed area in such enclosure a large hay barn and it was used in connection with the enclosed area.

"9. That although Third South Street prior to the opening of said Second South Street immediately south of the Daniel M. Smith holdings had been surveyed and staked, the same has never to the present time been opened or the area comprising said street has never been claimed by Pleasant Grove City.

"10. That shortly after said Daniel M. Smith came into the ownership and possession of said Lot 5, Block 8 and Lot 2, Block 7 and after the opening of said Second South Street (now Third South Street), said Daniel M. Smith planted hardwood trees all along the south side of said Lot 5, Block; Lot 2, Block 7 and the now disputed area, and that all of said trees through the years have developed into very large trees apparently 75 to 80 years old, four of which are immediately along the north side of said disputed area.

"11. That said Daniel M. Smith continued to cultivate a portion of said now disputed area and the orchard growing thereon, and theretofore planted by him and covering a portion of said area, and he maintained the other improvements upon said area as above set out; and at all times in good faith claimed the same as his property until in the year 1884 he conveyed the said lots 5 and 2 to his wife, Emma Smith, including the home located thereon and in which she and her family lived, and she took possession thereof including the now

disputed area and used and cultivated the same as theretofore and maintained the exclusive possession thereof until her death in 1914; and that she and her predecessors in interest in good faith maintained their possession of said property, claimed the same as their own, and without any claim to the possession or right to the possession of the disputed area by Pleasant Grove City or any of its officials and without any knowledge that there was ever any claim made by them to the now disputed area.

"12. That during all of the time up to the death of said Emma Smith, also known as Emma H. Smith, the disputed area formed a part of the enclosure covering Lots 5 and 2 above mentioned and from any visual inspection of the entire enclosure there was nothing to indicate but that the entire now disputed area formed a part of said Lots 5 and 2 as hereinabove mentioned.

"13. That upon the death of said Emma Smith, also known as Emma H. Smith, her estate was probated in the Fourth Judicial District of the State of Utah, and in the course of the probate proceedings the entire estate was partitioned and distributed to her heirs at law (7 in number) and the said Lots 5 and 2 above mentioned, including the now disputed area, were partitioned and distributed as above stated and a decree of distribution was duly made and entered in the matter of the estate of Emma H. Smith, deceased, and recorded in the records of the court dated the 3rd day of July, 1916, in Book 98, Page 515 of the records of Utah County, State of Utah; and as a part thereof there was partitioned and decreed to Burdett Smith, one of the heirs at law, the following described parcel of property including the east one-half of the area now in dispute, to-wit:

Commencing at the Northwest corner of Lot 5 in Block 8, Plat "A", Pleasant Grove City Survey;

thence East 10 rods 6 feet; thence South 29 rods; thence West 12 rods 6 feet; thence North 28 rods 14½ feet; thence East 2 rods to place of beginning. Also 3 acres of Pleasant Grove Irrigation Company Water.

That as a part of said decree of distribution there was partitioned and decreed to Earl C. Smith, one of the heirs at law of the said Emma H. Smith, the following described parcel of land and including the west one-half of said now disputed area, to-wit:

Commencing at the Northeast corner of Lot 2 in Block 7, Plat "A", Pleasant Grove City Survey; thence East 2 rods; thence South 14 rods 11 feet; thence West 41 rods; thence North 7 rods 11 feet; thence East 10 rods; thence North 7 rods; thence East 29 rods to the place of beginning. Also 5¾ acres of Pleasant Grove Irrigation water.

"14. That the said parcels of land partitioned and decreed to Burdett Smith and Earl C. Smith were, commencing in the year 1917, assessed to the respective parties above named and their successors in interest up to and including the year 1951 and the taxes were paid to Utah County for the benefit of the State of Utah, Utah County and Pleasant Grove City, and the descriptions thereof have appeared upon the records of Utah County as decreed and described as above mentioned ever since.

"15. That on March 24, 1917, Burdett Smith and his wife mortgaged to Thatcher Brothers Banking Company the above property as described in said decree of distribution for \$500.00, which mortgage was later paid and the same released of record; that on February 9, 1920, Burdett Smith and his wife, Lottie F. Smith conveyed by warranty deed to Edward R. Nelson said property conveyed by said decree of distribution to said

Burdett Smith, and received a mortgage back from Edward R. Nelson and wife for \$1000 which mortgage was later assigned to Louis W. Lund; that on March 10, 1926 said property was sold to Utah County for delinquent taxes and the same not being paid, an auditor's tax deed was issued to Utah County covering the above described property dated March 15, 1930; that on October 3, 1930, Utah County resold to Edward R. Nelson by quit claim deed the said property; that the Edward R. Nelson mortgage to Burdett Smith was assigned but finally paid and released on December 29, 1933; that on March 6, 1934, said real estate deeded to Edward R. Nelson and his wife was mortgaged, not being paid the same was foreclosed and the same sold to Home Owners Loan Corporation, and sheriff's deed issued to said Home Owners' Loan Corporation dated October 14, 1939 and recorded in Book 348, Page 434 of the records of Utah County; that on March 8, 1944, said parcel of land as first hereinabove described was sold and conveyed to Lawrence Crease, also known as Laurence Crease, and Retta S. Crease, husband and wife, as joint tenants, by warranty deed recorded in Book 400, Page 584 records of Utah County, Utah.

"16. That said Laurence Crease and Retta S. Crease purchased and paid for said property in good faith and without any knowledge from any visual inspection or otherwise that Pleasant Grove City had or claimed any interest for street purposes or otherwise in said property.

"17. That since purchasing said property said Laurence Crease and his wife, Retta S. Crease, have paid substantial sums of money for remodeling the home located adjacent to the disputed area, by building a cesspool upon said area and in moving the said barn above mentioned from where it was located on said Lot 5, Block 8 onto said disputed area, and by making oth-

er improvements in and about said disputed area at a cost of approximately \$3,000.00, in good faith, without any knowledge or information whatever that Pleasant Grove City claimed any interest or right to said property and that the title thereto was in any way clouded by any claim of Pleasant Grove City until shortly before this action was commenced in 1950.

“18. That if said street should now be opened as proposed by Pleasant Grove City, it would cause the home of said defendants to be greatly depreciated in value, the granary would be of no value and the property adjoining said disputed area could be damaged to the extent of several thousand dollars and would be made unsuitable for residential purposes.

“19. The court further finds as to the property conveyed and partitioned to Earl C. Smith by the decree of distribution in the matter of the estate of Emma H. Smith, deceased, that in the year 1921 said property was sold for taxes in the name of Earl Smith and was later advertised for sale as described in said decree of distribution, and the taxes not being paid was sold to Utah County, January 3rd, 1921, and the taxes not thereafter being paid an auditor's tax deed was issued to Utah County, State of Utah, on March 23, 1923; that later Utah County by quit claim deed sold and conveyed said property to Eldores Smith and Benarr Smith; that later Eldores Smith and Benarr Smith conveyed the same property to Earl Smith by quit claim deed; that February 26, 1921, Earl Smith signed and recorded the Declaration of Homestead on the said property decreed to him as hereinabove stated; that on August 28, 1916, Earl C. Smith and Lizzie M. Smith, his wife, mortgaged said property to the Bank of Pleasant Grove for \$500.00; on March 18, 1922, Earl C. Smith, a widower, mortgaged said property to the Bank of Pleasant Grove for \$873.70; on December 28, 1825,

said property was sold to Utah County after being advertised for sale and was later redeemed; on March 15, 1930, the above described property was sold to Utah County for delinquent taxes after being advertised for tax deed was issued to Utah County recorded in Book 305, Page 526 on March 15, 1936; on March 15, 1937, the Earl C. Smith property was sold by Earl Smith, also sometimes known as Earl C. Smith, to Eldores R. Smith and Benarr Smith as recorded in Book 348, Page 221 of the records of Utah County; on April 30, 1941, Utah County conveyed by quit claim deed the property decreed to Earl C. Smith to Paul A. Adamson; on May 1, 1945, Paul A. Adamson and wife sold and conveyed a portion of said property to E. Earl Walker and Thorban Jacob Walker by warranty deed and including the west two rods of the area now claimed by the plaintiff in this action; that on July 21, 1947, said E. Earl Walker and Thorban Jacob Walker, his wife, sold and conveyed by warranty deed the said property to Richard L. Bezzant and Angelina F. Bezzant, defendants herein, as joint tenants, including the west two rods of property now claimed by the plaintiff, Pleasant Grove City; that shortly after Richard L. Bezzant and Angelina F. Bezzant purchased the property hereinabove mentioned from E. Earl Walker, said defendants in good faith and without any knowledge of any claim of Pleasant Grove City, and relying upon their title to said property as shown by their abstract of title, applied to the building inspector of Pleasant Grove City for a permit to build a home on said property purchased and they made plans for the building of a modern home on said property locating said home near the west side of the property now claimed by Pleasant Grove City for street purposes; and said defendants, relying upon their title and in accordance with the permit from the building inspector, began the construction of said home and expended approximately \$2,000 in excavating therefor,

and the erection of, a foundation for said home, and then shortly thereafter applied for and obtained a mortgage loan on said home and property in order to complete the same from the State Savings and Loan Association, a corporation, for the sum of \$6500, and that this was done in full reliance upon the title to said property purchased and without any knowledge that Pleasant Grove City made any claim of right or title to any portion of said property.

"20. The evidence further shows that said Richard L. Bezzant and his wife would not have purchased said property or planned and erected their home thereon had they had any notice or knowledge that the city made any claim to any of said property now claimed by it in this action, and that if Pleasant Grove City should utilize the property claimed by it herein for street purposes, the said Richard L. Bezzant and his wife would suffer substantial damage and the value of their home would be greatly depreciated.

"21. That for more than 80 years prior to the commencement of this action, the defendants, Laurence Crease and Retta S. Crease, his wife, and Richard L. Bezzant and Angelina F. Bezzant, his wife, and their predecessors in interest and the predecessors of each of them have had the open, notorious and exclusive possession of said parcel of land now in dispute and claimed by the plaintiff with knowledge and acquiescence of the plaintiff and its officers; and they have used the same for residential, business and agricultural purposes as hereinbefore found and without any knowledge or notice from the city of Pleasant Grove or the officers thereof during all of that time and no such claim was ever made by it or them until shortly before this action was commenced in 1950."

POINTS RELIED ON

Although in our statement of points filed before the District Court and in our Statement of the Case above referred to, we stated the proposition under three headings, there is really only one point, and that is that the findings authorized and required the court to enter judgment for defendants on their counterclaims quieting the respective titles of defendants as against plaintiff and that the court should have adjudged and decreed that defendants' titles be quieted as against plaintiff.

In further elaboration of this point, it is specifically contended that conclusion of law No. 2 and paragraph No. 2 of the decree both determining that judgment of "no cause of action" should be entered on defendants' counterclaims, are erroneous and that the court erred in refusing to modify its conclusion and decree in order to quiet defendants' titles as against plaintiff for the reasons:

I. That defendants being in possession and it having been determined that the plaintiff had no right, title or interest in the property, the defendants' titles should have been quieted as against plaintiff.

II. The findings of fact show that defendants are the owners of the land in controversy and a decree should have been entered accordingly.

III. The findings of fact show as a matter of law that the plaintiff should be, and is, estopped from questioning defendants' title.

These points will be considered in the following argument in order.

ARGUMENT

I. The defendants being in possession and it having been determined that the plaintiff had no right, title or interest in the property, the defendants' titles should have been quited as against plaintiff.

The court determined that the evidence failed to show that Pleasant Grove City had any right to the possession of, or title to, the area in dispute (File 23, Finding 3).

The findings further show that ever since prior to 1869 the defendants and their predecessors in interest have, and now have, the open, notorious and exclusive possession of the land with the knowledge and acquiescence of the plaintiff and its officers and that they have used the same for residential, business and agricultural purposes during all of said period without any claim ever being made by such city or its officers until shortly before this action was commenced ((File 32).

The record being undisputed, and the effect of the court's decree being to finally determine, that the city had no right, title or interest in, and to, the property in question, and a judgment of no cause of action having been entered on its complaint therefor, the court should not have left the title as between the parties dangling in the air, but should have quieted defendants' titles as against the plaintiff. As between a party in possession and one having no title, the court should quiet the title of the party in possession. *Pender v. Bird*, _____Utah_____, 224 P.2d 1057.

II. The findings of fact show that defendants are the legal owners of the land in controversy and a decree should have been entered accordingly.

The right of the defendants to have their title quieted as against plaintiff under the doctrine discussed in Point I above is not dependent upon legal title; nor is the right of defendants under the doctrine of estoppel which we will discuss under Point III dependent upon legal title. However, we wish to now point out that the findings require the conclusion that the defendants are the owners by reason of adverse possession initiated by their predecessors prior to entry by the city. The facts as found by the court entitled the defendants to the judgment of the trial court quieting in them the title to their respective parcels of the disputed area by reason of adverse possession held by them and their predecessors in interest from a time prior to the entry of said land by the Mayor of Pleasant Grove City under the town-site law, which entry was made on June 26th, 1869.

True, it is generally held, though there is a division of authority, that adverse possession does not run against a city with respect to its streets. 1 Am. Jur. "Adverse Possession", Sec. 106, pp. 850-852. It is even more clear that where adverse possession has extended for the statutory period before title to the highway was attempted to be acquired by the municipality, title thereby vested in the adverse occupant may be sustained as against the municipality. (Ibid).

The fair intendment of the findings may be that this case comes under the latter rule, but a more interesting question is presented if, as appears possible, the record merely shows herein that the adverse possession was initi-

ated several years prior to the entry by the city, without any affirmative showing that this prior period amounted to seven years, but with the showing that after the town-site entry such adverse possession continued uninterrupted for far beyond the statutory period of seven years.

In such case, we contend that adverse possession thus initiated prior to entry by the city, the other elements being present, matures into a complete right and is not interrupted by the attempted entry by the city. Upon the occupancy of the claimant prior to entry, he became the equitable owner of the land, against which the attempted entry was not effective in view of the continued adverse possession. Granted that one might not be able as against a right on the part of the city to initiate adverse possession, such possession once initiated, we submit, was not interrupted by subsequent entry by the city.

Not directly in point, but analogous, is the situation of an adverse claimant to land whose possession is characterized by its initiation as hostile, adverse and open, and who subsequently acquires the status of a fiduciary. Unless there is an actual breach of trust, the subsequent fiduciary relationship should not prevent the running of the statute, although the adverse period could not have been initiated during the fiduciary relationship. The point as applied to adverse possession against the city has been at least impliedly passed upon by this Court favorable to our contention in the cases of *West v. Child*, 8 Utah 223, 30 Pac. 755, and *West, et al v. Utah National Bank, et al*, 8 Utah 374, 31 Pac. 987.

In the first case, it was held that under 14 U. S. Stat. at Large, p. 541, providing that public land occupied as a townsite, in case the town is incorporated, may be entered

by the corporate authorities in trust for the occupants thereof according to their respective interests, an occupant before such entry has an inchoate right to the benefit of the law, which descends to his widow and children but which they lose by failing to retain possession until the entry is made. The action was against other claimants under the townsite entry by Mayor of Ogden City. The complaint of the successors to those originally in possession prior to the entry was held not to state a cause of action, on the ground there was no allegation that the possession of the original claimant had been maintained. We quote the conclusion of this opinion after the case of *Stringfellow v. Cain*, 99 U. S. 610, is referred to therein:

“The Court held that as to such portions of the lot as had been sold by the widow or by the administrator, or to which she had yielded the possession to another, the rights of herself and children had gone, and she and her children were only entitled to such portion of the lot as was possessed or occupied by them when entry of the land was made. The widow and children of West inherited from him his right to the adverse possession of the property in controversy, but not of the title thereto, there being no averment that the land had been entered before his death. But there being no allegation in the complaint that they continued the possession begun by him in his lifetime until the entry was made, we think the complaint fails to state facts sufficient to constitute a cause of action, and that the demurrer was rightfully sustained on that ground. We deem it unnecessary to discuss the other questions argued by counsel. The judgment of the district court is affirmed.”

In *West, et al v. Utah National Bank, et al, supra*, this Court again sustained a demurrer to a similar complaint on the ground that it was not alleged that the administrators or the heirs were in possession of the land at the time of its entry by the Mayor of Ogden City under the townsite entry law. The Court added: "Without such an allegation, the complaint did not state a cause of action." The clear implication of both of these opinions is that with such an allegation and proof, adverse possession would run, or at least title would be established in favor of the original occupant who had maintained adverse possession after the entry by the Mayor of the City.

In the case at Bar, it is expressly found that the possession by the predecessors in interest of the defendants antedated the townsite entry and that such adverse possession has been maintained ever since the original entry.

Finding No. 4, p. 23 of the File finds that some years prior to the year 1869, but as to the number of years the evidence does not show, Sterrett was in possession of, and claimed, the title to the land in controversy. Finding No. 3 shows that prior to June 26th, 1869, Sterrett sold and transferred such land to Daniel M. Smith and that said Smith was in possession of such land on the 26th day of June, 1869, on which date there was an entry made by John Brown, then Mayor of Pleasant Grove City, Utah. It is further found that at the time of such entry and ever since there were no streets and the area was enclosed in private fence lines (File 24-25) and was used as orchard and for purposes in connection with farm and home by Smith and his successors (File 25-26) and that the property has been used, mortgaged and sold in the chain of title by defendants and their predecessors as private property (File 27-31); in short,

for more than 80 years prior to the commencement of this action, as found by the court, the defendants and their predecessors in interest had had the open, notorious and exclusive possession of said parcels of land in dispute. Under such circumstances there seems no reason why defendant should not be declared to hold legal title, since even the townsite entry has the effect of reserving the land in trust for the inhabitants entitled thereto and since by reason of the original occupation prior to the townsite entry and maintenance of adverse possession ever since the predecessors of the defendants, and the defendants have established and maintained their rights.

III. The findings of fact show that the plaintiff should be and is estopped from questioning defendants' title.

Irrespective of what the Court may determine on the two preceding points, it seems clear that the same conclusion must be reached because the city under all of the facts and circumstances is estopped from questioning the title of these defendants. The facts furnishing the basis of this estoppel are found in detail by the court. We think it commendable on its part that, while not agreeing with appellants as to the conclusion to be drawn, it did at least find fully the facts established by the evidence so that this question dividing the parties could readily be determined upon a review here.

As a matter of history, of which the Court may take judicial notice, the lands settled upon and later included within Pleasant Grove townsite entry were occupied from an early date, perhaps about 1849. Pleasant Grove City was incorporated in January, 1855, by an act of the Governor and legislative assembly of Utah Territory. At that

time and until June 26th, 1869, the same was a part of the public lands of the United States. The said townsite entry was made by John Brown as Mayor of Pleasant Grove City on June 26th, 1869. As a matter of historical and common knowledge, these public lands were taken into possession by the early settlers by building homes thereon, by fencing the same, or by the cultivation thereof.

The findings in this case show that W. G. Sterrett was one of the early settlers of this Pleasant Grove area and later Pleasant Grove townsite entry, and that before June 26th, 1869, and at least several years theretofore, he was in possession of what was later designated as Lot 5, Block 8; Lot 2, Block 7; and Lot 2, Block 14, Plat "A", Pleasant Grove City Survey and including also the area in dispute between said lots.

The record further discloses that W. G. Sterrett, as such occupant of the above mentioned lots and of the area between the same, later transferred his rights as above mentioned to Daniel M. Smith, sometime prior to the time that John Brown made the said townsite, but as to how long before, the record does not definitely show. It does show that said Smith was in possession and was the occupant of said lots and area herein last above mentioned at the time of said entry on June 26th, 1869, and that the same had been transferred to him by said W. G. Sterrett and that said lands, including the area now in dispute, were enclosed together with nothing to indicate the presence of any street whatever as far as any marks or indication upon the ground were concerned and that ever since the land in dispute has been used and claimed by the defendants and valuable rights predicated thereon.

The parcel of land now claimed by Pleasant Grove between said Lot 5, Block 8 and Lot 2, Block 7, has continued to be in the exclusive possession of, and under claim of ownership, and within substantial enclosure by, the defendants herein and their predecessors in interest ever since shortly after its first settlement and long before the same was entered by Mayor John Brown, with every appearance upon the ground, of ownership and exclusive possession in connection with said Lot 5, Block 8 and Lot 2, Block 7.

The record shows that Pleasant Grove City has never had nor claimed the ownership or the possession of said land now in dispute until shortly before the commencement of this action. During all of said time, and commencing prior to the entry of the townsite, said parcel of land in question has been enclosed by a substantial fence and by gates leading into such enclosure and used only for the convenience of the occupants; that during practically all of said period, portions of the said disputed area have been farmed and cultivated as a part of the larger tract and an orchard has been grown on a portion thereof and treated by defendants and their predecessors in interest from the beginning as a part and parcel of the said lots and handled in all respects as a portion thereof.

A home, granary and a barn were built on said Lot 5, Block 8, adjacent to said disputed area in such a position as would necessarily be considered undesirable had any street been contemplated on said disputed area, nothing being apparent upon said Lot 5 or the now disputed area to differentiate one parcel from the other.

The disputed area, for other purposes entirely inconsistent with the use of it as a street, was utilized by the various occupants of the same. From the earliest time within

the memories of the oldest residents of Pleasant Grove City, corrals, pigsties, chicken coops, a blacksmith shop, machinery sheds or buildings were constructed and maintained on the disputed area; and such use of the area has continued until the present time, and all this without any complaint, objection or notice of any claims from the plaintiff city until shortly before the commencement of this action. There was nothing through all these years to indicate that the disputed area was held by the defendants and their predecessors in any different capacity than was Lot 5, Block 8 and Lot 2, Block 7.

In the year 1934, the parcel of land now owned and claimed by the defendants, Laurence Crease and wife, was mortgaged to Home Owners' Loan Corporation, a corporation, and later said mortgage was foreclosed and the property sold at public auction to the Home Owners' Loan Corporation and a sheriff's deed issued to the Home Owners' Loan Corporation and the same was later, or in about 1939, sold under contract to Laurence Crease and his wife, and later by warranty deed dated March 8th, 1944 and recorded on March 22nd, 1944, all of which is shown by the evidence in this case and the exhibits above referred to.

The findings further show that said Crease and his wife would not have purchased the said property had they known of any claimed street, as now contended for by plaintiff city and if said city should now be permitted, under the above circumstances, to take said property as attempted by this action, said defendants would suffer great and irreparable injury.

What is said about Lot 5, Block 8 and the two rods adjoining the same on the west thereof, is also true of Lot 2, Block 7 and the two rods of ground adjoining the same

on the east side thereof now claimed by Richard L. Bezzant and wife—they purchased said property in good faith without any knowledge of any claim of Pleasant Grove City or that there was any street as now claimed by said city covering a portion of the land deeded to them. In reliance upon their ownership of the land which was deeded to them by warranty deed on July 21st, 1947, as shown by page 35 in exhibit 6, almost immediately after such purchase, the said defendants commenced the construction of a new home adjacent to the east side of said parcel thus purchased and under a permit from Pleasant Grove City.

To complete said home, they mortgaged the same and the parcel of land deeded to them as hereinbefore stated to State Savings and Loan Association, a corporation, for the sum of \$6,500 which mortgage was recorded in the records of Utah County, State of Utah on June 23rd, 1949. The record shows that the said defendants, Richard L. Bezzant and his wife, had they known of any claim of Pleasant Grove City that a public street covered a portion of the land purchased by them, would not have made the purchase nor would they have expended this substantial sum of money on a home thereon, and if such street be opened as contemplated by said city, such defendants would suffer greatly and irreparably.

Without repeating all of the findings set out in the statement of facts, they clearly show an estoppel against the plaintiff. Municipal corporations may be estopped by their acts, conduct or contracts in like manner and under like circumstances as in the case of an estoppel against individuals, as is stated in 21 C. J., 1160:

“One who with knowledge of the facts and without objection suffers another to make improvements

or expenditures on, or in connection with, his property, or in derogation of his rights under the claim of title, will be estopped to deny such title to the prejudice to that other who has acted in reliance on and been misled by his conduct.”

Numerous authorities in support of the above proposition are quoted from various states, including Utah.

These are general rules applicable to individuals as well as cities. It would be a violent presumption to assume that the mayors or city councils of Pleasant Grove City would go on for seventy or eighty years without knowledge that the defendants and their predecessors in interest had been occupying and improving the property in dispute for that period and that it had been fenced and the public excluded therefrom, and that the taxes on said disputed property had been paid to the city for upwards of thirty-five years. To the contrary, it must be found that the mayors and city councils of Pleasant Grove City throughout the years were conversant with, and had knowledge of the conditions as set out herein and that they are precluded at this late date to deny the possession of such knowledge. We quote from *City of Los Angeles v. Cohn*, 35 Pac. 1003:

“While municipal corporations do not own their public streets, and while the laches of municipal officers cannot defeat the rights of the public in those streets, yet individuals have some rights which, in the exercise of common justice, the municipality must respect.”

And quoting from *Dillon*, the said case continued:

“It will, perhaps, be found that necessities sometimes arise, of such a character that justice requires that an equitable estoppel shall be asserted, even against

the public; but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments."

And, again from such text:

"We think, therefore, that mere adverse possession, for the statutory period, of a street or alley in a town which is a public highway, cannot confer a title, but where such possession is accompanied with other circumstances which would render it inequitable that the public should assert its rights to regain possession, then, upon the principle of estoppel, a party may be protected against the assertion of right by the public, in order to prevent manifest wrong and injustice."

Another case referring to the facts necessary to establish estoppel:

"Neither is it necessary to point to any special word or act on the part of those now represented by appellant to justify an estoppel; for an estoppel will be created by silence, when it operates as a fraud, as effectually as by spoken word or overt act. Estoppel is a doctrine enforceable by the courts whenever the equities of the particular case demand it. Sometimes it may be predicated upon word or action; sometimes upon the lack of them; but, whatever its origin, it is invoked in the interest of equity and good conscience." *Rogers, et al v. Reynolds*, 164 Pac. 80, esp. 82.

Cases without limit from different jurisdictions could be cited relating to estoppel, decided under different conditions and circumstances, but which would throw little light on cases under facts similar to the case now before the Court, and a review of these cases might entail endless search and result in confusion rather than clarity. For that reason,

we are content to cite a few authorities showing the general principle with respect to which there is little or no dispute, and then consider the cases in our own state which may aid the Court in arriving at a just conclusion and which announce the law of estoppel in this state. These cases are: Wall v. Salt Lake City, 50 Utah 593, 168 Pac. 766; Tooele City v. Elkington, 100 Utah 485, 116 P.2d 406; Hall v. Ogden, 109 Utah 304, 166 P.2d 221; Premium Oil Company v. Cedar City, 112 Utah 324, 187 P.2d 199.

The plaintiff at the trial cited the Provo City case reported in 156 Fed. 2d 710, which was heard on a writ of certiorari. The facts in the Provo case are quite dissimilar from the facts in this case, and throw no light upon the case of Pleasant Grove. That very case, however, recognizes the principle of the Wall case under different facts. The Provo case involved a street which had been actually in use up to recent times.

The case of Wall v. Salt Lake City, *supra*, is a well considered case, and is about the first case decided by our Court having any particular bearing upon facts somewhat analogous to the facts in this case. It merits more than casual consideration and we will therefore discuss this case more or less in detail.

The plaintiff, Nellie M. Wall, brought the action against Salt Lake City to quiet title, for damages and for injunctive relief. Salt Lake City contended that Eighth South Street in said city was one hundred thirty-two feet in width throughout its entire length; the plaintiff in the lower court and the respondent in the Supreme Court disputed that claim and contended that said Eighth South Street was but sixty-six feet wide from Tenth East to Thirteenth East Street and that the other sixty-six feet was her private prop-

erty. In this discussion, we will hereafter designate Mrs. Wall as plaintiff and Salt Lake City as defendant:

Plaintiff claimed the property in dispute as her private property and she was in possession of the same, when the defendant, against her protest, entered upon the same and commenced to excavate the ground, preparatory to installing a sewer, upon the claim that said area was a part of a city street and therefore, both parties claimed title to the said property. Plaintiff claimed her title to the property through various conveyances made by her predecessors in interest who had occupied the premises both before and after the townsite entry was made in 1871.

Such predecessors in interest had occupied the premises in dispute, together with land adjoining the same on the south as farm and pasture.

The land was enclosed during a large portion of the time from sometime prior to 1871 until 1891, when plaintiff's grantors platted the same as a townsite under the name of Fremont Heights in which plat, Eighth South Street was only sixty-six feet wide.

Up to 1891, there was no substantial evidence that the ground in dispute was used as a public street and was largely unuseable for the purposes of a street, and that was substantially its condition when the same was platted by the plaintiff's immediate predecessor and when it was procured to be adopted by the defendant in 1891.

The defendant city based its right to the disputed area upon certain plats or diagrams found in the files of the City and County of Salt Lake, which, however, do not appear to be authenticated as official plats. One such plat, called "Plat F", was especially relied on by defendant because it was claimed that it covered the area in dispute and that it

was recognized by the plaintiff and her predecessors in interest, with its lots, blocks and streets, as a plat of that portion of the city, prior to the townsite entry and since, and that plaintiff was bound thereby.

Defendant, however, did not contend that the city opened or used the ground in question as a public street prior to the adoption of the Fremont Heights Addition, except by a general ordinance or resolution in 1887, authorizing the opening of streets and removing obstructions therefrom. But, defendant city contends that the ground, being platted as a public street before the entry as a townsite in 1871, it was unnecessary that the same be opened or used by the public at the time in order to give the city title thereto.

The defendant further contended that the action of the city in adopting the Fremont Heights plat where Eighth South was limited to sixty-six feet between Tenth and Thirteenth East Streets, and in recognizing the disputed strip as private land, was void, and being so considered by the city in 1912 when the defendant entered upon the same to construct the sewer. The Supreme Court, however, brushed aside the claim above set out, in the following language:

“These are the main contentions of the parties as to the basis of their respective claims of title. Minor consideration in support of, or against, these contentions will be referred to, if material, later in the course of this opinion.”

The case was tried by the court, judgment rendered for the plaintiff declaring her to be the owner of the property, awarding her damages and injunctive relief.

Further quoting:

"In view of the case, many of the questions argued at great length by counsel of the respective parties need not be considered in detail, as the conclusion we have reached renders them immaterial and their consideration wholly unnecessary.

"Some of the questions thus presented are of great importance and whenever a case is presented in which they, or any of them, become turning points in the case they will then be of vital importance demands.

"Whether or not the ground in dispute was a platted street at the time the townsite was entered and whether or not it was platted at that time and recognized by persons conveying adjacent property, and whether or not occupants of the land, in presenting their claims to the probate court, by not claiming certain ground platted as streets, thereby abandoned any right they may have had or become barred by the statute of limitations, and whether or not the federal grant under which the townsite was entered should be construed one way or the other, are questions which are not in the least degree controlling in view of the conclusions at which we have arrived. In our view, the one question in this case which overshadows all others, and to which this opinion should be mainly directed, is whether or not the defendant city is estopped by reason of its own conduct from now claiming title to the property in question. This being the case, it is manifest that any serious consideration given to the questions above referred to would be entirely unnecessary."

The principle issue involved here is whether or not the plaintiff by its conduct should be held estopped to claim any right to the parcel of land in dispute and as to whether

or not such disputed area should be quieted in the defendants.

The facts are before the Court on the findings. The question on this branch of the case therefore is: Do such facts justify the conclusion that the city is now estopped to claim any right to the property in question? Without repeating the facts, as heretofore set out, we may, however, call the attention of the Court to the fact that since 1916, the title to the property in dispute has been shown in the records of Utah County as being held in private ownership and the same has been mortgaged by the record owners from time to time to different parties in Pleasant Grove and elsewhere, and the title thereto has been conveyed by warranty and quit claim deeds to different parties, and said disputed area has been foreclosed at different times and title transferred by public officers after being advertised for tax sale, and disposed of at public auction and finally purchased by the defendants; and during all these periods and previous thereto, any inspection of the premises by mortgagees or purchasers would show the same as a part of the larger tracts, and the abstracts would show the record as conveyed by metes and bounds covering the disputed area, and said tax record would show that said property since 1916 to be taxed and the taxes collected and said parcels in all respects treated as private property. Any inspection by plaintiff's authorities, officers or any person either as to the county records or an inspection of the premises would show that said parcels of land were being held as private property and that defendants, in the view of the record, purchased the property and have made valuable improvements upon the same in good faith, and in reliance upon their title, without any act on the part of the city or

anyone else to indicate to them that the title was not as represented by their warranty deeds. Under that record and those conditions, it is rather astounding to find the city trying to deprive these people of their property without condemnation proceedings and attempting to remove the defendants therefrom without any compensation.

Judge Thurman, in writing the opinion on the Wall case, said:

“By far the greater number of cases cited by respondent, like those cited by appellant, relate only to questions of adverse possession, prescription, statutes of limitation, and equitable estoppel by acquiescence on the part of the municipality that it should be estopped, under the circumstances, from asserting that the ground is a public street. Very few of the cases show that the municipality did any affirmative act or made any declarations, as a basis for the estoppel. In other words, the majority of the cases cited by respondent simply assert the contrary doctrine to that held by the cases cited by appellant under facts generally, if not entirely similar. Numberless cases on both sides of the question, in addition to those cited by appellant and respondent, could be referred to, reviewed, and criticized and only one conclusion would be finally reached and that is that in the character of cases cited the decision appear to be in hopeless conflict.”

In many respects, this case is a much stronger case than the Wall case supporting the theory of estoppel against municipalities and as the authorities cited by Judge Thurman in his opinion are also persuasive in favor of defendants' contention here, we will take the liberty of further quoting from said case, which refers to a Wisconsin case reported in 68 NW on page 957. In concluding its opinion, the Wisconsin court said:

“The adoption of the second plat by the act incorporating the city of Kaukauna in 1885, the requirement made by such city of Law to build a sidewalk along the side of the park, the construction of such sidewalk, the payment of taxes assessed annually on the property for a long period of years, and the improvement of the property at considerable expense, relying upon the long-continued recognition of private ownership by the municipality, in which all persons interested, so far as appears, acquiesced, with all the other facts and circumstances, show satisfactorily that, if a change of position on the part of the public now be allowed, such injustice and wrong will result as to warrant the application of the doctrine of equitable estoppel in pais to prevent such injustice.”

In the course of the opinion, Judge Thurman referred to the good faith of the plaintiff in the Wall case and showed that the plaintiff improved the property purchased on the faith of a good and sufficient title to the ground. He then observed:

“After 20 years from the time the Fremont Heights addition was approved and after all of these equities had intervened, the defendant comes upon the scene, and with no other excuse than that it had made a mistake twenty-one years before, it commenced to tear up the ground, and by force and arms exercise a dominion over this property. Recognized it not only by the plat it approved but by assessing it and enriching its own coffers by tribute exacted in the form of taxes. We believe as was said by the court in *City of Sullivan v. Tichenor*, *supra*, cited by appellant that: ‘A municipal corporation can no more profit by fraud upon property owners than an individual and may be estopped by conduct.’ ”

And then quoting from Judge Dillon, Justice Thurman continues quoting:

"The principle of estoppel in pais has been applied to exceptional cases where the elements calling for its exercise appear to have been an abandonment of the public use for the prescriptive period, inclosure and expensive improvements, such as large and costly buildings, or acts of the municipality inducing the abutter to believe that there is no longer any street, and the expenditure of money in reliance upon the acts of the municipality. The absolute bona fides of the abutter or adverse possessor is a most important factor where an estoppel in pais is claimed. The acts relied on must be of such character as to amount to a fraud, if the city were permitted to claim otherwise."

And we think it pertinent at this point to call attention to what Judge Thurman further said with reference to the facts in the Wall case and that municipalities may be estopped by permitting the expenditure of large sums of money in buildings and the like upon public streets without objections. Then he observes:

"We confess that we are unable to see any difference in principle between a person who, under the circumstances, spends his money in the erection of a building and one who expends his money upon the same assurance for the purchase of land which is subject to controversy. The loss to a party of his improvements of the value of \$3,000 or more is no greater injury to the person injured than the loss of any other investment of the same amount."

The case of Tooele City v. Elkington, *supra*, is very dissimilar to the Pleasant Grove case now before the Court. No improvements were made upon the property involved.

No taxes were assessed or paid upon the property, and while the city executed a deed to the property at Elkington, practically without consideration, the said deed was executed without authority under the statute which provided:

“No person shall be allowed to acquire any right or title in or to any lands held by any town or city, or the corporate authorities thereof, designated for public use as streets, lanes, avenues, alleys, parks, public squares, or for other purposes by adverse possession thereof for any length of time whatsoever.”

This law was not enacted until 1899. Judge Moffitt in the Tooele case cited the Wall case with approval, and holds that the Tooele case is not in any way in conflict with the Wall case.

Another case referred to above, Premium Oil Company, also cites with approval the Wall case, including the citations made by Judge Dillon, which Cedar City case is in no way in conflict with the Wall case nor with the authorities therein cited, and it further upholds and confirms the equitable doctrine that municipalities as well as individuals may be estopped from repossessing property under conditions set out in the Wall case and other cases of like character. See McMullin on Municipal Corporations, revised second edition, Vol. 4, p. 815; Cedar City case. *supra*.

The principle of estoppel is controlling whether adverse possession is, or is not, present. As far as the case of Hall v. North Ogden City and the Provo City case are concerned, neither of those cases in any way is inconsistent with the Wall case or the authorities hereinabove referred to. We therefore deem it unnecessary to review them in detail. In the Hall case, neither was estoppel relied upon or pleaded;

adverse possession alone being relied upon under facts different than here involved.

Adverse possession was pleaded upon the peculiar facts in this case, but estoppel may be shown in evidence even though adverse possession may or may not be a valid claim. While we do not admit that the defense of adverse possession is not meritorious, we believe that the estoppel which the facts raise against the city removes any question either with, or independent of, technical, adverse possession.

Judge Thurman in the Wall case posed the question of adverse possession but declined to make any ruling with respect thereto on the ground that the Wall case was clearly a case that should be decided upon the principle of estoppel.

CONCLUSION

Since it is undisputed that the defendants are now in possession and have been in the possession of the property in question for more than eighty years, they at least have a better right than plaintiff, which has been determined to have no right, title, interests or possession at all, and therefore defendants' titles should be quieted as against the plaintiff. Moreover, the facts show in effect that defendants actually have legal title, they and their predecessors having been in adverse possession of the property from a time prior to the original townsite entry in 1869.

Finally, and even more conclusively, as has been repeatedly indicated by this Court, cities may be estopped by conduct over a long period of time from asserting titles as against citizens, the facts found by the lower court convincingly establish such estoppel. In fact, it would be difficult to imagine a case which more clearly gives right to an es-

toppel from every standpoint of equity, justice and fair dealing. From these standpoints, and pursuant to the established law of this state, that portion of the lower court's judgment denying relief to defendants should be reversed and the entry of judgment should be entered by this Court, quieting defendants' respective titles to the land in controversy as against the plaintiff, and awarding defendants their costs.

Respectfully submitted,

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