

1982

# Vaughn Judd and Ora Nell Judd v. Kanab City et al : Brief of Plaintiffs-Appellants

Utah Supreme Court

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H. Delbert Welker; Attorney for Plaintiffs;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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VAUGHN JUDD and ORA NELL JUDD :  
his wife, )  
Plaintiffs-Appellants, :  
 )  
 :  
 V. )  
 :  
 )  
 KANAB CITY, a body politic and : Case No. 18300  
corporate under the laws of the )  
State of Utah; GAYLEN HOYT and :  
JOLYNN HOYT, his wife; and ARUEL )  
ROBINSON and LULA ROBINSON, his :  
wife, )  
 )  
Defendants-Respondents. )  
 :

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BRIEF OF PLAINTIFFS- APPELLANTS

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NATURE OF THE CASE

This is an appeal by the Plaintiffs-Appellants, from a judgment of the Sixth Judicial District Court, the Honorable Don V. Tibbs, district judge, awarded judgment to the Defendants-Respondents that the street in question was owned by Kanab City and said city was able to use and dedicate the street in any manner that best serves the public.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment in that appellants should be declared the rightful and legal owners of the street in question.

## STATEMENT OF THE FACTS

This case is a consolidation of two matters. On July 8, 1978 appellants brought an action against respondents to a quiet title in two parcels of land in Kane County to wit:

PARCEL NO. 1 : Beginning at the Southeast Corner of Lot No. 1 in Block 8, Plat "C" of the official survey of Kanab Townsite, and running thence North 208 feet; thence West 320 feet; thence South 208 feet; thence East 320 feet to the place of the beginning

PARCEL NO. 2 : All of the property lying immediately East of the above-described property consisting of approximately 66 feet; being that portion of property between Block 7 and Block 8, "C" of the official survey of Kanab Townsite which commences at the Southwest Corner of Lot 2 in Block 7, Plat "C," and running thence North 208 feet; thence West approximately 66 feet to the East boundary of the property described in Parcel No. 1 above; thence South 208 feet; thence East approximately 66 feet to the East boundary of Lot 2 in Block 7, Plat "C."

Appellants also sought an injunction against respondents to enjoin the construction of a road on the above described real property. A preliminary injunction was granted on August 16, 1978 enjoining and restraining respondents from constructing any roads during the pendency of this action.

In the second matter Kanab City filed a verified petition for probate deed seeking the issuance of a Probate Judge's deed to a portion of the property platted as Third North Street and Fourth West Street according to the official survey of the Kanab Townsite and is the same property described in Parcel No. 2 above.

Respondents objected to the issuance of a probate deed to Kanab City for the portion of Third North Street which lies west of a ditch traversing said street by means of a culvert. They also objected to the issuance of a probate deed to any portion of Fourth West Street.

All of the parties stipulated and agreed at trial that a probate deed to Kanab City could be issued for that portion of Third North Street lying to the east of the ditch and culvert described above. The parties further agreed that respondents are in fact and law the owners of the real property described above as Parcel No. 1.

The sole issue at trial was whether a probate deed should be issued to Kanab City for the remaining portion of Third North Street west of the ditch and culvert to its intersection with Fourth West Street. The map described as Plaintiffs Exhibit #17 is representative of the streets in question.

## ARGUMENT

### POINT I

KANAB CITY IS NOT ENTITLED TO AN OWNERSHIP INTEREST IN THE DISPUTED AREA OF PARCEL NO. 2 PURSUANT TO THE TOWNSITE ACT OF 1867.

At the time a community was occupied there was no need to transfer title to the inhabitants of that community as the Federal Townsite Act of 1867, 14 Stat. 541, 43 U.S.C.A., Section 718 set forth the standard:

"That whenever any portion of public land of the United States has been or shall be settled upon and occupied is a townsite... it shall be lawful in case such towns shall be incorporated, for the corporate authorities thereof and if not incorporated for the judge of the county court for the county in which such town may be situated to enter at the proper land office. . . the land so settled and occupied in trust for the several use and benefit for the occupant thereof, according to their respective interest ; the execution of which trust. . . to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated: . . . and provided, further, that any act of said Trustee's Deed not made in conformity to the rules and regulations herein alluded to shall be void, . . ."



The Kanab Townsite resulted by grant from Congress as set forth in the above-described act. The laws adopted by the Territorial Legislature for Utah provided regulations for the disposal of townsite land. These rules state in part as follows:

"...there the corporate authorities in cases where the land shall have been entered by them, and the judge of the probate, in cases where the land shall have been entered by them, shall cause the same to be surveyed and layed out to suitable blocks and lots, and shall reserve such portions as may be deemed necessary for public squares, school houses or hospital lots, and shall cause all necessary streets, roads, lanes, and alleys to be layed out through the same a plot which properly certified, shall be recorded in the Recorder's office of the county in which the same may be situated; . . . (See sections 1175 of compile laws of Utah, 1876).

Although no transcript is available the pleadings and findings indicate that both appellants and respondents Robinson and their predecessors in interest have occupied, used and fenced in the land in question for at least eighty years and that said use may have existed from the time Kanab was settled and has continued to the present time.

Since appellants have shown continuous use of the property for many years the holding of Hall vs. North Ogden City, 175 p.2d 703 comes into play:

"Since the lands in controversy have been in the peaceable notorious and open position of the Plaintiffs and their predecessors for many years, in order to prevail, the town must show some right on title to these lands under the proceedings of the Federal Townsite act of 1867, or a dedication of such lands to the public for the use of the street by the owners thereof under such Act. . . ."

The facts in the above referenced case are similar to the case at bar. The Court evaluated the various equitable interests of the parties and stated at page 711:

"We therefore conclude that it is sufficient occupancy to have the land fenced in, and being used as farm land at the time of entry.

Plus it is clear that the equitable ownership of these lands were at the time they were entered, in the Plaintiffs' predecessors. Had this ownership been transferred to the town of North Ogden? If so, it must have been by dedication by the owners thereof through the filing of the plat by the county surveyor, by Plaintiffs' predecessors filing their claims in the probate court without describing therein the lands plated as streets, or by making the later transfers by reference to the North Ogden Plat, or by all of these facts together."

Subsequent to the analysis of the equitable ownership to the property the Court treated the subject of whether or not there was any dedication of the street or whether there was an intent to dedicate any street:

"Before a dedication of a street to the public use can be effected there must be either an intention to so dedicate such lands on the part of the owner thereof or he must act in such a manner as to be estopped from denying such intention. Such intention may be shown either by oral or written declarations or it may be inferred from the surrounding facts and circumstances for the case but in all cases such intention must be clearly manifest. 16 Am Jr. 361 dedication, 17; 26 C.J.S., dedication #12 page 64; Harding vs. Jasper, 14 Cal. 642, 643. There being no showing that the owner had anything to do with the preparing or filling of the plat that fact does not tend to prove an intention on the part of the owners to dedicate the streets platted therein to public use. Nor does the further facts that the original claims and later transfers of Plaintiffs' lands all described them by reference to the plat, under the facts and circumstances of this case have such a tendency."

The above analysis is relevant in the instant that none of the parties has shown or attempted to show that appellants, respondents Robinson or any predecessors in interest ever intended the land in question to be dedicated to the city for the use of the public.

The holding of Hall apparently stands for the proposition that the mere fact that a city prepares an official map showing the existence of a street does not prove that the owner had an intention to dedicate the street plotted therein to the public use. (See also the dissent of Justice Callister in Bonner V. Sudbary, 417 P. 2d 646 at page 651).

In Automotive Products Corporation v. Provo City Corporation 502 P2d 568, the Utah Court affirmed the trial courts ruling which awarded the disputed area to the plaintiffs occupant. The city argued that it adopted a general street plan which was designed to promote a public convenience and that plaintiffs lessee constructed a curb and gutter along the proposed line of the street of the street amounted to implied dedication of the property to the city for street purposes. The court ruled against the city as follows:

"Implied dedication must be based on the intention of the land owner, and that intention must be showed by word, acts or deeds of the owner which might clearly manifest an intention to dedicate. The fact that the city prepared and filed a plat which eliminated the city's street and their widths and lengths without a show in the Plainfill acquiesced in the plan and without a showing that intended to bound thereby would be insufficient to show an intention to dedicate  
....."

"In this instant case there is nothing in the records to dedicate its property to the public use, and upon the contrary the records clearly indicates that the Plaintiff, through its managing officers, objected to the city taking and occupying the property as a part of a public street."

In the instant case, both appellants and respondents Robinson their predecessors in interest have always claimed ownership of the disputed area, and respondents Robinson have paid taxes on said area.

## POINT II

### KANAB CITY ABANDONED THE LAND IN QUESTION

In plaintiffs trial exhibit G. Kanab City Council Meeting of July 8, 1975, the City Council voted unanimously to abandon the land in question pursuant to a petition of the property owners:

"A petition of the property owners in the area of Third North and Fourth West was read to the Council. The petition stated the property owners objection to opening the street from Third No. to Fourth North on Fourth West, and asked the Council to abandon the street at this time. After some discussion a motion was made by Councilman Aiken to abandon the street. The motion was seconded by Councilman Swapp. Attorney Behle was asked by the Council to handle the abandonment of the street. The motion passed unanimously."

Defendants, at trial were unable to show any documents indicating that the City Council reversed themselves on the abandonment . It is clear that the City did not take subsequent formal steps pursuant to its abandonment ruling and it is equally clear from the many trial exhibits of City Council meetings that the City never reversed their abandonment ruling.

### SUMMARY AND CONCLUSION

Appellants and its successors in interest along with Respondents Robinson and its successors with respect to the subject property possessed and maintained said property for approximately 80 years. Apparently there was no testimony as to who possessed the subject property prior to 1900. It is also clear that Kanab City plotted the subject property as a street in its survey plan of the City. It is equally clear that the plot was not recorded at the county recorders-

office even though it was maintained at said office. Considering the above the city should not have a greater interest that appellants in disposing of the property.

In addition the City Council abandoned the subject property in an official vote of a regular City Council meeting. The vote was never reversed or rescinded. The last official act with respect to the property by the city is abandonment. Therefore judgment should be reversed.

DATED THIS \_\_\_\_\_ Day of \_\_\_\_\_ 1982

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#### CERTIFICATE OF MAILING

I Herby certify that I mailed two copies of the foregoing brief to the following:

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On the \_\_\_\_\_ day of \_\_\_\_\_ 1982