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Vaughn Judd and Ora Nell Judd v. Kanab City et al : Brief of Respondents

Utah Supreme Court

David Nuffer; F. Kirk Heaton; Attorneys for Defendants-Respondents;
H. Delbert Welker; Attorney for Plaintiffs;

IN THE SUPREME COURT OF THE STATE OF UTAH

VAUGHN JUDD and ORA NELL JUDD, his wife,

Plaintiffs-Appellants,

-vs-

KANAB CITY, A body politic and corporate under the laws of the State of Utah; GAYLEN HOYT and JOLYNN HOYT his wife; and ORVIL ROBINSON and LULA ROBINSON, his wife,

Defendants-Respondents

Case No. 18300

BRIEF OF RESPONDENTS

Appeal from a Final Order and Judgment of the Sixth Judicial District Court of Kane County, State of Utah, the Honorable Don V. Tibbs District Judge.

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BRIEF OF DEFENDANTS-RESPONDENTS

NATURE OF THE CASE

This appeal is from a consolidation of two district court actions. Plaintiff-Appellants, Vaughn Judd and Ora Nell Judd, his wife, brought suit against Kanab City and the four individuals seeking to quite title to certain real property and seeking an injunction against the Defendant-Respondents to enjoin the construction of a road on the real property.

The other matter was a probate petition filed by the Defendant-Respondent Kanab City. The action sought the issuance of a Probate Judge's Deed to that same real property described in Plaintiffs' Complaint.

Plaintiffs protested the issuance of a probate deed to Kanab City.

DISPOSITION BELOW

The Court below, following consolidated trial, found in favor of Defendants and against Plaintiffs, ruling that the area in question was indeed a city street.

STATEMENT OF FACTS

The statement of facts by Plaintiff-Appellants outlines the procedural matters leading to this position in the lawsuit but does not outline the facts and transactions prior to the filing of these cases. The following recitation of facts is consistent with the Findings made by the lower court.

The trial court found that a plat located in the Office of Kane County Recorder showing the Kanab City area was not officially recorded but was actually used as an official Kanab City plat since "time immemorial." (Findings ¶8) The plat designated as streets those portions of real property sought by Plaintiffs. (Findings ¶9) The disputed area had been used for gardens, plants and animal grazing and had never been officially opened as street or used as streets. (Findings ¶10 and 11)

In spite of those somewhat inconsistent uses, "from time immemorial" the subject property has "been

recognized by the public as portions of Third North Street and Fourth West Street belonging to Kanab City." (Findings ¶11)

The Court found that there was no evidence that the Plaintiffs or their predecessors had occupied or used the disputed land prior to the entry of the Kanab townsite and that in fact the Plaintiffs and their predecessors had recognized the designation of the disputed area as city streets. (Findings ¶12 and 15) No taxes had ever been assessed on the property platted as streets and no one (including the Plaintiffs) had ever paid taxes on that property. (Findings ¶18)

There was a (City Council) meeting on July 8, 1975, at which Plaintiffs presented a petition requesting abandonment of the street area. The city council voted favorably, but there was total failure to comply with the requirements of Utah statutes and the effort for abandonment was of no effect. (Findings ¶19)

ARGUMENT

Defendant-Appellants are entitled to this Court's affirmance of the trial court's Judgment. Plaintiff-Appellants have failed to challenge any of the lower court's findings, which are amply supported by the record. Without a challenge of these findings, the decision below is unimpeachable since its legal premises are sound.

POINT I THE LOWER COURTS' DECISION IS ENTITLED TO PRESUMPTIONS OF VALIDITY

Plaintiff-Appellants have appealed from the lower court's decision without challenging any of the factual determinations made. Further, no transcript of the trial is available to support any such challenge.

Where no transcript of trial is available, the trial court's actions are presumed valid. Goodman v. Wilkinson, 629 P.2d 447 (Utah 1981), Estate of Thorley, 579 P.2d 927 (Utah 1978).

POINT II PLAINTIFFS HAVE NO CLAIM TO THE LAND UNDER THE FEDERAL TOWNSITE ACT

The original site for Kanab City was designated pursuant to federal statutes enacted by the United States Congress in 1820 and 1867. The first law was entitled "An Act Making Further Provisions for the Sale of the Public Lands." The second was entitled "An Act for the Relief of the Inhabitants of Cities and Towns Upon the Public Lands," and is commonly known as the Federal Townsite Act. These laws together established the authority for a state or territory to prescribe rules and regulations whereby a townsite could be established and disposal made of public land.

A portion of the Federal Townsite Act, 14 Stat. 541, 43 U.S.C.A., §718, provides as follows:

> That whenever any portion of the public lands of the United States have been or shall be settled upon and occupied as a townsite, and therefore not subject to entry under the agricultural pre-emption laws, it shall be lawful, in case such town 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, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, 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...

The Federal Townsite Act was amended on June 8, 1868, (15 Stat. 67), so as to require not only the payment of the minimum price for such lands but also the costs of surveying.

The Territorial Legislature of Utah, as authorized, enacted on February 17, 1869, an act known as the Territorial Townsite Act. C.L. Utah 1867, §1166 et. seq. The substance of the Territorial Townsite Act is still retained in Utah law and is presently found at Section 57-7-1 et. seq., Utah Code Ann. (1953), as amended.

Section 57-7-1 provides that when the District Judge (formerly the Probate Judge) entered at the proper land office the land occupied and settled as a city or town it was his duty "to dispose of and convey the title to such land, or to the several blocks, lots, parcels or shares thereof, to the persons entitled thereto," as determined by law.

The Territorial Townsite Act further provided that after entry of the land public notice was to be given, and within six (6) months after the first publication, every person claiming any lot or parcel of land within the land entered was required to specify in writing, giving an accurate description of the land claimed, all property he claimed to be entitled to receive [Sections 57-7-2, 3 Utah Code Annotated (1953)]. Section 57-7-3 further provides

that any person failing to make and deliver to the Clerk of the Court his claim within the six (6) months provided by law would be "forever barred of the right of claiming or recovering such land, or any interest or estate therein or in any part thereof, in any court." The Court could, for good cause shown, extend the time for filing a claim, but not to exceed one (1) year from the date the notice was first published.

Defendant's Exhibit 39 contains a copy of the Patent for the Kanab Townsite issued to William A. Bringhurst, County Judge in and for the County of Kane, Utah Territory, by Rutherford B. Hayes, President of the United States of America. This document was dated May 15, 1880, and was filed for record with the Kane County Recorder on March 7, 1889. A careful reading of the document indicates Judge Bringhurst had entered the land containing the Kanab Townsite with the General Land Office of the United States at Salt Lake City, Utah Territory, had made full payment therefore, and was entitled to the issuance of a patent for the Kanab Townsite.

Inasmuch as no proof to the contrary was presented at trial it is conclusive that the statutory provisions for the disposal of the land within the Kanab Townsite were complied with, i.e. that within thirty (30) days after the entry of such lands public notice was given and all

claimants were given an opportunity to claim the land they were then occupying or in which they had any interest.

The record is clear that Plaintiff-Appellants' predecessors in interest did not claim the land under the provisions of Section 57-7-3, Utah Code Annotated (1953).

If the Plaintiff-Appellants' predecessors in interest did not claim the land then the land would have been disposed of as unclaimed land. The present provision for the disposal of unclaimed lands is contained in Section 57-7-15, Utah Code Annotated (1953). However the language contained in the Territorial Townsite Act, which governed in 1880, is more detailed and for that reason reference is made to that act. Section 1175 of the Territorial Townsite Act provided that if unclaimed lands remained after the expiration of time for filing claims then the Probate Judge was obligated to "cause the same to be surveyed and laid out into 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 laid out through the same, a plot of which, properly certified, shall be recorded in the recorder's office of the county in which the same may be situated" [emphasis added]. Section 1175 further provided that the Probate Judge could then "sell the lots or blocks so laid out, and not reserved for public use

in suitable parcels, to possessor[s] of adjoining lands or to other citizens of such city or town."

The evidence received in the instant case indicates that the land in question was platted prior to being occupied, that it was then sold to the Plaintiffs' predecessor in interest, and that the conveyance to the Plaintiffs predecessor did not contain the real property that had been previously platted as public streets.

Plaintiffs Have No Pre-Townsite Claim

Defendants Exhibits 27, 30, 31 and 39 show that no claim was made by Plaintiff-Appellants predecessors to having rights prior to the townsite plat. In fact, the minutes for the Probate Court's proceedings of April 8, 1892 show Plaintiffs predecessor, Joseph G. Brown, appeared and took action inconsistent with any claim of prior right.

The minutes reflect that Mr. Brown presented a deed to the Court which had been issued to him by Kane County and which contained an error both as to the location of and the amount of the real property. According to the minutes Mr. Brown claimed that he was only entitled to 15 acres rather than 23 acres and 6 rods. He asked that his deed be corrected and the proper amount of land be given to him. In conformity with his request the Court ordered the

preparation of the new deed conveying to Mr. Brown the following described lots in accordance with a survey that had been recently made:

> "Lots 3 & 4 in B.56. Lots 3 and 4 in B.57 in Plat A. Lots 1-2-3-4 in B. 7. Lots 1-2-3-4 in B.8 Plat C, comprised in the S1/2 of Sec. 21, and within the Corporate limits as platted in the Recorders (sic) Office."

No mention is made of the property comprising the streets of Fourth West and Third North. Had those streets been omitted by error, Mr. Brown would have had the opportunity to once again return to the Court to have the error corrected. He obviously know the procedure to correct an error.

The probate minutes clearly indicate that the hearing concerned the title to lands within the corporate limits of Kanab that had been "advertised and platted by the Probate Judge." The fact that the lands in question had been platted is very important to the determination of the issues before this Court. There would have been no need to plat the property had Mr. Brown been an original claimant under the Territorial Townsite Act. All he would have had to do was file his written claim in compliance with the statutory guidelines and he would have been entitled to all of the property which he was occupying or possessing at the time the Kanab Townsite was entered. This hearing was some

twelve years after the issuance of the patent, and some three years after the patent was recorded. The statutory time period for filing an original claim had long since lapsed.

Pertinent Case Law

The two leading Utah cases which construe the Townsite Act and the provisions of Section 57-7-1 et seq. are Hall v. North Ogden City, 109 Utah 325, 175 P.2d 703 (1946) and Cox v. Carlisle, 11 Utah 2d 372, 359 P.2d 1049 (1961).

Plaintiff-Appellants rely on the Hall case, but it is factually dissimilar. In the Hall case the Utah Supreme Court, on rehearing, held that where the Plaintiffs had shown that at and prior to the time the townsite was entered they or their predecessors in interest had occupied and used the land and had continued to so occupy it until the filing of the action that they had obtained "an equitable ownership in the property which [they were] occupying at the time of the entry, [and] that such ownership became a vested right when the lands were entered in the land office." In each of the cases relied on as precedent in the Hall opinion the fact situations were such that each claimant could show evidence to the effect that either they or their

predecessors in interest were the occupants of the land in question at the time the entry of the townsite was made.

In the Cox case, the Plaintiff-citizen appealed from judgment in favor of the Defendant city. The city was adjudged owner of the street. Significant in the Courts reasoning was a distinction between Cox and Hall:

> No evidence of occupancy of the street by plaintiff and her predecessors, at the time of the deeds, the Townsite Entry of the petition for confirmation, is reflected in the record. Therefore, Hall v. North Ogden City, upon which plaintiff so heavily leans, seems uncontrolling. 11 Utah 2d at 372.

The same facts are in evidence here, and the trial court should likewise be affirmed.

The present case can be distinguished from the facts of the Hall case and those cases referred to in the Hall opinion. The trial court found there was no testimony nor documentary evidence showing the occupancy of the land in question prior to or at the time the Kanab Townsite was entered with the Land Office in Salt Lake City, Utah.

Wesley Theo McAllister, who was called as a witness by the Plaintiffs, testified that he was born in 1905 and that he had a memory of events that transpired in 1910. This is thirty years after the patent for the City of Kanab was issued to the Probate Judge. It is twenty-one years after the patent was recorded and became public record. On cross-examination Mr. McAllister testified that the property in question was not occupied until his

grandfather obtained it and that he did not know whether his grandfather "had ever even grew anything." The Plaintiffs, whose burden it is to show occupancy by themselves or their predecessors in interest both before and at the time of the Townsite Entry, showed none. Not only did the Plaintiffs fail to show such proof but the evidence received by the Court would indicate that the contrary was the case, i.e. that the Plaintiffs-Appellants' predecessors in interest did not in fact occupy the property in question prior to or at the time of entry but were not occupants of said property until after the townsite had been entered and the unclaimed land had been platted, advertised and sold.

It is the Defendants-Respondents' position that the Cox case is controlling on the facts of the case now before this Court. A careful analysis of the facts of that case reveals the following similarities:

1. In the Cox case at the time the Plaintiff's predecessors obtained confirmation of title from the Probate Court they asserted no claim as to title to or occupancy of any part of the platted street. Likewise in the present case at the time Joseph G. Brown obtained a corrected confirmation of his title from the Probate Court he asserted no claim as to title to or occupancy of any part of either Third North Street of Fourth West Street.

2. In Cox there was no evidence of occupancy of the street by the Plaintiff or her predecessors, "at the

time of the deeds, the Townsite Entry or the petition for confirmation." It was for this reason and this reason alone that the Court distinguished the Cox case from the Hall case and found that holding as not controlling. Likewise in the case at bar there was no evidence presented of occupancy at the time of the Townsite Entry, or at the issuance of the deed or when Mr. Brown's petition for confirmation or a corrected deed was heard.

3. In both Cox and the present case there was no showing that taxes had ever been paid on the platted roads; likewise neither Manti City nor Kanab City had ever claimed of anyone taxes on the roads in question.

4. In both cases some ninety years had elapsed before the Plaintiffs challenged the ownership of the platted streets in the municipalities.

In summary, the Plaintiffs-Appellants, whose burden it was to show occupancy by them or their predecessors before and at the time of the Townsite Entry, showed none. Thus, Hall is not controlling and the application of the Cox holding would require the Court to affirm the trial court.

POINT III KANAB CITY HAS NOT ABANDONED FOURTH WEST STREET

Appellants claim the action of the Kanab City Council on July 8, 1975, was sufficient to constitute an abandonment of the street. Plaintiffs' Exhibit 6 indicates that in that City Council meeting, the Plaintiffs' petition requesting the City to abandon Fourth West Street, was read and considered. After some discussion a motion was made, seconded and passed to abandon the street. No further action was taken.

The statutory procedure for a city to abandon or vacate a street is set forth in Utah Code Annotated §10-8-8 et. seq. A brief review of the procedure will show that the attempt of July 8, 1975, to abandon Fourth West Street was void for failure to comply with the law.

Section 10-8-8.1 establishes in detail the procedure that must be followed for a city council to consider a petition to vacate a road or street as follows:

> On petition by a person owning a lot in a city, praying that a street...in the immediate vicinity of such lot may be vacated,...the governing body of such city, upon hearing, and upon being satisfied that there is good cause for such...vacation..., that it will not be detrimental to the general interest, and that it should be made, may declare by ordinance such street...vacated...[emphasis added]

Section 10-8-8.3 requires that notice of the city council's intention to vacate a street, or any part thereof, be given, except where the council has obtained the written

consent to such vacation from all of the owners of property abutting the street to be vacated. Section 10-8-8.4 provides the type of notice to be given as follows:

> No street...shall be so vacated, unless notice of the pendency of the petition and prayer thereof, and the date of the hearing therein, is such petition is filed,...be given by publishing in a newspaper published or of general circulation in such city once a week for four consecutive weeks preceding action on such petition..., and by mailing such notice to all owners of record of land abutting the street...proposed to be vacated addressed to the mailing addresses appearing on the rolls of the county assessor of the county wherein said land is located. Action thereon shall take place within three months after the completion of notice.

Further, without the requisite notice, the meeting of July 8, 1975, could not qualify as the required hearing. Finally, no ordinance was passed. There was merely a motion. The requisite findings of public benefit were not made.

Kanab City failed to comply with the following statutory requirements in its attempt to abandon Fourth West Street:

1. No ordinance was adopted
2. No hearing was held.
3. Proper notice was not given.
4. Statutorily required findings were not made.

The effect of the deficiencies of the July 8, 1975 meeting is clearly stated in Utah Code Annotated Section 10-8-8.4 "no street...shall be so vacated, unless notice..., and the date of the hearing...be given..."

Without even considering the legality of the manner in which the City Council attempted to abandon the street, we note from the evidence received by the trial Court that on at least nine other occasions after the meeting of July 8, 1975, the City Council discussed Fourth West Street and on none of those occasions did they acknowledge the fact they considered the street abandoned. In fact, in the majority of those discussions the City Council asserted its ownership or control over the street and persisted with the notion of opening the street to the public. See Plaintiffs' Exhibits 7, 8, 9, 10, 11, 12, 13, 14, and 15.

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be affirmed in all respects.

DATED this 15th day of October, 1982.

Snow & Nuffer
A Professional Corporation

By _____
DAVID NUFFER

_____
F. KIRK HEATON

MAILING CERTIFICATE

I hereby certify that on the 19th day of OCTOBER, 1982, I served two copies of the foregoing BRIEF, on H. Delbert Welker, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

H. Delbert Welker
2567 Filmore Street
Salt Lake City, Utah 84106

T. Kirk Heaton