

1960

Southeast Furniture Co. v. Granite Holding Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

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SOUTHEAST FURNITURE COM-
PANY, a corporation,

Plaintiff and Respondent,

—vs.—

GRANITE HOLDING COMPANY,
a corporation,

Defendant and Appellant.

Supreme Court, Utah

Case No.
9175

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE STATE OF UTAH

SOUTHEAST FURNITURE COM-
PANY, a corporation,

Plaintiff and Respondent,

—vs.—

GRANITE HOLDING COMPANY,
a corporation,

Defendant and Appellant.

} Case No.
9175

BRIEF OF APPELLANT

STATEMENT OF FACTS

The appellant, Granite Holding Company, was the defendant below, and the respondent, Southeast Furniture Company, was the plaintiff.

This being an equity action for specific performance on appellant's counterclaim, the appellate court may review the facts as well as the law.

For many years prior to 1941, the parties and others used a right of way that extended south and west of

the right of way referred to in this action. The present right of way was created by joint action of the parties and was substituted for the old right of way. The single question to be decided is whether or not the appellant is now entitled to continue to use the substituted right of way.

The subject matter of this action is a right of way which runs easterly from McClelland Street approximately 500 ft. south of 21st South Street in the Sugar House area of Salt Lake City. This right of way amounts to a continuation of Elm Avenue which runs westerly directly opposite to it and on the west side of McClelland Avenue. The right of way is approximately 33 feet wide and 170 feet long. (Ex. D-3, D-9, R. 83, 133).

This roadway is used by appellant and respondent and their customers and others to gain access to property owned by appellant and respondent and others in the general areas east and north of this roadway. The roadway has, in fact, been used by the public generally for many years to gain access to the places of business, shops, and stores in this area. (R. 94, 95, 96, 117).

The title to the land comprising the west 130 feet of this roadway is in the respondent and the title to the land comprising the east 40 feet is in the appellant. (Ex. D-2, D-3, D-4, D-9, R. 132).

Appellant claims the right to the joint use of this roadway because of ownership of part of the land making up the roadway and by reason of an executed express oral agreement, or by reason of an implied agreement or by reason of estoppel, or as a public way.

For many years prior to about 1941, appellant and respondent and others gained access to the property in this area by means of a long, hazardous, inconvenient, roundabout and narrow right of way that entered east off of McClelland Street approximately 250 ft. south of the present roadway and curved northeast into their property in this area. (R. 84-90, 104, 105, 107, 113). The greatly increased business activity of the respondent, Southeast Furniture Company, made it very desirable for it to have a wider and more convenient means of access to its store properties from McClelland Street and it repeatedly urged appellant to join with it in creating this new joint right of way. (R. 89-90, 107-8). The closing of the old right of way would also relieve respondent from a possible encroachment claim by a land owner who stood to gain by the closing of it. (R. 163-4).

Accordingly, in 1941 it was agreed by appellant acting through Mr. Nephi J. Hanson, its President, now deceased, and respondent acting through Mr. S. E. Sorenson, its President, now also deceased, that the old right of way would be abandoned (R. 120) and a new joint right of way would be created by them to which both appellant and respondent would have a joint right of use. (R. 85, 90-95, 98, 106, 107, 114, 117, 120-22, 133 135, 136, 137). In fact, counsel for respondent agrees that if appellant had asked for a right of way deed at the time of the foregoing agreement by which this right of way was created, it would have been given. (R. 150) In 1941 contemporaneously with the foregoing agreement, respondent acquired title to the land which became the western part of the roadway, and appellant tore

down rental garages on its land to open up and make available land for the eastern part of the roadway. (R. 108-10, 113, 120-1, 136, Ex. P-6 and 7). Both parties thus joined in the actual physical preparation and creation of the roadway (R. 108).

Upon the creation of the roadway, it was put into joint use by appellant and respondent and others, and thereafter, appellant, relying upon the agreement and conduct of respondent, took action which irrevocably closed its old right of way to the south, (R. 91, 117) and thereby abandoned, quit-claimed away (R. 135, 136, Ex. D-8) and extinguished its only other means of access to its property from McClelland Avenue. This new roadway ever since such time has been and now is in continuous use by appellant, respondent, and others (R. 107, 122, 166).

As evidence of the intent and agreement that this should be a roadway open to the joint use of appellant and respondent and others, appellant and respondent in 1942 jointly requested in writing that the Salt Lake City Commission dedicate this very roadway here under consideration as a public street and as an eastern extension of Elm Avenue. In pursuance of this, the parties tendered executed deeds conveying their respective titles to the City. (R. 94-96, 144, 145, Ex. D-2, D-3, D-4). The City decided against dedication of the roadway inasmuch as its east end terminated on private property, and the deeds were returned to the parties. (Ex. D-3, R. 98).

For more than ten years the roadway was used harmoniously by both parties and the public generally

(R. 107, 117, 119, 147-8), and there was never a question but what appellant and respondent had reciprocal rights of way over each other's property and a joint right to the use of the roadway pursuant to the earlier acts and agreements of the parties. (R. 115, 121, 139) During this time respondent posted no signs of any kind. (R. 94, 99, 101, 102) In the meantime, the officers of appellant and respondent who had entered into the agreement and who had acted in creating the roadway, died.

Appellant's right to the use of the right of way was not questioned until about 1952 when appellant sought written evidence of it from respondent in order to satisfy an insurance company that was making a loan to appellant on its land in this area. Respondent refused to give appellant such written evidence unless appellant would pay an exorbitant price of \$10,000.00. (R. 137, 138) Subsequently, intensely bitter feelings arose between appellant and respondent over this and other matters apart from this roadway (R. 145), and in an attempt to strike at appellant, the respondent filed a complaint against appellant initiating this action on March 30, 1954 (R. 1) claiming rentals due respondent for the use by appellant of that portion of the roadway to which respondent had title.

Such action was filed without notice and without prior claim to rent having been asserted in any way by Respondent. (R. 92, 139-40) Further, the complaint makes no allegation of any express agreement for the payment of rent. Appellant claims that it was about this time that the small sign shown in Exhibit P-5 was

posted concerning the permissive use of the roadway. (R. 99, 102, 138, 146) The large sign that may have been posted earlier by respondent, was only directional to respondent's place of business. A close examination of the picture of the large sign shown in Exhibit P-5 clearly supports this. There can be seen showing through the white painted arrow the old original words "Service Entrance" even though an attempt has been made to paint them out. Any reference to permissive use originated with the small square sign placed of recent years about the time that respondent filed its complaint. (R. 99, 138, 140, 146) There is no definite evidence as to when either sign was placed. However, it is clear no signs of any kind were posted for several years. (R. 93, 99, 102, 138, 146) The appellant never considered that such signs pertained to it because of the prior agreement and acts of the parties (R. 140, 146), and the appellant and the public generally, have continuously used and now use said roadway.

On May 5, 1954, one month after the filing of the foregoing Complaint, appellant filed a motion to dismiss and an answer to the complaint. Nothing was done by respondent to press its suit for alleged rentals for many years. (R. 27, 29) Finally, the appellant, in order to affirm its right to cross over that portion of the roadway to which respondent claims title and to settle the cloud on said right of way caused by the pending suit, filed an amended answer and counterclaim on September 9, 1958, requesting specific performance of the agreement of the parties.

It is significant that respondent thought so little of the contentions of its complaint that it failed to appear on appellant's motion for leave to amend its answer and to file its counterclaim. Further, respondent made no effort to reply to the counterclaim which was duly served on September 24, 1958, and the default of respondent was entered October 21, 1958. Appellant was awarded a default judgment on its counterclaim more than three months later on January 27, 1959. (R. 8, 16, 27, 29) This default judgment was set aside on March 9, 1959. Thereafter, respondent again did nothing to press the complaint and alleged claim for rent, and appellant advanced the case to trial by filing a notice of readiness for trial on May 20, 1959.

The case was set for trial on October 8, 1959, and at the commencement of the trial, respondent abandoned its alleged rental claim and voluntarily requested dismissal of its complaint. (R. 76) It developed in the course of the trial on appellant's counterclaim, that the evidence showed not only an executed oral agreement creating a reciprocal right of way over the adjoining land of the parties, but also a right of way by estoppel and that the conduct, history and use of the right of way amounted to the creation of a public highway through public use in accordance with 27-1-2 Utah Code Annotated, 1953, and an amended answer and counterclaim to conform to this evidence was filed with leave of the Court. (R. 48, 53, 62)

The appellant does not dispute the right of respondent to use appellant's portion of the right of way, but seeks an affirmation of its right to the use of respond-

ent's portion of the right of way. In this regard, counsel for respondent stated frankly that respondent "is not asking that (appellant) be denied the right to the use of the right of way." (R. 92-3) Further evidence of this was the voluntary dismissal by respondent of its complaint. (R. 76, 92)

There is some evidence in the record that in recent years, appellant has moved to acquire an interest in a fifteen foot strip of land north of the present right of way. (R. 128, 151-2) This was done in desperation and as a possible escape in the event that the respondent should prevail in its recent change of position in regard to this right of way and to insure appellant's ability to perform its prior and long standing obligations to others to provide them a right of way. (R. 128-30) Respondent objected to any attempt to so explain this acquisition in the course of the trial. (R. 152-3)

It would irreparably damage appellant to lose its right in the substituted right of way.

STATEMENT OF POINTS RELIED UPON

- I. **There is an executed oral agreement creating a joint and reciprocal right of way over the adjoining lands of the parties.**
- II. **The executed oral agreement takes it out of the statute of frauds.**
- III. **The respondent is estopped to assert the statute of frauds.**
- IV. **A right of way over respondent's land has been created by estoppel.**

- V. **There is an implied agreement creating a joint and reciprocal right of way over the adjoining lands of the parties.**
- VI. **The roadway has been dedicated and abandoned to the use of the public in accordance with 27-1-2 U.C.A. 1953.**
- VII. **There were no signs placed which prevented the creation of joint and reciprocal right of way by any of the means referred to by appellant.**
- VIII. **It was error to set aside respondent's default judgment on the counterclaim.**
- IX. **The failure of the trial court to rule upon the incompetency of witnesses to testify on particular matters was prejudicial error.**
- X. **The findings of the court are not responsive to and do not cover all of the material issues.**
- XI. **The findings and judgment are contrary to the evidence.**

ARGUMENT

POINT I.

There is an Executed Oral Agreement Creating a Joint and Reciprocal Right of Way Over the Adjoining Lands of the Parties.

It is not disputed that for some years prior to 1941 the parties with others used a right-of-way located several hundred feet south of the roadway now in question in order to gain access to their properties from McClelland Street. The appellant had reserved this right-of-way out of land it formerly held. It was a narrow, inconvenient, roundabout right-of-way. Both parties had

a valuable vested interest in it as it was the only existing way they had to gain access to their properties from McClelland Street since their properties did not abut on McClelland Street.

Further, it is not disputed that by the acts of the parties, a new, wide, direct, and much more convenient roadway was created to the north of the old right-of-way about 1941 which has been used continuously ever since by the parties and others as the only means available for them to gain access to their properties from McClelland Street. The appellant provided the necessary land for the east portion of the roadway, and respondent provided the necessary land for the west portion.

It is the contention of appellant that this new right-of-way was created pursuant to an express oral agreement which provided that appellant would have the right to the use of such right-of-way. The court below ruled that there was no such agreement. A review of the record indicates there is ample evidence to show such an agreement.

Witness Clyde F. Hansen testified that he was personally present and participated in the negotiations between appellant and respondent in which the oral agreement was made concerning the right of appellant to use the new right-of-way. (R. 90, 91, 98, 107). At that time this witness was secretary-treasurer of appellant.

Witness Willard B. Richards from personal knowledge testified concerning an agreement for the creation and right of use of the right-of-way. His testimony was that he personally talked to officers of the appellant

and respondent at the time and on the scene where the roadway was being created by the demolition of buildings and the acquisition of new land, and he was told they were by agreement going to change the right-of-way from the one going south. (R. 117, 120, 121, 122).

Witness W. L. Hansen testified concerning the oral agreement by which the new joint right-of-way was created and by reason of which the appellant had a right to the use of the right of way over the land of the respondent. The evidence also shows that the existence of this oral agreement and resulting right was affirmed by action of appropriate officers of respondent on several occasions (R. 133, 135, 136, 137, 146, 147, 149, 150).

It is significant that at no place in the entire record is there any testimony for the respondent actually denying the existence of the oral agreement claimed by appellant. On the other hand, the circumstances and the acts of the parties all go to corroborate the evidence adduced by appellant that there is an executed oral agreement as claimed by appellant.

The fact of the change of location of the right of way evidences the required meeting of the minds for the existence of the contract. The right-of-way could not have been changed except upon mutual accord and agreement. There is ample consideration to support the contract in that appellant abandoned and gave up a valuable right-of-way to the south and demolished income producing buildings and thereby forfeited and permanently lost the monthly rental therefrom, and respondent gained a much more convenient and advantageous right-of-way.

POINT II.

The Executed Oral Agreement Takes it out of the Statute of Frauds.

There is no question but what the parties have fully performed pursuant to their oral agreement for the creation and use of the new right of way. The appellant performed by tearing down its rental buildings to provide part of the necessary land for the right of way, abandoning its old right of way to which it cannot now be restored, and assisting in the actual physical preparation and creation of the new right of way. The loss in rentals to appellant on the storage sheds since they were torn down approximately 19 years ago conservatively amounts to at least \$7,000.00. Respondent performed by acquiring and providing part of the necessary land for the right of way, abandoning the use of the old right of way, and assisting in the actual physical preparation and creation of the new right of way. Further, ever since the creation of the new roadway, the parties have jointly and continuously used and are now using the new right of way. The only thing that remains undone is the execution of cross deeds by the parties, and counsel for the respondent admits that this would have been done at the time had the appellant requested it. (R. 150)

The appellant seeks judicial affirmation of its permanent right to use the right of way and a decree for continued specific performance of the oral contract on the part of respondent. The appellant cannot be restored to its former condition and right of way nor would damages adequately compensate it for its loss of this interest in land.

It is a fundamental rule that executed or partially performed oral agreements are taken out of the Statute of Frauds and are enforceable. It is expressly provided by 25-5-8 U.C.A. 1953 that:

“Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance.”

The rule that part performance of an oral agreement takes it out of the Statute of Frauds specifically applies to agreements relating to the creation of an easement. The following rule is stated in at 49 *Am. Jur.* 790, Section 488:

“The doctrine of part performance applies to a parol agreement for a permanent easement as well as to an agreement for the sale of land. Thus, an oral agreement for a private way or railroad right of way, for the establishment of a private road, street, or alley, or for a right of storage is enforceable in equity where the grantee has acted in reliance on the agreement so that the failure to enforce the agreement specifically will result in the perpetration of a fraud upon or injustice toward him.”

The following are specific applications of the general rule and are contained at 101 A.L.R. 982, *Part Performance of Oral Land Contracts*:

“An oral agreement for the establishment of a private road will be specifically enforced, where it has been partly performed by the parties.”

“So, an oral agreement among several landowners that each will donate a strip of ground necessary to lay out a continuous street and highway will be specifically enforced against one

landowner at the suit of the others, where the latter have performed." (*Brower v. Walker*, 182 Iowa 804, 166 N.W. 269)

The acts of part performance may of themselves be such as to prove the contract and take it out of the statute of frauds. If the acts performed are such that they cannot be explained consistently with any other agreement than the one alleged, they may be relied upon as the sole proof of the contract.

"The true rule is, however, as we think, very clearly stated by Pomeroy (*Spec. Perf.* Sec. 107) in these words: "The acts of part performance must be such as show that *some* contract exists between the parties, that they were done in pursuance thereof, and that it is not inconsistent with the one alleged in the pleadings. Whenever acts of part performance are made out which thus point to a contract, the door is opened, and the plaintiff may introduce additional parol evidence directed immediately to the terms of the contract relied upon"; a proposition which the author supports by abundant citation of authorities."

"If the acts of part performance prove the whole contract, there is no occasion for any parol evidence of its terms, and no difficulty whatever arises under the Statute of Frauds." (*Andrew v. Babcock*, 63 Conn. 109, 26 A. 715, 101 A.L.R. 961).

There is ample evidence in the record to show an oral agreement by the parties to create the new joint right of way involved herein and give the parties reciprocal rights to cross over the adjoining land of the other. Otherwise, how does the respondent explain the acts of the appellant in abandoning its only existing right of way and demolishing its rental buildings to provide

land for the new right of way and all of the other acts of appellant and respondent in connection with the creation of the new right of way. Even though appellant was required to furnish some right of way for respondent because of an earlier agreement, it would not have changed the location of this right of way which it needed and was using if in so doing it lost its only existing right of way and became subject to the permissive use and control of the respondent in the new right of way. There was no reason for the appellant to have put itself in this position, and the respondent has shown none.

The acts of the parties in performance support the agreement as alleged. To hold otherwise would result in fraud on the performing party.

“Part performance which will avoid statute of frauds may consist of *any act* which puts party performing in such position that nonperformance by other would constitute fraud.” (*Utah Mercur Gold Mine Co. v. Herschel Gold Min. Co.*, 103 Ut. 249, 134 P.2d 1094)

In the above referred to *Utah Mercur* case the court found that the part performance supported and took outside of the statute of frauds an oral agreement to extend a written lease and in so doing used the following language:

“Whether the legal label given to the basis of plaintiff’s claimed right to continue in possession of the property is equitable estoppel, irrevocable license, or an oral contract for a written extension taken out of the statute of frauds because of partial performance is not so important. These concepts are but forms designed to serve a more ultimate principle that no one shall induce

another to act on promise of reward for such act and then after obtaining the benefit of the same repudiate the contract.”

POINT III.

The Respondent is Estopped to Assert the Statute of Frauds.

The courts have long since announced the fundamental rule that they will not allow the Statute of Frauds to be used as a shield for fraud. The type of fraud the courts have reference to is defined in 49 *Am. Jur.*, *Statute of Frauds*, Sec. 580, page 888 as follows:

“When one party induces another, on the faith of a parol contract, to place himself in a worse situation than he could have been if no agreement existed, and especially if the former derives a benefit therefrom at the expense of the latter, and avails himself of his legal advantage, he is guilty of a fraud and uses the statute for a purpose not intended — the injury of another — for his own profit. In such cases, equity regards the case as being removed from the statute of frauds and will in proper cases enforce the contract or otherwise interfere to prevent the application of the statute.”

Conduct amounting to estoppel is described at 49 *Am. Jur. Statute of Frauds*, Sec. 583, page 890 as follows:

“The doctrine of estoppel to assert the statute of frauds against a claim or defense based upon an oral contract is founded upon the general principles of estoppel in pais. The vital principle is that he who by his language or conduct leads another to do, upon the faith of an oral agreement, what he would not otherwise have done, and

changes his position to his prejudice, will not be allowed to subject such person to loss or injury, or to avail himself of that change to the prejudice of such other party."

These rules are so well accepted as to require no further authority. The undisputed facts of this case fit all the requirements of this rule. On the faith of respondent's representation that a new joint right of way would be created and in reliance on the acts of respondent in acquiring land that would be used as part of the joint right of way, appellant tore down rental buildings to make land available for part of the right of way, abandoned its only existing right of way, and has continued to this day some 19 years later to use the new right of way, and has used and developed its land in reliance thereon.

POINT IV.

A Right of Way Over Respondent's Land Has Been Created by Estoppel.

It is the accepted rule that an easement in land can be created by estoppel.

"It seems to be the generally recognized modern rule that the doctrine of estoppel in pais may be successfully invoked to preclude an assertion of title to land; and it is generally recognized that permitting the doctrine of estoppel to operate in effect to transfer real estate does not contravene the statute of frauds. One may by estoppel in pais be precluded from asserting an equitable title to land; and an estoppel in pais may be asserted to raise an equitable title or interest in land as against the legal title. The modern rule is generally well settled that title to land or real

property may pass by an equitable estoppel, which is effectual to take title to land from one person and vest it in another where justice requires that such action be done." (49 Am. Jur., *Statute of Frauds*, Sec. 152, page 492)

While easements are usually created by express written grant, by prescription or by implication (and we feel that an easement has been created by implication as will be discussed later),

"... it has long been recognized by the court that an easement may exist by virtue of estoppel." (17A Am. Jur., *Easements*, Sec. 18, page 631)

"Notwithstanding the general rule as to the prerequisites to its creation, an easement may arise from an estoppel... An easement by estoppel has been held to exist in a passageway over a boundary strip as a result of the reciprocal use of the strip by the adjoining owners as a passageway for a long period of time." (17A Am. Jur., *Easements*, Sec. 21, pp. 633-4)

In *Forde v. Libby*, 22 Wyo. 464, 143 P. 1190, where the land comprising the right of way was contributed by both of the adjoining owners, the court said:

"The original owners who were parties to the oral agreement, had become interested in maintaining said alley because their improvements had been constructed with reference to it and its use in connection with their improvement... The easement was established by estoppel by the *acts* and *conduct* of the original parties, and as between them, and upon the facts, they and their grantors were each estopped from denying such easement. *It was as completely established as between them and their privies, and subjects their parcels of land to the servitude as completely as though it were created by a deed for that purpose.*"

In *Wright v. Barlow*, 169 Okla. 472, 37 P. 2d 958, the Oklahoma court cites with approval the *Forde v. Libby* referred to immediately above and states:

“Courts of equity have declared that one or his privies ought to be estopped and denied the right to repudiate his *acts* when they have been relied and acted on, and when to do so would operate as a fraud or work an injustice. . . The owner of land, by his *acts* in pais may preclude himself from asserting his legal title. . . .”

“Where owners of adjoining lots orally agree on private way between lots and construct improvements with relation thereto, each is estopped from disputing the other’s right of way.”

The facts of this case support the creation of a right of way by an equitable estoppel (estoppel in pais) and also by reason of promissory estoppel. These two kinds of estoppel shall be discussed as they fit the facts of this case. Equitable estoppel will be referred to first.

“The doctrine of estoppel in pais is founded upon principles of morality and fair dealing and is intended to subserve the ends of justice . . . Estoppel of this character arises from the conduct of a party, using the word ‘conduct’ in its broadest meaning as including his spoken words, his positive acts, and his silence when there is a duty to speak. . . . Accordingly, it holds a person to a representation made or a position assumed where otherwise inequitable consequences would result to another who, having the right to do so, under all the circumstances of the case, has in good faith relied thereon and been misled to his injury.” (19 Am. Jur., *Estoppel*, Sec. 42, pp. 640-42)

The essential elements of an equitable estoppel as related to the party estopped and as related to the party

claiming the estoppel are set out and discussed at 19 Am. Jur., *Estoppel*, pp. 642-51 and 730-742. Each of these are listed below and discussed as they fit the facts of this case.

A. As Related to the Party Estopped:

1. "Conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert."

Respondent here openly acquired and made available new land for use as part of the new right of way, observed the appellant tear down its rental buildings to make its land available for part of the right of way, acquiesced in the appellant and those claiming through it to use the new right of way for many years, and knew or had reason to know that appellant and those claiming through it abandoned the only other existing right of way.

2. "Intention, or at least expectation, that such conduct shall be acted upon by the other party. . . . An actual intent to mislead or defraud is not essential. . . . It is enough if there was a holding out to all who might have occasion to act of the existence of a certain state of facts which they might assume to be true and upon which they might act."

In this case, it could reasonably be assumed that appellant would act on the strength of the conduct of the respondent, and it did in fact so act. It is not contended that respondent necessarily had an intent to deceive or mislead by its conduct, holding out, and acquiescence in

connection with the creation and use of the right of way. However, as already pointed out, it is not always necessary that a fraudulent purpose be present at the inception of the transaction. The fraud may, and frequently does, consist in the subsequent attempt to controvert the representation (conduct) and to get rid of its effects and thus injure the one who has relied on it.

3. "Knowledge, actual or constructive, of the real facts."

Respondent had actual knowledge that appellant was tearing down its rental buildings to make land available for part of the right of way. It knew that there were several others who claimed the use of a right of way through appellant and that appellant was obligated to provide a right of way for them. Respondent knew or should have known that with the creation and use of the new right of way, the old and only other existing right of way was abandoned and allowed to be closed.

B. As Related to the Party Asserting the Estoppel:

1. "Lack of knowledge and of the means of knowledge of the truth as to the facts in question."

For many years after the creation of the new joint right of way in this case, there was no question concerning the permanent right of appellant to use the newly created right of way. Appellant's use has been uninterrupted and continuous. Appellant did not know and had no means of knowing that respondent claimed that appellant had no permanent reciprocal right to cross over that portion of the joint right of way owned by respondent. Respondent claims that a sign that was posted should have conveyed this knowledge to appellant. In

this regard, the evidence in its most favorable light to respondent shows that there was a lapse of at least several years before the first sign was posted. A detailed discussion concerning any signs that were placed is set out in Point VII below. Further, appellant contends, and the prior understanding and course of conduct of respondent and appellant pertaining to the creation and use of the right of way justifies such contention, that it did not consider any signs, if placed, applied to it, but that they applied to the general public.

2. "Reliance on the conduct of the party estopped."

There is no question but what appellant in good faith relied upon the conduct and representation of respondent in participating in the creation of the right of way and making it available to the use of appellant. But for this reliance, appellant would not be in its present predicament.

3. "Action based on such reliance of such a character as to change his position prejudicially."

In reliance on respondent's conduct and representation, appellant tore down its rental buildings and contributed its land to the right of way, lost the rental therefrom totaling at least \$30.00 per month, and abandoned the only other existing right of way and allowed it to be closed.

It is submitted that the undisputed evidence supplies all of the above required elements and clearly supports the creation of a right of way by equitable estoppel.

The creation of the joint right of way is also supported by promissory estoppel. The evidence in this case

makes out a classic situation for the application of this doctrine.

“There are numerous cases in which an estoppel has been predicated on promises or assurances as to future conduct.” (19 Am. Jur. *Promissory Estoppel*, Sec. 53, page 657)

The Restatement of the Law of Property, Vol. 5 on *Servitudes*, Section 524, page 3173 sets forth a rule on “Promises Enforceable by Estoppel” and a rationale that fits perfectly the facts of this case as follows:

“An oral promise or representation that certain land will be used in a particular way, though otherwise unenforceable, is enforceable to the extent necessary to protect expenditures made in reasonable reliance upon it.

“Owners of neighboring lands are prone to enter into informal agreements respecting the future use of their respective lands in which each agrees to use his land in a way that will benefit the other. The relationship of trust and confidence frequently existing between neighbors tends to produce a very considerable degree of casualness and informality in their dealings with each other. Adjustments in improvement and use are frequently made on the basis of their informal understandings. If the observance of these understandings is not compelled, much hardship may result. To prevent such hardship, informal agreements to use land are enforced to the extent necessary to protect those who have acted in reasonable reliance upon them. . . .”

“The phrase ‘though otherwise unenforceable’ as here used means that the promise could not be enforced were it not for the application of the doctrines of estoppel.”

The application of the doctrine of promissory estoppel is discussed at 19 Am. Jur. *Estoppel*, Sec. 53, page 658, as follows:

“The doctrine of promissory estoppel is most widely recognized and most frequently applied in cases of promises or representations as to an intended abandonment of existing rights.”

The facts of this case fall within this specific application of promissory estoppel. Respondent acquired the land comprising its portion of the joint right of way and represented and agreed that appellant would have a right to the use of it as a means of access to its property, and in pursuance of this right, the appellant has used the joint right of way for many years. By joining in the creation of the new right of way and agreeing to appellant's right of use, the respondent represented that it was giving up or abandoning a valuable and existing right and relinquishing part of its fee title in its part of the land that was used in creating the right of way. In reliance on this representation of the abandonment of an existing right, the appellant abandoned its only other existing right of way, tore down sheds, lost rentals, and contributed a portion of the land for the new right of way.

The facts of this case bring it squarely within promissory estoppel rule set down in *Ravarino v. Price*, Utah 260 P. 2d 570 as follows:

“Generally, the doctrine of equitable estoppel is applicable only when a misrepresentation is made as to past or present facts; however an exception is recognized when a misrepresentation as to the future operates as an abandonment of an existing right on the part of the party making

the misrepresentation. 21 C.J. 1142, *Bigelow on Estoppel*, (6th Ed.) 637). Actually this exception is a limited application of the doctrine of promissory estoppel. 31 C.J.S., *Estoppel* Par. 80. The general principal of promissory estoppel is embodied in the *Restatement of the Law of Contracts*, Sec. 90, under the heading of 'Informal Contracts, Without Assent or Consideration,' as follows:

'A promise which the promissor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise.'

"Promissory estoppel is historically rooted as a substitute for consideration, *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 159 N.E. 173, 57 A.L.R. 980, per Cardozo, C.J. citing 1 *Williston on Contracts*, Sections 116, 139; however it is applied where the promise of the promisor as to his future conduct constitutes the intended abandonment of an existing right on his part. In *Waugh v. Lennard*, 69 Ariz. 214, 211 P. 2d 806, the defendant induced the plaintiff to refrain from commencing action on a promissory note by representations that he would not invoke statute of limitations as a bar. The court held the defendant was estopped from raising the defense of the statute, basing its decision on cases where the promisor had manifested an intention to abandon an existing right, and quoting the *Restatement of Contracts*, Sec. 90. For similar illustrations, see *Schroeder v. Young*, 161 U.S. 334, 16 S. Ct. 512, 40 L. Ed. 721; *Faxon v. Faxon*, 28 Mich., 159; *Dickerson v. Colgrove*, 100 U.S. 578, 25 L. Ed. 618; 3 *Williston on Contracts*, Sec. 689, p. 1988.

“The common element in these cases is that the promise as to future conduct constitutes a manifestation that the promissor will abandon an existing right which he possesses.”

POINT V.

There is an Implied Agreement Creating a Joint and Reciprocal Right of Way Over the Adjoining Lands of the Parties.

If the court is of the opinion that there was no express oral agreement, there is ample evidence to show an implied agreement to vest in appellant a right to the use of the new right of way.

The Restatement of the Law of Contracts, Sec. 5, states how a promise may be made:

“ . . . A promise in a contract must be stated in such words either oral or written, or must be inferred wholly or partly from such conduct, as justifies the promisee in understanding that the promissor intended to make a promise.”

The following concerning implied contracts is set out at 12 Am. Jur., *Contracts*, Sec. 4 p. 498:

“In an express contract all the terms and conditions are expressed between the parties, while in an implied contract, some one or more of the terms and conditions are implied from the conduct of the parties.”

The rule of implied contracts is further stated as follows:

“Express contracts are those in which the terms of the agreement are fully and openly incorporated at the time the contracts are entered into, while implied contracts are such as arise by

legal inference *and upon principles of reason and justice from certain facts, or where there is circumstantial evidence showing that the parties intended to make a contract.* (*McDonald v. Thompson*, 184 U.S. 71, 46 L. Ed. 437, 22 S. Ct. 297).

In 27 ALR 2d 332 there is a discussion of the problem of mutual or common use by adjoining owners, for a common purpose, of a strip of land owned in part by each. In the summary and comment the compiler at page 338 states the following concerning an implied oral agreement:

“A use by adjoining owners, for a common purpose, of a strip of land over and along their boundary strongly suggests some kind of agreement therefor, and in most cases the *fair implication* has been that the use originated in a mere oral agreement.”

The creation of the new right of way herein required and involved the following specific actions and conduct on the part of the appellant and respondent, all of which are undisputed in the record and from which an agreement can be implied:

1. Appellant tore down at least three storage sheds owned by it to provide the east part of the land necessary to make the new right of way.
2. The appellant has lost rentals at the rate of at least \$30.00 per month since that time from such sheds. (R. 108, 109)
3. Appellant assisted in the actual physical preparation and building of the right of way.
4. Appellant abandoned its only right of way to the south.

5. Appellant has directed the use and improvement of its property in reliance on the use of the right of way.

6. Respondent acquired at a cost of less than \$200.00 (R. 121, 135, 136) the land necessary for the west part of the right of way.

7. Each party executed and delivered deeds to Salt Lake City covering the land owned by each which comprised the right of way and joined in requesting that it be dedicated as a public highway.

8. For many years the right of way was jointly used with no notice of claimed permissive use or claim for rental arising.

It is inconceivable that such specific action was taken by the parties without an intention in both parties as to the right of way so created. There is ample testimony in the record that conversations were had by the parties preceding and during these actions which make out such an intention and assent.

“The statute of frauds cannot operate as a defense to the creation of an easement by implication.

“It should be noted that even though a grant of an easement is embraced within the operation of the statute of frauds and must consequently be in writing, an executed parol grant of easement will be upheld and sustained under the same circumstances and upon the same principles that a parol contract would similarly be sustained.” (49 Am. Jur., *Statute of Frauds*, Sec. 182, p. 514)

This Court within the past few months has had occasion to apply the law of implied agreements in the two Utah land dispute cases of *Harding v. Allen*, 353 P. 2d

911, and *Johnson Real Estate Co. v. Nielson*, 353 P. 2d 918. While these were boundary dispute cases, they involved the same principles as the case herein and the establishment of the rights of the adjoining landowners based on their long period of conduct in regard to their land. These cases both referred to two earlier cases of *Ringwood v. Bradford*, 2 Utah 2d 119, 269 P. 2d 1053 and *Brown v. Mulliner*, 120 Utah 16, 25, 232 P. 2d 202, 207 and quoted the following:

“ . . . in the absence of evidence that the owners of adjoining property or their predecessors in interest ever made an express parol agreement as to the location of the boundary between them, if they occupied their respective premises up to an open boundary line visibly marked by monuments, fences or buildings for a long period of time and mutually recognized it as the dividing line between them, the law will *imply* an agreement fixing the boundary as located, if it can do so consistently with the facts appearing and will not permit the parties nor their grantees to depart from such line.”

It is also noted in the concurring opinion in *Hummel v. Young*, Utah, 265 P. 2d 410 which refers to the early case of *Holmes v. Judge*, 31 Utah 269, 87 P. 1009 that the establishment of an express agreement in situations involving principles similar to what we are here concerned with is not necessary nor controlling.

The undisputed specific actions of the parties cannot be reasonably accounted for except on the postulate that an agreement or understanding (express or implied) existed as to the use of the newly created right of way as contended by appellant.

POINT VI.

The Roadway Has Been Dedicated and Abandoned to the Use of the Public in Accordance with 27-1-2 U.C.A. 1953.

Public use which constitutes dedication is defined by 27-1-2 U.C.A. 1953 as follows:

“A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.”

The undisputed records of the Salt Lake City Recorder's office show that in 1942, which was within a few months after the creation of the joint right of way, the parties each executed and delivered deeds conveying their respective parcels of land making up the right of way to the City with the request that the right of way be dedicated as a public highway which would be an extension of Elm Avenue in that area. At that time the general public was using it as an access to all the property in the area and as a means of a short cut through to Highland Drive. The City finally decided not to dedicate the right of way. However, respondent's conduct in regard to the right of way did not change, and the same general public use of the right of way that existed at the time of the execution of the deeds and request for dedication, continued thereafter on even a more expanded basis for more than the required statutory ten year period and, in fact, continues to this day. Respondent contends that subsequently there were placed signs as to permissive use, but the evidence shows that these were not placed until after the right of way had been used by the general

public for more than ten years. The question of the signs is discussed in detail in Point VII below and applies in full force to the argument on the point under discussion here.

The Utah Court in the early case of *Schettler v. Lynch*, 23 Ut. 305, 64 Pac. 955 set out rules as to what amounts to the dedication of a public highway which have been followed in a series of cases since that time:

“A dedication may be express or implied. . . . If the intention to dedicate is manifest, it is sufficient. An implied dedication is founded on the doctrine of equitable estoppel; and when land has been thus set apart as a highway for the use of the public, for their convenience and accommodation, and enjoyed as such, and private and individual rights acquired in relation to it, ‘the law’ as said by the Supreme Court of the United States, ‘considers it in the nature of an estoppel in pais, which precludes the original owner from revoking such dedication.’ *City of Cincinnati v. White*, 6 Pet. 431, 8 L. Ed. 452. And such an appropriation of land is not within the statute of frauds, and may be established by parol evidence showing the acts and conduct of the owner of the land. In fact, an implied dedication of land for public use as a highway may be established in any conceivable way by which the intent of the owner can be made apparent. . . . ‘If the open and known acts are of such character as to induce the belief that the owner intended to dedicate the way to public use, and the public and individuals act upon such conduct, proceed as if there had been in fact a dedication, and acquire rights which would be lost if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate no matter what may have

been his secret intent.' *Elliott, Roads and S.*, pp. 92, 93."

The decision of the City Commission not to formally dedicate the deeded property as a public street did not mean that the way could not become a public highway pursuant to 27-1-2 U.C.A. 1953. In the Utah case of *Jeremy v. Bertagnole*, 116 P. 2d 420, in which the Court sustained the dedication of a public way it stated:

"It has been held by numerous courts that the grant may be accepted by public use without formal action by public authorities, and that continued use of the road by the public for such length of time and under such circumstances as to clearly indicate an intention on the part of the public to accept the grant is sufficient."
(Many cases are there cited which support this rule)

In the recent Utah case of *Boyer v. Clark*, 7 Utah 2d 395, 326 P. 2d 107, this Court held that there was sufficient evidence as a matter of law to establish the dedication of a public highway and used the following language in considering the type of use and the acceptance required of the public:

"The use of the road was not great because comparatively few people had need to travel over it, but those of the public who had such need, did so."

". . . An acceptance could be made 'by public use without formal action by public authorities. and that continued use of the road by the public for such length of time and under such circumstances as to clearly indicate an intention on the part of the public to accept the grant is sufficient'." (Reference being made by the Court to

Lindsay Land & Livestock Co. v. Churnos, 75 Utah 384, 285 P. 646)

“This evidence was sufficient as a matter of law to establish a highway by dedication and the court erred in finding otherwise. The highway once having been established by such use, it is provided by statute, Sec. 27-1-3 U.C.A. 1953, that it . . . must continue to be a highway until abandoned by order of the Board of County Commissioners.’”

There is, therefore, ample Utah authority and express statutory provision to support the dedication of a public highway in this case.

POINT VII.

There Were No Signs Placed Which Prevented the Creation of the Joint and Reciprocal Right of Way By Any of the Means Referred to by Appellant.

The evidence shows that there were no signs of any kind posted by the respondent concerning the use of its portion of the right of way for several years. (R. 93, 99, 167, 101-2) Further, the evidence shows that when the large first sign was finally posted, it served only to direct people to respondent's place of business and “service entrance” and contained no language purporting to limit or restrict the use of its portion of the right of way. (Ex. P-5) It was only in recent years about the time respondent filed its suit in 1954 that a second and smaller sign was placed which had language pertaining to permissive use. (R. 99, 102, 138, 146) A superficial examination of the two signs shown in Exhibit P-5 upon which respondent relies indicates they are not of the same age or era. The smaller permissive use sign is not the same

material, construction or printing. These together with its very manner and location tell that it was placed as a recent after-thought as is contended by appellant.

Finally, the alleged posting of any restrictive signs would be entirely repugnant and inconsistent with the conduct and manifest intention of the parties originally and over a long period of time as has been discussed above. The idea of permissive use is one given recent birth by respondent for reasons that will be discussed below.

The respondent relies on the signs shown in its Exhibit P-5 to defeat the right of appellant in respondent's portion of the right of way. However, the sign painter called as a witness by respondent to establish when such signs were placed, testified that he did not place them, (R. 156) did not service them, (R. 156) and did not know when they were placed (R. 157) His testimony therefore did not establish when either of the signs were placed.

The respondent attempted to establish the time of placing and the wording of signs by a witness who is an owner and secretary-treasurer of the respondent company. This witness testified to a sign being posted for "as long as I remember," (R. 160) but there is no testimony from him as to the specific language of the sign or signs except that Exhibit P-5 contains "a modern version." (R. 160-1) This same witness testified on cross examination that he had no memory of any of appellant's rental sheds which extended entirely across appellant's land and which required tearing down to create the right of way and no memory of the actual tearing down of these

sheds to make the land available for the right of way. (R. 161) In view of the undisputed facts that these sheds did so exist and that they were actually torn down to make appellant's land available for the right of way, and that this occurred at about the same general time that the posting of some sign was *remembered* to have taken place, this court in reviewing the evidence in this equity case is justified in questioning such memory of this witness pertaining to the placing of signs and what they said.

The limited knowledge of this witness and the other officer witness referred to below concerning the facts of this case is demonstrated by their testimony that it was not until 1954 that they had any knowledge that appellant owned the eastern portion of the land comprising the right of way. (R. 165)

Respondent next attempted to establish the time of placing of signs by testimony of a witness who is an owner and who is now president and has always been general manager of the respondent company. He remembered of a sign being placed about 1944, but he did not state what this sign may have said. (R. 167) He remembered acquiring the land from which to provide respondent's portion of the right of way and of selling off part of such land, but he did not have any recollection as to about how much was paid for it or how much was received for the portion sold. (R. 168) The undisputed evidence is that the cost of the original parcel of land acquired by respondent was \$300 and that a portion of it was sold for \$120 and that, therefore, the cost of the land contributed by respondent for the right of way was less

than \$200. (R. 121, 135, 136)

Certainly none of this testimony reviewed in its most favorable light is either convincing or clear as to what sign or signs may have been placed, when they were placed, and what they said. It is, however, significant for two reasons. First, assuming that the large first sign was placed as early as 1944 as contended by the general manager and that it contained permissive use language, (both of which assumptions are controverted by other evidence and are repugnant to the theory and basis upon which the right of way was created) there elapsed at least a three year period of time in which the appellant was allowed unrestricted use of the right of way and during which time the appellant abandoned its only existing other right of way and otherwise changed its position as has been referred to herein. In such length of time and under such circumstances the appellant acquired a right over respondent's portion of the right of way by estoppel if not by any of the other means discussed in this brief. Second, this testimony gives a clue as to why the respondent would want to now deny and refuse the interest of the appellant in the right of way. The cost of the land acquired by respondent and made available for its part of the right of way at the time of its creation was about \$200.00. (R. 121, 135, 136). The testimony of the general manager of the respondent now puts the value of this piece of land at \$20,000.00. (R. 167)

On cross examination of appellant's witness, Mr. Richards, respondent endeavored to fix the time of placing the signs shown in Exhibit P-5. The testimony is not at all clear that Mr. Richards understood what signs

and what locations were being referred to in the course of the cross examination. (R. 122-4) Under careful leading, the witness stated that there may have been a sign up for as much as ten years, but he was not at all sure. This witness recognized that there were two different signs and that they probably went up at different times. This is consistent with other evidence which showed that when the first of any signs was posted, it was directional only, and that the permissive use sign was posted about 1954 and after strong feelings had arisen between the successor representatives of the parties. (R. 99, 102, 138, 146) This witness was unequivocal on cross examination that this new right of way was to be a substitute for the old one which would be closed and that the new right of way would always be left open. (R. 120, 122)

The former secretary of the appellant company testified that he was connected with such company until 1945 and that there were no signs of any kind posted up to that time (R. 102) and that the signs in question were posted when the right to the use of the right of way was questioned by the 1954 filing of the lawsuit for rent by respondent. (R. 94, 99, 101, 102, 146)

The owner of the appellant company testified definitely that there were two different signs posted by respondent on the right of way property. These were posted at different times. The earlier one was directional only to the respondent's business. The later one had to do with permissive use and was posted in 1954 at about the time the suit for rent was filed by respondent. (R. 138, 140, 146).

Some of the most convincing evidence that the permissive use question was not raised by respondent until recent years is provided by respondent's own Exhibit P-5. All evidence points to the large sign predating the small sign shown in the exhibit. The preponderance of the evidence is that the small permissive use sign did not appear until about the time respondent questioned appellant's right to use the right of way by the filing of the suit in 1954. A very close examination of the large sign will show that originally this sign served as a directional sign only. There can be seen showing through the white painted arrow the old original words "Service Entrance" even though an attempt has been made to paint them out. Unwittingly the respondent has been betrayed by its own exhibit. Certainly this adds credence to the contention of appellant that for many years the appellant and others used the right of way without any notice or restriction by respondent and is compatible with every point relied upon by appellant to give it a right to the use of the way.

This is the sum total of the evidence as to signs posted, and we submit, that there is no showing that a sign was posted that would prevent the creation of the joint right of way and the vesting of reciprocal rights of the parties in and to the use of it or that would have prevented the establishment of a public way.

POINT VIII.

It Was Error to Set Aside Respondent's Default Judgment on the Counterclaim.

The setting aside of the default after the expiration of more than three months time after its entry was error

and directly contrary to the explicit provisions of Rule 60(b) U.R.C.P. that a motion for such relief based upon "*mistake, inadvertence, surprise, or excusable neglect*" shall not be made more than three months after the judgment or order was entered or taken.

Added emphasis is given the consideration of this point in the light of the history of the suit which shows an almost utter lack of interest in it on the part of respondent.

It is significant that this action all started on March 30, 1954, by the filing of a complaint by respondent in an attempt to recover rent from appellant for its use of respondent's portion of the joint right-of-way. Prior thereto, there had been no notice of claim for rent made in the more than thirteen years in which the parties had reciprocally used the parcels of land making up the joint right-of-way. The little merit placed in that complaint by respondent is graphically demonstrated by the fact that respondent did virtually nothing to advance that suit for nearly six years, and respondent subsequently underlined its lack of faith in its merits by dismissing the complaint on the morning of the trial on October 8, 1959.

Several years after the filing of the complaint, it became apparent that appellant would have to move to clear its right to the use of the right-of-way which had been put in question by this suit. On September 9, 1958, appellant served and filed a notice and motion to amend its answer. No one had interest enough to appear at the hearing on the motion. Leave was granted by the Court to file the amended answer and counterclaim, and a copy was duly served on respondent on September 24, 1958.

Respondent still did nothing and did not reply to the counterclaim, and on October 22, 1958, the default of the respondent was entered. More than four months later on January 27, 1959, a default judgment was granted and entered giving appellant a permanent right to the use of the right-of-way. Respondent moved to set aside the judgment on February 6, 1959 on the grounds of "*mistake, inadvertence, surprise and excusable neglect*," and this was granted March 18, 1959.

Rule 60(b) as it pertains to the setting aside of a default on the grounds claimed by respondent reads as follows:

"On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . The motion shall be made for reason(s) (1), not more than three months after the judgment, order, or proceeding was entered or taken. . . ."

The federal rule 60 (b) on this point is identical with the Utah rule except that the arbitrary time limitation is one year. The federal cases have uniformly treated this time limitation as inflexible and jurisdictional when relief under the rule is sought on the ground of "mistake, inadvertence, surprise, or excusable neglect."

The rule is stated in Barron & Holtzoff, *Federal Practice and Procedure* (Rules Edition) Volume 3, Section 1330, p. 265 as follows:

"Rule 60(b) governs the time within which a motion *must* be made for relief from a judgment

for any of the reasons or grounds enumerated . . . Motions grounded on mistake, inadvertence, surprise, excusable neglect, newly discovered evidence or fraud or misconduct of a party *must* be made not later 'than one year after the judgment, order, or proceeding was entered or taken'."

The following are quotations from cases construing and applying the language of federal rule 60(b) covering judgments, orders, or proceedings, the relief from which governed by the specific time limitation of the rule. In reading these cases it should be remembered that the language of the federal rule and the Utah rule is identical on this point except the federal time limitation prior to 1948 was six months and after that is one year.

"After expiration of six months, Court was without authority to relieve defendant from an *order of default*." *Cassell v. Barnes*, D.C.D.C. 1940, 1 F.R.D. 15.

"The one year limitation prescribed in Rule 60(b) for filing of motion by defendant for vacation of default and judgment entered thereon reflects the *extreme* period within which the motion might be made, and it must be made within a reasonable time which may conceivably be less than one year from entry of judgment." *Woods v. Severson*, D.C. Neb. 1949, 9 F.R.D. 84.

"District Court had no jurisdiction to strike out order dismissing cause without prejudice for want of prosecution, where motion to strike order and restore case to calendar was not made until more than six months after entry of the order of dismissal." *Reed v. South Atlantic S. S. Co. of Delaware*, D.C. Del. 1942, 2 F.R.D. 475.

There are many other similar cases cited under Sec. 1330 of Barron & Holtzoff referred to above.

The United States Supreme Court has ruled on federal rule 60(b) on a number of occasions. The most recent case was *Ackerman v. U.S.*, Texas, 71 S. Ct. 209, 340 U.S. 193, 95 L. Ed. 207. This case involved a motion to set aside a judgment canceling a certificate of naturalization for the reason of "excusable neglect" under Rule 60(b). The motion was filed after the express time limitation provided by the rule. The Supreme Court affirmed the action of the District Court in denying the motion and stated:

"A party's motion for relief from a judgment on the ground that his failure to appeal therefrom is excusable is a motion for relief because of 'excusable neglect,' as provided in Rule 60(b) (1) of the Federal Rules of Civil Procedure, and hence must, by the terms of the Rule, be made not more than one year after the judgment was entered. . . . It is immediately apparent that no relief on account of 'excusable neglect' was available to this petitioner on the motion under consideration."

This Court has held that an equity court no longer has complete discretion in granting or denying relief from a default judgment but is bound by the prescribed three months time of Rule 60(b) when relief is sought on any of the specified grounds (including "mistake, inadvertence, surprise, or excusable neglect") referred to in the Rule to which this time applies. To hold otherwise, would nullify the express time limitation language of the Rule.

The Utah case of *Warren v. Dixon Ranch Co.*, 260 P. 2d 741 involved an attempt to set aside a default judgment on the grounds of excusable neglect in a quiet title suit 90 days after the answer was due and 64 days after

default had been entered. This court affirmed the district court's refusal to set aside the default judgment and stated:

"To hold . . . that they have the *right* to have the case reopened since they personally received no notice of the action would be to undermine the Rules which are positive in their application and are designed to expedite litigation."

"And although a judgment may be erroneous and inequitable, equitable relief will not be granted to a party thereto on the sole ground that the negligence of the attorney, agent, trustee, or other representative of the present complainant prevented a fair trial. *Restatement of Judgments*, Sec. 126."

The recent Utah case of *Ney v. Harrison*, 299 P. 2d 1114, reaffirms that where relief under Rule 60(b) is sought upon any of the first four specified grounds set out in 60(b) (of which "mistake, inadvertence, surprise, or excusable neglect" are lumped together as the first of the four specified grounds), it must be sought within three months from the entry of the default judgment. In fact, the Court used the following precise language in regard to the time limitation in which relief must be sought as follows:

"Relief upon the first four grounds must be sought within three months from the entry of judgment."

The Court in the *Ney* case did grant relief from the judgment because of a showing under Reason (7) of Rule 60(b). The time limitation for seeking relief under Reason (7) is "a reasonable time." In the *Ney* case, the Court pointed out that:

“Defendant Alda did not request relief until nearly eleven months had elapsed and, hence, the only applicable section of Rule 60(b) on which he could rely was (7).”

It is clear that the respondent did not intend or attempt to invoke relief under Reason (7) of Rule 60(b) but in the second paragraph of its Motion to Set Aside Default Judgment (R. 19) respondent uses the express language of Reason (1) of Rule 60(b) to-wit: “mistake, inadvertence, surprise and excusable neglect.” Further, the *Ney* case recognizes the rule set down in the *Warren v. Dixon Ranch Company* case (supra) that:

“An equity court no longer has complete discretion in granting or denying relief.”

The intention of the rules to fix an inflexible time limitation for the seeking of relief under Rule 60(b) is clearly demonstrated by the reference made to it in Rule 6(b) U.R.C.P. having to do generally with the enlargement of time. Rule 6(b) permits the enlargement of the time wherein an act is required or allowed to be done at or within a specified time, where the failure to act was a result of an excusable neglect but it provides that the Court may not extend the time limitations set out in Rule 60(b) in which action for relief thereunder must be taken. Rule 6(b) reads as follows:

“(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a

previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 25, 50(b), 52(b), 59(b), (d), and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them."

Reading Rules 60(b) and 6(b) together, it must be concluded that it is the intention of the rules to make the time limitation in which a party must move for relief because of Reason (1) of Rule 60(b) a definite and inflexible time limitation. In fact, the last portion of Rule 6(b) is a direct injunction that the court *may not extend* the time for taking action under Reason (1) of Rule 60(b). The federal court expressly and unequivocally so held in *Wallace v. U.S. C.C.A.* 2d 142 F. 2d 240 certiorari denied 65 S. Ct. 37, 323 U.S. 712, 89 L. Ed. 573.

The default of the respondent was entered on October 21, 1958, and the judgment entered on January 27, 1959. The respondent has contended that the three months time limitation of Rule 60 (b) did not begin to run until the date of entry of the judgment on January 27, 1959. The relief sought under Rule 60(b) is from a "final judgment, order, or proceeding." Further, the Utah Court in the early case of *Cutler v. Haycock*, 32 U. 354, 90 P. 2d 897, ruled that the entry of the default is the controlling act and the thing from which relief must be sought. This court there stated:

" . . . Where a default has been rightfully entered, a party cannot thereafter, as at matter of right, arrest the entering of judgment on the default by simply filing a pleading with the clerk.

In order to do this he should obtain leave to file it from the Court."

It is submitted that if respondent's alleged "mistake, inadvertence, surprise, or excusable neglect" is viewed against the background of respondent's marked lack of attention to and interest in this case through the years after respondent had initiated it, there is actually no such showing of "mistake, inadvertence, surprise, or excusable neglect" that would support the invoking of Reason (1) of Rule 60(b) even if relief had been sought within the three month period required by the Rule. Even if relief is sought within the time limitation of the Rule, it is addressed to the discretion of the court and must be based on a good excuse for the default.

"A motion to set aside a default or a judgment by default is addressed to the discretion of the court. . . . In moving to set aside a judgment by default the defendant must show both that there was good reason for the default and that he has a meritorious defense to the action. . . . A motion to set aside a judgment by default on the ground of neglect of counsel to file an answer has been denied where it was not shown that the neglect was excusable. . . ." (Barron and Holtzoff, *Federal Practice and Procedure*, Rules Edition, Vol. 3, Sec. 1217, pp. 53-4)

The failure of the respondent to file a reply to the counterclaim nearly five months after the filing and service of it and nearly four months after entry of default falls into the pattern and routine established by respondent in connection with this case as has been previously referred to in detail and is not excusable. Respondent, therefore, did not qualify for relief under Rule 60(b) either as to time or substance.

POINT IX.

The Failure of the Trial Court to Rule Upon the Incompetency of Witnesses to Testify on Particular Matters Was Prejudicial Error.

The provisions of 78-21-3 U.C.A., 1953 require the court to decide on all questions of law, and reads as follows:

“All questions of law, including the admissibility of evidence, the facts preliminary to such admissions, the construction of statutes and other writings, and the application of the rules of evidence are to be decided by the Court and all discussions of law addressed to it.”

The court failed to rule on any of the objections raised as to the competency of all witnesses for the appellant to testify concerning conversations and dealings had by such witnesses with the original representatives of the parties concerning the creation and projected use of the joint right of way. (R. 86, 88, 96, 116, 132, 135, 153-4)

The Memorandum of Decision of the Trial Court (R. 45) found as follows:

“1. That there was never an agreement between the parties creating an interest in the defendant in and to the right of way involved in this action.”

Objections were made to the competency of these witnesses to testify concerning any agreement. The court reserved its ruling until the conclusion of trial, but never did rule. We are, therefore, at a loss to know what, if any, testimony of appellant's witnesses was considered or not considered in making the finding that there never was an agreement between the parties creating an interest

in the defendant in and to the right of way. It is submitted that the failure of the court to so rule was prejudicial. If there had been a ruling, the appellant would have had an opportunity to meet the objection and present additional or other evidence by further interrogation of these witnesses or with other witnesses or by more extended cross-examination of respondent's witnesses, and through the possible use of additional documentary evidence.

The rules in this regard are set out as follows :

“A ruling on objections to evidence or motions to strike evidence should be made as soon as possible, either at the time the objections or motion is made, or during the trial and before judgment rendered, in time to give the opposite party the opportunity to meet the objection. The better practice is to rule positively, one way or the other, when the evidence is offered. . . . If, however, evidence is received subject to objection, without a ruling thereon, a ruling should be made prior to the conclusion of the trial, and in time for the party to present his case with respect to such ruling. . . .”

“Improper evidence should not be admitted at counsel's risk, but should be excluded in express terms or the intention of the court to exclude the evidence made clearly to appear.” (88 C.J.S. *Trial*, Sec. 145, pp. 289-290; *Mayer v. Detroit, etc. R. Co.*, 152 Mich. 276, *Louisville, etc. R. Co. v. Collinsworth*, 45 Fla. 403, 33 So. 513, *Collins v. Janesville*, 111 Wis. 348, 87 N.W. 241, 1087, *Stephens v. Harris*, 180 Ark. 128, 20 S.W. 2d 866.

“A distinct ruling, should be made upon an objection immediately—in most cases—after the objection is interposed. It is not commendable

practice to reserve a ruling on an objection, or to admit evidence subject to a motion to strike to be argued later; in fact, such practice in some cases constitutes prejudicial error.” (2 *Bancroft’s Code, Practice, and Remedies*, Section 1371, page 1843)

If the court had ruled on these objections, counsel would have had a right and opportunity to request the court for its reasons for so ruling. The rule in this regard is set out at 88 *C.J.S. Trial*, Section 145, p. 289 as follows:

“Indeed, counsel who is unable to comprehend the reason for the exclusion of evidence is entitled, on request, to a statement from the court of its reasons for exclusion. Evidence cannot be excluded without assigning a reason, where the probability is that the reason for the exclusion could have been obviated if known.”

The following are quotations from cases applying the above referred to rules:

“In the case of *Gilcrest v. Bowen*, 95 Mont. 44, 24 P.2d 141, this court condemned the practice of trial judges taking objections under advisement and not thereafter disposing of the same by an appropriate ruling. And again, in *Langston v. Currie*, 95 Mont. 57 26 P. 2d 160 we expressly approved what was said in the *Gilcrest* Case, and forecast that eventually it would be necessary for this court to reverse a cause before it because of the failure of the trial court to dispose of objections or motions which had arisen during the progress of the trial; we again repeat the prophecy there made.” (*Frisbee v. Coburn*, Mont., 52 P. 2d, p. 882)

“A judge presiding at the trial of a case should rule *promptly* and *clearly* upon each and

every objection or motion which is made by the attorneys, thus not only affording the parties the benefit of his judgment and guidance as to the future conduct of the trial, but also making a crystal clear record for the assistance of an appellate court when reviewing his action." (*Los Angeles County v. Beverley*, 271 P 2d 965)

In view of the above, the failure of the court to rule on these objections was clearly prejudicial to the presentation of appellant's case.

POINT X.

The Findings of the Court are Not Responsive to and Do Not Cover All of the Material Issues.

The following language of Rule 52, U.R.C.P. requires the court to make findings:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall, unless the same are waived, find the facts *specially* and state separately its conclusions of law thereon and direct the entry of the appropriate judgment;"

Rule 52 also expressly provides that "Requests for findings are not necessary for purpose of review." This, of course, is the necessary corollary to the direction of the Rule that the facts must be found specially.

It is reversible error to fail to find on all material issues. This rule is stated at 3 Am. Jur., *Appeal & Error*, Sec. 1147, p. 660, as follows:

"The failure or refusal of the trial court to make findings of facts material to the decision is ground for reversal on appeal by a party prejudiced thereby;"

The only material issue found by the court and as set out in its memorandum decision (R. 45) was "that there was never an agreement between the parties creating an interest in the defendant in and to the right of way involved in this action." Further, this is the only material finding set out in the findings prepared by respondent and signed and filed by the court. (R. 58)

There were no findings on either of the following material issues which were raised by the pleadings and supported by evidence:

1. Appellant acquired an interest in the right of way by estoppel. The evidence shows that in reliance on the conduct of respondent, appellant changed its position to its detriment and prejudice and to the benefit of respondent all as alleged in the pleadings and as has been detailed earlier in this brief. Appellant in substance pleaded into estoppel in its First Amended Answer and Counterclaim (R. 9) and urged and argued relief on this issue during the course of the trial in the light of the evidence adduced, although the reporter's transcript does not contain a record of the argument of counsel. Appellant specifically pleaded estoppel in its Motion to Amend to conform to the evidence and in its Answer and Counterclaim that was amended to conform to the evidence and filed by leave of the court after hearing thereon. (R. 48, 65)

2. The right of way has been dedicated and abandoned to the use of the public in accordance with 27-1-2 U.C.A. 1953. This became apparent in the course of the evidence adduced at the trial and was specifically pleaded

in appellant's Motion to Amend to conform to the evidence and in its Answer and Counterclaim that was amended to conform to the evidence and filed. (R. 53, 68)

The Utah court has held many times that the failure to find on all material issues is reversible error.

“The court should find the facts upon every issue, either affirmatively or negatively, as the evidence may be, and thus give the defeated party an opportunity to assail the finding as not being supported by the evidence. The court erred in not making findings upon the issue of want of authority, and also upon the issue of renunciation of the contract.” (*Thomas v. Clayton Piano Co.*, 47 Ut. 91, 151 P. 543)

“The law is well settled that the findings when compared with the pleadings must be within the issues and be responsive thereto, and must cover the material issues raised by the pleadings, whether they arise because of allegations in the complaint and denied by the answer, or upon affirmative defense pleaded in the answer, or upon a counterclaim, denied by answer thereto or treated as denied, and this is required whether evidence be introduced or not upon such issues, and if there be no finding upon a material issue the judgment cannot be supported.” (*Parowan Mercantile Co. v. Gurr, et al.*, Utah, 30 P.2d 207)

The most recent Utah case of *Gaddis Investment Co. et al. v. Morrison*, 3 Ut. 2d 43, 278 P. 2d 284 interpreted what is required in the way of findings by the court under Rule 52. In this case, the defendant's answer raised the issue of abandonment of the contract but the trial court made no finding regarding it. The judgment was set aside and the case remanded. This Court in that case quoted the language of Rule 52 and stated:

“It appears that the judgment was based principally upon the findings that the contract was entered into and the commission had not been paid, totally disregarding defendant’s answer to the complaint. It has been frequently held that the failure of the trial court to make findings of fact on all material issues is reversible error where it is prejudicial.”

The court in the *Gaddis* case then referred to the following long line of Utah cases that have announced and followed this rule:

Hall v. Sabey, 58 Utah 343, 198 P. 1110;
Baker v. Hatch, 70 Utah 1, 257 P. 673;
Prows v. Hawley, 72 Utah 444, 271 P. 31;
Simper v. Brown, 74 Utah 178, 278 P. 529;
West v. Standard Fuel Co., 81 Utah 300, 17 P. 2d 292;
Pike v. Clark, 95 Utah 235, 79 P. 2d 1010.

Respondent contends that there was an actual or implied agreement between the parties as to the use of the right of way by respondent as has been previously argued. In addition to this, however, the respondent submits that had the court considered and made a finding on the issues referred to above, it would have found affirmatively in view of the evidence, or at least, such findings would now be before this court for review. The failure to make these findings, therefore, was prejudicial to appellant’s case and is reversible error.

POINT XI.

The Findings and Judgment are Contrary to the Evidence.

The finding and judgment that there never was an agreement between the parties creating an interest in ap-

pellant in and to the right of way and that appellant has no right, title or interest in it, is not supported by the evidence.

Rule 52(b) reads in part as follows :

“When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.”

Judgments resting upon findings contrary to or not supported by the evidence may be set aside.

“It is well established that findings of fact must conform to and be supported by the evidence, and that a judgment resting upon a finding not so supported may be set aside upon motion for new trial, or appeal.” (53 Am. Jur., *Trial*, Sec. 1144, p. 798)

“The rule giving great weight in the appellate court to the finding of the trial court on a question of fact lays no restraint on the power of the former to ascertain, by full and careful investigation and analysis of the evidence, what the facts and circumstances are and whether the general finding is consistent therewith. . . .” (3 Am. Jur., 463-2 *Appeal & Error*, Sec. 899 pp. 463-64)

There is uncontroverted evidence in the record that at least for a few years (R. 99 , 167, 101, 193) there was no dispute concerning the right of appellant to use the joint right of way. In fact, the substantial evidence is that it was many years before this right to use was put in dispute in any way.

It is an inescapable conclusion from the evidence that the parties had some kind of an understanding giving appellant a permanent right to use the newly created joint right of way. How else can the conduct of the appellant be explained in closing its only existing right of way that it must have for its property and which it had previously obligated itself to provide for those claiming by, through, or under it, in tearing down valuable sheds that were producing income in order to provide land for the new right of way, and participating physically in the making of the right of way.

The respondent does not deny this conduct on the part of appellant and significantly does not attempt to explain or give reason for it, but argues that such conduct on the part of appellant resulted in it ending up with only a permissive use in the resulting new and only existing right of way. The evidence will not support this kind of conclusion.

There is substantial uncontroverted evidence to show either an executed express oral agreement, or an implied in fact agreement, all of which have been previously discussed in detail.

The findings of the court that there was no agreement between the parties in the face of this kind of evidence is patently contrary to and not supported by the evidence.

There is substantial uncontroverted evidence to support the creation of a right in the appellant to the use of the right of way by estoppel. The evidence establishes all of the required elements of a classic equitable estoppel

or of a promissory estoppel, and it was contrary to the evidence not to so find.

Finally, there is substantial uncontroverted evidence that the parties intended to and did dedicate and abandon the jointly created right of way to the use of the public and the same has become a public way in accordance with 27-1-2 U.C.A., 1953, and the failure to so find was contrary to the evidence.

CONCLUSION

Although respondent initiated this suit more than six years ago to recover rent for the use of a jointly created right of way, it did not move to advance it any time during the pendency of this case. Respondent seemed satisfied to have cast a cloud on appellant's right to the use of the right of way. Appellant filed an answer and counterclaim to determine and protect its right to the use of the right of way.

Appellant contends and the evidence shows that appellant has a permanent right to the use of the right of way by reason of any one or more of the the following: An executed oral agreement, estoppel, implied agreement or because the right of way has become a public way pursuant to 27-1-2 U.C.A. 1953.

Appellant further contends that it was error for the court to set aside the default judgment which affirmed the right of appellant to use the right of way where the motion to set aside was based upon "misake, inadvertence, surprise, or excusable neglect" and was filed more than three months after entry of default.

In reviewing this case this Court is justified in considering the manner in which it was filed by respondent; its utter lack of interest in it; its failure to advance it for more than six years, and finally the voluntary dismissal of the complaint by respondent. Respondent first asserted a right to rent and then abandoned this for the inconsistent position of permissive use. These raise serious questions concerning the reliability of all matters asserted by respondent.

It is respectfully submitted that it would be a gross miscarriage of justice if under the facts and circumstances here shown, the appellant were to lose its access and right to the use of a right of way it jointly participated in creating.

It is respectfully requested that the judgment of the trial court be reversed and the case remanded with instructions to enter judgment for appellant giving appellant and those claiming by, through, or under it the right to use the right of way referred to herein in accordance with the detailed provisions of the default judgment in the record (R. 17) or a judgment that such right of way is a public way.

Respectfully submitted,

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