

1960

Ludean H. Cox v. Edward C. Carlisle : Brief of Plaintiff and Appellant

Utah Supreme Court

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Don V. Tibbs; Attorney for Plaintiff;

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

OCT 17 1960

LUDEAN H. COX,

Plaintiff and Appellant.

— vs. —

EDWARD C. CARLISLE, Mayor of
Manti City, MANTI CITY, A Municipal
Corporation, Henry Henningson, John
McIntosh and Ed Nielson,
Defendants and Respondents.

Clerk, Supreme Court, Utah

Case No. 9242

UNIVERSITY OF UTAH

JUL 10 1967

BRIEF OF PLAINTIFF AND APPELLANT

LAW LIBRARY

Appealed from the District Court of
Sanpete County, Utah

Honorable L. Leland Larson, Judge

DON V. TIBBS

Attorney for Plaintiff
and Appellant

Manti, Utah

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IN THE SUPREME COURT of the STATE OF UTAH

LUDEAN H. COX,
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— vs. —

EDWARD C. CARLISLE, Mayor of
Manti City, MANTI CITY, A Municipal
Corporation, Henry Henningson, John
McIntosh and Ed Nielson,
Defendants and Respondents.

Case No. 9242

BRIEF OF PLAINTIFF AND APPELLANT

STATEMENT OF FACTS

Fences fell and the Manti City grader plowed its way across the neatly furrowed farmland. Manti City was opening up a platted street outside the Manti city limits, which the Plaintiff and her predecessors had been farming for several generations.

Immediately upon obtaining notice of the heavy equipment's invasion, Plaintiff filed suit to prevent the trespass and obtain damages for the injury to the growing crops, the

destroyed leveled farm land and the engineered irrigation system.

Trial was held on May 28, 1959, in the District Court in and for Sanpete County, State of Utah. The Court dismissed the Plaintiff-Appellant's action and declared that the Defendant-Respondent Manti City was the owner of the 66 foot strip of land located between Plaintiff-Appellant's Parcels 99 and 113, Plat "A" Manti City Survey, and that said strip of land was a public road.

This is an appeal from the Judgment and Decree in favor of the several Defendants-Respondents entered and filed on February 26, 1960, based upon the Trial Court's Findings of Fact and Conclusions of Law.

For convenience, the parties will be referred to as they appeared in the Court below.

PLEADINGS

The Complaint alleges that the Plaintiff is the owner of Parcel 99 and Parcel 113 and all land located between said Parcels in Plat "A", Manti City Survey, Sanpete County, Utah.

It further states that Defendants unlawfully without Plaintiff's consent and against her repeated protests, entered upon her farm, destroyed her fences, crushed and damaged the crops planted thereon, and destroyed the leveled grade and engineered irrigation system on said land.

The Plaintiff asked the Court for a restraining order to prevent the Defendant Manti City from building a road on the strip of land farmed by Plaintiff, for \$1,000.00 special damages and \$5,000.00 general damages.

The Defendant's answered Plaintiff's complaint by claiming ownership of the strip of land between Parcels 99 and 113, in that the said strip of land was laid out and dedicated as a public street as shown on the official Plat of Manti City.

EVIDENCE

The Defendant Manti City is an Incorporated City of the third class in Sanpete County, Utah. The Plaintiff is the owner of an 80 acre farm which includes Parcels 99 and 113 and the strip of land between them, said farm being located north of the City limits. The official plat of Manti City shows a 66 foot wide public road between the said Parcels 99 and 113.

It was stipulated that taxes had not been paid on the said 66 foot strip of land. It was Plaintiff's evidence that the premises had always been part of Plaintiff and her predecessors farm.

Parcel 113 was deeded to William A. Cox on December 21, 1871, from Luther T. Tuttle, Mayor of Manti City. Parcel 99 was deeded to William Bench on December 14, 1871, from Luther T. Tuttle, Mayor Manti City. Both of these conveyances were made pursuant to the act of the Utah Legislature of February 17, 1869, (Compiled Laws of 1869, Sec. 1166 et seq.) and an act of Congress of March 2, 1867.

The Mayor of Manti received Title to all the land (both Parcels 99 and 113 and the strip between) in trust for the several use and benefit of the occupants of the said City by a patent from the United States of America dated September 2, 1872. This patent was issued pursuant to the

provisions of the Federal Townsite Act of 1867 (Act of March 2, 1867, 14th Stat. 541, 43 USCA, 718.)

Manti City had been settled and occupied as a Townsite for many years having been incorporated in 1851 under the laws of the Territory of Utah.

On January 25, 1892, the official Plat of Manti City prepared in February of 1871, was adopted. It showed that Parcels 99 and 113, Plat "A" Manti City Survey, were separated by a road 66 feet wide and 759 feet long.

The Defendants-Respondents rely upon the official plat to prove their title to the said strip of land. They also introduced testimony from three witnesses to prove that the public once used this road. Plaintiff-Appellant believes that the witnesses testimony does not show there was ever a road on the land in question.

The Plaintiff-Appellant introduced testimony showing that for over 70 years there has never been a road on the said land and that the land was always used as part of the farm of Plaintiff and her predecessors in interest.

The Plaintiff also introduced in evidence to prove there never was a road in existence, Civil Case No. 786, in the District Court in and for Sanpete County, Utah, which case resulted in a Decree disconnecting and detaching this and other property from the city limits of Manti. This case was commenced in 1910 by a Petition signed by 43 owners of real property located immediately north of the City which included the owners of Parcels 99 and 113. All of these landowners and citizens of Manti stated there were no streets, alleys, sidewalks, or any public improvements on any of said premises to be detached and disconnected from the City. The

effect of these ancient documents is to show that there was no road between Parcels 99 and 113. It is also interesting to note that the map of the area to be disconnected makes a jag to take in this specific property, namely Parcels 99 and 113 and the strip of land located between the said parcels.

To prove there once was a road, the Defendants-Respondents called the following witnesses:

First: William T. Hall, an 80 year old resident of Manti who died soon after this testimony, stated that he could remember when the land in question as well as land located further north was not separated by fences and that there were bars to get into the premises. He stated that all of the land was used as a community cow range. He testified that there was a public road over the premises, but on Cross-examination on page 39 he stated:

“Question: (By Mr. Tibbs) So that, in other word, there wasn’t any definite markings of a road. It was merely a couple of gates through the field?

Answer: Well, that is right. That is right.

MR. TIBBS: That is all.

THE WITNESS: There were just bars.

MR. WOOLLEY: That is all then.”

Second: Defendants-Respondents also relied on the testimony of Fred W. Cox who testified there once was a road between the two Parcels. He is the same Fred W. Cox who signed the Petition in Civil Case No. 786 in 1910 as previously referred to, which stated in effect that there was no road over the premises.

On page 107 on Direct-examination, he testified where the road went through the premises.

“Question: (By Mr. Woolley) State whether or not there was any bars in that fence?

Answer: There was bars down by Uncle Haze Clark’s Stack yard.

Question: Were there any bars in that fence near the cemetery corner: that far south?

Answer: No. Not that I ever remember.

Question: You don’t remember those?

Answer: No. We came down to the bottom of Parcel 99 and then went right out through these bars.

Question: What bars are you talking about?

Answer Well, the bars over next to the cemetery line here to where Uncle Haze Clark’s stack yard was. We came right out on the south side of his stack yard and come in to the lane across from over to the bottom of Parcel 99.”

Consequently, the road he described, if any, was not on the strip of land between parcel 99 and 113, but located on the land farther to the north. It is worth noting in regards to this testimony that the “Uncle Haze Clark” referred to, is the same person as H. R. Clark, the witness for the Plaintiff, who testified there has never been a road over the strip of land between Parcels 99 and 113.

Third: The Defendant Manti City also relied on William Ambrose Tuttle to prove there was a public road.

He testified on page 126 about the gates being located on the Clark premises.

“Question: (By Mr. Tibbs) You mentioned getting out of the gates down by Mr. Clark’s premises, didn’t you?

Answer: There was bars. There was not gates.

Question: The bars?

Answer: That is right.

Question: That was on the east fence?

Answer: That is right. That runs north.

MR. TIBBS: I call the court’s attention to the fact that the Clark premises are not the premises known as 113 or 99. They are premises further to the north.

THE COURT: That is my impression.

THE WITNESS: Well, I am not acquainted, of course - -

Question: (By Mr. Tibbs) Just one other question, Ambrose, excuse me. But I know you well, too. You have gone through ditches and over lanes, through all of the dogon farm land around here, haven’t you.

Answer: Yes, sir.”

On page 125 Mr. Tuttle also testified that he never saw anyone go over the strip of land between Parcels 99 and 113.

“Question: (By Mr. Tibbs) How old were you then?

Answer: I was about six years old. I would say about ’96 when it was. As I have stated, I am seventy-three, will be on the first day of August.

Question: Did you ever see anybody else travel through there?

Answer: No, sir. I never did.

Question: Drive cattle through?

Answer: No. I don't know anybody ever drove cattle through. As I say, I am not acquainted and not prepared to argue or make any statements on that."

The Plaintiff-Appellant to prove there was never a road located between Parcels 99 and 113 called Dr. H. R. Clark, a lifetime resident of Manti, whose family owned the premises immediately to the north of Parcel 113 and who has been familiar with Parcel 99 and 113 for over 70 years. He testified on page 77 as follows:

"Question: (By Mr. Tibbs) So you can nearly remember back seventy years, is that correct?

Answer: Yes, sir. I herded cows up and down that lane all my young life.

Question: Now that lane is the lane between the Cox farm - -

Answer: And the cemetery.

Question: The cemetery. Dr. Clark, during this time do you ever remember of a public road traveling from the cemetery lane, if you want to call it that, west across the Grant Cox farm?

Answer: No, sir. There never was a road there.

Question: Do you ever remember the public traversing that, those - -

Answer: No, sir. They never did.

Question: - - lands? Did you ever remember a road being fenced over those lands?

Answer: No, I don't.

Question: During this time has, have those lands been used for farming purposes?

Answer: Always. As near as I know.

Question: Have they always been occupied by farmers?

Answer: Yes, sir.

Question: Has there ever been strips running east and west that weren't farmed or weren't occupied by the farmers that were occupying the land?

Answer: No, sir."

The Plaintiff's family owned the Parcels in question and on page 59 she testified concerning her knowledge of the premises.

"Question: (By Mr. Tibbs) Have you been familiar with this land for the past forty years then?

Answer: I think I could say that I have been.

Question: During that time, Mrs. Cox, has there ever been a road over that land?

Answer: Not to my recollection.

Question: Have you ever seen the public cross that land at any place going from east to west?

Answer: Not that I remember of. As I remember it, our ten acres joined right on the land owned by Mr. Henry that was right to the bottom of our farm, of our top ten acres, and there was willows, and, of course, the fence, and then there was willows and shrubs along the bottom. Not shrubs, but willows, rose bushes, things of that nature, that was along the bottom of the fence.

Question: Did you subsequently come into possession of the property that you designate owned by Mr. Henry?

Answer: Yes. My father bought it from Mr. Henry."

On page 92 Grant Cox, the husband of the Plaintiff, testified concerning his knowledge that there was not a road over the premises.

“Question: (By Mr. Tibbs) Since you’ve been familiar with this land and since you have owned this land has there, has anyone ever had possession of a strip of land across, crossing this farm other than the occupant of the premises, Parcel 99, Parcel 113?

Answer: Nobody has ever had access to that land except us.”

STATEMENT OF ISSUES

The main question involved is whether or not Manti City should be prevented from building a road over a platted street outside the City limits, which land has been used and improved as part of the Plaintiff’s farming operation.

In the Trial Court the Plaintiff argued two points:

1. That under the Federal Townsite acts of March 2, 1867, the Mayor of Manti was given title to the land, in Trust for the several use and benefit of the occupants thereof, according to their respective interests. The Plaintiff relies on the Deed from the Mayor of Manti City dated December 14, 1871, recorded May 12, 1874, as to Parcel 99, and on the Deed dated December 21, 1871, recorded January 10, 1872, as to Parcel 113. Plaintiff contends that because these Deeds are dated prior to the time the Mayor of Manti received the premises in trust, it shows that the premises, both Parcels 99 and 113, and the strip between them, were occupied prior to the time the Mayor received the patent.

2. That in the event the Court did not hold that the strip of land located between Parcel 99 and Parcel 113 was held in trust for the Plaintiff or her predecessors who were occupiers of said land then the Plaintiff contends the City is estopped to open up the road because of the exceptional circumstances involved and because equity and justice requires that the municipality be precluded from causing irreparable injury to this plaintiff who honestly and in good faith and acting because of the City's conduct made the valuable improvements to the entire 80 acre farm by leveling and placing an engineered irrigation system on same.

SPECIFICATION OF POINTS RELIED UPON
FOR A REVERSAL OF THE
JUDGMENT APPEALED FROM

The errors upon which the Appellant relies for the reversal of the Judgment appealed from are:

POINT I

BECAUSE OF THE EXCEPTIONAL CIRCUMSTANCES INVOLVED THE TRIAL COURT ERRED IN FAILING TO USE THE DOCTRINE OF ESTOPPEL TO PREVENT THE DEFENDANT-RESPONDENT MANTI CITY FROM OPENING THE 66 FOOT WIDE STRIP OF LAND USED AS PART OF PLAINTIFF-APPELLANT'S FARM AS A PUBLIC STREET.

POINT II

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT NUMBER 8, WHERE IT FOUND THAT THE 66 FOOT WIDE STRIP OF LAND BETWEEN PARCELS 99 AND 113, PLAT "A" MANTI CITY SURVEY, HAD BEEN USED AS A PUBLIC STREET.

POINT III

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT NUMBER 9, WHERE IT FOUND THAT THE PLAINTIFF OR HER PREDECESSORS IN INTEREST WERE NOT IN OCCUPANCY OF THE SAID 66 FOOT WIDE STRIP OF LAND AT THE TIME OF THE ENTRY UPON THE LAND BY THE CORPORATE AUTHORITIES OF MANTI CITY.

POINT IV

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT NUMBER 10, WHEN IT HELD THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT THE 66 FOOT WIDE STRIP WAS OCCUPIED BY ANY PRIVATE PERSON AT ANY TIME PRIOR TO THE DATE OF THE PATENT TO LUTHER T. TUTTLE, MAYOR OF MANTI, AND THAT IF THE 66 FOOT WIDE STRIP WAS NOT BEING USED AS A PUBLIC STREET AT THE TIME OF THE ENTRY, IT WAS VACANT AND UNOCCUPIED, AND ON JANUARY 25, 1892, WAS DEDICATED AS A PUBLIC STREET.

POINT V

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT NUMBER 12, WHEN IT FOUND THERE WAS NO EVIDENCE OF LEGAL ABANDONMENT OR ANY ABANDONMENT OF THE PUBLIC STREET BY MANTI CITY OR BY OFFICIAL CITY OR COUNTY ACTION.

ARGUMENT

This is an action in equity and in law. It is either admitted in the pleadings or is stipulated by the parties that Manti City is a Municipal Corporation, that the Plaintiff Ludean H. Cox is the owner and is in possession of Parcel 99 and Parcel 113, Plat "A" of Manti City Survey. Plat "A" of Manti City Survey shows a strip of land between Parcels 99 and 113 held in the name of Luther Tuttle, Mayor of Manti City in trust for the several use and benefit of the occupants of the City according to their respective interests. It is the Defendants' contention that the strip of land is a road and that they have possession of it. It is Plaintiff's contention that they and their predecessors in interest have always had the possession of the strip of land between Parcels 99 and 113, and that said strip of land has always been used as a part of the farming operation of Plaintiff and her predecessors. Plaintiff further contends that the City has never had possession of said strip of land, that there has never been a road located on it.

Plaintiff's testimony is to the effect that for over 40 years she has been familiar with the property, and during this time there has never been a public road across the premises.

Dr. H. R. Clark, a life long resident of Manti, testified that his father owned the land immediately north of Parcel 113. He testified he could remember for over seventy years, and that based upon his memory and familiarity with these premises he knew there had never been a public road across them, and that the strip of land, if there was one, had always been used by the occupants of the land as part of their farm.

Grant Cox, husband of the Plaintiff testified that he had been farming the premises since approximately 1933, and knew that since that time there has never been a road across the land.

The Court admitted in evidence Civil Case No. 786 in the District Court in and for Sanpete County, wherein a Petition was filed by Fred Jensen and others -vs- Manti City, praying for the detachment from the City limits of certain territory, including Parcel 99 and Parcel 113, and the strip of land located between them. This Petition was signed by over $\frac{3}{4}$ ths of the farmers owning land immediately north of Manti City, including plaintiffs predecessors in interest. The Petitioners on March 4, 1910, stated that they were the owners of the land immediately to the East and North of the boundaries of Manti City, that the land was used for agricultural purposes, that the land was located outside the City as indicated by streets and roads, and they stated that the land was situated out of and remote from the range of Municipal benefits, there being no streets, alleys, or sidewalks, or any other improvements thereon. They also stated that the land had not been utilized or needed for Municipal purposes, and it was entirely unlikely and improbable that the City would ever be extended to, or upon said land, or that any streets, driveways, or other improvements would ever be had or made.

In response to the Petition an Order was served upon Manti City in the same manner as a Summons. A Publication of Notice was published in the Manti Messenger for ten days, and the Default of Manti City was entered on April 4, 1910. The Court appointed three Commissioners to adjust

the terms of the property to be severed, and to determine the mutual property rights of the City to the territory to be detached. The Commissioners reported there was no property belonging to said City, or in which the City had any interest, located or situated on or upon the said described territory, or any part thereof. This covered Parcels 99 and 113 and the 66 foot strip of land now claimed by Manti City. The Court on May 20, 1910, by A. J. Christensen, Judge, issued an Order in pursuance to the Commissioners' report and prayer, and it was ordered that the territory be disconnected and segregated from Manti City.

In comparison with the Plaintiff's evidence the Defendants presented the testimony of three witnesses, namely, William Terry Hall, F. W. Cox, and Ambrose Tuttle.

In analyzing the testimony in the best light favorable to the Defendants, Mr. Hall testified that he had travelled across this land, and that there was a bar-gate on the West end of the William Bench land, and a bar-gate on the Haze Clark land, which incidently, Haze Clark is the same as Dr. H. R. Clark that testified there had never been a road on the premises. Mr. Hall stated that there was a road running West from 1st East to the Cannery, that if they wanted to go through they lifted the bars down and traveled across the land. He knew there was a road because when he was a kid he and his father hauled hay across it. He stated other people used it, but he couldn't say who. He also stated that he went over it to avoid going into Manti City and around to 5th North and back. He stated that Brother Clark, Mr. Bench, Old Mr. Barton and Shomaker never objected. He stated that he and his father always respected the rights of

the land owners.

Mr. Fred W. Cox testified that he farmed with his father William Arthur Cox in 1905 or 1906 to 1911. He claimed that he had crossed this land on numerous occasions, and then stated that the bars of the gates were on the land of "Uncle Haze Clark". Viewing his testimony in the best light, it appears that he had gone across part of the premises, but that the gate was not on the strip of land between Parcel 99 and Parcel 113, but was farther North on the Clark property, North of Parcel 113.

The last witness relied upon by Defendants was Ambrose Tuttle. He testified that on two different occasions he took equipment on the land known as the Cox premises. That there was a road on the farm land, and in order to get to it from the West he had to cover a deep ditch using 2 by 4's. He testified he did not know if it was a public road. He also testified that he had gone over most of the roads and lanes in Sanpete County and on many individual's farms.

In reviewing the testimony of all three witnesses, none testified there was a fenced road separating Parcel 99 and Parcel 113. The witnesses Hall and Cox testified that the bar gate on the East of the road was farther North than Parcel 113, and consequently they did not have the alleged road located where Defendant Manti City now claims a road to be.

The Trial Court placed the burden of proof on the Plaintiff to show an occupancy of the 66 foot strip of land between the parcels prior to the date of the Patent. It is the contention of the Plaintiff that the burden should have been on the Defendant to show that there was a dedicated

road between the parcels. Plaintiff contends that before the Mayor of Manti City received the Patent from the United States Government there were occupants of the premises known as Parcel 99 and 113, and consequently the premises located between the Parcels. Because of the great length of time that has elapsed since 1871, it is impossible for anyone to obtain witnesses to testify to the occupancy of the land before that time. However, Plaintiff has evidence back 70 years or as long as memory of man and that evidence is to the effect there has never been a road over this 66 foot strip of land.

The Court should also apply the Doctrine of Equitable Estoppel as was done by our Supreme Court in Wall -vs- Salt Lake City, (50 Utah 592, 168 Pacific 766) in view of the exceptional circumstances involved. The Trial Court distinguished Wall -vs- Salt Lake City from the present case because Plaintiff had failed to show an affirmative act on the part of the City as a basis for the Plaintiff's and her predecessors' actions in occupying the said land. The Plaintiff contends that the Doctrine of Equitable Estoppel cannot be subjected to fixed and settled rules of universal application, like legal estoppels, or hampered by the narrow confines of a technical formula. (19 Am. Jur. 642) The Plaintiff further contends that there was such in-action on the part of the City under this exceptional state of facts and under the Civil Case detaching this property from the City limits to warrant Plaintiff's improving the land and the Court to apply the Doctrine of Equitable Estoppel.

POINT I

BECAUSE OF THE EXCEPTIONAL CIRCUMSTANCES INVOLVED THE TRIAL COURT ERRED IN FAILING TO USE THE DOCTRINE OF ESTOPPLE TO PREVENT THE DEFENDANT-RESPONDENT MANTI CITY FROM OPENING THE 66 FOOT WIDE STRIP OF LAND USED AS PART OF PLAINTIFF-APPELLANT'S LAND AS A PUBLIC ROAD.

Although there is some authority to the contrary, it has been more generally held and recognized that under some exceptional circumstances a Municipality may be estopped to open or use a street or alley heretofore created and still existing in point of law, but never opened, or once opened and in use, since fallen into disuse and seemingly abandoned, and it seems fair to say that the weight of authority sustains the possibility of a Municipality being estopped in this respect. (See 171 ALR Page 98, Wall -vs- Salt Lake City, 50 Utah 593, 168 Pacific 766).

The Oregon Court in Dabney -vs- Portland, (124 Oregon 54, 263 Pacific 386) held:

"No hard and fixed rule can be stated for determining when this principle (Estoppel in pais against a municipality) should be applied. Each case must be considered in the light of its own particular facts and circumstances."

In 171 ALR 107 it states:

"Among the cases, there appears to be rather general agreement that an equitable estoppel precluding a municipality from opening or using a public

street will arise only under exceptional circumstances strongly calling for the application of that doctrine to prevent manifest injustice.”

It goes on further to say:

“One basic requirement for the existence of such an estoppel against a municipality is that the conduct of the municipality and the situation of the one in possession of the street or alley area must, as a whole, be such that it would be clearly inequitable to allow the municipality to open the street and destroy and remove the private improvements.”

Plaintiff believes that this is a case where justice should require the Defendant-Respondent be estopped from opening the alleged road. There is no evidence that there was ever a fenced or an improved street or any houses or buildings located near it. The testimony of the nearest neighbor, who has been familiar with the property his entire life (over seventy years) was that there has never been a road or a street where Defendant contends it is located and that the strip of land has never been used by the public. The evidence is to the effect that as long as man can remember the strip of land between the Parcels has been used as part of the Plaintiff and her predecessors' farm. There is also so the ancient case, Civil Case No. 786, filed in the District Court in and for Sanpete County, namely Fred Jensen and others -vs- Manti City, for the detachment of land North of Manti from the City limits. This action was commenced by a Petition signed by more than $\frac{3}{4}$ ths of the farmers owning land in the vicinity. This Petition in 1910

stated that the land was situated out of and remote from the range of municipal benefits, there being no streets, alleys, or sidewalks or any other public improvements therein. The Court adopted the report of the Commissioners, wherein they reported there was no property belonging to said City or in which the City had any interest.

Over 30 years elapsed after the Court's Decree and the Plaintiff went to great expense in making improvements on the premises in accordance with good farming procedures. The entire 80 acre farm of the Plaintiff was leveled and an engineered cement irrigation system was installed at a cost in excess of \$15,000.00, in order that the utmost benefit could be derived from the irrigation water available for the said farm. The leveling and irrigation system greatly enhanced the value of the farm. When the Defendant-Respondent made its swath through the farm with the grader, it destroyed the grade for the irrigation system and the entire 80 acre farming operation of Plaintiff was substantially damaged. Plaintiff contends that when the Municipality failed to contest the allegations in the Detachment Proceedings, Civil Case No. 786, its negative conduct was even stronger than the affirmative conduct of the City in the case of Wall -vs- Salt Lake City, and that such negative conduct was of a type which would mislead and induce the Plaintiff to place the improvements on this farm and consequently on this strip of land under a claim of right and in good faith. Plaintiff-Appellant contends that these facts present a strong basis for an estoppel precluding the Municipality from opening up this strip of land as a road.

In *Boise City -vs- Wilkinson* (16 Idaho 150, 102 Pacific 148) the Court applied the Doctrine of Estoppel:

“We recognize that, as a general rule, the doctrine of estoppel does not apply to municipal corporations, and we are not unmindful of the fact that the courts of many states have absolutely refused to apply it to such corporations. We are not prepared, however, to announce an unalterable and unexceptionable rule in this state, which would inevitably result in perpetrating wrong and injustice in exceptional cases like this. Courts of equity are established for the administration of justice in those peculiar cases where substantial justice cannot be administered under the express rules of law, and to adopt a rigid rule that recognizes no exception would be to rob such courts of much of their efficacy and power for administering even-handed justice. The people in their collective and sovereign capacity ought to observe the same rules and standard of honesty and fair dealing that is expected of a private citizen. In their collective and governmental capacity they should no more be allowed to lull the citizen to repose and confidence in what would otherwise be a false and erroneous position than should the private citizen.”

In our case we are not concerned with a street where there are houses and barns located next thereto, but with a strip of land outside of the City limits which has been used and improved as part of an irrigated farm.

In *Wall -vs- Salt Lake City*, (50 Utah 593, 168 Pacific 766) this Court held that:

“Whether or not the ground in dispute was a platted street at the time the town site was entered, and whether or not it was platted at that time and recognized by persons conveying adjacent property, and whether or not occupants of the land, in presenting their claims to the probate court, by not claiming certain ground platted as streets, thereby abandoned any right they may have had or became barred by the statute of limitations, and whether or not the federal grant under which the town site was entered should be construed one way or the other, are questions which are not in the least degree controlling in view of the conclusion at which we have arrived.”

The Court then went on to say that the question is:

“Whether or not the Defendant City is estopped by reason of its own conduct from now claiming title to the property in question.”

The Court held that the Defendant by its acts, conducts and representations was estopped in setting up any claim whatsoever to said property, or any part thereof, for any purpose whatsoever. The Court held that a Municipal Corporation can no more profit by fraud upon property owners than an individual, and may be estopped by its conduct.

In Wall -vs- Salt Lake City, 21 years had elapsed from the first adoption of the Plat of Freemont Heights before the Defendant suddenly entered upon the premises and commenced work which finally culminated in the commencement of the action. Our Supreme Court held rightly that

it was its duty to decide as right and justice required. In our present case over 40 years have elapsed since anyone other than the owners went over the premises, and examining all the evidence together, it is very doubtful if anyone other than the Surveyor intended a road to go over this strip of land, and certainly there has been no road over the premises as long as man can remember.

In Washington -vs- Walla Walla (3 Washington 68, 13 Pacific 408) the Court stated:

“On the entry of lands, the interest of the public attached to those streets and alleys which exist as a fact at the time of the entry, either by actual use or by consent and acquiescence of the occupants affected, and not streets or lots laid out upon paper to which the occupant has never given his consent.”

In examining the cases, it is true that they exhibit considerable differences in theory and in application of theory. This Plaintiff believes that each case must be considered based upon its own facts. In this case, Manti City's failure to contest the partition action and to show there were allegedly streets within the area partitioned is such inaction as to wrongfully mislead the Plaintiff into believing that she could make the improvements on the land. Of course, it is the Plaintiff's contention that the City did not take any action because there never was a street and there was never an intent to have a street at this location.

In 171 ALR 110 it also states:

According to one substantial line of authority, an estoppel to open or use a street may arise where there is long-continued non-user by the Municipality, together with possession of the street area by private parties acting in good faith and in the belief that its use or once intended use as a street had been abandoned, and their erection of valuable improvements thereon without objection from the Municipality, which has knowledge thereof and the situation is such that to permit the Municipality to reclaim the land would result in great damage to those in possession.

POINT II

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT NUMBER 8, WHERE IT FOUND THAT THE 66 FOOT WIDE STRIP OF LAND BETWEEN PARCELS 99 AND 113, PLAT "A" MANTI CITY SURVEY, HAD BEEN USED AS A PUBLIC STREET.

There is no evidence that there has ever been a fenced road on this strip of land and the testimony upon which the Court based this finding did not even have the alleged road on the strip of land involved. According to the testimony of the Defendants-Respondent's witnesses, the only traveling on the alleged road was when there were bar gates to get in the large cow pasture. The East bar gate was not located between the Parcels 99 and 113 which are on each side of the strip of land in question. Contrary to the Court's findings, Dr. H. R. Clark of Manti, who has been familiar with

this land for over 70 years testified that there has never been a road over the premises. It is the Plaintiff's contention, consequently, that the Trial Court erred in making its finding that this strip of land had been used as a public street. Also the Plaintiff once again calls the Court's attention to the 43 signers of the Petition in the District Court of Sanpete County, Civil Case No. 786, who stated there had never been a road across said premises and there was not a road across the premises in 1910.

POINT III

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT NUMBER 9, WHERE IT FOUND THAT THE PLAINTIFF OR HER PREDECESSORS IN INTEREST WERE NOT IN OCCUPANCY OF THE SAID 66 FOOT STRIP OF LAND AT THE TIME OF THE ENTRY UPON THE LAND BY THE CORPORATE AUTHORITIES OF MANTI CITY.

This finding is not based on any evidence in this record. The Territorial Townsite Act recognized the necessity of having streets and authorized the proper authorities to designate such grounds as were at the time of the entry in the land office being so used for public use and to hold title thereof for such public use absolutely, but the acts did not authorize the Corporate authorities to designate for public use lands which at the time of the entry were being occupied for private purposes, and thereafter hold the title thereto absolute and without consent of the occupant. Plaintiff contends that because the Deeds from the Mayor of Manti City, dated December 14, 1871, recorded March 12, 1874 on Parcel 99, and Deed dated December 21, 1871, re-

corded January 10, 1872, as to Parcel 113, is prior to the date of the patent is evidence to the effect that the farm lands involved including the strip between them were occupied prior to the patent. The mere fact that the Plaintiff's predecessor had not been adjudged to be the owner of the strip of land was not an adjudication of said strip of land between the Parcels in the event there was not a public road on it at that time and Plaintiff contends the Mayor is still holding title to said strip of land in trust for the occupants of said land.

It is Plaintiff's contention that the Trial Court in making this finding, put the burden of showing who was in occupancy of the 66 foot strip of land on the Plaintiff, when in truth and in fact the burden should have been on the Defendant to show a dedication of the street.

Plaintiff does not feel that this Supreme Court should hold in the case of Hall -vs- North Ogden City that the city was holding the property in trust for the occupants of the land and then distinguish the Hall case from the present situation because the memory of man does not go back far enough. There is no question but that this land (alleged road) has been occupied as part of the farm of plaintiff for in excess of 70 years.

POINT IV

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT NUMBER 10, WHEN IT HELD THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT THE 66 FOOT STRIP WAS OCCUPIED BY ANY PRIVATE PERSON AT ANY TIME PRIOR TO THE

DATE OF THE PATENT TO LUTHER T. TUTTLE, MAYOR OF MANTI CITY, AND THAT IF THE 66 FOOT STRIP WAS NOT BEING USED AS A PUBLIC STREET AT THE TIME OF THE ENTRY, IT WAS VACANT AND UNOCCUPIED, AND ON JANUARY 25, 1892, WAS DEDICATED AS A PUBLIC STREET.

The Court held in Hall et al -vs- North Ogden City et al, that there must be a dedication to have a public street. On page 341 the Court said:

“Before a dedication of a street to the public use can be effected, there must be an intention to so dedicate such lands on the part of the owner thereof or he must act in such manner as to be estopped from denying such intention. Such intention may be shown either by oral or written declarations or it may be inferred from the surrounding facts and circumstances of the case but in all cases such intention must be clearly manifested.”

The Trial Court held in the present case that if the 66 foot strip of land was not being used as a public street at the time of the entry, it was vacant and unoccupied. This in spite of the fact that the lands on both sides of it was being farmed. Dr. Clark's memory goes back to 1892 and he says there was no road on the premises at that time.

It also was held by the Court in Hall et al -vs- North Ogden City et al on page 341 that the filing of the Plat did not prove an intention on the part of the owners to dedicate streets platted therein to public use, in absence of a showing that the owners had anything to do with the preparing or filing of the Plat.

The Court further held in Hall -vs- Salt Lake City:

“The mere conveyance by the owner of a tract of land describing it by reference to a map or plat thereof without the other elements above mentioned neither shows an intention to dedicate the streets therein platted nor estops the owner from denying such intention.”

In our case there is no evidence of any oral or written declarations of any occupant at any time. The dedication must be inferred from the surrounding facts and circumstances and according to Hall et al -vs- North Ogden City et al, the intention must be clearly manifested. There is no evidence that the owners had anything to do with preparing or filing the Plat, so the mere filing of the Plat does not prove any intention to dedicate and the mere fact that the conveyances were made with references to the Plat does not show an intention to dedicate or estop the occupants from denying such intention.

POINT V

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT NUMBER 12, WHEN IT FOUND THERE WAS NO EVIDENCE OF LEGAL ABANDONMENT OR ANY ABANDONMENT OF THE PUBLIC STREET BY MANTI CITY OR BY OFFICIAL CITY OR COUNTY ACTION.

There is no evidence of there ever having been a public street on the said strip of land and if there has never been a public street, there never could be an abandonment.

CONCLUSION

The Plaintiff-Appellant LuDean H. Cox, submits that the decision of the Court based upon its Findings of Fact and Conclusions of Law is in error. The questions before this Court are:

First: Are the particular facts and circumstances in this case such that it would be clearly inequitable to allow the Municipality to open the street and destroy the improvements; and

Second: Where the great preponderance of the evidence is to the effect there has never been a road across the strip of land, will the mere fact that it is platted road be sufficient to warrant the Municipality to open up this land for a road outside the City limits when it has been used as part of a farm in excess of 70 years?

The Judgment should be reversed and this Court should hold that there is not one rule of morals for a Municipality and another for an individual, that the Doctrine of Equitable Estoppel should not be subject to fixed and settled rules of universal application hampered by the narrow confines of a technical formula, and that instead each case should be considered in the light of its own particular facts and circumstances.

The Plaintiff-Appellant respectfully requests that this case and cause be remanded to the Court below with instructions that the Court prevent the City from entering the premises and the Court fix the damages caused to the Plaintiff based upon the evidence submitted.

Respectfully submitted,

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Manti, Utah.