MUNICIPAL CORPORATIONS: Cities of the 4th class may acquire easement in street for storm sewer, and may maintain same after street is vacated for travel.

FILE 35

September 11, 1944

9-16

Mr. Percy W. Gullic
Prosecuting Attorney
Oregon County
Alton, Missouri

Dear Mr. Gullic:

Further consideration is here given to your letter of August 5 and the correspondence incident thereto all of which is as follows:

"Mr. Percy W. Gullic
Prosecuting Attorney
Alton, Mo.

Dear Percy:

We have a situation here that the Mayor asked me to write you about and ask if you would write the Attorney General for an opinion. It is this:

"In 1938 the City Board vacated a city street. It is the part of First Street on the hillside just behind the Wall Drug Store. Under the law as you know when a street or alley has been vacated by order of the City Board, the land so vacated goes back to the property from which it originally was taken. Well in this case Rufus W. McLelland owns the land in question. He has had a survey made and finds that across part of this vacated land is a city storm sewer. It runs across the front part on the alley. He has requested the city to remove the sewer. The question now is: can he force the city to move the sewer?. It was built across this land in 1922 when the land belonged to the city as a public street.

"I would appreciate very much if you would try to get an opinion for us from the Attorney General.

"Hon. Roy McKittrick
Attorney General
Jefferson City, Mo.

Friend Roy:

"I am herewith enclosing a letter I have from the City attorney of Thayer, Missouri, requesting an opinion in said matter.

"Will you please forward me an opinion as soon as you find time, for which I will thank you very kindly.

"Also herewith I send you my congratulations, and sincere support for a great victory this fall."

"Mr. Percy W. Gullic
Prosecuting Attorney
Oregon County
Alton, Mo.

Dear Mr. Gullic:

"Your letter of August 5 has been received. Your letter states:

* *

"Your letter is accompanied by the letter of Mr. T. W. Mesara, Attorney at Law of Thayer, Missouri which states:

* *

"Your request for an opinion covering the subject matter stated in Mr. Mesara's letter is receiving attention by the writer to whom the matter has been assigned for writing the opinion.

"The writer has spent considerable time in studying the decisions of Missouri and other jurisdictions and other authorities on the principles involved in the question submitted.

"But the writing of an opinion that will be helpful in arriving at the correct solution of the problem involved will depend upon a statement of the facts in the case.

"It will be appreciated if you will supply this department with the following facts:

"(1)What method was followed in establishing the street in which the storm sewer is constructed? Was the street dedicated to public use by deed or by the filing of a plat dedicating the street as a part of an addition? Or was the use of the ground involved acquired by the city as a street by prescription.

"(2) Was the storm sewer constructed in the street ordered to be so constructed by ordinance, and, if so, was there any notice to the abutting property owners or any protest agaisst its construction?

"(3) What proceedings were followed in vacating the street in 1938? Did the city pass an ordinance ordering the vacation of the street, or was there a petition filed in the County Court of Oregon County with notice to the abutting property owners?

"The purpose of requiring this information is to determine first where the title to the real estate formerly used as the street in question in the city of Thayer and upon which the storm sewer was constructed in 1922, and which was vacated, or attempted to be vacated in 1938, rests.

"The opinion to be later written on this question will depend very largely on the state of facts as they exist under the questions which have been stated. So please give us a complete and accurate statement of those facts as your earliest convenience."

"Mr. Percy W. Gullic
Prosecuting Attorney
Alton, Missouri

Dear Percy:

"The Attorney General asked for further information regarding the vacating of the street in question that I wrote you about some time ago. I will try to give the information that he desires.

"First: The street was originally dedicated to public use by plat when the town was first laid out. The plat is a matter of record.

"Second; The storm sewer was not ordered constructed by ordinance but the minutes of the City Clerk show

that the matter of construction was discussed with the property owners and it was agreed that the cost would be divided between the city and the property owners served by the sewer in that block. This was in the year 1922.

"Third: When the street was vacated in 1938 it was done by an ordinance of the City, but upon the petition of all the adjoining property owners in that block.

"I think this answers the questions asked by the Attorney General in his letter to you under date of August 15th."

"Hon. Roy McKittrick
Attorney General
Jefferson City, Mo.

Dear Sir:

I believe the above answers your questions in your letter hereto attached."

The letter of Mr. Mesara of August 25 in reply to my request for a statement of the method by which the ground constituting First Street in the City of Thayer was acquired by the city for a street, (2) whether the storm sewer in question was ordered constructed by ordinance, and (3) what proceedings were followed in vacating said First Street in 1938, states the following to be the facts, viz:

"First: The street was originally dedicated to public use by plat when the town was first laid out. The plat is a matter of record.

"Second: The storm sewer was not ordered constructed by ordinance but the minutes of the City Clerk show that the matter of construction was discussed with the property owners and it was agreed that the cost would be divided between the city and the property owners served by the sewer in that block. This was in the year 1922.

"Third: When the street was vacated in 1938 it was done by an ordinance of the City, but upon the petition of all the adjoining property owners in that Block."

Having relation to the facts stated in Mr. Mesara's letters, your letter requests an opinion from this department whether the abutting property owners can compel the City of Thayer to remove the storm sewer constructed in said First Street in 1922, in as much as said street was vacated by the city in 1938.

The text writers lay down the rule that a street may be established by following any one of several methods. Corpus Juris under the subject of Municipal Corporations, Volume 44, page 884, Section 3601, states:

> "A street may be established as a public way by dedication, prescription, or statutory proceedings, and, as a general rule, a street can be established as a public highway only in these ways, although it is not necessary that the statutory course be pursued.* "

18 Corpus Juris, under the subject of Dedication, page 58, Section 43, sets forth the rule of the establishment of a street by dedication as follows:

> "Where the owner of real property makes a plat of it and divides the land into lots and blocks, intersected by streets and alleys, and sells any of the lots with reference to such plan, or where he sells with reference to the map of a town or city, in which his land is so laid off, he thereby dedicates the streets and alleys to the use of the public,* * * * * * * * * "
> (Citing Missouri cases under note 14.)

The Supreme Court of Missouri, in the case of Rose et. al. v. City of St. Charles, 49 Mo. 509, l.c. 511 gave its sanction to this rule where it states:

> "To show that the street filled by the city was so dedicated as to become public property, an agreement to dedicate it by a former owner of the property was offered in evidence against the objection of the plantiffs. It is not necessary, in order to constitute a street or alley in a municipal corporation, that the statutory course should be pursued. Any act by the owner of property setting apart to the public a portion of his property, clearly showing that such was his intention, vests the use of such property in the public for the purposes indicated;

> and if actually thrown open, the public may take possession. The usual course is to make a plan of a town or of an addition, setting apart streets, alleys, public squares, etc., and file a plat thereof with the recorder; but in the present case a contract was shown between the owner and purchasers of contiguous property, to dedicate certain streets of which the city has taken possession. The court correctly held this to be sufficient evidence of dedication. No ordinance is necessary.* * * * * * * * * * * * * * *"

In the case of **Taylor et. al. v. City of St. Louis, 14 Mo. 19, it is held That if any land was laid off by a proprietor as a part of a city and declared a part of the land as a public alley, no ordinance is required declaring that such is necessary. On this question the Court, Lc. 22, held:**

> "This case falls within the principle settled by this court in Gurno v. City St. Louis, 12 Mo. R. 414. The facts as we may assume them from the instructions are not distinguishable from the case of Callender v. Marsh, 1 Pick., 418. The whole subject is very fully discussed in Hooker v. New Haven & N. Co., 14 Conu. R. 146, and in the court of King's Bench in the Governor and Company of the British Cast Plate Manufacturers v. Meredith, 4 Yerger, 794.(a)
>
> "In the present action, the street or alley in question was laid out by the plaintiffs themselves or their ancestor, and the probability of its being graded, when the public interest required it, must have been calculated on when the buildings were erected. To grade a street or alley, already dedicated to public use, is not an exercise of the eminent domain so as to require compensation. It is not appropriating private property to public use, but simply an exercise of power over what is already public property. The damage resulting, by causing the plaintiffs to rebuild or prop up their falling walls is consequential, and as it is a consequence of the exercise of a power granted by the State to municipal corporations, for public purposes, and the power has not been abused, but skillfully and discreetly exercised, the city authorities are not responsible.
>
> "It is also objected in this case, that the alley in question had never been regularly declared by

ordinance as a public alley, previous to the passage of the ordinance which authorized its grading. This we think was unnecessary, since the proprietors had themselves, when laying off lands as a part of the city, declared it as a public alley. (b) Judgment affirmed."

Our Supreme Court held in the case of Hatton et. al. v. the City of St. Louis, 264 Mo. 634, l.c. 643 as follows:

"The pleadings and proof in this case require an application of the law governing the right of a city to acquire streets and alleys by a statutory and a non-statutory dedication and of the rule relating to the effect upon such titles of adverse possession for the period of ten years.

"The dedication of so much of his estate as was shown on the properly executed, acknowledged and recorded plat made by George Buchanan in his lifetime was in strict statutory form and vested title to the streets and alleys therein designated, without any act on the part of the city and was thereafter irrevocable by the dedicator or his heirs.* * * * * * * * * * *"

The Missouri Supreme Court announced the same rule in the case of The Town Of Ottervills v. Bente et. al. 240 Mo. 291, l.c. 295, 296 where it said:

"It is contended that the title to the parts of Grover and Boonville streets involved in this controversy never vested in the public, because, it is said, the plat was not properly executed and acknowledged and no acceptance of the particular parts of the streets mentioned is shown.

"If the evidence that the plat was duly executed, acknowledged and filed in the office of the recorder of deeds of Cooper county was true, this was a statutory dedication of the streets, and the fee thereto vested at once in the public by force of the statute (Sec. 8, Chap. 158, R. S. 1855), and no further acceptance was necessary. * * * * * * * * * *

"If the plat filed was defective and insufficient under the statute, it and the subsequent sale of lots thereunder, and building the town chiefly in this

> addition on the lots along the streets laid out therein and the acceptance by the town and the public of most of the streets in their entirety and the major portion of Grover and Boonville streets themselves, coupled with the sale, according to the plat, as indicated by the evidence, of all the lots abutting on the parts of Grover and Boonville streets now in dispute, constituted a common law dedication and an acceptance of the plat in its entirety and the whole of all the streets as marked on the plat.* * * * *"

It thus appears that the street known as First Street in the City of Thayer was, in fact, "originally dedicated to public use by plat when the town was first laid out", and that "the plat is a matter of record". It is conclusive, under the decisions of our Supreme Court cited above that said First Street was a legally established public street in said City by dedication.

Moreover, aside from the question of the dedication of said street as a public street under the statutory proceedings of including it in the orginal plat of the city and the recording of the plat, and its actual opening as a street, it would appear to have become a legally established public street by prescription by user for more than ten years, even had there never been a formal dedication. The authorities hold that a street may be established by that method.

Corpus Juris, Volume 44, Section 3604, page 886 and 887 states the rule as follows:

> "A street or an alley may be established by prescription, or long usage from which dedication and acceptance may be presumed, or from which the conclusive legal presumption may arise of establishment by competent authority. User by the public for more than forty years, or for more than twenty one years, or for more than twenty years, has been held sufficient as to time. So, user continuing for more than the time required by the statute of limitations to bar an action of ejectment may be sufficient,* * * *"

The Kansas City Court of Appeals held to the same effect in the case of McLemore v. McNeley, 56 Mo. App. 556, L.c. 562 in the following language:

> "As to the question of limitation, it is sufficient to say that it is now the well settled rule in this

> state that the public may acquire the right to the use of a road or easement on the land of another where from long use thereof as such by the public, acquiesced in by the owner, and the adverse occupancy and use of the same for a period of time equal to that prescribed by the statute of limitations for bringing actions of ejectment.'"

It must, therefore, be held that the street in question was up to the time of its vacation in 1938, a lawfully established street, viewed either from the standpoint of dedication by recorded plat or of prescription by user for more than ten years. (See Section 1002, R. S. Mo. 1939, with ten-year statute of limitations for recovery of land).

The rule of law is announced by text writers and the courts of every jurisdiction that a municipality may use a street for any public purpose if it does not interfere with its use as a highway by the public.

Volume 44, Corpus Juris, pages 937 and 938, Section 3702, states:

> "A municipality may use a street for any purpose not inconsistent with its use as a highway, and its rights are not limited to the mere surface of the street. For instance, it may lawfully use the streets for the construction of sewers, or for subways, or for drainage;* * * * * * * * * * * * * * "

McQuillin Municipal Corporations, 2nd Edition, Volume 4, page 407 and 408, Section 1553 holds that streets or alleys may be lawfully used for the construction of sewers and drains. The text of the citation states:

> "**Use of streets and alleys for sewers and drains.** The right to the use of a public street or alley by a municipal corporation for sewer and drainage purposes is necessarily incident to the use for which streets and alleys are opened and laid out. Such use is proper and lawful, is not inconsistent with the object of their establishment, and is not an additional burden on the easement, entitling the abutting owners or the owners of the fee to compensation. A grant of power will be liberally construed to this end. Furthermore, municipal corporations may lay sewers in public streets, whether the land for the street was acquired by dedication or by condemnation proceedings.* * * * * * * * * * * * * "

In 44 Corpus Juris, page 171, Section 2300 it is held that a lawful use to which streets may be subjected is the construction therein of sewers, drains, and water courses. Citing Heman Construction Company v. Lyon, 277 Mo. 628. The text announcing this is as follows:

> "As in the case of other improvements a city may, under express or implied power to do so, build, construct, maintain, improve, and repair sewers and drains. While it has been said that the right to lay sewers and drains in a street is a privilege annexed by usage and custom as an incident to the rights of the public in them, the power to construct and maintain drains, sewers, and sewerage systems, being a proper municipal function, may be conferred on a municipality by constitution, statute, or charter, expressly or by implication."

The Supreme Court of Missouri in the case of St. Louis v. Terminal Railroad Assn. et. al. 211 Mo. 364, held that the City of St. Louis had the right to use its streets for a lawful purpose that would not interfere with travel. The Court, l.c. 390, said:

> "It has been held by this court that the city has no right to give a railroad company a license to use a public street in such manner as to practically destroy its service as a public highway. * * * * * * * But that is not the condition which we are now to consider. The use that is designed to be made of Eighteenth and Twentieth streets by these approaches is an entirely public use, no one can make any use of it that every one cannot make; the approaches when constructed will be in their character as much public highways as the streets were before.* * * * *"

Our Supreme Court, in discussing the discretion that could be used by a municipality, under its implied powers, to construct a sewer system and to do all acts necessary to carry it into effect, in the case of Heman Construction Company v. Lyon, supra, l.c. 643, said:

> "The exercise of that discretion with which the legislative department of the city was vested in authorizing an improvement of the character here in question was within reason.* * * * * *The appellants were denied no substantial right and suffered no material injury. They were only required to bear a burden regularly imposed under the authority of the law. Of this they cannot complain."

It is stated in the statement of facts herein that the storm sewer in question was constructed in 1922. The statute in force at that time giving the Board of Aldermen in cities of the fourth class the power to make street improvements of or in the streets is Section 8512, R. S. Mo. 1919, which is as follows:

> "The board of aldermen shall have power to create, open and improve any public square, public park, street, avenue, alley or other highway, old or new, and also to vacate or discontinue the same whenever deemed necessary or expedient: Provided, that all damages sustained by the citizens of the city or the owners of the property therein shall be ascertained as prescribed in that portion of this article relating to the condemnation of private property for public use; and provided further, that whenever any public square, street, avenue or alley, or other highway, shall be vacated, the same shall revert to the owners of the adjacent lots in proportion as it was taken from them; and when the grade of any street or alley shall have been once established by ordinance, it shall not be lawful to change such grade without making compensation to all persons owning real estate on such street or square, avenue, alley or other highway, who may be damaged by such change of grade, to be determined and governed in all respects, with reference to benefit and damages, as is provided in this article."

It would thus appear that the City of Thayer had ample authority to construct the storm sewer as a street improvement or under the exercise of its police power for the general welfare and health conditions of the city.

It also appears from the facts stated by Mr. Mesara that the City Clerk's record shows that the storm sewer in question was constructed in 1922 after the matter was discussed with the property owners, and under the agreement with the property owners in the block to be served by the improvement, and that the cost of the storm sewer would be divided between such property owners and the city. The City of Thayer has maintained this improvement, exercised control over it, and used it as an easement belonging to the city for more than ten years--indeed, more than twenty years--without interruption by a suit or otherwise by abutting property owners on the street vacated in 1938 where the storm sewer exists, and with not only the ecquiescence but the participation in its construction by the then owners of property abutting upon said First Street.

19 Corpus Juris, page 876, under the title of "Easements" holds that a municipal corporation may acquire an easement. Section 21 states the rule as follows:

> "The inhabitants of a town or city, in their corporate capacity, may prescribe for easements or other incorporeal rights to the same extent as individuals."

An easement such as is embodied in the use of First Street in the City of Thayer for a storm sewer may be acquired by prescription by user for ten years, and if so acquired becomes a vested right in the city.

Corpus Juris, Volume 19, page 893, Section 63 on this point has the following to say:

> "Although it has been held that, in connection with other evidence, the adverse use of an easement for less than the prescriptive period may justify the presumption of a grant, the great weight of authority holds that, in order to acquire an easement by prescription, the user must be continued for the entire prescriptive period. This period, as heretofore shown, is in most jurisdictions the period limited for the acquisition of title to land by adverse possession, although most of these statutes do not in terms apply to prescriptive rights, but to the acquisition of corporeal hereditaments only. * * * * * * * * * * "

The case of Smith v. City of Sedalia, 152 Mo. 283 is cited as upholding the text of Corpus Juris above quoted under the ten-year statute of Missouri. That was a case in which Smith sued the City of Sedalia for damages for discharging sewage in a stream which flowed through his land. The city set up as a defense that it had acquired an easement by prescription so to do. Our Supreme Court, l.c. 297, held:

> "The theory of the defense advanced both in the answer and instructions, is that the city has acquired by long use a prescriptive right to empty its sewage into Cedar creek. That a prescriptive right to maintain a nuisance of the kind complained of by the plaintiff in this case may be acquired, is a well established principle of law.
>
> "The period requisite to establish such right is that which under the statute of limitations bars a right of entry which in this State is ten years. * * * *

> The user, however, upon which the prescriptive right is founded must be adverse in its character; mere permissive user can not create such a right. The burden is upon him who asserts the right to show not only the user but that it was exercised adversely and under a claim of right.* * *And the user relied upon must not only be of the same general character, but must have been exercised substantially in as offensive degree and to as great an extent as at the time the suit is brought.* * * * * * * * * * "

The case of Power v. Dean et. al. 112 Missouri Appeals, 288, is also cited in Corpus Juris under the same text. This was a suit involving the sole question of whether the plaintiffs had the right to an easement--the right to travel over it--on a small tract of land. The holding that an easement had been acquired by plaintiff to travel over such ground under the St. Louis Court of Appeal, l.c. 297, said:

> "As she executed no deed, the argument is that an easement, or right to use the strip as a private way, was never granted, because such a grant must be by deed. This proposition is sound too. But an easement in the nature of a private way may be acquired by prescription or ten years' adverse use, which is equivalent to a grant.* * *The question of a prescriptive right depends on adverse use for the limitation period.* * *A right to the private way acquired by adverse use is a vested right and not a license. * * * *"

Therefore, under the facts as stated and the decisions of our courts and the authority of the text books quoted above, the City of Thayer acquired as an easement the vested right to maintain the storm sewer in the street in question by prescription by more than ten years' user, long before this street was vacated in 1938.

The fact is stated that the City of Thayer by ordinance, upon the petition of all the property owners of the block on the street wherein the storm sewer exists and is now complained of, vacated the street in 1938.

Section 7062, Article 8, Chapter 38, R. S. Mo. 1929, which was the statute in force at the time of the vacating of the street in question, is as follows:

> "The board of aldermen shall have power to create, open and improve any public square, public park, street avenue, alley or other highway, old or new, and also to vacate or discontinue the same whenever deemed necessary or expedient: Provided, that all damages sustained by the citizens of the city or the owners of the property therein shall be ascertained as prescribed in that portion of this article relating to the condemnation of private property for public use: and provided further, that whenever any public square, street, avenue or alley, or other highway, shall be vacated, the same shall revert to the owners of the adjacent lots in proportion as it was taken from them; and when the grade of any street or alley shall have been once established by ordinance, it shall not be lawful to change such grade without making compensation to all persons owning real estate on such street or square, avenue, alley or other highway, who may be damaged by such change of grade, to be determined and governed in all respects, with reference to benefit and damages, as is provided in this article."

This statute gave the Board of Aldermen the power to vacate the street for travel, but their action in vacating the street for travel did not assume to abandon nor did it abandon the vested right in the city to the easement of maintaining the storm sewer in question. The mere vacating of the street for travel purposes did not operate to abandon the storm sewer or the easement held by the city to maintain and operate the same. It remained open and apparent to all, and has been continuously used as a public drain since the vacation of the street, all of which constitutes persuasive evidence that the city had no intention of abandoning its easement in the storm sewer. On the question of what does and what does not constitute abandonment of an easement Corpus Juris, Volume 19, page 941, Section 149, has this to say:

> "A party entitled to a right of way or other mere easement in the land of another may abandon and extinguish such right by acts in pais and without deed or other instrument in writing. This he may do without responsibility of any sort and without consulting the grantor where the easement was created by grant. The fact that the easement is created by statute does not affect the operation of the rule. Ordinarily the question of abandonment is purely one of intention. The acts relied on as evidencing this

> intent to abandon must be of an unequivocal and decisive character. Whether a party has abandoned his right to an easement is a question of fact for the determination of the jury, and is never a question of law for the court to determine. An abandonment is to be more readily presumed where the easement is granted for the public benefit than where it is held for private use, otherwise an inactive corporation might deprive the public of useful and beneficial improvements.
>
> "Abandonment of part of a right of way, the remainder of the right of way being still used as contemplated in the grant creating the right, will not extinguish, the entire right of way, but only so much of it as has been abandoned."

Hence, it may well be held that the vacation of the street for travel purposes by the city did not operate to abandon its easement in the ground formerly constituting the public street for storm sewer purposes.

All persons who participated in the construction of the storm sewer in question in said First Street and all persons who may have acquired abutting property from them, or who claim under them, with notice of the storm sewer are now estopped to deny the right of the city to continue to maintain the same on that part of the abutting lots which formerely constituted part of the street after the street was vacated. The doctrine of equitable estoppel or estoppel in pais applies to the case. The matter of the construction of the improvement was taken up with the property owners served by the sewer and discussed with them, and they agreed to participate and did participate in making the improvement by dividing the cost thereof with the city. Thereupon, in 1922 the city constructed the storm sewer in the street. They stood by all these years-- more than ten years-- prior to the vacating of the street in 1938, and until the city had acquired a vested right in the land by prescriptive use as a public easement, and for a period of six years after the vacating of the street in 1938 with out protest. Having thus participated in making the improvements and having acquiesced in its location and maintenance by the city they are estopped to claim now that the city lost its easement in the ground for storm sewer purposes by vacating the street for travel. On this proposition Corpus Juris, Volume 21, pages 1160, 1161, 1162, Section 163 says:

> "One who with knowledge of the facts and without objection suffers another to make improvements or expenditures on, or in connection with, his property, or in derogation of his rights under a claim of title or right, will be estopped to deny such title or right to the prejudice of that other who has acted in reliance on and been misled by his conduct; and a fortiori is applicable where the party against whom the estoppel is claimed not only makes no objection but assists in making the improvements. The estoppel may arise, even though the period of acquiescence is very short.* "

This question has often been before our Supreme Court. In the case of Dodd v. The St. Louis & Hannibal Railway Company, 108 Mo. 581, l.c. 585 the Court held:

> "The verdict was for the defendant, and it is now assigned for error that the court misdirected the jury by telling them that, if plaintiff and those from whom he derived title acquiesced in the building of the railroad on said land, he could not recover.
>
> "It is well settled in Missouri that ejectment will lie where a railway company builds its road over land to which it has acquired no requisite title by condemnation or conveyance or license, express or implied.* * * *
>
> "And it is equally well settled that a party, who, with full knowledge, stands by and permits a company to expend large sums of money in the construction of a railroad through his land without objection, forfeits his right of ejectment.* * * *This right is forfeited by virtue of the application of the doctrine of estoppel as well as the intervention of public interests.* * * * * * * * * * * * * * * * * "

In the case of Collins v. Rogers, 63, Mo. 515, l.c. 516, our Supreme Court on this question, said:

> "We think the proof ample to show that a mistake was made in the conveyance executed by plaintiff to his brother, James H. Collins. In addition to that, plaintiff acted as the agent of his brother in effecting the trade with Barlow, sent the deed on to Illinois to his brother to have it executed, and represented that his brother had the title,

> and afterwards delivered the deed obtained from his brother, and received the money for the land, Moreover, plaintiff stood silently by for years, while defendant, in good faith, has made valuable and lasting improvements on the disputed premises.
>
> "Taking into consideration all the foregoing circumstances, we feel no hesitancy in affirming the judgment of the trial court."

In the case of Miller & Lux v. Land Company, 99 Pac. 179, a California case, the plaintiff, a corporation, and the defandant, a land company, had agreed that plaintiff should construct a canal and canal gate leading from a reservior of water controlled by defendant to lands of plaintiff. Plaintiff constructed the canal and gate and was invited and encouraged to do so by the defendant, and defendant saw the work going on until the same was finished, and saw plaintiff using the canal and gate to convey water to plaintiff's land for several years. Defendant built a dam across the canal which destroyed plaintiff's use thereof. Plaintiff sued and had judgment in the lower court. Defendant appealed. The Supreme Court of California, p. 180in affirming the case, said:

> "From another point of view the complaint is equally impregnable against attack upon demurrer. The allegations above quoted, with others which the complaint contains, may be treated, and they are sufficient when so treated, as a pleading of estoppel in pais. The findings in support of these allegations establish that the defendant, knowing the purpose and nature of the work about to be done by plaintiff's grantor, assented to, aided and encouraged him in, the performance of this work, upon which was expended a considerable sum of money. Here are clearly present all facts necessary to establish such an estoppel. And thus, by this estoppel, defendant is forbidden to deny the granting of the parol license. The evidence is sufficient to support these findings."

The case of Kiowiatkowski v. Duluth Superior Dredging Co. 167 N. W. 970 (Mich.) was a case where the defendant, Dredging Co., deposited materials such as sand, silt, and gravel dredged from a river on the lands of plaintiff to his damage as he claimed. He sued and had judgment in the lower court. On appeal, the Supreme Court of Michigan in reversing the case,

l.c. 972 (2d) said:

> "It was the contention of defendant at the trial and the testimony tended to support it that Mr. Linton, as trustee for the Saginaw board of trade, attempted to secure from plaintiff the right of way across his land for the boulevard; that plaintiff refused to sell, but suggested a trade or exchange might be made for other land in the vicinity; that plaintiff did, however, give Mr. Linton permission to make the deposit on his land, and the inference from the testimony is that the question of trade or exchange would be taken up later; that plaintiff was there every day while the forms were being constructed on his land to hold the dredged materials in place;and that plaintiff gave some assistance in that work, and that he entered no protest during the time, and neither did he object during the seven days the dredging was being done. Under these circumstances, defendant claims that it had the right to take the judgment of the jury as to whether plaintiff acquiesced in the work while it was going forward, and that they should have been instructed that if he did so acquiesce he could not now be heard to say that defendant was guilty of a trespass.
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> "It is nearly always difficult to say whether the doctrine of equitable estoppel should be applied to a given state of facts. It appears to me, however, in the case under consideration that if the jury were impressed with the foregoing testimony they would be justified in finding that plaintiff so far acquiesced in the work as to preclude him from claiming that defendant was guilty of a trespass in making the deposit on his land. But it is urged that mere silence will not preclude him. This undoubtedly is true, but if defendant's testimony is to be believed, there was something more than mere silence, The plaintiff not only refrained from making any objection, but assisted in erecting some of the forms. He admitted, upon cross-examination, that he saw the forms on the Tyler place immediately north of him, and saw the dredged materials go into them before the work was undertaken on his premises. He made no protest then, nor did he protest while the operations were going on on his premises. Not only by his silence, but by his act, did he give credence to the talk which defendant understood that he had

had with Mr. Linton. I am of the opinion that these facts call for the application of the doctrine of estoppel in pais, and this view is supported by the recent opinion of Mr. Justice Kuhn, in Morrison v. Electric Light, etc., Co., 181 Mich, 624, 148 N. W. 354.* * * *The failure to give this request was prejudicial error."

It must, therefore, be held that the property owners who participated in the construction of the storm sewer in question, by paying a part of the cost thereof, and those who acquiesced in its use and maintenance by the city thereafter, as well as all purchasers who may have acquired any of such land with either actual or constructive notice of the use of the same for a storm sewer easement by the city are estopped to deny the city's right now to the easement. What constitutes notice and sufficient notice in such cases is contained in the text of 19 Corpus Juris, Sections 145 and 146, pages 939 and 940:

"One who purchases land with notice, actual or constructive, that it is burdened with an existing easement takes the estate subject to the easement, and will be restrained from doing any acts which will interfere with the benefit and enjoyment of the easement to the full extent to which the party having a right thereto, who has not parted with or impaired the same, was entitled at the time when such purchaser bought. He has no greater right than his grantor to prevent or obstruct the use of the easement. The rule applies whether the sale is voluntary or involuntary. Frequent applications of the rule are found in the case of private rights of way, stairways, and water rights.

"Notice of an easement may be imputed to the purchaser by a properly recorded instrument in which the easement is granted. And where the use of the easement is open and visible, the purchaser of the servient tenement will also be charged with notice, and that too although the easement was created by a grant which was never recorded. Nevertheless the purchaser of property may assume that no easements are attached to the property purchased which are not of record except those which are open and visible, and he cannot otherwise be bound with notice. There should be such a connection between the use and the thing as to suggest to the purchaser that the one estate is servient to the other."

CONCLUSION

Considering the facts stated in the request for an opinion herein, and applying the text law and decisions of the courts, in the authorities and cases cited and quoted, to such facts and conditions involved, it is the opinion of this department that the City of Thayer had a vested right as a perpetual easement in the ground formerly constituting First Street in said city to use the same for storm sewer purposes, notwithstanding said street was vacated in 1939, and that said city can not be compelled by any abutting property owners to remove said storm sewer or compel the discontinuance of any use thereof as an easement in the ground formerly used as a part of said First Street.

Respectfully submitted,

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GWC:MEB