

1957

J. P. Gibbons and Virginia L. Gibbons v. Salt Lake City Corporation : Brief of Appellant

Utah Supreme Court

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7-1-1930

Case No. 8596

**IN THE SUPREME COURT
of the
STATE OF UTAH**

FILED

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J. P. GIBBONS and VIRGINIA L.
GIBBONS,

Clk., Supreme Court, U. S.

Plaintiffs and Respondents,

—vs.—

SALT LAKE CITY CORPORATION,

Defendant and Appellant.

BRIEF OF APPELLANT

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City Attorney

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IN THE SUPREME COURT of the STATE OF UTAH

J. P. GIBBONS and VIRGINIA L.
GIBBONS,

Plaintiffs and Respondents,

—vs.—

SALT LAKE CITY CORPORATION,

Defendant and Appellant.

Case No.
8596

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an action to quiet title to a strip of land 21 feet wide east and west and 140.99 feet long, north and south. The complaint is in the usual form of a quiet title action and prays for a decree quieting title in plaintiffs. The defendant's answer denies plaintiffs' ownership and possession of said strip and alleges that defendant has been in possession thereof for more than 80 years for street purposes and that it is a part of a public street of defendant Salt Lake City. Defendant also claims the action is barred by Section 78-12-5 and 78-12-6, Utah Code Annotated, 1953, and that defendant has had adverse

possession for more than 7 years prior to the commencement of the action. Defendant prays that title be quieted in it.

The issue raised in the case is whether this strip is a part of 21st East Street in Salt Lake City or is a part of the property claimed to be owned by plaintiffs by virtue of a deed to them in which the property description gives the commencement point as "beginning at the original southeast corner of Lot 1, Block 27, Five Acre Plat "C", Big Field Survey, which point is located South 89° 57' W. 23.40 feet and North 31.77 feet from the Salt Lake City Street monument located at the intersection of 13th South and 21st East Street." The City contends that the southeast corner of said Lot is 44.4 feet west of this street monument. The Trial Court made findings to the effect that plaintiffs and their predecessor in interest have a continuous chain of title to this strip from the U.S. Patent to the date of trial. It further found that defendant City had acquiesced by its conduct for more than 50 years prior to the commencement of this action in the location of 21st East Street immediately adjoining the east of said property; that plaintiffs and their predecessor have been in open, actual and continuous possession under a claim of right and adverse to defendant for more than 25 years last past; that the City has no right, title or interest in and to the said property and has not had exclusive possession or use thereof or of any part of the public street for the past 80 years and said property has not been a part of the public street of the city. That the area here involved

is now used as a street but such use resulted solely from the city in 1955 requiring such use as a condition to granting a building permit to plaintiffs. A decree quieting title in plaintiffs and denying any interest in defendant was entered upon such findings of fact.

STATEMENT OF FACTS

Plaintiffs introduced in evidence an Abstract of Title marked Exhibit 2-P, (Tr.-22) covering the property involved from the U.S. Patent to plaintiffs' ownership. Page 3 of that abstract shows a patent to Henry Hugh Harris (Harries), dated September 20, 1870, covering the S $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 10, T1S, R1E. He did not convey the property in his lifetime. Pages 6, 7 and 8 show a Decree of Distribution in his estate dated November 30, 1907, and distribution to his heirs of property described as a part of Lot 1, Block 27, 5 Acre Plat "C", commencing 27.3 rods west of the southeast corner of said lot, and running east 27.3 rods, thence north 17.4 rods, etc. No mention is made of Section 10 or of 21st East Street or of any monument. No tie is made to any such corner or line. The explanatory notes in the front of the abstract show that blocks in 5 Acre Plat "C" are divided in 20 lots, each of which is 17.4 rods, or 287.1 feet, north and south and 46 rods, or 759 feet, east and west.

The same commencement point is used in all instruments covering the property, including the deed to Sylvia S. Harries, Entry No. 17, until Sylvia S. Harries con-

veyed to Elmer M. Savage and wife, plaintiffs' immediate predecessors, Entry No. 34, acknowledged December 10, 1935, recorded November 20, 1936. In this deed the grantor for the first time attempted to fix the position of the southeast corner of Lot 1, Block 27, 5 Acre Plat "C", by saying it was 23.4 feet west of the City Street Monument, being "the original southeast corner of said Lot 1." There is absolutely no evidence to support the assertion that there was an original southeast corner as contrasted to some other corner.

Since the commencement point and the east line of plaintiffs' property are tied to the southeast corner of Lot 1, Block 27, 5 Acre Plat "C", and since plaintiffs' grantors, and their immediate predecessor in interest gratuitously attempted to fix the location of said corner by stating in their deeds that the "original" corner or "original" east line were a certain distance namely, 23.4 feet, west of the city monument in the street, plaintiffs' whole case depended entirely upon establishing said corner at the point indicated.

Sylvia S. Harries, first grantor to use the city monument as a tie for the commencement point, took title simply by reference to the southeast corner of Lot 1, without any tie to anything except the 5 Acre Plat "C" survey, which was made in 1867 by Jesse W. Fox and without any mention of any "original" corner. There is no evidence whatever that when Mrs. Harries, in 1935, gave her deed to the Savages, plaintiffs' immediate predecessor in interest, that any survey had been made or

any other information had been obtained upon which the tie to the city monument is made, or that the commencement point established by such tie was the "original" corner or that there had been any prior or subsequent or other corner. The mere recitation in the deed that the southeast corner of Lot 1 was 23.4 feet west of the city monument would not, of course, establish the corner at that point. Plaintiffs recognized this and so attempted to submit proof that that was the location of said southeast corner. The following summarizes plaintiffs' evidence.

Mark B. Eggertson, President of Security Title Company, a licensed abstractor, and the one who wrote the title insurance policy covering the disputed area, testified he made no personal examination of any records or plats. He relied on his employed examiners who were cautioned and instructed to "pick up any documents that might disclose what would be called the east line of Lot 1, any documents establishing the roadway on 21st East Street." (Tr.-17, 25) He relied on a map attached to the abstract, Exhibit 2-P, made by J. C. Jensen, an abstractor, since deceased, prepared presumably in 1936, and assumed that Jensen must have found plats in the Recorder's office from which he made his map. (Tr.-21) The witness knew that the 5 Acre Plat "C" survey mentioned in the abstract referred back to the Jesse W. Fox map of 1867 and that the lots therein were 759 feet east and west of 287.1 feet north and south. (Note: The Court Reporter has written the year as 1887 instead of 1867 which is the correct year as shown by the map itself and

other testimony and has written the length as 769 whereas the correct length is 759 feet.) The foregoing appears in pages 21 to 25 of the transcript.

Plaintiffs introduced a map, Exhibit 3-P, (Tr.-26), prepared by a licensed engineer, George Fisher, which map was in Eggerton's possession before he insured the property. This map showed the east line of Lot 1 established by the City Engineer and showed it to be exactly where the defendant contends it is. Eggertson further knew that there was an excess in the length of Lot 1, varying from 30.33 feet to 9 feet depending on which plat was used. One plat placed the length as 789.33 feet, another at 774.106 feet, and another at 768 feet, while the lots should be 759 feet long. (Tr.-26, 27) He further knew that the whole chain of title depended on where the southeast corner of Lot 1 actually is. (Tr.-18)

Afton Harries Savage, age 61, testified she was acquainted with the property as long back as she could remember. Her father got the property in 1908. She and her husband bought the property in 1936, and sold to plaintiffs. There was a fence along the trees shown on the photos, Exhibits 4-P, 5-P, and 6-P. There was also an irrigation ditch east of the trees. There were posts along the line of the trees extending north past the house at 1294. There was also a large stone to the east of the line near the fence for use to get in a carriage. It was moved by the city. (Tr.-32, 35) She did not remember a fence to the west of the trees. She first said her husband made the ditch (Tr.-35) and a cross examination

says she didn't know who made it. She doesn't know who planted the trees. They never claimed to have owned any of the traveled part of the street, only what they used. (Tr.-42)

Frank W. Taylor, agent for Texaco Company, simply identified two photos, Exhibits 7-P and 8-P. The City refused to permit them to use the 21 feet in dispute for their service station. They were informed by the City that if the property owner succeeded in establishing the right to this 21 feet, the City would have to condemn to maintain the 66 feet for the street. (Tr.-44, 46)

Robert C. McAuliffe, Title Officer for Security Title Company, testified he made an examination of some records and plats to prepare for this litigation and assist the court in determining the location of the property. (Tr.-47) He testified the only thing of record to establish the west line of 21st East Street in the County Recorder's office appears to be an official plat of 5 Acre Plat "C"; that was the only one he could find. There was what he called F. M. Lyman's plat of Township 1 South, Range 1 East, prepared June 1, 1932, which gives the dimensions of the various lots in the vicinity. A photostat of this so-called plat is in evidence as Exhibit 9-P. There is no testimony as to who prepared this plat. The note on it shows it was not made by F. M. Lyman. On the contrary, it was made by someone who was trying to harmonize Lyman's survey of Section 16, an entirely different section, with surveys made by the City Engineer. The ties to the section corner were taken from Mc-

Allister's survey of 5 Acre Plat "C", Lyman's Survey of Section 16 and from surveys of subdivisions. The dimensions of the lots in 5 Acre Plat "C" are taken from surveys by the City Engineer. What surveys were thus used as the source of this information is not stated. The plat, erroneously called F. M. Lyman's plat in the testimony, was evidently made by a draftsman in the County Recorder's office in an attempt to correlate conflicting plats. This map gives the length of the south line of Lot 1, Block 27, as 774.106 feet, and the southwest corner as being 143.276 feet east of the section line of Section 10. (Tr.-49) This is not in harmony with the plat made by J. C. Jensen in the back of the abstract, Exhibit 2-P, upon which Eggertson relied so heavily. In that plat the length of Lot 1 is given as 789.3 feet and the southwest corner of Lot 1 is 128.67 feet east of the section line of Section 10, a difference of approximately 15 feet in each instance.

Plaintiffs placed in evidence, over defendant's objection an old file #7138, being a suit by Salt Lake City v. Ann Elmer filed December 29, 1887, to condemn property about 587 feet north of the property in dispute for 21st East Street. Attached to the file is a map (Tr.-19, 31, 105), McAuliffe testified that 21st East Street as reflected on the Lyman plat corresponds within three feet of the promulgation of the west line of 21st East Street on the Elmer map southerly to Lot 1. How he could possibly make such a statement is not apparent from the two exhibits.

Incidentally, it is well to point out here that the complaint in the Ann Elmer case states that the area sought to be condemned had been “for more than 20 years used and occupied as a public highway in said city, that said land was laid off in said street by plaintiff more than 10 years since and so used but vacated as such about 2 years ago, that on Thursday, December 28, 1887, said plaintiff by and through its corporate council resolved to open said street again, and authorized immediate action in the premises by reason of the fact that the highway was about to be closed to the great detriment and injury of said plaintiff and the public generally.” The court simply found in that case that the defendant was the owner of the land sought to be condemned and it was necessary to take it for a public street without determining whether it had once been a street and vacated or upon what defendant’s title was predicated.

A plat in the County Recorder’s office, placed in evidence as Exhibit 10-P, purports to show Section 10, Township 1 South, Range 1 East. There is no information on it as to when it was made or what it purports to show. So far as Lot 1, Block 27, 5 Acre Plat “C” is concerned, the map itself says “See Five Acre Plat “C”; so it has no bearing on the property here involved. The ownership plat covering Lot 1, Block 27, 5 Acre Plat “C”, was placed in evidence by defendant as Exhibit 24-D. This shows the length of Lot 1 to be 755 feet.

A map taken from the City Engineer’s office, Exhibit 11-P, was received in evidence. (Tr.-50, 51) The wit-

ness testified that if the west line of 21st East Street were extended from Sunnyside Avenue on the south it would run along a line 23.41 feet west of the city monument. A light pencil line from Foothill Drive to 13th South shows this imaginary extension. Plaintiffs introduced another plat, Exhibit 12-P, (Tr.-52), furnished by defendant, being a plat designated as "proposed property line location 21st East Street from 13th South to Foothill Drive." This shows what was proposed to be the east line of 21st East on 13th South on north to Foothill Drive, made in 1940. The witness testified that this line corresponds with the east line, if projected, shown on the Ann Elmer map. By what power of observation or calculation he could do this is beyond comprehension as a comparison of the two plats would show. However, it is well to point out that the west line of 21st East Street is shown on this map to be precisely where defendant contends it to be, 44.4 feet west of the street monument. It also shows the fence located in 1932 and the fence located in 1940, the former being along the property line and the latter inside the curb line.

Herbert H. Halliday, an employee of the Security Title Company, testified he examined the abstract of title, and, being put on notice of the 21 foot area dispute, went to the City Engineer's office. There he was shown an F. M. Lyman map and one or two others, which were older. The older maps showed as he recalled, 23.8 feet between the monument and the southeast corner of Lot 1, and the present map showed 44.4 feet. They were unable to explain to him why they had changed it. He believes

he talked to the City Engineer and some other individual who didn't have enough experience to talk. (Tr.-106, 107)

In support of its position defendant first introduced in evidence the following sections of the City Ordinances from the 1903 Revised Ordinances, which have been continued in identical language to and including the 1955 Revised Ordinances, now in effect:

“Sec. 153. *Duty of city engineer.* It shall be the duty of the city engineer to locate the lines and grades of all streets and sidewalks . . .”

“Sec. 155. *Street lines.* It shall be unlawful for any person to erect or construct, or to commence the erection or construction of any building, fence or other structure, or to make any excavation upon the line of any street, alley or other public way without first making application to, and obtaining from the city engineer a survey of such premises showing the property lines upon which such building, fence or other structure is to be constructed, or such excavation to be made.”

“Sec. 159. *Test of additions.* The city engineer shall from time to time make a test of the additions to the city, theretofore filed and recorded without a proper survey, or where the survey was so badly executed that great inaccuracy exists in respect to the lines of streets and alleys, and where there has been no official survey made by the city of the entire addition; and until a proper re-survey of such addition is made by the owners thereof, and the lines of the streets and alleys accurately determined by the engineer to agree with the recorded plat thereof, he may refuse to give any certificate of survey in connection therewith.”

“Sec. 163. *Re-surveys of additions.* The city engineer shall, from time to time as promptly as may be with the force at his disposal, proceed with re-surveys of additions as ordered by the city council.”

William Y. Tipton, chief draftsman in the City Engineer's office and licensed engineer since 1937, testified that he was familiar with this property since 1932. (Tr.-56) In that year when they were making a survey for Sylvia S. Harries (plaintiffs' predecessor) it was discovered that by some mistake the east line of 21st East Street going south from Park Crescent Subdivision and been produced by someone in the office to intersect the south line of the block. A survey on the ground was made based upon that premise and it was discovered that such line would be out in the traveled part of the street. Upon making this discovery the office immediately examined their records and found that an error has been made based upon the assumption that the line of a Park Crescent Subdivision street nearest 21st East Street should be produced to the south as the line of 21st East Street. They then made the correction, going back into their records and field notes. (Tr.-57) They discovered the following in their notes, which notes are a part of the official records of the city engineer: That on July (August) 9, 1915, their engineer Heath surveyed and located the fence at the northeast corner of 13th South and 21st East Street, on November 23, 1915, Heath located the fences on the southeast corner of said intersection. (Later, on January 26, 1938, Fisher located the fences at the southwest corner of the intersection.) On

August 31, 1911, Fiero located the fence traversing 13th South from the south line to the north line. The fences on the northwest corner were located by Cottrell on November 25, 1932. The line along the east side of the trees was run by Fisher in 1940, being the fence referred to by plaintiffs. Tipton prepared a plat showing these fences and corners as disclosed by these notes and their location from the city monument. This plat is Exhibit 13-D. (Tr.-58, 59)

They also found that the old Park Crescent Subdivision didn't have anything to do with the establishing of the east line of Lots 1, 19 and 20. It was a subdivision about 1000 feet to the north having no connection, actual or theoretical, with the east line of those lots. That subdivision did not conform in any way whatsoever to the Jesse W. Fox map or other maps containing the 5 Acre Plat survey. (Tr.-60)

In addition to containing field notes, Exhibit 13-D shows the line of the oiled road in 1932 and a dirt footpath that he observed in 1932. In 1932 there was no fence on the east side of the trees. The fence was to the west where Cottrell's notes showed it to be, which was 44.65 feet west of the city monument. He saw the fence east of the trees in 1934. Incidentally, this street monument was located arbitrarily as a matter of convenience and does not have any relationship to the width of the street or its boundaries. (Tr.-63)

The Jesse W. Fox map, dated August 27, 1867, was put in evidence as Exhibit 14-D. It contains 5 Acre Plat

“C” in its lower right hand corner. Lot 1, Block 27, was located by the witness by an arrow. He wrote in 13th South and 21st East to show those streets. This map does not itself give the width of the streets but it shows the pattern of 5 Acre Plat “A”, “B”, “C”, etc. The streets in this area are 66 feet wide south of 9th South and 132 feet wide north of 9th South. The map shows 21st East runs in a straight line. All lots are uniform in size. (Tr.-64) The problem involved in this case is the location of the southeast corner of Lot 1. No surveyor can make that determination as that is the duty of the City Engineer. Any surveyor would come to the City Engineer’s office to find where the corner is. There are no monuments as such marking the corner and no ties to a section corner. The government survey was made in 1869, two years after the Jesse W. Fox survey. (Tr.-65, 68) There are on record in the City Engineer’s office maps and plats showing the location, size, dimensions and width of lots in 5 Acre Plat “C”, made up by surveys and plats from which actual measurements are kept in detail as to the size of subdivisions and blocks and the lots throughout the city. (Tr.-69)

Exhibit 11-P, is a section map of the area involved. It shows Lot 1 to be 768.33 feet east and west and 287.1 feet north and south. This still makes the lot longer than the standard 759 feet. (Tr.-74) It fixed the southeast corner as being 44.4 feet west and 31.7 feet north of the city street monument, which is the position contended for by the City.

Exhibit 15-D, is a certificate of survey by the City Engineer, dated March 15, 1940, part of the official records, and shows the southeast corner of Lot 1 as being the same as on Exhibit 11-P. (Tr.-70, 71) Exhibit 16-D, a plat dated June 1, 1933, a part of the official records on file, shows the southeast corner of Lot 1 in the same place, 44.4 feet west of the city monument. This plat was available to any surveyor. The map made by Fisher, Exhibit 3-P, locates the southeast corner of Lot 1 in the same place as indicated on Exhibits 15-D and 16-D. It also shows the corner as fixed by plaintiffs' deed. (Tr.-72)

When this matter came up in 1932 Cottrell checked the street monument against the field notes and found it had not been moved and agreed with the notes in its location. When they found the error they set about to correct it and they fixed the lot and block dimensions based upon the findings from the surveys above referred to. They used the fences as their criteria. This fixed the lot as being 768.33 feet long. (Tr.-74) In the witness's opinion the area in dispute is entirely within the area of 21st East Street, as shown on the Jesse W. Fox map. To his knowledge it has been used as a street since 1932. (Tr.-75)

Defendants introduced in evidence several photos taken by the witness, Exhibits 17-D to 23-D inclusive, except Exhibit 22-D, which was not offered. The dotted ink line down 21st East Street is the east line of Lot 1 as claimed by plaintiffs. The heavy ink line to the left

is the east line as contended by defendant. (Tr.-77, 78)

The original error arose in assuming that the street in Park Crescent Subdivision near 21st East was where 21st East was as originally established. But that subdivision is in another section, section 21, and has no bearing on locating the southeast corner of Lot 1. There is no tie between the lots and blocks in Park Crescent and the original 5 Acre lots making up 5 Acre Plat "C". (Tr. 79) The witness could not explain how Exhibit 9-P, the so-called F. M. Lyman survey, could be material in locating the southeast corner of Lot 1, Block 27. It purports to be taken from surveys of the City Engineer, but it shows no monuments from which a surveyor could make the survey. (Tr.-80) Exhibit 10-P, apparently is taken from the County Records but it refers you to 5 Acre Plat "C" and gives no dimensions in the lots and blocks there.

Exhibit 24-D is a plat from the County Recorder's records, and is a duplicate of the same area as shown in Exhibit 10-P. It shows the parcels that go to make up Block 27 as it is divided and subdivided. It shows the southeast corner of Lot 1 as not being in line with the property north of Lot 19. There is a definite jog, approximately the same as shown on Exhibit 11-P. (Tr.-81) It shows Lot 1 to be 755 feet in length. The City's plat shows it to be 768.33 feet in length. Introduced in evidence is a plat made by the County Surveyor dated February 26, 1906. It was not given an exhibit number but a photostat of the area here involved was admitted

in evidence under stipulation (Tr.-82, 83), and has the endorsement of Judge Larson, the trial judge, to that effect. This map shows 5 Acre Plat "C" and shows a definite jog between the Park Crescent version of 21st East and the 5 Acre Plat "C" version of where 21st East is. (Tr.-82) The street referred to in Park Crescent and 21st East Street are in the upper center of the exhibit and are shaded red in this photostat as are also a similar pair of streets in another subdivision to the right and below the Park Crescent Subdivision which indicates another distortion of existing streets by a subsequent subdivision.

On cross examination Tipton testified that the west line of 21st East Street was fixed in 1932 and the east line in 1938 or 1940. (Tr.-93) The patent issued in 1870 was after the Jesse W. Fox Plat established the street there and the street was perfectly straight.

Counsel for plaintiffs referred the witness to Exhibit 12-P, the City Engineer's map, which shows the east line of 21st East Street. This indicated that in 1940 the City anticipated changing the property line. (Tr.-88, 89) Measuring from the line designated "plat line" to the east of 21st East Street a distance of 66 feet to fix the west line of 21st East Street would place the west line 21 feet east of where the city contends it to be. (Tr.-90) This is explained on redirect as follows:

There was an excess of 21 feet in the block to the east on 21st East which the owners of the ground wanted to get rid of. So it was decided to throw it in the street

physically. However, the City has not taken any steps to claim the 21 feet as it is still there for the people as it has always been and it has never been a part of the present street. It was a practical way of handling the thing. (Tr.-100) They did not take any land from those on the west side of the street. The photos introduced by both parties show that the east line of 21st East Street was not located as contemplated on Exhibit 12-P. The curb, gutter and sidewalk are constructed and the east edge of the roadway asphalt, as shown on Exhibit 3-P, George Fisher's map, is only 8 feet to the east of the street monument.

Fixing the lines of 21st East Street was more or less predicated by not only the fence along the west line but other fences in the block, and the general pattern in the intersection there that shows the four fence corners. We did the practical thing so the people would not be injured and still Salt Lake City would preserve the 66 foot highway for the public. The government survey did not have anything to do with fixing the lots and blocks and never did. (Tr.-96)

The plat attached to the Ann Elmer file was made of property which became the Park Crescent Subdivision, but it has nothing to do with the establishment of these lines in question. (Tr.-103, 104) It was drawn to scale of one inch equals 10 rods. Applying that scale to Lot 1, it is exactly 46 rods or 759 feet long, not 789.33 feet as plaintiffs must contend in order to take in the area in dispute.

If 21st East were extended south as contended by plaintiffs, it would cut off the business area between 13th South and 17th South and would cut off 21 feet all the way to 21st South (Tr.-104)

ASSIGNMENTS OF ERROR

I

The court erred in finding as a fact that the plaintiffs were the owners of, and they and their predecessors have been in possession of and cultivated, the east 21 feet of the real property described in Paragraph 2 of the Findings of Fact, and have an undisturbed continuous chain of title to the said real property from the grant of the U.S. patent to the present.

II

The court erred in finding as a fact that the plaintiffs and their predecessors in title have been in open, actual and continuous possession of said 21 foot strip under a claim of right and adverse to the asserted rights of the defendant and public for more than 25 years last past.

III

The court erred in finding as a fact that defendant Salt Lake City has no right, title or interest in and to the said 21 feet, and has not been the owner of nor in the exclusive possession of the use of said 21 feet for all or any part of the past 80 years and such area has not been a part of the public street of Defendant City.

IV.

The court erred in finding as a fact that defendant, by its acts and conduct for more than 50 years prior to the commencement of this action, has acquiesced in the location of 21st East Street immediately adjoining the real property described in Paragraph 2 of the Findings of Fact so as to exclude the east 21 feet thereof from being a part of 21st East Street.

V

The court erred in finding as a fact that the said east 21 feet of said real property first became used as a public street in 1955 and that such use resulted from requiring plaintiffs, as a condition to issuing a building permit for a service station, to premit such use.

VI

The court erred in its concluding as a matter of law that plaintiffs are entitled to a decree quieting title to said east 21 feet of said described real property and decreeing defendant has no right, title and interest therein.

VII

The court erred in decreeing that plaintiffs are the owners and entitled to the possession of the said east 21 feet, being the real property described in its findings of fact and in its decree, and in decreeing that defendant has no right, title and interest therein.

VIII

The court erred in not finding and holding that defendant had been in the actual, open, exclusive, uninterrupted and continuous possession and occupancy of said east 21 feet of the said real property for more than 7 years prior to the commencement of this action, under claim of right and adverse to plaintiffs and their predecessors in interest.

IX

The court erred in not finding and holding plaintiffs were barred from maintaining this action by the provisions of Sections 78-12-5 and 78-12-6, Utah Code Annotated, 1953, as set forth in Defendant's Second Defense in its Answer.

X

The court erred in admitting in evidence the district court file No. 7138, *Salt Lake City v. Ann Elmer* and the plat attached thereto.

STATEMENT OF POINTS

I

Plaintiffs must rely upon the strength of their own title and not on any weakness of defendant's title.

II

The burden was upon plaintiff to show that the 21 foot strip in controversy is a part of Lot 1, Block 27, 5 Acre Plat "C".

III

The plaintiffs' proofs do not show that the east line and the southeast corner of Lot 1, Block 27, 5 Acre Plat "C", have been established on the ground at the line and point contended for by them.

IV

Defendant's evidence, and the evidence as a whole, shows that the area in dispute is a part of 21st East Street.

V

The City Engineer could consider and rely on the old fence lines in fixing the location of the east line of Lot 1 and the west line of 21st East Street.

VI

Plaintiffs are barred from maintaining this action by sections 78-12-5 and 78-12-6, Utah Code Annotated, 1953.

ARGUMENT

POINT I

PLAINTIFFS MUST RELY UPON THE STRENGTH OF THEIR OWN TITLE AND NOT ON ANY WEAKNESS OF DEFENDANT'S TITLE.

It is elementary that one seeking to quiet title must succeed on the strength of his own title and not on the weakness of his adversary's title. *Babcock v. Dangerfield*, 98 Utah 10, 94 P. 2d 862; *Home Owners Loan Cor-*

poration v. Dudley, 105 Utah 208, 141 P. 2d 160; *Mercur Coalition Min. Co. v. Cannon*, 112 Utah 13, 184 P. 2d 34.

POINT II

THE BURDEN WAS UPON PLAINTIFF TO SHOW THAT THE 21 FOOT STRIP IN CONTROVERSY IS A PART OF LOT 1, BLOCK 27, 5 ACRE PLAT "C".

The abstract of title, Exhibit 2-P, shows the following: Page 2 shows a patent to Henry H. Harris (Harrises), dated September 20, 1870, covering the S $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 10, T1S R1E. Pages 6, 7 and 8 show a Decree of Distribution in his estate dated November 30, 1907, in which the interest of the estate in Lot 1, Block 27, 5 Acre Plat "C", Big Field Survey, was distributed to his heirs. The description commences 27.3 rods west of the southeast corner of said Lot 1, then runs east 27.3 rods, then north 17.4 rods, etc. No reference is made to any section line or corner or to 21st East Street or to any street monument. This same commencement point is used in all instruments covering the property until Sylvia S. Harris conveyed to Elmer M. Savage and wife, page 34, in 1935. In that deed for the first time the southeast corner of Lot 1 is called the "original" corner and is stated as being 23.4 feet west of the city street monument in the intersection of 13th South and 21st East Streets. The Savages conveyed to plaintiffs with the same commencement point. It is admitted that the 5 Acre Plat "C" referred to is the plat made by Jesse W. Fox, dated August 27, 1867, which is evidence as Exhibit 14-D. That plat did not fix the location of the southeast corner

of Lot 1, Block 27, by reference to any monument or section line or corner, the Federal Government survey not having then been made. It would be necessary to establish that corner on the ground by a competent authority. Whether the lot included the 21 feet in dispute could only be determined by proper evidence. Under such conditions the burden was on plaintiff to establish by satisfactory evidence that the 21 foot strip is the east line of said Lot 1. *Pepe v. Aceto*, 119 Conn. 282, 175 A. 775, wherein the court says:

“While title to a particular tract of land, in the absence of any evidence to the contrary, draws possession with it, general possession of the tract will not avail as regards any particular piece of land, unless it is satisfactorily shown to have been a part of that tract. In view of defendant’s denial of the complaint, the burden was upon the plaintiff to prove the correct boundary line and his ownership of the tract in dispute.”

POINT III

THE PLAINTIFFS’ PROOFS DO NOT SHOW THAT THE EAST LINE AND THE SOUTHEAST CORNER OF LOT 1, BLOCK 27, 5 ACRE PLAT “C”, HAVE BEEN ESTABLISHED ON THE GROUND AT THE LINE AND POINT CONTENTED FOR BY THEM.

What proof is there in the record that this 21 foot strip forms the east 21 feet of Lot 1, Block 27, 5 Acre Plat “C”, as contended by plaintiffs? Certainly, there is no evidence that the east line or the southeast corner of Lot 1, as claimed by plaintiffs, are the “original” ones, implying that there were others which were not the

“original” ones. On that matter there is absolutely no evidence whatsoever in the entire record as to how such “original” line and corner came to be established or determined to be the “original” ones, nor how they came to be the actual ones on the ground. Exhibit 14-D is the Jesse W. Fox plat of the 5 Acre Plat “C” to which the descriptions must refer. This certainly would be entitled to receive the designation of “original” for nothing could go back beyond that. Any subsequent fixing of the line and corner could not be “original”. It fixed the lots as 759 feet east and west and 287.1 feet north and south, but it did not designate any monument or tie on the ground as a means of locating any lot on the ground. To get this 21 foot strip within the east boundary of Lot 1 the lot must be extended 30.33 feet to 789.33 feet as was done by J. C. Jensen in his drawing attached to the abstract, Exhibit 2-P. By what authority he did this is not shown. Let us examine the record as to the evidence upon which plaintiffs must base their claim to this additional 21 feet.

In the first place there is no evidence whatsoever that the east line or the southeast corner of Lot 1 as contended for by defendant deprived anyone, not even the Savages, or the plaintiffs, of any land. The Savages still own the land adjoining on the north. All that plaintiffs are fighting for is what appears to be a fortuitous surplus and the City’s position gives them 9 feet beyond the 759 feet, the intended and original length of the lot.

We can dismiss the testimony of the witness Eggertson with the comment that he himself admitted that he

made no examination personally, nor did he personally examine any records in the County Recorder's office. (Tr.-24, 25) He relied on the drawing of J. C. Jensen in Exhibit 2-P, (Tr.-21), and upon the examination made by his examiners who relied entirely on the County Recorder's office. (Tr.-25)

The following are the maps and plats that plaintiffs introduced in evidence: Exhibit 3-P, is the survey of George Fisher, employed by plaintiffs. It shows the east property line and the southeast corner of Lot 1 as established by the City Engineer, being 44.40 feet west of the city street monument. It also shows the line and corner as claimed by plaintiff 23.4 feet west of said monument. It does not purport to show this latter line and corner to be the correct ones as shown on the Five Acre Plat made by Jesse W. Fox, Exhibit 14-D.

It shows that the gas main was installed west of the line claimed by plaintiffs and inside the area claimed by them. Also the traffic stop sign at 13th South and the utility pole and anchor at the north end of the property area are both west of the line claimed by plaintiffs, the former 10 feet west of that line and the latter 4.7 feet and 8.5 feet, respectively, west of that line. The trees to which plaintiffs claimed a fence was attached are shown to be 9 feet west of the east line as claimed by plaintiffs. The edge of the asphalt is shown to be inside of the east line claimed by plaintiffs from the south line of the property at 13th South running north approximately one-half of the 140.99 foot frontage on 21st East Street and from

there on north coincides with the east line as claimed by plaintiffs. The stop sign and utility pole and anchor are plainly shown on the photo, Exhibit 4-P. Exhibit 3-P also shows the distance from the city street monument east to the edge of the asphalt as 8 feet at 13th South as it begins to curve east into that street and 7 feet at the north end of plaintiff's property. Photos, Exhibits 5-P and 6-P, show the east side is curbed, guttered and the asphalt extends to the gutter. This is also shown on some of the photographs introduced by defendant. If plaintiffs' claimed property line is used there would then be only 30.4 feet of highway to the west of the east gutter, out of which the west gutter, curb, parking and sidewalk and the total traveled part of the street would have to come.

Exhibit 3-P clearly does not bear out plaintiffs' claim. On the contrary, it shows that approximately one-half of the disputed area was occupied and had been occupied by the City as a part of the area of 21st East Street with the usual street and traffic facilities and for vehicular traffic. The curbing, guttering, parking and sidewalk would of necessity be to the west of the traveled part when those improvements should be made.

The map attached to the Ann Elmer case does not purport to establish the east line of Lot 1 or the southeast corner thereof or to tie to any street monument. The same is true of Exhibit 9-P, the so-called Lyman plat, and 10-P, the blueprint of Section 10, Tp1S, R1E. All that can be said of these three plats is that no jog in the

west line of 21st East Street is shown, but that line appears as a straight line. Exhibit 10-P shows 21st East Street as coming out of Park Crescent Subdivision on a straight line. This, of course, is in harmony with the mistake that was made as testified to by William Tipton, in the City Engineer's office, in assuming that 21st East should be projected south from the nearest corresponding street in Park Crescent Subdivision. The Ann Elmer map predates the Park Crescent Subdivision and so does not show it. It was created without any reference to the 5 Acre Plat survey, being superimposed thereon without any tie thereto. The F.M. Lyman survey of Section 16, Exhibit 9-P, does not show the Park Crescent Subdivision. Perhaps it also predates that subdivision. The date of July 1, 1932 on this exhibit clearly is the date the draftsman made this particular exhibit by referring to the surveys already and theretofore existing, namely, Lyman's survey of Section 16, surveys made by the City Engineer and McAllister's survey of 5 Acre Plat "C". Certainly none of the foregoing plats fix the location of the southeast corner of Lot 1 or its east line at any particular point or place or as claimed by defendants.

Plaintiffs' whole case is predicated on the following: Exhibit 11-P shows the west line of 21st East Street is not a straight line north and south as it is shown from Sunnyside Avenue south to 13th South. At Sunnyside Avenue it is shown as being 34.23 feet west of the city street monument; at 9th South it is shown as 33.11 feet and 32.89 feet west of this monument; at Michigan Avenue it is 30.84 feet and 30.61 feet west of this monument

line; at the north side of Foothill Drive it is 28.59 feet west of this monument line; at the south side of F'oothill Drive the west line is 38.15 feet west of this monument line. This distance gradually increases to 44.40 feet at 13th South. The variance between the Sunnyside Avenue distance and the 13th South distance is 10.17 feet, not 21 feet as contended by plaintiffs. Plaintiffs get their 21 feet by ignoring everything on this plat and projecting the west line from the north of Foothill Drive south to intersect the monument line running west on 13th South. This gives about 21 feet, measured on the map with a ruler, between such imaginary line and the city street monument. Since the plats, Exhibits 9-P and 10-P, do not show any jog it is claimed this ipso facto shows that the west line of 21st East should be projected as plaintiffs did and so the southeast corner of Lot 1, Block 27, 5 Acre Plat "C", is thereby established. This, of course, assumes that the west line of 21st East Street to the north of Foothill Drive coincides with the east line of the lots that composed Block 27, 5 Acre Plat "C", being Lots 18, 17, 16, 15, 14, 13 and 12, as shown on Exhibit 9-P. There is no evidence to substantiate such an assumption. None of these lots are carried as such on Exhibit 11-P. A new subdivision is shown as Sunnyside Park Subdivision. Foothill Drive is shown as cutting across some of these original 5 acre lots. Also shown is the Fairway Subdivision to the south of Foothill Drive, which is tied into the west line of 21st East Street as fixed on this exhibit 11-P, 44.4 feet west of the city street monument. These two

subdivisions have obliterated Park Crescent Subdivision as well as the 5 Acre Plat "C" lots.

Mrs. Savage testified that she and those before her made no claim to any part of the traveled part of the street or shoulder, only what they used. (T.-42) The fence testified to was fastened to the trees. Plaintiffs' own photos, Exhibits 4-P and 5-P, show the road was actually used by traffic right next to the utility post, which is shown by the Fisher plat, Exhibit 3-P, to be 4.7 feet west of the line claimed by plaintiffs to be the west line of 21st East Street. No claim was made by Mrs. Savage beyond the fence on the line of the trees. The trees are 9 feet west of the line claimed by plaintiffs to be the west line of 21st East Street. The stop sign is 10 feet west of that line. In addition, Exhibit 5-P shows a white picket fence running east and west which ends to the west of the trees clearly indicating the position of the east property line. Another significant fact is revealed by the Fisher map, Exhibit 3-P. The east edge of the brush growing on plaintiffs' property coincides almost identically with the west line of 21st East Street and the east line of Lot 1, as established by the City Engineer, 44.4 feet west of the city street monument. There was likewise a row of trees to the west of this line.

It is manifest from the foregoing that the City was at all times actually occupying and using for vehicular traffic more than $\frac{1}{5}$ of the 21 feet and for the usual street purposes, such as utility poles, traffic signs, about $\frac{1}{2}$ of the 21 feet and that neither plaintiffs nor their pre-

decessors used or possessed such area nor did they ever claim the same. It is patent, therefore, that the court's finding of fact that the plaintiffs and their predecessors in interest used, occupied, cultivated and claimed, and have a chain of title thereto from the U.S. Patent to the present to the whole of said 21 foot strip and that defendant had no right, title or interest therein is contrary to plaintiffs' own evidence and the physical facts revealed thereby. It is also apparent that the remaining part of the area comprising this 21 feet is the usual part reserved for parking and sidewalk yet to be constructed and so is a part of the street.

We further submit that plaintiffs' evidence entirely fails to establish ownership of any part of this 21 foot strip. It fails because plaintiffs have failed to establish the east line or the southeast corner of Lot 1 as being at any particular line or corner other than as established by defendant and shown on Exhibit 11-P, namely, 44.4 feet west of the city street monument.

POINT IV

DEFENDANT'S EVIDENCE, AND THE EVIDENCE AS A WHOLE, SHOWS THAT THE AREA IN DISPUTE IS A PART OF 21ST EAST STREET.

Much that has already been said supports the above proposition. In addition, we would like to refer to the defendant's evidence. Mr. Tipton testified that in 1932 the City Engineer's office made a survey for Sylvia Harries. She is the one who conveyed to the Savages, in 1936, plaintiffs' immediate predecessors, and first used

the starting point as being 23.4 feet west of the city street monument. As a result of the survey so made in 1932, and the examination of field notes of other surveys previously made on file in the City Engineer's office, it was discovered that a mistake had been made by someone in the Engineer's office in assuming that the line of 21st East should be projected south from a street in Park Crescent Subdivision, which street it was assumed coincided with the lines of 21st East Street as shown on the 5 Acre Plat "C" plat of Jesse W. Fox. It was then discovered that 21st East Street on the 5 Acre Plat "C" map and on the ground was to the west of this Park Crescent street. A survey was made at that time by Mr. Cottrell of the City Engineer's office which located the east fence line of the Harries property. The field notes on file at that time were the following: A survey made July 9, 1915 by Heath in which he located the fences at the northeast corner of 13th South and 21st East; the survey made November 23, 1915 by Heath in which he located the fences on the southeast corner of said intersection; a survey made August 31, 1911 made by Fiero in which he located the fence traversing 13th South on the west side of 21st East from the south line to the north line of 13th South. In 1932 Cottrell's survey located the fence running north from 13th South past plaintiffs' property on the west side of 21st East, which coincided with Fiero's fence line across 13th South. The field notes covering these surveys were produced in court at the trial (Tr.-58) and defendant introduced in evidence Exhibit 13-D, which is a diagram in which Mr. Tipton

showed the location of these fences so located by these prior surveys, tying them into the city street monument here involved. This exhibit also shows another survey made January 26, 1938 by Fisher, which located the fence on the west side of 21st East running south from 13th South and the fence line running west from 21st East St. The fence running south coincides with the line located by Fiero in 1911 running north across 13th South.

From the foregoing surveys made prior to and during 1932, the city engineer established that the southeast corner of Lot 1, Block 27, 5 Acre Plat "C" was at the point contended for by defendant, 44.4 feet west of the street monument. Tipton testified that the records in the office were then changed to show this correction.

Tipton testified that he examined the area in 1932. He observed the fence as established by Cottrell in front of plaintiffs' property. He also saw the dirt footpath leading north to the east of this fence and the row of trees on which there was no fence at that time. In 1934 he observed the fence on the trees. There were then still remaining some remnants of the fence located by Cottrell. In 1932 the road was oiled to a line shown on this exhibit, a part of which was within the 21 feet claimed by plaintiffs. Strangely enough, these fences were so placed by these various surveys that they provided 21st East Street with a width of 67.4 feet north of 13th South and 65.1 feet south of 13th South, while the 5 Acre Plat "C" called for a 66 foot street. In fixing the east line of Lot 1 the four fence corners were considered as was

also the fact that no one would be injured in so fixing it and still leave the City 66 feet for its street.

To show how the Park Crescent Subdivision had been instrumental in creating the erroneous assumption that 21st East Street should be extended south from a street in Park Crescent, defendant introduced in evidence a map made by the County Surveyor and approved by the County Commissioners February 26, 1906; a photostat of the part thereof here involved being received in evidence in place of the map but not given an exhibit number. It is identified by Judge Larson's endorsement "Received in evidence in lieu of large map." (Tr.-82, 83) The street in Park Crescent nearest 21st East Street and 21st East Street are colored "red" on this exhibit. This shows the jog and the error in assuming that the one coincided with the other. A similar situation is shown to the right of the exhibit in Terrace Heights Subdivision. This bears out Tipton's testimony that Park Crescent Subdivision was superimposed on the 5 Acre Lots in Plat "C" without any tie thereto or any consideration of lots or streets in that plat.

Ever since the correction was made in 1932 the City has maintained its position that the west line of 21st East Street and the east line of plaintiffs' property are both 44.4 feet west of the city street monument. Exhibit 16-D, made in 1933, a survey of Emigration Creek at 21st East Street, shows the east property line of plaintiffs' property, then owned by Sylvia S. Harries, as being 44.40 feet west of the monument. Exhibit 15-D is a certi-

ificate of survey certified to by the City Engineer, dated March 15, 1940, made for Harries, Devine and Liddle, per David B. Ashton, of parts of lots 1, 2, etc. of Block 27, 5 Acre Plat "C", Big Field Survey. This fixes the east line of plaintiffs' property as being 44.4 feet west of the street monument. The east side of 21st East has been improved with curb, gutter, and sidewalk based on the lines of the street so established. Also traffic signs, utility poles, and a gas main have been installed on the west side based on the lines so fixed. The City has been in actual, exclusive and adverse use under claim of right of this 21 foot strip for street purposes at least from 1932, a period of 24 years. The defendant's photos, Exhibits 17-D to 23-D, and plaintiffs' photos, Exhibits 4-P to 8-P, show graphically the devastation that would result if plaintiffs' position is sustained. They also reveal beyond any doubt the fallacy of plaintiffs' contention. They further show that the City has used and maintained the area in dispute as a part of 21st East Street for many years. Exhibit 18-D is especially appropriate to show defendant's position. It shows the white picket fence ending right close to the property line as fixed by the City Engineer and also shown on Exhibit 5-P. It shows the position of the sidewalk to the east of plaintiffs' property line and its position as it will be extended north. It shows the trees planted in the parking area as is usual throughout the City. Exhibits 7-P and 8-P show how the east side of 21st East, north of 13th South, is in line with the east side south of 13th South. To compel defendant to move east 21 feet would cut off the business buildings to the south of 13th South.

POINT V

THE CITY ENGINEER COULD CONSIDER AND RELY ON THE OLD FENCE LINES IN FIXING THE LOCATION OF THE EAST LINE OF LOT 1 AND THE WEST LINE OF 21ST EAST STREET.

The general rule is stated in 8 *Am. Jur.*, page 787 Section 58, as follows:

“Ancient fences used by a surveyor in his attempt to reproduce an old survey are strong evidence of the location of the original lines, and, if they have been standing for many years, should be taken as indicating such lines as against the evidence of a survey which ignores such fences and are based upon an assumed starting point.”

In *Texas Company v. McMillan*, 13 F. Supp. 407, the court says:

“The position of lines, corners, *fences*, roads, and well marked outlines which have been recognized by people during the years must control.” *Hayes v. Lyon*, 192 Miss. 858, 7 So. 2d 523.

“The trier of the facts in adjudicating between conflicting modern surveys is justified in taking aid from fence locations of the character disclosed in this case when they have stood undisturbed long beyond the statutory period for adverse possession and fence lines of that age and character stand as sentinels that he who crosses beyond does so at his peril.”

Diehl v. Zanger, 39 Mich. 601. Judge Cooley in concurring, says:

“The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. The City Surveyor should,

therefore, have directed his attention to the ascertainment of actual location of the original landmarks set by Mr. Campau, and if those were discovered they must govern. If they are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known. As between old boundary fences, and any surveys made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are."

Beaubien v. Kellogg, 69 Mich. 333, 37 N.W. 891. The court says:

"Robinson and McLaughlin laid great weight on the old fences as evidence of the true line fixed by the Mullett Plat survey, and in this we think they were correct, and the court should have so instructed the jury."

The court then quotes the words of Judge Cooley above quoted and goes on to say:

"We cannot assume that Fremont Street is a true starting point because surveyors have agreed upon it. Some proof must be made that this was one of the points fixed by the Mullett Survey (the original survey) dividing this farm into outlots. No proof was offered in the case tending to show this fact. The court should have given defendants' first request to charge, that under the pleadings and evidence in this case your verdict must be for defendants."

Day v. Stenger, 47 Idaho 253, 274 P. 112. Here the original survey of Russell's second addition to the town of Moscow was made by Nymeyer, but there are no known monuments to said survey existing on the ground. Later surveys were made without reference to the Nymeyer survey. In one, by Lewis, certain iron pegs were found at certain corners of the street intersections. The court says:

“There is no evidence that either the Lewis or later surveys were correct, or that there was any attempt to ascertain where the original lines were, or monuments placed. The purpose of a resurvey is to ascertain the lines of the original survey and the original boundaries and monuments as established and laid out by the survey under which the parties took title. *Bayhouse v. Urquides*, 17 Idaho 286, 105 P. 1066; *Wing v. Wallace*, 42 Idaho 430, 246 P. 8. Parties cannot be bound by any survey not based upon the survey as originally made and monuments as erected. *Id.*

“In case of inability to establish the monuments and lines of the original survey, it then becomes necessary to accept evidence of ancient fences and other improvements as evidence of the original boundaries, though in its nature hearsay, upon the theory that the persons originally constructing the improvements would naturally have located them with reference to existing monuments. *Case v. Ericson et al.*, 44 Idaho 686, 258 P. 536. The evidence adduced by the parties concerning fences, trees, and other improvements should not have been disregarded by the trial court, but should have been considered, together with evidence of fences, sidewalks, and other artificial monuments in other blocks of Russell's

second addition, for the purpose of ascertaining the location of the original monuments and lines. The issues of adverse possession and long acquiescence were squarely raised by the answer, and the lower court, in failing to consider the evidence relating thereto, and in failing to make findings thereon, committed reversible error. The judgment is reversed and the cause remanded for a new trial; costs to appellant."

Orena v. City of Santa Barbara, 91 Cal. 621, 28 P.

268. In this case the court uses this language:

"In this case, the very fact that the plaintiff has inclosed his full quantity of land within the block, as claimed by the defendant, and that, after acquiescing in this line for a number of years, he put out his fence, intruding upon the street then actually used by the public, is a strong circumstance against him. That the fences were built by his tenants makes no difference. He let and relet the premises as inclosed, and still occupies and claims to the fences. He cannot deny his enclosures."

The case involves the element of an admitted mistake in the survey from which plaintiff's measurements were based and the court holds that since there was a mistake such survey could not be relied upon. The court also holds, in harmony with our statute, Section 78-12-13, Utah Code Annotated, 1953, that no one can gain title in a street by adverse possession.

When the original lines and corners of a survey could not be established by monument or ties on the ground then "they must be restored upon the best evidence obtainable which tends to prove where they origin-

ally were.” The problem is to establish them as they were originally established. *Washington Rock Co. v. Young*, 29 Utah 108, 80 P. 382. This the evidence shows the City Engineer did. This he was authorized to do under the ordinances of Salt Lake City in evidence. He resolved the uncertainty by reference to existing fence lines on all four corners of the intersection and the general pattern of the fences and lot lines and so made definite the location of the lines of 21st East Street as well as plaintiffs’ property line along that street.

When the Harries estate conveyed its interest in Lot 1 and when Sylvia S. Harries received the title thereto, the conveyance was made with reference to Lot 1, Block 27, 5 Acre Plat “C”, and not by any reference to any section. 5 Acre Plat “C” had been established before the Federal Survey was made. Under Sections 2382 and 2383, Revised Statutes of the United States, it was permissible to create townsites upon unsurveyed lands which would exhibit streets, blocks and lots. “When land is conveyed and described with reference to a map or plat, such map or plat is regarded as incorporated in the deed. The location of the lots and alley must be determined from the plat.” *Coop v. Geo. A. Lowe Co.*, 71 Utah 145, 263 P. 485.

POINT VI

PLAINTIFFS ARE BARRED FROM MAINTAINING THIS ACTION BY SECTIONS 78-12-5 AND 78-12-6, UTAH CODE ANNOTATED, 1953.

Without repeating the record on this point we con-

fidently assert that the evidence shows that plaintiffs and predecessors in interest have never been in possession or seized of the 21 foot strip here in controversy, and in particular not for a period of 7 years prior to the commencement of this action. Under Sections 78-12-5 and 6, they are barred from maintaining this action. *Bank of Vernal v. Uintah County*, Utah, 250 P. 2d 58. See also *Pender v. Bird*, Utah, 224 P. 2d 1057.

CONCLUSION

The evidence is without dispute that the east line of plaintiffs' property is the east line of Lot 1, Block 27, 5 Acre Plat "C", as shown on the Jesse W. Fox map made in 1867. The only evidence of the location of that line since it was not tied to any existing monument is the location thereof by the City Engineer based upon old fences and the lot patterns, as an attempt to resurvey the lot and to arrive at the location thereof as originally fixed by the 1867 survey. It was not an attempt to fix an arbitrary line, but as indicated, was an attempt, through such existing evidence as was available, to place the line where Jesse W. Fox put it in his survey. We submit that plaintiffs have wholly failed to establish the line otherwise or at all by any evidence they submitted. The burden was on them to establish that the area in dispute was within Lot 1, Block 27, 5 Acre Plat "C", as originally surveyed by Mr. Fox. That burden they utterly failed to carry. The judgment of the Trial Court should be reversed and judgment for defendant entered

quieting title to the area in dispute as a part of 21st East Street so that the public will not be deprived of the use thereof and so that plaintiffs be not unjustly enriched at the expense of the taxpayers of the City.

Respectfully submitted,

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Attorneys for Appellant.

ADDENDUM

Since sending our brief to the printers, we have discovered the following additional authority which we wish to cite:

1. *Morgan v. Town Council of Jamestown*, 32 R.I. 528, 80 A. 271, which states that a town council having the care and management of the highways of the town, even in the absence of special statutory authority therefor, has the power, without notice, to survey, bound and mark out the lines of an existing highway.

2. *Johnson v. City of Shenandoah*, 153 Iowa 493, 133 N.W. 761 and *Fleming v. City of Steubenville*, 44 Ohio App. 121, 184 N.E. 701, both of which bear upon the question of practical location of the lines of a street, estoppel and acquiescence and adverse possession.