

1957

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

Utah Supreme Court

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Pugsley, Hayes & Rampton; Attorneys for Respondents;

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OCT 31 1957

IN THE SUPREME COURT

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of the

STATE OF UTAH

J. P. GIBBONS and VIRGINIA  
L. GIBBONS  
*Plaintiffs and Respondents,*

vs.

SALT LAKE CITY  
CORPORATION,  
*Defendant and Appellant.*

No. 596

FILED  
JAN 18 1957  
Clerk, Supreme Court, Utah

BRIEF OF RESPONDENTS

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## INDEX

	Page
STATEMENT OF FACTS .....	1
STATEMENT OF POINTS .....	5
POINT I—PLAINTIFFS ESTABLISHED A CLEAR TITLE TO THE 21 FOOT STRIP BASED UPON THE FILES AND RECORDS THEREON AT THE SALT LAKE COUNTY RECORDER'S OFFICE. ....	6
POINT II—PLAINTIFFS ESTABLISHED A CLEAR TITLE TO THE 21 FOOT STRIP BASED UPON ADVERSE AND CONTINUOUS USAGE FOR OVER 50 YEARS. ....	6
POINT III—DEFENDANT SALT LAKE CITY COR- PORATION FAILED TO SHOW AND EVI- DENCE OF TITLE VESTED IN IT BY ANY DEED, GRANT, CONVEYANCE OR ASSIGN- MENT. ....	17
POINT IV—THE FINDINGS OF FACT OF THE COURT WERE SUSTAINED BY COMPETENT EVIDENCE SHOWING TITLE VESTED IN THE PLAINTIFFS. ....	17
POINT V—DEFENDANT SALT LAKE CITY COR- PORATION, MAY NOT BY ITS ARBITRARY UNILATERAL ACTION WITHOUT NOTICE TO PROPERTY OWNERS OR COMPENSATION THEREFOR CHANGE THE LOCATION OF STREET LINES THEREBY APPROPRIATING UNTO THE CITY THE LANDS HELD UNDER INDIVIDUAL TITLE. ....	19
POINT VI—DEFENDANT SALT LAKE CITY COR- PORATION, IS ESTOPPED TO ASSERT THE LOCATION OF THE STREET LINE AS CLAIM- ED BY IT. ....	19
POINT VII—PLAINTIFFS ARE NOT BARRED BY ANY STATUTES OF LIMITATION. ....	21
ARGUMENT .....	6
SUMMARY .....	22

## INDEX — (Continued)

Page

### CASES CITED

Bank of Vernal v. Uintah County, 121 Ut. 123, 250 Pac. (2d) 581 .....	27
Ekberg v. Bates, .....Ut. ....; 239 Pac. (2d) 205 .....	28
Sheppick v. Sheppick, 44 Ut. 131, 138 Pac. 1169, 1171..	27
Wall v. Salt Lake City, 50 Ut. 593; 168 Pac. 766.....	25

### STATUTES CITED

U.C.A. 1953, 17-21-11, 17-21-6 .....	22
U.C.A. 1953, 57-3-1, 57-3-2, 57-3-3 .....	22
U.C.A. 1953, 78-12-5, 78-12-6 .....	21
U.C.A. 1953, 78-12-7, 78-12-8, 78-12-9 .....	24, 27
U.C.A. 1953, 78-12-10 .....	24
U.C.A. 1953, 78-12-11 .....	24
U.C.A. 1953, 78-12-13 .....	25

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*Defendant and Appellant.*

No. 8596

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BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

This case was presented to the District Court upon the complaint seeking to quiet title to a strip of land 21 feet deep across the front of a tract facing 21st East Street at 13th South. The evidence presented by the plaintiffs consisted, primarily, of proof of title searches, both by an abstract of record and also by title insurance examiners, of the records of the Salt Lake County Recorder and other related matters and testimony by the plaintiffs predecessor

in title of the many years of continuous open and adverse possession of the 21-foot strip. The statement of facts set forth by the appellant is adopted generally except as hereinafter referred to and in the argument wherein any variances will be noted and the record thereon designated.

The material facts turn on the correct location of 21st East and show that the West line of 21st East, North of the Foothill Boulevard intersection, if continued South would correspond with plaintiff's contention, 23.4 feet West of the City Monument line at 13th South. (See exhibit 11-P Tr. 50-52). Then exhibit 12-P was presented, being a plat prepared by the City Engineer for "Proposed Property Line Location." This reflects a proposal by the City Engineer to move the East line of 21st Street West about 21 feet between the Foothill Boulevard and 13th South intersections. The exhibit shows the true "plat" line on the East side of 21st East and 66 feet West therefrom brings us to a point 23.4 feet West of the City Monument line along 21st East at 13th South. Thus by two plats from the City Engineer's office the true East and West lines of 21st East were established by Plaintiffs in conformance with their title position.

Mention should be made that the old maps in the City Engineer's office made by J. W. Fox and the plat by J. W. Fox for Salt Lake City in the

Ann Elmer action (R. 19 & 49, case #7138 and a part of this record) show that 21st East is a straight line. Salt Lake City must show an authorized jog of 21 feet westerly at the Foothill Boulevard intersection in order to prevail. No title evidence was introduced by the City to show authority for its arbitrary action in changing the 21st East street line 21 feet West on its plats South of Foothill Boulevard. The City's only witness, Mr. Tipton, admitted that he had made no search as to the title records relating to this land (R. 84) and did not know of any deed or instrument by which Salt Lake City could claim the 21 feet from Plaintiffs (R. 90).

The two abstracts of title show that Henry H. Harries, the grandfather of Plaintiffs' immediate predecessor in title Afton Harries Savage, received a patent to this and other property described as South  $\frac{1}{2}$  of Southwest  $\frac{1}{4}$  of Section 10, Township 1 South, Range 1 East. This included land on both sides of 21st East in this area including the piece in question. Title passed through his estate to his son, Benjamin R. Harries and then to Sylvia S. Harries. In 1930 Mrs. Savage purchased the land from her mother, Sylvia S. Harries but her deed was not executed until 1935 and recorded in 1936. No conveyance to Salt Lake City is shown of record as to any of the street it now claims. The distribu-



tion out of Henry H. Harries' estate in 1907 tied to the Southeast corner of Lot 1, Block 27, 5 Acre Plat "C". When Sylvia S. Harries sold to Mrs. Savage by deed dated in 1935 this Southeast corner of Lot 1 was tied to the City Monument line as being 23.4 feet West thereof.

Mrs. Savage, who has known the property since childhood and still owns adjoining land on 21st East, testified that the 21 feet had always been occupied and considered a part of the family land and that their trees, alfalfa, fence, irrigation ditches, etc. had been thereon (R 33-34) for many years. She was recalled to dispute the map drawn from memory by Mr. Tipton (Exhibit 13-D) which purported to show a path inside of the fence and tree line (R. 107-108) and she emphatically rebutted that item. In addition she testified that Salt Lake City had assessed the 21 feet to her for the sewer on 13th South and she had paid the tax thereon. (R. 109).

Another independent witness, Mr. Frank W. Taylor of Texas Company, confirmed by photographs and word that Plaintiffs' predecessors had exclusive possession of the 21 foot strip prior to the erection of the service station and that the City Commission agreed that if title to the strip was shown to be in Plaintiffs then the City would condemn it for a street (R. 45-46).



# STATEMENT OF POINTS

## POINT I

PLAINTIFFS ESTABLISHED A CLEAR TITLE TO THE 21 FOOT STRIP BASED UPON THE FILES AND RECORDS THEREON AT THE SALT LAKE COUNTY RECORDER'S OFFICE.

## POINT II

PLAINTIFFS ESTABLISHED A CLEAR TITLE TO THE 21 FOOT STRIP BASED UPON ADVERSE AND CONTINUOUS USAGE FOR OVER 50 YEARS.

## POINT III

DEFENDANT, SALT LAKE CITY CORPORATION, FAILED TO SHOW ANY EVIDENCE OF TITLE VESTED IN IT BY ANY DEED, GRANT, CONVEYANCE OR ASSIGNMENT.

## POINT IV

THE FINDINGS OF FACT OF THE COURT WERE SUSTAINED BY COMPETENT EVIDENCE SHOWING TITLE VESTED IN THE PLAINTIFFS.

## POINT V

THE DEFENDANT, SALT LAKE CITY CORPORATION, MAY NOT BY ITS ARBITRARY UNILATERAL ACTION WITHOUT NOTICE TO PROPERTY OWNERS OR COMPENSATION THEREFOR CHANGE THE LOCATION OF STREET LINES THEREBY APPROPRIATING UNTO THE CITY THE LANDS HELD UNDER INDIVIDUAL TITLE.

## POINT VI

DEFENDANT, SALT LAKE CITY CORPORATION, IS ESTOPPED TO ASSERT THE LOCATION OF THE STREET LINE AS CLAIMED BY IT.

## POINT VII

PLAINTIFFS ARE NOT BARRED BY ANY STATUTES OF LIMITATION.

## ARGUMENT

### POINT I

PLAINTIFFS ESTABLISHED A CLEAR TITLE TO THE 21 FOOT STRIP BASED UPON THE FILES AND RECORDS THEREON AT THE SALT LAKE COUNTY RECORDER'S OFFICE.

### POINT II

PLAINTIFFS ESTABLISHED A CLEAR TITLE TO THE 21 FOOT STRIP BASED UPON ADVERSE AND CONTINUOUS USAGE FOR OVER 50 YEARS.

This case has been tried without a jury and was then submitted to the Court for adjudication. We shall endeavor to summarize the facts and the law in an orderly manner to clearly demonstrate the plaintiff's right and title to the 21 foot strip of land at issue.

At the corner of 21st East Street and 13th South Street in Salt Lake City, Utah was situated the old Harries homestead property. This land came to Henry H. Harries by U. S. Patent in 1870 by description which read: "The South  $\frac{1}{2}$  of Southwest  $\frac{1}{4}$  of Section 10, Twp. 1 South, Range 1 East, Salt Lake Base and Meridian." Roughly speaking, that encompassed an area running South from the Emigration Canyon stream bed and on both sides

of what is now known as 21st East Street, including our land.

The abstract of title to the land, exhibit 1-P shows the subsequent conveyances from the original patentee through his children and grandchildren to the warranty deed in favor of the present owners, plaintiffs in this case, J. P. and Virginia L. Gibbons. The testimony is clear that the said corner tract of land, including the 21 foot strip, was purchased for the erection of a service station and that such has now been constructed at the corner.

Three competent title men, Mr. Mark Eggertsen, Mr. Robert McAuliffe and Mr. Herbert Halliday, an attorney, testified concerning the work of the Security Title Company in the examination of this title in contemplation of a title insurance order presented to them. At the inception they were advised that Salt Lake City might claim the 21 foot strip and hence, they carefully searched the title records of Salt Lake County in order to ascertain the true status of the title. The customary records were all examined, and earlier abstract of title belonging to Mr. and Mrs. Savage (Exhibit 2-P) was scrutinized, old maps and plats of record in the County Recorder's office were checked and then, prior to a determination, Mr. Halliday went to the office of the Salt Lake Engineer and endeavored to find the legal or factual basis of any possible claim

by the city. He even discussed this with the City Engineer, himself, Mr. McLeese, but was given no evidence or satisfactory proof of title by the city. A survey was made of the corner, Exhibit 3-P, and duly weighed.

Following these exhaustive title search steps, that company then concluded that the entire corner, including the 21 foot strip, was validly vested in Mr. and Mrs. Savage and thereupon Mr. and Mrs. Gibbons purchased title. The opinion of these experts, in the field of title searching and examination, was that the city had and has no right, title or interest in and to the 21 foot strip. A policy of title insurance was then issued to the plaintiffs in the regular course of business, after the recording of the warranty deed from the Savages, showing the title vested in the plaintiffs free and clear from encumbrances.

When the time came for the actual construction of the service station, the city refused to grant a permit unless the improvements were set back 21 feet. Mr. Frank W. Taylor testified that he was informed that the city wanted it so set back for traffic purposes and if litigation established that it did not have title to the 21 foot strip, the city would condemn and purchase the same, (R. 46). In consequence and under protest, the service station was erected and set back of the 21 foot strip.

May we analyze the evidence before the Court as it bears upon the title problem here presented:

1. The Henry H. Harries patent included the area of the street and both sides of it.

2. Title and open possession of the area has been continuously in the Harries family from 1870 to 1954 and the plaintiffs and their predecessors have paid all taxes assessed thereon.

3. Salt Lake City has presented no deed, easement or other grant of title in its favor.

4. The streets in the area were designed for 66 foot width and the property, plat and survey lines on the East side of 21st East from Fort Douglas running South to 13th South represent a straight line but the city has arbitrarily altered the West line of 21st East on its maps, South of Foothill Boulevard.

5. The city has failed to prove its claim of title or possession.

Both abstracts in the record and Mrs. Savage's testimony confirm the fact that Henry H. Harries applied for and received a patent from the U.S.A. dated in 1870 and then conveyances were made later to his descendents to and including Mrs. Savage who appeared as a witness. The original patent included patent included the area in dispute, the

street area and both sides of the same. No exceptions or reservations for a street are found in the patent. Thus, any title which Salt Lake City might assert must have come from the Harries family.

This family has tenaciously held on to the land and has adversely asserted title even in the face of the attempt of the City Engineer's office to appropriate the 21 foot strip. In 1952 when the city tore down Savage's fence, removed the carriage step and attempted to bulldoze ou the shrubs and trees, Mrs. Savage vigorously resisted and protested.

The testimony of Mrs. Savage related to the line of trees and shrubs in front of their property, and irrigation ditch East of the trees, a fence on the East side of the ditch, which the city unlawfully tore down in 1952, and beyond that to the East was her grandfather's stepping stone, likewise removed by the city in 1952. She testified that they had paid all of the taxes assessed, including the sewer assessment to Salt Lake City on this 21 foot strip. Her testimony as to a foot path was very clear that no public traffic used it, only family members for the irrigation and cultivation of the area in question at the corner.

This testimony by Mrs. Savage is confirmed by Mr. Frank W. Taylor of the Texas Company. He went upon the land for a fixed purpose, to de-

termine the feasibility of constructing a service station, and he testified that he inspected it carefully for easements, paths, etc. and found none except the faint foot path for irrigation purposes, inside of the tree line. Mr. Tipton of the City Engineer's office presented a map drawn by him, from memory, just before the trial, purporting to show a public pathway. No reason was presented to recall this except the inspection made a few days before when taking pictures for the trial. No pathway was shown in any of the so-called "field notes" which he claimed to have examined. We feel that this was a belated effort to justify the defendant's claim of title set-forth in its pleading of adverse possession. No neighboring dwelling existed to the North of the Harries-Savage residence and the irrigation path was wholly within the fence so no public easement could have arisen. No one testified to any different use. The photos, Exhibit 5-P, 6-P and 7-P, show the raised character of the property higher than the street level.

Though many factors must be considered in determining title to property, it is very significant that in this case not one title document was presented or referred to by the city to justify its claim to title. No deed, condemnation, lease, easement or other title vesting instrument in favor of Salt Lake City is claimed or presented.



The only document bearing directly upon any title rights of the City to any part of 21st East street was presented by the plaintiffs in the form of the condemnation proceedings filed by Salt Lake City against Ann Elmers in 1879, Case No. 7138 in the Third District Court. Here the City recognized that it had no title to what is now 21st East street and so proceeded to condemn a street right-of-way North of the Emigration Canyon Creek to the Fort Douglas reservation.

In conformity with the established practice, a 66 foot street was condemned and acquired. The plat, prepared and filed by Salt Lake City in that case, shows the continuation of the street lines South of the Emigration Creek in a straight line extending South to and including the point where plaintiffs contend that the street now should be. We feel that it is a fair assumption that at said time the City probably entered into some agreement with Mrs. Savage's deceased grandparent for the establishment of 21st East through his property and along that same line or it would have condemned the right-of-way all the way South to what is now 13th South street (shown as 10th South on the plat).

The old Jesse Fox plat of Salt Lake City prepared in 1860 was adduced by the city and then disclaimed as a true plat, because it was not to

scale and was not subject to exact measurement. However, it was presented to show “the pattern” of lots and blocks. This shows a street in the approximate area of 21st East as a straight street. It was the same Jesse Fox who prepared the plat in the Ann Elmer case for condemnation of the right-of-way for 21st East. Once again it was shown as a straight street. Though the representative of the city engineer characterized this scale plat as a “picture” yet the legal description in the condemnation proceeding decree accurately ties this 66 foot street into metes and bounds; and the testimony of Mr. McAuliffe confirms our position that this same line extended to our property places the street line on the East of our 21 foot strip. The F. M. Lyman, Jr. survey of Five Acre Plat “C” July 1, 1932, Exhibit 9-P, likewise shows a straight street for 21st East and an excess of footage East and West in Lot 1 of Block 27 here at issue.

Perhaps the Salt Lake City Engineer’s office had laudable motives in modifying their plats when the Foothill Boulevard was designed and constructed across 21st East. This traffic problem could be best solved by conforming street and property lines to their new ideas. However, there is a legal proceeding for the exercise of eminent domain available to the City and the titles to real property are

not to be struck down by the stroke of a draftsman's pen in the City Engineer's office.

Two exhibits, both prepared by the City Engineer's office, but presented in evidence by the plaintiffs, No. 12-P and No. 11-P, illustrate forcefully our position that the City has on its own initiative attempted to appropriate the 21 foot strip in question for street purposes without due process of law.

Exhibit 12-P is a plat prepared by the City Engineer's office to show "Proposed Property Line Location, August 1940". The plat shows the entrance of Foothill Boulevard into and across 21st East at a point North of the fire station which is North of the Emigration Creek. Thus the area shown includes the street area as condemned by the Ann Elmer suit in 1879, as well as the extension to our property. But what is shown by this exhibit?

(a) To the North of the Boulevard crossing, 21st East is a 66 foot street.

(b) To the South of the Boulevard crossing, the East line of said street continues as the "plat line" all the way to the 13th South intersection.

(c) West of the said extended East line, which is the "plat line", we find a "proposed" new property line.

(d) The West line of 21st East, North of the Boulevard crossing conforms with the line as condemned and established in the Ann Elmer suit, but then the city engineer shows the West line of 21st East to the South as being 21 feet West of the true extension.

The next exhibit to be now considered is No. 11-P. This is a plat of Block 27, 5 acre Plat "C" as prepared by and procured from the City Engineer's office. The attention of the witness McAuliffe was drawn to the East line of the block, which extends from Fort Douglas to 13th South along 21st East. This plat shows the Monument line as established by the City Engineer many years ago. It shows the Westerly line of 21st East coursing South from the Fort Douglas and down to Foothill Boulevard in a straight line, but at a slight angle, converging towards the Monument line as indicated by the City Engineer's distance markings which we have encircled in red. Then it visually demonstrates the jog to the West commencing South of the Boulevard crossing which the City Engineer has platted to accomodate traffic. An extension of the original West line Southerly at the identical original angle brings it to the exact point claimmed by the plaintiff. Penciled notes by the witness McAuliffe placed on the margin confirm this (R. 52).

This exhibit No. 11-P likewise confirms the

fact that the City Engineer's office accepted and approved the West line of 21st East to the North of Foothill Boulevard along the line of the condemnation decree and plat in the Ann Elmer case as there are recorded subdivisions all along the street Southerly to the Foothill Boulevard. But at no place does the evidence show any consent or approval by the property owners to the alteration of the West street line South of the Boulevard. The distance of this altered West line from the Monument line varies about 10 feet from the North to the South side of the intersection of Foothill Boulevard and another 7 feet at the Laird Drive intersection.

The explanation attempted by the City for this land grab are two-fold; first, they contend that there was a fence line in the 1920's that would confirm the West line contended for by them. This is refuted by Mrs. Savage who has been familiar with the property for 60 years and has owned it since 1930. Even if true, a random fence line would not fix title in this case. The second explanation is that there is an excess of East-West footage in the block and they met with the owners of the land on the East side of 21st East, a Mr. Ashton, and between themselves decided to move the street to the West to give them a 21 foot strip but take it away from our owners without consulting us. By this process they say that the City only wants a 66 foot street

so we should not complain, even though that street now would include 21 feet of land taken from us without our consent and given to the property owners on the East.

### POINT III

DEFENDANT, SALT LAKE CITY CORPORATION, FAILED TO SHOW ANY EVIDENCE OF TITLE VESTED IN IT BY ANY DEED, GRANT, CONVEYANCE OR ASSIGNMENT.

### POINT IV

THE FINDINGS OF FACT OF THE COURT WERE SUSTAINED BY COMPETENT EVIDENCE SHOWING TITLE VESTED IN THE PLAINTIFFS.

The Findings of the Court were made after Judge Larson had heard the evidence, observed the witnesses and their exhibits and studied the memoranda submitted by counsel. Appellant attacks the Findings by its "Assignments of Error" #I; #II; #III and #IV. These have been generally answered by the previous argument and statement of facts.

As to items I and II, the testimony of Mrs. Savage is unempeached that she, her parents and grandparents occupied this corner, including the 21 foot strip, for more than sixty years prior to this litigation. She told of the trees planted and irrigation ditches established by her grandparent, the alfalfa raised, the plum trees, the fence line and the family stepping stone. Also she told of her protests



to the City in 1952 when it forceably bulldozed out some items, fence, stone, and some shrubs. The Photographs taken quite some time after the 1952 invasion by the City (Exhibits 5-P, 6-P, 7-P and 8-P) still show the raised character of the land, the trees, etc. The survey by Mr. Fisher made just prior to closing the purchase (Exhibit 3-P) reflects the edge of the roadway corresponding with our line except at the very corner where it cuts across slightly.

The public has not owned nor used the 21 foot strip and hence, Salt Lake City cannot complain that the Court did not find the same to be a part of a public street for 80 years. Such a finding would have been an obvious error. To sustain its position, Salt Lake City must account for the 21 foot jog in 21st East Street to the West from Foothill Boulevard Southerly. Mr. Tipton admitted that he knew of no deed or other instrument vesting in the City any title to the area (R. 90).

All of the title evidence sustains Plaintiffs' position. The City's own plats show a straight line. How has the City acquiesced in the location of the street to the East of our 21 foot strip? When the Ann Elmer suit for condemnation was filed in 1887 by the City, it showed the street as a straight line all the way past our property and that plat shows Henry Hugh Harries as the owner. The old Jesse



W. Fox plat of Salt Lake City shows the street straight. Even the City's plat, Exhibit 16-D drafted in 1933 shows the actual roadway of 21st East, both North and South of Emigration Creek as being along the Monument line. Exhibits 10-P and 11-P taken from the City Engineer's office have been previously discussed and demonstrate the Engineer's efforts to re-locate the street.

The only resolution relating to 21st East adopted by the City Commission was that in 1887 shown in the Ann Elmer suit which located it at the point contended for by Plaintiffs. The continued adverse use by the Harries family members for over fifty years confirms the Court's findings.

#### POINT V

THE DEFENDANT, SALT LAKE CITY CORPORATION, MAY NOT BY ITS ARBITRARY UNILATERAL ACTION WITHOUT NOTICE TO PROPERTY OWNERS OR COMPENSATION THEREFOR CHANGE THE LOCATION OF STREET LINES THEREBY APPROPRIATING UNTO THE CITY THE LANDS HELD UNDER INDIVIDUAL TITLE.

#### POINT VI

DEFENDANT, SALT LAKE CITY CORPORATION, IS ESTOPPED TO ASSERT THE LOCATION OF THE STREET LINE AS CLAIMED BY IT.

Salt Lake City Corporation is a creature of law and cannot grab land from the title holders whenever the City Engineer decides that the traffic

pattern would be benefitted. Certain advantages to traffic flow from Foothill Boulevard came from moving the 21st East street West 21 feet, however, we cannot be bound by the unilateral and arbitrary action on the part of the City Engineer. The predecessors of title of plaintiffs have openly, peacefully and adversely held, cultivated and possessed the strip at issue. The City in 1952 attempted to move in on the land by bulldozing out the old land marks, and stepping stone of Mr. Harries, the fence to the East of the ditch, but they were stopped before they tore out all of the shrubbery and trees.

The affirmative defense of the City is that it has had "exclusive possession and use", but it has completely failed of proof on that matter. Even the photographs which they have inked over show that the asphalt line has never encroached upon our 21 foot strip except right at the corner turning into 13th South. This is confirmed by the certified survey. All taxes and assessments on the realty have been paid by plaintiffs or their predecessors in title. The service station was set back at the demand of the City, under protest and upon the oral assurance of the Commission that if the City did not have title, it would condemn the 21 foot strip.

May we summarize our position as follows; plaintiffs have proven title by certified abstracts of

title, by expert opinion, by plats prepared by the City Engineer and by adverse possession. The City has failed to show any title evidence or and substantial proof upon which the Court could make findings adverse to the plaintiffs. Should the City desire to widen or change the true course of 21st East street, they have their remedy at law. The statutes have given the City the power of eminent domain for this purpose.

## POINT VII

### PLAINTIFFS ARE NOT BARRED BY ANY STATUTES OF LIMITATION.

Salt Lake City asserts that Plaintiffs are debarred from maintaining this action by Section 78-12-5 and Section 78-12-6 U C A '53. This position is not well taken because our cause of action did not really accrue until in 1955 when the City refused a building permit on the 21 foot strip. A partial cause of action may have accrued in 1952 when the City bulldozed out a few feet of the elevated frontage and removed the fence and ditch at the corner and along our property. However, even that was well within the 7 years provided by these sections.

Our clients and their predecessors are the ones that have been in title and possession. It is the City that is trying to break into this land. Under Section

78-12-5 we proved possession for over 60 years prior to the 1952 action of the City. Actually Section 78-12-6 should bar all recovery by Salt Lake City even if they had proved any basis for title, rather than barring the Plaintiffs, as the City was out of possession until its unlawful invasion in 1952.

## SUMMARY

Several questions of law are presented by this case. One of the first is the question of whether or not the title to real property is to be determined from the official records of the State of Utah and its constituent political subdivisions. For the purpose of fixing a focal point to which all property owners might go to determine their titles, the recording statutes were adopted. Our Utah statutes relating to this are Sections 57-3-1, 57-3-2, 57-3-3, 17-21-11 and 17-21-6; U.C.A. 1953.

The statutes, abeted by the established business customs, dictate that all of the title records shall be recorded and made available for inspection at the County Recorder's office. Here abstackers, title searchers, attorneys, land experts and others must seek information for the determination of titles to real property. At no place do we find the City Engineer's office officially designated as the source or depository of title records. No indexing or other safeguards are available there. The precautionary

inspection made in this case at the City Engineer's office illustrates the absence of any probative records there.

The plaintiffs have shown expert and diligent searches of the official title records and proof thereof was presented to the Court by the abstracts and the title experts' opinions. At this point not only a prima facie case was established, but a full and complete case was proven to verify title in the plaintiffs. The burden of going forward and of proof shifted to the defendant.

As we view it, the City under its Answer could defend its position in either or both of two ways; (1) proof of deeds, conveyances or similar documents transferring to the City some title to the property or (2) competent testimony of its asserted adverse possession of the property by the City.

The only semblance or pretense towards proof of title in the evidence is the introduction of ordinances adopted by the City saying that its Engineer can fix the boundaries of streets. Are we to suppose that by such an approach the City can vest in itself the power to alter, establish, fix or relocate street boundaries in new or different locations thereby taking from property owners all or part of their land? The mere recitation of that proposition makes obvious the answer that such is ab-

solutely contrary to all concepts of due process of law and hence wholly unconstitutional.

Yet that must be the thinking of Salt Lake City as no other title evidence was presented. The City Engineer's representative admitted consulting with the property owners on the East side of the 21st East street to attempt a relocation of the street a few years back, but made no mention of any procedure against or consultations with the property owners on the West side whose property it would take by the Westerly shifting of the street.

The second proposition would be title based upon adverse possession. Let us examine the premise for such a right, it being a statutory right which would apply to both litigants, see Sections 78-12-7, 78-12-8, 78-12-9, 78-12-10, 78-12-11 and 78-12-12, U.C.A. 1953. Let us look to the evidence of Salt Lake City under 78-12-11, which would apply if any section is applicable. Its purported adverse possession is not under any written instrument and there is no proof that the City has (a) fenced, (b) cultivated or improved, or (c) \$5.00 per acre for irrigating it. Plaintiffs' predecessors have done all of these things.

No competent or other evidence can be found on this proposition in favor of Salt Lake City. Cer-



tainly there is no evidence of any recorded document to give the City "a claim of right".

On the plaintiffs' side of adverse possession, we feel first that no such proof is necessary as we have already established legal title and we are presumed to be in possession. However, as an additional factor, the evidence shows the basic elements referred to in the statute: (a) a claim of right based upon the original patent to Henry Harries and then later conveyances in the 1930's tying the title to a point 23.4 feet West of the City's Monument line; (b) over 50 years of open possession; (c) cultivated; (d) fenced until the city unlawfully removed it in 1952; (f) irrigation; and (g) payment of all taxes assessed, including those assessed by Salt Lake City on the 21 foot strip of property.

We recognize that the Utah statute Section 78-12-13, U.C.A. 1953 says that no title by adverse possession can be obtained to the public streets. However before this is applicable, it must be proven by the City by a preponderance of the evidence that this 21 foot strip was in fact a street belonging to the City. Our Supreme Court has held in the case of Wall vs. Salt Lake City, Utah, 50 Utah 593, 168 Pac. 766, that the City may be estopped from claiming part of the street that has been adversely held where earlier surveys seem to confirm a different line and the property owner has paid the City's tax



assessments on the area involved. Both of those factors appertain in our case as the early survey and plats of the City show a straight line on the West side of 21st East and Mrs. Savage paid the sewer special assessment levied by Salt Lake City on this 21 foot strip.

Due process of law, justice and equity all require that the City follow the established procedure when a street is to be changed or widened. The City Engineer should not be permitted to expropriate from citizens their lands without legal procedure and just compensation.

Appellants' brief refers to cases on the proposition that old fence lines can be relied upon to fix the location of 21st East Street. We take no issue with the general legal proposition presented by the cases, i.e., that old fence lines are to be considered by surveyors in disputed areas. However, we do strongly resist the contention that such have any relevancy in this case for the following reasons:

(a) This was not unsurveyed lands. Though the City Engineer admitted that they did not have a copy of the U.S. Survey, yet the abstract clearly shows that the land had been surveyed prior to the patent issuance in 1870.

(b) There are City monument lines along 21st East that have been established for sixty years.

(c) The Plaintiffs' witnesses have tied the location of our corner to the old survey plat in the Ann Elmers suit in 1887 and to other proven plats.

(d) The section and the lot and block at issue have excess footage in them.

(e) The physical facts of the property as shown by its elevated character above the roadway, the cultivation and occupancy thereof by the Harries family for over 60 years negative any need for reference to old fence lines.

(f) Mrs. Savage testified as to the fence line East of the tree line for over 50 years along the street line, which the City does not mention or apparently want to consider as an old fence line since it tore it out in 1952.

Under our Utah statute, Section 78-12-7 Utah Code Annotated 1953 the presumption of possession adheres to ownership. Plaintiffs by the abstracts of title and expert evidence proved legal title to the 21 foot strip and the Court's Findings confirm this. Thus their evidence of 60 years of actual, open possession and cultivation thereof is fortified by the statutory presumption. See: *Sheppick v. Sheppick*, 44 Ut. 131, 138 Pac. 1169, 1171; *Bank of Vernal v. Uintah County* 121 Utah. 123, 250 Pac. (2d) 581.

Though Plaintiffs have certainly established beyond question their title to the 21 foot strip and

their actual possession thereof for many years. The further element of acquiescence by the City over the years may be helpful to the Court. The Utah rule has been spelled out more recently in *Ekberg v. Bates*, .....Utah....., 239 Pac. (2d) 205. In that case the Court said that sound public policy of avoiding disputes and litigation over boundaries justifies the law in implying an agreement to fix the boundary when the line has been visibly marked by monuments, fences, or buildings for a long period of time. In our case the road for 21st East was established and maintained for over 50 years East of our 21 foot strip. A fence, a line of shrubs, a carriage step and other monuments, plus the raised character of the area above the street, marked the boundary as recognized by the parties for 50 years before the City removed the monument and fence in 1952 over Mrs. Savage's objections.

The resort to old, unexplained fence lines is not necessary in our case as we have in the record proof of the undisturbed city monument line along 21st East street that has existed for many years. This has been tied in by the witness, McAuliffe, by metes and bounds with our property and the old plats showing a straight street. Had the city contended that the government survey monuments or the city survey monuments had been lost or destroyed, then some merit might be found in reference to the fence

lines of former days. The city makes no such contention as such are not the facts.

Respondents therefore urge the Court to affirm the judgment of the lower court and leave the city to its statutory right of condemnation if it desires to acquire the 21 foot strip from the plaintiffs rather than its program of attempted expropriation.

Respectfully submitted,

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