

1957

J. P. Gibbons and Virginia L. Gibbons v. Salt Lake City Corporation : Reply to Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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UNIVERSITY UTAH

IN THE SUPREME COURT

SEP 10 1957

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of the

STATE OF UTAH

J. P. GIBBONS and VIRGINIA L.
GIBBONS,

Plaintiffs and Respondents

vs.

Case No. 8596

SALT LAKE CITY
CORPORATION,

Defendant and Appellant.

REPLY TO PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF

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} Case No. 8596

REPLY TO PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF

Respondents, J. P. Gibbons and Virginia L. Gibbons, his wife, respectfully reply to the Petition for Rehearing filed by the appellant.

Respondents submit the following points in support of their Reply hereby made.

POINT I.

THERE IS SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT BOTH THE TRIAL COURT'S DECISION AND THE SUPREME COURT'S DETERMINATION.

POINT II.

THE COURT DID NOT ERR IN CONCLUDING THAT APPELLANT CITY HAD NO TITLE TO THE LAND IN DISPUTE UNDER ITS CLAIM THAT SUCH IS PART OF 21st EAST.

POINT III.

THE COURT PROPERLY HELD THAT RESPONDENTS HAD ACQUIRED AND RETAINED TITLE TO THE AREA CLAIMED BY THEM.

STATEMENT OF FACTS

The facts have been quite thoroughly reviewed in the original briefs. However, the following pertinent facts should be considered in conjunction with this Reply to the Petition for Rehearing.

We have prepared an attached illustrative plat to show the East and West lines of 21st East as reflected by official records of Salt Lake County and of Salt Lake City. The only witness who carefully presented these facts was Mr. Robert McAuliffe. He is a title officer from Security Title Company and before him were the following particular parts of our present record:

(a) The condemnation proceedings in 1887, *Salt Lake City v. Ann Elmer* and its attached plat prepared by Jesse Fox for Salt Lake City. This shows 21st East, both North and South of Emigration Creek, as a continuous line;

(b) Exhibit 9-P, a portion of Five Acre Plat "C" which shows 21st East also

from 9th South to 13th South, likewise having straight lines on both sides;

(c) Exhibit 10-P is a plat of Section 10 from the Salt Lake County Recorder's office, showing 21st East likewise as a straight street, also without the jog to the West now claimed by Salt Lake City.

(d) Exhibit 11-P shows all of Block 27, Five Acre Plat "C" which includes the West line of 21st East from Sunnyside Ave. to 13th South. This illustrates the way the City has jogged Westerly starting at Foothill Blvd. and continuing to 13th South;

(e) Exhibit 12-P prepared by the City Engineer showing "Proposed Property Line Location" from Foothill Blvd. to 13th South in 1940 which shows the true plat line and the City's proposed move Westerly to accommodate traffic from Foothill Blvd.

Mr. McAuliffe identified the documents and told of his computations and preparations for trial. Two items were significant: *First*, he testified that the East and West lines of 21st East, North of Foothill Blvd., which are not altered on any of the five plats, correspond with the lines asserted and established by the City in 1887 for 21st East in the Ann Elmer condemnation (R. 52-53); and *Second*; he physically demonstrated on Exhibit 11-P the departures which the City has unilaterally imposed as to the West side of 21st East, South of Foothill Blvd. and that a continuation of the true line of 21st East would place respondents' corner exactly as found by the trial court.

We have endeavored by the attached illustration to show the relative positions of the street lines according to the Exhibits. Mr. McAuliffe's testimony and his analysis of the plats not only was uncontradicted, but he was not even cross-examined.

The decision rendered by your Court, April 23rd, finds existence of the fence East of the line of trees. The establishment and continuance of this was testified to by Mrs. Afton Harries Savage. Even the free-hand plat prepared by the City's only witness (Ex. 13-D) shows the fence on the East side of the trees. The true location of such trees on the property is fixed by a survey just prior to the erection of the service station. (Ex. 3-P) This shows the *center* of the trees to be 9 feet West of the East line contended for by respondents and found by the trial court to be correct. The diameter of the trees, 1.5 feet, is also shown on the survey.

Other pertinent facts are set forth in our prior Brief.

ARGUMENT

POINT I.

THERE IS SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT BOTH THE TRIAL COURT'S DECISION AND THE SUPREME COURT'S DETERMINATION.

The trial Court saw the witnesses, heard their voices and observed their demeanor. These factors

were an aid to that court in reviewing and understanding the exhibits and their purport. Based upon that opportunity and knowledge, the trial Court found the evidence in support of the plaintiffs, respondents herein.

The City would now, not only overthrow that court's findings and decree, but also overthrow your Court in its careful and unanimous review of the case. We shall not review all factors, but do assert that the evidence is adequate, competent and complete in favor of the findings and decree of the trial Court.

The more recent expressions of your Court would seem to affirm a position that in a quiet title action your Court will not ignore the efforts of a trial Court and its opportunity to more fully comprehend the case from the presentations of living witnesses than is sometimes possible from the cold pages of the record on appeal. This is a quiet title action. No case is known to us where your Court has declared such to be purely equitable in character, and hence subject to complete review and re-statement of facts by your Court. Two recent decisions lead us to feel that your Court should rely more fully upon the trial Court's findings in our own present case and affirm that decision.

Dalton v. Dalton, 307 Pac. (2d) 894,Utah
..... (March 1957) was an appeal in a *quiet title*

action. Contradictory evidence was resolved by the trial Court. In affirming that decision your Court said,

“... on review of a case of this kind we must view the facts in a light most favorable to defendants and we cannot disturb the conclusions of the trial court if, viewing the facts in such fashion, there is substantial competent evidence supporting the trial court’s pronouncement.”

In the most recent case, *Buehner Block Co. et al v. Nick Glezos et al*, decided in May of 1957, the issues involved foreclosure of mechanics liens and determination of a partnership. On this topic the trial Court’s findings were affirmed and the decision states:

“The trial court having found in favor of the plaintiffs, we are obligated to review the evidence and every inference and intent fairly arising therefrom in light most favorable to them”. (Cases are cited in support thereof.)

Respondents now urge the following propositions; either the trial Court’s decision should be affirmed in full, or its findings and decree are entitled to *great* weight in support of the decision of your Court insofar as the same coincide. The City’s Petition for Rehearing asserts nothing basic in the evidence or law to contradict these two positions.

We did not have the *Dalton v. Dalton* opinion

available when we prepared our initial brief or argued this case. If such had been decided and available, we believe that your Court would have unanimously affirmed Judge Larsen in this case in toto. Therefore, we suggest that consistent with the Dalton pronouncement on quiet title action, your Court now should affirm the original judgment in this case as to the entire 21 foot strip, as there is substantial competent evidence in our record to support that pronouncement.

POINTS II. AND III.

THE COURT DID NOT ERR IN CONCLUDING THAT APPELLANT CITY HAD NO TITLE TO THE LAND IN DISPUTE UNDER ITS CLAIM THAT SUCH IS PART OF 21st EAST.

THE COURT PROPERLY HELD THAT RESPONDENTS HAD ACQUIRED AND RETAINED TITLE TO THE AREA CLAIMED BY THEM.

The City's primary attack seems based upon a theory that though it holds no title records, deeds, easements, resolutions or similar documents upon which to assert its title to 21st East, yet the old Jesse Fox map of 1867 fixed the City's rights. This map is no more than a picture of how they intended to lay out the city in 1867. No scale is to be found that can be applied to it with accuracy. This old map shows 21st East to be straight, without a jog. In 1887 this same Jesse Fox, for Salt Lake City, prepared the plat accompanying the 21st East con-

demnation suit against Ann Elmer. This last map by Fox is to scale and accompanies the legal proceedings setting forth the metes and bounds description, tied to the section corner.

The City does not claim that Jesse Fox changed positions of the street in 1887. Mr. McAuliffe testified that the lines for 21st East in the 1887 plat coincide with the East and West lines of 21st East North of Foothill Blvd. Now, upon what theory does the City claim the legal right to modify the location of the street South of Foothill Blvd. after its creation in about 1940? The Petition for Rehearing is silent on that.

The foremost contention of the City's first point is that because of the decree from the patentee to respondents' predecessors referring to the lot corner, in 1907, thereby 21st East was dedicated to the public. The City forgets that 21st East at that time was where respondents contend and the trial Court found it. Foothill Blvd. had not then been conceived and the traffic problems had not yet suggested to the City Engineer the desirability of pushing the West line of 21st East Westerly. (See Engineer's plat showing proposed new property lines in 1940, Ex. 12-P.)

The City would lead the Court to believe that respondents deny the existence of 21st East. (See p. 5 of its Brief) We recognize the existence of the

street, but do not bow to the City's arbitrary and unlawful act of pushing it down on to respondents' land 21.0 feet without process of law or compensation.

The title at issue is clearly shown by the evidence to be in respondents who purchased from the granddaughter of the patentee. That issue was found by the trial Court and affirmed by your decision.

“4. That the plaintiffs and their predecessors in title have an undisturbed continuous chain of title to the above described property from the time of the grant of the United States Patent to the date of trial.” (R. 118)

On the issue of possession of the 21 foot strip, once again the trial Court found the issues in favor of the plaintiffs and against the City. Your decision largely confirms this, except as to the area East of the fence East of the line of trees. Here again Salt Lake City now demands that you ignore the trial Court's findings and your Court's determination.

We are in harmony with the next to last paragraph of your decision on this point.

“Although Section 78-12-13, U.C.A. 1953, prohibits a person from “acquiring any right or title in or to any land held by any” city designated for use as a street, it has no appli-

cation to this case, for the city has completely failed to show that this land is now or ever has been 'held' by the city, as that term is used in this statute. In order for the city to hold property under the above statute, it must have some semblance of title, possession or the right to the use thereof. It is not sufficient to establish a holding by the city for the city engineers to make a survey of the property and destroy a fence which serves as a boundary line between the street and adjoining property and verbally assert that the city is the owner of such property. That is about the extent of the holding by the city of this property."

Mrs. Savage's grandfather was patentee holding title to the land both East and West of what is now 21st East. When he died and distribution of his estate occurred in 1907, no thought was given to using any description other than by lot and block of Five Acre Plat "C". At that time the city had not tried to move down the line of the road West-ly. Later, when the attempted drawing board appropriation of the land by the City Engineer became known, the deed received by Mrs. Savage from her mother (Entry 45 of abstract, Ex. 1-P) takes the precaution of identifying the East line of said Lot I, Block 27 as being 23.4 feet West of the Salt Lake City street survey monument. This deed was dated in December of 1935 and recorded in November 1936. Mrs. Savage testified that she actually purchased and occupied the property in 1930.

We need not review in detail her clear testimony of possession, irrigation, cultivation and fencing of the disputed area, nor need we review the physical assault upon the land by the City in tearing out some shrubs and fences in front of the property in recent years.

CONCLUSION

Respondents urge that the City's Petition for Rehearing be denied. Respondents further urge that the Court should consider favorably restoring fully the Findings and Decree of the trial Court in favor of the plaintiffs as to the entire 21 foot strip because such Decree is supported by competent, substantial and adequate evidence.

Respectfully submitted,

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FOOTHILL BLVD

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(S.L.City vs. Ann Elmer -
condemnation in 1887)

(Exh. 90P -- Five Acre Plat "C"
F. M. Lyman Survey)

(Exh. 10-P -- Section 10 plat
from S. L. Co. Recorder)

(Exh. 11-P -- Blk. 27, Five Acre
Plat "C" from Recorder)

* * *
* ILLUSTRATIVE *
* PLAT SHOWING *
* EAST and WEST *
* LINES *
* 21st EAST *
* *

EMIGRATION CREEK

(Exh. 12-P -- S.L.City Engineer
plat of "Proposed Property
Lines" --- this indicates
the "Plat line" and also
the newly proposed property
line suggested by the City
Engineer)

Plat line:

Proposed property line:

(Line now claimed
by S.L. City now)

(Property line of
Plaintiff and as
found by the trial
Court) -----

T H I R T E E N T H S O U T H