

1992

Ludean H. Cox v. Edward C. Carlisle, Mayor of
Manti City, Manti City, a municiple corporation,
Henry Henningson, John McIntosh and Ed
Nielson : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

LUDEAN H. COX,

Plaintiff and Appellant,

vs.

EDWARD C. CARLISLE, Mayor of
Manti City, MANTI CITY, a mu-
nicipal corporation, HENRY HEN-
NINGSON, JOHN McINTOSH
and ED NIELSON,

Defendants and Respondents.

Case No.
9242

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Divorced from emotive statements about falling fences, neat furrows, equipment invasions, and "extraordinary circumstances," the present case is concerned with the question of whether a person can acquire public property merely by claiming ownership.

Defendants-respondents—hereinafter called “defendants”—agree with the plaintiff’s statement of facts insofar as it repeats occurrences at the trial; however, defendants do not agree with the conclusions drawn from some of the recited testimony. The chosen excerpts do not give an accurate picture of the total impression which must have been given to the trial judge. Moreover, with respect to the question of occupancy, the plaintiff was stingy in her references to documentary evidence in itself sufficient to sustain the findings of fact.

Manti City was incorporated in 1851. In 1872 the property upon which the townsite was located was conveyed to Luther T. Tuttle, then mayor of Manti, by patent from the United States of America (Ex. 7), pursuant to an act of Congress of March 2, 1867, generally referred to as the Townsite Act (14 Stat. 541; 43 U.S.C. § 718).

No direct evidence was introduced at the trial as to the date upon which the townsite was entered. However, the trial judge, with plaintiff’s acquiescence, requested defendants’ counsel to find out when the entry was made and whether a plat was entered along with it, and to let the court know (R. 173; Unpaged minute entry of June 15, 1959). The Director of the Bureau of Land Management of the United States Department of the Interior wrote to counsel that Cash Certificate No. 636 was issued to Mayor Tuttle on May 15, 1871. Copies of the letter were furnished to the court and plaintiff’s counsel, and it is reprinted herein as Appendix A. The letter indicates that no declaratory statement was filed and that a cash entry was made.

Mayor Tuttle deeded Parcel 99 to William Bench under

date of December 14, 1871, and Parcel 113 to William A. Cox under date of December 21, 1871. Both deeds described the property by reference to "Plat A of Manti City Survey." The deed to Parcel 99 (Ex. 6) described the land as being "35 rods north and south by 46 rods east and west containing ten acres", and the deed to Parcel 113 (Ex. 8) described the land as "being 46 rods east and west by 6 rods north and south containing one 106/160 acres." These descriptions are in conformance with the official plat (Ex. 5) and are accurate only if there is a 66-foot strip between Parcels 99 and 113.

One of the documents introduced in evidence by the plaintiff was an abstract of title (Ex. 1). It shows that Parcels 99 and 113, beginning with the 1871 conveyance by Mayor Tuttle, were always described in such a way that a strip of land 66 feet wide kept them apart—even after both parcels came into common ownership. There has never been a conveyance in which anyone claimed to be the owner of the 66-foot wide strip (or street) between Parcels 99 and 113.

Although these deeds from the mayor to the original occupants do not conclude plaintiff, as *res judicata*, from now claiming that her predecessors were the occupants of the street at the time of the entry, the deeds constitute evidence that the grantees were not in possession of the street at the time of the entry. Other documents enhance the value of the deeds for this purpose. The official record of the declaratory statements made by claimants at the time of the land adjudications, and the official record of the adjudications were introduced in evidence as defendants' Exhibits 10 and 9, respectively.

The record of declaratory statements, Page 181, Entry

59 (Ex. 10), shows the claim of William Bench to Parcel 99 "containing 10 acres." The adjudication record (Ex. 9), Page 132, Entry 59, shows William Bench to have appeared in court and "claimed to be the rightful owner of possession of land as set forth in statement, to wit, * * * Parcel 99 being 35 rods north and south by 46 rods east and west containing 10 acres." In the same book, Page 156, Entry 166, William A. Cox is shown to have appeared in court and claimed to be the rightful owner of possession of various parcels of land, among which was Parcel No. 113 "being 46 rods east and west by 6 rods north and south, containing one and 116/160th acres." No claim was made by either Mr. Bench or Mr. Cox to the property in the platted street lying between Parcels 99 and 113.

Exhibit 5, sheets A through D, introduced by the defendants, is the official Manti plat and map. It shows Parcel 99 to contain 10 acres, to be 35 rods north and south by 46 rods east and west and to be separated by a street between it and Parcel 113. Parcel 113 is shown on the map to be 6 rods north and south by 46 rods east and west and to contain one and 116/160ths acres. The plat was adopted as the official Manti City plat on January 25, 1892, and was filed for record on January 29, 1892. The drawing contains the following certificate:

"I hereby certify that this is a correct Map of a survey made by me in the month of February, 1871.

E. W. Fox
County Surveyor"

These documents constitute the only direct evidence as to occupancy of the 66-foot street at the time of entry in the Utah land office by Mayor Tuttle. Both sides introduced

testimony of inhabitants of the area—plaintiff's witnesses saying there was no street, and defendants' that there was, at various times in years gone by. The testimony referred to known landmarks, and from the testimony as a whole the court could justifiably conclude that there was a street used by the inhabitants of Manti some time after the entry. While the excerpts quoted by the plaintiff in her brief might raise some question as to the parcels that were being talked about by the witnesses, the entire testimony has to be read, and the plaintiff cannot successfully attack the testimony by slighting references to small portions. The evidence shows that there was a street.

One witness called by the plaintiff, H. R. Clark, testified, in effect, that there was a road running west to the Cox property line where it ended abruptly, somewhat like an aircraft runway (R. 109). This type of street taxes the imagination.

Mr. William Terry Hall testified that there was a road separating Parcels 113 and 99, that he used it to haul hay, that the use was made without asking anyone for the privilege, that no one ever tried to stop him, and that he understood, from what his father told him that there was a platted road through that area (R. 59, 60, 62, 64 and 67).

One of plaintiff's witnesses, Fred W. Cox, testified that the lane ran between Parcels 99 and 113, that it was traveled some, but that it was never fenced, "only on one side, over in on Parcel 113" (R. 135).

In March, 1910, property owners within a section of Manti City petitioned the District Court of the Seventh Judicial District for disconnection of certain territory from the City of

Manti (Ex. 2). The action was initiated pursuant to § 288 *et seq.*, *Compiled Laws of 1907*, which is substantially the same as the present Chapter 4, Title 10, Utah Code Annotated 1953.

The prayer of the petition was that:

“ * * * the clerk of said court cause notice to be given of the filing and purpose of this petition in the manner provided by law and that after the hearing hereon and the proceedings had in conformity with the requirements of the statute in such case made and provided, that the court make a decree disconnecting and detaching the said described property from said Manti City.”

The City of Manti was served with summons but did not answer the petition, and on April 4, 1910, the city's default was entered.

Other evidence related to the Cox farm and what the plaintiff and her husband, Grant Cox, had done with it. Plaintiff testified that she was born in 1912, could remember back as far back as 1919, but to her recollection there was never a road between Parcels 99 and 113 (R. 88). She agreed with her counsel that the premises had been improved “by leveling and placing fertilizer on them” (R. 94).

Grant Cox, the plaintiff's husband, was also her witness. He testified that he and his wife had occupied the property since about 1948 or 1949. They had improved the lands by changing the irrigation system; equipping a well with a pump; constructing a pond; and putting in cement ditches, risers and headgates. Since 1948 they had spent in the neighborhood of \$15,000.00 on the land (R. 114). But this amount was spent

on the entire 80 acres owned by the Coxes, not on the 11 and 116/160ths acres included in Parcels 99 and 113, and certainly not on the 66-foot by 759-foot Manti City street. Mr. Cox testified that six or seven years before the trial he had been told by one of the city councilmen that the city intended to build a road between Parcels 113 and 99 (R. 117), that in January of 1959 he noted that the defendants had knocked down his fence and had run a grader through some alfalfa and had filled in a ditch (R. 118). He said the placing of a road would affect the leveling of the ground and that it would have to be re-leveled (R. 118), but that he could not estimate the amount of damage he had suffered because of the destroyed fences, the damaged ditches and the cut into the drain (R. 120). It would take \$10 or \$15 to repair the fence (R. 120), half a day to fill up the hole that had been dug through the field (R. 121) and about \$10 to clean out the ditches.

On cross examination Mr. Cox testified that the \$15,000.00 he was talking about was the cost of improving approximately 80 acres in the vicinity. Mr. Cox also testified that the land was re-leveled in 1955 (R. 126) which, according to his own testimony, would have been sometime after the city first put him on notice of its claim to the road (R. 117). He also testified that the pond and the pipe, the cement pipe and the cement ditches were put in after the city had told him that they wanted to build a road between Parcels 99 and 113 (R. 126). But he was not very clear as to just what effect the roadway would have on his irrigation system (R. 127). While he thought that putting in a road would "cut the value down quite a bit," there was no testimony by him or by any appraiser as to how much it would cut it down (R. 128).

STATEMENT OF POINTS

1. The evidence supports the court's finding that a 66-foot street existed between Parcels 99 and 113 at the time of the entry of Mayor Tuttle under the Townsite Act.

2. The evidence supports the trial court's finding that there was no abandonment or vacation of the street.

3. The evidence supports the court's finding that the defendants are not estopped from claiming title to and opening the street.

ARGUMENT

I.

THE EVIDENCE SUPPORTS THE COURT'S FINDING THAT A 66-FOOT STREET EXISTED BETWEEN PARCELS 99 AND 113 AT THE TIME OF THE ENTRY OF MAYOR TUTTLE UNDER THE TOWNSITE ACT.

Plaintiff and defendants seem to agree that the Utah law relating to rights of occupants under the Townsite Act of 1867 is set out in *Hall et al. v. North Ogden City et al.*, 109 Utah 325, 175 P.2d 703 (1946). There it was held that a conveyance by the probate judge, acting as trustee, to a city or town in contravention of the rights of the occupant as of the date of the entry, was void. The case also held that although a claimant had presented a claim for and participated in an adjudication as to certain properties, this was not *res judicata* as to adjacent land claimed by the city to have been dedicated as public streets.

In the *Hall* case, however, it was stipulated that, except for one small tract, none of the lands had ever been opened up or used as streets by the public, and the only evidence, apparently, as to that tract, was that it had never been opened up as a street. The plaintiff here doesn't have such a stipulation or such proof. On the other hand, there is enough evidence against her to support—even require—a finding that the plaintiff and her predecessors were not in occupancy of the disputed strip at the time of entry under the Townsite Act.

First, there is the official plat of Manti City as introduced in evidence at the trial (Defendants' Exhibit 5). This map shows a 66-foot street between Parcels 99 and 113. There is a certificate on the exhibit that it is a correct map of a survey made by the County Surveyor in February, 1871, about three months prior to the entry. At the trial, this map was the most reliable probative evidence of the existence of streets and the occupancy of lands in Manti City at the time of the entry.

It has been held, in a case decided under the Townsite Act, that such a map is *prima facie* evidence of the facts shown in it. In *Placer County et al. v. Lake Tahoe Ry. and Transportation et al.*, 58 Cal. App. 764, 209 Pac. 900 (1922), there was a dispute as to whether lands platted as a public common had been occupied at the time of the entry. The court said:

"In the first place, it is to be observed that a map made in 1863 was introduced in evidence and thereon Block 6 was marked and designated as public common and the Bethel map, as seen, corresponds in that particular with said map of 1863. We refer to the last mentioned map because it is stated by counsel for the defendants that there is no evidence to show that

prior to the survey of the townsite made by Bethel in 1871 Block 6 constituted a public common and because, also, they contend that the mere fact that Bethel marked and designated Block 6 on his map as public common is not evidence that the block was previously regarded as public common. Now, as to the Bethel map on which the whole of Block 6 is marked designated as public common, said map having been made by and under the authority of the act of the legislature of 1867 and 1868, *supra*, constitute, by virtue of the provisions of section 3 of said act, 'prima facie evidence of the content and correctness thereof in all the courts of this state.' Hence the burden was upon the defendant mercantile company to overthrow or overcome, by competent evidence, the fixed probative effect imparted by the law to said map and the field notes made at the same time. This burden the mercantile company failed to sustain."

Utah, too, has a statute which makes the surveyor's map of 1871 *prima facie* evidence of its contents. It is provided in 78-25-3 Utah Code Annotated 1953:

"Entries in public or other official books or records, made in the performance of his duty by a public officer of this state or by any other person in the performance of a duty specially enjoined by the law, are prima facie evidence of the facts stated therein."

It was the County Surveyor's duty to make surveys and record them. See Territory of Utah, *Compiled Laws of 1876*, §§ 226-235.

Apart from statute, however, the 1871 map—the authenticity of which has not been challenged, and which was recognized by the Manti City council in adopting the map as the official plat of Manti City in 1892—is competent evidence

of the facts shown on the map, according to the overwhelming weight of authority, ancient and modern.

The general rule is stated in an annotation, "Admissibility in evidence of ancient maps and the like," 46 A.L.R. 2d 1318, 1320:

"An exception to the general rule which requires maps, surveys, and the like, to be authenticated by the testimony of the party making the same exists where the documents are ancient. Maps, surveys, etc., purporting to be thirty years old or more are said to prove themselves and are admissible in evidence without the ordinary requirements as to the proof of execution or handwriting if relevant to the inquiry, when produced from proper custody, on their face free from suspicion, and authorized or recognized as official documents."

The plat and map of Manti City, prepared in February, 1871, by E. W. Fox, County Surveyor, meets the requirements set out in the reported cases. The map, therefore, is evidence that there was a 66-foot street between Parcels 99 and 113 at the time of the entry by Mayor Luther T. Tuttle.

And the map isn't the only evidence. The conduct of plaintiff's predecessors would lead one to believe that there was a street separating Parcel 99 from 113. As pointed out in the Statement of Facts, William Bench in his declaratory statement, and both William Bench and William H. Cox in the land adjudication proceedings, described their property in the same way as it was shown on the map: same dimensions, same acreage. Neither Mr. Cox nor Mr. Bench said anything to the court about being entitled to the possession of the 66-foot strip between Parcels 99 and 113, nor to any part of it. A fact finder would have to leave the realm of reality to

avoid reaching the conclusion that the strip wasn't claimed because the claimants knew it was a city street.

To overcome this evidence of the County Surveyor, the council of Manti City (which adopted the plat as official), and the declaratory statement and the statements before the probate court, the plaintiff has introduced not a trace of evidence relating to occupancy of the street *at the time of entry*.

There was some testimony by plaintiff's witnesses, it is true, to the effect that there never was a street between Parcels 99 and 113. But their memories didn't go back beyond the 1890's, and some of the testimony doesn't appear to have any probative value. For instance, Mrs. Cox, the plaintiff, couldn't remember past 1918—some 47 years after the entry. Even if testimony about the conditions in 1892 were relevant to prove conditions in 1871, nevertheless the defendants introduced testimony from disinterested witnesses to the effect that there was a street (admittedly not paved, curbed and guttered as are modern streets in modern cities) for a long time after 1871. Could this court, on that state of the evidence, direct a trial court to find that there was no street between Parcels 99 and 113 at the time of entry; and, beyond that, to find that plaintiff's predecessors occupied the strip?

II.

THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT THERE WAS NO ABANDONMENT OR VACATION OF THE STREET.

Under the present Utah statute, cities and towns may vacate public streets only by ordinance (10-8-8 Utah Code Annotated 1953). The requirement that the vacation of streets by a city be done by ordinance first came into Utah law by Chapter 123, *Laws of Utah*, 1917, § 206 x 8. Prior to that time the statute had provided only that cities and towns might vacate streets, without specifying the method.

Inasmuch as there is no evidence that any ordinance was ever adopted or other official action taken, to vacate the street in question, plaintiff must rely upon some act of the city in carrying out an intention to abandon the street, and this prior to adoption of the 1917 amendment.

Plaintiff apparently seeks to become owner of a city street by virtue of the 1910 disconnection proceeding, though her theory is not clear to defendants since the 1910 decree did nothing more than remove a large parcel of property from Manti City. The street was "disconnected" from Manti—but it continued to connect two sides of Manti. The southern boundary of the disconnected portion was not a straight line, and Manti's northern boundary after the disconnectoin looked something like this:



The street connects sides A and B. (See Exhibits 2 and 5).

Even if the court should conclude that the city has no power to open or maintain a street outside the city limits, this

would still not help the plaintiff. The most that would happen would be that the street *as street* might go to Sanpete County, while the strip *as real property* would remain in Manti City.

In *Odom v. Wood*, 177 S.W. 2d 165 (Mo. App. 1944) it was held that upon separation of lands from a city the right to streets within the separated area vested in the county. And in *Knight v. Thomas*, 35 Utah 470, 101 Pac. 383 (1909) this court held that upon vacation of a street the right to occupy and use the land is in the owner of the fee. The court said:

"If all the interest which the city had in and to the land was only with respect to the public way on the land, then on vacation of the street, all its interest in and to the land ceased. * * * When the street is vacated, the right to occupy and use the land belongs to him in whom the fee is—the city, or the original landowner if it was reserved by him and not conveyed, or to the abutting property owners—and the land is subject to all the use and enjoyment and burdens of other lands; and *if the fee is in the city the land is just as much real property as is other lands owned by the city.*" (Emphasis added.)

Moreover, there is no evidence that an ordinance was adopted by Sanpete County abandoning or vacating the street, if it should be assumed that Sanpete County, after the disconnection, was the proper public body to do it. Prior to 1911 the statute regulating the power of counties to abandon highways provided as follows:

"All highways once established must continue to be highways until abandoned by order of the Board of County Commissioners of the county in which they are situated, by operation of law; or by judgment of a court of competent jurisdiction; provided, that a road

not used or worked for a period of five years ceases to be a highway." *Compiled Laws of Utah*, 1907, § 1116.

In 1911, the year after the disconnection proceeding, the statute was amended by Chapter 142, *Laws of Utah*, 1911, to read as follows:

"All highways once established must continue to be highways until abandoned by order of the Board of County Commissioners of the county in which they are situated, or by judgment of a court of competent jurisdiction." (Cf. 27-1-3 Uth Code Annotated 1953.)

To prove abandonment or vacation of the street the plaintiff must prove some affirmative act on the part of the city or the county indicating an intention to abandon. If she relies upon the action of the county, it must be upon some unofficial act or non-user for a five-year period prior to 1911. This she cannot do, since the county did not become involved until after the 1910 disconnection. There has been no statute providing that city streets may be abandoned by non-user for five or any other number of years.

The question of what is necessary to constitute abandonment of the street by a city was considered in *Tooele City v. Elkington et al.*, 100 Utah 485, 116 P.2d 406 (1941). This court distinguished earlier cases between strictly private parties, where conduct of the city had been a factor and seemed to indicate that a good deal more than non-user would be required if an adverse title were asserted against a city itself.

In the present case plaintiff must rely solely upon the fact that for a number of years the city did not improve and maintain the public street. Moreover, this would have to have

been for a number of years prior to 1917, because since then cities have not been able to abandon or vacate a street by any other method than by ordinance. (See 10-8-8 U.C.A. 1953, and its history in *Tooele City v. Elkington*, *supra*).

To establish abandonment of the street, the plaintiff must show not only non-user but an *intention to abandon*. It has been stated that non-user is only an evidentiary fact aiding in the resolution of the question of intention. It has also been held that non-use, coupled with failure to remove obstructions erected by abutting owners and others has been held not to amount to abandonment and that an intention to abandon is not established by negative or equivocal acts. 11 *McQuillan on Municipal Corporations* (3d Ed.) § 30.182; 1 *Antieau on Municipal Corporation Law* 580.

Although the statutes prior to 1917 did not prescribe the method by which a street would have to be vacated by a city, "vacation" is an "affirmative act." 11 *McQuillan on Municipal Corporations* (3d Ed.), *supra*; it ordinarily describes "termination of the existence of a highway by direct action of the public authorities." *Bond v. Green et al.*, 189 Va. 23, 52 S.E. 2d 169, 172. There is no evidence that anything was done by Manti City or Sanpete County to vacate the street. The plat and the abstracts, as well as the property descriptions in all conveyances, showed the street, and all conveyances of property were made with relation to it. Accordingly, it would seem that there was no vacation, that the street continued in existence, and that the city owned the fee, unless the city is estopped from claiming title to the strip and the right to open the street.

Although this court has not set out just what is necessary for a city to do to abandon a street, it has recognized that different rules govern the abandonment or vacation of city streets than the abandonment of highways by a county. In *Sowadzki v. Salt Lake County*, 36 Utah 127, 104 Pac. 111, 115 (1909), decided during the period when a county could abandon roads by five-years' non-use, the court said:

" * * * the legislature has always treated streets as being controlled by different provisions than those which affect county highways. In view of these provisions, and others which require no special mention, we are of the opinion that the legislature intended the streets in cities and towns should be governed by a different rule with regard to the abandonment thereof than are roads and highways in the county outside of such cities and towns. The reason for such distinction is clearly pointed out by some of the authorities heretofore cited as well as in those hereafter noticed. But independently of such reasons, if the legislature has made such a difference (and we think it has), then it becomes our duty to enforce it."

III.

THE EVIDENCE SUPPORTS THE COURT'S FINDING THAT THE DEFENDANTS ARE NOT ESTOPPED FROM CLAIMING TITLE TO AND OPENING THE STREET.

The plaintiff's most fervent argument is based upon what she calls "extraordinary circumstances" which should estop the city from opening the street. She relies upon the decision of this court in *Wall v. Salt Lake City*, 50 Utah 593, 168 Pac. 766, (1917), seeing in the instant case "extraordinary circumstances" like those in *Wall*. We don't agree.

In *Wall v. Salt Lake City, supra*, there was affirmative misleading conduct, the city having actively led the plaintiff or her predecessors to expend money in subdividing and selling the lots, and to advance money on security of a mortgage. This had been done after several contacts had been made with the city and the city had approved a subdivision the existence of which was inconsistent with the location of a street thereafter claimed by the city. In *Wall v. Salt Lake City, supra*, the court correctly held that the defendants were estopped from claiming the street.

There were extraordinary factors present in that case: active misleading by the city; expenditure of large sums of money in reliance upon the city's action; taxation of the property in question to the land owners over a number of years; and collection and use of the taxes by the city.

In the present case those factors are absent. We have, at most, non-action by the city with respect to maintaining the street between Parcels 99 and 113. In addition, the evidence as to improvements is of an equivocal character; there is no evidence of substantial monetary loss to the defendants; there is evidence that many of the improvements relied upon by the plaintiff as a basis for estoppel were made after the city had given notice of its intention to re-open the street; in continued transfers of the property plaintiff's predecessors have recognized the existence of the street; no one in the chain of title has paid taxes on the property or sought to have it assessed; and they have had the benefits of possession and use without paying rent.

Plaintiff's case is weaker than the one held by this court

in *Tooele City v. Elkington*, *supra*, 100 Utah 485, 116 P.2d 406 (1941), to be insufficient to raise an estoppel. There the court said:

"In the case at bar, the consideration given the city by Elkington was small, if anything; the deed was made in contravention of the statute; there is no evidence that the property had been assessed against the defendants or their predecessor's interests; the time element is short; and there was not a replatting or a change in the whole neighborhood to the benefit of all adjacent landowners."

Moreover, in the *Elkington* case, the defendants relied on an estoppel created by the actual giving of a deed by the City of Tooele. The only stronger element here, from plaintiff's standpoint, is that the non-user was for a longer period. But non-user, no matter how long continued, is usually held not to be a sufficient ground for raising an estoppel to prevent a city from opening a city street.

Even the annotations cited by plaintiff in her brief preponderantly support the proposition that the mere fact that the municipality has permitted a platted street or alley to remain unopened over a long period of years will not estop it from opening such street or alley. And those cases holding that non-user or inaction on the part of the city may be sufficient to raise an estoppel, also require a finding that failure to raise the estoppel would result in great damage to the persons in possession (171 A.L.R. 110).

A thread running throughout the estoppel cases is the idea that it would be grossly unfair to permit the city to change its position. Courts will not permit such a change if

great damage would result to the other party and that the public interests are outweighed by this great damage. In the present case plaintiff's evidence was skimpy at best as to just what effect the street would have upon her ability to farm, and to utilize the irrigation system, the pond, the concrete pipes and what-have-you. She failed to differentiate between the portion of her \$15,000 spent upon the 80-acre tract and the portion spent on the city's 66 by 759-foot strip. She failed to differentiate between the amounts spent before and the amounts spent after the city notified Mr. Cox of its intention to open the street.

We are confident that if this court were sitting as the trier of fact it would not, under those circumstances, raise an estoppel against defendants. But this court is not sitting as the trier of fact. To reverse the trial judge this court must not only regard the facts as sufficient for an estoppel, but hold that on such evidence it is mandatory that a trial court find "extraordinary circumstances" and give the public's property to private parties without compensation. The plaintiff's evidence just isn't that good or that much. It's equivocal, thin, and unconvincing.

The only thing left upon which plaintiff can rely is the 1910 disconnection proceeding. And she seems to contend that the defendants are bound not only by the judgment but by the statements in the petition. This is not the law. Although summons was served upon the defendant Manti City, it did not answer and default was entered against it. Thereafter the proceeding went ahead, apparently without the participation of the city, and certainly without litigation of any of the facts

upon which the judgment was based. The prayer was only that the property be disconnected from the city, and the judgment did not and could not go beyond the prayer of the complaint. Section 3187 of the *Compiled Laws of 1907* (in effect at the time of the proceeding) provided:

"The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; * * * "

Plaintiff seems to argue in her brief that the disconnection proceeding somehow had the effect of depriving the city of title to a street—a fee title it had received by patent from the United States to the Mayor of Manti City in 1872. She would have judgment go far beyond that prayed in the complaint, solely on the basis of some statements in the petition, one of the signers of which was interested only in escaping a tax burden (R. 146).

The judgment cannot have any effect as *res judicata* on the question of the ownership of the street by the city. As stated in the *Restatement of Judgments*, § 68(2):

"A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact nor actually litigated and determined in the first action."

The reasons for the rule are set out in Comment D to § 68, in part as follows:

" * * * The result is different, however, as to the effect of the judgment upon other causes of action. The defendant is not precluded from interposing a defense to the subsequent action which he might have interposed but did not interpose in the first action.

"Although it is not unfair to the losing party to hold that any question of fact actually determined in the action shall be conclusive against him in a subsequent action between the parties based upon a different cause of action, it would be unfair to him to hold that he is precluded from relying upon facts which might have been but were not determined in the prior action. If the defendant fails to interpose a defense in the prior action and judgment is given against him, the original cause of action is merged in the judgment; but there is no reason why he should not make the defense when sued upon a different cause of action. He may have various reasons for not interposing the defense in the first action and for permitting the plaintiff to obtain a judgment against him in that action. It may be that the action involves so small an amount that a defense to the action would cost him more than he would lose by failing to defend. * * * It would be most unjust to him to hold that his failure to defend should have the same result as though he had interposed a defense and it was found that the matters alleged in the defense were untrue."

The only purpose of the disconnection proceeding, as can be seen from a reading of the statute and the authorities, as well as a Utah case considering disconnection, is a political one to determine city boundaries for purposes of taxation and mutual obligations and rights as between the governing body and its citizens. It was never intended, and there is nothing in the statute that indicates that it was, to be a means of depriving a city of property it owns. Cf. Title 10, Chapter 4, Utah Code Annotated 1953 (substantially the same as §§ 288 *et seq.* of *Compiled Laws of 1907*); *Plutus Mining Company v. Orme*, 76 Utah 286, 289 Pac. 132 (1930); 1 *Antieau on Municipal Corporation Law*, § 1.24.

(If plaintiff argues that the city has no power to maintain streets outside the city limits, the answer is that the question of "power"—apart from ownership of the street—is no concern of hers. It is a question between the city and its taxpayers.)

Taken all in all, then, the claim of estoppel as raised by the plaintiff in the above case is based solely upon inaction (one type of which was failure to oppose disconnection) by the city over a number of years, but without proof of any particular reliance by the plaintiff, without proof of any expenditure, in general, without proof of any extraordinary circumstances, but with proof that the plaintiff and her predecessors have taken advantage of the fact that taxes were not being assessed against the property. The plaintiff's circumstances are ordinary, not extraordinary.

CONCLUSION

The evidence clearly establishes that there was a city street between Parcels 99 and 113 at the time of the entry by Mayor Luther T. Tuttle under the Townsite Act. This is shown by an official map made at approximately the time of the entry, certified by the County Surveyor, and by the declaratory statements and adjudications of the claimants to the property.

Plaintiff has failed to prove facts sufficient to raise an estoppel against the city. While there may have been non-use of the street over a period of years, non-use isn't enough; and there has not been reliance and expenditure by the plaintiff such as to justify application of the doctrine of estoppel.

There is no evidence that the city took any action at any time that would constitute abandonment or vacation of the street between Parcels 99 and 113.

The disconnection proceeding filed in 1910 has no further effect that to change the political boundaries of Manti City. Even if it were held that jurisdiction over the streets was affected by the proceeding, the result would be to put the street *as a street* under the county's control—but it would have no effect on the street *as property*. [The plaintiff has not shown herself to be a proper party to contest the city's right to spend tax money on a street it owns outside the political boundaries of the city.]

The plaintiff's claim of estoppel is not well-founded, since she has failed to show that the city ever did anything except fail to take affirmative action to maintain the street and failed to make an appearance in an action in which certain taxpayers wanted to get out of the city. Under the cases this is not sufficient to raise an estoppel against the city, particularly where the property owner has not relied upon the inaction to his substantial detriment. The plaintiff failed to make the kind of proof that would support estoppel in any kind of case, let alone one in which the rights of the public in the city streets is concerned. Failure to estop the city won't lead to any injustice—gross or otherwise.

The Findings of Fact of the trial court are supported by ample evidence, the Conclusions of Law are correct, and the judgment should be affirmed.

Respectfully submitted,

Dilworth Woolley
Manti, Utah

Bryce E. Roe

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Attorneys for Respondents

APPENDIX A
UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Washington 25, D. C.

July 2, 1959

Mr. Bryce E. Roe * * *

Dear Mr. Roe:

In response to your letter of June 18 we have checked our records concerning the entry for Manti Town Site, Utah.

We find that Luther T. Tuttle, Mayor of Manti, purchased at the Land Office at Salt Lake City, Utah, on May 15, 1871, the S $\frac{1}{2}$ sec. 1, E $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 11, all sec. 12, T. 18 S., R. 2 E., and lots 1, 2, 3, 4 sec. 7, and lot 7 sec. 6, T. 18 S., R. 3 E., Salt Lake Meridian, Utah. Full payment for the land was made in the amount of \$1600, being at the rate of \$1.25 an acre for the 1280 acres purchased.

Cash Certificate No. 636, Salt Lake City, issued to Mayor Tuttle on May 15, 1871, the date he purchased the land, followed by the patent which issued to him, in trust for the inhabitants of Manti, on September 2, 1872. This patent is recorded in our patent record volume 2, page 162. A certified photostatic copy thereof may be obtained for \$1. You may also obtain a similar copy of the cash certificate and the cash receipt for \$1 each. Your remittance for this purpose should be by check or postal money order made payable to the Bureau of Land Management.

Our records disclose no other papers, nor any plat of the town site. Such plats were usually filed with the county recorder's office of the county where the town site was located.

Sincerely yours,

For the Director:
/s/ S. C. Nichols