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North Temple Investment Corporation, Blaine J. Palfreyman, And Larue Palfreyman, His Wife v. Salt Lake City Corporation, A Body Politic, And Salt Lake County, A Body Corporate And Politic : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

NORTH TEMPLE INVESTMENT CORPORATION, BLAINE J. PALFREYMAN, and LARUE PALFREYMAN, his wife,

Plaintiffs and Respondents.

vs.

SALT LAKE CITY CORPORATION, a body politic, and SALT LAKE COUNTY, a body corporate and politic,

Defendants and Appellants.

Case No. 12247

APPELLANTS' BRIEF

Appeal from the judgment of the Third Judicial District Court for Salt Lake County. Honorable Marcellus K. Snow, Judge.

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TABLE OF CONTENTS

Page

CASES CITED

Page

STATUTES CITED

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STATEMENT OF THE NATURE OF THE CASE

The respondents brought this action to quiet title to the property within a subdivision known and designated on the official records of the Salt Lake County Recorder, State of Utah, as "Fritch and Zulch's First

Addition to Salt Lake City" and to have the subdivision declared to be abandoned and have all streets and alleys designated for public use declared to be cancelled and vacated.

DISPOSITION OF THE CASE IN THE LOWER COURT

The lower court granted the respondents' Motion for Summary Judgment and held the title to Fritch and Zulch's First Addition to Salt Lake City to be quieted in the respondents; and that appellant be enjoined, debarred, and restrained from asserting any claim or interest whatsoever in or to the said land, or any part thereof; and that the subdivision was declared to be abandoned, vacated, null and void, and of no force and effect; and the streets and alleys and any portion of said subdivision designated for public use was cancelled and vacated.

RELIEF SOUGHT ON APPEAL

The appellant seeks (1) a reversal of the summary judgment to the respondents by the lower court, and (2) a ruling by this court that the appellant is entitled to summary judgment.

STATEMENT OF FACTS

The facts in this case are not in dispute. The plat of Fritch and Zulch's First Addition to Salt Lake City was

recorded on December 18, 1889, in the office of the County Recorder of Salt Lake County, Territory of Utah, as Entry no 13579, Book B, Page 97, Official Records, Salt Lake County, Territory of Utah. A portion of said subdivision lies within the corporate limits of Salt Lake City and this portion only is the subject matter of this appeal. Since the recordation of said official plat, none of the streets, alleyways, or other portions of said subdivision designated for public use has been developed or used as streets and alleyways. The respondents have also not developed the subdivision in any manner and have not put the property to any use which would be inconsistent with the rights of Salt Lake City regarding said streets, alleyways and other portions of said subdivision designated for public use nor for which purpose they were dedicated.

STATEMENT OF POINTS

POINT I

STREETS AND ALLEYWAYS, ONCE DEDICATED BY FILING OF A PLAT, REMAIN AS STREETS AND ALLEYWAYS AND ARE NOT ABANDONED BY MERE NONUSE.

POINT II

THE STATUTE WHICH RESPONDENTS RELIED UPON IN THEIR CLAIM THAT THE SUBDIVISION WAS ABANDONED, SECTION

2070, C.L.U. 1888, DOES NOT APPLY
CORPORATED CITIES; THUS THE
COURT ERRED IN GRANTING RE
ENTS' MOTION FOR SUMMARY JUD
BASED UPON THIS STATUTE.

ARGUMENT

POINT I

STREETS AND ALLEYWAYS, ONC
CATED BY FILING OF A PLAT, REM
STREETS AND ALLEYWAYS AN
NOT ABANDONED BY MERE NONU

In 1889, when this subdivision was rec
statute which was the controlling means for a
of streets and alleys to public purpose, read a

> "Roads, streets, alleys and bridges lai
> recorded by order of the county courts
> cipal corporations within their respec
> dictions, are public highways." Sect
> C.L.U. 1888.

Thus, the laying out and recording of a pla
municipal corporation causes the roads, stre
and bridges designated thereon to become pu
ways.

In the case at bar, the plat of Fritch a
First Addition to Salt Lake City was laid out
and streets designated thereon and said plat w

ed December 18, 1889. All provisions required by the statute were complied with; hence, there is no question that the streets and alleys within the Fritch and Zulch's First Addition to Salt Lake City have been dedicated to the public use.

Once streets and alleys are dedicated to public use, there are only four methods of releasing property from such dedication, which are, (1) statutory, (2) vacating, (3) abandonment, and (4) impossibility of use for the purpose dedicated. Since Salt Lake City has not vacated the streets and alleys, and since there has been no occurrence which would render the purpose impossible, the only methods of releasing the property from said dedication which would remain in question are statutory abandonment or actual abandonment by Salt Lake City. Statutory abandonment is discussed in Point II. Therefore, only actual abandonment will be discussed here.

Mere nonuse, or a mere lapse of time, or adverse possession will not destroy the public right to use of streets and alleys which have been dedicated to the public use. See, *Dunlap v. Tift*, 209 Ga. 201, 71 S.E.2d 237 (1952); *Robinson v. Korns*, 250 Mo. 663, 157 S.W. 790 (1913). This is especially true where streets and alleys are concerned, because the muncipality has a discretion as to the time for opening and a discretion as to when the necessity for public use arises. See, *Sowadzki v. Salt Lake County*, 36 Utah 127, 104 P. 111 (1909); *Griffin v. Olathe*, 44 Kan. 342, 24 P. 470, (1890); *Killam v. Multnomah County*, 137 Ore. 562, 4 P.2d 323 (1931).

In the *Griffin v. Olathe* case, the court, as page 474, said:

> "Until the time arives when any street or part of a street is required for actual public use, and when the public authorities may be properly called upon to open it for public use, *no mere non-user of any length of time* will operate as an abandonment of it, and all persons in possession of it will be presumed to hold subject to the paramount right of the public." (Emphasis added.)

In the *Sowadzki* case, which is a Utah case, the court said:

> ". . . in case the statute has substantially been complied with, dedication is complete, and no formal acceptance by the public is necessary, and that the streets so dedicated may be opened *at any time* after such dedication when necessary for public use, and that *a failure to open them until such time* will not be deemed an abandonment thereof." (Emphasis added.) *Sowadzki v. Salt Lake County*, supra, at page 113.

Further, the court stated:

> ". . . that, when so dedicated, the streets, alleys, and public places *retain their public character* until vacated in the manner prescribed by law, or until abandoned . . ." (Emphasis added.) *Sowadzki v. Salt Lake County*, supra, at page 114.

An abandonment does not result from mere non-use. *Swope v. Kansas City, Kansas*, 132 F.2d 788 (1942); *Coffin v. Portland*, 27 F. 412 (1886). Likewise, abandonment will not result from mere failure of the

city to exercise control or supervision over the dedicated streets and alleyways. *Interstate Iron & Steel Co. v. East Chicago*, 187 Ind. 506, 118 N.E. 958 (1918); *City of Henderson v. Yeaman*, 169 Ky. 503, 184 S.W. 878 (1916). Even 30 years delay in opening streets and alleys was not by itself enough to show an abandonment, and the city was not estopped from opening them. *Jefferson v. Eiffler*, 16 Wis. 2d 123, 113 N.W.2d 834 (1962). The court, in the case of *City of Henderson v. Yeaman*, supra, stated at page 882:

> "When streets are set apart and dedicated to the public use . . . the city authorities are not required to take physical possession or control of each street, or to improve it in order to save their right."

Further, at page 882, the court observed:

> "The city may delay manifesting its acceptance by control and improvement as long as it pleases. It may wait until the needs of the public or the city may required improving."

The court said that, if mere delay would work an abandonment of dedicated streets and alleys, this would deprive the public of valuable property rights. This is stated in the following language found at page 882:

> "If mere nonuse by the public or failure on the part of city authorities to take some affirmative action . . . would work an abandonment of it for the purposes for which it was dedicated . . . it might deprive the city as well as the public of valuable property."

In *City of Jefferson v. Eiffler*, it was stated at page 839, thusly:

> "Negligence and unreasonable delay by themselves are not sufficient to constitute abandonment, other extenuating circumstances must be shown."

At page 839, the court stated:

> "The public use is the dominant interest and the public authorities are the exclusive judges when and to what extent the street shall be improved. Courts can interfere only in cases of fraud or oppression, constituting manifest abuse of discretion."

The court said that there must be some affirmative action taken by the city in order for an abandonment to be effectuated. The fact that there must be an affirmative act before an abandonment will result was substantiated in the following cases: *Village of Newport v. Taylor*, 225 Minn. 299, 30 N.W. 2d 588 (1948); *Bitney v. Grim*, 73 Ore. 257, 144 P. 490 (1914). In *Skrmetta v. Moore*, 227 Miss. 119, 86 So. 2d 46 (1956), the court said there must be an unequivocal act showing clear intent to abandon the streets and alleys and that payment of taxes by the property owner was not a sufficient act to work an abandonment when the streets and alleys are dedicated to the public use. Partial enclosure and occupancy of highway under a claim of right was also not sufficient. *Jersey City v. Morris Canal & Banking Co.*, 12 N.J. Eq. 547.

There is no showing in the case at bar that any un-

equivocal act on the part of the city or the respondent has taken place which would work an abandonment.

POINT II

THE STATUTE WHICH RESPONDENTS RELIED UPON IN THEIR CLAIM THAT THE SUBDIVISION WAS ABANDONED, SECTION 2070, C.L.U. 1888, DOES NOT APPLY TO INCORPORATED CITIES; THUS, THE LOWER COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BASED UPON THIS STATUTE.

The method provided by the Legislature for dedicating highways to public use at the time the land in question was so dedicated was Chapter XIII, C.L.U. 1888, Section 2068, which states as follows:

> "Roads, streets, alleys and bridges laid out and recorded by order of the county courts or municipal corporations within their respective jurisdictions, are public highways."

The section relied upon by respondent for his proposition that there has been an abandonment by statute is Chapter XIII, C.L.U., Section 2070, which provides:

> "A road not worked or used for a period of five years ceases to be a highway."

It should be noted that Section 2070 states only that a "road" not worked or used for five years ceases to be a highway. It does not say a street or an alley

not worked or used for five years ceases to be a highway. Section 2070 also does not state that a highway not worked or used for five years ceases to be a highway. If the Legislature had intended that dedicated streets and alleys be abandoned if not worked or used for five years, they would have used the language as they did in all other sections, "roads, streets, alleys, and bridges." See Sections 2065, 2066, 2067 and 2068. Since they did not, the Legislature's intention was that only roads not worked or used for five years are considered as abandoned. The term "road" has a distinct and separate meaning in the statute, or it would not be used. The question of what the Legislature intended by the word "road" is the real issue here. The term "road" is ordinarily applied to a free public way in the county. See, *Parsons v. Wright,* 223 N.C. 520, 27 S.E.2d 534 (1943); *Mushbaugh v. East Peoria,* 260 Ill. 27, 102 N.E. 1027 (1913). It is submitted that this is the meaning which the Legislature gave to the term when it enacted Chapter XIII, C.L.U., 1888. This court has consistently held that each word in a statute must be given meaning and that construction is favored which will render every word operative rather than meaningless. *Stevenson v. Salt Lake City,* 7 U.2d 28, 317 P.2d 597 (1957); *Metropolitan Water District v. Salt Lake City,* 14 U.2d 171, 380 P.2d 721 (1963).

The term "street" strictly speaking, refers to a public thoroughfare in an urban community such as a city, town or village. *Duval County v. Jacksonville,* 36 Fla. 196, 18 So. 339 (1895); *Karb v. Bellingham,* 61

Wash. 2d 214, 377 P.2d 984 (1963); *Carlin v. Chicago,* 262 Ill. 564, 104 N.E. 905 (1914). The term "street" is not ordinarily applicable to roads and highways outside municipalities. *Montgomery v. Santa Ana Westminster R. Co.,* 104 Cal. 186, 37 P. 786 (1894); *Wooster v. Arbenz,* 116 Ohio St. 281, 156 N.E. 210, 52 A.L.R. 518 (1927).

Respondent has cited no case where a court has applied the language of Section 2070, nor any similar language, to property within an incorporated city and held that huch language would work an abandonment on dedicated streets and alleys within such incorporated city. Appellant has also found no case where such has been held. Many states have statutes with this same language or similar language. All cases where they declared an abandonment were cases where the property was not within an incorporated city and in many cases the court stated that such language applied only to roads or highways which are in the county. Examples os some of these cases are: *Myers v. Daubenbiss,* 84 Cal. 1, 23 P. 1027 (1890); *Sowadzki v. Salt Lake County,* supra; *Mallory v. Taggart,* (Utah Supreme Court, 1970), 470 P.2d 254.

On the other hand, in all cases found where the property was within an incorporated city, the court held that they were not abandoned because the statute applied only to roads or highways in the county. Examples of some of the cases are: *Plaine Lumber Co. v. City of Oshkosh,* 89 Wis. 449 61 N.W. 1108 (1895); *Lake*

Shore and M. S. Ry. Co. v. Town of Whiting, 161 Ind. 80, 67 N.E. 933 (1903); *Baltimore O & C. R. Co. v. Town of Whiting,* 30 Ind. 182, 65 N.E. 759, (1902); *The James McDonough,* 200 F. 556 (1912); *Lacelede-Christy Clay Products Co. v. City of St. Louis,* 246 Mo. 446, 151 S.W. 460 (1912); *Evans v. Andres,* 226 Mo.App. 63, 42 S.W.2d 32 (1931); *Odom v. Hook,* (Mo. App., 1943), 177 S.W.2d 165.

The *Sowadzki* case and the *Mallory* case were decided on a later statute, Section 1116, R.S.U. 1898, which statute added the language, "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, . . . " then, the section included the language of Section 2070, U.C.L. 1888, "a road not used or worked for a period of five years ceases to be a highway."

The language of the amendment clarified what was means by "road" in that it referred to the County Commissioners of the county in which they are situated. The court in *Sowadzki* used this language along with other statutes to show that the intent of the Legislature was that a road is a county road and not city streets and alleys. The court at page 115, stated:

> "We fully agree with counsel for respondent that the sections we have referred to were not intended to and do not apply to streets in incorporated cities and towns in this state, but we cannot

agree with them that those sections do not apply to dedicated roads and highways as well as to roads that were established by any other method known to the law. *The reasons why these sections do not apply to city or town streets are to our minds reasonably clear.* It will be observed that section 1116 refers to all highways over which the board of county commissioners has jurisdiction. While it does not so state in terms, it nevertheless directly refers to the commissioners of the county in which the highways are situated, and says nothing about highways or streets which are exclusively under the control of city or town authorities. In this state we have no village organization, but are limited to cities and towns, which are divided into classes. By subdivision 8 of section 206, and again in section 255, Comp. Laws of 1907, authority and discretion to establish, vacate, and control city and town streets, alleys, and public places are expressly vested in the city and town councils, while in subdivision 24 and 27 of section 551 such power, control, and discretion are vested in the county commissioners over all highways 'within the county outside of incorporated cities.'" (Emphasis added.)

There are specific reasons why streets and alleys in a city should not be deemed abandoned in such a short time as five years as was indicated by the court when it said that these reasons were reasonably clear in their minds. A city grows much faster and develops subdivisions to a much greater extent than does a county. The need for a uniform system of streets is greater in the city than in a county and the likelihood that a platted and recorded subdivision will become an actual subdivision is greater within a city than in the outlying

districts of a county. A subdivision, laid out and recorded, which is in the county and has much less chance of becoming an actual subdivision if it is not developed within five years than does one within a city. For these reasons it is reasonable to call for an abandonment of a county roads if they are not developed within five years, but a city should be allowed a longer period to develop streets. It is the contention here that the Legislature has always treated streets and county roads as being different and governed by different provisions. The court in *Sowadzki* case, supra, at page 115, stated:

> "We have referred to these things for the purpose only of showing that *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 that 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.*" (Emphasis added.)

In view of the foregoing authorities, it is submitted that the statute does not apply to streets and alleys in incorporated cities; therefore, that this court should reverse the ruling of the lower court and direct that appellant be granted judgment in accordance therewith.

CONCLUSION

The streets and alleys within the Fritch and Zulch's First Addition to Salt Lake City have not been abandoned by the city; therefore, the lower court erred in granting the respondents' Motion for Summary Judgment.

Respectfully submitted,

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