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Joseph Lavern Boyer v. Clifford Clark : Brief of Plaintiff and Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

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JOSEPH LAVERN BOYER,

Plaintiff and Appellant,

vs.

CLIFFORD CLARK,

Defendant and Respondent.

Clerk, Supreme Court, Utah

Case No. 8681

BRIEF OF PLAINTIFF AND APPELLANT

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TABLE OF CONTENTS

	PAGE
STATEMENT OF FACTS	1
STATEMENT OF POINTS	9
I. THE COURT ERRED IN HOLDING THAT NO PUBLIC HIGHWAY OR OTHER PUBLIC EASE- MENT EXISTS OVER THE PROPERTY OF RESPONDENT.	9
ARGUMENT	10
PROPOSITION a. USE BY PUBLIC PRIOR TO 1911..	10
PROPOSITION b. USE BY PUBLIC SUBSEQUENT TO 1911	15
PROPOSITION c. NO ABANDONMENT PRIOR TO 1911	21
PROPOSITION d. NO ABANDONMENT SUBSE- QUENT TO 1911	22
CONCLUSION	22

CASES CITED

City of Butte v. Mikosowitz, 39 Mont. 350, 102 P. 593.....	18
City of Cincinnati v. White, 6 Pet. 440, 8 L. Ed. 452.....	16
Culmer v. Salt Lake City, 27 Utah 252, 75 Pac. 620.....	17
Dahl v. Roach (Utah) 287 P. 622, pg. 623.....	21, 22
Great Northern Railroad Co. v. Viborg, 17 S.D. 374, 97 N.W. 6	18
Harkness v. Woodmansee, 7 Utah 227, 26 Pac. 291.....	17
Hatch Bros. v. Black, 25 Wyo. 109, 165 P. 518.....	18
Jeremy v. Bertagnole, 116 P. 2d 420, pg. 422.....	17
Lindsey Land & Livestock Co. v. Churnos, et al (Utah) 285 P. 646, pg. 648.....	11, 12
McRose v. Bottyer, 81 Cal. 122, 22 P. 393.....	18
Montgomery v. Somers, 50 Or. 259, 90 P. 674.....	18
Morgan v. Railroad Co., 96 U.S. 723, 24 L. Ed. 743.....	16
Morris v. Blunt (Utah) 161 P. 1127, pg. 1130.....	16

TABLE OF CONTENTS

	PAGE
Murray v. City of Butte, 7 Mont. 61, 14 P. 656.....	18
Okanogan County v. Cheetham, 37 Wash. 682, 80 P. 262.....	18
Schettler v. Lynch, 23 Utah 305, 64 Pac. 955.....	17
Schwerdtle v. Placer County, 108 Cal. 589, 41 P. 448.....	18
Sprague v. Stead, 56 Colo. 538, 139 P. 544.....	18
Streeter v. Stalnaker, 61 Neb. 205, 85 N.W. 47, 48.....	17
Walcott Tp. v. Skauge, 6 N.D. 382, 71 N.W. 544.....	18
Whitaker v. Ferguson, 16 Utah 240, 51 Pac. 980.....	17
Wilson v. Hull, 7 Utah 90, 24 Pac. 799.....	17

TEXTS

Lawyer's Reports Annotated, 1917A 355.....	18
--	----

STATUTES

Act of July 26, 1866, c. 262, Sec. 8, 14 Stat. 253.....	11
Compiled Laws of Utah 1907, Sec. 1116.....	10, 21
Compiled Laws of Utah 1917, Sec. 2802.....	21
Laws of Utah 1911 Ch. 142.....	21
Laws of Utah 1880, Chapter 29.....	11
Laws of Utah 1886, Chapter 12, Sec. 2.....	12
Utah Code Annotated 1953, Title 27, Chapter 1, Sec. 1.....	10
Utah Code Annotated 1953, Title 27, Chapter 1, Sec. 2.....	10
United States Code Annotated, Title 43, Sec. 932.....	11, 17

IN THE SUPREME COURT of the STATE OF UTAH

JOSEPH LAVERN BOYER,

Plaintiff and Appellant,

vs.

CLIFFORD CLARK,

Defendant and Respondent.

Case No. 8681

BRIEF OF PLAINTIFF AND APPELLANT

STATEMENT OF FACTS

This case was tried before the court without a jury. The appeal is taken from the judgment of the court in favor of the respondent and against the appellant, decreeing that no public highway or other public easement exists from Utah State Highway No. 133 over the property of the respondent in Middle Canyon in Section 33, Township 3 North, Range 6 East, Salt Lake Meridian, Summit County, Utah (R. 15).

The Middle Canyon road extends in a northerly direction from the Coalville-Upton road, State Highway No. 133, up Middle Canyon and over the ridge onto the Grass Creek road (R. 24).

The action was brought to determine whether Middle Canyon road and trail is a road open to the public for travel. Incidental remedies were sought for damages growing out of a specific incident and for a restraining order restraining the respondent from interfering with the travel of the public upon the highway (R. 1-3).

The property in question was a part of the public domain until the issuance of a patent by the United States Government to the Union Pacific Railroad on January 7, 1902 (R. 68). The respondent, Clifford Clark and his wife, Bertha W. Clark, acquired title to the property on the 21st day of July, 1944 "subject to lawful existing rights of way and easements over the same, . . ." (R. 184)

James H. Judd, a man over 84 years of age (R. 99), has been acquainted with the "Middle Canyon Road," the road here in question, since his first recollection when he was about 8 or 10 years of age (R. 100). He, therefore, has known the road since about 1880 to 1882. He drove cattle, sheep and a wagon over it (R. 100). He used the road for 50 years or more, commencing when he was 10 years of age, and during that time no one tried to prevent him from traveling it (R. 100). In response to the question, "What others used it besides yourself?" Mr. Judd replied, "Well, anybody was traveling it that wanted to." (R. 100) Others traveled it on horses and in wagons at the time the Grass Creek Mines were in operation (R. 100). Mr. Judd hauled coal on the road crossing the Fewkes place (premises now owned by respondent) (R. 27) for fifty years (R. 101). Others were using it for the same purpose (R. 101). After his marriage he and his

wife used the road to visit his wife's parents in Grass Creek (R. 101-102). They traveled in a wagon, a white top rig and any way they had of going, including a cart (R. 102). He stated that his use of the road commenced in the early 1880s and has continued to later years (R. 102). For fifty years he traveled it every week or two, hauling coal out of there and to Upton up to about 30 years ago (R. 103). He and other people had reason besides hauling coal to go up the Canyon because they had cattle and sheep there (R. 104). He testified that nearly everybody was hauling coal out of there (R. 104). He hauled coal while it was an open range (R. 104). (This would be prior to the issuance of the patent in 1902). He also did work on the road and helped to improve it and rode the canyon on horseback nearly every day (R. 104).

James H. Wilde, 76 years of age, was born in 1880 (R. 108). He went up Middle Canyon when he was a kid of 12 to 14 years of age (R. 108). He testified that you get into Middle Canyon from the Upton-Coalville Road and that it has been that way as long as he can remember (R. 108). He traveled the road on foot and on horseback (R. 109). He saw Will Robinson haul coal out of there (R. 109), and he stated that, "When people wanted to go up there, they went up there" (R. 109). He testified there was no Grass Creek road; that you could go over there but you would have quite a time (R. 110). He also said he fetched cattle out the Middle Canyon road three times he could remember, but was not on the road like lots of others and did not know where it started (R. 111).

Joseph H. Boyer, the father of the appellant, knew the Middle Canyon Road 60 years before he testified (R. 127). (That would be about 1896) He used the Middle Canyon Road to get wood (R. 128). He testified that some people went to Grass Creek to the mines at that time (R. 128). Other people used the road to haul coal from Clark Mines in Section 28 (R. 128). William Diston traveled the road to work at the mines in Grass Creek (R. 129). thirty five or forty years ago (R. 130). Mr. Boyer testified, "In 1900 there was not any land bought and people used to go up in there with livestock back and forth. That was quite a traveled road up in there with livestock. One man would go in with stock one way and another man would go in the other way before the land was bought" (R. 130). "The people who bought the land used to go up and down there all the time traveling that road" (R. 130). He further testified that no one ever tried to stop him from using the road up to the time the difficulty arose in this action (R. 131).

Robert Burns Stonebraker first became acquainted with the Middle Canyon Road about 50 years before he testified (R. 114). (That would be about 1906 and after the patent had issued to the Union Pacific) He and others traveled the Middle Canyon Road to go from Upton to dances in Grass Creek (R. 115). He was then 14 years of age (R. 115). He is now 62 years of age (R. 114). (That would be about 1908) He stated that they would go over in wagons and on horseback (R. 115). The last time he went over the road was about 5 years ago (R. 116). He worked in Grass Creek when he was homesteading in Section 28 in Middle Canyon (R. 116). Section 28 is the

property now owned by the appellant (Exhibit 3, R. 182). The road from his homestead to Grass Creek was miserable in a car. They used a hayrack to travel it (R. 116) but he drove his car from Section 28 to the main road to Upton and Coalville and never had any trouble (R. 117) (This was the Middle Canyon Road from Appellant's property to the main highway over the property of the respondent). Mrs. Stonebraker drove the road over respondent's property sometimes two times a week in 1925 (R. 117). People used to come up to their homestead and several used the road to travel back and forth from Upton to Grass Creek, usually on horses (R. 117). Nephi Bailey and his wife used the road (R. 117). No one ever tried to stop Mr. Stonebraker from using the road (R. 117). Mr. Robinson, Charles Bailey and the Neffs traveled it in wagons from the year 1919 (R. 118). He saw other people travel it prior to 1925 (R. 118). After the years 1926 and 1927 he ceased to travel it "very much" (R. 118). He went from Upton to Grass Creek through Middle Canyon on horseback for a dance in 1932 (R. 119). Nephi Bailey had men working at Grass Creek (R. 120 & 121). He lived at Grass Creek and made trips quite frequently to Upton (R. 121). They always used this road "It was so far around to go down Clark's Canyon, they always traveled Middle Canyon Road" (R. 121).

David E. Moore lived at Upton about 40 or 50 years (R. 121). He moved there in 1909 (R. 122). He drove sheep, cows and horses through Middle Canyon when he lived there until seven or eight years ago. (R. 122). He saw men go up from the ranches to the mines (R. 123).

These men would use the Chalk Creek and Middle Canyon roads. (R. 123). In 1910 and 1911 Ivan Fewkes and Mr. Clark used the road to go to the mines (R. 123 & 124). Mr. Moore was never stopped from using the road (R. 124). He has seen Joseph Boyer and the Neffs drive sheep up the Middle Canyon Road (R. 124). "In 1910 or 1911 I drove cattle down Middle Canyon" (R. 126). He stated, "I used the Middle Canyon road at the time the cattle would be straying and I would bring them back, fetch them into my field." (R. 126). Mr. Moore is 74 years of age (R. 127).

Sam Smith, the man who sold the property to the respondent in 1944, (Exhibit 5, R. 184) stated that he gave the appellant possession about thirty days before the deed was delivered (R. 90). Mr. Smith lived on the property now owned by respondent twenty years and never refused anyone access to that road (R. 91). Leo Newton, Mr. Erconbrack and anyone who wanted to use the road used it (R. 91). Diston traveled over it to Grass Creek on horseback (R. 92). Sheep men used their vehicles (R. 92), sheep camps and automobiles part way (R. 92). Deer hunters used the road to the center of Section 28 (R. 92). Stockmen used the road (R. 92). The highway above Mr. Smith was used as well as on his property (R. 93). He and the Erconbracks used the road for twenty years and no one tried to stop them (R. 93). He bought the land in 1924 (R. 95). On cross examination, although he could not remember the name of a certain man, he said, "but he had used the road, as far as I was concerned it was never stopped to usage" (R. 95).

The appellant, Vern Boyer, testified that he re-

membered the road since he was a boy 9 or 10 years of age (R. 24). He is now 47 years of age (R. 24). He traveled the road to Grass Creek (R. 24). He worked for the Government in 1938 and 1939 and during the war was a range supervisor of Summit County for P.M.A. During that time he traveled most of the roads frequently. He traveled the road in question and observed others traveling it (R. 25). He observed livestock being driven and vehicles going over the road (R. 26). The Middle Canyon road, the Coalville to Grass Creek road, has remained substantially in the same position during the time he remembers (R. 27). He further testified that he has no other way of getting into his property, (R. 31 & 32) except via Grass Creek and over the top five or six miles, (R. 31 & 32) as compared with a one-half mile, plus 750 feet up the Middle Canyon road (R. 32). No one, except the respondent, ever tried to stop him from using the road. On cross examination, Mr. Boyer testified that Lester Oswald used the road (R. 39) with a sheep truck (R. 40). Appellant's father used the road to drive sheep (R. 40). Rube Davis trailed sheep in 1935, 1936 and 1937 (R. 41) for three years (R. 41). He had horses (R. 41). A Clark boy used the road to drive sheep (R. 41). William Diston used the road. He had horses up there (R. 42). William Diston rode back and forth during the period the mine was working in Grass Creek (R. 42). He saw Rube Davis take a wagon over the hill a time or two when he was homesteading in 1933, 1934 and 1935 (R. 43). He saw besides the Boyer family and the Clark family, Mr. Davis and Mr. Carl B. Horton take wagons over the road (R. 44). Mr. Boyer stated he could get

to one end of his property up Clark's Canyon but it was impossible to drive lambs over the hill (R. 45). He further stated that his vehicles, wagons and trucks must come up the Middle Canyon road (R. 46). When asked whether he purchased a right of way from Blonquists, west of Mr. Clark's home, he replied, "No sir, I did not." (R. 46). He further testified, "The main road of the Blonquist's side goes up the ridge and a little trail comes down to the bottom and crosses up the other side. You cannot go up with a truck or anything heavy, but it could be opened up with a tractor. You can go any place mostly with a tractor" (R. 72). He stated he had driven sheep up the Middle Canyon road (R. 47 & 48) for 8 or 10 years. Deer hunters have used the road (R. 49). The soil conservation man used the road (R. 49). The use by the deer hunters was to get to the hunting ground (R. 64 & 65).

J. Emerson Staples, County Clerk of Summit County, was called on behalf of respondent. He testified that Exhibit "B" is a map from his office (R. 137). It was not offered to show all of the roads in Summit County (R. 137). He stated that where the roads are marked in blue they are County roads maintained by the County. Mr. Staples searched the ordinance book and found nothing in it concerning Middle Canyon. He made a partial search of minutes and found nothing in the Clerk's office to show that Middle Canyon Road had been quoted as a County highway (R. 139).

The remaining witnesses of the respondent, Clifford B. Clark, his wife, Mrs. Clifford Clark and Dean Clark

did not testify concerning anything prior to the time they moved to Coalville in 1944 (R. 140-170 inc.). Since it is the contention of appellant that the public road had been established long prior thereto and that since that time abandonment must be made by the exclusive methods provided by the Utah Statutes as amended in 1911, the testimony of these witnesses has no important bearing upon the questions to be raised in this brief. Therefore, the summary of their testimony is omitted.

STATEMENT OF POINTS

The point upon which appellant intends to rely for a reversal of the judgment below is as follows:

I. The Court erred in holding that no public highway or other public easement exists over the property of respondent.

To assist in the presentation of the argument the discussion will be divided into the following propositions:

a. It was established by the uncontradicted evidence that the road and trail up Middle Canyon had been abandoned to the public and continuously used as a public thoroughfare for a period long in excess of ten years prior to the year 1911.

b. It was established by the preponderance of the evidence that the road and trail up Middle Canyon had been abandoned to the public and continuously used as a public thoroughfare for a period in excess of ten years after the year 1911.

c. Respondent did not attempt to establish that Middle Canyon road and trail had not been used or worked for a period of five years prior to 1911 when the Compiled Laws of Utah, Section 1116, was amended to provide the two exclusive methods of abandonment of a public road.

d. No evidence was produced to establish that the road and trail in question had been abandoned in the exclusive manner provided by statute since the year 1911.

ARGUMENT

Utah Code Annotated 1953, 27-1-1 defines public highways as follows:

“Public highways defined. — In all counties all roads, streets, alleys, lanes, courts, places, trails and bridges laid out or erected as such by the public, or dedicated or abandoned to the public, or made such in actions for the partition of real property, are public highways.”

It is contended by appellant that the road and trail in question was dedicated and abandoned to the public. Utah Code Annotated 1953, 27-1-2 defines the elements of dedication and abandonment to a public use as follows:

“Public use constituting dedication.—A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.”

a. USE BY PUBLIC PRIOR TO 1911

Appellant's testimony on the use of the Middle Can-

yon Road commences about 1880 (R. 100). Since Section 34 in Middle Canyon was public domain until the issuance of a patent by the United States Government to the Union Pacific Railroad on January 7, 1902, (R. 68) we must first determine whether, under the state of the law at that time, a public road could be acquired under the statutes of Utah over public lands belonging to the Federal Government. United States Code Annotated, Title 43, Public Lands, provides as follows:

“Section 932. Right of Way for Highways. The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted. (R.S. Sec. 2477.)” Act of July 26, 1866, c. 262, Section 8, 14 Stat. 253.

Lindsey Land and Livestock Company v. Churnos, et al, (Utah) 285 P. 646 made reference to this statute, and at page 648 analyzed the numerous holdings of various courts as to what constituted an acceptance by the public of a right of way allowed by the above quoted Federal statute and then held:

“In the territory of Utah, the statutes in force during the times in question were as follows: Chapter 29, Laws of Utah 1880, provided:

“‘Sec. 2. Highways are roads, streets or alleys and bridges laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the use of the public.

“‘Sec. 3. Roads laid out and recorded as highways by the County Court, and all roads used

as such for a period of five years, are highways. ***”

“By chapter 12, Laws of Utah 1886, Section 2, it was enacted:

“All roads, streets, alleys and bridges laid out or erected by others than the Public and dedicated or abandoned to the use of the public are highways. A highway shall be deemed and taken as dedicated and abandoned to the use of the Public when it has been continuously and uninterruptedly used as a Public thoroughfare for a period of ten years.”

“(2) In this case the court found as a fact that, while the lands traversed by the road were public lands of the United States the road was used as a public thoroughfare for the period from 1876 to 1894, a time in excess of that required by the territorial statutes in force for creating a public highway by use. That finding, if supported in fact, is sufficient in law to amount to an acceptance of the congressional grant of the right of way over the public lands, and thus would constitute and create the road in question a public highway by dedication.”

It is, therefore, established by our Supreme Court that a road may be abandoned and dedicated to the public use on public domain. In *Lindsey Land and Livestock Company v. Churnos, et al.*, supra, a test is laid down which is of great assistance in this case as follows:

“While it is difficult to fix a standard by which to measure what is a public use or a public thoroughfare, it can be said here that the road was used by many and different persons for a variety of purposes; that it was open to all who

desired to use it; that the use made of it was as general and extensive as the situation and surroundings would permit, had the road been formally laid out as a public highway by public authority. We therefore conclude that the court was justified in finding that the road had been continuously and uninterruptedly used as a public thoroughfare for more than ten years."

Applying this test to the case at bar, we observe that "many and different persons" used the Middle Canyon Road for "a variety of purposes." James H. Judd drove cattle, sheep and a wagon over it (R. 100). Mr. Judd testified in response to the question, "What others used it besides yourself?" "Well, anybody was traveling it that wanted to" (R. 100). He further stated that others traveled it on horses and in wagons at the time the Grass Creek Mines were in operation (R. 100). Mr. Judd hauled coal across the property now owned by the respondent for fifty years (R. 101). Others were using it for the same purpose (R. 101). After Mr. Judd's marriage he and his wife used the road to visit his wife's parents in Grass Creek, traveling in a white top rig or a cart (R. 102).

James H. Wilde, a man 76 years of age, testified that the Middle Canyon Road from the Upton-Coalville road had remained the same as long as he could remember (R. 108). He traveled the road on foot and on horseback (R. 109). He saw Will Robinson haul coal out of there and he stated, "When people wanted to go up there, they went up there" (R. 109).

Joseph H. Boyer knew the Middle Canyon Road

from about 1896 (R. 127). He used the Middle Canyon road to get wood (R. 128). He also testified of people going to the Grass Creek Mines at that time (R. 128). He stated other people used the road to haul coal from the Clark Mines in Section 28 (R. 128 & 129). William Diston traveled the road to work at the mines (R. 129). Mr. Boyer further testified, in 1900 people used to go up in there with livestock, back and forth. His words were, "That was quite a traveled road up in there with livestock" (R. 130).

This variety of uses took place before 1902 when the patent was granted the Union Pacific Railroad Company (R. 68). "That it was open to all who desired to use it" before and after 1902 was testified by Mr. Judd, (R. 101) Mr. Wilde (R. 109) and Mr. Boyer (R. 130 & 131).

"That the use made of it was as general and extensive as the situation and surroundings would permit, had the road been formally laid out as a public highway by public authority" is also evident from the testimony above cited. Between 1902 and 1911 this extensive use continued. Mr. Judd knew the road and used it for fifty years or more (R. 100). Mr. Boyer knew the Middle Canyon Road from about 1896 (R. 127) and in his testimony covered a period from that time up to the present time (R. 127 to 135).

To summarize, the road was used from approximately 1880 to 1911 to drive livestock, including cattle and sheep, (R. 100 & 130) to haul coal, (R. 101, 128 &

129) to visit with relatives, (R. 102) to haul wood, (R. 128) to travel from home to work at the Grass Creek Mines, (R. 129) and just before 1911 to travel from Upton to Grass Creek to dances (R. 114, 115). It was traveled on foot and on horseback, (R. 109) in wagons, (R. 100) in white top rigs and carts (R. 102). The period of time such use took place was much in excess of ten years. As above outlined in this Argument and in the Statement of Facts shown, appellant's witnesses used the road and saw it used continuously from approximately 1880 (R. 100) for a period long past 1911. All of this evidence was without contradiction. Respondent produced no witness with any acquaintance of the situation during this period of time.

b. USE BY PUBLIC SUBSEQUENT TO 1911

Again we call to the Court's attention the fact that the testimony of the respondent covered only the period after respondent moved to Coalville in 1944 (R. 184). Mr. Judd's testimony covered a period of fifty years, or approximately from 1880 to 1930 (R. 100). Joseph H. Boyer's testimony commenced about 1896 and covered up to the present time (R. 127). Robert Burns Stonebraker's testimony commenced in about 1906 or 1908 (R. 114) and continued to about five years before he testified (R. 116). David Moore's testimony covered a period from 1909 (R. 122) up to seven or eight years ago (R. 122). Sam Smith, the owner of the property in question just prior to respondent, showed a clear intent to abandon the road to public use when he testified that for twenty years he never refused access to

that road (R. 91), that as far as he was concerned it was never stopped to usage (R. 95), and he knew it was being used by anyone who wanted to use it to travel to work (R. 92), to transport vehicles necessary in the sheep business (R. 92), including sheep camps and automobiles part way and by deer hunters to get back into the deer country (R. 92). Mr. Smith used the same road that ran through his place through Middle Canyon from Boyers and Erconbracks and no one tried to stop him during the twenty years he traveled it (R. 93). Although there are conflicts in the testimony given by Vern Boyer, the appellant, and that given by the respondent and his family, it is not necessary to rely upon that testimony to prove the continuous use of this road and trail up Middle Canyon for a period in excess of ten years after 1911.

In connection with the establishment of a road or trail under the statute by abandonment to the public, appellant acknowledges that under the law of this state a dedication rests primarily in the intent of the owner.

Morris v. Blunt (Utah) 161 P. 1127 at 1130:

“(1) A dedication rests primarily in the intent of the owner. There must be a concession intentionally made by him, which may be proved by declarations or by acts, or may be inferred from circumstances. No form or ceremony is necessary. It must, however, appear that he knew of the use by the public, and intended to grant the right of way to the public. No formal acceptance by any public officer or agent is necessary, but there must be actual use by the public. *City of Cincinnati v. White*, 6 Pet. 440, 8 L. Ed. 452; *Morgan v. Rail-*

road Co., 96 U.S. 723, 24 L. Ed. 743; Harkness v. Woodmansee, 7 Utah, 227, 26 Pac. 291; Whittaker v. Ferguson, 16 Utah, 240, 51 Pac. 980; Schettler v. Lynch, 23 Utah, 305, 64 Pac. 955; Culmer v. Salt Lake City, 27 Utah, 252, 75 Pac. 620; Wilson v. Hull, 7 Utah, 90, 24 Pac. 799."

The facts in the foregoing case are not analogous to the case at bar, for in that case the road had been plowed up as much as ten years before the commencement of the action. Nevertheless, the statement concerning intention is helpful when applied in this case. From 1880, the earliest testimony offered in this case, to 1902 when the Government issued a patent covering the land in question to the Union Pacific Railroad, we have a specific intent on the part of the Government to allow public roads to be established by use upon the public domain (43 USCA 932). The only question remaining was whether the public accepted such an offer so made under the statute hereinbefore quoted, 43 USCA 932.

The Supreme Court of this State in the case of *Jeremy v. Bertagnole*, 116, P. 2d 420 at 422, after quoting Section 932 of the United States Code, *supra*, stated:

"'By this act' said the court in *Streeter v. Stalnaker*, 61 Neb. 205, 85 N.W. 47, 48, 'the government consented that any of its lands not reserved for the public purpose might be taken and used for public roads. The statute was a standing offer of a free right of way over the public domain, and as soon as it was accepted in an appropriate manner by the agents of the public, or the public itself, a highway was established.'

"'It has been held by numerous courts that

the grant may be accepted by public use without formal action by public authorities, and that continued use of the road by the public for such length of time and under such circumstances as to clearly indicate an intention on the part of the public to accept the grant is sufficient. *Montgomery v. Somers*, 50 Or. 259, 90 P. 674; *Murray v. City of Butte*, 7 Mont. 61, 14 P. 656; *Hatch Bros. v. Black*, 25 Wyo. 109, 165 P. 518; *Sprague v. Stead*, 56 Colo. 538, 139 P. 544. Other decisions are to the effect that an acceptance is shown by evidence of user for such a length of time and under such conditions as would establish a road by prescription, if the land over which it passed had been the subject of private ownership. *Okanogan County v. Cheetham*, 37 Wash. 682, 80 P. 262, 70 L.R.A. 1027; *City of Butte v. Mikosowitz*, 39 Mont. 350, 102 P. 593, or of public user for such time as is prescribed in state statutes upon which highways are deemed public highways. *McRose v. Bottyer*, 81 Cal. 122, 22 P. 393; *Schwerdtle v. Placer County*, 108 Cal. 589, 41 P. 448; *Walcott Tp. v. Skauge*, 6 N.D. 382, 71 N.W. 544; *Great N.R. Co. v. Viborg*, 17 S.D. 374, 97 N.W. 6. See, also, annotation on necessity and sufficiency of acceptance, L.R.A. 1917A, 355."

" . . . In this case the court found as a fact that, while the lands traversed by the road were public lands of the United States the road was used as a public thoroughfare for the period from 1876 to 1894, a time in excess of that required by the territorial statutes in force for creating a public highway by use. That finding, if supported in fact, is sufficient in law to amount to an acceptance of the congressional grant of the right of way over the public lands, and thus would constitute a public highway by dedication."

Without reiterating the facts which have been heretofore set out, we feel it is sufficient to say that while the land in question was a part of the public domain it was traversed and used as a public thoroughfare from 1880 to 1902, a time in excess of that required by the statute for creating a public highway by use.

Appellant is not restricted by the evidence to the period before 1902 in which to establish a right of way by public use under the laws of this State. That use continued after the land was in private ownership. We have heretofore quoted several of the witnesses who have testified that their use of the road met with no interference from anyone. If we are to give any meaning to the statute at all, a use for fifty years without objection certainly indicates an intention upon the part of the owners to allow the use to which the property was being put, especially when the use was so general as established by the evidence in this case. We think that a fair reading of the cases indicates that in order to constitute acquiescence in a legal sense, the owner must know the public is using his land as a road. There must be an act of the mind, a knowledge that the public is using the land as a highway, and a purpose on the part of the owner not to object. A knowledge of the use for such a purpose without objection by word or act, may authorize the inference that the owner consents to the appropriation.

In this case, after 1902 no evidence is given as to intention of previous owners to Sam Smith who testified for the appellant, although the witnesses did refer to the use of the road prior to that time without inter-

ference from anyone. However, in the case of Sam Smith who owned the land in excess of ten years, he gave the significant statement heretofore quoted but which deserves re quoting in light of the discussion. "But he had used the road, as far as I was concerned it was never stopped to usage" (R. 95). What clearer statement could be made as to intention of this owner? Under these circumstances, the statutory period for creation of the road has passed several times.

Although the attorney for respondent endeavored, during the course of the trial, to prove private use of the road and trail, he was unsuccessful because many of the uses shown herein were not in connection with the use of the land in the canyon and none of the uses was under claim of a private right of way.

Respondent also attempts to minimize the claim of appellant on the ground that the road above appellant's property over the hill to Grass Creek was not the type of a road that could be used by an automobile. However, the words of the statute include even trails and in this case wagons, livestock, horses all traversed the highway clear from the Coalville-Upton road to the Grass Creek road.

The question of accessibility of the property of the appellant through other means of entrance simply goes to the urgency of the appellant's claim rather than to the merits of the controversy. Appellant testified that the Clark Canyon road went onto one end of his property but that he could not drive the lambs over the hill to the property in Middle Canyon (R. 45). The Blonquist

route does not belong to the appellant although it was purchased by his father and it is not suitable for vehicular traffic (R. 46 & 72). Appellant has learned "the hard way" since the enforcement of this decree that his property in Middle Canyon is greatly restricted without the use of the Middle Canyon Road.

c. NO ABANDONMENT PRIOR TO 1911

In *Dahl v. Roach*, (Utah) 287 P. 622, at 623, our Supreme Court gave a pertinent history of the statutes involved in this situation as follows:

"Prior to 1911 we had a statute (Comp. Laws Utah 1907, Sec. 1116) which provided: '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.'

"In 1911 that section of our statutes was amended (Laws 1911, c. 142). It is now section 2802, of the Comp. Laws Utah, 1917, and reads: '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.'"

Although appellant established by clear and convincing proof the continued use of Middle Canyon Road by the public for a variety of purposes under a permissive Federal statute and later with the knowledge and consent of the owners, respondent made no attempt

to show that this road and trail had not been used or worked for a period of five years prior to 1911. Without such proof, there were no facts upon which the Court could find an abandonment.

d. NO ABANDONMENT SUBSEQUENT TO 1911

As indicated in *Dahl v. Roach*, supra, any abandonment after 1911 must be by the exclusive methods provided by statute which are by order of the Board of County Commissioners or by judgment of a court of competent jurisdiction. The only evidence produced by respondent in this regard was helpful to appellant, for the County Clerk of Summit County testified that he had searched the ordinance book and found nothing in it concerning Middle Canyon (R. 139). It was nowhere contended that any decree of the Court had previously been had abandoning this road. Rather, it has been the position of respondent that no road was ever established. This perhaps is his strongest position with reference to abandonment, but it leaves much to be desired in answering the uncontradicted evidence of the appellant concerning the use of the road and trail for the convenience of all who cared to use it for well over 50 years.

CONCLUSION

We, therefore, conclude that the finding No. 7 of the Court (R. 13) "That plaintiff has failed to produce sufficient evidence to establish a public highway or easement over the property of the defendant in Middle Canyon in said Section 33 as alleged in plaintiff's complaint" is contrary to the evidence and ignores the well-

established principles of law as laid down by the Supreme Court of this State. The judgment of the Court declaring that no public highway or other public easement exists up Middle Canyon is not supported by, and is contrary to, the evidence in the case. The Judgment should be reversed.

Respectfully submitted,

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