

1959

Leroy R. Clark et al v. James T. Ereksen et al : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Pugsley, Hayes, Rampton & Watkiss; Attorneys for Appellants;

Recommended Citation

Brief of Appellant, *Clark v. Ereksen*, No. 9005 (Utah Supreme Court, 1959).
https://digitalcommons.law.byu.edu/uofu_sc1/3281

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

LEROY R. CLARK and DAGMAR
J. CLARK, his wife, CLYDE R.
THOMPSON and MRS. CLYDE
R. THOMPSON, his wife,
Plaintiffs and Appellants,

vs.

JAMES T. EREKSON, and KATE
M. EREKSON, his wife, MAR-
LOW L. CRABTREE and
ELIZABETH A. CRABTREE,
his wife and MARY FERN
EREKSON.

Defendants and Respondents.

SEP 8 - 1959

Clark, Supreme Court, Utah

Case No. 9005

UNIVERSITY UTAH

AUG 6 1959

LAW LIBRARY

BRIEF OF APPELLANTS,
CLYDE R. THOMPSON and MRS. CLYDE R.
THOMPSON

PUGSLEY, HAYES,
RAMPTON & WATKISS
721 Cont'l Bank Bldg.
Salt Lake City, Utah
Attorneys for Appellants,

Clyde R. Thompson and
Mrs. Clyde R. Thompson

INDEX

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	5
POINT I. THE COURT ERRED IN FINDING AND CONCLUDING THAT THE WIDTH OF EREK- SON'S LANE IS A PUBLIC ROAD AND SHOULD BE 40 FEET WIDE IN PART AND 50 FEET IN PART, AS SUCH FINDING IS CONTRARY TO THE EVIDENCE AND THE LAW.	5 & 6
POINT II. THE COURT ERRED IN NOT FIND- ING THAT THE USE OF THE LANE HAS BEEN RESTRICTED BY THE CULVERTS, THE TREES, THE PONDS AND THE GATES, AND HAS NOT EXCEEDED 25 FEET IN WIDTH AT ANY TIME.	5 & 15
POINT III. THE COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT ONCE IT HAS FOUND A PUBLIC RIGHT OF WAY TO EXIST ALONG THE ESTABLISHED LINE OF THE LANE THAT IT MAY BY DECREE WID- EN THE SAME TO SUCH WIDTH AS THE COURT DEEMS NOW REASONABLY NECES- SARY FOR ITS USE AS A PUBLIC ROAD IN LIGHT OF PRESENT VEHICULAR TRAV- EL.	5 & 20
POINT IV. THE COURT ERRED IN NOT FIND- ING THAT THE TITLE TO THE PLAINTIFFS PROPERTY SHOULD BE QUIETED ALONG THE LINE OF THE BOUNDARY LINE AS SHOWN BY THE TREES, GARAGE, AND FENCE BEING 244.90 FEET EAST OF THE PRESENT QUARTER CORNER MONUMENT (OR 204.90 FEET EAST OF THE OLD MONU- MENT) AS REFLECTED BY THE CONCLU- SIONS OF LAW.	6 & 25
ARGUMENT	6
CONCLUSION	27

INDEX—Continued

Page

APPENDIX

CASES CITED

Boyer v. Clark, 326 P (2) 107, 7 Ut. (2) 395	24
Burrows v. Guest, 12 P. 847, (Utah 1887)	24
Harris v. Schwartz, 115 N. E. 345	8
Jeremy v. Bertagnole, 116 P (2) 420	14 & 20
Lindsay Land & Livestock Co. v. Churnos, 285 P. 646..	14
Thompson v. Nelson, 273 P (2) 720 (Utah 1954)	9
Whitesides v. Green, 44 P. 1032 (Utah)	23

STATUTES CITED

U.C.A., 1953, 27-1-2	7
----------------------------	---

CONSTITUTIONAL PROVISIONS

Constitution of Utah, Article 1, Sec. 22	23
--	----

IN THE SUPREME COURT
of the
STATE OF UTAH

LEROY R. CLARK, et al,
Plaintiffs and Appellants,

vs.

JAMES T. EREKSON, et al
Defendants and Respondents.

Case No. 9005

BRIEF OF APPELLANTS,
CLYDE R. THOMPSON and MRS. CLYDE R.
THOMPSON

STATEMENT OF FACTS

This case arises as a result of a dispute as to the width of a lane known as Erekson's lane which is located in Salt Lake County as an extension of 7th East, running southerly from Vine Street east of Murray, Utah. The evidence shows that a lane has been open through the area for over 50 years

and now a dispute has arisen as to the proper width thereof. After taking testimony, the court concluded that a public road existed and that the reasonable width of said lane between the properties of the parties should be 40 ft. in part and 50 ft. the balance of the distance, he having concluded that "such width is reasonably necessary as a public road."

The undisputed facts show that for more than 30 years last past the maximum width of said lane in front of appellant's property has been 24.6 ft. This width has been established by the east fence line of the defendants' land and the west fence, tree and garage line of the plaintiffs' land.

The witnesses may be classified into the following groups as to their testimony relating to the use of the lane over the past years:

1. Members of the South Cottonwood Ward and Grant Ward traversed the lane on foot, on horseback or in buggies in going to and from church. (R. p. -04, 11. 25-30; R. p. 105, 11. 1-30; R. p. 106, 11. 27-28; R. p. 127, 11. 9-12; R. p. 133, 11. 15-30; R. p. 149, 11. 1-13; R. p. 175, 11. 22-30; R. p. 176, 11. 1-22; R. p. 194, 11. 12-15; R. p. 195, 11. 1-14).

2. Business customers or business associates of the Erekson dairy farm used the lane in delivering feed or to purchase milk and other dairy products (R. p. 104, 11. 20-25; R. p. 106, 11. 19-24; R. p. 127, 11. 13-19; R. p. 140, 11. 4-11).

3. Fisherman occasionally used the lane while fishing in the creek (R. p. 84, 11. 13-24; R. p. 149, 11. 14-19).

4. On rare occasions other persons used the lane for other purposes (R. pp. 82-83; R. p. 163, 11. 8-30; R. p. 169, 11. 1-24). Respondent Crabtree testified that the "public" used the lane (R. p. 106, 11. 6-7). However, an examination of his testimony at pages 104 to 106 discloses that the "public" to him meant the church members, the fishermen and Ereksen's customers and business associates. That counsel for the respondents was aware of this apparent defect in proof is demonstrated by his unsuccessful attempts to show that the lane was used by the customers of a store located north of subject property (R. p. 135, 11. 12-30; R. p. 164, 11. 6-11).

Six restrictive factors are undisputed in the record as to the width of use of the lane.

A. 19 to 22 feet long culvert across the lane immediately north of plaintiff's property has restricted the use to such 19 to 22 feet width as long as anyone can remember;

B. The Rauscher Pond within the limits of the plaintiff's property which extended westerly to the point of the line of the plaintiff's trees and fence which restricted the use of the lane to 24.6 feet up until about 1925;

C. Approximately 30 years ago the west portion of the Rauscher Pond was filled and within four or five years thereafter the trees were planted and the fence erected along its present line and the existence of the trees, fence and garage along the west side of plaintiff's property has restricted the use of the lane to 24.6 feet for the past 30 years;

D. At the crossing of the Cottonwood stream to the south of plaintiff's property the old Cedar Post and tree show that the maximum width there was approximately 22 feet;

E. To the south of the stream in an extension of the lane the defendants, Erekson, have maintained two ponds which are 16 feet apart between which the lane passes and hence have restricted the width and use of the lane to 16 feet.

F. The defendant, Erekson, has maintained gates approximately 15 feet in width across the lane at its south termini, which perforce, have restricted the use of the lane to such width.

This lane is a meandering country alley and the character of the lane is shown by the photographs Exhibits 1, to 9 inclusive. Attached hereto as an Appendix are two illustrative plats of the area showing the restricted nature and use of the lane and superimposed thereon the effect of the decree by the Court in widening the same beyond its former use and purpose.

There is an ancillary factual issue in the proceeding as to the description of the Appellants' property, in that the court found that a boundary by acquiescence was established at a point 244.90 feet east of the present quarter corner monument, whereas the decree quieting title does not exactly follow said line. The finding by the Court is that the Appellants' trees, fence and garage have been there at the said line for over 30 years. The conclusion is that a boundary by acquiescence has been thus established, but the Decree failed to follow said line. This inadvertance should now be rectified.

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN FINDING AND CONCLUDING THAT THE WIDTH OF EREKSON'S LANE IS A PUBLIC ROAD AND SHOULD BE 40 FEET WIDE IN PART AND 50 FEET IN PART, AS SUCH FINDING IS CONTRARY TO THE EVIDENCE AND THE LAW.

POINT II.

THE COURT ERRED IN NOT FINDING THAT THE USE OF THE LANE HAS BEEN RESTRICTED BY THE CULVERTS, THE TREES, THE PONDS AND THE GATES, AND HAS NOT EXCEEDED 25 FEET IN WIDTH AT ANY TIME.

POINT III.

THE COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT ONCE IT HAS FOUND A PUBLIC RIGHT OF WAY TO EXIST ALONG THE ESTABLISHED LINE OF THE LANE THAT IT MAY

BY DECREE WIDEN THE SAME TO SUCH WIDTH AS THE COURT DEEMS NOW REASONABLY NECESSARY FOR ITS USE AS A PUBLIC ROAD IN LIGHT OF PRESENT VEHICULAR TRAVEL.

POINT IV.

THE COURT ERRED IN NOT FINDING THAT THE TITLE TO THE PLAINTIFF'S PROPERTY SHOULD BE QUIETED ALONG THE LINE OF THE BOUNDARY LINE AS SHOWN BY THE TREES, GARAGE, AND FENCE BEING 244.90 FEET EAST OF THE PRESENT QUARTER CORNER MONUMENT (OR 204.90 FEET EAST OF THE OLD MONUMENT) AS REFLECTED BY THE CONCLUSIONS OF LAW.

ARGUMENT

POINT I.

THE COURT ERRED IN FINDING AND CONCLUDING THAT THE WIDTH OF EREKSON'S LANE IS A PUBLIC ROAD AND SHOULD BE 40 FEET WIDE IN PART AND 50 FEET IN PART, AS SUCH FINDING IS CONTRARY TO THE EVIDENCE AND THE LAW.

The decree of the trial court adjudges that a north-south public road (called Erekson Lane) extends along the west boundary of the property described in paragraph 1. a. of the decree (hereinafter called "subject property") and that said lane is fifty feet in width at certain points and forty feet in width at certain points as it passes subject property. A portion of this lane is shown in Exhibits 1 to 5, 8 and 9 in relation to subject property. Exhibits 2, 3, 4 and 8 are pictures taken from the north looking south and show a row of trees in line

with the side of a garage abutting the east side of the lane. Exhibits 1, 5 and 9 are pictures taken from the south looking north and show the abutting trees and garage from the opposite direction.

The public road decreed to exist includes not only the travelled portion of the lane shown in said exhibits but also an untravelled area ranging in width from about fifteen to twenty-five feet extending east of and including said row of trees and garage. Appellant Clyde R. Thompson asserts: A The evidence fails to support the finding and decree that Erekson Lane is a public road, and B Assuming Erekson Lane is a public road, there is no evidence to support the finding and decree as to the untravelled area.

A

The evidence fails to support the finding and decree that Erekson Lane is a public road. The Utah statute governing the dedication of public streets by use (27-1-2 U.C.A. 1953) provides that "a highway shall be deemed 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." While the record contains substantial evidence that the lane has been and now is being regularly used by certain limited classes of persons, it does not contain evidence of use by the general public sufficient to constitute the lane a public road.

The record shows that the following persons have used the lane over the years for the purposes indicated:

1. Members of the South Cottonwood Ward and Grant Ward traversed the lane on foot, on horseback or in buggies in going to and from church;

2. Business customers or business associates of the Ereksen dairy farm used the lane in delivering feed or to purchase milk and other dairy products;

3. Fishermen occasionally used the lane while fishing in the creek;

4. On rare occasions other persons used the lane for other purposes. Respondent Crabtree testified that the "public" used the lane (R. p. 106, 11. 6-7). However, an examination of his testimony discloses that the "public" to him meant the church members, the fishermen and Ereksen's customers and business associates. That counsel for the respondents was aware of this apparent defect in proof is demonstrated by his unsuccessful attempts to show that the lane was used by the customers of a store located north of subject property (R. p. 135, 11. 12-30; R. p. 164, 11. 6-11).

The use of a road by a few individuals but not by the public generally does not create a public highway by prescriptive use (*Harris v. Schwartz*, 115 N. E. 345). The use of a road by employees,

customers and business associates does not constitute it a public highway (*Thompson v. Nelson*, 273 P. 2d 720, Utah, 1954). This court in the *Thompson* case quoted with approval the following definition of what constitutes a thoroughfare:

“A “thoroughfare” is a place or way through which there is passing or travel. It becomes a “public thoroughfare” when the public have a general right of passage. Under this statute the highway, even though it be over privately owned ground, will be deemed dedicated or abandoned to the public use when the public has continuously used it as a thoroughfare for a period of ten years, but such use must be by the public. Use under private right is not sufficient. If the thoroughfare is laid out or used as a private way, its use, however, long, as a private way, does not make it a public way; and the mere fact that the public also make use of it, without objection from the owner of the land, will not make it a public way. Before it becomes public in character the owner of the land must consent to the change. Elliott, Roads and Streets, No. 5.’ ”

The record is barren of evidence that the “public” has used Ereksen Lane for ten continuous years so as to constitute it a public road. The use of the lane by neighboring church friends, employees, customers and business associates was obviously permissive not hostile, particularly in view of the regular use at intervals of the gates. The sporadic use

of the lane by fishermen in season or the occasional use by others is wholly insufficient to support a finding and decree of a public road.

B

Assuming Erektion Lane is a public road, there is no evidence to support the finding and decree as to the untravelled area. The uncontradicted evidence detailed below is that prior to 1925 to 1930 the so-called "Rauscher" pond extended west of its present location (shown in Exhibits 3 and 8 to approximately the line of said row of trees. A fence guarded the pond on the west at that time. Between 1925 and 1930, a portion of the pond was filled in and its western edge moved eastward fourteen or fifteen feet to its approximate present location shown in said Exhibits 3 and 8. When the pond was filled in the fence was moved east to about the location of the fence shown in said Exhibits 3 and 8. Not over four or five years after these changes occurred, the row of trees was planted abutting the east side of the lane along the approximate line of the former pond edge and the garage was moved to its present location.

The following testimony and findings corroborate the above recitals:

Joseph Gillam who has lived in the neighborhood since he was a boy (R. p. 133, 11. 4-5) testified

that between 1888 and 1910 there were fences but no trees on both sides of the lane north of the creek (R. p. 137, 11, 1-30). Horace Godfrey used the lane from 1890 to 1903 (R. p. 162, 11. 10-18) and testified there was a fence on the Rauscher's (east) side of the lane and that when he took loads of hay into the Rauscher's barn during haying he would have to "turn with vigor, just within a short distance up there, into the barn" (R. p. 164, 11. 12-19). Godfrey said there was a pond on the west side of the Rauscher place next to the lane; that the lane was sixteen to twenty feet wide where it crossed the creek (R. p. 166, 11. 11-26); and that the culvert beneath the lane was the same width (R. p. 168, 11. 2-11). Irene Littson Ottley who used the lane as far back as 1892 remembered the Rauscher pond and could not remember when it was constructed. She said there were fences on both side of the lane north of the creek between it and Vine Street (R. p. 170, 11. 4-15). Defendant J. T. Erekson stated the so-called Rauscher pond at one time extended further west than it now does; that Shafer filled in a portion of the pond, moving the west edge of the pond east and at the same time moved the fence east (R. p. 178, 11. 14-24). Brent Gaufin remembered that before the pond was filled in, the west edge extended approximately to where the row of trees shown on Exhibit P3 now is (R.

p. 145, 11. 25-30). Gaufin said that between 1925 and 1930 the west edge of the pond was moved eastward approximately fourteen to fifteen feet (R. p. 146, 11. 10-30) and that before this change occurred the lane was approximately twenty-five feet wide between the west edge of the pond (the present tree line) and the west side of the lane (R. p. 151, 11. 9-13). Plaintiff Leroy R. Clark moved to said property in August, 1935 (R. p. 77, 11. 12-13) and said that at that time there was a fence post at the "end of the last tree" in front of the garage (R. p. 88, 11. 11-27). Based on this evidence the court found:

"Prior to the planting of the trees and erection of the garage, plaintiffs' predecessor in title maintained a pond which presently exists but which extended Westerly to the line described in the preceding paragraph until it was filled about 30 years ago." (R. p. 64)

Defendant J. T. Erikson testified that the garage shown in Exhibits 1, 2, 3 and 4 was placed in its present position and the row of trees was planted some time between 1925 and 1930 and have been in place since then (R. p. 179, 11. 3-30). Brent Gaufin also testified that said trees were planted between 1925 and 1930 (R. p. 143, 11. 15-29) and that the garage moved to its present location after 1930 (R. p. 144, 11. 1-5). Based upon that and

other testimony, the court found, and properly so, that "for more than thirty years last past the plaintiffs have had, established and maintained a garage, trees, and a fence along the west line of the property described in paragraph 2 above" (R. p. 63). There is no evidence that the public has made any use of the area east of said row of trees since they were planted.

Except for a period of not over four or five years the east line of Erekson Lane, as it passes subject property, has been marked either by the row of trees and the west side of the garage shown in said exhibits or by the pond edge which formerly extended out to the present tree line and which was surrounded by a fence. There is no evidence whatsoever that the untravelled area east of said tree line has ever been used by the public. It could not have been used prior to 1925-1930 because of the pond and fence nor afterward because of the trees and garage. This untravelled area *may* have been used during the four or five year period between the filling in of the pond and the planting of the trees although there is no evidence to prove it. Even if it were used during this period, the use was not of sufficient duration to establish a public road.

Since the record is clear and the findings confirm the fact that Eerekson Lane where it passes the so-called Rauscher pond (even assuming the

land is a public street) could never have exceeded its present width (approximately twenty-five feet) except possibly for an interval of four or five years, the decree of the court that the lane at that point is either forty or fifty feet wide must, as to the untravelled portion east of the tree line, be based upon something other than actual use. Perhaps the court's error arose from a misinterpretation and misapplication of the principle state in *Lindsay Land & Live Stock Co. v. Churnos*, 285 Pac. 646, and *Jeremy v. Bertagnole*, 116 P. 2d 420, that the width of a public highway created through ten years of continuous public use would be that reasonable and necessary for the uses which were made of the road and that the width would not be limited to the area actually used. If that is the basis of the court's decision as to the untraveled area, the court erred for the following reasons:

First: Under the facts and circumstances of this case a right-of-way the width of the area now travelled and used is all that is reasonable and necessary for the uses which have been made of the lane; and

Second: The above principle is inapplicable here since the abutting land never actually used by the public as a right-of-way is occupied by valuable improvements.

POINT II.

THE COURT ERRED IN NOT FINDING THAT THE USE OF THE LANE HAS BEEN RESTRICTED BY THE CULVERTS, THE TREES, THE PONDS AND THE GATES, AND HAS NOT EXCEEDED 25 FEET IN WIDTH AT ANY TIME.

Erekson Lane is an irregularly-shaped, meandering country lane which prior to the advent of automobiles was used principally by pedestrians and horseback riders and some buggies and wagons. The lane is now occasionally used by automobiles although such use has been rare because of the lack of a vehicular bridge across the creek. About the only vehicles that now use the lane are those belonging to the customers and business associates of the Erekson dairy (R. pp. 104-106). During fishing season some cars pull into the lane and park while the occupants are fishing (R. p. 84, 11. 13-24). Very few automobiles use the lane as a means of getting from Vine Street to 59th South. Clark testified that during the more than twenty years he lived there he occasionally crossed the creek and drove to 59th South from his place but that he seldom saw other cars driving through (R. p. 84, 11. 3-12). The reason for this is obvious since the public would not reasonably be expected to use a narrow dirt country lane often closed by gates which crosses an open unbridged ditch when there are wide public highways available for use nearby (Exhibit 14).

The lane in its present condition is wholly adequate for the uses to which it has been put. No one has ever complained that it is inadequate. The vehicles that use it come and go without difficulty except possibly when they get stuck in the ditch and that circumstances of course has no relationship to the width of the lane. On the occasions when the county has had equipment in the lane it has been able to maneuver without any reported difficulty. The lane in its present condition is wide enough for two vehicles to pass (R. p. 123, 11. 14-19).

The attention of the court is directed to the attached appendix which are illustrative plats. Particularly there are six restrictive factors which obviate any possible legitimate claim of a public road over 24.6 feet wide.

- a. 19 to 22 feet long culvert across the lane immediately north of plaintiff's property which has restricted the use to such 19 to 22 feet width as long as anyone can remember;
- b. The Rauscher Pond within the limits of the plaintiff's property which extended westerly to the point of the line of the plaintiff's trees and fence which restricted the use of the lane to 24.6 feet up until about 1925;
- c. Approximately 30 years ago the west portion of the Rauscher Pond was filled and within four or five years thereafter the trees were planted and the fence erected along its present line and the existence of the trees, fence and garage along the west side of plaintiff's property has restricted the use of the lane to 24.6 feet for the past 30 years;

d. At the crossing of the Cottonwood stream to the south of plaintiff's property the old Cedar Post and tree show that the maximum width there was approximately 22 feet;

e. To the south of the stream in an extension of the lane the defendants, Ereksen, have maintained two ponds which are 16 feet apart have restricted the width and use of the lane to 16 feet.

f. The defendant, Ereksen, has maintained gates approximately 15 feet in width across the lane at its south termini, which perforce, have restricted the use of the lane to such width.

These six obstacles are of long standing and have utterly prohibited a "public or other use of the lane in excess of the 24.6 ft. width." The fence line of respondents along the west side of the lane has been there for more years than anyone cared to state. This has fixed the west line apparently though the logic of the district court's decree would permit this to be moved over as readily as appellants' trees, garage and fence to accommodate the width which the trial court feels might be more desirable for present automotive travel.

This country lane fords the Cottonwood Creek. In the winter no one tries to run a car through the snow and the creek too. There was no evidence of such winter travel through the creek. In the spring, during the runoff, the lane is impassible because of high waters. At the point where the lane enters

the Cottonwood Creek heading south, there is an old cedar post just 21 feet east from the respondents' fence line. Mr. Clark testified as to a special examination and measurement of the same made during the course of the trial.

It is respectfully suggested there is no valid legal basis upon which the court can decree a right-of-way greater in width than the used and travelled area when for the past seventy or eighty years the lane as it now exists has adequately served the purposes for which it has been used without difficulty or complaint.

It is obvious that the defendants are now attempting by means other than appropriate condemnation proceedings to expand what is and always has been a narrow, quiet, little-used country lane into a city street. On cross-examination defendant Marlowe L. Crabtree testified as follows:

“Q. That is your property, that is what you claim?

A. Yes, but I don't want it for any purpose other than a road.

Q. You just want it for a road?

A. I want to open that road, we all want.

Q. You want to make that road in there?

A. Yes.

Q. Now when you make that road, are you going to make that middle line, and make it half here and half here (indicating), or do you want to leave the road as it is now?

A. From my east fenceline, I want to go as far east as the Judge would allow us, at least 50 feet, and if they make it four roads, it would be fine." (R. p. 121, l. 30; R. p. 122, ll. 1-12)

Later Crabtree testified:

"Q. Is it 50 feet wide along all the way it runs?

A. I haven't measured.

Q. Well, approximately. You can tell about what 50 feet is.

A. We would like to have it.

Q. Running even across hills, or do you want to make it straight?

A. I don't know. It is other people's—Straight. I think I would go along just definitely in opening up that lane anywhere you want it.

Q. You want to make it a County road through there?

A. Yes.

Q. O.K. 50 feet wide, you want to make it?

A. I would like four roads." (R. p. 126, ll. 2-15)

It is significant that as late as 1953 defendant Erekson asserted to plaintiff Clark that Erekson

Lane was a private lane and that Clark would have no right to use it in reaching a tract which he had reserved in conveying to Thompson (R. p. 185, 11. 26-30; R. p. 186, 11. 1-5; R. p. 189, 11. 17-20; R. p. 208, 11. 22-30; R. p. 209, 11. 1-8). Yet for reasons best known to Erikson he had at the trial changed his position and then asserted that the lane was and always had been a public street.

POINT III.

THE COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT ONCE IT HAS FOUND A PUBLIC RIGHT OF WAY TO EXIST ALONG THE ESTABLISHED LINE OF THE LANE THAT IT MAY BY DECREE WIDEN THE SAME TO SUCH WIDTH AS THE COURT DEEMS NOW REASONABLY NECESSARY FOR ITS USE AS A PUBLIC ROAD IN LIGHT OF PRESENT VEHICULAR TRAVEL.

The effect of the court's decision is to enlarge the above principle to mean that the width of a road created by public use is that width which is reasonably necessary for the purposes for which it *might* be used in the future rather than for the purposes established by prior public use. That this court did not intend such a result is illustrated by the statement in *Jeremy v. Bertagnole* that "A bridal path abandoned to the public may not be expanded by court decree into a boulevard."

B.

Appellants contend the principle developed in

the above cases is inapplicable here not only because the travelled area is adequate for the uses to which the lane has been put but also because of the different circumstances involved. In those cases the asserted public road was across open grazing land. Here the land is a heavily wooded rural residential and farming area. Except in the one instance noted below, the roads there involved do not appear to have been bounded by fences. There is a fence here. In neither of those cases does it appear that there were valuable buildings, trees or other improvements owned by the abutting land owner in conflict with the decreed public road. Here a valuable garage and full-grown shade trees over thirty years old conflict with the decreed right-of-way. In both of those cases the road was regularly used for the trailing of sheep or cattle and in using the road for this purpose an area greater in width than the decreed public road was used. The use of Ereksen Lane has been limited to pedestrian, equestrian and some vehicular traffic. Under the circumstances of the *Lindsay* and *Jeremy* cases the courts' refusal to limit the declared width of the public road to the width of the observable use (sixteen feet in the *Jeremy* case) is understandable and has reason. However, to enforce the court's decree here will be unreasonable and will irreparably damage appellant by requiring the removal of a valuable building and the beautiful shade trees which greatly enhance

the value of the property and which constitute one of the chief attractions causing appellant Thompson to purchase it. If a court has the power to so condemn valuable private property without compensation, what, if any, is the limit to such power? Suppose that instead of the trees and garage there had been constructed on said land a million dollar structure used by the plaintiff and his predecessors in the conduct of a business permitted by local zoning ordinances. As is true of the grage and trees, such building would have been upon land declared by the court to belong to the plaintiff subject to a public road although in fact the public has never used the property. Yet under the court's view, appellant would be required to remove the building without compensation. Appellant asserts the court has no such power under our law except as it may be exercised in proper condemnation proceedings where the appellant can be adequately compensated for his loss.

A circumstance in the *Jeremy* case suggests that the principle there applied is modified where the landowner has improvements on the land abutting the used portion of the road. There the court declared the road to be sixty feet in width "for a small fenced portion of its length" and "* * * Five rods for the remaining portion." If the court in the *Jeremy* case had the power which the trial court in

this case assumes to exercise, why wasn't the public road decreed to be of uniform width both as to the fenced and unfenced portion? Obviously the court considered that different principles governed the two road segments. Since the existence of fences enclosing the narrower segment is the only factor to distinguish it from the wider one, it must be assumed that the court considered it was, for some reason related to the fences, precluded from decreeing a larger width as to the fenced portion. Appellant submits this reason was that the court recognized it lacked authority to condemn the area occupied by the fences without proper proceedings in which the abutting land owner could be compensated for his loss. To do otherwise would constitute a taking of private property without due process of law contrary to the provisions of Article I, Section 22 of the Utah Constitution which provides: "Private property shall not be taken or damaged for public use without just compensation."

In *Whitesides v. Green*, 44 Pac. 1032 (Utah) decided April 13, 1896, the evidence was that appellant had on March 25, 1895 constructed a fence approximately one-half rod inside the boundary of his property and asserted that the highway in question was only one rod wide. The Supreme Court affirmed the trial court's holding that the road was three rods wide and had been established through

fifteen years uninterrupted use by the public. The effect of that decision would be to require the removal of the fence located on appellant's property. However, unlike this case, the fence there was located after the public road had been created.

In *Burrows v. Guest*, 12 Pac. 847 (Utah 1887) the Utah Supreme Court reversed the trial court's holding that the question of whether a public road existed should have been submitted to the jury. The court by dictum said that the existence of a formal recorded plat of survey showing the width of a road would be strong evidence in determining the area dedicated for public road purposes and by implication approved the action of the road supervisor in removing shrubs and trees from an area within a platted street but off the regularly used portion of the street. However, here the official plat does not show Erekson Lane and the evidence clearly demonstrates that the public has never used the untravelled portion of said decreed public road.

We are not unmindful of the *Boyer v. Clark* decision 326 Pac (2) 107, 7 Ut. (2d) 395 wherein the Middle Canyon Road was decreed to be a public road. Therein the court remanded the case for a determination by the trial court, "the width of the highway, which must be determined in accordance with what is reasonable and necessary for the uses to which the road has been put." The trial court

was spared the necessity of making a determination in that case because the parties proceeded to stipulate as to width.

However, in our present case, the trial court here construed the *Boyer v. Clark* case decision to require that he fix a width for the Erekson Lane to accommodate automotive traffic far in excess of any present or past use. It is now proper that your court clear up this matter and relieve the trial courts from their misapprehension that on their shoulders rests the right and responsibility to widen a path, a lane or a country road into a modern boulevard.

POINT IV.

THE COURT ERRED IN NOT FINDING THAT THE TITLE TO THE PLAINTIFF'S PROPERTY SHOULD BE QUIETED ALONG THE LINE OF THE BOUNDARY LINE AS SHOWN BY THE TREES, GARAGE, AND FENCE BEING 244.90 FEET EAST OF THE PRESENT QUARTER CORNER MONUMENT (OR 204.90 FEET EAST OF THE OLD MONUMENT) AS REFLECTED BY THE CONCLUSIONS OF LAW.

The court found that for more than thirty years the appellants have had established and maintained a garage, trees and a fence along the west line of subject property and concluded that said line of trees, garage and fence established the boundary between the property of appellants and respondents by use and acquiescence (R. pp. 63, 65). The respon-

dents do not question this portion of the court's findings and conclusions. The property described in paragraph 1. a. of the decree quieting title in appellant Clyde R. Thompson excludes a strip of land north of said garage 0.757 rods wide and 14.706 rods long which lies east of said decreed line separating plaintiffs' and defendants' property. It is requested, therefor, that the decree be altered to conform with the findings of fact and conclusions of law by changing the description in said paragraph 1. a. to include said omitted strip of land.

CONCLUSION

This case clearly presents two basic legal principles:

- (a) Does the occasional permissive use of a lane over a restricted width (not over 24.6 feet) establish a public use and measure the extent of the possible easement; or
- (b) May a trial court, after finding a limited public use of a lane, expand that narrow lane into a modern highway by decreeing a width "reasonably necessary" for traffic.

We submit that the court should now refuse such unfettered power of taking land without just or any compensation. The Decree as to the width of the lane should be modified to 24.6 feet and the long acquiesced boundary should be corrected to conform with the findings and conclusions.

Respectfully submitted,

PUGSLEY, HAYES,
RAMPTON & WATKISS

721 Cont'l Bank Bldg.
Salt Lake City, Utah

Attorneys for Appellants,

Clyde R. Thompson and
Mrs. Clyde R. Thompson

EREKSON
PROPERTY

CULVERT

50.0'

40.0'

10.0'

RAUSCHER POND

CRABTREE
PROPERTY

FILLED IN
30 YRS. OR SO

THOMPSON
PROPERTY

GARAGE

CREEK

COTTONWOOD

EREKSON
PROPERTY

CLARK
PROPERTY

