

1959

Leroy R. Clark et al v. James T. Erekson et al : Brief of Respondents

Utah Supreme Court

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Moffat, Iverson and Elggren; Attorneys for Respondents;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

— vs. —

JAMES T. EREKSON, et al
Defendants and Respondents.

Clk. Supreme Court, Utah

Case
No. 9005

UNIVERSITY UTAH

AUG 6 1959

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BRIEF OF RESPONDENTS

MOFFAT, IVERSON and ELGGREN

By D. HOWE MOFFAT

Attorneys for Respondents

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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The Statement of Facts appearing in the brief of Appellant Clark is substantially more accurate than that appearing in the brief of Appellant Thompson. To avoid confusion Respondents elect to restate the facts. There has existed for more than fifty (50) years, and Respondents contend since prior to the issuance of any patents to land in the area, a road running North and South at what would be 7th East Street from Vine Street on the North to 5900 South Street on the South. Immediately North of the juncture of this road and Vine Street, Vine

Street runs in a North and South direction for a substantial distance and the West fence line of Vine Street and the West fence line of the road in question are in direct alignment.

At a point approximately five hundred feet South of the juncture of the road in question with Vine Street, Appellant Clark was the owner of a tract of land abutting the road on the East and Respondent Crabtree is the owner of tract of land abutting the road on the West immediately opposite the Clark property. Respondent Erikson is the owner of land abutting upon the West side of the road both North and South of the Crabtree property and land abutting upon the East side of the road South of the Clark property. In December, 1953, Respondents Clark conveyed the North portion of their property being that immediately opposite the Crabtree property to Respondent Clyde R. Thompson. The description in this Deed so far as it relates to the West line of the property, that is the property abutting upon the road, is substantially different than the description of the West boundary in the Deed by which Clark acquired title to this property, the difference being that the West boundary of Clark's property as described in his deed of acquisition, was *the center of an open street*, "four chains East of the Southwest corner of the Northwest corner of Section seventeen (17)", and was a due North and South straight line, whereas in his deed of conveyance to Respondent Thompson, he described the West line of the property as commencing at a point 3.74 chains East from the same quarter corner. The West line also shows

an offset of .754 rods, and a course South 0 degrees 18 minutes 30 seconds East, rather than a North-South course. Clark endeavored to obtain from Respondents a Quitclaim Deed to the property representing the difference between the land he acquired and the land which he deeded Appellant Thompson and when Respondents refused to give him such a deed, he commenced this action.

The road from Vine Street down to the North boundary of what is now the Thompson property, was the subject of an action in 1928 in the Third District Court of Salt Lake County, Case No. 40279, between J. T. Erekson, father of Respondent Erekson, and McClanahan, who was the owner of the property on the East side of the road in question, located immediately North of the land of Respondents.

In that case the Court found that the road was a public road and that it was forty-six feet in width. This case has not been reversed or the Decree modified. Up until 1924, at a point approximately forty (40) feet South of the North boundary of what is now the Thompson property, an artificial pond protruded from what is now the Thompson property into the road a distance of some twenty (20) to twenty-five (25) feet, and there was no fence separating the pond from the traveled portion of the road. About 1924 the then owner of what is now the Thompson property caused most of the pond protruding into the road to be filled with dirt which he took from other parts of the roadway and he then constructed a fence, to divide the remaining portion of the pond from

the roadway, at a point approximately forty (40) feet East of the West fence line of the then road. Some three (3) or four (4) years later a different owner of the now Thompson property moved a building from the North-easterly portion of the now Thompson land out into what was then the East half of the road and built a fence along the West side of the garage at a point approximately twenty-five (25) feet East of the West line of the road to a point approximately forty (40) feet South of the North boundary line of the property. The fence went thence East approximately twenty-five (25) feet and thence North to the North boundary line. At the same time he planted some trees along this fence line North of his garage. Subsequently, the fence was moved back to its previous location at a point some forty (40) feet East of the West line of the road. The trees and the garage have remained in their present position since about 1928.

STATEMENT OF POINTS

POINT I.

IS THERE A PUBLIC ROAD RUNNING NORTH AND SOUTH BETWEEN THE PROPERTY OF APPELLANTS AND THE PROPERTY OF DEFENDANTS?

POINT II.

IF THERE IS A PUBLIC ROAD AT THE PLACE INDICATED IN POINT I, WHERE IS THE EAST BOUNDARY OF THE ROAD AS IT PASSES ALONG THE WEST SIDE OF APPELLANT'S PROPERTY?

ARGUMENT

The two questions involved in this lawsuit are ultimate questions of fact and the legal questions are concerned with the legal effect of the evidence in establishing the ultimate question of fact.

POINT I.

IS THERE A PUBLIC ROAD RUNNING NORTH AND SOUTH BETWEEN THE PROPERTY OF APPELLANTS AND THE PROPERTY OF DEFENDANTS?

Respondents claim, and the Court so found, that Ereksen Lane as it runs north and south between the property of Appellants on the east and the defendants on the west is a public road.

First, let us refer to the Decree entered in Case No. 40279 in 1928 by Judge Chris Mathison. In this case Judge Mathison found that Ereksen Lane from the north boundary of appellant's property to Vine Street to be a public road 46 feet wide. The road as it passes appellant's property is bounded on the west by an old fence surrounded by a privet hedge. The east boundary is identified by a fence 50 feet east of the west fence for the northerly 40 feet. It then jogs west 10 feet and the fence then runs at a distance of 40 feet from the west fence to the garage. The west line of the garage is approximately 25 feet from the west line, then the fence from the south side of the garage runs in a southeasterly direction. Appellants did not at any time contend that there was ever

a fence or any other obstruction in the road, or that it was ever narrower than 50 feet for the north 40 feet of appellant's property.

The abstract of title of Respondent Crabtree is in evidence as Defendant's Exhibit 12. This abstract discloses that the Patent was issued in 1891, but as far back as June 26, 1875, the patentee conveyed the property of Defendant Crabtree, and commenced the description as follows:

“Beginning at a point in the center of a north and south County Road 4.12 chains true East from the northeast corner of the Southwest Quarter of the Northwest Quarter of Section 17, * * *”

This Deed clearly indicates that the parties thereto considered that a County road existed at the point in question, and in view of the fact that the patent to this land had not been issued, it could only have become a County road by user pursuant to the provisions of 43 U.S.C.A. 932, which provides:

“* * * the right of way for the construction of public highways over public lands not reserved for public uses is hereby granted.”

Patents are issued subject to existing rights of way, so respondents contend that there has been a County road at the point in question since at least 1875.

The Erikson abstract, in evidence as Defendant's Exhibit 13, at Entry 3 identifies a north-south County road at the point in question, the Deed being dated in 1901. The abstract of title to appellant's property in

evidence as Exhibit 7, and the conveyances running as far back as 1877 have the following opening the description:

“Commencing in the center of an open street about four chains East from the Southwest Quarter of the Northwest Quarter of Section 17 * * *.”

(See Entries numbers 6, 7, 8, 12, 19, 21, 23, 28, 29, 30, 34, 35 and 43)

All of these descriptions, in addition to commencing in the center of an open street, also describe the west line of appellant's property as a straight line running due North and South. It is interesting to note also that the means of ingress and egress to and from appellant's property has been by way of Ereksen Lane, and if their right to the use of the lane was predicated on some type of a private easement, it is to be noted that there is nothing in the abstract to indicate such private right, and there likewise is no grant of such right contained in any of the deeds of conveyance to said property. It is acknowledged that the conveyances convey rights of way and appurtenances, but such a valuable right as the right of ingress and egress, if it were a private right, would certainly have been identified in the several conveyances.

In addition to the documentary evidence above referred to, Respondent Clark, who resided in the property of appellants from 1935 until 1953, testified that he traveled from his home south along the lane to 5900 South Street four or five times each year. (Tr. 83) He testified that sometimes there were a couple of gates across the road, but that they were never locked.

Respondent Crabtree, who has been a continuous resident on the lane since 1934, testified that there was between 50 and 100 persons who traveled through the lane each month during the entire period. (Tr. 106) He also testified that the County had used its snow removal equipment to clear the lane; that at times they have graded the road (Tr. 108), and they have put in a culvert in the lane. (Tr. 109)

Joe Gillham, a witness called on behalf of respondents, testified that from about 1890 until 1910 he was a member of the South Cottonwood Ward, and that in going to and from the meeting house would go East on 59th South to Ereksen Lane thence North along the lane past the property in question to the meeting house. (Tr. 134) That at that time there were no gates on the lane.

Mr. Gillham, on cross-examination, stated that the lane was 50 feet wide as it passed the property of appellants. (Tr. 135-6) That at that time there were no fences on either side of the lane south of the property of appellants. He said that all of his neighbors traveled this same route, and he named some of them and indicated that they traveled on foot, or by team, surrey or buggy. (Tr. 133)

Brent Graufin, called as a witness by respondents, testified that he was Principal of the Mid Valley School in the Jordan District, and was a nephew of Respondent Ereksen's wife, and that from 1915 until 1927 (Tr. 140), he spent many of his summers at the home of Respond-

ent Erekson, and that he was very familiar with Erekson Lane, and particularly that part of it between appellant's property and Respondent Crabtree. He prepared plaintiff's Exhibit 10 from measurements and field notes that he had made in connection with T. F. McDonald, a licensed surveyor, for whom he worked at odd times. He further testified that from 1918 to 1928 that nearly every day there would be carriages, and sometimes automobiles, traveling through the lane. (Tr. 148) He identified some of the people who traveled through the lane, and that some people used it that he was not acquainted with, and that some would travel down to the creek and go fishing. (Tr. 149)

Horace Godfrey, a witness called on behalf of Respondents, testified that from 1890 to 1903 he frequently had occasion to travel through Erekson's Lane (Tr. 162), and that during that period he saw many other people using the road, and at that time the condition and width of Erekson Lane was comparable to that of Vine Street. (Tr. 167)

Irene Litson Ottley, a witness called on behalf of respondents, testified that she had lived in the vicinity of 6344 South 7th East since 1884, and she was very well acquainted with Erekson Lane (Tr. 168), and that on many occasions she traveled from Vine Street to 59th South by way of Erekson Lane, usually walking, but occasionally riding in a wagon; that she saw many, many other people using the lane during the period, some of whom she named. (Tr. 169)

Respondent J. T. Erekson testified that he had lived at his present address, 766 East Vine Street, since 1918, and that he can remember Erekson Lane for about sixty years. (Tr. 174) That the County had put gravel on the road at different times. (Tr. 182) That there has always been substantial travel through the lane (Tr. 175), and that the volume of traffic was fairly constant from 1900 to 1920, but with the coming of automobiles there was a smaller volume of traffic because of having to ford the creek. (Tr. 176)

James Orland Thorum, a witness called on behalf of respondents, testified that he had lived at 482 East 59th South since 1900, and that he had been acquainted with Erekson Lane for many years, and that from 1900 to 1912 (Tr. 194), he traveled through Erekson Lane once or twice each week, and generally on Sundays he would find other people using the lane at the same time. (Tr. 195)

Earl E. Howe, a witness called on behalf of Respondents, testified that he has been familiar with Erekson Lane for 50 years, and in response to the question by Counsel for respondent as to the travel on the lane, he answered: "Yes. It is traveled considerably."

James M. Dunster, a witness called on behalf of Respondents, testified that he frequently had used Erekson Lane (Tr. 205), and that he would bring beet pulp from West Jordan Sugar Factory to his home by going East on 59th South to Erekson Lane, thence North on Erekson Lane to Vine Street.

more than sixty years last past, so the location of the east boundry of the road can best be determined as being at some appropriate distance east of the west boundry. This method is also indicated by virtue of the fact that the west quarter corner of Section 17, to which the surveys of the property in question has been tied, is presently represented by two different monuments, each of which purports to be the true quarter corner. (Tr. 110)

The evidence shows without dispute that prior to 1924 the garage was located on the easterly part of appellants' property, and there were no trees west of the pond. The evidence further shows that the artificial pond, which, prior to 1924, extended in to the 50-foot roadway some 20 or 25 feet, was filled in my the then owner of appellants' property, a man by the name of Shafer. (Tr. 178; Tr. 146) Shafer filled the pond from dirt from the roadway. Prior to that time there had not been a fence between the road and the pond as testified to by appellants' witness, Earl Home. (Tr. 201) After the pond had been filled in the then owner of the property, Shafer, built the fence between the pond and the road at a point 40 feet east of the west fence line. (Tr. 202; Tr. 179; Tr. 147) About 1924 Schryver, the then owner of appellants' property, moved the garage, which had theretofore been a cow barn, out into the road, and a few years thereafter planted some trees to the north of there in the roadway. (Tr. 152; Tr. 178) Appellants apparently sought to establish their right to the land where the trees and garage were located on the basis, as attorney for appellant Clark stated: "By adverse possession and pre-

scriptive use.” (Tr. 46) This very statement presupposes that prior to the time that the garage and trees were located at their present site the land in question was part of the public road. Their position has changed and now seems to be that the road always ran to the west of where the trees and garage are now located. In other words, that Erekson Lane as it proceeded southerly was at a rather uniform width of from 46 to 50 feet until it got to this particular point where all of a sudden it narrowed to 25 feet, and after passing appellants’ property immediately widened out to a 40 to 50 foot road. It is submitted that there is no evidence whatsoever to support this proposition, but on the contrary, the only evidence is that the road was approximately 50 feet in width throughout its distance from Vine Street to 59th South. (Tr. 135; Tr. 181; Tr. 182; Tr. 146)

On the question of width this Court has had the following to say:

In *Jeremy v. Bertagnole*, 101 Ut. 1, Utah, 1941, 116 P. (2d) 420, the Court found a public way to be 60 feet in width in places and 5 rods in other places.

“Before doing so, however, it is proper to observe that even as to pedestrians and vehicular traffic, where the evidence establishes dedication of a roadway as in this case, the width of such roadway is not to be by the court measured by the boundaries of the beaten track. ‘It was proper and necessary for the court in defining the road to determine its width, and to fix the same according to what was reasonable and necessary, under all the facts and circumstances, for the uses which

The appropriate law applicable to the above facts is as follows:

Utah Code Annotated, 1953:

Sec. 27-1-1. "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.

Sec. 27-1-2. 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.

Sec. 27-1-3. Highways once established continue until abandoned. — 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 other competent authority.

The latest declaration of this Court on the subject is found in *Boyer v. Clark*, 7 U 2d 391, Utah 1958, 326 P. (2d) 107, where the Court said:

"The uncontradicted evidence in the instant case disclosed that for a period exceeding 50 years, the public, even though not consisting of a great many persons, made a continuous and uninterrupted use of Middle Canyon Road in traveling by wagon and other vehicles and by horse from Upton to Grass Creek and other points as often as they found it convenient or necessary. They trailed cattle, and sheep, hauled coal, and used this trail for other purposes in traveling from Grass Creek and various other points to and from Highway 133. This

evidence was sufficient as a matter of law to establish a highway by dedication and the court erred in finding otherwise. The highway once having been established by such use, it is provided by statute, Sec. 27-1-3, U.C.A. 1953, that it '* * * must continue to be highway(s) until abandoned by order of the board of county commissioners * * * or other competent authority.' There is no contention that any such procedure has been invoked here."

See also: *Wilson v. Hull*, 7 Ut 90, Utah 1890, 24 P. 799
Whittaker v. Ferguson, 16 Ut. 240, Utah 1889, 51 P. 980.

By virtue of the fact that the appellants offered no testimony whatsoever to contradict the testimony of the witnesses hereinbefore referred to, coupled with the fact that Counsel for appellants Clark predicated their claim to the land where the garage and trees are located, on the basis of adverse possession and prescriptive use (Tr. 75-6), it seems clear that Ereksen Lane is a public road and has been since prior to patent, and certainly the evidence amply supports the proposition that for more than ten years there has been continuous use of the road by the public, and there is no evidence of any abandonment of the road by the county commissioners.

POINT II.

IF THERE IS A PUBLIC ROAD AT THE PLACE INDICATED IN POINT I, WHERE IS THE EAST BOUNDARY OF THE ROAD AS IT PASSES ALONG THE WEST SIDE OF APPELLANT'S PROPERTY?

All of the testimony indicates that the west boundary of Ereksen Lane is now situated where it has been for

were made of the road.' Lindsay Land & Live Stock Co. v. Churnos, *supra*. In Whitesides v. Green, 13 Utah 341, 44 P. 1032, 1033 57 Am St. Rep. 740, in discussing the question here involved, this court said:

“ ‘Counsel for the appellant appear to insist that the public have only a right to travel on the beaten path, and must be confined to one rod in width. We cannot agree with counsel that, where the public have acquired the right to a public highway by user, they are limited to such width as has actually been used by them. Generally, the greater part of the travel on a county highway is doubtless confined to the track made by vehicles, but there must be room enough for travelers with wagons, carriages, or implements to pass each other, and for necessary improvements and repairs to be made so as to keep it in a suitable condition. The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement of travel, and where the public have acquired the easement the land subject to it has passed under the jurisdiction of the public authorities, for the purpose of keeping the same in proper condition for the enjoyment thereof by the public. Such authorities are bound to keep the road open and in suitable repair, and, if obstructions be placed thereon, it is their duty to remove the same, and care for the rights of the public. * * * The purpose for which the easement was acquired must determine the effect of the right parted with by the owner, and the width necessary for the enjoyment of the highway by the public. Where the easement is acquired by prescription or use such width must be determined from a consideration of the facts and circumstances peculiar to the case, because in such event the court cannot say that in law the highway is of a certain width, in the absence of statutory pro-

vision. * * * Whatever may be the width in any particular case, the easement cannot be limited, when acquired by user, to the actual beaten path.' "

"(3) Hence, while it is true as contended by appellant, that where dedication is established by user to which the way has been put measures the extent of the right to use, this limitation goes to the kind of use. A particular use having been established, such width should be decreed by the court as will make such use convenient and safe. A bridle path abandoned to the public may not be expanded, by court decree, into a boulevard. On the other hand, the implied dedication of a roadway to automobile traffic is the dedication of a roadway of sufficient width for safe and convenient use thereof by such traffic."

Respondents content that the mere fact that a depression in the earth has been filled with water to form a pond which projects into a public road does not cause the land under the water to lose its character as a public road. The mere fact that vehicles could not travel through the pond is not conclusive as the width of the road.

This Court has pointed out in *Wilson v. Hull, supra*, that where the evidence established

"There were two or three sloughs, at rainy times, that were impassible; and that it was laid out four rods in width, and was upon the line between the sections * * *"

did not take the impassable portion out of the road, and in *Lindsay v. Churnos*, Utah 1930, 75 Ut. 384, 285 P. 646, the finding were, among others, that:

“During the last four or five years the road in places has become impassable to ordinary vehicles and has been used only in driving animals, pack outfits, etc., over it.”

still it was a road.

See also: *Deseret Livestock Company v. Sharp*, 123 Ut. 353, Utah, 1953, 259 P. (2d) 607.

Respondents contend that the pond extended into the road; first, the boundaries of both appellants and respondents are a straight line as they abut upon the road; second, the pond is an artificial pond; and third, Shafer, when the owner of the property, filled the part of the pond projecting into the road and built a fence along the east side of the fill, and this constituted a dedication or admission by the then owner as to the width of the road.

Again, it is important to observe that the only question before the Court in Case No. 40279 (*supra*) concerned the existence of a public road, and its width between the property of plaintiff and defendant in that case. It is the same question as the one involved in this matter except that it involves different parties, and at a point immediately south but upon the same road as Case No. 40279. Whether the Erektion Lane is a public road beyond the property of appellants is not a question now before this Court. However, it is to be noted that Respondent Erektion, who is the owner of the land upon both sides of the road between Respondents' property and 5600 South Street, has testified that it is a public

road and hence it would be difficult for him at some future date to change his position.

It is important to remember that all public roads are not through roads, many of them are *cul de sacs*. Appellant Thompson has no private way on Erekson Lane, and Clark, who has reserved for himself the property south of the creek, has not reserved any way for him to get in and out of this property if Erekson Lane is not a public road.

REPLY TO SPECIFIC POINTS IN THE BRIEFS OF RESPONDENTS

Respondent Clark first raises the point that there is no evidence of any "formal dedication" of Erekson Lane. *Section 27-1-1, supra*, indicates that dedication is only one of a number of ways in which land becomes a public highway. There is no provision in our statutes aside from subdivision ordinances of cities and counties wherein there is a formal dedication of a public highway. There is no contention by respondents that there was a formal dedication of Erekon Lane, but rather that "it was laid out — by the public —", and hence became a public highway.

Respondent Clark then points out that there is no evidence of any objection by the neighbors to the use of Erekson Lane. We assume that he means there is no evidence of objection by abutting property owners. This is true, but appellant thereupon concludes that it was a permissive use, and hence that no rights accrued either

to the public or to the users as private citizens. This argument carried to its ultimate conclusion would deprive both of appellants from any use of Erekon Lane because there would be no public road and there would be no private easement. We cannot believe that appellants intend to advance this proposition. On the other hand, if Erekon Lane is a public road, as contended by respondents, it would be unusual to expect the abutting property owners to register any complaints because of the use of the road by the public.

Appellant Clark's last point is that respondent Crabtree wanted the lane widened. This undoubtedly was wishful thinking on Mr. Crabtree's part, but his position is that the lane should be restored to its original width, that is, the distance between the two fences prior to the time that the garage building was placed in the street and the trees planted in the street.

Relative to the trees, it is unique to have appellants contend that by planting trees in a public street that they can thereby acquire some right in and to the street. It is common knowledge that trees are planted in the public highways by abutting property owners as part of their landscaping programs, and it is unique to have anyone contend that by so doing they can acquire an interest in the street adverse to the public.

Appellant Thompson, on page 2 of his Brief, says the undisputed facts show that the maximum width of the land in front of appellants' property has been 24.6 feet. It is undisputed that the fences on the north 40 feet of

appellants' property have been 50 feet east of the west fence line. (Tr. 142; Ex. 10; Tr. 181) The foundations of the old coops fronting on the street are still intact; and the undisputed evidence is that the fence was fastened to these coops.

The plats attached to Respondent Thompson's Briefs are misleading, in that they indicate a road only 25 feet wide north of the Thompson property, whereas, the fact is that the Decree in Case No. 40279 establishes a road 46 feet wide. Respondent Thompson at page 8 makes a point of the fact that the users of the road can be placed in various categories. He seems to feel that people going to church are no longer citizens. He overlooks the fact that practically all of the witnesses testified that persons used the street whom they could not identify, so it is difficult to see what category respondent has placed these unknown persons in. He also fails to put Mr. Dunster, his own witness, in any category when he was hauling beet pulp through this road. On page 9 he makes reference to permissive use, and on page 12 to the planting of trees, both of which have been discussed above. On page 15 he makes reference to the fact that the culverts, which are all north of appellants' property, do not extend the full width of the 46 foot road. We believe it is proper to take notice of the fact that bridges, culverts and similar devices for crossing water courses do not, except on the most recent and modern of highways, extend the full width of the right of way, and it is not unusual that this should be true of Ereksen Lane. On page 20 he raises the point that respondents and the trial court are widen-

ing Erekon Lane. This begs the question. Respondents are trying to remove an obstruction from the lane and have its boundaries restored to their historic location.

Section 78-12-13, provides that there can be no adverse interest acquired in a public road:

“Adverse possession of public streets or ways. — No person shall be allowed to acquire any right or title in or to any lands held by any town, city or county, or the corporate authorities thereof, designated for public use as streets, lanes, avenues, alleys, parks or public squares or for any other public purpose, by adverse possession thereof for any length of time whatsoever, unless it shall affirmatively appear that such town or city or county or the corporate authorities thereof have sold, or otherwise disposed of, and conveyed such real estate to a purchaser for a valuable consideration, and that for more than seven years subsequent to such conveyance the purchaser, his grantees or successors in interest, have been in the exclusive, continuous and adverse possession of such real estate; in which case an adverse title may be acquired.”

Sections 27-1-12, -13, -14, -15, -16, -17, U.C.A. 1953, provide for methods by which the public authorities may remove encroachments from the public highways. It seems altogether fitting and proper that the Court in this action, in which private citizens are endeavoring to enforce a public right, should apply the public remedy to the removal of the obstructions.

Finally, the point is made that beyond and to the south of that part of the road now under consideration there have from time to time been gates placed across the road. These gates have not been in existence continuously because witness Dunster testified there were no gates there when he traveled the road in the 1890's. The evidence is undisputed that the gates were not closed except on rare occasions and were never locked. This Court considered this problem in the case of *Sullivan v. Condas*, 76 Ut. 595, Utah 1930, 290 P. 954, where the road was established in much the same way as Erekson Lane, and on this the Court had the following to say:

“There is ample and satisfactory evidence to show that as early as 1873 the roadway extended up and down the canyon over the lands now owned by the plaintiffs and the defendant and others, while such lands were a part of the public domain, and was traveled and used by the public generally as occasion required in going up and down the canyon. The patent to the land issued to the predecessors in interest of the plaintiffs was issued in 1906, about thirty-three years thereafter. The plaintiffs acquired their interest in the lands in 1922 or in 1924. The right of way having been established over public lands by public user, the predecessors of the plaintiffs when the patent was issued to them, and the plaintiffs when they acquired their interest in and to the lands, took them subject to the easement in favor of the public, unless it was thereafter extinguished by operation of the state law, which was not done.”

Relative to the gates maintained by plaintiff, the Court had the following to say:

“A further point is made that gates were put up by the plaintiffs and their predecessors in interest, thereby indicating that the character of the roadway was a private roadway and interrupted the use of it. But there is ample evidence to show that whatever gates or fences were put up were erected after the roadway had for many years been established and used as a public highway by the public generally and by those who had occasion to use it and was so continued to be used after as before whatever gates or fences were erected.”

The New Hampshire Court held that an owner cannot bar use of a public way once established by putting up bars part of the time. *Town of Windham v. Jubinville*, 92 New Hampshire 102, 25 A. (2d) 415.

See: *Bolger v. Foss*, 65 Cal. 250, California 1884, 3 P. 871,

where, after the Court had found a way to be a public road had the following to say about gates:

“The fact, as found, that in the fall of 1877 the plaintiff placed gates at the points where the road entered upon and emerged from this land, which did not prevent the passage across it, does not overcome the effect of the finding that the road was used as a public road; nor does the fact that plaintiff, a ‘short time’ before he commenced this action, notified defendant that it was not a public road.”

To the same effect see: *Barnes v. Daveck*, 7 CA 220, California 1907, 94 P. 779.

CONCLUSION

Respondents maintain that a public street was laid out prior to the issuance of a patent and became a North-South county road pursuant to 43 U.S.C.A. 932, and in addition thereto, the evidence conclusively shows user for more than ten years prior to 1900 and continuous use since. There is no evidence of any abandonment of the road by any duly constituted public authority or otherwise, and Erekson Lane is now and for many years last past has been a public street. That fifty feet is a reasonable and necessary width of the street and the encroachment of the ponds at one time as an artificial obstacle is no evidence of a narrower width. That established fence lines justify a finding of a fifty-foot width, and that the use of gates by Erekson have not at any time interfered with the public use of the street, and could not under the law interfere with its use.

Respectfully submitted,

MOFFAT, IVERSON and ELGGREN

By D. HOWE MOFFAT

Attorneys for Respondents