

1967

Vern H. Petersen And Georgia Petersen, Husband
And Wife; Reed L. Petersen And Ethel L. Petersen
v. Jule Combe, Jr., And Jule Combe, Sr. : Brief of
Respondent

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

VERN H. PETERSEN and
GEORGIA PETERSEN, husband and
wife; REED L. PETERSEN and
ETHEL L. PETERSEN

Plaintiffs and Respondents,

JULE COMBE, JR., and
JULE COMBE, SR.,

Defendants and Appellants.

STATEMENT OF KIND OF CASE

The Plaintiffs brought this action to restrain the Defendants from interfering with the use of a road known as 4600 South Street in Weber County, Utah. The Plaintiffs further sought a restraining order requiring the Defendants to remove signs posted on said road which indicated that it was a private road, with a further statement that the road came to a "dead end" and that no trespassing thereon would be allowed. The defendants counterclaimed, alleging that the road was a private road and could restrict the use thereof by other landowners.

DISPOSITION IN LOWER COURT

The District Court of Weber County, by the Hon. Charles G. Cowley, Judge, adjudicated that the road in question was a public road, and restrained the Defendants from interfering with the use thereof.

RELIEF SOUGHT ON APPEAL

The Plaintiffs and respondents seek to have the lower Court Judgment rendered herein, affirmed.

STATEMENT OF FACTS

Regarding the statement of facts as elicited in appellants' brief, respondents deny that the original road did not connect with Harrison Boulevard, as stated on Page 2, and further, that the signs mentioned on Page 3 were in existence, as indicated. Further, the preponderance of the evidence indicated that the public had used the road, without objection from the Defendants, and further, that the County had definitely maintained the road. The facts in support of respondents' contentions are as follows:

In 1965, the Plaintiffs had a subdivision dedicated and approved in Ogden City, known as "The Knollwood Estates" subdivision (TR 91, lines 7-12). This subdivision was planned for approximately seventy building lots for residential construction. At the time of the trial hearing five homes had been constructed in said subdivision and were all occupied (TR 91, lines 29-30). The subject road is the only road that gives any access to Plaintiffs' subdivision. (TR 93, line 4). The subject road is further the only road that led to the Farrell home, Plaintiffs' predecessor in interest for more than 25 years. (TR 93, line 6).

There are other homes that use 4600 South Street as access to their property. Bertha Martinet (TR 41, line 12) testified that she had lived in her home for 50 years or more, that the road has been in existence for 50 years or more, and that this is the only access road to her property (TR 41, lines 14-19). She further testified that "a lot of people go

over it" (TR 41, line 22) and that no one has ever been stopped from using the road (TR 41, line 24). Defendant Jule Combe, Sr. further testified that he offered to give the road to the County in 1945 if they would grade and maintain it (TR 140, line 30), (TR 141, lines 1-9). Defendant Jule Combe, Sr. further testified that Weber County equipment was used to construct the road (TR 141, line 11), as follows: "Did they use a County grader to put it in?" Answer: "Yes." Defendant Combe, Sr. further stated, by his own admission, that Mr. Farrell, Plaintiffs' prior owner, had used the road since 1945 (TR 143, line 2). Defendant Jule Combe, Sr. further admitted that the County had scrapers on the road every year since 1945 to plow the snow and maintain same (TR 143, lines 25-30) and (TR 144, lines 2-7), and at his request, (TR 144, line 16) "You wanted the County to maintain this road, didn't you?" Answer, "Yes." Defendant Jule Combe, Sr. further testified that for the last 10 years he had not stopped anyone from using the road (TR 145, line 17), however he did testify that more than 10 years ago he attempted to stop "lovers" from driving over the road but they didn't pay any attention to him (TR 145, line 11).

Plaintiffs' witness, David Wadsworth, an employee of Ogden City, testified that Ogden City has a reservoir east of the Plaintiffs' property and that he has used the road every day to maintain the reservoir and has never been stopped from using same. He further stated that this is the only road that gives Ogden City access to said reservoir (TR 9, line 14 and line 30). Plaintiffs' witness Florence J. Harris, testified that Jim Farrell had used the road for more than 33 years and that she personally had travelled over the road for the last 33 years (TR 16, lines 29-30). Her frequency of use

apparently was two to three times a month (TR 17, line 17).

Anna Martinet, another owner of a home on 4600 South Street, testified that she has lived in her residence, off and on, about 50 years (TR 20, line 17). She also testified that the road had been in use by other people for the last 50 years (TR 20, line 21). Her testimony further stated that there had not been any gates across the road for the last 50 years (TR 21, line 4). Her testimony further indicated that the public had never been stopped from using the road in the last 50 years (TR 22, lines 1-3), and verified the county maintenance of the road (TR 23, line 20). On cross-examination, Anna Martinet further testified that the road had become heavily travelled in the last 8 or 10 years (TR 27, line 30 (TR 28, line 1)).

Kathy Preece testified that she owns a home in the Knollwood Estates Subdivision (TR 34, line 16). Her testimony further indicated that she had never been restricted in the use of the road (TR 35, lines 7-9). Action was also taken by the Weber County Commission wherein a resolution was unanimously passed declaring that the road in question was a public road because of the usage by the public in excess of 10 years. This resolution is stated in Plaintiffs' Exhibit "C". Plaintiffs' sixth witness was a Mr. Charles Hansaker. He stated that he moved into the Farrell home, on Plaintiffs' property, in 1941 (TR 47, lines 18-19). He further indicated that 4600 South Street was the only road to the Farrell home that he was renting (TR 47, lines 23-29). He lived in the Farrell home from 1941 until the fall of 1952 (TR 48, lines 18-20). He then moved back in the Farrell home in 1952 and lived there until 1956 (TR 48, lines 20-25). Altogether he lived in the Farrell home 22 years (TR 49, line 3). He further stated that during these 22 years the public had never

been restricted from using the road (TR 49, lines 11-16). Regarding the "no trespassing" sign, his testimony indicates that it was first put up three or four years ago (TR 50, lines 22-24). Mr. Hansaker further stated that the Weber Basin Water District had used this road since 1956 or 1957 (TR 56, lines 16-18), with the Forest Service, and the South Ogden Water Company (TR 56, line 30). He further indicated that County plowed, scraped, and maintained the road once every two months (TR 5, lines 20-29). He further stated that he, himself, had called the County a dozen times to "plow the snow", starting in 1941 (TR 59, lines 22-24).

Plaintiffs' seventh witness was Mr. A. E. Benning. His testimony stated that his home also was on 4600 South Street, east of the Combe property (TR 61, lines 7-28). Further, he stated that this is the only road to his property (TR 62, lines 8-10)). He bought his property in 1954 (TR 62, line 12). Mr. Benning further indicated that he did not know of the public being restricted in the use of the road since 1954 (TR 17, line 22). The next Plaintiffs' witness was Mr. Elmer L. Burton. He testified that he owned real estate south of A. E. Benning's property (TR 76, lines 1-2). He further stated that the public had the full use of the road for the last 25 years (TR 76, line 20). His testimony further indicated that this was the road that gave him access to his property (TR 76, lines 26-30). He further indicated that the Burch Creek Water Company used this road (TR 77, line 16). He further indicated that the first time he saw a "no trespassing" sign was two or three years ago (TR 80, line 10).

Plaintiffs' next witness was Jim Kostoff, an employee of the Weber Basin Water Conservancy District. He testified that the Weber Basin Water District constructed reservoirs

in an area south of the Plaintiffs' property. He further described "Exhibit R", showing the location of the reservoirs and air valves, etc., which must be maintained by said district (TR 112, lines 27-30) and (TR 113, lines 1-11). He further testified that these facilities required inspection at least two or three times a week during the summer (TR 113, lines 14-15). Mr Kostoff further indicated that 4600 South Street was the only road available to get access to the Weber Basin facilities (TR 113, lines 24-26). He further testified that he first used the road in 1956 (TR 115, line 56) and that he had never been restricted from said usage (TR 115, line 18), and that he had travelled it himself 30 to 40 times (TR 115, lines 28-29). An employee of the Mountain States Telephone Company, James L. Patterson, testified that his company had a reflector located on the foothills, which was constructed in 1962. He further indicated that it was necessary to travel 4600 South Street to get to their facilities, which were inspected at least once a year (TR 120, lines 11-13), (TR 120, line 30), (TR 121, line 1).

The next witness was a Udell Gardner, an employee of the Utah Fish and Game Department. He indicated that the Fish and Game Department owned Section 19, which lies just south and a little east of the Knollwood Estates Subdivision (TR 123, lines 20-21). He further indicated that to his own knowledge the Fish and Game Department had travelled 4600 South Street to get to their property since 1960 and probably before that (TR 123, lines 24, 25, 26). He further indicated that the Fish and Game Department had never been restricted in their use of this road (TR 15, line 17). Plaintiff Vern H. Petersen, testified that there are 71 lots altogether in the Knollwood Estates Subdivision, and that the value of the

homes that have been constructed have been approximately \$30,000 (TR 127, lines 14-17). Plaintiffs' exhibit "A" to "R" further show the extent of the use of the road, the opinion of the Weber County Surveyor's office, and that this roadway was described in prior deeds, beginning in 1907. Jule Combe, Jr., the most militant Defendant, just purchased his property in 1961, and moved into his home in 1962 (TR 156, lines 17-20) and only owns approximately 300 feet, of the total length of approximately 5,000 feet of the road.

ARGUMENT

Utah Statute 27-12-89, enacted in 1963, which is identical to the former Statute of 27-1-2, which was originally enacted in 1898, provides as follows:

PUBLIC 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 year.

Of the 16 witnesses, the only witness that claimed that there had not been unrestricted use of the road for 10 years or more was Jule Combe, Jr.

Anna Martinet, and Bertha Martinet, who have used 4600 South Street as access to their residence, testified that it had been used by them for at least 50 years. Mr. Hansaker, who rented the home on the Plaintiffs' property, and used 4600 South Street as the only access to his home, testified that he had used the road without restriction for a total of 22 years since 1941. If the Defendants were allowed to close the road, or restrict the use, then any of the other 40 to 50 land-owners who have their homes on 4600 South Street, or use

this road, would also have the same right, which could deny access to all owners. Approximately two-thirds of the road has been paved by Weber County, and the other part was constructed by Weber County, and totally maintained by the County since its existence. The Defendants themselves consider this the County's obligation. Further, Jule Combe, Sr. stated that he offered the road to the County in 1945, if they would maintain same.

The evidence is conclusive by all witnesses that the County has maintained the road since this offer was made. It is undisputed that the James Farrell home, Plaintiffs' prior owner, used 4600 South Street as access thereto since 1945, even as admitted by Defendant Jule Combe, Sr. The usage of the road, in providing access to residential property, has not been changed to all by the Plaintiffs. It seems ironic, that Defendant Jule Combe, Jr., who has only used the road since 1961, now claims that he has the right to restrict the use thereof, when less than 7% of the entire road is located on his land, and there have been other rights of usage thereto, by the other owners for more than 50 years.

If the other property owners demanded the same rights that he claims, then he would not have access to his property.

It now appears that with the Forest Green Estates Subdivision, and Knollwood Estate Subdivision, there will be in access of 200 homes that will use this road as an access to their property. Further, the resolution passed by the Weber County Commission, states as follows:

"NOW THEREFORE, it is hereby resolved and ordered that the area of 4600 South Street, located in the unincorporated area of Weber County, Utah, as now platted

in the records of the Weber County Recorder, be and the same is hereby declared to be a county road, for the benefit and use of the public, and that said area of road shall continue to be maintained by Weber County.

Stated March 16, 1965.

*Board of County Commissioners of Weber County.
State of Utah, by Bud Favero, Chairman.*

A recent Utah decision is *Bonner v Sudbury*, cited in 417 P2d 646. This case concerned the public use of a dead-end alley in Salt Lake City. Our Court held that where this alley had been platted as a public street, paved and maintained through the use of public funds, and where witnesses testified that it had been used for more than 25 years by the public, that these facts would constitute a dedication under 27-12-89 UCA 53. The court further stated that the resolution of this issue cannot rest entirely upon what the owner says was his intent.

In *Clark v Erikson* cited in 341 Pd 424 our Supreme Court further held that where there was testimony that the road had been used considerably in excess of 10 years, as a short-cut to a fishing stream and by people going to church, and with further reference being made to the road in the deeds and abstracts, that this usage constituted a public dedication under this statute.

Another recent case is *Joseph Boyer v Clifford Clark* cited in 326 P2d 107, where a road in Summit County crossed approximately 1500 feet of the Defendant's property. The testimony in that case established that the road had been used for over 50 years for hauling coal, crossing the open range, driving cattle, sheep, etc. The landowner objecting to public use had acquired his property approximately 12 years

prior to the filing of the court action when he installed signs thereafter and attempted to restrict its use. The Supreme Court in reversing the trial court, held that there was sufficient evidence to establish public use under 27-12-89, even though this road had never been maintained at public expense. The court, in discussing the evidence and applicable law, stated as follows:

*"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 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 commissioner * * * or other competent authority." There is no contention that any such procedure has been invoked here."*

Another Utah statute, 27-12-92, also enacted in 1963 which was an exact re-statement of 27-1-10, originally enacted in 1898, states as follows:

"PATENTEE AND COUNTY TO ASSERT CLAIMS TO ROADS CROSSING LAND — Whenever any person shall acquire title from the United States to any land in this state over which there shall at the time extend any public highway that shall not theretofore have been duly platted, and that shall not have been continuously

used as used for a period of ten years theretofore, he shall within three months after receipt of his patent assert his claim for damages in writing to the board of county commissioners of the county in which the land is situated; and said board shall have an additional period of three months in which to begin proceedings to condemn the land according to law. Such highway shall continue open as a public highway during said periods; but in case no action is begun by the board of county commissioners within the period above stated, such highway shall be deemed to be abandoned by the public. In case of a failure by such person so acquiring title to public lands to assert his claim for damage as aforesaid for three months from the time he shall have received a patent to such lands, he shall thereafter be barred from asserting or recovering any damages by reason of such public highway, and the same shall remain open."

It is apparent from the wording of this statute that if a patentee desire to contest the existence of any public highway upon his property when the patent is issued, even though the road shall not have been used for 10 years prior thereto, he shall have 3 months after receipt of his patent to assert a claim against the county commissioners for damages, and to further require the condemnation of said road. If this action is not asserted within said period, then he is forever barred from asserting or recovering any damages, by reason of such public highway and the same shall remain open.

It is clear from this statute and the evidence admitted at the trial that Michael Combe, Defendants' predecessor in interest, had to assert his claim within 3 months after receiving his patent or he would be forever barred from disputing the public use thereof.

The testimony of witnesses indicated tthat this road was

in existence and used by George Farrell, as the entrance to his home, as he homesteaded Section 15 and received the patent thereto, as did Michael Combe to Section 10.

Another applicable federal statute is 43 USCA 932, which states as follows:

"RIGHT-OF-WAY FOR HIGHWAYS. The right-of-way for the construction of highways, not reserved for the public uses, is hereby granted."

A case construing this statute is Van Wanning v Deter, cited in 112 NW 902.

"A settler on public lands on which there is a road in common use as a public highway takes subject to the public easement of such, as a road though it was never established by the public authorities under the general road laws."

Another Utah case is Morris v Blunt cited in 161 P 1127, where the Court held as follows:

"Under this section, 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."

Another recent Utah case is Gillmor v Carter cited in 391 P2d 426, where the Court held as follows:

"In order for a private road to become a public thoroughfare there must be evidence of intent by the owner to vacate the road to a public use and an acceptance by the public. Such intent may be inferred from the decorations, acts or circumstances and uses by the general public."

Regarding the resolution passed by the Weber County

Commission in March of 1965, this authority would seem to be inferred from Utah Statute 17-5-42, which states as follows:

"REGULATIONS OF USE OF ROADS. They may enact ordinances and make regulations not in conflict of law for the control, construction, alteration, repair and use of all roads and highways in the county outside of incorporated cities."

It further appears from the statement issued by the Weber County Surveyor's office that there has been continual use of 4600 South Street for more than ten years, and further shows their opinion regarding public dedication.

CONCLUSION

Most of the cases cited by appellants in their brief in the lower Court, were decisions that were rendered before the advent of the automobile. The photographs, that were admitted in evidence, also show the extensive usage of this road. Further, the testimony of the tenant of the Farrell home, showing his occupancy since 1940 and the use of the road to get to his home, which is undisputed, shows a minimum of 27 years of unrestricted use. Where it is the intention of the Plaintiffs to just use the road for access to residential property, as it has been so used in excess of 27 years, then there is no change of usage thereof. It is respectfully submitted that the lower Court judgment should be affirmed.

Respectfully submitted,
KEITH E. MURRAY