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 Appellants

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,

vs

JULE COMBE, JR., and
JULE COMBE, SR.,
Defendants and Appellants.

CASE NO.
11009

BRIEF OR APPELLANTS

Appeal from the Judgment of the Second District Court
for Weber County
HONORABLE CHARLES G. COWLEY, JUDGE

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Defendants and Appellants.

STATEMENT OF KIND OF CASE

Plaintiffs brought an action requesting the District Court to declare a road upon and going through defendants' properties to be a public road, with defendants requesting in their Counterclaim that the Court declare the same to be a private road in Weber County, Utah.

DISPOSITION IN LOWER COURT

The lower Court found for plaintiffs and declared said road to be a public road.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the Judgment of the lower Court, and for a Judgment in the said defendants' favor, determining that said road is a private road.

STATEMENT OF FACTS

The road and land in question lies in Weber County,

east of Harrison Boulevard and in the vicinity of a street known as 4600 South Street. Said land being originally homesteaded by Michael Combe, then subsequently deeded away by Michael Combe to his family and eventually ending in the ownership of Jule Combe, Sr. and Jule Combe, Jr. The road in question goes through the property of Jule Combe, Sr. on the west, through the Martinet property in the center, and through the property of Jule Combe, Jr. on the east.

In the opening address to the Court by plaintiffs' counsel, it was admitted that the road was never formally dedicated (TR 3, lines 20, 21) (TR 4, lines 7, 8), and in fact the road has never been described by metes and bounds but merely referred to as "the existing road", and the only plat showing the accurate location of said road is an aerial map introduced by plaintiffs as Plaintiffs' Exhibit "A". In Plaintiffs' Exhibit "R", there is shown a plat with the road drawn in by dotted lines and referred to as "existing road". The unchallenged testimony was to the effect that when Michael Combe originally attained title to the property in question he constructed a road to his home, located on the easterly most part of the tract, and started from an area referred to in the proceedings as the Blue Onion, which said area is approximately one mile north of 4600 Street (TR 131, lines 4-26). This private road did not connect with Harrison Boulevard at the time and was just a wagon trail (TR 132, lines 17-22). The only use for this road was to get to Michael Combe's home (TR 132, lines 28-30) (TR 133, lines 1-7). Occasionally the property owner above Michael Combe used this first road (TR 133, lines 29, 30) (TR 132,

lines 1-7). This testimony of Jule Combe, Sr. was verified by Jule Combe, Jr. (TR 158, lines 1-21). In approximately 1945 a road was graded up to the Combes' private road where the Combe road was fenced (TR 132, lines 10-26) (TR 145, lines 29, 30) (TR 159 lines 17-30). There was a gate placed on the road at this time, which was subsequently opened and "no-trespass" signs placed at this location and maintained thereafter (TR 134, lines 1-30) (TR 146, lines 2-7). This was verified by the testimony of Jule Combe, Jr., who stated that at the time the fence gate came down they erected "no-trespassing", "dead-end", and "private property" signs, which were thereafter maintained (TR 159, lines 17-30) (TR 160, lines 1-12) TR 182, lines 18-30). There has been no evidence offered by plaintiffs to the contrary and no challenge by plaintiffs with respect to these facts. Defendants Jule Combe, Sr. and Jule Combe, Jr. have testified that since the road was graded up from Harrison Boulevard to their own private road they have kept the same posted on the west end, and on the property owned by Jule Combe, Jr. on the east end - the signs reading "no-trespassing", "private road" "dead-end" (TR 136, lines 8-26) (TR 152, lines 29, 30) (TR 153, lines 1-4((TR 160, lines 1-12) (TR 182, lines 18-30). It was the testimony of the Combes that the only persons using this road, either before 1945 or after 1945, were the property owners to whom they had deeded property, and occasionally a few spectators (TR 135, lines 18-25) (TR 162, lines 3-20). Further testimony was, that from the time the street from Harrison Boulevard joined their own road they continually, to the date of this action, attempted and did keep the people from using the road, except for the property owners living

along it (TR 137, lines 25-30) (TR 138, lines 1-6 (TR 145, lines 9-16) (TR 151, lines 18-25) (TR 163, lines 6-23). The witnesses of both plaintiffs and defendants testified that the land at the end of the dead-end road and surrounding terrain had absolutely no place of public interest. The area was rocky, dry, with some oakbrush, there was no public park nor other reason for the public at large to use the road to get to any place whatsoever (TR 136, lines 1-7) (TR 153, lines 5-16) (TR 166, lines 1-14. Plaintiffs' witness, Anna Martinet, verified this in her testimony (TR 29, lines 21-30) (TR 30, lines 1-9). Same witness admitted, on direct examination by plaintiffs' counsel, that she had seen signs posted along the road (TR 26, lines 17-21). Plaintiffs' witness, Bertha Martinet, also stated that she recalls that the road in question was, for many years, posted on the west line of the property of Jule Combe, Sr., although she would not identify how many years (TR 44, lines 3-30) (TR 45, lines 1-15). Also (TR 46, lines 9-18). Plaintiffs' witness, Charles Hansaker, admitted he had seen "no-trespassing" signs along the road, possibly since 1960. Although he was indefinite about how long he had seen said signs, he stated it was long before 1964 and before plaintiffs purchased their housing area above the Combes to the east (TR 50, lines 11-24) (TR 51, lines 9-26). He also confirmed that the road dead-ended at the home above Combes and that the road was paved from Harrison Boulevard only up to the Combe property (TR 54, lines 5-16). He also admitted there was nothing of public interest nor any reason for the public as a whole to use this road as "it was good-for-nothing mountain land". (TR 55, lines 8-21). Another of plaintiffs' witnesses, Mr. A. E.

Benning, on direct examination testified that he knew of the "no-trespassing" signs posted on the road in question in 1954, and acknowledged these "no-trespassing" signs by requesting permission of the Combes to use the road. Mr. Benning's testimony goes back to 1954 when he was looking for property to build a home on, which would necessitate his using the Combe's road (TR 62, lines 14-23) (TR 63, lines 28-30) (TR 64, lines 1-10) (TR 70, lines 3, 4). He states that he saw the "no-trespassing" signs, both on the property of Jule Combe, Sr. on the west and the property of Jule Combe, Jr. on the east (TR 64, lines 5-25). He did in fact ask the Combes for permission to use this road (TR 64, lines 26-28) (TR 65, lines 2-6) and he determined that the road was Michael Combe's private road (TR 66, lines 24-30) (TR 67, lines 1-21), the same going through Michael Combe's chicken coop. He stated that he did now know of anyone using the road except the land owners from 1954 to 1960 (TR 65, lines 25-28) (TR 67, lines 22-29) (TR 68, lines 1-22). Mr. Benning further indicated that there was nothing of any public interest whatsoever along this road (TR 70, lines 23-30) (TR 71, lines 1-18). Plaintiffs' witness, Elmer L. Burton, on direct examination, stated he knew of the "no-trespassing" signs on the road in question (TR 80, lines 6-14) (TR 81, lines 7-9), and he stated that they had been there two or three years ago, at least. He further stated that the signs were old and rusty, which would indicate they had been there for many, many years (TR 82, lines 5-24). He further confirmed the fact there was no public park or place of public interest whatsoever for the public to use said road (TR 85, lines 6-11. As a matter of fact there is nothing in the

transcript whatsoever to indicate that the public at large was ever using the road. Plaintiffs' Reed Petersen and Vern Petersen, testified they had seen the "no trespass" signs and had been stopped by defendant Jay Combe, Jr. (TR 92, lines 5-29) (TR 95, lines 15-23). They had known of their workmen, or agents, being stopped since 1964 (TR 93, lines 18-23). Reed Petersen further testified that he knew the road was never dedicated to the public and knew that the County refused to fix this road (TR 98, lines 22-24) (TR 98, lines 10-14) (TR 102, lines 15-17) (TR 106, lines 9-26) (TR 108, lines 8-18). The most favorable interpretation of plaintiffs' testimony is that the witnesses themselves have used the road to visit friends living along the road, or that homeowners along the road had used it to get to their own private property. Various governmental bodies had used the road to get to their installations above the Combe property—all with express permission of the Combes (TR 138, lines 22-28) (TR 139, lines 1-18) (TR 163, lines 29, 30) (TR 164, lines 1-24) (TR 179, lines 2-22) (TR 180, lines 10-15) (TR 181, lines 5-25)—except the City of Ogden which indicated that they desired a right-of-way along the road but, when they would not agree to the terms of the Combes, stated that they would take their chances by using it and trespassing over the same (TR 187, lines 4-17). The County had at various times refused to work on the road, refused to fix the same and declined to accept it as a public road in return for reduction of taxes (TR 140, lines 1-15-24-28). They used the same, graded it occasionally and plowed it out in the winter in return for gravel from defendants' property, which was received free (TR 138, lines 22-28) (TR 139, lines 1-18) (TR 143, lines 8-20) (TR 153

lines 15-26) (TR 161, lines 1-15) (TR 175, lines 2-5). The Coombes never intended or considered it to be a public road, but rather a private road (TR 165, lines 9-26) (TR 177, lines 1-30). Plaintiffs' witness, Anna Martinet, seemed to indicate on her direct examination that she also felt only the landowners were entitled to use the road in question, rather than the public at large (TR 24, lines 1-4) (TR 25, lines 2-5-12-18) (TR 27, lines 21-28), and that she knew of none but property owners who used the road (TR 28, lines 16-30) (TR 29, lines 1-11). Plaintiffs' witness, Bertha Martinet, also indicated her feeling that the road was only for use of the landowners, rather than the public (TR 43, lines 11-13-17-19).

ARGUMENT

POINT I.

The Court erred in finding that part of the road known as 4600 South Street, which is upon and through the land of both defendants, has been used by the public for more than ten years and constitutes a public road.

The law is well established in Utah, under our Supreme Court decisions, that the requirements necessary to take private property for a public road are: (1) An intent of the owner of the property in question, clearly shown to dedicate such property as a road to the public, and (2) User by the public for a period of ten years. It is also clearly established that the burden of proof is upon the shoulders of the party alleging such dedication to prove it by clear and unequivocal proof.

In one of our latest cases, *Bonner v Sudbury*, 18 Utah 2d 140, 417 P2d 646, decided in 1966, the Court stated as follows:

> "In connection with this review we deem it appropriate to note our agreement that the dedication of one's property to a public use should not be regarded lightly . . . The presumption is in the property owner and the burden of establishing public use for the required period of time is on those claiming it. The mere fact that members of the public may use a private driveway or alley without interference will not necessarily establish it as a public way nor will the fact that it was shown on the public records to be a public street nor even that it had been paved and sign-posted as a public street by the city."

The dissent of Justice Callister indicates the Court's complete understanding of the importance of the right of individuals who own property, when he stated as follows:

> "The majority opinion in this case condones violation of the constitutional inhibition against taking private property for public use without just compensation for the owner."

Use under private right is not sufficient. In a California case, *Tate v City of Sacramento,* 50 Cal. 242 (no Pacific citation) the Court held, as do all of the Courts in our sister states, that the burden of proof is upon those who allege land to be a public highway with title in the individual owner, and all of the rulings seem to indicate that the burden must be established by clear, convincing and unequivocal evidence. See *Village of Clayton v Colorado and S. Ry. Company,* 232 P 521, a New Mexico case. See also, *Town of Hooker v Morris,*

218 P 869, an Oklahoma case. *Christy v City of Bandon*, 162 P 248. *Track v Moore*, 149 P2d 854, a California case; *City of Inglewood v City and County of Denver*, 299 P2d 667, a Colorado case.

In the case before this Court we contend that plaintiff has failed to prove any intention to dedicate on the part of the defendants, and has failed to prove public usage for a period of ten years. Plaintiffs have failed to sustain the burden of proof requisite to justify a judgment which was granted in the lower Court.

The intent to dedicate is a necessary element for plaintiff to succeed in his case. The Bonner vs Sudbury case, heretofore cited, recognizes this principal of law. A case decided by this Court, shortly prior to the Bonner case, also stated this rule, that the intent of the owners to dedicate must be shown to constitute a dedication to the public, *Gilmore v Carter*, 15 U 2d 280, 391 P2d 426.

In another Utah case, this Court held as follows:

> "Before a dedication of a street to the public use can be affected there must either be an intention to so dedicate such lands on the part of the owner thereof or he must act in such a manner as to be estopped from denying such intention. . . . But in all cases such *intention must be clearly manifest.*" (Italics ours.)
>
> *Hall vs North Ogden City*, 109 Utah 325, 175 P2d 703.
>
> In accord, *Sowadzki vs Salt Lake County*, 36 Utah 127, 104 P 111.

In another Utah case, which sets the rule for clearly and succintly, the Court held as follows:

> "The intention of the owner of the land to dedicate may be inferred from his acquiescence in its continual use as a road by the public. In order to constitute acquiescence, in a legal sense, *the owner must know that the public is using his land as a road. There must be an act of the mind, a knowledge that the public is using the land as a highway and a purpose on the part of the landowner not to object.*" (Italics ours.)
> "The vital principal of dedication is the intention to dedicate."
>
> *Shettler vs Lynch,* 23 Utah 305, 64 P 955.

In referring back to the testimony of plaintiffs' witnesses, it is apparent that none of said witnesses ever proved any act on the part of defendants, or any action implying such an intent, to dedicate this road to the public use. As a matter of fact, all of plaintiffs' witnesses admitted seeing no-trespass, dead-end and private property signs posted on defendants' property on the west side of their road, the side nearest Harrison Boulevard. Plaintiffs' witness, A. E. Benning, indicated that he had seen the signs, had known the Combes considered this to be a private road, and had personally contacted Michael Combe for permission to use the road to get to his home. It was admitted that the road had never been formally dedicated at the time plaintiffs began attempting to use the same, knowing full well of the no-trespass signs.

The road was never described on the official plats

by metes and bounds from the point that it started onto the Combe property to the dead-end area. The only maps or plats showing this road was an aerial map, and a plat with a road drawn in dotted lines and not described. It was further determined, by the testimony of the witnesses, Jule Combe, Jr. and Jule Combe, Sr., that the road had only been used by the land owners living along the same when the Combes deeded lots to these particular owners. The testimony was further, that, the only reason the street known as 4600 Street was ever joined to their own private road was because Weber County, in 1945 or thereabouts, wanted gravel from the Combe property, which the Combes agreed to give them if they would take care of their own private road by grading the same and keeping it in repair. There was no testimony to contradict this testimony. Plaintiffs' witnesses, Anna Martinet and Bertha Martinet, both stated they had seen cars along the road, but both admitted there had been signs posted along the road concerning the fact this was a private road and a dead-end road. Plaintiffs' witness, Charles Hansaker, admitted he had seen no-trespassing signs along the road, as did plaintiffs' witnesses, Elmer L. Burton, A. E. Benning, and others. All of plaintiffs' and defendants' witnesses stated that the road was a dead-end road and was in an area where there was no place of public interest; no park, no fishing streams, no hunting areas, merely sage brush and rocks, and good-for-nothing land. There would be no reason for the public to ever want to use this land or to establish a right-of-way along plaintiffs' road. It is our impression, that the only testimony in the case, concerning the public use, was that various people had seen cars using the same. There

was no designation as to whether they were land owners or the public at large. There was certainly no testimony on the part of the Combes that they ever intended to dedicate this land to public use. Our Courts have uniformaly held, that a private right-of-way cannot be converted into a public right-of-way. The public at large must have obtained this right-of-way by its usage of the land for a period of ten years. The plaintiffs themselves testified that they had seen no-trespassing signs and had been stopped by defendants from using the road. This was at the time they began to look the property over, which they subsequently bought and upon which they built homes. Reed Petersen testified he knew the road was never dedicated to the public and that the County refused to fix this road. Plaintiffs made no attempt to contact the Combes to get permission to use the road, and merely went ahead to try to force their way through. They did say there was a question in their mind as to whether this was a public road and they attempted to get Weber County to declare the same to be such. The uncontroverted testimony of defendants clearly shows their intention not to dedicate.

This Court, in the case of *Wilson v Hull,* 7 Utah 90, 24 P 799, in speaking on the question of acquiescence held as follows:

> "The owner must know that the public is using his road as a road. There must be an act of the mind a knowledge that the public is using the land as a highway, and a purpose on the part of the land owner not to object. . . . The vital principal of dedication is the intention to dedicate."

The law, as established in Utah, seems to follow very closely the law as set forth in American Juris Prudence, which is as follows:

> "The intention of the owner to set aport lands or property for the use of the public is the foundation and life of every dedication. This intent is essential, whether express or implied dedication is relied upon, and must be clearly and unequivocally manifested."

23 Am Jur 2d 17 - Dedication, Section 19.

> "The intention to make an offer of dedication is not a subjective intention concealed within the mind of the landowner but must be manifested by his acts, and must be expressed in his conduct. Such acts and declaration, moreover, should be of a public nature, hence, it is necessary for the owner to do some act from which can be drawn a positive intent to dedicate the property to the public."

23 Am Jur. 2d 19 - Dedication, Section 21.

> " . . . The circumstances surrounding the public user must be plainly inconsistent with the owner's right to claim the exclusive use of the land. They must show something more than permissive use. For instance, the mere use of a wharf by individuals for their own convenience with permission of the owner and without any intent by him to allow the public to use the wharf as a manner of right is not sufficient to amount to a dedication."

23 Am Jur 2d 28 - Dedication, Section 29.

This same rule of law seems to be accepted in a of our sister states. See *Inyo County v Given,* 191 688; *People ex rel. Howland v Dreher,* 35 *P* 867; *Kos land v Cherry,* 110 *P* 143; *City of Mantattan Beach Cortelyou,* 76 *P*2d 483; *City of Los Angeles v Wh* 156 P2d 54. Oregon also follows this rule, see *Ci of Clatskanie v McDonald,* 167 P 560. As does the Sta of Washington, see *Provident Trust Company v City o Spokane,* 114 P 1030. Also Oklahoma, see *Town o Hooker v. Morris,* 218 P. 869. And New Mexico, se *Village of Clayton v Colorado and S. Ry. Co.,* 232 P. 52

Defendants and appellants therefore respectfull represent that plaintiffs have failed to prove the neces sary facts under the law of the State of Utah to sup port a Judgment on their behalf, and the facts clearl show that defendants have always held out to the publi that it was their own private road and not to be used by the public.

We respectfully submit, also, that there has been no proof on the part of the plaintiffs that the road belonging to the defendants and appellants has been used by the public for ten years, or for any period of time.

CONCLUSION

Defendants and appellants conclude, therefore, that under the statutes and the laws of the State of Utah as determined by the Courts' decisions, Judgment should be granted to defendants and appellants and the de cision of the lower Court should be reversed in this respect, and that defendants and appellants should be awarded their costs.

Respectfully submitted,

Huggins and Huggins

J. Gordon Huggins