

1964

Gloria G. Fenton v. Cedar Lumber & Hardware Co. : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

FILED
DEC 18 1964

Clark, Supreme Court, Utah

GLORIA G. FENTON,
Plaintiff and Respondent,

vs.

CEDAR LUMBER & HARDWARE
COMPANY, a corporation,
Defendant and Appellant.

Case No. 10238

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
FIFTH JUDICIAL DISTRICT COURT
FOR IRON COUNTY, UTAH

HONORABLE C. NELSON DAY, Judge

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In the Supreme Court of the State of Utah

GLORIA G. FENTON,
Plaintiff and Respondent,

vs.

CEDAR LUMBER & HARDWARE
COMPANY, a corporation,
Defendant and Appellant.

Case No. 10238

BRIEF OF RESPONDENT

NATURE OF CASE

The plaintiff-respondent agrees with the statement of the nature of the case in the brief of the defendant-appellant.

DISPOSITION IN LOWER COURT

The plaintiff-respondent agrees with the statement of disposition in the lower court as presented by the defendant-appellant.

RELIEF SOUGHT ON APPEAL

The plaintiff-respondent seeks an affirmance of the action of the lower court quieting title to the disputed property in the plaintiff.

STATEMENT OF FACTS

There are several differences from the standpoint of the parties in the statement of facts. The last sentence of defendant-appellant's statement of facts, "The west two rods of the street property is not in dispute and is owned by the appellant and we are only concerned with the east two rods or the half of the street adjoining the property of the plaintiff" is not entirely correct. The plaintiff-respondent has no claim on the west two rods of said street property. However, one Jim Urie, living at 425 Circleway Drive, is the adjoining property owner to approximately the South 25 feet of the west part of the property that was the street property, and the remainder of said west side of said street property is owned by one Ann J. Gardner. The undersigned is informed that said Jim Urie does intend to assert a claim to the portion of said west two rods that is adjacent to his property, and is uninformed as to the intention of said Ann J. Gardner. The only statement that the plaintiff-respondent would be willing to be bound by in relation to the west two rods is that the plaintiff-respondent claims no interest in said west two rods of said property.

In addition, other items that should be included in the statement of facts are to be found in the Stipulation of the parties which was filed on 3 July, 1964:

"3. That on the 15th of March, 1950, one Kate Wallace made and executed a warranty deed to Cedar City, a municipal corporation, whereby the land in question, together with two rods on the West thereof

was delivered to Cedar City Corporation. That said deed contained the following statement, in addition to the description: 'The above property is to be used for street and no other purpose.' That at some date after the 15th of March and prior to the 4th of May of 1950, at a date unknown to any of the parties, this deed was delivered by Kate Wallace to Cedar City and was recorded at the request of Cedar City. That at the time of said transaction, a street by the name of Dewey Avenue had been opened up North from the captioned street, running between 200 South and 400 South in Cedar City, Utah. That it was the intention of Cedar City Corporation to extend said Dewey Avenue to the South, and Cedar City Corporation accepted said deed for this purpose. However, shortly after accepting said property, the defendant which had purchased from the said Kate Wallace's grantee all of the property now known as Valley Circle Subdivision and shown on Page 3 of the abstract, opened negotiations with Cedar City Corporation to subdivide the land South of the land in question, which culminated in January, 1952, in a subdivision shown on Page 3 of said abstract as 'Valley Circle Subdivision,' and that this subdivision plan did not require the extension of Dewey Avenue on to the South, and had no road connecting with the land in question. That as a result of this subdivision, the use of the area in question for a street was no longer needed, and said area was never placed on the official map of said city as a street because of this, and any city equipment on said area was there only to control weeds and unsightliness, and was never there for the purpose of opening up a street or grading same. That said street has never at any time appeared on any official map as a city street and it has never at

any time been opened up and used as a street."

That in addition certain other paragraphs out of said stipulation should be included in the fact situation, as follows:

"5. That thereafter, Cedar City Corporation by ordinance, vacated said land including the land in question and the two rods immediately West thereof, as a street. Same was done with the consent of the property owner on the East, and also with the consent of the property owner on the West, with the exception of the South approximately 25 feet; that said ordinance was not contested in any way. That Entry No. 42 of said abstract is a copy of said ordinance."

"6. That on the 17th day of July, 1961, the plaintiff above named acquired the land in question, together with four rods East thereof by quitclaim deed, That the grantors in said deed had owned the four rods adjoining on the east at the time of said vacation by Cedar City Corporation. That said quitclaim deed to the plaintiff dated 17 July, 1961 and recorded 20 July 1961 did contain the property in question, being the East two rods of the area vacated as a street by said Cedar City Corporation. That the deed to the plaintiff is in said abstract as Entry No. 43. That the property abutting on the street on the west is owned by a party not a party to this action."

"8. That the only claim of the defendant to the land in question is the quitclaim deed from Kate Wallace shown as Entry No. 39 in said abstract. That said defendant makes no other claim to said property, other than this deed, and said defendant acknowledges that it has no other claim to said property except said deed."

"9. That each of the parties have paid the taxes on

said property for the entire period since said street was vacated by Cedar City Corporation."

A R G U M E N T

POINT I

THE DEFENDANT-APPELLANT'S POINT 1 IS PRE-DICATED UPON AN ERRONEOUS ASSUMPTION THAT THE PLAINTIFF-RESPONDENT DOES NOT CLAIM THE FEE IN THE TWO RODS IN QUESTION.

The fact stipulation which has been quoted by the plaintiff-respondent states the plaintiff's position in the last portion of Paragraph 7:

"That the claim of the plaintiff to the land in question is based upon her being a successor in interest to the parties who owned the property immediately to the East of said street at the time of said vacation of said street by Cedar City, and succeeding to their right in the East two rods of said street by virtue of said deed from the grantors, who were adjacent property owners on the East of said street at the time of vacation of said street by Cedar City Corporation."

At no time has plaintiff taken the position that she is not the owner in fee in the East two rods, but claims all the rights that her predecessors in interest had at the time the deed was executed to her.

This matter as to what the predecessor in interest of the plaintiff acquired upon vacation of the street by Cedar City by ordinance is governed under the provisions of Title 36-1-7, Utah Code Annotated, 1943, and Title 27-1-7, Utah Code Annotated, 1953, which was in effect at the time of the vacation by Cedar City, which reads as follows:

"27-1-7. Public Acquired Only Easement — Fee in Abutting Owner. By taking or accepting land for a highway the public acquires only the right-of-way and incidents necessary to enjoying and maintaining it. A transfer of land bounded by a highway passes the title of the person whose estate is transferred to the middle of the highway."

The 1943 Code which was in effect at the time of part of the actions of the parties reads the same. The various cases that are applicable to this item hold to the effect that this statute creates a presumption that whenever title to land adjoining a street is passed, this passes title to the center of the street and that this is a complete presumption and that the only way to overcome it is by evidence of the intent of the grantors otherwise. This doctrine was enacted by the Utah State Supreme Court in interpreting this particular section in the case of *Brown vs. Oregon Short Line Railroad Company*, 36 Utah 257, 102 Pac. 740, in which the Supreme Court of Utah pointed out that the statute was declaratory of Common Law, and that at Common Law a private conveyance of land bounded by or abutting on a highway, the fee to which belongs to the abutting owners, is presumed to convey in the highway to the center line thereof. This doctrine is affirmed in the case of *Hummel vs. Young*, 1 Utah 2d 237, 265 Pac. 2d 410, in which in addition to restating the doctrine of *Brown vs. Oregon Short Line Railroad*, it was pointed out that the presumption is rebutted only by clear evidence that the grantor did not intend to convey his interest lying in the highway. Under these conditions it should be presumed that the abandonment by Cedar City Corporation vested in the then owners of the abutting property title to the land in question to the center of the street, unless there is a clear and preponderant showing of intent by the pre-

vious grantor otherwise. This is in accord with established doctrine in Common Law as set forth in Section 128, of Highways, Volume 25, American Jurisprudence, at Page 424:

“Where the public agency acquires the title to the fee in trust for public use, as distinguished, on the one hand, from an absolute and unqualified fee simple estate, and on the other from a mere easement of passage, the title, upon vacation or abandonment, likewise reverts to the then abutting owner, . . .”

The big question in the case at hand is whether or not one Kate Wallace intended to retain any reversionary interest in the land in question. Inasmuch as Kate Wallace has passed to her reward, one must look to her prior actions to determine her intent. This has been declared on the land in question and the adjoining two rods west thereof — that it was her intent to convey said property for a street. Prior to conveying said property for a street, she had completely divested herself of the property on the West. As to the adjoining property on the East, Kate Wallace, on Page 27 of the abstract on 23 October, 1942, deeded the adjoining property to Alice S. Smith, with reference that it went to the East line of the public road as platted on Plat A of the plat of said property and adjoining property made by Theron Ashcroft. There is no question that she did intend to convey to a street, and in this deed there is no reservation of any right whatsoever in the fee in the street. It is most significant that this was her intent because the second paragraph, “This deed is made subject to the express condition that no building shall be placed upon the above described property less than 25 feet from the West boundary line thereof, and that no dwelling house of a value less than \$2,000.00 shall be erected upon said property” requires a setback from the West because it is a street, and she intended to treat it as a street.

Of equal significance is the deed from Kate Wallace to Afton Duffin dated 13 April 1943 which is Entry No. 28 of the abstract, wherein the description in the conveyance refers to the east line of the public road as the West line of the property, and again states, "to the east line of the public road as platted on Plat A of the plat of said property and adjoining property, made by Theron Ashcroft." This would indicate that Mr. Ashcroft had made a plat of the property that did have this area as a street. Also it is significant that in this deed the same condition concerning no dwelling house to be placed nearer than 25 feet of the west line of the property and Kate Wallace treating it as a street. Again in this deed to Afton Duffin, there was no reservation of any fee in the road whatsoever.

Again it is significant in Entry No. 29 of the abstract that Afton Duffin in deeding to Alice S. Smith, the plaintiff's predecessor in interest, again referred to the east line of the public road as platted on Plat A of the plat of said property and adjoining property made by Theron Ashcroft, indicating that there was a plat that showed this as a street, and again had the reservation of 25 feet of the west line of said property.

Of even greater significance is that on September 17, 1946, this lady Kate Wallace, apparently to remedy an error in previous deeds, again deeded to one Alice S. Smith, and specifically referred to the previous deeds as being in error. Again, Kate Wallace did not in any way claim or establish any reservation of the fee in the area of the street. If there was a street, these deeds certainly passed the fee in the adjoining property under the provisions of Title 36-1-7, Utah Code Annotated, 1943, which existed at that time.

The next item of interest is Entry No. 36 in the ab-

stract which is the warranty deed from Kate Wallace to Cedar City, which was a deed for the street property and contained the provision, "The above property is to be used for street and no other purpose." Again one must note that this is a warranty deed and not an easement, and under these conditions there is no question that Kate Wallace felt that she had already passed on the fee to the adjoining property owners. Except for statute, if Kate Wallace had a fee, this would have passed it on to Cedar City Corporation. Certainly there is no indication in this deed of any intent of one Kate Wallace to keep a fee in herself, nor do the words that said property is to be used for a street and no other purpose constitute a reversion to Kate Wallace. By statute said document passed on only to Cedar City the right of use for a street, regardless of the language of this deed. It is to be noted that the date of this deed to Cedar City Corporation was 15 March 1950 and same was recorded 4 May 1950.

The next item of significance in the abstract is Entry No. 38. It is to be noted that this was after the deed to Cedar City of the street and that Cedar City had accepted and recorded the deed to the street prior thereto, and that the fact stipulation entered into by the parties was that Cedar City did accept this deed and did record same. Pertaining to Entry No. 38 of the abstract, it is a quit claim deed from Kate Wallace and her husband to Alice S. Smith of the same property on the East, and again referred to the street as platted by Theron Ashcroft, running West 132.9 feet and then running along the captioned property at the side of the street. Again it requires the property not to have a house within 25 feet from the west boundary thereof, and again says it is given to correct that certain warranty deed made previously.

The most significant transaction of the entire matter is shown in Entry No. 39, which is the deed from

Kate Wallace to Cedar Lumber and Hardware Company which is the basis of the defendant's claim on the property which follows the description of the street property, and is notarized by counsel for the defendant. The recording of this deed shows no document stamps, and under these conditions it is presumed that nothing was paid for this deed. This is a quit claim deed which contains the notation, "It is the intention of the grantor to convey all right, title and interest which grantor may own in the above property, heretofore conveyed to Cedar City Corporation for a street, in the event Cedar City Corporation vacates said street." What does this amount to? It amounts to recognition that there was a street. This was accepted by Cedar Lumber and Hardware Company on the supposition that there was a street present. This is one of the most revealing documents in the entire line of this particular transaction. Bearing in mind that it was prepared by the defendant's attorney, was this the original deed that was prepared? It is quite apparent that it was not. Certainly the defendant's attorney did not voluntarily put in the words "may own" in referring to any interest that Kate Wallace might have had, but simply shows that it was the intention of the defendant at that time to acquire this property from Kate Wallace without cost, have the City abandon same, and include it in the subdivision which ran to the West and the South of the property, and upon being approached to sign the deed referring to any reversion interest, said Kate Wallace had made the statement that she did not have any reversion interest, and had refused to sign any deed with any sort of a qualification clause on it. That thereafter, after considerable discussion, the deed had been redrafted and that all that Kate Wallace intended to transfer was any interest she may own. Certainly this is not the action of a party who has intended to retain in herself any fee interest or any other item.

Kate Wallace at that time was of the opinion that she had completely divested herself of the property, and that in her deed previously the fee interest had gone to her successors in interest on the various sides of the property; that she could not be talked into signing a deed purporting to convey any fee interest or reversionary interest, and that she had refused to sign this deed until the insertion of the words "may own" were included. Certainly she signed the deed without consideration, and with the stipulation that she did not claim anything in the property and that all she was signing was a quit claim deed.

POINT II

THE TRIAL COURT DID NOT FIND THAT VACATING A STREET PASSES TITLE TO THE FEE IN THE STREET.

The findings of Fact and Conclusions of Law as prepared by defendant's counsel amount to a finding that at the time of the vacation of the street by Cedar City Corporation, the East side thereof was owned by plaintiff's predecessors in interest, and that as such they owned the fee to the center of the street in conformity with the statute, Title 27-1-7, Utah Code Annotated, 1953, and 36-1-7, Utah Code Annotated, 1943, and that transfer of the land bounded on the East of the street passed the title of the person whose estate was transferred to the middle of the street, and that at this time title was passed at the time of the conveyance to plaintiff's various predecessors in interest from Kate Wallace and her predecessors in interest, and that each of these conveyances passed title to the middle of the street, and that even if there were a question as to whether or not there was a street before the deed to Cedar City Corporation, the correction deed thereafter from Kate Wallace to a

predecessor in interest of the plaintiff referring to the street, referred to the actual street and took any question out of the matter, and if there was any fee interest still in Kate Wallace it was passed by the correction deed at that time. This is also exemplified and shown by the fact that at the time of the deed to the defendant, said Kate Wallace claimed nothing, and used the word "May" to show that she was making no claim at all to any interest in the property whatsoever, and felt that she had conveyed away any interest she might have in the area, and was simply being talked into signing a deed. Under these conditions, the court's finding that plaintiff's predecessors in interest were the owners of the adjoining property at the time of the vacation of the street by Cedar City Corporation, amounts to a finding that they were the owners in fee of the East portion of the street, and that as such, the East two rods of the street came to them as owners of the fee and the fee in the adjoining property.

There is no question that counsel for the defendant does not claim there was any reversion to the grantor established by the deed to Cedar City Corporation. If so, why the following question on Page 11 of defendant-appellant's brief, "What if Kate Wallace had instead put in her deed 'only an easement for a public street over the above property is hereby conveyed and if Cedar City never opens up a street, or if opened and later vacated, the property shall revert to the grantor'?" Certainly this question would not be necessary if there had been any reversion.

In the case of *Brown vs. Oregon Short Line*, 102 Pac. 740, 36 Utah 257, as a leading case on the subject, it is clearly shown that the court is justified in its finding that plaintiff is entitled to the property. In that case it was held "that a grantor in granting an easement may restrict his conveyance by apt words to the precise par-

cel of land intended to be conveyed, and he may reserve to himself the title to that portion of land within the street subject to the public easement, and if it appears that such was the intention of the party, the intention will prevail, and the land in the street, in case it is vacated, will revert to the grantor and not to the abutting owner." Counsel now wants to argue that the words "to use property for a street" amounted to reversion. This is indeed no so, and Kate Wallace did not think it was so. As a matter of statute, all that was conveyed by the deed was the right of use, and as a matter of statute, if there were any conveyances of any adjoining property, they also conveyed to the center of the street unless the deeds specifically said otherwise. There is no place that any of the deeds have said otherwise, and certainly the corrective deed in November of 1950, after the property had been deeded to the city, passed on, where there was no reservation, any interest in the fee that was still existent. Also it is clear that in the various references to the street on the West of the property, at the time of making the original deeds and the other correcting deeds, said Kate Wallace was of the opinion that the property she was conveying was bounded on the west by a street, and that she intended to divest herself of the fee to the East half of the street in these items also. In no place is there any reservation. If there was any question in anyone's mind as to her intent, the very fact that she refused to claim a fee interest in the street but simply said that she "may own" in the deed to the defendant, completely does away with any question of that nature.

POINT III

THE RULE THAT A CONVEYANCE OF LAND ABUTTING UPON A STREET ALSO CONVEYS TO THE CENTER OF THE STREET HAS NO APPLICATION

WHERE THERE IS NO STREET EITHER OPEN AND IN USE OR EXISTING BY MAP OR PLAT IS FAL-LACIOUS.

This assumes that before any city or public body has any interest or rights in any street that they must open and use same as such, or put it on a map or plat. This is not true The rules of law is that there are ways in which it can be found that a city or public body has accepted a particular street.

There are also other ways in which it can be found that a public body has accepted a particular street. If a city has not accepted a street and private individuals open it up, there still is not a public easement although there may be a private easement established, and if there is a private easement, abandonment of a public easement over the same property by a city does not do away with a private easement. When property is tendered by an individual to a city for a street, either in a subdivision or by any other means, the controlling factor on whether or not it is a street that can be vacated by ordinance or some other appropriate means of city government, is whether or not it is accepted by the city. In the Stipulation that is part of the record, in Paragraph 3, one finds the following:

“That at some date after the 15th of March and prior to the 4th of May of 1950, at a date unknown to any of the parties, this deed was delivered by Kate Wallace to Cedar City and was recorded at the request of Cedar City. That at the time of said transaction, a street by the name of Dewey Avenue had been opened up North from the captioned street, running between 200 South and 400 South in Cedar City, Utah. That it was the intention of Cedar City Corporation to extend said Dewey Avenue to the South, and Cedar City Corporation accepted said deed for this purpose.”

This amounts to an agreement by the parties that the deed and the property was accepted by Cedar City Corporation for a street. Under these conditions, where there is an agreement that it was accepted for a street, the question of whether it was opened up or not, or put on a map or plat, has no bearing on the matter, as they were simply ways of showing acceptance.

POINT IV

THE INTENT OF KATE WALLACE WAS TO CONVEY THE FEE OF THE EAST HALF OF SAID STREET TO THE ADJOINING PROPERTY OWNER ON THE EAST.

This is shown by the fact that in every deed signed by Kate Wallace she referred to the street and required until the time of 1950 that the house be set back from the street on the West; that in 1950, after having deeded this specific property to Cedar City for a street, she again deeded the property to the predecessors in interest of the plaintiff, on the East, and again failed in any way to make any reservation. There is no reservation at any point by Kate Wallace, and the cases and statute so hold that there is a presumption that the person does transfer to the middle of the street. There is no question this was the intent of Kate Wallace and she herself indicated that it was her intent by the language of the deed that she signed which the defendant-appellant claims is the basis of its rights. The use of the word "may" indicates that she does not at any time claim anything still in the property. On Page 20 of the defendant-appellant's brief, in referring to the deed to the defendant, the word "may" has been left out. Is this an attempt to put something in the deed that is not correct, or to make the deed read different from what it actually did?

Commenting upon the defendant-appellant's statement on Page 22 and 23 of brief to the effect that some-

one is attempting to get something for nothing, one has only to look at the deed whereby defendant claims to have acquired title from Kate Wallace, to find that the consideration was \$1.00; that the notary was counsel for the defendant, and that there was no document stamp placed upon the deed, to ascertain who was trying to get something for nothing. An examination of the deed to the plaintiff from plaintiff's predecessors in interest, reveals that for the property in question and the four rods immediately adjacent thereto on the East, \$2.20 in document stamps was placed on said deed by the persons selling the property. There is absolutely no question that Mrs. Wallace had no desire to retain anything to herself. The language in the deed to the City does not amount to a reversion. The statutes very clearly indicate that anyone passing land bounded by a street passes title of the person whose estate is transferred to the middle of the highway unless there is a specific exemption. In four deeds which Mrs. Wallace signed affecting the East boundary of the property, there was no exception whatsoever, and in each of these deeds she referred to a street. One of them was after she had deeded the property in question to Cedar City and Cedar City had accepted and recorded this deed. Certainly the language of Mrs. Wallace in the deed to the defendant does not claim any right whatsoever in the property.

CONCLUSION

In conclusion, plaintiff-respondent claims that she did acquire the fee to the East two rods of said street from her predecessors in interest, when the predecessors in interest deeded to her the East two rods of said street and the adjoining four rods on the East, and that her predecessors in interest had acquired all rights to the

East two rods of said street at time of deeding by Mrs. Wallace and at the time of the abandonment by Cedar City Corporation. It is rather unique to notice that defendant-appellant contends that there never was a street, inasmuch as he has by stipulation, agreed that Cedar City accepted the street, and accepted the property for a street. Also if there never was a street, how could it be abandoned by Cedar City? Inasmuch as the plaintiff-respondent is the owner of the fee in the two rods in question by deed, and is in addition owner to the surface rights by deed since the abandonment by Cedar City Corporation, the only conclusion there can be is that the plaintiff-respondent is entitled to have the title to the two rods in question quieted in herself, and that the decree of the trial court should be affirmed.

Respectfully submitted,

Patrick H. Fenton,
Attorney for Plaintiff
and Respondent.