1969

John O. Farnsworth and Sharon Annette Farnsworth v. Soter's Inc. : Brief of Soter's Inc. Defendant and Third Party Plaintiff and Of Salt Lake County, Third Party Defendant and Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN O. FARNSWORTH and SHARON ANNETTE FARNSWORTH, his wife,
Plaintiffs and Appellants,

vs.

SOTER'S INC., a corporation,
Defendant and Third-Party Plaintiff and Respondent,

vs.

ROBERT B. SWANER and LOUISE S. SWANER, his wife, SALT LAKE COUNTY, a body politic, and SAM F. SOTER, individually,
Third-Party Defendants and Respondents.

Case No. 11626

BRIEF OF SOTER'S INC. DEFENDANT AND THIRD PARTY PLAINTIFF AND OF SALT LAKE COUNTY, THIRD PARTY DEFENDANT AND RESPONDENT

Appeal from a Judgment of the Third District Court of Salt Lake County
HONORABLE STEWART M. HANSON, Judge

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TABLE OF CONTENTS

AUTHORITIES CITED

CASES

STATUTES

TEXTS

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STATEMENT OF THE KIND OF CASE

Plaintiffs, by their brief, have attempted, for the first time, to make this an action for either condemnation

or inverse condemnation. However, the pleadings and evidence do not substantiate such a case as Plaintiffs in their First Cause of Action are seeking alleged damages for the removal of an alleged right of way and in their Second Cause of Action are seeking restoration of said non-existant right of way.

RELIEF SOUGHT ON APPEAL

Defendant and Third-Party Plaintiff and Respondent, Soter's Inc., as well as the Third Party Defendants and Respondents, seek to have the lower court's Judgment of Dismissal dated March 3, 1969 affirmed.

STATEMENT OF FACTS

Appellants, in their brief, have set forth a statement of facts which the Respondents feel contains some statements which are without support in the evidence and some facts that are either omitted or misconceive the pleadings and which are based upon suppositions or assumptions and are sought to draw unfair inferences. Therefore, it becomes inherent that the Respondent restate the facts in order that they may be correctly viewed.

Plaintiff, John O. Farnsworth, acquired the property, the subject of this lawsuit, as set forth in Plaintiffs' Complaint, together with the property to the East, South and West, including that property conveyed to

Happy Valley Inc. (Exhibit D-12) and that property conveyed to Plaintiff, John O. Farnsworth's, sister (Exhibit D-13) consisting of approximately 120 acres in all, from Florence N. Stoven on June 7, 1943 (T. - 179 and 185, Exhibit P-4).

At the time Plaintiff acquired said 120 acres of property there was a roadway running in an easterly and westerly direction North of but not contiguous to the North property line of Plaintiffs' property known and referred to as Creek Road (approximately 8200 South Street) to a point approximately 10 feet 8 inches North and a little to the East of Plaintiffs' property, the subject of this lawsuit, at which point said roadway turned North and ran northward to the bridge crossing Little Cottonwood Creek (Exhibit D-9).

There was an opening in the fence running along the North boundary of Plaintiffs' property at the extreme northwest boundary of said property which Plaintiffs used to gain access onto the property conveyed to Plaintiff, John O. Farnsworth's, sister and brother-in-law under date of March 23, 1959 (Exhibit D-13) and that remaining in the name of Plaintiffs. This opening still exists, is now, and has been at all times used by either Plaintiffs or John O. Farnsworth's sister and brother-in-law (Jessops), and has not been altered in any way, shape or form. There absolutely were no other openings adjacent to or abutting any of Plaintiffs' property now owned or formerly owned by Plaintiffs, along the North boundary of the property

of the Plaintiffs and the South boundary of the property known and referred to as Oak Creek Estates No. 5, which was formerly owned by the Defendants and Respondents, Swaners, and which is now owned by Soter, Inc. The Salt Lake County Surveyor's Office has made three (3) separate surveys of the old and new roadways and surrounding properties and said three (3) separate surveys have been specifically tied into one another and correlated into Exhibits D-9 and D-19. Exhibit D-9 emphatically shows that the southern most portion of the oiled portion of the old road varied in distance from 14 feet 6 inches to 7 feet 6 inches from the North boundary of Plaintiffs' original property and also shows that the South portion of the old roadway was considerably higher in elevation than the North boundary of the Plaintiffs' property, either in its original state or as presently existing.

The old roadway has been left intact in front of the property formerly owned by Plaintiffs, but now owned by Jessop's (Exhibits P-1, P-2, P-3, D-9, D-10, D-11, and D-13).

The Plaintiffs on April 10, 1958 by Warranty Deed, conveyed all of their property abutting their present one acre on the East and South to Happy Valley Inc. (Exhibit D-12) and all of the property to the West of said one acre tract to Plaintiff, John O. Farnsworth's, sister and brother-in-law, David L. Jessop and Noleen F. Jessop, his wife, on March 23, 1959 as is shown by Exhibit D-13, without reserving

any entrance whatsoever to the remaining one acre, either from the West, or the East, or the South. Plaintiffs, of course, had absolutely no other opening to their remaining acre at any point along the South side of said old roadway other than that conveyed to Jessops by the above mentioned Deed.

The property conveyed to Happy Valley Inc. has been developed into Willow Creek Subdivision No. 2 (Exhibit P-2) with the South portion of Plaintiffs' and Plaintiff, John O. Farnsworth's sister and brother-in-law, Noleen F. Jessop and David L. Jessop's, property abutting Rubidoux Road. Both Plaintiffs and the Jessops have a ready-made access to the South portion of their respective properties by merely reimbursing the Willow Creek subdividers for a nominal sum for said protective strip as is outlined in Exhibit D-18.

Salt Lake County, because of a hazardous conditon of said old roadway, (T. - 185 and 186) on September 15, 1958 and September 17, 1958 (Exhibits D-17 and D-16) exchanged Quitclaim Deeds with Third-Party Defendants Swaners, with Third-Party Defendants Swaners quitclaiming any interest in and to the new realignment of Creek Road as shown on Exhibits D-9, D-10, and D-11, to Salt Lake County and Salt Lake County quitclaiming any interest in the old 8200 South Street known as Creek Road to Third-Party Defendants, Swaners, and which property was later transferred to Defendant and Third-Party

Plaintiff, Soter's Inc., and is evidenced by Exhibits D-15 and D-24.

The realignment of the new 8200 South Street was made by Salt Lake County in the late summer or early fall of 1959 with the new roadway being paved in the spring of 1960. A pile of dirt was put on the old roadway stopping access to the use of same at a point East of the opening into the Jessop property and the County scarified the entire rest of the old roadway to Little Cottonwood Creek. Said old roadway remained blocked and scarified until approximately June 11, 1964 at which time Defendant and Third-Party Plaintiff, Soter's Inc., caused the old roadway to be completely obliterated. There is no dispute as to when the new realignment took place but there is some dispute between the parties hereto as to how long the Plaintiffs continued to use the old roadway. However, no complaint was made by Plaintiffs whatsoever from 1959 until approximately September 12, 1964 at which time Sam F. Soter of Soter's Inc. requested the use of the Jessop's telephone because of car trouble and at this time Mrs. Jessop discussed said old roadway with Mr. Soter (T. - 208 and 215, Deposition - Page 13).

Plaintiff, John O. Farnsworth, by his testimony stated that he had not planted, used, grazed, or built or requested permission to build upon the one acre of property, or lived there, at any time from the time the property was sold to Happy Valley Inc. or his

sister, which amounts to approximately seven years (T. - 205, 206, and 216, Deposition-Pages 11 and 12).

The Third-Party Defendants, Swaners, sold the property known as Oak Creek Estates No. 3 (Exhibit P-1), together with other property, to Sam F. Soter on or about May 15, 1959 with title passing to Sam F. Soter on May 29, 1964 (Exhibit D-15) and the same being transferred by deed to Defendant and Third-Party Plaintiff, Soter's Inc., the same day (Exhibit D-24). Soter's Inc. did not include into Oak Creek Estates No. 3 the triangular 115 foot by 39.17 foot strip shown on Exhibits P-1, D-10, and D-11 beginning at a point 1,901.66 feet East of the Southwest corner of the Northeast quarter of Section 34, Township 2South, Range 1 East, Salt Lake Base and Meridian; the road and access to the property now owned by Jessops, and formerly owned by Plaintiffs, was left intact.

The Plaintiffs now have the same openings as they always had into their property except that they choose to convey the only opening to Jessops in 1959 (Exhibits P-2, P-3 and D-13) and to landlock themselves on the East and South when they conveyed to Happy Valley Inc. in 1958, as shown by Exhibits P-2, P-3 and D-12.

ARGUMENT

Point 1. THE PLAINTIFFS HAVE NOT BEEN DEPRIVED OF PROPERTY WITH-

OUT DUE PROCESS OF LAW OR COMPE
SATION.

It appears that the Plaintiffs have misconceive
their own case as their entire argument contained
Point 1 lies solely in quotations from the Fifth an
Fourteenth Amendments of the Constitution as we
as recitations from surrounding states' cases and oth
cases sounding solely in condemnation and inverse co
demnation.

Neither Plaintiffs' pleadings nor any evide
adduced at the trial sounds whatsoever either in emine
domain or inverse condemnation. The only place th
such argument is treated is in Plaintiffs' brief and,
stated above, is not substantiated whatsoever by eith
the pleadings or the evidence and therefore should n
be considered here.

The Defendant and Third-Party Plaintiff, Sote
Inc., does not come within the classification of t
parties allowed to invoke the rights of the emine
domain statutes as set forth in Title 78 Chapter 3
Utah Code Annotated 1953, and the doctrine of "inve
condemnation" has been repeatedly rejected in t
State of Utah as is evidenced by the cases of Fa
clough v. Salt Lake County et al., 10 U.2d 4
354 P.2d 105, and Sine v. Helland et.al., 18 U.2d 2
418 P.2d 979 and ancillary cases referred to in e
of said cases.

Plaintiffs attempt to apply some condemnation a

inverse condemnation rules to the instant case by claiming that their property abuts the Defendant and Third-Party Plaintiff and Respondent's property upon which the old road was and by alleging that they are abutters and that they own to the center of the old roadway, which was North some 7 to 15 feet of the Defendant's North property line. Plaintiffs also allege that if they cannot become abutters then they have a right by prescription, which argument is also fallacious.

To show the fallacy in Plaintiffs' contention as being an abutter and having rights, either as an abutter or a prescriptive right, it is necessary that we look to the true definition of these respective words which Plaintiffs seem to have overlooked.

Corpus Juris Secundum in 1 C.J.S. 406 defines "abut" as follows:

> "ABUT. In its most ordinary sense, "abut" means to be contiguous, or border on; to bound upon; to end, end at, or terminate, to join at a border or boundary; to meet; to touch at the end or side. Usually "abut" implies contact, but this is not always so.
>
> Phrases: "Abut against" the solid rock," "abuts on the highway," "abuts or adjoins," "abuts upon the improvement," and "abuts upon the street."
>
> "Abutting" is a word of common usage, having a definite, well understood meaning, as well in legal as in common parlance. It has been defined as meaning adjacent; adjoining; coming together; contiguous; ending; joined to; meeting; touching. It has been said that it conveys

the idea of bordering on, bounded by, *with nothing intervening*. While the word "abutting" may not imply that the things spoken of are necessarily in contact, the usual meaning conveyed is that of touching or coming together. (Emphasis added)

In a narrow and restricted sense the term is used in reference to that which touches at the end as distinguished from that which adjoins it on the side. In ordinary usage, however, it is said to have no restricted sense, but to refer to that which touches other premises whether at the ends or on the sides; and it has also been said not to include land lying wholly within, although in a particular connection, the use of the word may convey the idea of abutting and lying partially within.

"Abutting" has been distinguished from "adjacent," "fronting," "occupying," and "tributary."

Phrases: "Abutting, adjoining, contiguous," "abutting and occupying," "abutting, contiguous and tributary," "abutting each other," "abutting its line," "abutting lands," "abutting lot," abutting on or adjacent to," "abutting on such laterals," "abutting on the improvement," "abutting or adjacent real estate," "abutting or fronting," "abutting owner," "abutting platted lots," "abutting property," "abutting property owner," "abutting railroad property," " 'abutting' the street," "abutting unplatted property," "abutting upon, adjacent, vicinal or proximate to the street," "abutting upon such avenue," "abutting upon the street or streets," "adjacent or abutting," "bordering or abutting upon street or streets," "contiguous

property abutting," "facing or abutting upon the improvement," "fronting or abutting feet," "fronting or abutting upon," "lands not immediately abutting,' 'and "occupying or abutting any highway."

ABUTTER. One whose property abuts, is contiguous, or joins at a border or boundary, as where no other land, road, or street intervenes; the word has sometimes been spelled "abuttor." "

Black's Law Dictionary Third Edition, Pages 18 and 19 define "abutter" and "abutting owner" as follows:

"ABUTTER. One whose property abuts, is contiguous, or joins at a border or boundary as where no other land, road, or street intervenes.

ABUTTING OWNER. An owner of land which abuts or adjoins. The term usually implies that the relative parts actually adjoin, but is sometimes loosely used without implying more than close proximity. See Abut."

The most recently legal dictionary, namely, Ballentine's Law Dictionary Third Edition 1969, at Pages 8 and 9 defines "abut" and "abutting owner" as follows:

"ABUT. To end at; to border on; to reach or touch with an end, as where a lot touches the highway. Hensler v. Anacortes, 140 Wash 184, 248 P 406.

ABUTTING OWNERS. Those owners whose lands touch a highway or other public place. 1 Am J2d Adj L § 1; 25 Am J1st High § 153.

It is arbitrary to limit the meaning of "abu ting owners" to lands bordering a highway an not to speak of lands as "adjoining" a highwa but the usefulness of a distinction in legal artic between lands that abut on a highway and ad joining lands generally, arbitrary and fanci although it may be, is not to be denied. 1 A J2d Adj L §1."

The term "abutter" or "abutting owner" is som times referred to as adjoining land owner and 1 A J2d 691 and 692 defines "adjoinng landowners" a follows:

"As the term is used in legal terminology "adjoining landowners" are the owners of lan that are separated by a common boundary. Th word "lands" includes town and city lots as we as rural property. Lands have been held to ad join, within this rule, although they are sep rated by a public street. "Adjoining premises however, are held to be premises which touc or are connected with premises of another, distinguished from premises lying near or ad jacent thereto. The ordinary meaning of th words "contiguous territory" is not territor nearby in the neighborhood or locality, but te ritory touching, adjoining, and connecting, distinguished from territory separated by oth territory. The word "adjoining" implies cont guity in describing lands.

Lands which lie along, and are bordered b a highway "adjoin" the highway in a liter sense of the word, but as used in this work an in legal literature generally, the phrase "abuttin owners" is used to designate those whose lan touch a highway or other public place. The di

tinction is wholly arbitrary, but it answers a useful purpose in that it gives a definite and distinctive classification and avoids confusion that might otherwise arise.

In considering the rights, duties, and liabilitiles of adjoining landowners, it should be kept in mind that land has in its legal signification an indefinite extent upward, and includes everything terrestrial, not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hands of man, as houses and other buildings."

It is evident from the foregoing definitions as well as the exhibits and evidence before the court that it is impossible for the Plaintiffs to be classified as an abutting property owner when in fact their property line ends at the section line and the old roadway was a considerable distance North of the section line and property line and at a different elevation than Plaintiffs' property with no openings being available *or ever* having been used by the Plaintiffs from their North boundary to said old roadway (T. - 197, 203, and 246, Deposition Pages 5 and 15) except the one opening into Plaintiff, John O. Farnsworth's, sister and brother-in-law's, Jessop's, place which has not been altered by either the Defendant or by any of the Third-Party Defendants (Exhibit D-10 and D-11) and which is in its original location and condition.

Plaintiffs admit both from the evidence (T. - 181) and in their own brief that the old roadway was created

by prescription and by public dedication and that there were no openings that had been used on the Plaintiffs' North property line except that into what is now known as the Jessop property formerly owned by the Plaintiffs and conveyed to Jessops (T. - 202).

It has been stated that any person capable of receiving a grant of an easement may acquire one by prescription. While legally organized or political entities may acquire an easement by prescription, the general public is incapable of receiving a grant and hence, according to some courts, cannot acquire a prescriptive easement. Bertolina v. Frates, 89 Utah 238, 57 P2d 346. Nor can one acquire title by adverse use where his use is as a member of the public, in common with all others exercising and enjoying the privilege of use, Simmons v. Perkins, 63 Idaho 136, 118 P2d 740, since the use in such a case is not exclusive. 25 Am Jur 2d, § 40 and 41 on Prescription.

An easement may be acquired by prescription in private property; but, by the weight of authority, it cannot be so acquired in property held for public use. 28 C.J.S. 633, §9(c).

The Plaintiffs at page 8 of their brief cite Utah Road Commission v. Hansen, 14 U2d 305, 383 Pac.2d 917, in support of their position, however, this case also specifies as follows:

> "Absent an established easement, all that abutting owner is entitled to is some reasonable means

of access to highway the same as all other members of the public."

"Owners of property abutting on a street were not entitled to additional compensation on ground that limitation of access would lessen value of the remainng land should they desire to divide and sell it into smaller pieces."

In the instant case the Plaintiffs were not abutters, did not have a prescriptive easement as they never, as the evidence overwhelmingly substantiates, had an opening in their fence nor used the property all along the North boundary of their remaining property to gain access to the old roadway for the reason that the street was further to the North than their North boundary and also that there was no opening other than that transferred by the Plaintiffs to the Jessops, as well as there being a difference in elevation (Exhibit D-9). Therefore, they had no easement, could not lose something they never had and were not entitled to, and were not abutting property owners and under any stretch of the imagination could not own to the center of a road which was on someone else's property.

There is absolutely no dispute that when the new road was opened up in 1959 the general public specifically used that road from that time on. Salt Lake County abandoned said old road, having transferred same to Third-Party Defendants, Swaners, and Swaners in turn having transferred said old roadway to Sam F. Soter, Third-Party Defendant and Respondent, who in turn transferred same to the Defendant and

Third-Party ~~Defendant~~ Plaintiff, Soter's Inc. The old road being a public dedicated roadway, and the public having been furnished a means of reasonable access, the Plaintiffs, still retaining the access that they already had, certainly had no reason to complain at a subsequent date because they landlocked themselves. Furthermore Plaintiffs have a better and paved street with curb and gutter which they can acquire from the developers of Willow Creek Subdivision by paying a nominal sum as is evidenced by Exhibit D-18.

Assuming that the Plaintiffs are abutters, which we expressly deny, and quoting from Plaintiffs' own brief at Page 18, Plaintiffs specify as follows:

> "Before an abutter is entitled to compensation for the impairment of his access rights, he must show that he suffers a special injury, differing in kind and not merely in degree from that suffered by the public in general."

> "The abutter is not entitled to access at all points of his property, and as long as a suitable means of access is left to him, he has suffered no legal injury . . . "

Here Plaintiffs, even if abutters, which they are not, have suffered no injury as they still would have had the same access, if they had not conveyed it to the Jessops, as they had prior to the installation of the new roadway.

Plaintiffs at Page 21 of their brief improperly attempt to invoke a 1965 Session Law to the instant

case and attempt to retroactively apply same in connection with the abandonment of the old highway, which, by Defendant's contention, was in 1959 and by Plaintiffs' contention, was in 1963 and/or 1964. This theory, of course, must also fail for two reasons: (1) Said law cannot be applied retroactively, and (2) said law would not be applicable even if in force at the time of abandonment for the reasons previously stated.

Point 2. THE COURT DID NOT ERR IN DENYING PLAINTIFFS A JURY TRIAL.

Plaintiffs, in their argument of Point 2, again attempt to imply that they have been denied due process by asserting that it is a fundamental procedure and right in American Jurisprudence to have a jury trial and that same should not be lightly denied.

It will be noted that Plaintiffs filed their Complaint in the Salt Lake County Clerk's Office on March 17, 1966, their Motion of Readiness on February 6, 1967, said case had been pretried and many Motions heard, yet Plaintiffs' Notice and Motion for a Jury Trial was not made until February 14, 1969, just a few days prior to the time the case was set for trial, which would appear to be just a little bit tardy.

This court has ruled on this question on many occasions and this matter of demand for a jury trial is covered by the following:

CONSTITUTION OF UTAH: Art. 1, § 10 - *Trial by Jury* - "In capital cases the right

of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consits of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. *A jury in civil cases shall be waived unless demanded.*" (Emphasis added)

UTAH RULES OF CIVIL PROCEDURE: Rule 38 (b) *Demand* - "Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory jury fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than shall be fixed by rule of the court in which the action is pending. Such demand may be indorsed upon a pleading of the party."

RULES OF PRACTICE IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF UTAH: Rule 8 *Jury Demand* - "Any case originally set for trial without a jury may nevertheless be set for jury trial, provided that written notice and payment of the jury fee be deposited with the clerk of the court not later than the pretrial conference of said action."

This court in Thompson et ux, v. Anderson et al 107 U.331, 153 P2d 665, says as follows:

"It is a matter of discretion with the court to allow or refuse a demand for a jury, when not made within statutory time or extended time provided by court rule, and it is not an abus-

of discretion to refuse a late demand for jury trial if no excuse is shown for failure to make timely demand."

The court, in the same case, further specifies as follows:

"Where Defendant filed motion for jury trial after case was set on nonjury calendar, but not within required time limit as provided by court rule, extending statutory time limit for such motion, and, gave as justification therefor that he was giving consideration to overtures of plaintiffs which tended toward settlement of case, trial court did not abuse its discretion in denying motion."

See also the following Utah cases:

Wood v. R.G.W. Ry., 28 Utah 351, 79 P. 182; Ogden Valley Trout & Resort Co. v. Lewis, 41 Utah 183, 125 P. 687; Board of Education of Salt Lake City v. West, 55 Utah 357, 186 P. 114; Utah State Building & Loan Ass'n. v. Perkins et al., 53 Utah 474, 173 P. 950; Emerson-Brantingham Implement Co. v. Giles et al., 59 Utah 54, 202 P. 543; State ex rel. Nichols v. Cherry, 22 Utah 1, 60 P. 1103.

It is evident from the foregoing cases, all directly in point, that the Plaintiffs' demand for jury trial came too late, that they had waived their right to a jury trial, and that the trial court did not abuse its discretion in denying Plaintiffs' motion at such a late date.

CONCLUSION

It is evident from the evidence, the record, and t exhibits that none of the Defendants have injur the Plaintiffs in any way whatsoever. Plaintiffs saw fi to convey their property to Happy Valley Inc. and the Jessops without retaining a right of way into th own property. However, they do have a right of wa to the South of their property as their property abu Rubidoux Road. Neither the Defendant nor Thi Party Defendants have taken away any rights wh soever from the Plaintiffs as they never had any righ other than what they retained or chose to convey someone else. The approach and opening used by t Jessops, which was conveyed by the Plaintiffs to t Jessops, is as it was and has been for the past numero years. Plaintiffs' property never did abut the roadwa nor did Plaintiffs have a right by prescription to s roadway, the fee of which was formerly owned Swaners and which was conveyed by mesne convey ances to the Defendant, Soter's Inc.

We have here simply a matter and a condit that Plaintiffs have created themselves.

The lower court's Judgment of Dismissal shou be affirmed.

Respectfully submitted,

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