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Max Hunsaker, Kathleen Hunsaker, Susie M. Hunsaker And Rhea H. Beverly v. The State of Utah, By And Through Its Road Commission And Pollard Incorporated, A Utah Corporation : Appellant's Brief

IN THE SUPR
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MAX HUNSAKER
HUNSAKER, SU
and RHEA H.

vs.

THE STATE
its Road
INCORPO

Appeal
Judge

LELAND B. TO
Assistant Attor
236 State Capitol
Salt Lake City,

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IN THE SUPREME COURT OF THE STATE OF UTAH

MAX HUNSAKER, KATHLEEN HUNSAKER, SUSIE M. HUNSAKER and RHEA H. BEVERLY,
Plaintiffs-Appellants,

vs.

THE STATE OF UTAH, by and through its Road Commission and POLLARD INCORPORATED, a Utah Corporation,
Defendants-Respondents.

Case No. 12854

APPELLANTS' BRIEF

Suit by grocer to enjoin widening of highway into area used for customer parking, without condemnation proceedings, and to quiet title to the disputed area against claims by Highway Department that said area had been dedicated and abandoned for highway purposes.

DISPOSITION IN LOWER COURT

District Court held that disputed area had been dedicated and abandoned to highway purposes and dismissed Plaintiffs' complaint.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek an order declaring that their property has not been dedicated and abandoned to highway pur-

poses, requiring the road commission to condemn if they are to use it for a highway, or in the alternative for a new trial.

STATEMENT OF FACTS

Plaintiffs are owners of real property at 5300 West 3500 South, Hunter, Utah (R. 69), the North 16.5 feet of which is occupied by the asphalted South lane of a two lane street known as 3500 South Street. The disputed strip of land, which is 16.5 feet wide, lies South of that asphalted traffic lane and North of Plaintiffs' grocery and has been used for many years for gasoline pumps and for parking of Plaintiffs' customers and suppliers. Defendants attempted to widen 3500 South into a 4 lane highway using the disputed strip for an additional lane of traffic and this action was commenced to enjoin taking of the disputed strip without condemnation and to quiet title to that strip in the name of Plaintiffs. Unless the Road Commission can establish that the disputed strip has been dedicated and abandoned to the public for highway purposes within the meaning of 27-12-89, UCA, 1953, the Highway Department has no claim to that strip. Accordingly the sole issue involved in this case is whether or not such a dedication and abandonment has occurred. The following is a brief history of Plaintiffs' property.

The center of 3500 South Street is also the section line. The earliest record produced at the trial was a center line survey made in 1856 (R. 44-46) which fails to state the width of the highway. The Revised Laws of 1898, Sec. 111 (R. 50) established the width of public highways at 66 feet, but expressly states that it should not be con-

strued to increase or diminish the width of established highways. Since the highway in question had already been established its width was not altered by that statute. The patent was issued to Plaintiffs' predecessors in interet in 1908 subject to "easement or right of way of the public to use all such highways as may have been established according to law, over the same or any part thereof" (R. 69, Par. 6, Ex. 18P, Page 6). The Revised Laws of 1898, Sec. 1122 imposed a duty upon the County Commissioners to prepare and file plats showing descriptions of existing public highways (R. 51), however no such plat could be found and none was produced at the trial.

The first hard surface highway on 3500 South was a 20 foot wide concrete highway constructed about 1915 (R. 129), the South 10 feet of which occupied the North 10 feet of Plaintiffs' property (R. 38). About 1956 the 20 foot concrete highway was widened to 33 feet and covered with asphalt (R. 9), 16.5 feet of which occupied the North 16.5 feet of Plaintiffs' property. The business buildings used by Plaintiffs as a grocery store were originally constructed in the early 1920's as a service station (R. 130), and gasoline pumps were installed in the disputed strip of land (R. 130, 133, see also photographs exhibits 1P, and 7P). Those gas pumps were removed about 1956 and the disputed area was blacktopped by Plaintiffs about 1963 to provide additional parking area for store customers and suppliers (R. 103, 105). No fences were ever installed between the highway and the Plaintiffs' property so far as the record discloses (R. 135), although fences installed on property adjacent to the Plaintiffs' property were approximately 33 feet South of the center of the high-

way and had been there for many years (R. 69, Par. 3, R. 134). The Court found that Plaintiffs' predecessor in interest recognized in a deed executed in 1957 that the highway was 33 feet wide (R. 69, Par. 7, Ex. 18P, page 82), however that deed pertains to a 26 ft. driveway area West of the land involved in his dispute as shown by the plat in the back of the abstract (Ex. 18P). No statement as to the width of 3500 South exists in the chain of title to the property in dispute in this case which is the smaller tract upon which the grocery store is located (Ex. 18P). Neither the real estate contracts of 1948 (Ex. 17P) and 1961 (Ex. 37-D) or the other transactions shown in the abstract (Ex. 18P) state the width of 3500 South Street. The Court also found (R. 70, par. 8) that Plaintiffs' mortgage given in February, 1971 (Ex. 38D), describes the highway right of way as including the North 33 feet of Plaintiffs' land. Plaintiffs acknowledge that this is true, however that mortgage appears to have been prepared by a lending institution, does not constitute a conveyance to the State of Utah, and is less than 10 years prior to the date of the lawsuit so the Road Commission cannot contend that it has acquired rights under 27-12-89, UCA, 1953, which requires dedication and abandonment for 10 years.

ARGUMENT

POINT I

THE STATE OF UTAH FAILED TO SUSTAIN IT'S BURDEN OF PROVING THAT PLAINTIFFS HAD DEDICATED AND ABANDONED THE DISPUTED

PROPERTY TO HIGHWAY PURPOSES BY PERMITTING PUBLIC USE FOR 10 YEARS.

Plaintiffs are the record owners of the disputed strip of property lying between the asphalt highway and Plaintiffs' store. If The State of Utah has a right of way across that land for highway purposes it must have been acquired by public use as provided by 27-12-89, UCA, 1953, which reads as follows:

> "A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."

The burden of proving that property has been dedicated to public use is upon the State of Utah. *Bonner v. Sudbury,* 18 U2d 140, 417 P.2d 646. Dedication of one's property to public use should not be regarded lightly. The presumption is in favor of the property owner and the burden of establishing public use for the required period of time is on those claiming it. *Bonner v. Sudbury,* Supra. Dedication of private property to public use must be proven by clear and convincing evidence, Petersen v. Combe, 438 P.2d 545, 20 U.2d 376.

The Findings of Fact (R. 69-70) and evidence adduced at the trial are insufficient to establish by clear and convincing evidence that Plaintiffs or their predecessors in interest ever "dedicated" or "abandoned" the property in question, or that the disputed property was in fact used by the public for highway purposes. The undisputed evidence indicates that before the road was hard surfaced in about 1915 it was a gravel road used primarily by

wagons, horses, buggies and surreys (R. 124) and that it remained a 20 ft. concrete highway, 10 ft. of which was (on Plaintiffs' property), until it was widened in 1956 to a 33 ft. highway (16.5 feet of which was on Plaintiffs' property) (R. 19). There is no evidence whatever of any use being made of any additional portion of Plaintiffs' property for highway purposes. The argument that because other persons in the area had fences situated approximately 33 feet south of the center of the street may be evidence of their abandonment and dedication of their land to highway purposes, but is not evidence as to such an abandonment or dedication by Plaintiffs or their predessors in title. On the contrary, the evidence clearly shows that since the advent of the automobile that the disputed tract of land has been used by Plaintiffs and their predecessors in interest for business purposes such as an area where automobiles parked while being serviced with gasoline, etc. and as a parking lot for the business building situated upon Plaintiffs' property. (R. 38, 129, 130, 103, 105, 135) The absence of a fence in front of the Plaintiffs' property, together with continued use of that property shows an absence of an intent to dedicate and abandon the disputed property to highway purposes.

Plaintiffs are entitled to a decree quieting title to the disputed property since the State Road Commission failed to establish by clear and convincing proof that it has aquired a right of way over Plaintiffs' property.

POINT II

THE RIGHTS ACQUIRED BY UTAH ROAD COMMISSION ARE LIMITED TO THOSE RIGHTS "DEDICATED" AND "ABANDONED" BY PLAINTIFFS AND THEIR PREDECESSORS IN TITLE.

The controlling statute (27-12-89, UCA, 1953) speaks of a property owner being deemed to have "dedicated" and "abandoned" his property "to the use of the public" when it has been "continuously" used as a "public thoroughfare" for a period of 10 years. "Dedication" of land for highway may be either express, as where owner manifests his purpose by grant evidenced by a writing, or implied, as where acts and conduct of owner clearly manifest his intention to devote land to public use. *Schlettler v. Lynch,* 23 U. 305, 64 P. 955. An effective dedication requires an intention, express or implied, to dedicate, and manifestation of some form of acceptance within a reasonable time. *Brown v. Oregon Short Line R. Co.,* 36 U. 257, 102 P. 740. Acceptance is implied as a matter of law where it has been used for longer than ten years. *Lindsay Land & Live Stock Co. v. Churnos,* 75 U. 284, 285 P. 646.

Our case differs substantially from *Burroughs v. Guest,* 135 U. 91, 12 P. 847 (1896) *Whitesides v. Greene* (1896), 13 U. 341, 44 P. 1032, *Lindsey Land and Livestock Company v. Churnos,* 75 U. 384, 285 P. 646, and the *Jeremy* case, supra and *Deseret Livestock Company,* 1234, 353, 259 P.2d 607, relied heavily upon by Defendants (R. 39) since in our case, unlike those cases, there is other sub-

tantial evidence that Plaintiffs and their predecessors dedicated only 16½ feet to highway purposes, and actually retained the right to use the other (disputed) 16½ feet for customer arking. Had Plaintiffs executed a deed to the State of Utah for highway purposes and in that deed retained the right to use the 16½ feet between the store building and the asphalt highway for parking purposes the matter would be clear and The State would have no right to establish a lane of traffic through that parking lot without compensation to Plaintiffs. In our case, however, the grant (dedication) to the State of Utah is implied by the acts of the parties. *Schlettler v. Lynch,* Supra and *Brown v. Oregon Short Line R. Co.,* Supra. The extent of the rights surrendered by Plaintiff and acquired by the State of Utah are measured according to the intent of the Plaintiffs as shown by their acts and conduct. The undisputed evidence shows that Plaintiffs and their predecessors in interest always retained and used the disputed land for service station and parking lot purposes in connection with their adjoining business. (R. 103, 105, 130, 133). There is no evidence that Plaintiffs or their predecessors in interest ever intended to "dedicate" or "abandon" the disputed strip of land. The burden is upon the State of Utah to prove by clear and convincing evidence as shown by the acts and deeds of Plaintiffs and their predecessors in interest that the disputed strip of land was in fact "dedicated" and "abandoned" to public use. *Peterson v. Combe,* Supra. Defendant's evidence falls far short of that burden of proof and accordingly fails.

Counsel for Defendants quotes extensively from Whitesides v. Greene, Supra, Burrows v. Guest, Supra, and

Jeremy v. Bertagnole, Supra, (R. 39-41) in support of the proposition adopted by the Court (R. 69-70) to the effect that circumstances to be considered in determining the width of the highway include such things as (1) width of the highways in the vicinity of the land in question, and of the highway system, (2) the position of fences in the area, (3) recognition of width of road by owners of land in question, and (4) that once a particular use such as automobile traffic has been established, such width should be decreed by the court as will make such use convenient and safe for automobile traffic. (R. 39-41).

Plaintiffs agree that the matters mentioned are important and are helpful in deciding the width of a highway in a case such as *Whitesides v. Greene,* Supra, ". . . where there is no other evidence of dedication . . ." and where the disputed land was on the highway side of the landowner's fence, or as in *Burrows v. Guest,* Supra, where a plat had been filed for 30 years showing the width of the highway in question, which plat had been accepted and adopted by the owner, or where as in *Jeremy v. Bertagnole,* Supra, they were dealing with unfenced range lands. The basic inquiry to determine the width of the road in each case was to determine the intent of the land owner by considering what he did and by considering all surrounding circumstances, including the apparent public purpose and user. In our case it is clear that Plaintifffs did not intend to surrender their right to use the disputed strip of land as a parking lot, and it is also clear that the public user of the adjacent 16½ feet was for a two lane asphalt highway for automobile traffic. he state now seeks to double the size and to

construct a four lane highway by using Plaintiffs parking lot for the additional traffic lane. If that is permitted on the basis of the need of the public for a four lane highway what is to preclude the state from saying next year that they need a six lane highway and from building it over additional land of Plaintiffs without compensation. Certainly adequate roads are needed and should be built, but the cost of those roads should be shared equally among the public by using the tax money to acquire property. Plaintiffs should not be required to give their property to the state for a highway without compensation. Without the parking lot the grocery business cannot function and Plaintiffs' business is wholly destroyed.

CONCLUSION

The State Road Commission has the burden of proving by *clear and convincing evidence* that the disputed strip of land has in fact been "dedicated" and "abandoned" to public use as a "public thoroughfare" for ten years. Their evidence at most establishes (1) that fence lines in the area allow for a 66 foot road but there is no evidence that Plaintiffs' property was ever fenced; (2) that the usual width of highways in the area is 66 feet; (3) that a highway of unknown width existed when the patent to the land was given, which patent was subject to existing highway rights of way; (4) that some adjacent property deeded to Plaintiffs in 1957 described the roadway as including 33 feet of that property; and (5) that a mortgage was given by Plaintiffs in 1971 also recite the roadway as including 33 feet of Plaintiffs' property (R. 69-

70). That evidence, at most, creates an inference that Plaintiffs or their predecessors in interest may have "dedicated" or "abandoned" 33 feet of their property to highway purposes, and probably does not meet the "clear and convincing" evidence burden of proof imposed upon Defendant, and when considered in light of evidence that the South 16½ feet of the claimed 33 feet have always been used for service station and parking lot purposes by Plaintiffs, the evidence falls far short of proving an intent to "dedicate" or "abandon" that disputed strip of land.

The purpose for which a portion of the land was in fact "dedicated" and "abandoned" by use was to permit the establishment of a two lane highway, not the four lane highway sought by Defendants. The State of Utah received no more rights than were surrendered by the acts and conduct of Plaintiffs and their predecessors in interest, which rights did not include the right to exclude Plaintiffs and their customers from their parking lot without compensation.

The judgment of the District Court should be reversed and title to the disputed strip should be quieted in Plaintiffs, or in the alternative a new trial should be granted.

Respectfully submitted

RONALD C. BARKER