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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 : Respondent's Brief

In The Supreme Co
of the State of U

MAX HUNSAKER, KATHLEEN
HUNSAKER, SUSIE M. HUNSA
AND RHEA H. BEVERLY,
Plaintiffs

-vs-

THE STATE OF UTAH, by
its ROAD COMMISSION
INCORPORATED, a Utah
Defend

BRIEF OF

APPEAL FROM A
THIRD DISTRICT C
COUNTY, STATE O
ABLE ERNEST F.
PRESIDING.

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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

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

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, dissolved the injunction against defendant and its contractor, Pollard Incorporated, and dismissed plaintiff's Complaint.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek an order declaring that their property has not been dedicated and abandoned to highway purposes, requiring the Road Commission to condemn if they are to use it for highway, or in the alternative for a new trial.

STATEMENT OF FACTS

Defendants essentially agree with the statement of facts as set forth by appellants, except in the following particulars:

1. Plaintiff, in referring to the disputed strip of land 16.5 feet wide which lies south of the asphalted traffic lane makes reference to its use for many years for gasoline pumps and for parking of plaintiff's customers and suppliers, but neglects to state further that it also has been used for a highway drain (R-119), pole lines (R-119), storage of snow removed from defendant's highway (R-121, 122) and a sewer line (R-155).

2. Respondent disputes the allegation of appellant in the first paragraph of his Statement of Facts where he says, "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." To the contrary,

the facts show that the patent to the property in question issued on January 30, 1908, and was recorded July 6, 1908, (Exhibit 18-P, page No. 6), and was subject to

> ". . . any easement or right-of-way of the public to use such highways as may have been established according to law over the same or any part thereof. . . ."

Appellants concede that the center line survey of 1856 established the fact that a highway existed at that time and it is therefore just as reasonable to say the burden is on appellant to establish that the highway right of way is not a 66-foot right of way as respondents assert. This is consistent with the revised laws of 1898, Section 1117, Title 25, (R-50), and this is not a fact but the question which the court must decide.

3. Respondent's Exhibit 39-D, a drawing prepared by defendant, State Road Commission's employees, shows the exact distance of appellant's store to be 32.5 feet from the center line of the road known as 3500 South Street. This cnter line is also the north property line of appellant's property and coincides with the location of fence lines in the area. Plaintiff's own witness, Wendell Jones testified that they had been in their present location as long as he could remember which was before the Hunsaker Market building was constructed, (R-132) and this would have been after

1912, the time of his birth, and prior to 1920 when the store was built. (R-130)

ARGUMENT

POINT I.

THAT THE STATE OF UTAH SUSTAINED ANY BURDEN IT MAY HAVE HAD TO PROVE THAT PLAINTIFFS HAD DEDICATED AND ABANDONED THE DISPUTED PROPERTY TO HIGHWAY PURPOSES BY PERMITTING PUBLIC USE FOR TEN YEARS.

Point I of Appellant's brief contends that the Respondent, State of Utah, had the burden of proving dedication and abandonment to public use by user for a period of ten years. Respondents are of the opinion that they had no burden as alleged by Appellant in this connection for the reason that the records show that a roadway was in existence at the present location of 3500 South in Salt Lake County as early as 1856. (R-44, 45) The abstract introduced by plaintiff which is Exhibit 18-P shows the first entry to be a land certificate issued December 31, 1881. Further, the record shows that the patent which issued in 1908 is subject to, "any existing right-of-way." It is, therefore, the Respondent's contention that the only burden which the State of Utah had in this connection is the burden

of showing the width of the roadway existing at the time the patent issued. Respondents submit that both statutory law and case law support Respondent's contention that it has a 66-foot right-of-way, 33-feet of which would be south of the center line of the highway and upon Appellant's property. The case of *Whitesides v. Green,* (1896) 13 U. 341, 44 P. 1032, states,

> ". . . that where there is no other evidence of dedication than mere user by the public the presumption is not necessarily limited to the traveled path, but may be inferred as extend ing to the ordinary width of highways, or, if the road being enclosed with fences, to include the entire space so enclosed . . ."

The *Whitesides* case was preceded by the case of *Burroughs v. Guest,* 5 U. 91 12 P 847, wherein the court stated the following:

> ". . . in determining the extent of the dedication, all the circumstances may be considered . . . The width of the highways in the vicinity of the land in question, the width of highways in a system in which the one in controversy forms a part, any circumstances of recognition by the owner of the fee and the public of definite and fixed limits. . . ."

The court further stated the following in that case:

> ". . . The continued use of the lands by the plaintiff was not absolutely as matter of law, inconsistent with the easement created by the right-of-way as a highway. The owner of the fee has the right to use land in any way not inconsistent with the requirements of the public. . . ."

The later case of *Jeremy v. Bertagnole,* a case decided in 1941 by the Utah Court found in 101, U.1, 116 P.2d 420 states as follows:

> ". . . whatever may be the width in any particular case, the easement cannot be limited, when acquired by user, to the actual beaten path. . .
>
> A particular use having been established, such width should be decreed by the court as will make such use convenient and safe."

In the statutes of 1898, under Title 25, Chapter 1, beginning with Section 1114, it is stated that all highways established shall have a width of at least 66-feet. Anyone who does research into the law and cases decided between 1853 and 1920 continually runs into references to rights of way 66-feet in width, which is equivalent to four rods, a unit of measurement commonly used during that period of time.

Assuming, but not admitting, that the State of Utah did have the burden of showing user for a period

of 10 years then Respondents respectfully submit that sufficient evidence of user has been established by testimony and documentary evidence in the trial. Respondents submit that dedication and abandonment to the use of the public would constiute any useage customarily found within highway rights of way ordinarily permitted or licensed by highway authorities which in addition to the traveled way, include sidewalks, utility lines and poles, sewer lines, water lines, highway drains and drainage facilities and shoulders adjacent to the traveled way. In the instant case, the record is replete with evidence of part or all of these useages including utility lines and poles, (R-119) highway drains immediately in front of Appellant's property, (R-119) sewer lines, (R-155) water lines, and in addition, the evidence shows that Respondents customarily push snow from the highway surface onto the strip of disputed land and they have historically done so and that this has continued despite the request of Appellant to cease and desist. (R-122) In this connection the Respondents submit that most of these uses were, in fact, not objected to by Appellants and that this is evidence of user as set forth in the annotation found in 52 A.L.R. 2d 263, which annotation refers to the case of *A. C. Graff, Respondent v. The City of Casper,* 281 P.2d 685, a Wyoming case decided in 1955, involving utility lines.

Additionally, Respondents submit that the width of the highway in question should be determined by reference to the usual width of the highways in the area

and of the highway system of which this one is a part. Numerous exhibits including the following: 1-P through 16-P, 25-D through 35-D and 49-D, which are all photographs taken at various times, show that the fence lines encompass rights of way 66-feet in width to the east and west of the property in question. The usual width as enunciated by the Legislature of the State of Utah in 1898, (R-50) and again in 1909, (Exhibit 34-D) established the width for the system of highways of which 3500 South is a part at 66-feet, or four rods, and this is consistent with both case law and statutory law then applicable. Particularly significant is Section 1117, supra, which provides that all public highways shall be at least 66 feet wide.

POINT II.

THE EVIDENCE ADDUCED AT TRIAL SHOWS AT MOST THAT APPELLANT'S USE OF THE AREA IN FRONT OF THEIR PROPERTY WITHIN THE CLAIMED RIGHT OF WAY WAS BY ACQUIESENCE OF RESPONDENT.

Appellants in Point II of their Brief use a "bootstrap argument" to the effect that the rights of Respondent are limited to those rights "dedicated" and "abandoned" by plaintiffs and their predecessors in title and state that there is evidence that plaintiffs and their predecessors dedicated only 16½ feet to highway

purposes and actually retained the right to use the other 16½ feet for customer parking. Respondents submit that the evidence does not, in fact, substantiate Appellants allegation for the reason that the store was allegedly constructed in approximately 1920. Since that time the area in front of the building has been utilized for customer parking and dispensing of gasoline from pumps placed within the disputed 16.5 feet area. Respondents submit further, that this wholly ignores the fact that the evidence also shows that there were fence lines in existence in the area to either side of the subject property prior to the construction of the store which encompassed an area 66 feet in width, that a road existed prior to the issuance of the patent and apparently prior to the acquisition of an ownership right to the property traversed by the highway by any individual, and further that the building in question owned by Appellants was constructed 32.5 feet from center line or in effect on the edge of the 33 foot right of way claimed by Respondents. This is an implied recognition of Respondent's claim to the right of way over the north 33-feet of plaintiff's property. Also, Respondents contend that this ignores the other highway uses which Respondents have subjected said 16.5 foot strip to or caused same to be subjected to by others, such as installation of utility lines and poles, installation and maintenance by Respondent's agents of a highway drain, installation of sidewalks in the area, snow removal and highway shoulders.

Appellants assert that they and their predecessors in interest always retained the disputed land for service station and parking lot purposes in connection with their adjoining retail business. Respondents assert that evidence shows that this may have been true from 1920 on but that same was done by implied consent and with the sufferance of the Respondent, Utah State Road Commission and amounted, at most, to an encroachment within the right of way which Respondent, State Road Commission, had acquired prior to the issuance of the patent to plaintiff's predecessors in 1908. Again the language of the *Burroughs v. Guest* decision, supra, cited in Point No. I regarding use of the area in dispute by the fee holder is important, where it states that the owner of the fee may use the property as long as the use is not inconsistent with the rights of the public.

Appellant cites the case of *Peterson v. Combe,* 20 U. 2d 376, 438 P.2d 545, as evidence that dedication of private property to public use must be proven by clear and convincing evidence. Counsel for Respondent is aware that the roadway involved in the *Peterson v. Combe* case was the subject of a subsequent law suit instituted by the State Road Commission of Utah against Weber County, and the parties in the *Peterson v. Combe* case and that in the trial of that proceeding evidence clearly and convincingly proved that there was a dedication by user of the road in question. The *Peterson v. Combe* case thus stands for the additional propo-

sition that counsel for plaintiff in that instance did not submit the "clear and convincing evidence" that was available. In this instance, Respondent takes the position that there is abundant "clear and convincing evidence", that the road now known as 3500 South has historically been a main thoroughfare since at least 1856. It at one time was a part of the Lincoln Highway, (Exhibits 36-D and 47-D) and it has historically been referred to by the State Road Commission as one of the important thoroughfares in the State of Utah, (Exhibits 46-D and 47-D) and the road would not conceivably have been smaller in width than the minimum width recognized and established both by statute, supra (R-50) and case law, *Burroughs v. Guest,* supra, and *Whitesides v. Green,* supra, at the time the property in question was settled and immediately subsequent thereto.

POINT III.

SURVEYS, COUNTY PLATS, AND RECOGNITION BY APPELLANTS IN CONVEYANCES CONSTITUTE EVIDENCE OF RECOGNITION OF RESPONDENT'S CLAIM TO A 33-FOOT RIGHT OF WAY.

Respondents at the time of trial introduced documentary evidence of area reference plats, (Exhibits 43-D) showing a 33-foot right of way parallel to the section line which is also the center line of 3500 South

which encompasses a 66-foot right of way with 33-feet on either side of center line. These are official plats of the Salt Lake County Recorder's Office and counsel concedes they do not explain how the right of way shown first came to be shown, but presumably they have a legal basis. Section 1122 of Title 25, Chapter 1, Statutes of the State of Utah for 1898, requires that the county commissioners determine what public highways exist and that they prepare duplicate plats to be on file in the office of the county clerk. No plat involving this particular property was submitted at the time of trial since none could be found, however, further to the east about four miles in the area east of Redwood Road on 3500 South, a plat of this nature was found and sufficiently established a claim to a 66-foot right of way by Respondent in another law suit involving a similar question to the one involved herein, which decision is attached to defendant's memorandum of authority in support of defendant's position. (R-52)

In addition, Exhibit 44-D is a Warranty Deed involving two of the Appellants, Susie M. Hunsaker and Rhea H. Beverly, and described a right of way 20-feet wide over the west side of the property described in the Deed, and the said described right of way commences 33-feet south of the north line of the entire tract which describes to the center line of the highway known as 3500 South, and constitutes an implied recognition of a 33-foot right of way for roadway purposes.

The Appellants, Max D. Hunsaker and Kathleen U. Hunsaker, in the contract by which they purchased the property in question, (Exhibit 37-D), recognized the same description which impliedly recognized the 33-foot right of way, and in February of 1971, clearly recognized the 33-foot right of way in a Mortgage to First Thrift and Loan Corporation, as shown in Exhibit 38-D and the trial court correctly found that this was a recognition by Appellants of Respondent's claim to a 33-foot right of way.

Respondents, at the time of trial, were prepared to call a witness from the Salt Lake County Surveyors Office to show that at least as far back as 1956, he found road stones 33-feet from the center line of 3500 South in the area in question (R-181-189), and that these stones were placed by earlier surveyors to locate the claimed 33-foot right of way which is now shown on County Survey Records. (Exhibits 43-P and 50-P) in the area of Appellants' property. Said witness was not called but it was stipulated that if he were called he would testify as set out above.

CONCLUSION

Respondents submit that the decision of the trial court, holding that the area in dispute, had been dedicated and abandoned to highway purposes is the proper conclusion and the only conclusion which is legally sound in this matter.

Respondents submit that if, in fact, they had a

burden to show that there was a dedication and abandonment of the property in question for highway purposes, that they successfully met that burden at the trial of this matter. Respondents submit, however, that Appellant had at least an equal burden to show that the right of way claimed by Respondent, State Road Commission of Utah, was less than the 33-feet which said Respondent claims.

As Respondents have pointed out in this brief, the statutory law of 1898 established minimum highway widths of 66-feet. As also pointed out, this is consistent with case law decided prior to that time in the cases of *Burrows v. Guest* in 1886, and *Whitesides v. Green* in 1896, which were cases dealing with highways of comparable widths. These cases apparently dealt with a similar problem to that presented by Appellants, to-wit; What is the extent of the dedication and abandonment? It is interesting that the language of the cases talk about, "widths of highways of which the one in question is a part, usual widths of fence lines and other evidence of recognition of set right of way widths by adjoining landowners, etc. . ." In addition, these cases point out that the traveled way is not the governing criteria, but that the dedication extends to the, "usual" width, or, "necessary" width.

Respondents further submit that evidence adduced in the trial shows that the disputed area of the claimed right of way has been used for "highway purposes",

when one considers the broad meaning of the term to include utility lines and poles, drain lines, storage of snow removed from the highway, etc. Respondents submit that this proposition is legally sustained by decisions from other jurisdictions as cited herein.

Respondents further submit that the evidence shows that the Appellants and their predecessors have historically recognized the limits of the right of way claimed by Respondents in conveyances, construction of the building on the edge of the claimed right of way, and that official documents on file in county offices, as well as surveys, define and encompass the right of way as claimed by Respondents.

Respondents respectfully submit that the evidence shows that the road came first, that it was in existence at least as early as 1856, that the rights of the public were established first, and that Appellants and their predecessors in interest took title to the property subject to the rights of the public. The law of the State of Utah in effect at the time the legal title to the land in question issued in the form of a patent in January, 1908, made the land subject to rights of way which were then established. The trial court was correct in its findings and conclusions to the effect that Respondents have a 33-foot right of way as claimed. This fact was properly established under both statutory and case law, and has been recognized by Appellants and their predecessors in interest and there is either a sufficient dedication and

abandonment to sustain the claim of Respondents to the 33-foot right of way over the north part of Appellant's property, or said property was acquired by Appellants and their predecessors in interest subject to an existing, valid right of way as claimed.

Respondents respectfully request this court to affirm the decision rendered in the trial court.

Respectfully submitted,

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