• Superior Court Opinions

SUPERIOR COURT
FOURTH JUDICIAL DISTRICT

Superior Court in Fairbanks decides Condemnation Cases.

State of Alaska v. Arlene Fowler a/k/a Arlene Higgins, et al, Alaska Superior Ct., Fourth Dist., Civil Action No. 61-320, Mem. Op. dated Sept. 26, 1962.

State of Alaska v. Irving Reed and Elenore Stoy Reed, et al, and State of Alaska v. Gene R. Coleman and Joseph N. Folz, et al, Alaska Superior Ct., Fourth Dist., Civil Actions Nos. 61-319 and 61-320 (joined), Mem. Op. dated Sept. 27, 1962.

MEMORANDUM OPINION
RABINOWITZ, J.

The matter comes before the Court upon an ancillary proceeding to the State's within condemnation action.[1] The State seeks to condemn, in fee, a fifty foot strip on either side of the center line of a proposed hard surface highway. The proposed Highway is to be located approximately along the existing route of Farmers Loop Road.[2] It should be noted at the outset that the State excepts from the within condemnation the existing width of the right-of-way of Farmers Loop Road. It should be further noted that the State contends that the width of the existing right-of-way is sixty-six feet. By her Answer, defendant, Arlene Fowler, put in issue the question of "title." Upon the State's "Motion For Judicial Determination Of Title," the issue of "title" was tried to the Court, without jury.

The State contends that the existing high-of-way of sixty-six feet in width (hereinafter referred to as Farmers Loop Road) was established pursuant to the provisions of Section 932, Title 43, U.S.C.A.[3] Defendant Fowler's position is that the State "only has a right-of-way for the width of the road utilized in the past and now by the Highway Department.[4] The width of the Farmers Loop Road utilized "in the past and now by the Highway Department" is approximately thirty feet.[5]

The portion of the proposed highway that affects the interest of defendant Fowler has been designated Parcel No. F-1353, and is more particularly described as follows:

> "A portion of the Southeast Quarter of the Southeast Quarter (SE ¼ SE ¼) of Section 30, Township 1 North, Range 1 West, Fairbanks, Meridan. . . .
>
> . . . excluding therefrom any right of way which may exist within the bounds of this description. The parcel excluding existing right of way contains 0.5 acres, more or less."

Under the issues tendered as to Parcel No. F-1353 and in accordance with the holding of **Hamerly v. Denton,** Opinion No. 47, 359 P.2d 121, 123 (Alaska, 1961), the State has the burden of proving that Farmers Loop Road was located over public lands (i.e. before any predecessor in interest of Fowler had made a valid homestead entry as to the lands encompassed in Parcel No. F-1353) and the State has the further burden of proving that the character of the use made of Farmers Loop Road was such as to constitute acceptance by the public of the statutory grant contained in Section 932, Title 43 U.S.C.A. It is only after the resolution of these two issues that this Court, as trier of the facts, can reach the issues pertaining to width.

As to the first two issues to be determined, the evidence discloses the following. The first valid entry under the homestead laws as to Parcel No. F-1353 was made by Villy Yankovich on August 20, 1929. Villy Yankovich subsequently relinquished on May 31, 1955 on which date Charles O. Fowler made entry as to Pacel No. F-1353.[6] Charles O. Fowler (deceased husband of defendant Arlene Fowler) was issued a patent for lands encompasing Parcel No. F-1353 on January 23, 1959.[7] Yankovich himself testified that prior to making application on August 20, 1929 he had lived on the land in question for a few years. Yankovich also testified that when he went out to the land nobody was living on it and that he was the first to stake it.[8] From the foregoing, this Court concludes that the evidence establishes that the lands encompassed within Parcel No. F-1353 were public lands prior to Villy Yankovich's entry on August 20, 1929.

Before discussing the evidence relating to the second issue under consideration, it should be remembered that the State does not contend that Farmers Loop Road became a public highway by any act on the part of public authorities. The State's contention is that Farmers Loop Road was established under the provisions of Section 932, Title 43 U.S.C.A. by public user. In discussing the provisions of Section 932, Title 43 U.S.C.A., Justice Dimond in his opinion in **Hamerly v. Denton,** supra, 359 P.2d at 123 states:

> "The operation of this statute in Alaska has been recognized. The territorial District Court and the highest courts of several states have construed the act as constituting a congressional grant of right of way for public highways across public lands. But before a highway may be created, there must be either some positive act on the part part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted."

The evidence adduced pertaining to the establishment, prior to August 20, 1929, of Farmers Loop Road over the lands encompassed within Parcel No. F-1353 discloses the following: Villy Yankovich testified that when he first went out to the land in question there was a road there and that the road today is the same as it was in 1929. Edby Davis testified that he was first on Farmers Loop Road in 1912 when he was employed as a farm hand. That in 1912, the road was frequently used for farm purposes and for hauling wood. That the road in 1912 was a wagon road and is the same location now as it was in 1912. Charles Creamer testified that he was first on Farmers Loop Road in 1911. According to Mr. Creamer's testimony, Farmers Loop Road was started by wood haulers who had homesteaded in the area due to the presence of birch trees. Mr. Creamer further testified that Holton (a homesteader) put the road in across what has been designated Parcel No. F-1353 in 1915, and that in 1915 when he traveled the road to visit Holton, he passed "Fowler's" and that no cabin was located on the same at that time.

Anton Radak testified that he had been on Farmers Loop Road between 1910 and 1912 cutting wood and that in 1912 you could travel the entire length of Farmers Loop (i.e. from College area to the Steese Highway). Mr. Radak further testified that the road was the same at it was in 1912. Frank Young was on the Farmers Loop Road in the years 1908 and 1909 and thereafter. Mr. Young testified that the farmers in the area had built the road themselves and that in 1925-1926 the road was completely hooked up (i.e. the loop was completed from College area to the Steese Highway). Helen Keep was first on the road on July 4, 1915 and in 1928 and 1929 traveled the whole of Farmers Loop. Mrs. Keep testified that her husband worked on maintenance of the road for "the government" in

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[1] In paragraph II of its complaint of July 10, 1961, the State of Alaska alleges that "Authority for the taking is found in Title 57, Ch. 7, ACLA, 1949, as amended by Ch. 91, SLA, 1953, and Ch. 9, SLA, 1957; Ch. 58, SLA, 1953, as amended by Ch. 84, SLA, 1955; and in Ch. 152, SLA, 1957."

[2] The highway is designated "Alaska Project No. S-0684(3), from Federal Aid Project 37 to Federal Aid Project 61 near the village of College, Alaska, terminating on the Steese Highway and comprising some (9) miles, more or less."

[3] Section 932, Title 43, U.S.C.A. provides: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Note: this provision is derived from Act 26, 1866, c.262, § 8, 14 State. 253.

[4] See defendant Fowler's "Reply to plaintiff's Statement of Points and Authorities," page 3.

[5] See testimony of Ben H. Cothern who took measurements of the roadway at defendant Fowler's land in April, 1962.

[6] See plaintiff's Exhibits "C" and "D."

[7] See defendants' Exhibit 1.

[8] Yankovich also testified that no one contested his entry.

NOTICE

Editor's Note:

The names of the superior court judges who wrote the opinions appearing in the **January** issue of the Journal were inadvertently omitted. The judges writing the opinions were:

Judge Walter E. Walsh: **State of Alaska v. Everett C. Wooster,** et. al.

Judge James M. Fitzgerald: **Mack Trucks, Inc. v. Park Equipment Sales and Service, Inc.**

Judge Jay A. Rabinowitz: **Sedlock v. Sedlock**

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1921 and that the road is in substantially the same location today as it was in 1928-1928.

Erving Reed testified that in 1925 he drove completely around the Farmers Loop Road. Mr. Reed also testified that in 1925 the Alaska Road Commission maintained the road. Lee E. Link drove over the Farmers Loop Road, from College to the Steese Highway, in 1928. Mr. Link testified the road at this time was consistently traveled and was used to haul potatoes. He also testified that the road is presently in substantially the same location as in the year 1928.

From the foregoing truncated outline of the evidence as to this second issue, this Court concludes that the evidence established that there was "public user for such a period of time and under such conditions as to prove that the grant" under Section 932, Title 43 U.S.C.A. had been accepted.[9] More specifically, that Farmers Loop Road became a public highway by virtue of public user over the lands encompassed in Parcel No. F-1353 while the same were public lands.

In reference to Section 932, Title 43 U.S.C.A., the Court in **Hatch Bros. Co. v Black**, 25 Wyo. 109, 165 P. 518 (1917), at pages 519 and 520 of its decision states:

> "The grant is unconditional and contains no provision as to the manner of its acceptance. . . . It must be borne in mind that it is not a question of the establishment of a highway by prescription which is here in question; and therefore it does not depend so much on a definite length of time of use as upon the character of the use, taking into account the needs and convenience of the public, as manifesting an intention on its part to accept the grant. . . .
>
> . . . The decisions are not harmonious as to the time the public use must continue to constitute an acceptance of the grant by the public; some courts holding that it must be for the same length of time as would be necessary to acquire a right of way by prescription over privately owned lands, while others hold that the length of time of the user is not controlling and may be for a shorter period. The latter holding, we think is supported by the better reasoning. Title or right by prescription implies adverse user, while we are here considering a case where the use is not adverse, but the appropriation and use of the land is with the consent and by an express grant by the owner. Time, therefore, becomes material only as an element to be taken into consideration together with the character of the use and the necessity or convenience of the public in determining the question of the acceptance of the grant. . . .

Also of interest is the opinion in **Leach v. Manhart**, 102 Colo. 129, 77 P.2d 652 (1938) where the Court writes at page 653 of its opinion:

> ". . . The sum of our holdings is that the statute [43 U.S.C.A. § 932] is an express dedication of a right of way for roads over unappropriated government lands, acceptance of which by the public results from 'use by those for whom it was necessary or convenient'. It is not required that 'work' shall be done on such a road, or that public authorities shall take action in the premises. User is the requisite element, and it may be by any who have occasion to travel over public lands, and if the use be by only one, still it suffices. 'A road may be a highway though it reaches but one property owner. 29 C.J. 367. He has a right to access to other roads and the public has a right of access to him. Pagels v. Oakes, 64 Iowa 198, 19 N.W. 905, 907. Its character is not determined by the fact that but few persons use it' . . ."[10]

It is further concluded that, since this Court has found that Farmers Loop Road was established by public user prior to Villy Yankovich's homestead entry upon the lands encompassed within Pacel No. F-1353 and prior to Charles O. Fowler's homestead entry as to the same lands, that Charles O. Fowler's title to the lands within Parcel No. F-1353 was subject to the Farmers Loop Road right-of-way.[11]

There remains one issue to be determined, namely that of the width of the Farmers Loop Road right-of-way. In **Bishop v. Hawley**, supra, note 10, 238 Pat. 286, the Court, in determining the question of the width of a right-of-way established pursuant to Section 932, Title 43 U.S.C.A., stated as follows:

> "From the cases concerning the width or height of rights of way arising from private grant, we find that it is a general principle that, when such an easement is granted but not defined, the privilege must be a reasonable one for the purposes for which it was created . . .
>
> Practically the same rule is applied to determine the width of highways established by prescription or adverse user. The right of way for such a road 'carries with it such a width as is reasonably necessary for the public easement of travel'. . . .
>
> We think, therefore, that the trial judge was right when he declared 'as a matter of law' that the width of the highway in the case at bar 'must only be a reasonable width necessary for the use of the public generally' . . . for we think we may safely assume that Congress intended by said act to grant only rights of way reasonably necessary for the use of the general public."

Similarly, the Court's opinion in **Montgomery v. Somers**, 50 Or. 259, 90 P. 674 (1907) at page 678 reads as follows:

> ". . . Where the right to a highway depends solely upon user by the public, its width and the extent of the servitude imposed on the land are measured and determined by the character and extent of the user, for the easement cannot on principle or authority be broader than the user. . . .
>
> . . . While it is the general rule that the width of a highway established by user is limited to the ground, actually used, the question is usually for the jury, giving proper consideration to the circumstances and conditions attending the use. . . ."[12]

In view of the foregoing authorities, it should be noted at this point that the State relies primarily upon the approach taken by the Court in **City of Butte v. Mikosowitz**, 36 Mont. 350, 102 P. 593 (1909) in support of its contention that the width of the Farmers Loop right-of-way is sixty-six feet. At pages 595 and 596 of that opinion, it is stated:

> "In using the term 'highway' the Congress must have intended such a highway as is recognized by the local laws, customs and usages; and, since in this state public highways generally are 60 feet in width . . ., the Court did not err in its judgment in this record. . . ."[13]

Further, the State, relying solely upon the provisions of Section 1, Chapter 19, S.L.A. 1923, contends that the provisions of this Act evidence the applicable "local laws" and "customs" and that this Court is, therefore, required to find that the Farmers Loop right-of-

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[9]The evidence outlined in this Memorandum Opinion does not reflect the total extent of the testimony pertaining to the two issues discussed thus far.

Unlike the evidence adduced in Hameriy v. Denton, supra, 389 P.2d at 125, this Court finds that those who did use Farmers Loop Road had real interests in the lands to which it gaves access and that Farmers Loop Road was necessary or convenient for the accommodation of the public.

[10]For additional authorities pertaining to public user under Section 932, Title 43 U.S.C.A., see **Ball v. Stephens**, 68 CA2d 843, 158 P.2d 207, 209, 210 (1945); **Lovelace v. Hightower**, 50 N.M. 50, 168 P.2d 864, 867 (1946); **Bishop v. Hawley**, 33 Wyo. 271, 238 P. 284, 285, 286 (1925); **Wheeler v. City of Oakland**, 35 C.A. 671, 170 P. 864, 866 (1917); **Lindsay Land & Livestock Co. v. Churnos**, 75 Utah 384, 285 P. 646 (1930) where at page 648 the Court wrote:

> "While it is difficult to fix a standard by which to measure what is a public use or a public thoroughfare, it can be said here that the road was used by many and different persons for a variety of purposes; it was open to all who desired to use it; that the use made of it was as general and extensive as the situation and surroundings would permit, had the road been formally laid out as a public highway by public authority. . . ."

[11]**Ball v. Stephens**, supra note 10, 158 P.2d at 211; **Lovelace v. Hightower**, supra note 10, 168 P.2d at 874; **Sullivan v. Condas**, 76 Utah 585, 290 P. 954, 957 (1930); **Wilson v. Williams**, 43 N.M. 173, 87 P.2d 663, 665 (1939); **Kirk v. Schultz**, 62 Idaho 286, 110 P.2d 266, 268 (1941); **Costain v. Turner County**, 72 S.D. 427, 36 N.W. 2d 382, 383 (1949).

[12]See Lindsay Land & Livestock Co. v. Churnos, supra note 10, 285 P. at p. 649 where it is stated:

> ". . . It was proper and necessary for the court in defining the road to determine its width and to fix the same according to what was reasonable and necessary, under all the facts and circumstances, for the uses which were made of the road. . . ."

See also **Bayard v. Standard Oil**, 38 Or. 438, 63 P. 614, 615 (1901).

[13]The quoted language has reference to Section 932, Title 43 U.S.C.A.

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way is sixty-six feet in width.[14] In brief, this Court cannot agree or find that the provisions of Section 1, Chapter 19, S.L.A. 1923 established the local law or reflect the local custom as to width of right-of-way established pursuant to the provisions of Section 932, Title 43 U.S.C.A. at the times in question. In light of the evident adduced at the hearings, and adopting the **Bishop, Montgomery** and **Lindsay** decisional tests, this Court is of the opinion that the State has not established that a sixty-six foot right-of-way should be excluded from the present condemnation action as the same pertains to Parcel No. F-1353.[15] This Court further concludes, taking into consideration the character and extent of user as disclosed by the evidence and upon consideration of what is deemed a reasonable width necessary for the use of the public generally, that as to Parcel No. F-1353 only the present width of Farmers Loop Road should be excluded from the condemnation in question.[16]

The foregoing shall constitute Findings of Fact and Conclusions of Law. No costs or attorneys' fees are awarded. Counsel for defendant Arlene Fowler is to serve and lodge an appropriate Judgment in conformity with the foregoing.

[14]Section 1, Chapter 19, S.L.A. 1923 provides:

'A tract of four rods wide between each section of land in the Territory of Alaska is hereby dedicated for use as public highways, the section line being the center of said highway. But if such highway shall be vacated by any competent authority the title of the respective strips shall enure to the owner of the tract of which it formed a part by the original survey."

Note: As to Parcel No. F-1352, the evidence shows that we are not concerned with section line lands. See: Plaintiff's Exhibit "A".

[15]Note also the State's position is somewhat selective in that the State concludes that Section 1, Chapter 19, S.L.A. 1923 is more preferable than the provisions of Section 13, Chapter 36 S.L.A. 1917 which provided:

"The Divisional Commission shall classify all public Territorial roads and trails in the division as wagon roads, sled roads, or trails . . . The lawful width of right-of-way of all roads or tracts shall be sixty feet."

In limitation of the foregoing, see Clark v. Taylor, 9 Alaska 293, 312 (D.C.D. Alaska 1938). See also 39 Stat. 409, 411, 413 for examples of other widths.

[16]The evidence establishes that prior to Villy Yankovich's entry Farmers Loop Road had evolved from its inception width of a road wide enough for one wagon (4 to 8 feet in width) to a road of a width of 15 to 16 feet. The evidence further discloses that the present width of Farmers Loop Road at Parcel No. F-1353 is 25 feet.

Supreme Court
Op. No. 131 (1963)

Constitutional Law-equal protection; Criminal Procedure-stay pending appeal.

Imposition of a special burden on licensed commercial fishermen whose licenses have been forfeited following conviction of fisheries laws or regulations by prohibiting the court the discretionary authority to stay a license forfeiture pending appeal under a statute while permitting a stay pending appeal in other classes of license suspension or revocation denies commercial fishermen of "equal rights, opportunities, and protection under law" under Art. I, Sec. I of the state constitution; and statute held unconstitutional.

HENRY C. LEEGE, District Magistrate, First Judicial District, at Juneau, and STATE OF ALASKA,

Appellants,

v.

AL MARTIN, JAMES HOUSTON, WILLIAM DAVIS, JR., and JOHN G. MARTIN,

Appellees.

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, James A. von der Heydt, Judge.

Appearances: George N. Hayes, Attorney General of Alaska, and Avrum M. Gross, Assistant Attorney General, Juneau, for appellants. Roger G Connor, Juneau, for appellees.

Before: Nesbett, Chief Justice, Dimond and Arend, Justices.

DIMOND, Justice.

Appellees, commercial fishermen, were convicted by a jury in district magistrate court of fishing in a closed area. By statute in 1959 this offense was made a misdemeanor with penalties of fine and imprisonment.[1] In addition, the statute provided for forfeiture of commercial fishing licenses.[2] In 1961 the legislature enacted chapter 112 which amended the license forfeiture provision by adding the sentence: "Any forfeiture under this section is effective immediately upon conviction and no stay pending appeal may be granted."[3]

Appellees appealled their convictions to the superior court. Pending determination of those appeals, the superior court ordered a stay of that part of the magistrate court's judgment providing for forfeiture of the fishing licenses, and declared unconstitutional that portion of chapter 112 which prohibited the granting of a stay pending appeal. The appellants (who for convenience will be referred to collectively as the "state") have appealed to this court, claiming that the superior court's decision was erroneous. We shall consider two issues: (1) whether chapter 112 effectively changed rules of practice and procedure made and promulgated by this court; and (2) whether chapter 112 denies appellees equal rights, opportunities, and protection under the law in violation of Art. I, § 1 of the state constitution.[4]

Rule Making Power.

Article IV, § 15 of the constitution provides:

> The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

It is the state's position that enactment of chapter 112 prohibiting a stay pending appeal constituted the exercise by the legislature of its constitutional authority to change rules of practice and procedure that had been made and promulgated by the supreme court.

This court has adopted a rule governing stays of imprisonment and fines where an appeal in a criminal case is taken from the magistrate court to the superior court.[5] There is no rule which specifically authorizes the superior or magistrate courts to stay the execution of a license forfeiture.

Appellees contend that in this situation, when there is no specific rule in a particular procedural area, the legislature has no authority to act; since its constitutional power to change "These rules" is limited to promulgated, existent rules upon which a change may be wrought. On the other hand, the state argues that the rules promulgated by this court must be considered in their totality; that it is the body of those rules as an entity which the legislature is empowered to change; that an addition to the body of rules is no less a "change," within the meaning of the constitution, than a deletion or amendment of a specific, existing rule; and that the legislature therefore does have the power to enact a procedural statute in an area not covered specifically by a rule of this court.

This is not the occasion to answer the question raised by appellees and the state as to whether the legislature may intervene to add a provision dealing with a procedural problem not specifically covered by a court rule. The reason is that chapter 112, if it is held to have force, will directly change, by limitation, specific rules of practice and procedure promulgated by this court.

Where the jurisdiction of this court is invoked, either by way of appeal, by petition for review, or by original application, this court or a justice thereof is authorized by Supreme Ct. Rules 7(d) and 33(b) to stay the enforcement or effect of the judgment appealed from or of the order or decision sought to be reviewed, and to stay proceedings in the court below.[6] The

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[1]SLA 1959, ch. 94, art. III, §13, as amended SLA 1960, ch. 131, §24.

[2]SLA 1959, ch. 94, art. III, §11 makes the forfeiture discretionary with the court on first and second convictions, and mandatory on a third conviction.

[3]SLA 1961, ch. 112.

[4]Alaska Const. art. I, §1 provides: "This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State."

[5]Mag. Crim. R. 2(d) provides in part: "A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail. A sentence to pay a fine or a fine and costs may be stayed, if an appeal is taken, by the magistrate or by the superior court upon such terms as the court deems proper." This rule was Crim. R. 60 (d) prior to January 1, 1963, with identical wording.

[6]As to appeals, Supreme Ct. R. 7 (d) (2) provides: "The supreme court or a justice thereof may stay the enforcement or effect of the judgment appealed from or the proceedings in the court below upon such terms as to bond or otherwise as may be proper. Application for a stay to this court or a justice thereof normally will not be entertained unless application has first been made to the court below and has been denied, or unless the security offered below has been disapproved."

As to petitions for review and original applications, Supreme Ct. R. 33 (b) provides: "Proceedings in the superior court or the enforcement of any order or decision thereof shall not be stayed by the filing of a petition for review or of an original application for relief unless the superior court or this court or a justice thereof shall so order. Applications for stay to this court or a justice thereof normally will not be entertained unless application has first been made to the superior court and has been denied."