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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed December 26, 1984

**LOREN L. LARSON AND HELEN E. LARSON,**

Plaintiffs-Appellants,

vs.

**JULIA W. JOHNSON, PETER J. JOHNSON and MICHAEL JOHNSON,**

Defendants-Appellees.

4-457
83-976

431

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Appeal from the Iowa District Court for Woodbury County - Michael S. Walsh, Judge.

Plaintiff property owners appeal from judgment for defendants in an equitable action seeking to permanently enjoin defendants from blocking access to a paved strip of road, asserting that the trial court erroneously placed on plaintiffs the burden of proof on the issue of abandonment of the road and that the evidence was insufficient to support the trial court's finding that the road had been abandoned. REVERSED AND REMANDED.

Robert W. Green of Carter, Sar, Edmonds & Green, Sioux City, for plaintiffs-appellants.

Raymond E. Pogge of Pogge, Root & Steege, Council Bluffs, for defendants-appellees.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

SACKETT, J.

## I. Nature of the Case

Plaintiff-Appellants filed a petition in equity on September 13, 1978, to temporarily and permanently enjoin the defendant-appellees from blocking access to a paved strip of real estate which had been used as access to plaintiff's property. The real estate involved in this case was a portion of former Highway 141. On October 23, 1978, the plaintiffs obtained a temporary injunction restraining defendants from blocking plaintiffs' access, over the paving, to their farm property. Plaintiffs continued seeking a permanent injunction. The trial court found that the property had been abandoned and that plaintiffs had failed to prove that they had a valid easement. The temporary injunction was dissolved and plaintiffs' petition was dismissed. Plaintiffs appealed.

## II. Statement of Facts

This case involves a dispute as to whether an easement for road purposes remains on a strip of paved realty. In 1919 the State of Iowa purchased an easement from the father of one of the defendants - one A. S. Wendell. The easement became part of Highway 141. In 1959, Highway 141 was relocated. The portion of "old" 141, which is the subject of this lawsuit, was used by the plaintiffs as a means of access to their farm property.

On December 1, 1971, the Iowa State Highway Commission (now the Department of Transportation) passed a formal resolution of abandonment of the road in question. The "old" 141 then was designated "Woodbury F-2(12)." The plaintiffs claim that a valid easement exists over the road in favor of Woodbury County, Iowa. If this is so, the plaintiffs would have a right to use it and defendants should be enjoined from prohibiting the use. The trial court found the plaintiffs failed to prove that Woodbury County had a valid easement over the portion of "old" 141 in question and denied a request for a permanent injunction.

## III. Applicable Law

### A. Scope of review.

Plaintiffs petitioned for a permanent injunction in order to keep "old" 141 open so as to allow them access to their farm property. There was no claim for monetary damages. An injunction may be obtained in either an equity proceeding or an action at law. See Iowa R. of Civ. P. 320 (1983). Here, in the absence of a claim for damages, plaintiffs have sought only equitable relief. Cf. Green v. Advance Homes, Inc., 293 N.W.2d 204, 208 (Iowa 1980)(money damages sought in the alternative to equitable relief found to be a combination of legal and equitable remedies). Therefore, our scope of review in this appeal shall be de novo. Iowa R. of App. P. (1983). We give weight to the findings of the trial court, but are not bound by them. Iowa R. of App. P. 14(f)(7)(1983).

### B. Trial court erred in finding abandonment.

The trial court issued its ruling on July 13, 1983, and concluded that the temporary injunction which had been in operation was dissolved and denied plaintiffs' prayer for a permanent injunction. The court concluded that the "totality of the evidence" demonstrated the fact that "old" 141 had been abandoned. While it is unclear from its order it appears that the court determined the abandonment was by the State Highway Commission, and not by Woodbury County. After reviewing the facts and circumstances of this case, as well as the applicable law, we conclude that the trial court erred in denying a permanent injunction to the plaintiffs. We reverse and remand for the implementation of an injunction so as to prevent defendants from barricading "old" 141. The injunction is to remain in place until the appropriate government agency takes fully lawful steps to vacate or abandon "old" 141, thereby removing the easement across defendant's property.

Highway 141 was rerouted in 1959. Chapter 306 of the 1958 Code of Iowa contained the legislative authority for the vacation of highways. The particular provisions to focus on in this regard are Code sections 306.4 - 11. Iowa Code §§306.4 -11 (1958). Section 306.4 of the 1958 Code provides in part: ". . . the board or commission which has control and jurisdiction over such hiway or highway system, shall have power, on its own motion, to alter or vacate and close any such highway. . . ." Iowa Code §306.4 (1958). In section 306.5 the Code provides that the agency body with jurisdiction over a particular highway "shall fix a date for hearing" before the closing takes place. Iowa Code §306.5 (1958)(emphasis provided). Hearings in this regard need to be genuine, not a mere sham. Bricker v. Iowa County Board of Supervisors, 240 N.W.2d 686, 690 (Iowa 1976). This is not just a matter of legislative intent, but required by due process. Id.

We turn our attention to the task of making a determination as to what governmental agency had jurisdiction over the portion of "old" 141 in question after the rerouting in 1958, and also for all times pertinent to this lawsuit. Chapter 306 contains a provision which aids us in making this determination. "Jurisdiction and control over the highways of the state are hereby vested in and imposed on (1) the state highway commission as to primary roads [and] (2) the county board of supervisors as to secondary roads within their respective counties, . . . ." Iowa Code §306.3 (1958). When originally constructed in 1919, Highway 141 was a primary road under the jurisdiction of the Iowa State Highway Commission. After the rerouting of 141 was completed in 1959, with no affirmative action taken pursuant to Chapter 306 of the Code, it is clear that the State retained jurisdiction of the relevant portion of "old" 141. In 1971, a "Resolution of Abandonment" was passed by the Highway Commission. In a purported abandonment, the designation of "old" Primary Road No. 141 was changed and now was to be referred to as Woodbury F-2 (12). We find that this "abandonment"

operated to do nothing more than to transfer the exclusive jurisdiction of this part of "old" 141 from the State and its Iowa State Highway Commission to Woodbury County and its corresponding Board of Supervisors.

There are two alternative methods by which "old" 141 could be abandoned by the County. The first alternative, described as "vacating" a highway, would be to follow the statutory procedure described in Chapter 306 of the Code. This alternative was not followed in this case. No hearing was ever held by the Board of Supervisors, no date was ever fixed for a hearing, no place for a hearing was designated. See Iowa Code §306.5 (1958). No notice of a hearing was ever given to interested persons. See Id. at 306.6. No final order of vacation was ever issued by the county supervisors. Id. at 306.10. The resolution which was passed by the Highway Commission certainly did not effectuate a vacation. Cf. Bricker, 204 N.W.2d at 689 (Iowa 1976)(board holds series of meetings before order of vacation issued). A good example of an agency following proper vacation proceedings pursuant to the Code can be found in the opinion of Crowley v. Johnson County, 234 Iowa 142, 12 N.W.2d 244 (Iowa 1943). The supreme court in Crowley noted that:

> "an application was filed asking that the road be vacated; notice was given to appellant of such application and a time was fixed for the hearing thereon; that at such time appellant and all interested parties were present with counsel; that the board of supervisors investigated the matter thoroughly and took full cognizance of the situation and all the factors entering therein and following granted the application and ordered the road vacated and in their order gave reason for so doing."

Id. at 149, 12 N.W.2d 244, 247 (Iowa 1943). The case at bar does not exhibit a factual situation in any sense resembling the proceedings undertaken by the county board in Crowley.

A second alternative to removing the easement for highway purposes from defendants' title, contrasted with that of the procedural method of statutory

vacation, would be by abandonment. Sioux City v. Johnson, 165 N.W.2d 762, 766 (Iowa 1969); Polk County v. Brown, 260 Iowa 301, 306, 149 N.W.2d 314, 317 (1967). It is well settled in Iowa that in addition to the statutory procedure for vacation of a highway, the rights under an easement may be lost by abandonment. Brown at 306, 149 N.W.2d at 316. Absent a showing of compliance with the vacation provision of the Code it would be defendants' burden to show that abandonment had occurred. As to the issue of burden of proof with regard to abandonment the supreme court has stated:

> "In connection with the matter of claimed abandonment of this roadway in question. . . [a]bandonment is a fact which must be proved and the burden is on the one who asserts abandonment to prove it by clear and satisfactory evidence. * * *"

Sterlane v. Fleming, 236 Iowa 480, 483, 18 N.W.2d 159, 161 (1945).

We point out what was stated by the supreme court in Sterlane as regarding this second alternative. Quoting from McCarl v. Clarke County, 167 Iowa 14, 20, 148 N.W. 1015, 1018 (1914) the court said:

> "A road may not be discontinued unless it is vacated, or possibly by abandonment. Abandonment would be a discontinuance in one sense. The question of abandonment of a road involves, not so much the question of time, though after a long time there may arise a presumption. But it involves more the question of intent and acts of the public. Nonuser is not enough, unless coupled with affirmative evidence of a clear determination to abandon. * * * Nor will obstructions or encroachments necessarily work an abandonment. * * * Nor does the failure to keep the road in repair necessarily work an abandonment. * * *"

236 Iowa 480, 483-84, 18 N.W.2d 159, 161 (1945)(citations omitted). Although alluded to in the above excerpt, we would point out that abandonment requires the requisite proof as to two distinct elements. There must be evidence of an intent to abandon the highway, coupled with clear and convincing evidence of affirmative actions evidencing abandonment. We find that defendants' have failed to carry their burden of proof as to both of these issues. Traffic has been regular over the portion of highway in question, albeit derived from limited sources - namely the plaintiffs and defendants. Maintenance by the county has been rare

but some snow removal has taken place. There has been no evidence to establish relinquishment of permanent control or ownership by Woodbury County. See Town of Marne v. Goeken, 147 N.W.2d 218, 223 (Iowa 1966); see also 1 C.J.S. Abandonment §2a P. 5 (1963). Without a prima facie showing of abandonment, there is no need to discuss the ten-year period of nonuse which is an element of the proof needed to show affirmative, outward acts of abandonment. See Kelroy v. City of Clear Lake, 232 (Iowa 161, 168, 5 N.W.2d 12, 17 (1942). In the case of Sioux City v. Johnson, 165 N.W.2d 762 (Iowa 1969) the supreme court discussed factors which would be important to a finding of abandonment: long continued nonuse; id. at 768; adverse and inconsistent possession by others than the county; id.; conduct of county which reasonably tends others to believe use is no longer contemplated; id. at 769; county allowance of others to make valuable improvements on land which county would later try to claim; id.

For the above reasons, we reverse the judgment of the trial court. We remand this matter for the implementation of an injunction to enjoin defendants from obstructing plaintiffs' ingress and egress to and from this property. Such injunction will remain in effect until such time as vacation or abandonment occurs, if one does occur.

REVERSED AND REMANDED.