

PETE C. MERGENSCHROER ET AL *v.* GERALD ASHLEY

5-4603

429 S. W. 2d 120

Opinion delivered June 3, 1968

[Rehearing denied July 15, 1968.]

1. MUNICIPAL CORPORATIONS—ACTION FOR ABATEMENT OF ENCROACHMENT UPON STREETS—GROUNDS.—Before one can abate an encroachment upon a public street, he must show special damages not common to the public at large.
2. MUNICIPAL CORPORATIONS—ACTION FOR ABATEMENT OF ENCROACHMENT—DAMAGES.—Asserted error on ground court refused to order defendant to remove that part of structure which extended into the street right-of-way held without merit where the encroachment shown was not on any portion of the street appellants proposed to use and special damages not suffered by public in general were not shown.

Appeal from Pulaski Chancery Court, Third Division, *Kay L. Matthews*, Chancellor; affirmed.

*Jack Sims*, for appellants.

No Brief filed for appellee.

CONLEY BYRD, Justice. Appellants Pete C. Mergenschroer et al appeal from a chancery decree refusing to enjoin appellee Gerald Ashley's operation of Jo-Jo's Bar-B-Que at 3401 Parker Street, North Little Rock, as a nuisance, and refusing to cause appellee to remove as an obstruction that portion of his barbecue pit that extended into the street right-of-way. For reversal appellant relies upon the following points:

I. The Chancellor erred in holding that the North Little Rock Board of Adjustment was empowered to allow and approve defendant's building his structure into the public right-of-way.

II. The Chancellor erred in refusing or declining to order the defendant to remove that part of the structure known as Jo-Jo's Bar-B-Q which extended into the street right-of-way.

We do not reach the alleged error of the trial court in holding that the North Little Rock Board of Adjustment was empowered to allow and approve appellee's building of the encroachments on the street, because appellants have failed to show any special damages which would entitle them to enjoin the encroachments.

The record shows that the dedicated street right-of-way is 50 feet; that the paved or traveled portion of the road comprises some 25 or 30 feet; and that appellants readily recognize that they could not drive on the 8 or 9 feet of the dedicated right-of-way obstructed by the barbecue pit.

In *Adams v. Merchants & Planters Bank & Trust Co.*, 226 Ark. 88, 288 S. W. 2d 35 (1956), we held that before one could abate an encroachment upon a public street he must show special damages not common to the public at large. Here the encroachment shown is not on any portion of the street which appellants propose to use and because of their failure to show any special damages from the encroachments not suffered by the public in general, we find their contentions to be without merit.

Affirmed.

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