

1953

Mike Dragos and Milka Dragos v. Teddy G. Russell and Manilla Russell : Brief of Appellants

Utah Supreme Court

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Merrill K. Davis; Weston L. Bayles; Attorneys for Defendants and Appellants;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MIKE DRAGOS, and MILKA)	
DRAGOS, his wife,)	
Plaintiffs and Respondents,)	Case No.
)	7895
-vs.-)	
TEDDY G. RUSSELL, and MAN-)	
ILLA RUSSELL, his wife,)	
Defendants and Appellants.)	

FILED

JAN 16 1953

BRIEF OF APPELLANTS

Clerk, Supreme Court, Utah

MERRILL K. DAVIS

WESTON L. BAYLES

Attorneys for Defendants
and Appellants.

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IN THE SUPREME COURT
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MIKE DRAGON. and MILKA :
DRAGOS, his wife, :
Plaintiffs and Respondents. :

Case No.
7895

-vs- :

TEDDY G. RUSSELL and MANILLA :
RUSSELL, his wife, :
Defendants and Appellants. :

BRIEF OF APPELLANTS

STATEMENT OF FACTS

This is an action between adjoining land owners to determine the property line between them, each side claiming trespass and damages against the other. Plaintiffs were awarded judgment by the District Court. The case was then appealed to the Supreme Court, *Dragos v. Russell --Utah--*, 227 P. 2d 831. The Supreme Court reversed and remanded the case with instruction that additional evidence be taken to determine the description necessary to fix the boundary line between the lots of the adverse parties, along the old fence line

north of defendants' new cabins, and to determine location of the sewer line. Further evidence was taken by the District Court and a judgment entered placing the line between the parties along the old fence line with the sewer line to remain in place. Thereafter the judgment was modified placing the property line underneath or near the north edge of defendants' (Teddy G. and Manilla Russell) cabins and ordering the sewer line to be removed. Defendants' appeal from this last modified judgment.

The retrial was held January 19, 1952, and all transcript references herein will be made to the transcript of the rehearing.

The question of the location and removal of the sewer line has now become mute inasmuch as defendants have removed same to the south side of their cabins.

The evidence of plaintiffs on the retrial, was largely an attempt to show the fence had been moved by defendants and was not north of defendants' new cabins, in contradiction of the Supreme Court's former decision.

All parties appear to agree the front line of both plaintiffs' and defendants' property boarding on State Street is 33 feet west of the east line of Lot 15, Block 33, Ten Acre Plat "A", Big Field Survey, and that the dividing point for the front of the land on State Street is North $0^{\circ} 01' 30''$ East 65.06 feet and South $89^{\circ} 55'$ West 33 feet from the Southeast corner of said lot, in Salt Lake County, State of Utah.

The surveyer's plat (Def. Exh. 1 of Jan. 19, 1952) shows the line, claimed by defendants to be the old fence line as running from west to east, however, we believe it will be easier to follow the description from the above described starting point and proceed from east to west.

The old fence line commences at a point (Point 1, Def. Exh. 1 of Jan. 19, 1952), which coincides with the deed point of origin on the east property line of the lands of both parties. This point is North $0^{\circ} 01' 30''$ East 65.06 feet and South $89^{\circ} 55'$ West 33 feet from the Southeast corner of Lot 15, Block 33 Ten Acre Plat "A" Big Field Survey, in Salt Lake

County, Utah (Def. Exh. 1 of Jan. 19, 1952) and runs thence along an old fence South $83^{\circ} 26'$ West 7 feet to point 2 (sway in fence), thence North $82^{\circ} 54'$ West 10 feet to point 3 (sway in fence); thence North $89^{\circ} 54'$ West 87 feet to point 4, the west end of an old fence running west from the east side and between the lands of the parties, each point is a curve in the fence, (Tr. 22, Def. Exh. 1 of Jan. 19, 1952). This fence looks like it has not been disturbed, (Tr. 22); thence North $88^{\circ} 23'$ West 37 feet to a position south of point 5, the east power pole (Def. Exh. 1 of Jan. 19, 1952, Tr. 22, 28-29). This pole is about 2 feet north of defendants' cabins, (Tr. 26); thence North $89^{\circ} 47'$ West 187 feet, (south of point 6 the south end of an old fence running north and south on plaintiffs' property) to point 7, the west power pole, (Def. Exh. 1 of Jan. 19, 1952, Tr. 21). This pole is about 1.5 feet north of defendants' cabins, (Tr. 22, 27); thence South $89^{\circ} 45'$ West 67 feet (north of point 8, the northwest corner of defendants' new cabins) to point 9, old trees, (Def. Exh. 1 of Jan.

19, 1952, Tr. 20, 21); thence South $87^{\circ} 44'$ West 12.7 feet to point 10, the east end of an old fence, (Def. Exh. 1 of Jan. 19, 1952, Tr. 21); thence North $89^{\circ} 46'$ West 87.43 feet along an old wood fence between plaintiffs' land on the north and defendants' land on the south to point 11, an old fence post on the west side of the lands of the parties hereto, (Def. Exh. 1 of Jan. 19, 1952, Tr. 21). This post is also in line with the fence proceeding west and dividing the land west of the land herein in dispute, (Tr. 10, 23, 24). All parties appear to agree that this post is 2.7 feet north of the deed line, (Tr. 24, Def. Exh. 1 of Jan. 19, 1952), except one witness for plaintiffs, who places it 3 feet north of the deed line, (Tr. 10). All parties appear to agree this post is North $0^{\circ} 01' 30''$ East 67.76 feet and South $89^{\circ} 55'$ West 528 feet from the Southeast corner of said lot.

STATEMENT OF POINTS

1. The former decision of the Supreme Court of the State of Utah between the parties in this case, *Dragos vs. Russell*, --Utah-- 237 P. 2d 831, controls

further hearing in the action.

2. The findings of fact, conclusions of law, and judgment and decree entered by the District Court January 29, 1952, as corrected, were correct, and were supported by the evidence.

3. The District Court erred in entering the order of March 1, 1952 straightening the fence line 165 feet due west and the previous line west of the new point to remain the same.

4. The District Court erred in entering amended Findings of fact, conclusions of law, and the amended judgment and decree, July 21, 1952. These are not supported by the evidence, and are contrary to the evidence, the law and the rule of the case set forth in the Supreme Court in the former hearing *Dragos v. Russell --Utah--*, 237 P. 2d 831.

ARGUMENT

I.

The former decision of the Supreme Court of the State of Utah between the parties in this case, *Dragos v. Russell, --Utah--*, 237 P. 2d 831, controls further

hearing in the action.

An adjudication on a former appeal becomes the law of the case for subsequent proceedings including subsequent appeal. *Grand Central Mining Co. vs. Mammoth Mining Co.*, 36 Utah 364, 104 Pac. 573; 3 Am. Jur. 541, Sec. 985. In *Helper State Bank vs. Crus*, 95 Utah 320, 81 P. 2d 359 at page 361 the court speaking of this rule says:

"It is well established rule in this jurisdiction, as well as in a majority of other jurisdictions that where the question of law and fact are the same the decision of the first appeal, whether right or wrong, becomes the law of the case on the second appeal and is binding as well on the parties to the action, the trial court, and the appellate court. To this effect was *Wenard v. Green*, 4 Utah 456, 11 P. 337; *Societe des Mines v. Mackintosh*, 7 Utah 35, 24 P. 669; *Krantz v. Rio Grande Ry. Co.*; 13 Utah 1, 43 P. 623, 32 L.R.A. 828; *Brim v. Jones*, 13 Utah 440, 45 P. 46, 352; *Silva v. Pickard*, 14 Utah 245, 47 P. 144; *People's B. & L. Ass'n v. Fouble*, 18 Utah 206, 55 P. 57; *Petter v. Ajax Mining Co.*, 22 Utah 273, 61 P. 999; *Herriman Irrigation Co. v. Keel*, 25 Utah 96, 69 P. 719; *State v. Mortensen*, 27 Utah 16, 74 P. 120, 350; *Corporation of Members of L.D.S. v. Watson*, 30 Utah 126, 83 P. 731; *Teakle v. San Pedro Railroad Co.* 36 Utah 29, 102 P. 635, 639; *Grand Central Mining Co. v. Mammoth M. Co.*, 36 Utah 364, 104 P. 573, Ann. Cas. 1912A, 254; *Grow v. Oregon S. L. Ry. Co.*, 47 Utah 26, 150 P. 970; *Chadwick v. Beneficial Life Ins. Co.*, 56 Utah 480, 191 P. 240; *Thompson v. Reynolds*, 59 Utah 416, 204 P. 516; *Huntsman v. Huntsman*,

61 Utah 376, 213 P. 179; Forbes v. Butler, 73 Utah 522, 275 P. 772; Utah State Nat. Bank v. Livingston, 74 Utah 456, 280 P. 327; Sessions v. Dee Memorial Hospital Ass'n., Utah, 78 P. 2d 645."

The Supreme Court, page two of the former decision, *Dragos v. Russell*, --Utah--, 237 P. 2d 831, provides:

"Additional evidence should be taken to determine what description is necessary to fix the boundary between the lots of the parties so that the new line correctly coincides with the fence line which is conclusively shown to be north of the cabins."

The under scoring is added.

II.

The findings of fact, conclusions of law, and judgment and decree entered by the District Court January 29, 1952, as corrected, were correct, and were supported by the evidence.

The survey line along the old fence line as set forth in the statement of facts might be more concisely stated in table form, showing the distance of each point from the deed line. These have been calculated by interpolation from the tables in Howard Chapin Ives, *Natural Trigonometric Functions*. Second Ed., Fourth Printing, 1945, and are as follows:

<u>Description</u>	<u>Distance from deed line</u>
Commencing at point of origin 0° 01' 30" E 65.06 ft. and S 89° 55' W 33 ft. from SE cor. Lt. 15, Blk. 33, Ten Acre Plat "A", B. F.S. in Salt Lake Co., Utah, (point 1)	0
th. S 83° 26' W 7 ft. to point 2 (sway in fence)	.794 ft. S
th. N 82° 54' W 10 ft. to point 3 (sway in fence)	.462 ft. N
th. N 89° 54' W 87 ft. to point 4 (west end of fence)	.741 ft. N
th. N 88° 23' W 37 ft. to point 5 (East Power Pole)	1.829 ft. N
th. 89° 47' W 187 ft. to point 7 (West power pole)	2.938 ft. N
(N W corner of cabins point 8)	2.774 ft N.
th. S 89° 45' W 67 ft. to point 9 (old trees)	2.743 ft N.
th. S 87° 44' W 12.7 ft. to point 10 (east end of old fence)	2.259 ft. N
th. N. 89° 46' W 87.43 ft. to point 11 (post on west end of old fence)	2.742 *
*cumulative error .042 ft.	

This table shows the fence line as determined
by the survey of George V. Gudgeon, a professional

engineer and surveyor (Tr. 18) is the correct line for the old fence line north of the building.

The general direction of the old fence is toward the north, from the east to the west, the same general direction of the new cabins constructed after 1944.

The sewer line as established by the surveyor, George V. Gudgell, runs in the same general direction south of the fence line, being about one foot to fourteen inches away from the buildings (Tr. 26). Defendants contend this location of the sewer line is correct and that the sewer line was south of the fence and that its location adds credance to the location of the fence line as established and claimed by defendants.

It is not controverted that plaintiffs attached to defendants' sewer line at one time and paid defendants for such accomodation. Does such action indicate plaintiffs were complaining that the sewer line was on their land or

extending beyond the fence line, which they and defendants were recognizing as the line between them?

Plaintiffs' witnesses themselves add credance to defendants' arguments. George S. Jones testifying for plaintiffs said that in 1936 or 1937 a pole was placed next to the fence (Tr. 5). (This is the east pole or point #5 on Def. Exh. 1 of Jan. 19, 1952). He could not say how far the pole was from the fence, maybe 10 or 12 inches. He did not know about the other pole (Tr. 6). Thus by the testimony of plaintiffs' witness George S. Jones, the location of the east pole point #5, the old fence would be at least one foot or more north of defendants' building.

The fence line in the survey by the witness George V. Gadgell was followed where it remained and as many points as could be were tied to determine

its proper location, (Tr. 28, 29). In addition the fence line and the westernmost post thereof coincides with the fence line between lands to the west of the lands here in question, (Tr. 10, 11, 24). This supports contention of defendants that the location of the fence line as heretofore set forth is correct.

III

The District Court erred in entering the order of March 1, 1952 straightening the fence line 165 feet due west and the previous line west of the new point to remain the same.

The old fence running from the east sidewalk towards the west runs to the north as disclosed by the evidence. There is no evidence whatsoever indicating the old fence line runs due west, (points 1,2,3, and 4 Def. Exh. 1 of Jan. 19, 1952). Such order is in direct conflict with the former Supreme Court decision, *Drages v. Russell*, --Utah--, 237 P. 2d 831.

IV

The District Court erred in entering findings of fact, conclusions of law, and the amended judgment

and decree, July 21, 1952. These are not supported by the evidence, and are contrary to the evidence, the law and the rule of the case set forth in the Supreme Court in the former hearing *Dragos vs. Russell --Utah--*, 237 P. 2d 831.

Nowhere in the record is there any evidence that the old fence ran from the beginning point (which is N $0^{\circ} 01' 30''$ E 65.06 feet and S $89^{\circ} 55'$ W 33 feet from the SE corner of Lot 15, Block 33, Ten Acre Plat "A" B.P.S.) South $89^{\circ} 55'$ West 165 feet (this is the old deed line) thence North $89^{\circ} 36' 52''$ West 330.002 feet. Such a finding and decree is contrary to the evidence and the former decision on appeal, *Dragos v. Russell, --Utah--*, 237 P2d 831.

If the line of this decree is followed and analyzed defendants contention can be seen more clearly. Calculation interpolation with the tables in Howard Chapin Ives, *Natural Trigonometric Functions*, Second Ed. Fourth Printing, 1945, the foregoing line S $89^{\circ} 55'$ W) would reach the edge of defendants' cabins 144.32 feet from the east sidewalk. At 165

feet from the sidewalk the line would be .234 feet underneath defendants' cabins.

At 165 feet west of the sidewalk the line continues N 89° 36' 52" W. to be 2.7 feet north of the deed line 330.002 feet further west, however the cabins extend north over the deed line 2.7 feet at the northwest corner of the cabins, which is one 217.1 feet west of the point, 165 feet west of the east sidewalk. Thus at the northwest corner of the cabins they extend over this decreed line .9226 feet or almost one whole foot. Thus almost the complete north edge of defendants' cabins have been determined to be encroaching over the fence line between the parties which the Supreme Court's decision held was north of defendants' cabins, *Dragos v. Russell*, --Utah-- 237 P. 2d 831.

CONCLUSION

Upon the basis of the law and the facts it is respectfully submitted that this court should determine the boundary line between the parties herein, to be along the old fence lines and described as follows:

"Beginning at a point which is North 0° 01' 30" East 65.06 feet and South 89° 55' West 33 feet from the Southeast corner of Lot 15, Block 33 Ten-Acre Plat "A", Big Field Survey, Salt Lake County, State of Utah, and running thence South 83° 26' West 7 feet, thence North 82° 54' West 10 feet, thence North 89° 54' West 87 feet, thence North 88° 23' West 37 feet, thence North 89° 47' West 187 feet, thence South 89° 45' West 67 feet, thence South 87° 44' West 12.7 feet, thence North 89° 46' West 87.43 feet to a point North 0° 01' 30" East 67.76 feet and South 89° 55' West 528 feet from the Southeast corner of Lot 15, Block 33, Ten Acre Plat "A", Big Field Survey, Salt Lake County, State of Utah.

Respectfully submitted,

MERRILL E. DAVIS

WESTON L. BAYLES

Attorneys for
Defendants and Appellants

Received a copy of the foregoing brief this _____
day of January, 1953.

Attorney for Plaintiffs and Respondents.