1956

Stan Naisbitt v. Parley Hodges and Theora Hodges : Brief of Appellants

Utah Supreme Court

David H. Bybee; Attorney for Appellants;

IN THE SUPREME COURT OF
THE STATE OF UTAH

AN NAISBITT,

Plaintiff and
Respondent

-vs-

RLEY HODGES and
EORA HODGES,

Defendants and
Appellants

CASE No. 8531

BRIEF OF APPELLANTS

DAVID H. BYBEE
Attorney for Appellants

AUTHORITIES CITED

STATUTES

TEXTS

STATEMENT OF FACTS

A suit was commenced in the lower court to quiet title to two tracts of land located along the South end of Bear Lake in Rich County, Utah. Two of the Defendants, J. W. Neil and Ellen F. Neil, his wife, entered a disclaimer and therefore are not made parties to the action on this appeal.

Pending a hearing on the matter, the parties Plaintiff and Defendants Hodges agreed and stipulated that each would obtain the services of an engineer, and the two engineers would conduct a survey and measurement of the land under dispute. This was accomplished, and pursuant to the measurements and survey made, all differences between the parties were resolved so far as the property described as Tract No. 2 in the complaint was concerned. Therefore, Tract No. 2 is not involved in this appeal. The engineers also established the location and the measurements of Tract No. 1, as described in the complaint.

The Defendants Hodges claim the South 130' of the land described in Tract No. 1 in the complaint. They assert no claim to the portion of the land lying North of this 130' strip.

The other issues in the court below had to do with the right to use a public road running approximately North and South connecting with State Highway, and running to the lake. This has been partially resolved by the parties. The main issue was the ownership of the South 130' of the land described as Tract No. 1.

The trial court found in favor of the Plaintiff, and against the Defendants Hodges, and it is from this finding and decree that the Defendants Hodges now appeal

STATEMENT OF POINTS

1. The trial court erred in finding there was a mutual mistake in the transfer of property from the Defendants Hodges, to a predecessor in interest of Plaintiff, in 1916.

2. The trial court erred in finding that Plaintiff had acquired title to the South 130' of the Tract No. 1 by adverse possession.

3. The trial court erred in finding that there was an express agreement between the Defendants Hodges and one of Plaintiff's predecessors as to the location of the boundary line between the South 130' of Tract No. 1, and the North portion of Tract No. 1, which express agreement had been acquiesced in and carried out by the parties until just recently, and as a result of this agreement, and by acquiescense the Defendants Hodges transferred the property described as the South 130' of Tract No. 1, to a predecessor in interest of the Plaintiff.

ARGUMENT

1. The trial court erred in finding that there was a mutual mistake involved in the transfer of property, wherein the Defendants Hodges granted to Plaintiff's predecessor property described in the Conveyance.

The land transferred to the Neils by the Hodges in 1916 was a part of Lot 5 which Parley Hodges and his wife, Theora Hodges, acquired under the Homestead Laws. They received a patent to the property in about the year 1916. Before the patent was obtained by Parley Hodges and his wife, the Hodges Land, Livestock and Milling Company, a Corporation had constructed lambing sheds close to the lake shore along the north portion of this Tract. Testimony of the surveyor, Torrey Austin, and of Joseph Hodges indicates there was also a fence line approximately where the dividing line between the portion of land that Parley Hodges claims and the portion deeded to Neil exists; that is, about 75' South of the Northeast

corner of Lot 5. This fence apparently ran approximately East and West for about 867', and the Hodges land, Livestock and Milling Company had entered into an agreement with the Neils whereby they intended and promised to transfer this property to them. To do this, it was necessary that they acquire this property from Parley Hodges.

There can be no dispute as to the location of the Northeast corner of Lot 5. That was established by the engineers retained by the parties for that purpose, and it was stipulated in this hearing that the point so established is the proper commencing point for all measurements of Tract No. 1 used herein. The deed recited specifically, that starting at that point, it ran South 75' thence West over a given number of feet to or past the roadway; thence, North to the lake, and thence along the meander line of the lake shore to the point of beginning. There was no ambiguity in its terms.

After 1916 the entire area, known as Tract No. 1 was used by Hodges and the lambing sheds were used jointly by Neil and the Hodges for various enterprises. Prior to 1918, Hodges built a garage on the South portion of Tract No. 1, on the land which he claimed and still claims, and he used this garage for commercial purposes for a number of years. This certainly is inconsistent with any mutual mistake, theory or purported mutual mistake that Respondent or any of his predecessors might claim. It would appear that had Neil known or, thought that he owned this property, he most certainly would have prevented Hodges, or attempted to prevent Hodges, from building his garage upon this area.

According to the record, the documentary evidence, to-wit: The Abstract of Title, this property was conveyed by the Neils to O. H. Nelson about 1939. The same description is recited in the Deed to Nelson, as was recited in the Deed from

Hodges to the Neils. Had there been a mutual mistake, or had there been any mistake, it seems most reasonable that it would have been discovered and an attempt made to correct it between the time it was conveyed to Neil in 1916, and the time it was conveyed by Neil to Nelson in 1939. While it is not incumbent upon Defendant to disprove mutual mistake, all of this evidence is in the record to point only to one conclusion, and that is that there could have been no mistake in the boundaries of the property conveyed by Hodges to Neil in 1916.

2. The lower court erred in a finding that Plaintiff obtained title to the disputed property by adverse possession.

The Utah Code Annotated 1953, Title 78, Chapter 12, Paragraph 7, "Adverse Possession".; POSSESSION PRESUMED IN OWNER. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by Law, and the occupation of the property by any other persons shall be deemed to have been under and in subordination to the legal title unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of this action." The evidence shows that Defendant Hodges obtained a patent to this property by virtue of having homesteaded it for the requisite time and performing the requisite conditions which awarded them the patent to the property. At no time does the Abstract of Title reveal that Defendants Hodges divested themselves by conveyance or otherwise of the disputed area. Since it cannot be claimed that plaintiff is claiming land under written instrument, or judgment, then the conditions and limitations of Utah Code Annotated Title 78, Chapter 12, Paragraph 10-11-12, must be construed to determine whether or not plaintiff could claim title by virtue of adverse possession.

78-12-10 UNDER CLAIM NOT FOUNDED ON WRITTEN INSTRUMENT OR JUDGMENT.

Where it appears that there has been an actual continued occupation of land under claim of title, exclusive of any other right, but not founded upon a written instrument judgment or decree, the land so actually occupied and no other is deemed to have been held adversely.

Utah Code Annotated 1953, 78-12-11. "WHAT CONSTITUTES ADVERSE POSSESSION NOT UNDER WRITTEN INSTRUMENT". For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, judgment or decree, land is so deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial enclosure.

2. Where it has been unusually cultivated or improved.

3. Where labor or money has been expended upon dams, canals, embankments, acquaducts, or otherwise, for the purpose of irrigating such land, amounting to the sum of five dollars per acre.

In the instant case, the first of these requirements has never been met. This particular parcel of land has never been enclosed by a substantial enclosure. It must be remembered that where there are adjacent properties, the person claiming one by adverse possession must actually occupy this portion claimed. The evidence shows that along the West of this property, a substantial fence was erected by persons other than the owners of the property. That subsequently a fence was put along the South of this disputed strip. There never was a fence along the East of this disputed strip, and there never was a substantial enclosure along the West for the requisite period of time. The evidence shows that when the roadway from the highway to the lake was established, a fence going part way along the West of the property was erected, but it remained only a very short time. It did not continue on to the lake,

so that the property never was enclosed by a substantial fence. At a subsequent time, the evidence shows that this property, with other property, was leased for a summer and the lessee pastured his cow upon it, and he put a single wire fence along the West side of the property to the lake. This was only for the purpose of keeping the cow within the enclosure. It was removed immediately after the cow was taken out, so that there was never a fence of any kind except this single wire which certainly could not be classed as substantial, along the West side of this property.

2. There was no evidence that this property was cultivated by plaintiff or his predecessors in interest. The evidence shows that during and prior to the year 1918, Defendant Hodges erected a garage upon this disputed area, and used the same as an enterprise of his own for several years. That about this time, jointly with Neil, there were several cabins placed partially upon this disputed strip. That they were subsequently moved, however. The evidence also shows that Defendant Hodges filled in a slough that was upon this disputed area, during and subsequent to the year 1918. About 1939, Defendant Hodges installed a pipeline to conduct water along this disputed area, and across it and down to a dance pavilion right on the lake shore which was constructed and operated by O. H. Nelson, another of the Plaintiff's predecessors in interest. But at no time does the evidence show that there was exclusive possession of this strip by Plaintiff or his predecessors. It appears that Defendant Hodges occupied the disputed strip and worked in conjunction with Plaintiff's predecessors upon the whole area at all times, from 1916 until Plaintiff Naisbitt acquired the property, at which time he attempted to exclude Defendant Hodges.

3. Prior to the time that this lawsuit was commenced, there is no evidence that money in the amount of five dollars per acre was expended for the purpose of irrigating or of constructing canals, dams embankments or acquaducts.

78-12-12. "Possession must be continuous and taxes paid, in no case shall adverse possessions be considered established under the provisions of any sections of this Code unless it shall be shown that the land has been occupied and claimed for a period of seven years continuously, and that the party, his predecessors and Grantors, have paid all taxes which have been levied and assessed upon such land, according to Law".

There is nothing in the record that would indicate that the Neils occupied this disputed area at any time, or that their successor in interest, O. H. Nelson, occupied any of the land South of the area described in the Deed which he received from Neil, to the exclusion of the Hodges. All of his buildings were put along the lake shore within the area described in the Deed. The water line was brought from the corner of Tract No. 1, down to his dancing pavilion, on the lake shore. There is no evidence that any of the previous owners occupied this disputed area, except in conjunction with Hodges. There never has been exclusive occupancy by any of the predecessors in interest of the Plaintiff. From the records and from the evidence, it would be impossible to make a finding that Plaintiff and Plaintiff's predecessors had paid the taxes upon this disputed strip of land. As a matter of fact, the evidence and the records show that the recorded owner paid the taxes and that all assessments were made to the owner of record from the deeds, and at no time was Plaintiff or Plaintiff's predecessor the owner of record of this disputed strip.

I have separately listed the main requirements for acquiring title by adverse possession, but it must be remembered that all of the requirements of the Statute must be met, otherwise, adverse possession cannot develop into a legal title, and payment of the taxes is one of the requisites, and only one. All requisites for acquisition of title by adverse possession must have been met and it is the burden

of Plaintiff to prove that these requirements all and singular have been met.

Home Owners Loan Corporation vs. Dudley, 105 Utah, 208, 221 and 141, Pac. 2d. 160-166. Title by adverse possession cannot be established unless the adverse claim is supported by the payment of all taxes assessed against the particular property for the Statutory period.

Fares vs. Urban 46 Utah 609-151, Pac. 57. Huntsman vs. Huntsman 56, Utah 609, 192 Pac. 367 exclusive, continuous uninterrupted possession of property under claim of right and adverse to all the world for more than seven years held of no avail in establishing title unless claimants paid all taxes levied and assessed against property during period of seven years. Under this section, title to land cannot be established by adverse possession unless claimants or predecessors entitled have paid taxes thereon in accordance with its requirements.

Tripp vs. Bagley, 74 Utah 57, 276 Pac. 912, and 96 ALR1417. Where in suit to determine disputed boundary line, defendant claims strip in conflict by adverse possessionbut admitted that plaintiff had paid the taxes thereon. Defendants claim was unsustainable. Crane vs. Judge 30, Utah, 50-83 Pac. 566. Where there was no evidence that either person claiming title by adverse possession nor his predecessors paid any taxes on disputed strip of land, claimant failed to make out case of adverse possession. Peterson vs. Johnson 84 Utah, 89-34 Pac. 2d. 697.

3. That Defendant Hodges and O. H. Nelson, the predecessor of Plaintiff, verbally acquiesced in a boundary line which acquiescenses had been agreed to and acquiesced in until just recently. The court could, from the facts, make no such findings. It is appreciated by Counsel that there is a sufficient number of cases and line of authority which might es-

tablish a disputed boundary line on the principle of acquiescenses, but, it involved a comparatively small amount of land, or a short distance one way or the other from a given point, then these cases would apply, but this involves the whole of defendant's holdings in this tract, and for the lower court to assume that he could acquiesce in establishing a boundary line which would grant all of his property to the plaintiff, or to anyone, would be giving effect to a verbal deed. Utah Code Annotated 1953, 25-5-1 Estate or interest in real property. No estate or interest in real property other than leases for a term not exceeding one year or any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered, or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

From the foregoing we submit that the findings and decree of the lower court should be reversed so far as it includes and pertains to this Section of Tract No. 1, to wit: The South 130' thereof. Insofar as the remainder of the property sued upon is concerned, the parties have agreed upon the descriptions, upon the boundaries, and defendants Hodges have no claim to any of the property described in the complaint, except this South 130' of the area described here as Tract No. 1 in the Complaint.

Respectfully submitted,

David H. Bybee
Attorney for Appellants