1960

Edward A. Knaus and Edna Knaus v. James Earl Smith and Zelda P. Smith et al : Appellants' Reply Brief

Utah Supreme Court

W. D. Beatie; Attorney for Appellants;

IN THE SUPREME COURT OF THE

STATE OF UTAH

EDWARD A. KNAUS and
EDNA KNAUS, his wife,

Plaintiffs and Appellants

-vs-

JAMES EARL SMITH and ZELDA
P. SMITH, his wife, R. V.
MANNING and LOIS MANNING,
his wife,

Defendants and Respondents

Case No. 9071

APPELLANTS' REPLY BRIEF

W. D. BEATIE
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Appellants

I N D E X

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REPLY OF APPELLANTS

STATEMENT OF FACTS

RES JUDICATA

The question of res judicata has been raised by cross appeal to which the appellants reply.

There is no dispute that on August 19,

1957 the defendants Manning in this action did commence an action against one Ira P. Packard and Florence Packard, his wife, being Case No. 113422 in the Third District Court. That action did not include as parties defendant Edward A. Knaus and Edna Frances Knaus, his wife, who were the owners of part of the premises in dispute and who were the contract sellers to the defendants Packard in that action, nor did the Knauses help or participate in the action (R.227) nor agree to pay part of the costs of the action. (R.229 and 235)

The theory of that action as it was commenced was for the determination of a right of way by prescription by a continued use in excess of twenty years and that said right of way was and is a right of way of necessity for the use of the plaintiffs Manning. (See statement of complaint page 32 and 33 of appellants' brief)

On the 11th day of November, 1957 the plaintiffs amended their complaint to read as follows:

"5. Prior to the year 1943 the land now possessed by all parties hereto was owned and possessed by one person, and in or about the year 1943 conveyances were made to the respective predecessors in interest of the plaintiffs and the defendants, using the descriptions above given to describe the land being conveyed, and in reliance on said conveyances, predecessors in interest of the plaintiffs continued to use the said driveway, believing and assuming the said driveway to be within their described land, due to the fact that a portion of their east land was not actually occupied by them, and the predecessors in interest of the defendants acquiesced in the said west line of said right of way, as the boundary between the two properties.

"6. Defendants and plaintiffs, likewise, acquiesced in the claim of ownership by the plaintiffs, as establishing the lands of the respective parties and acquiesced in the west boundary line of said right of way or driveway, as the boundary line between the parties, until a survey was made in the summer of 1957 which survey indicated that the said driveway, always theretofore used by the predecessors in interest of the plaintiffs, was actually part

of the property within the description of land held by defendants, whereupon defendants claimed the right to occupy all of said driveway and said disputed strip of land, which has given rise to a controversy between these parties over ownership, right to occupy, and right to exclude others from the said disputed driveway area.

"7. Plaintiffs are the owners, and have the right to occupy the west 10 feet of the east 20 feet of lot 2, Bradford's Subdivision, as above described, through establishment of the west line of said property as the boundary by acquiescence between the parties hereto and their predecessors in interest for a period of 14 years."

On the 30th day of April, 1958 Judge Joseph G. Jeppson rendered a decree in that action in favor of the Mannings and against the Packards. Said decree quieted title in the Mannings to 6 feet of ground in front and 7.68 feet in the rear, part of which was taken from the property being purchased by the Packards. Mr. Lee W. Hobbs represented the Packards in that action. This counsel

was employed on the last day of appeal from said judgment by the Packards and did prepare and serve a notice of appeal to protect their right of appeal. This counsel did subsequently dismiss that appeal and did commence the present action on September 29, 1958.

Lot 2 of Bradford Subdivision is 55.52 feet wide with defendants owning the east 10 feet thereof leaving a balance of 45.52 feet in the west side of said lot 2.

Plaintiffs Knaus acquired the west 44.46 feet of said lot 2 from Fred J. Peterson and his wife by warranty deed dated April 28, 1951 (page 71 Ex. P-1) which property was being sold to the Packards at the time the Mannings brought suit against them. Thus there was a strip of property 1.06 feet wide which was still owned by Fred J. Peterson and his wife. Plaintiffs Knaus, on July 25, 1958, obtained a quit claim deed from the Petersons to all of lot 2 except the east 10 feet thereof Bradford Subdivision (page 75

Ex. P-1), which deed included the 1.06 feet lapse of property between the plaintiffs and the defendants in the present action.

ARGUMENT

WAS THE ACTION BETWEEN MANNINGS AND PACKARDS RES JUDICATA OF THIS ACTION AND ARE PLAINTIFFS ESTOPPED TO MAINTAIN THIS ACTION

The question that arises is whether plaintiffs Knaus were parties to the action or in privity with the Packards in Case No. 113422.

Under the heading of JUDGMENTS 30-A, Am.Jur.,page 448, section 390 - IDENTITY OF CHARACTER OR CAPACITY:

> "In order that parties for or against whom the doctrine of res judicata is sought to be applied may be regarded as the same in both actions, the general rule is that they must be parties to both actions in the same capacity or quality."

Section 399, page 451 - PERSONS INCLUDED AS PRIVIES.

"Under this rule privity denotes

mutual or successive relationship to the same right or property so that a privy is one who, after the commencement of the action, has acquired an interest in the subject matter effected by the judgment through or under one of the parties as by inheritance, succession, purchase or assignment."

Section 400, page 453 - NECESSITY OF SUBSEQUENT ACQUISITION OF INTEREST.

"Similarly a judgment in favor of or adverse to the interest or title of an assignee or grantee rendered in an action to which the assignor or grantor is not a party, is not conclusive as between the assignor or grantor and the successful assailant of the assignees or grantees interest or title. Citing Taylor vs. Barker 70 Utah 534, 262 Pac. 266, 55 ALR 1032.

In the case of STATE BANK OF SEVIER -vs- AMERICAN CEMENT AND PLASTER CO., ET AL, 80 Utah 250, 10 Pac.(2d) 1065. J. Folland at page 262 of the Utah Report said:

"A grantor or vendor is not in privity with the vendee and is not bound as to the third persons by any judgment which they may obtain against the vendee adjudi-

cating the title. 1 Freeman on Judgments 969; Butler vs. Fryer, 59 Okl. 274, 159 P. 367; Seymour v. Wallace, 171 Mich. 402, 80 N. W. 242.

It is the contention of appellants that the action between the Mannings and the Packards could not be res judicata of this action for the following reasons:

FIRST: The plaintiffs Manning in Case No. 113422 had the right and duty, if they desired a final adjudication, to include the Knauses who were then the record title owners of the west 44.46 feet of lot 2, Bradford Subdivision. The plaintiffs Knaus in this action were not made parties defendant in Case No. 113422 which was an action between respective contract purchasers.

SECOND: The actions were not the same as the property which the Knauses were selling to the Packards did not include the strip of ground 1.06 feet wide which lay between

the properties of the parties to that action and which strip of property was subsequently acquired by the Knauses from the owners Fred J. Peterson and his wife and is included in the present action.

THIRD: The Knauses, as contract sellers, were not in privity with the Packards, the contract purchasers, and therefore could not be bound by a judgment entered by Judge Jeppson in Case No. 113422.

The counterclaim of the defendants at the trial of the present case (page 6 appellants' brief) was as follows:

> "1. Long continued acquiescence in the boundary thereof by the parties on both sides of said western boundary."
>
> "2. Defendants are the owners of said strip and are entitled to the possession and use thereof as an appurtenance to the land lying to the east of said strip, it having passed to the predecessors in interest of defendants' Manning, the same being the defendants' Smith by a purchase from a common owner of the land

now owned by defendants and plaintiffs including the said described strip of land."

The brief of respondents makes the following statements:

At page 4:

"The Court gave judgment to the respondents on the theory that the disputed strip came into ownership of Smith as part of the house and lot at the purchase in 1939 (Findings of Fact and Conclusions of Law No. 1 - R. 55, 56 and 57)

At page 15:

"Judge Ellett's oral decision was that the conflicting surveys in 1948 and 1956 and the understandings of the common owner and the Smiths establish the property from the east to the west edge of the driveway as the property purchased. (R. 241)

At page 22:

"In the present case Judge Ellett decided the case on the theory of practical location of boundary or parol evidence to establish an intended boundary."

Judge Ellett stated, as set forth on page 35 of appellants' brief:

"but I don't think that there is any question at all but what this law suit would be just the same as if it were between Linnell and Smith, that what Mr. Knaus and his predecessors in interest bought has no bearing because whatever Linnell gave and whatever Linnell held is determinative of the rights of Smith. Smith bought first out of the common piece and I think there is no question that I could find anyway other than to give Smith his land that was marked off on the ground at the time from the old fence."

The three statements aforesaid in respondents' brief do not agree with the pleadings in their counterclaim of acquiescence and appurtenancy; likewise the statement of Judge Ellett quoted above does not follow the theory of acquiescence or appurtenancy and it is felt by the writer of this brief that Judge Ellett decided the case under the apparent theory of reformation of an instrument which is in variance with the pleadings.

In this action the amount of ground

called for by the respective deeds of appellants and respondents from the common grantor is in existence and there is no shortage of ground unless the present judgment is allowed to stand in which event the respondents will have a frontage of 70.1 feet instead of 64.1 as the deeds and contracts of respondents specify, and the appellants will be 6 feet short on their frontage.

The contention of appellants is best stated in the case of NELSON -vs- DaROUCH ETUX, 87 Utah 457, 50 Pac.(2d) 273. J. Moffat at page 466 of the Utah report said:

> "It would seem to be a requirement, in order to establish a boundary by acquiescence other than the true one as called for by the conveyances relating legal title, there being no conflicts, that the claimed boundary line varying from the true one, or the so called practical boundary line, must be open to observation marked by monuments, fences or buildings and knowingly acquiesced in as the recognized true line for a long

> period of time. When such conditions are shown by the evidence the law will imply an agreement fixing the boundary accordingly."

It is respectfully submitted that there is no evidence in this record if the case was tried upon the theory of acquiescence, to justify the findings, conclusions or decree, as the claimed boundary line was not marked by any fences, monuments or buildings. Further, if the case was tried as if it had been a suit between the first purchaser of grand, namely, Smith, and the common owner, Linnell, it would be clearly a suit for reformation of an instrument instead of boundary by acquiescence.

It is felt that the facts adduced in this case do not bring it within the case of Holmes v. Judge, supra, or any of the cases following the doctrine of boundary by acquiescence.

Respectfully submitted,

W. D. BEATIE
Attorney for plaintiffs
and appellants.