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Lawrence H. Stratford and Ella L. Stratford v. George G. Wood and Leah C. Wood : Brief of Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

FILED

LAWRENCE H. STRATFORD and
ELLA L. STRATFORD,

Plaintiffs and Respondents,

—vs.—

GEORGE G. WOOD and LEAH C.
WOOD, his wife,

Defendants and Appellants.

APR 6 - 1960

Utah Supreme Court, Utah

Case No. 9198

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

STATEMENT OF THE CASE

This suit was brought by Lawrence H. Stratford and Ella L. Stratford, Respondents, to quiet title to Lots 11, 12 and 13, Block 5, The Groves, in Emigration Canyon, together with damages for trespass by defendants on plaintiffs' lands.

There was no dispute as to the fact that plaintiffs are and at all times material to this action were the owners of Lots 11, 12 and 13, Block 5, The Groves, but the question in issue is, where on the ground is the South line of Lot 11, owned by plaintiffs, which is the North line of Lot 10, owned by defendants.

Defendants answered setting up that they were entitled to the property heretofore occupied by them by right of adverse possession, but failed to adduce evidence sufficient to support this defense.

Plaintiffs first employed Mr. Robert A. Wilkins to survey the lots. Subsequently plaintiffs employed Bush and Gudgell to survey the lots. The Survey of Bush and Gudgell found the line dividing Lots 10 and 11 to be approximately 17 feet south of the dividing line as found by Mr. Wilkins. Defendants contended for the line as established by Mr. Wilkins, and plaintiffs for the line established by Bush and Gudgell.

The case was submitted to the jury on two Interrogatories:

1. Which survey, the Wilkins or Gudgell survey, correctly shows the true boundary line between the land of plaintiffs and defendants.
2. The amount of damages sustained by plaintiffs as a result of the use of plaintiffs' land by defendants.

The jury found that the Gudgell survey was correct and that plaintiffs are entitled to damages in the amount of \$295.00.

In order to pass upon the errors which Appellants assert were committed by the Trial Court, it is necessary to direct the attention of the Court to the evidence offered and received at the trial. This we shall do.

George B. Gudgell was first called and testified in substance as follows: That he is a Consulting Civil Engin-

eer and Land Surveyor and has been engaged in surveying for about sixteen years. They surveyed Lots 11, 12 and 13 in Block 5 of Groves Subdivision. (R. 13) He followed the official plat of The Groves Subdivision. (Exhibit 4) (R. 13) His men found the section corner which was identified by two blazed trees and located the two county monuments. He verified the correctness of the section corner with the two county monuments. (R. 15) He stated that:

“We used our traverse down from the section corner, then went up and tied it to the plaintiffs’ property and staked out or put his corner stakes in directly from the section corner.” (R. 16)

Exhibit 1 is a plat reflecting the location of these corners and it correctly reflects the location of the improvements, buildings, picnic areas and such as they are located on the land in relation to that corner. They tied in several fences as they went up the canyon.

On cross examination Mr. Gudgell was asked whether or not he did the surveying himself. He stated that the original survey he did not do himself, but when he found out the matter was going to court, he went up and checked the survey. He started at the county monuments. His men checked into the county monuments and checked the corner monuments, so he started on those monuments. He did not start from the section corner himself. He did not show all the courses with all the distances set out on the map that he introduced first. (Exhibit 3) He ran a traverse line of his own up there. (R. 17) They calculated their traverse and calculated the corners, but they did

not run the courses of each angle and each distance set out on the map which had been introduced as Exhibit 4. He ran the courses and distances at the office, but not on the ground. (R. 18) They checked some of the fence lines on some of the lots as they went up for the purpose of determining whether or not the angles and distances set out in Exhibit 4 were correct. Surveyors and Engineers place great confidence in old established fence lines which show the angles and distances in various lots. (R. 18) He was asked to assume that there is more land in the area than is shown on the map Exhibit 4, and was asked whether the lots might fit going up, but coming down they might not fit. He stated that the Subdivision is tied to the one section corner only, and that is what he had to survey from. He checks fence lines and angles on lots to confirm the fact that the lot is correctly platted. (R. 19) He was asked the following question and gave the following answer:

- Q. "You do check your p.i.'s (point of intersection and your fence lines to determine whether or not the lots are correctly platted or correctly located on your plat, don't you?"
- A. "We check those to tell whether our lots are correctly—what we do is tie in with those things to see if as we go up there we have something to substantiate our survey. That is the reason for it."

If, upon such a check, a fence line which has been established for twenty or thirty or forty years was twenty or thirty feet out, it would immediately raise the question as to whether or not the survey was correct. (R. 20)

On redirect examination Mr. Gudgell testified that if he found a fence line substantially out, he would not change his survey according to the fence. He surveyed according to the deed description. (R. 20) He ran the survey line himself with two other men. (R. 21) He checked the fence or corner of Lot 2. His stake was west, or rather, south of the fence line about two feet at that point. (R. 21-22)

On recross examination Mr. Gudgell testified that he ran a traverse on each of the pieces of property from the starting point up to the Wood property, but a traverse is not run on each piece of property. (R. 23)

On redirect examination he testified that running a traverse is the standard and customary manner of surveying as against running each individual property line. That they usually traverse the easiest line and then calculate where they are and calculate where the corners are when they get up close to the property and put the corners in from that. It is possible to achieve an accurate property line in running a traverse in that manner. (R. 24)

Mr. Robert John Ketchum was then sworn and testified: That he is Vice-President of the Ketchum Builders Supply Company. (R. 27) If the sleeping cabin were removed, he could probably sell the same for \$600.00, and the cost of moving it would probably be \$400.00, leaving them a profit of \$200.00. (R. 30)

Mr. Gordon C. Holt was then sworn and testified: That he is a Real Estate Broker and has been for about twenty years and is experienced in appraising property.

(R. 33-34) In the last five years he has had transactions involving two properties in Emigration Canyon and is familiar with the lots and values in Emigration Canyon. It is his opinion that Lot 11 has a value of \$2500.00. He has had experience in leasing property. The rental value of property is usually based upon a capitalization of the value of the property. (R. 35) That a fair rental value of Lot 11 would be \$21.00 a month. (R. 36)

On cross examination he stated he could not tell of any sale in the area within the last five years of a 100-foot piece of property for \$2500.00. (R. 37) He does not know of any rentals of vacant property ever having been made in Emigration Canyon. (R. 38)

In answer to a question of the Court as to whether the witness thought that in the vicinity of the cabins on the property in question a vacant lot could be rented for any price for a short term, he stated he did not know. (R. 43) The Court stated he supposed that vacant sites in the canyon were of use to the public generally only when a cabin is built on it, to which witness answered "Yes". The Court asked him if he knew of any other use made of the sites, and he answered "No, sir." (R. 44)

Plaintiff Ella L. Stratford was then called and testified as follows: That she is one of the owners of Lots 11, 12 and 13. The sleeping cabin on Lot 11 was erected in May or June, 1954, by defendant George Wood. (R. 45) In June of 1954 she and her husband and Mr. Wood had a conversation. Mr. Wood said, "I guess I have built on some of your land." (R. 46) Her husband asked why he

had done so, and he stated he didn't think that they would care. Her husband told Mr. Wood to get the cabin off the land. (R. 47) She told Mr. Wood that if he didn't move his cabin, they would have it surveyed. (R. 48) When asked on other occasions concerning the matter, Mr. Wood would never give a definite answer, except to say "Where is your line?" She couldn't say. She had conversations with Mrs. Wood, but Mrs. Wood would make no comment other than to say she would talk with her husband and see what he says. (R. 48-49)

On cross examination she stated she told Mr. Wood that the whole area involved in the suit was their land; that about 25 or 30 years ago they had had the land surveyed, but she couldn't tell where the surveyor fixed the line. (R. 50) The only time that she talked about any survey or stakes with Mr. Wood was in 1954 when she asked Mr. Wood to remove the cabin from her land. (R. 51)

Mr. Lawrence H. Stratford was then called and testified: He is one of the plaintiffs in the action and one of the owners of Lots 11, 12 and 13. The sleeping cabin was erected in the forepart of June, 1954, by Mr. Wood. (R. 51) In the forepart of June, 1954, he, Mrs. Stratford and Mr. Wood had a conversation. At that time Mr. Wood was just finishing the cabin. When the conversation first started Mr. Wood said, "Strat, I guess I built on your property, but I didn't think you would care." He told Mr. Wood that he wanted him to get off the property. Mr. Wood stated that he wouldn't know where the line was,

and Mr. Stratford asked him why he didn't get it surveyed. (R. 52) Witness stated that he had had two surveys of the property made, one by Mr. Wilkins and the second by Bush & Gudgell. He paid Mr. Wilkins \$205.34 for making the survey and gave a check to Bush and Gudgell for \$480.00 for the later survey. The two checks were introduced into evidence as Exhibits 8 and 9. (R. 53) Objection was made to the introduction of the checks for any purpose other than to fix the date thereon, on the ground that the same were immaterial. The Court overruled the objections. (R. 54) Mr. Stratford stated that neither he nor his family ever used the sleeping cabin nor had they used the picnic area. (R. 54)

Plaintiff rested.

Mr. Robert A. Wilkins was then called to testify. He stated he was 72 years of age. He has been engaged in engineering since 1913 and as a licensed engineer and surveyor. (R. 56) He has been a surveyor since 1915, and was qualified in the mining business and became a United States Mineral Surveyor and practiced the patenting of mining claims for eight years in the Tintic Mining District. In August or September, 1956, at the request of Mr. Stratford he surveyed Lots 10, 11, 12 and 13, and that he recently rechecked the survey of those lots to determine where the south line of Mr. Stratford's property is. At the request of Mr. Wood he rechecked his survey made for Mr. Stratford and went carefully over all of the deeds and the abstract from the beginning of the survey, The Groves, taking the courses and distances on each side

of the lane, which is called Burr's Lane. (R. 57) Witness was asked the following question and gave the following answer:

Q. "Did I understand you correctly to say that you started down at the south end and went up the courses and distances of each course and distance until you got up to the property that belonged to Mr. Stratford?"

A. "I did, and I didn't only take one side. I took both sides because the courses and distances are different on the turning point and in that way I was able to see how these lots fit in. If you study this map you will see that the pattern is definite and all the way up there and there are so many lots that have to be put in between these turning points, and even if you were just a careful observer you will get on to that pattern and you cannot go very far wrong." (R. 58-59)

He stated that he determined where the south line of Mr. Stratford's property is following the courses and distances and drove an iron pipe to mark the point. (R. 59) That the sleeping cabin is 10.7 feet from a line drawn from the peg fixed by the witness as being on the south line of the Stratford property. (R. 60) He has checked against the courses and distances with the monuments that are on the side of the road, that is, fences and other monuments. (R. 61)

He identified Exhibit D 13 as a map made for Mr. Stratford. (R. 62) He found that there was more ground than the lots called for. (R. 63) He started at the south end and measured each distance and each course up the

whole area up to the Stratford property trying to fit in the various lots that are shown on the map, Exhibit D13. (R. 64) He measured the distance between his line and the line that was fixed by the stakes of Bush & Gudgell, and it was a distance of about 19 feet. (R. 64) The line as fixed by him ran 10.8 feet from the sleeping cabin. (R. 65) The Bush & Gudgell line is 19 feet south of the line drawn by the witness. (R. 66)

On cross examination Mr. Wilkins testified: He used the southeast corner of Lot 13 as the starting point for the beginning of his survey. (R. 70) That there was a monument at the intersection of the fences on Lot 13. The fence is still there, it is well identified with a 2x2x10 foot high monument. In making the survey in 1937 he located a sandstone monument, but when he made his survey for Mr. Stratford in 1956 he did not find the sandstone monument. He used the same beginning point because the fence was still in place. (R. 71) He had started from the point, which, from his recollection, was the location on which the sandstone monument had been, and it is his belief and his understanding that that was the best possible point because it was right on the Company ground and their own fence and the beginning of private lots. (R. 72) He saw but did not use the section corner. The county monuments did not have a bearing on the survey. (R. 72) He did not attempt in 1956 to locate the section corner. He took the line of the fence near the starting point and went into the lot a certain distance and then turned the angle to the call of the Deed. He ran traverse lines. He turned his angle from the compass and then

checked from the backside of the compass to check that he was correct. (R. 75) He always reads the compass as a check with the horizontal angle, and he read the vertical angle for distances. In making this survey he was going up a hill. (R. 77) He told Mr. Gudgell and Mr. Brayton and Counsel for plaintiff that he turned his angles with the compass and checked it by taking the reverse side of the compass. That is a check he always uses. He read the horizontal angle each time. He set up points and turned the angle, then read the compass to see that an error could not creep in. In setting his beginning course he used the course of the fence on Lot 13. (R. 78) The road leaves Burr's Lane as it is platted in many instances. It is crowded over to the east side. (R. 81) He had run a traverse line in getting up to the property. It is standard practice for surveyors to run a traverse line. (R. 82)

Mr. George G. Wood was then called and testified: He is one of the defendants in the action. (R. 84) He moved on to the property in 1943. The area between his cabin and the bunk house consists of two patios. Most of the rock work on the patios had been built in the 20's. At one time there was lawn put in, but it wouldn't grow, so shale was put on the area. Mr. Whitney sank his septic tank right beneath the east patio. The west patio is about fifteen feet long and about ten feet wide. Mr. Whitney had put cement on that and built up walls on the side. It was built in 1924. The boy's initials are still there in the cement. Just north of the lower patio Mr. Whitney has a little shack which is used for a tool shed now, but which used to house an electrical generator which gener-

ated electricity for his house. (R. 85) The shed was located where the bunk house is now located. The shed was moved over to make way for the bunk house. There has been no enlargement of the patios since witness moved in in 1943. On the upper patio witness had put a table and some stools around the table which seat seventeen people. The table is round and built of cement. The bunk house was built in 1956 or 1954. (R. 86) Mr. Stratford said that he thought the bunk house had been built on his (Stratford's) property, and to move it off. Witness stated he did not recall saying that he guessed he had built on Stratford's land. (R. 87) Mrs. Stratford stated that the bunk house was on her property. He measured from the upper line or big gate on Mr. Stratford's property 100 feet south. So measuring, Mr. Stratford's south line would be north of the bunk house about eighteen to twenty feet. (R. 88) The land immediately north of the bunk house dips down into a little creek that drains plaintiffs' spring. (R. 89)

On cross examination Mr. Wood stated he did not have a survey made before building the bunk house. He had recently had a survey made by Mr. Wilkins. (R. 89) Also that he had had Mr. Arnold Coon survey the property. That the line fixed by Mr. Coon was "pretty close to the line fixed by Mr. Gudgell, about two inches different." He went out with Mr. Coon when he found the section corner. He didn't make a survey from the section corner down. He started from the county monuments and he checked out within two inches of the line shown on plaintiffs' Exhibit 1. (R. 90) Mr. Coon did not follow each

course as Mr. Wilkins did. He had not had Mr. Coon check with the Wilkins' survey to find out if there was anything wrong with it. (R. 91) The sleeping cabin is about twenty feet long. (R. 93) In measuring the Stratford property, witness started at the edge of the road where Mr. Stratford's gate is measured down 100 feet. (R. 95) Mr. Whitney did not ever show him a property line. The cabin on the Woods' property was built in 1909 by Mr. Whitney, and Mr. Whitney told him the south line was about two or three feet south of the cabin. Mr. Whitney told him he had put his septic tank under the patio. He found the tank north of the house. Until the lawsuit came up, witness had no idea where the property line was and no one has ever told him. (R. 100)

Defendants rested.

Plaintiffs recalled Mr. Gudgell who testified as follows: He heard Mr. Wilkins testify that he made the beginning point of his survey at what he thought had formerly been a location of a standstone monument. The witness surveyed that monument and tied in to the fence line from which Mr. Wilkins started. His calculation was within three feet of the line found by Mr. Wilkins. (R. 103) The use of a transit gives a closer check on an angle than just using the compass and if there is any metal close to the compass or a car parked close to the transit when it is set up, it can vary the needle quite a bit. (R. 106) A metal pencil in the surveyor's pocket may make a difference of three or four degrees. If there is error in turning an angle, it will throw off the findings in reach-

ing a point. (R. 107) Such an error in going north would have a tendency to throw the survey off more east and west than north and south. (R. 108)

Arnold W. Coon was then sworn and testified in rebuttal for plaintiffs. He is a licensed engineer and land surveyor. He was asked to check the survey made by Mr. Gudgell. In the interest of economy, he suggested getting together with Mr. Gudgell and checking the calculations that he had made and to go up on the site with the man who had done the actual field work for Bush & Gudgell and check his procedures and then give an independent opinion as to whether he thought the method and mathematics they had used were valid or not.

On objection of counsel for defendants that the witness' testimony was not rebuttal, the Court sustained the objection as to any computation which Mr. Gudgell had made, but stated that he could testify as to anything that he had checked on Mr. Wilkins' work.

The witness stated that he was later retained to go up with instruments and courses and determine the location of Bush & Gudgell's point in respect to the Wilkins' point. (R. 111) He tied them in and found that there was a difference of 17.2 feet north and south between the two surveys. (R. 112-113) The witness was asked the following questions and gave the following answer:

Q. "Have you made any independent check of the procedures made by or taken by Mr. Wilkins? Do you know what procedures he followed?"

A. "No. The only thing I had was a copy of a

map that he had drawn of that area, but I have never talked to Mr. Wilkins, and anything that I have concerning his procedures or methods or calculations would be strictly hearsay."

The witness was then asked the following question :

Q. "Based upon your own calculations of the location of that corner, is it your opinion that the Wilkins' location of that corner is correct or incorrect?"

To which the same objection was made. The Court then stated that he could answer whether in his opinion the Wilkins' survey was incorrect. He answered "Yes, our survey would indicate that the Wilkins' survey is incorrect."

On cross examination the witness stated that he used the county monuments that are in existence on the grounds as a starting point and ran a complete and independent survey so that he had the information concerning Gudgell's traverse, but he did not run the courses along Burr Avenue. In answer to question by the Court as to why he did not run the courses along Burr Avenue, he stated that it would necessitate cutting down trees to make such a survey. The Court asked him if he got on to a line so that he could see whether there were any trees in his way, to which he answered, "No." (R. 116)

Mr. Edwin Whitney was called to testify on behalf of the plaintiff, but at the conclusion of his testimony, the Court ordered all of his testimony stricken.

Both parties then rested.

The Court orally instructed the jury and counsel argued the case to the jury. Counsel for the defendants in arguing the matter, attempted to argue that the fact that the area between the Gudgell survey line and the Wilkins survey line had been occupied in connection with the Wood property for 35 years and had been occupied by Mr. Wood from 1943 to the time of commencing the action without question, was evidence that the Wilkins survey was correct. On objection of counsel for the plaintiff, the Court refused to permit counsel for the defendant to discuss such evidence, which ruling counsel assigned as prejudicial error.

STATEMENT OF POINTS

Appellants argue this appeal on the following points:

POINT ONE

THE COURT ERRED IN REFUSING TO PERMIT COUNSEL FOR DEFENDANTS TO ARGUE THAT THE FACT THAT THE AREA BETWEEN THE GUDGELL SURVEY LINE AND THE WILKINS SURVEY LINE HAD BEEN USED AND OCCUPIED IN CONNECTION WITH THE WOOD PROPERTY FOR 35 YEARS AND BY DEFENDANTS FROM 1943 UNTIL 1954 WITHOUT QUESTION, WAS EVIDENCE THAT THE WILKINS SURVEY WAS CORRECT. (R. 138-140)

POINT TWO

THE COURT ERRED IN PERMITTING THE WITNESS COON, OVER THE OBJECTION OF COUNSEL, TO STATE HIS OPINION THAT THE WILKINS SURVEY WAS INCORRECT. (R. 114)

POINT THREE

THE COURT ERRED IN GIVING INSTRUCTION NO. THIRTEEN AND EACH SUBDIVISION THEREOF.

ARGUMENT

POINT ONE

THE COURT ERRED IN REFUSING TO PERMIT COUNSEL FOR DEFENDANTS TO ARGUE THAT THE FACT THAT THE AREA BETWEEN THE GUDGELL SURVEY LINE AND THE WILKINS SURVEY LINE HAD BEEN USED AND OCCUPIED IN CONNECTION WITH THE WOOD PROPERTY FOR 35 YEARS AND BY DEFENDANTS FROM 1943 UNTIL 1954 WITHOUT QUESTION, WAS EVIDENCE THAT THE WILKINS SURVEY WAS CORRECT. (R. 138-140)

The main issue in this case is whether the boundary line fixed by Wilkins or the line fixed by Gudgell is correct. The Wood property, Lot 10, lies south of the Stratford property, Lots 11, 12 and 13. The Gudgell line runs east and west a few feet north of the Wood cabin which was built in 1909. The Wilkins' line parallels the Gudgell line and is 17.2 feet north of the Gudgell line. (R. 112) The sleeping cabin built by Mr. Wood in 1954 is 10.7 feet north of the Wilkins boundary line. (R. 60) The area between the two survey lines was used by Mr. Whitney, Mr. Wood's predecessor in title, during the 1920's and 1930's. He built two patios of cement with walls in the area between the two survey lines, and put his septic tank first beneath the east patio. Mr. Whitney deeded to Mr. Stevenson in January, 1941. (Ex. P-10) Mr. Stevenson deeded to Mr. Wood in August, 1943. (Ex. P-12) Mr. Wood built a round table on the westerly of the two patios, built a lazy susan on the table and stools for seven-

teen people around the table. (R. 86) This patio is fifteen feet long and ten feet wide. The area between the two survey lines is indispensable to whoever uses the Wood cabin. The occupants of the Wood cabin have always used the area north to the general area of the Wilkins line.

Mrs. Stratford testified that 25 or 30 years ago they had the property surveyed. No question of the use of the area north of the Wood's cabin to the Wilkins line was ever raised by the Stratfords. It was not until Mr. Wood built the sleeping cabin 10.7 feet north of the Wilkins line in 1954 that the Stratfords complained that he was on their property. Then as Mrs. Stratford testified, "He was told to get the cabin off the land." (R. 47) She also testified she told Mrs. Wood that the sleeping cabin was on "our" (Stratford) property, and "they wanted it off." (R. 48) She further testified:

"The only time I talked about any survey or stakes was in 1954 when I asked Mr. Wood to remove the 'sleeping' cabin in the area from our land." (R. 44)

In none of the conversations did the Stratfords claim the area between the Gudgell and Wilkins survey lines. Apparently the first time the Stratfords saw the sleeping cabin they complained that it was on their land. They then laid no claim to the area south of the Wilkins line. The conclusion seems obvious that the line established by the surveyor whom Mrs. Stratford testified surveyed the land for them 25 or 30 years ago was approximately the same line that Mr. Wilkins found when he surveyed

for the Stratfords for they apparently considered the line to be approximately there.

The foregoing facts appellants were not permitted to argue. These facts should hardly be clearly in the minds of the jurors because all of the evidence on the foregoing matters had gone in piecemeal and the jury could not be expected to appreciate the significance of the evidence unless it was argued to them.

Furthermore, in denying appellants the right to argue this all important part of their case, the Court in effect told the jury they could not consider such evidence.

The effect of an erroneous ruling on the matter of permitting Counsel to argue evidence to the jury was considered in the case of *Givans v. Chi. St. P. M. & O. Ry. Co.*, 56 N.W. (2d) 300, Minn., 38 A.L.R. 1393. In that case the Court said:

“Where at the opening of a court’s charge the jurors were told by the court that arguments of counsel are unnecessary and need not be given, the fundamental importance of such arguments is thereby so minimized in the minds of the jurors that the resulting prejudice and error cannot reasonably be cured by belatedly permitting arguments to be made at the close of the charge. Under the circumstances here existing the making of an argument at the close of the charge would have appeared to the jurors as an unimportant and unwarranted encroachment upon their time and as being permitted only with the reluctant consent of the judge to whom they looked for guidance.”

The statement of this Court in *Joseph v. W. H. Groves L.D.S. Hospital*, 318 P.(2d) 330, 7 Utah (2d) 39, applies in this case:

“This emphasizes the importance of according plaintiff’s counsel the opportunity of performing one of his essential functions, that of arguing his case to the jury. In doing so, he should be permitted to refer to and use all of the competent evidence he has marshalled and presented in the trial and to explain its meaning and argue its significance to a client’s cause.

“Some indication of the importance of the error with which we are here concerned is to be found in the fact that counsel thought the matter of sufficient consequence that he objected to the reading and use of the evidence in the argument to the jury. It strikes the writer as being somewhat inconsistent that Counsel now urges that depriving plaintiff of the use of such evidence is merely harmless error. If it is so plain that it would not have helped plaintiff’s case, one is lead to wonder why counsel made the objection and insisted that it not be used. The obvious answer seems to be that defendant’s counsel was actually apprehensive that it may have a substantial effect against his client. Of course, he could not be sure, nor can we.

“In view of the fact that there is such substantial doubt that we cannot, with any degree of assurance, affirm that the use of such evidence would not have been helpful to plaintiff, the doubt should be resolved in favor of allowing him to have a full and fair presentation of his cause to the jury.”

In the case at bar Counsel for plaintiff objected to appellants' Counsel arguing the foregoing facts, and the Court sustained the objection in the presence of the jury.

In 88 *C.J.S.*, page 330, *Section* 165, it is said:

“Where there is an issue in the case to be submitted to the jury, and he is not in default, a party litigant has a right to have his case fully and fairly argued to the jury, even though facts may appear plain to the court.”

The other evidence in this matter on the most important issue in the case of the correct location of the boundary line would not preponderate in favor of either side to any great degree, and the argument which defendants' Counsel was not permitted to make was, therefore, of great importance to appellants, and constituted serious prejudicial error.

POINT TWO

THE COURT ERRED IN PERMITTING THE WITNESS COON, OVER THE OBJECTION OF COUNSEL, TO STATE HIS OPINION THAT THE WILKINS SURVEY WAS INCORRECT. (R. 114)

When witness Coon started to testify that he had checked Gudgell's procedures, Counsel for Appellants objected that his evidence was not rebuttal. The Court sustained the objection as to anything Gudgell had done, but stated he would permit Coon to testify to anything he checked on Wilkins. (R. 110-111) Coon was asked the following questions and gave the following answers:

- Q. "Have you made any independent check of procedures made by or taken by Mr. Wilkins? Do you know what procedures he followed?"
- A. "No. The only thing I had was a copy of a map that he had drawn of that area, but I have never talked with Mr. Wilkins, and anything that I have concerning his procedures or methods of calculations would be strictly hearsay."
- Q. "Based upon your own calculation of the location of that corner, is it your opinion that the Wilkins' location of that corner is correct or incorrect?"

To this question Counsel objected that the question was leading, suggestive and calling for a conclusion which was not the province of the witness, but the province of the jury. The objection was overruled. (R. 113)

The witness did not directly answer the question, but subsequently was asked the following question:

"And in your opinion of the two surveys, your professional opinion would be that the Wilkins' survey is incorrect?"

To this Counsel made the same objection as heretofore stated. The Court then stated:

"Well, he may answer as to whether in his opinion the Wilkins' survey is incorrect."

Witness then made the following answer:

"Yes, our survey would indicate that the Wilkins' survey is incorrect." (R. 114)

It will be noted that this opinion "that the Wilkins' survey is incorrect," is an opinion on the credibility of the testimony of Mr. Wilkins.

Counsel is aware of the position of this Court on the matter of admissibility of opinion evidence on the matter directly before the jury to decide. This Court has followed the reasoning of Wigmore and McCormick. We submit the following statement from *McCormick on Evidence*, pages 25-26, as applicable to the matter now before this Court:

"Undoubtedly there is a kind of statement by the witness which amounts to little more than an expression of his belief as to how the case should be decided, or as to the amount of damages which should be given, *or as to the credibility of certain testimony*. Such extreme expressions as these all courts, it is believed, would exclude. There is no necessity for such evidence and to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witness. . . .

"The opposite view (the view that expert testimony is always admissible even though it directly bears upon the ultimate issue) would entirely discard the rule that mere coincidence with an ultimate issue is a ground for exclusion of a witness's opinion or conclusion. It is doubtful if any court has found it expedient to go so far, but this is the view of Wigmore, and is the one embodied in the uniform rules. Probably Wigmore would have conceded that the extreme instances mentioned above of opinions as to how the case should be decided and the like should be excluded as impolitic and superfluous and there is real doubt that a judge trained in the common law

tradition in a state which has adopted the uniform rules would exclude such opinions under Rule 45, on the ground that their value is outweighed by a 'substantial danger of undue prejudice or of confused issues or of misleading the jury.' "

POINT THREE

THE COURT ERRED IN GIVING INSTRUCTION NO. THIRTEEN AND EACH SUBDIVISION THEREOF.

Counsel took exception to Instruction No. 13, which in substance stated as follows:

- "(a) That plaintiffs are entitled to recover an amount representing reasonable rental value of the property used by defendants;
- "(b) . The reasonable cost of removing structures built upon the land less the salvage value thereof; and
- "(c) One-half of the cost of making a survey of the land."

As to the first portion of the Instruction, objection was made upon the ground that the only evidence in the case was to the effect that such property had no rental value. Plaintiffs' only witness to this matter, Mr. Holt, stated in answer to a statement from the Court:

Q. "I suppose these sites up there are of use to the public generally only when a cabin is built on them."

A. "Yes." (R. 44)

The Court then offered to change the Instruction to provide only that the damages should be assessed one-

half of the Wilkins' survey cost if the Wilkins survey is adopted, or one-half of the Gudgell survey, if the Gudgell survey is adopted. (R. 143) However, the Court did not change the Instruction.

The Court also made the observation that since the building is worth the amount of removal of it, that the second portion of the question might be taken from the jury. (R. 143) This leaves only the third portion of the question, which the Court would not concede, was erroneous. The third portion was the awarding of one-half of the cost incurred in making a survey.

Based on this Instruction the jury found in favor of plaintiffs for the amount of \$295.00.

As stated in 15 *C.J.* 124, Sections 271-2:

“According to the weight of authority the expense of procuring surveys, maps, plats or plans is not taxable as costs unless there is a clear statutory authority therefor.”

We do not have any statutory authority for assessing survey expenses as costs.

The case of *Weiss v. Meyer*, 32 P. 1025, 24 Ore. 108, is in point. In this case the Court stated:

“Was there error of the trial court in refusing to allow an item of \$75.00 claimed to have been paid by the defendant for surveying and making a plat of the ground in controversy. We are clearly of the opinion that this item was no more necessary as a ‘disbursement’ than clerical services in the preparation of the pleadings or the board and

expenses of himself or counsel while attending the trial or any other expense incident to a trial and for which the law does not contemplate there should be a charge against the adverse party."

CONCLUSION

It is submitted that the judgment upon the verdict of the jury appealed from should be reversed, and a new trial ordered, and appellants awarded their costs.

Respectfully submitted,

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