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San Juan County v. Grand County : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT

APR 9 1962

of the

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STATE OF UTAH FILED

No. 9563

APR 9 - 1962

SAN JUAN COUNTY, a Body Corporate, and
Politie of the State of Utah, Clerk, Supreme Court, Utah

Plaintif-Respondent
and
Cross Appellant

vs.

GRAND COUNTY, a Body Corporate and
Politie of the State of Utah.

Defendant and Appellant

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STATEMENT OF FACTS

Grand County, in its brief, presented true and accurate statement of the facts notwithstanding the unfounded challenge to the contrary made by San Juan County in its answering brief.

Grand County, in this reply, feels that it must review some of the facts in order to prevent the Court from being misled or by its silence appear to have concurred with the statement of fact presented by San Juan County.

In its reply Grand County will discuss the subject matter contained in respondent's and Cross Appellant's brief in the same order as presented by San Juan County.

All utilities were not taxed by San Juan County as stated in pages 3 and 4 of its brief and none were taxed prior to 1956.

Mr. Kerr of the State Tax Commission, Witness for San Juan County, stated he was using a map dated 1955 and if any other map had been used he did not know it. (Transcript Vol. I, page 108, lines 5 through 10.) Mr. Kerr also testified that he did not know if Mountain States Telephone Company paid any utility tax in the so-called disputed area. (Transcript Vol. I, page 101, lines 17 through 21.) The San Juan County Treasurer, Marion Bailes, testified that the only utility companies which paid tax to San Juan County were Utah Power and Light Company and The Pacific Northwest Pipeline Company (predecessor in interest to the El Paso Natural Gas Company) and that they paid

taxes to San Juan County only for the years 1956, 1957, 1958 and 1959. (Transcript Vol. II, page 299.) This lawsuit was filed by San Juan County December 18, 1958. The testimony of Utah Power and Light Representative, Oral J. Lowe, was that Utah Power and Light Company incurred its first tax obligation in 1955, reportable to the Tax Commission in 1956. (Transcript Vol. I, page 228, lines 20-21.) It is also a fact as stated by Miss Bailes, Treasurer of San Juan County, that she knew of no instance whatsoever when San Juan County ever collected real estate taxes other than utility taxes in the so-called disputed area. (Transcript Vol. II, page 301, lines 27 through 30, and page 302, lines 1 and 2.)

Jack Corbin, employee of the Midland Telephone Company since 1917, testified that he had always computed utility taxes due to San Juan County by computing distances to the State Road Commission markers and nobody had ever questioned this method of computation. (Transcript Vol. II, pages 347-359.) Mr. Corbin also testified that he had purchased State Lands in the so-called disputed area and paid his taxes to Grand County.

C. R. Christensen, former Assessor of San Juan County, testified that after the 1912 survey was completed both counties used that line for making their assessment and collected taxes accordingly. (Transcript Vol. II, pages 454-486.)

When Grand County offered exhibits to show that all of the property taxes north of the south line of Township 26 South were always taxed by Grand County, the Court and attorneys for the respective parties made the following statements:

"THE COURT: If I understand their offer it is to show they collected in this disputed area, they assessed and collected taxes, the Defendant was, is that right?

"MR. RUGGERI: That is right.

"MR. REIMANN: We have alleged they have collected taxes. We have alleged that the collection was unlawful as far as the area south of 38°30' is concerned.

"MR. BURTON: I assume they go a little farther than that. They continued to try until we stopped them."

(Transcript Vol. II, page 442, lines 1 through 12.)

JURISDICTION OVER ROADS IN THE DISPUTED AREA

With respect to roads in the so-called disputed area, it is the undisputed testimony that the B & C Road Funds did not come into existence until about 1938 (Transcript Vol. II, page 279, line 17) and that the Plaintiff and Defendant Counties entered into agreements with respect to B & C Road Funds in the so-called disputed area for the first time in 1953 (Transcript Vol. II, page 291, lines 17-18) and that the trial Judge in commenting on allocation of monies for B & C Road Funds stated: "Well, what the Court is now ruling on is the fact that the Counties received from a state agency a certain portion of certain road funds. It doesn't, in the Court's opinion, tend to establish any boundary line." (Transcript Vol. I, page 24.)

RECOGNITION BY PROPERTY OWNERS

The State of Utah, by and through the State Land

Board, has consistently issued certificates of sale, patents and leases in the so-called diputed area describing the said disputed area as being in Grand County. (Defendant's Exhibits 34, 36, 36, 37, 38, 39, 40, 41, 42, 43.)

The State Land Board of the State of Utah also certified certificates of sale of state lands to the Property Tax Division of the State Tax Commission showing the purchaser's equity. (Vol. II Transcript page 40, lines 17-18-19.) The Tax Commission in turn certified to the respective counties (Transcript Vol. II, page 40, lines 27-29 and page 410, lines 5 through 11) the buyer's equity for county tax purposes. In each and every instance the disputed area north of the south line of Township 26 South, Salt Lake Base and Meridian, was described by the State Land Board and the State Tax Commission as being in Grand County, (Defendant's exhibits 155, 156, 158, Transcript Vol. II, page 114, lines 6 through 8.)

San Juan County on September 12, 1953, by and through its County Commissioners, deeded land to Grand County for the Grand County Airport. In this deed San Juan County recognized the common boundary line between the two counties to be as now asserted by Grand County. (Defendant's Exhibit 32.)

It is interesting to note that there is a state road sign on the west shoulder of Highway 160 reading "Entering San Juan County," and on the east shoulder of Highway 160 reading "Entering Grand County," both of which are located on the South line of Township 26 South, Salt Lake Base and Meridian. (Transcript Vol. II, page 422, lines 14

through 19 and 25 through 29.)

1912 SURVEY

Contrary to the statements made by San Juan County in its brief, C. R. Christensen, former Assessor of San Juan County, testified that the surveyors of both counties were present in 1912 at the time of the joint survey and that San Juan County abided by the line so marked and monumented after the survey was completed. (Transcript Vol. II, page 454, through 486.)

The facts show, and the Trial Court found in its Findings of Fact No. 6, as follows: "There is evidence in the record that in the year 1912 the County Surveyors of the Plaintiff and Defendant Counties surveyed the common boundary line between the two counties and there is evidence of monuments and other markings being made, but the exact location thereof cannot now be determined."

Uncontracted testimony of Richard O. Cozzens, Civil Engineer and Land Surveyor, establishes these old monuments to be on a line coincident with what is now the south line of Township 26 South, Salt Lake Base and Meridian, (Transcript Vol. II, page 420 through 435.)

SURVEY AND MONUMENTING BY STATE ENGINEER

Mr. Hubert C. Lambert from the State Engineer's office, called by the Plaintiff San Juan County as its witness, while being interrogated by Plaintiff's Attorney on

direct examination and referring to the Plaintiff's alleged 1958 reconnaissance, stated: "A. Personally I have done no actual engineering in the establishment of the parallel 38° 30' which is the objective of this particular study we went into." (Transcript Vol. I, page 20, lines 9 through 11.) The Trial Court, in its Findings of Fact, quoted in full in Defendant's brief, found as fact what the State Engineer stated above, namely: "That the State Engineer never conducted any survey or placed any monuments on Parallel 38°30' North Latitude or any other place pursuant to said employment but requested the Coast and Geodetic Department of the Federal Government to do a reconnaissance survey, which was conducted by the said Coast and Geodetic Department of the Federal Government. No further steps were taken and the project was abandoned." (Finding of Fact No. 5.)

Section 17-1-33 Utah Code Annotated 1953 sets forth the steps that must be taken when one county refuses to join in any contemplated survey by the State Engineer. These steps were taken by San Juan County and the Trial Court so found. (Finding of Fact No. 7, page 7, Appellant's brief.)

Paul Reimann, attorney for San Juan County, in response to objections made to Plaintiff's Exhibits 76, 77, and 78, which are the drawings of the reconnaissance performed by the Coast and Geodetic Service, stated: "We can get a man here from San Francisco if we have to." (Transcript Vol. II, page 74, lines 21-22.) It is significant to note that the only witness from the Coast and Geodetic Service that was called during the course of this trial was called

not by the Plaintiff San Juan County, who now relies on said reconnaissance, but by the Defendant Grand County. The Defendant Grand County called Captain Isador Edward Rittenberg, who was second in command of the Coast and Geodetic Service at the time the so-called reconnaissance was conducted in 1958. Captain Rittenberg testifying, with respect to the impossibility of accurately locating parallel 38°30' North Latitude on the earth's surface based upon the information shown on Exhibits 76, 77 and 78, that Parallel 38°30' North Latitude could not be located on the earth's surface, and compared said exhibits "to a road map that I could pick up in a gas station." (Transcript Vol. II, page 371.)

ARGUMENT

POINT I.

The position now taken by the Plaintiff seems to be based a on a contract theory. If Plaintiff now relies upon a contract theory it is untimely and contrary to the pleadings, the pre-trial order, the evidence, and the findings of the Trial Court.

Neither the pleadings nor the pre-trial order raised any issue of estoppel now relied upon by the Plaintiff, but on the contrary the Plaintiff in paragraph 13 of its Complaint states as follows: "There has been no official survey to determine the location on the ground of the common boundary line between the counties which are parties hereto, and no determination on the ground of the common boundary lines between the parties hereto has been made by the

county surveyor of the parties hereto by the State Engineer."

The Defendant admitted that the State Engineer never made a survey but alleged that surveys had been conducted which created the boundary. Paragraph 14 of Defendant's Amended Answer reads as follows:

"Answering paragraph thirteen Defendant admits that the State Engineer has made no official survey to determine the boundary line between the Plaintiff and Defendant Counties, but alleges that surveys have been made and surveys show the common boundary line between the Plaintiff and Defendant Counties to be on a parallel 38°30' North Latitude and which parallel 38°30' North Latitude is also shown to be coincident with the south boundary of Township 26 South, Salt Lake Base and Meridian, that said boundary is marked and extends between the Eastern boundary of the State of Utah and the middle of the main channel of the Green River."

The Deputy State Engineer, Herbert C. Lambert, by his own testimony stated that the State Engineer's office did not participate in any survey to locate parallel 38°30' North Latitude on the earth's surface, and there has been no evidence or reference made to any statute authorizing the State Engineer to delegate a duty specifically imposed upon him to the Coast and Geodetic Department of the Federal Government, and a search of the statutes by Grand County has revealed no such statutory authorization, and such authority certainly could not be conferred on a federal agency by Grand or San Juan Counties or by the State Engi-

neer. Captain Rittenburg of the Coast and Geodetic Service, conspicuously called by the Defendant Grand County, stated that the reconnaissance conducted by them did not locate parallel 38°30' North Latitude on the earth's surface. The Trial Court in its Findings of Fact determined that the project had been abandoned.

The Plaintiff omits any reference whatsoever in asserting its estoppel to that portion of Section 17-1-33 that provides the only means for one county to proceed under the law to complete the survey without the consent or cooperation of the other county and offers no explanation whatsoever why it did not avail itself of that portion of the statute which provides, in referring to county conflicts and county surveys, that the counties interested shall: "Engage the services of the State Engineer, who with the aforesaid county surveyors, or either of them if but one appear for that purpose, all having received due and proper notice shall proceed forthwith to permanently determine such boundary line."

Despite all of the documented facts above set forth the Plaintiff now seeks to take advantage of its own inaction and in some manner twist adverse facts and inaction to its own advantage by asserting an estoppel which it claims would prevent Grand County from claiming any other line as the true boundary than an indefinite, unmarked, undefined strip of land "approximately 2/3 of a mile north of the south line of Township 26 South, Salt Lake Base and Meridian."

If the Plaintiff's position were to be sustained the

taxes presumably could be collected on an "approximate" basis, fire control districts and cemetery districts formerly created in the area by Grand County could be administered on an "approximate" basis, police protection, jury selections and other matters for county and school business would all have to be conducted on an "approximate" basis.

The Defendant feels that the arguments presented in its brief with respect to the 1912 survey are fully covered and further discussion of that point would be repetitious and would serve no useful purpose here.

The doctrine of acquiescence is fully covered by Defendant's brief and discussion here will be limited to distinguishing the authorities cited by San Juan County from the facts of the cases Defendant cites as authority for the proposition that the doctrine of acquiescence does not apply to the facts of this case.

San Juan County relies on the case of YUMA COUNTY vs. MARICOPA COUNTY, 19 Arizona 475, 172 Pac. 276, apparently for the position that acquiescence is not material.

This case has no application to the facts presented here because it was decided under the particular and unique provisions of the Arizona Statute that the Supreme Court of Arizona has original jurisdiction over county boundary cases and it is charged by law with the duty to define and designate the true boundary and have it marked under the statutory declaration. The Arizona Supreme Court distinguishes the cases of JONES vs. POWERS, 65 Tex. 207, and TRINITY COUNTY vs. MENDO-

CINO COUNTY, 151 Cal. 279; 90 Pac. 685 cited and relied upon by Grand County in its brief in the following language: "Our Legislature has provided that we shall define and designate the true boundary line. It has imposed a duty upon the Supreme Court which the Legislature of California did not impose upon the Court of that state."

20 C.J.C., Sec. 21, page 772, in referring to the matter of county boundary line cases in absence of a statute like the Arizona statute states as follows: "Suit in Equity. In absence of such a statute a Court of Equity has jurisdiction to determine the true location of a disputed boundary between counties, and, if necessary, to cause the line to be marked by permanent monuments."

The Grand County Officers have never sought to extend the territory of their county; San Juan County brought this action to extend its jurisdiction over an area never previously administered by San Juan County, whereas Grand County only seeks to retain what is rightfully Grand County's and to have the Court declare the line, which has been surveyed, monumented and acquiesced in over a long period of time, judicially established as the boundary.

A vast number of eminent authorities cited by Grand County fully support the position that a line established by authority of law and acquiesced in for a long period of time creates a boundary line between two counties.

BURDEN OF PROOF

All of the elements of proving a boundary line acquies-

cence have been fully met by Grand County.

In the case of VIRGINIA vs. TENNESSEE, 148 U. S. 503, 37 L Ed 537 13 S. Ct. 728, in speaking of the governmental functions exercised by governmental bodies over territory, stated as follows: "Such use of the territory on different sides of the boundary designated, in a single instance would not, perhaps, be considered as absolute proof of the assent or approval of Congress to the boundary line; but the exercise of jurisdiction by Congress over the country as part of Tennessee on one side, and as a part of Virginia on the other, for a long succession of years, without question or dispute from any quarter, furnishes as conclusive proof of assent to it by that body as can usually be obtained from that body by its most formal proceedings.

"Independently of any effect to the compact as such, a boundary line between states or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards, recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant."

20 C.J.S Section 22, page 773.

"Long usage, acquiescence in, and recognition of a particular boundary as the true county boundary may have the effect of establishing it as such."

Points II, III and IV are not replied to for the reason that they appear to be fully covered in the Appellant's brief and Respondent's answer.

CONCLUSIONS

The judgment of dismissal of the Complaint of San Juan County should be affirmed, in as much as San Juan County attempted to annex an indefinite and undetermined land area over which San Juan County has never exercised any supervision or control. The judgment dismissing the Counterclaim of the Defendant should be reversed and judgment entered establishing the early surveys conducted in accordance with law as the common boundary between the counties, not as an alienation of territory as alleged by the Plaintiff, but as a definition of the true and ancient boundary.