1970

David W. Smith v. Joseph Deniro And Helen Deniro, His Wife; Mary Ann Deniro, Individually and as Executrix of the Estate of William Deniro, Deceased : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID W. SMITH,
Plaintiff-Respondent,

vs.

JOSEPH DeNIRO and HELEN DeNIRO, his wife; MARY ANN DeNIRO, individually and as Executrix of the Estate of William DeNiro, Deceased.
Defendants-Appellants.

Case No. 12036

BRIEF OF APPELLANTS

Appeal from the Judgment of the Third District Court for Salt Lake County, Utah
Hon. Stewart M. Hanson, Judge

RICHARD C. HOWE
5055 South State Street
Murray, Utah
Attorney for Defendants-Appellants

HARRY D. PUGSLEY
Pugsley, Hayes, Watkiss, Campbell and Cowley
400 El Paso Gas Building
Salt Lake City, Utah
Attorney for Plaintiff-Respondent

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AUTHORITIES

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STATEMENT OF THE KIND OF CASE

Plaintiff Smith brought this action to quiet title to certain subdivision lots. Defendant, Mary Ann DeNiro, counterclaimed seeking to quiet title to the southerly portion of some of the lots, which portion lies within the banks of the old Gordon Mill Race, and claiming an easement to discharge drainage and irrigation water into the mill race.

DISPOSITION IN LOWER COURT

The case was tried to the court. The court quieted title to all the lots in the plaintiff, but subject to certain drainage rights in the defendant, Mary Ann DeNiro. She appeals. The other defendants, Joseph DeNiro and Helen DeNiro, his wife, stipulated a settlement with the plaintiff at the opening of the trial. They are not parties to this appeal.

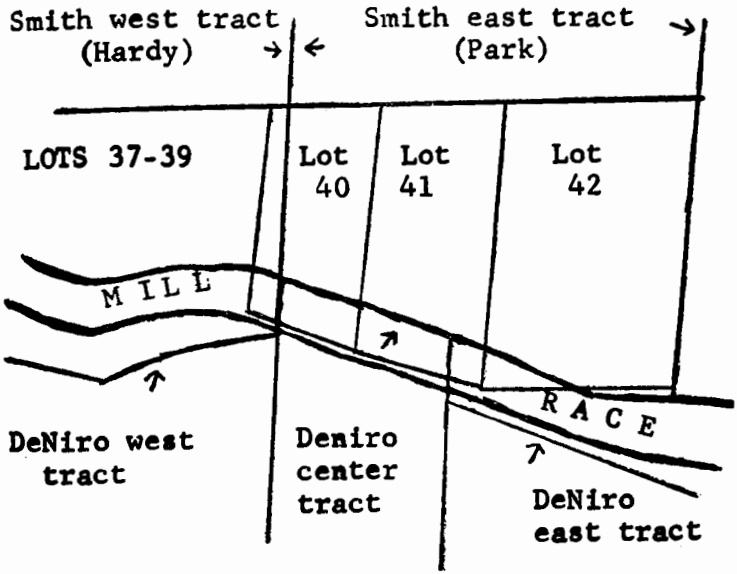
RELIEF SOUGHT ON APPEAL

Appellant-Defendant, Mary Ann DeNiro, both individually and as executrix of the estate of her late husband, William DeNiro, Sr., seeks (1) reversal of the decree quieting title entered by the District Court insofar as it pertains to the southerly portion of Lots 40, 41, and 42, which portion lies within the Gordon Mill Race, and (2) a decree quieting title in her to at least an undivided one-third interest in that portion lying within the mill race.

STATEMENT OF FACTS

Plaintiff Smith owns property to the north of the defendant, Mary Ann DeNiro. Separating these properties is the Gordon Mill Race, which is a channel 25 to 30 feet in width through which for over 50 years coursed water which was diverted from Big Cottonwood Creek, east of these litigants' properties. The water ran west

through the mill race and eventually returned to Big Cottonwood Creek several miles downstream. See the accompanying plat.



In 1963, plaintiff recorded a subdivision plat on his property lying north of the mill race, and included part of the mill race in the subdivision in Lots 37-A through 42. He could not obtain title insurance, however, on some of these lots (R. 91) and hence, on May 29, 1963, filed this quiet title action to quiet title to the entire subdivision, including the portion in question which intrudes into the mill race. In 1966, three years after the plaintiff commenced this action, Salt Lake County removed the diversion dam in the Big Cottonwood Creek and use of

the channel as a waterway was thereafter discontinued, except it continued to serve as a drain for waste and irrigation water from adjoining land.

Smith acquired his property which lies north of the mill race in two parcels at two different times. The west parcel he purchased from Karl Hardy in 1943. (Exhibit 4-d) This parcel is referred to in the record as either the west tract or parcel, or the Hardy tract. The south line of this tract and the north line of the DeNiro property adjoining on the south (sometimes called the west DeNiro tract) coincide fairly well along a line south of the mill race. Appellant, therefore, does not contest or dispute the action of the lower court in quieting title in plaintiff Smith as to Lot 37, 37A, 38 and 39, which lie within this Hardy parcel.

Later, in 1946, plaintiff Smith purchased from James Park what is referred to as the Park property or Smith's east parcel. As will be seen from the engineer's map, exhibit 1-P, and the subdivision plat, exhibit 2-P, the south line of this tract runs along the north bank of the mill race. In the warranty deed from James Park to the plaintiff Smith (exhibit 14-d), the south boundary is designated as follows: "thence S. 5° W. 511.5 ft. along a line of fence to the north bank of Gordon Mill Race; thence along said bank S. 72° 40′ E. 132 ft.; etc." Therefore, it is clear that Smith has never had any title by deed or by any other instrument to any land lying south of the north bank of the mill race in the Park property, wherein are platted Lots 40, 41 and 42. Smith did not

claim at the trial any title by deed to that area. The court did not find that he had any title by deed to that area.

The DeNiro family acquired the property lying south of Smith's east (or Park) tract in two parcels. An undivided one-third interest in the westernmost tract (sometimes referred to as DeNiro's center tract) was acquired by defendant William DeNiro in 1922. See page 32 of abstract, exhibit 3-d, where the tract was conveyed in 1922 by Lorenzo and Sarah Williams to the three DeNiro brothers, Michele (Mike) DeNiro, Pasquale (William) DeNiro, and Gusseppe (Joseph) DeNiro, subject to a life estate in their father and his wife, Felix (Feliz) and Teresa DeNiro. It is important to note that the description of this tract runs: ". . . thence N. 5° 2.70 chains to the north bank of the Gordon Mill Race; thence N. 70° W. 2 chains, to a cedar post in a line of wire fence and about 10 feet from the south bank of said race . . ." Thus at this point both the Smith and DeNiro descriptions meet at the north bank and closely coincide along a line N. 70° or 72° West a distance of 2 chains or 132 feet.

Years later, in 1959, the three brothers partitioned this tract, together with other land they jointly owned. William DeNiro was given the tract adjoining the mill race. See warranty deed, exhibit 15-d. The north line in the description used in that deed from his two brothers ran along the south edge of the mill race. See engineer's map, exhibit 1-P. It did not run to the north bank of the mill race as had prior instruments in the chain of title.

In the district court, Smith sought comfort in that fact, but defendant DeNiro contends that since the deed of partition (exhibit 15-d) did not include all the land owned by the three brothers, they would continue to own as tenants in common the mill race which had not been included in the deed of partition to William DeNiro. Thus William today would still own an undivided one-third interest in the land between the banks of the mill race at this point.

Also adjoining the Park property on the south, and lying east of the center DeNiro tract which has just been discussed, lies what is referred to in the record as the east DeNiro tract. This was acquired by William DeNiro's father and mother, Felix and Rosena DeNiro, in 1912 and title descended to the three sons. See pages 27, 44, and 65 of abstract, exhibit 3-d. Throughout the chain of title, the north line of this tract runs south of the south bank of the mill race. Thus there is a gap between the north line of this tract and the south line of Smith's east tract which adjoins on the north, which as has been pointed out, runs to and along the north bank. Neither party has any title by deed or by any other instrument to this gap wherein lies the mill race.

Following the trial, Judge Hanson wrote a memorandum decision holding that Smith had acquired title to the mill race by adverse possession and payment of taxes, but expressly reserved making any finding or reaching any conclusion so far as acquiescence was concerned. (R. 60-61) In the Findings of Fact, (R. 67-70)

nowever, the court abandoned the theory of adverse possession and payment of taxes (supposedly because Smith did not ever plead, claim or prove such) and instead adopted the doctrine of boundary by acquiescence, finding the Smith and DeNiro had acquiesced in the south bank as a boundary between Smith's east (Park) tract and DeNiro's center and east tracts. Accordingly, Judge Hanson quieted title to the entire subdivision, including the portion lying in the mill race in the plaintiff. The court recognized DeNiro's drainage rights and directed plaintiff to establish necessary ditches to carry off her irrigation and waste water.

ARGUMENT

POINT I

THERE IS NO EVIDENCE THAT THE PARTIES ACQUIESCED IN THE SOUTH BANK OF THE CHANNEL AS A BOUNDARY BETWEEN THEM.

The lower court quieted title to Lots 40, 41 and 42 in Smith, including that portion of the lots lying south of the north bank to which Smith admittedly has never had any title by deed. This was done on the finding that Smith and DeNiro had acquiesced in the south bank as the boundary (Finding of Fact No. 5 & 7, R. 69). The only testimony which plaintiff Smith produced as to possible acquiescence came from his son, Vernon D. Smith. He testified that his father and family had

formerly operated a dairy on the west, or Hardy tract (R. 97); that in 1946 the dairy operation was discontinued and they sold their cows (R. 100); that in 1946 his father purchased the east, or Park property (R. 100); that at that time there was an old fence in bad disrepair down in the channel (R. 102, 111); that in 1950, when he finished college, he and his father for two years ran beef cattle in both their west and east parcels (R. 102); that he and his father built a fence along the north bank of the channel on the east (Park) parcel, and that remnants of it are still there as shown by the engineer's map and subdivision plat, exhibits 1-P and 2-P. (R. 102, 111). There was never any fence on the south bank at this point (R. 113). William DeNiro grew vegetables on his land south of the mill race and it was undisputed that he had discharged irrigation water into the mill race at several places, and that he and other users cleaned the mill race each year to permit the free flow of water through it. (Finding of Fact No. 5.)

It is difficult to see how the court could decree that the south bank had been acquiesced in as the boundary when the only evidence adduced by Smith was that there was a fence in the bottom of the channel when he purchased the Park property in 1946 and that in 1950 he built a fence on the *north* bank to fence in his beef cattle which he kept on the property for two years thereafter. There is no other evidence of the use of the channel at this east (Park) parcel by Smith. He offered no testimony as to any use his predecessors may have made of the channel before 1946 when he purchased the prop-

erty, nor did he offer any testimony as to any use he may have made after he discontinued his beef operation in 1952. The net sum of plaintiff's evidence is that the north bank of the channel was the furtherest point south ever used by him, and that from 1952 on, no use of the channel was made at all by him. This action was commenced in 1963. Between 1952 and 1963 are 11 years immediately prior to the filing of this action that Smith did not produce any evidence as to use of the channel for any purpose by him.

This court in Fuoco v. Williams, 18 U. 2d 282, 421 P. 2d 944, speaking through Mr. Justice Callister reiterated the four prerequisites to establish a presumption of boundary by acquiescence: (1) occupation up to a visible line marked by monuments, fences or buildings, (2) mutual acquiescence in the line as a boundary, (3) for a long period of years, (4) by adjoining landowners. Mr. Justice Callister pointed out that ordinarily a landowner does not acquiesce in an irrigation ditch as a boundary just because he does not find it practical or convenient to farm the other side of it. So it is here. Smith cannot prevail simply because DeNiro made no other use of the channel than to discharge irrigation water into it. It must be remembered that this channel could be used for no other purpose than the purpose put to it by DeNiro, viz. a water channel and drain. DeNiro is not required to farm it in order to retain title to it and prevent his neighbor from acquiring it by acquiescence. The land lying south of the channel which was farmed by DeNiro is higher than the channel, and the channel

could not be used for any other purpose. Smith admittedly had no title at all to the channel on his east (Park) tract and the lower court erred in giving him any part of it. This would be so whether DeNiro had any title to the channel or not. But, as has been pointed out heretofore, the channel at Lots 40 and 41 was included in the description by which William DeNiro and his two brothers acquired title by deed in 1922. (Exhibit 3-P, abstract page 32.) Certainly, one should not lose his land to a neighbor by acquiescence simply because he can make no use of it except as a part of a system to drain his and adjoining lands. That is certainly an active use which would preclude acquiescence.

POINT II

THERE IS NO EVIDENCE THAT THE PARTIES ACQUIESCED IN THE SOUTH BANK AS A BOUNDARY FOR A LONG PERIOD OF TIME.

In Finding of Fact #5, the court found the parties had acquiesced for over 25 years in the south bank of the mill race as the boundary as it coursed along south of the Park property. This finding is wholly without support in the evidence. Plaintiff purchased the property in 1946 and in 1963 brought this quiet title action. That is a span of only 17 years. Certainly the bringing of this action and the filing of an answer by the defendants setting forth their claims would terminate any acqui-

escence that may have theretofore existed. As previously pointed out, plaintiff offered no evidence as to any use he made of it after 1952 when he discontinued his beef cattle raising project. Even when he had cattle on the east or Park property, he admittedly built a fence along the north bank of the channel which would preclude any use of the channel by him. In 1946 when he purchased the property there was an old fence down in the channel from which it might be inferred that his predecessors at some time may have used the north half of the channel. But even this generous assumption would not extend to acquiescence in the south bank as the court found.

This court has always required the acquiescence to be for a "long period of time." Fuoco v. Williams, supra; Brown v. Milliner, 120 Utah 16, 232 P. 2d 202. While the period of time has never been definitely fixed by the court, counsel has been unable to find any case by this court where less than 20 years was permitted. In the case of King v. Fronk, 14 U. 2d 135, 378 P. 2d 893, Mr. Chief Justice Henriod, by way of dictum, indicated that 20 years should be the minimum time, except perhaps in rare instances when equity might compel a shorter period. It was there wisely pointed out that anything short of 20 years would do violence to the adverse possession statutes which require possession, improvements and payment of taxes for at least 7 years.

In the instant case, there was never any acquiescence in the south bank and particularly never any acquiescence for anything approaching 20 years. The

court's finding of 25 years is without support in the evidence.

POINT III

THE COURT SHOULD HAVE QUIETED TITLE TO THE AREA WITHIN THE MILL RACE IN DEFENDANT, MARY ANN DENIRO, BASED UPON TITLE BY DEED AND/OR ACQUIESCENCE IN THE NORTH BANK AS THE BOUNDARY.

The court erred in failing to quiet title in defendants, Mary Ann DeNiro, to a one-third undivided interest in the area of Lots 40, 41 and 42 lying within the mill race. Defendant clearly owns *by deed* an undivided one-third interest in the southerly end of Lot 40 and the approximate west two-thirds of Lot 41 lying within the mill race. As has been already shown, an undivided one-third interest in Deniro's center tract was acquired in 1922 by each of the three DeNiro Brothers, Michele (Mike), Pasquale (William), and Gusseppe (Joseph), subject to a life estate in their father and his wife, Felix (Feliz) and Teresa DeNiro. This deed is shown at page 32 of the abstract, Exhibit 3-P. The description clearly runs to and along the north bank, coinciding almost perfectly with the south line of the adjoining Park property purchased by Smith in 1946. The fact that Mike and Joseph conveyed their interest in that tract in 1959 to William by a deed containing a metes and bounds description which did not

include the mill race in no way extinguishes William's one-third interest in the mill race. William and his brothers, or their estates, would continue to own the mill race as tenants in common. The north deed line of the center DeNiro tract shown on the subdivision plat, Exhibit 2-P, to be south of the mill race, is the deed line contained in the warranty deed, Exhibit 15-D, from Mike and Joseph to William. It is not the deed line of the description contained in the warranty deed from Lorenzo and Sarah Williams to the three DeNiro brothers (page 32 of the abstract), which as we have seen contained a call to and along the north bank. Defendant, Mary Ann DeNiro, clearly owns a one-third undivided interest in the mill race at this point by virtue of said 1922 deed. Title to that interest should have been quieted in her by the lower court. Its refusal to do so was error. As has been pointed out, there was no acquiescence for a long period of time at any other place which would have deprived her of that interest.

Lying east ofthis center DeNiro tract is DeNiro's east tract. As has been shown, the north line of this tract has never run north of the south bank of the mill race. Adjoining it on the north is Smith's east (Park) parcel, the south line of which runs to and along the north bank. Thus there is a gap between the Smith and DeNiro descriptions at this point where neither party has title by deed or by any instrument. This gap affects the south end of the approximate east one-third of Lot 41 and the westerly part of Lot 42. Defendant Mary Ann DeNiro contends that the mill race at this

point should have been quieted in her on the basis that the parties have acquiesced in the north bank as the boundary for a long period of time. As has been shown under Point I and Point II of this brief, Smith has never made use of the channel at the Park property. When Smith purchased it in 1946, there was a broken down fence in the bottom of the channel, but Smith replaced it with a fence on the north bank. Some of the posts of this fence remained there when this litigation was commenced and are shown on Smith's own subdivision plat, Exhibit 2-P. Smith produced no evidence at all as to ever using the channel as it ran through his east (Park) tract. On the contrary, his whole evidence was that he fenced the north bank and did not use the mill race.

On the other hand, DeNiro produced testimony that the DeNiro family had always used the channel as a drain for waste and irrigation water, and that they annually cleaned it. William DeNiro, Jr., Joseph DeNiro, and two former farm hands, Glen Bean (R. 148) and Sylvester Koceja (R. 153), so testified. This cleaning dated back to the time they purchased the property in 1922, to as late as 1961, just two years before this action was commenced (R. 148). It is true that DeNiros did not ever farm the channel because it could not, of course, be farmed. But they did make the only use which anyone could make of a channel, viz. they used it as a drain and maintained it as such. In so doing, they used the channel over to the north bank where the fence was located. The witnesses testified of a fence always

being on the north bank through this Park property. William DeNiro, Jr. testified that there had always been a fence along the north bank (R. 125). Pictures of this fence on the north bank were introduced into evidence. (Exhibits 5-D to 12-D and identified by William DeNiro, Jr. (R. 126). Joseph DeNiro testified that all his life there had been a fence along the north bank of the mill race (R. 139). He was born in 1910 (R. 135). Thus there could be no question but what this fence was mute evidence that the parties have always regarded the north bank as the boundary along and through Smith's east (Park) tract. The court should have quieted title to the mill race over to the north bank in defendant, Mary Ann DeNiro, on the basis of acquiescence as well as her ownership by deed to part of the channel.

CONCLUSION

The District Court erred in ignoring DeNiro's title by deed to the mill race through Lots 40 and 41. It deprived DeNiros of the ownership of this strip of land on an unsupported finding that the parties had acquiesced in the south bank. Smith's evidence wholly fails to support this finding. The north bank was actually always fenced and the acquiescence was at the north bank, not at the south bank. Defendant, Mary Ann DeNiro, is entitled to have quieted in her a one-third undivided interest in the mill race either upon the

strength of her title by deed, or by acquiescence at the north bank, or by both such theories.

Respectfully submitted,

RICHARD C. HOWE

5055 South State Street
Murray, Utah

Attorney for Defendant-Appellant