1972

Keith J. Lane And Lea N. Lane : Brief of Appellants

In The Supreme Court of the State of Utah

KEITH J. LANE and LEA N. LANE,

Plaintiffs and Appellants,

-vs-

RAISA W. WALKER and CYRIL F. WALKER; and all other persons unknown claiming any right, title, estate or interest in or lien upon the real property described herein adverse to the Plaintiffs' ownership, or clouding their title thereto,

Defendants and Respondents.

Case No. 12,868

BRIEF OF APPELLANTS

Appeal from the Judgment of the Fourth Judicial District Court of Utah County, The Honorable George E. Ballif, Judge.

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STATEMENT OF NATURE OF THE CASE

This is an action brought by the plaintiffs and appellants to quiet title to a parcel of land located within Provo City, based upon a record title to the property. By an amended answer and counterclaim, defendants and respondents claim a portion of the land by occupation thereof up to a fence line over a long period of years. The case was tried on the theory of boundary by

acquiescence. The parties will hereafter be referred to as plaintiffs and defendants.

DISPOSITION IN THE LOWER COURT

The lower court held that a portion of the property up to the fence line had been occupied by the defendants over a period of years, and entered a decree quieting title to that property in the defendants against plaintiffs pursuant to defendants' counterclaim.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek to have the judgment of the lower court with respect to defendants' counterclaim reversed, with a direction to the lower court to enter its decree quieting title in plaintiffs to the whole parcel as prayed for in plaintiffs' complaint.

STATEMENT OF FACTS

It will be helpful to the court and facilitate the making of this statement if the court will refer to the plat of the property introduced in evidence as plaintiffs' Exhibit No. 1.

The property shaded in green on Exhibit No. 1 is the property which plaintiffs sought to quiet title to by their complaint. Plaintiffs record title to the property is not in dispute. (Plaintiffs' Exhibit No. 7). Their record title is not perfect, which is the reason

for the quiet title action in the first place, but is superior to defendants who have no record title whatever. (TR. 18, 19, 45, 47) (Defendants' Exhibit No. 13, which is defendants' only evidence of record title, does not include the land in dispute.)

The property outlined in red, including the portion shaded green and marked with an "x" is the property claimed by the defendants. The portion in dispute and which is the subject of this appeal is the shaded green part marked with the "x". At the time of trial plaintiffs conceded to defendants the shaded green portion marked "y". This was done because of the claimed occupation by the defendants and the payment of taxes thereon by the defendants for more than seven years, although plaintiffs also paid taxes thereon during the same period. Defendants have never paid any taxes on the "x" portion and all taxes thereon have been paid by the plaintiffs and their predecessors. (TR. 20, 21)

Plaintiffs' land, which is shaded in green, came to the plaintiffs in three separate parcels. (Plaintiffs' Exhibit Nos. 3, 4, 5 and 7.) Plaintiffs' surveyor testified that he made the survey as shown by plaintiffs' Exhibit No. 1 and that the property shaded in green was located on this plat from the title lines of three separate parcels, all assessed in the name of Afton Crandall, plaintiffs' predecessor in interest. (TR. 9, 13, 14) The assessor's cards, (Plaintiffs' Exhibit Nos. 3, 4, 5) show separate tax assessements on the three separate parcels to Afton Crandall, and the abstract of title (Plaintiffs' Exhibit

No. 7) shows the property to have been acquired in a similar manner. Taxes on all three properties making up the land shaded in green, including the properties designated as "x" and "y" have always been paid by the plaintiffs and their predecessors in interest, although defendants also paid the taxes on the "y" portion. (TR. 20)

The fence line in question is shown on Exhibit No. 1 to be along the southwest boundary of the parcel marked "x" which is also substantially along the dividing line of two of the three parcels making up the shaded green portion. It is labeled on the plat as "picket fence" and the picket fence extends only a very short way from the southwest corner of the "x" portion toward the southeast and appears to follow an old fence line which apparently had been there for many years previous. (TR. 25, 27) The county plat numbered as plaintiffs' Exhibit No. 15 also shows the three parcels making up plaintiffs' record title, and defendants' Exhibit No. 12 shows the extension of the picket fence line along a fence line in substantially the same place. Defendants' Exhibit No. 12 also shows the very close proximity of plaintiffs' house to the fence line, and defendants' surveyor testified that the defendants' house is located about 49 feet from the fence line. (TR. 30)

There is no evidence in the record as to who put up the original fence, when it was erected, or the purpose. The only evidence of its antiquity is that of defendant, RAISA WALKER, who says she has a recollection of the fence being in place when she was six and one-

half years old. (TR. 33, 34) Based upon her present age, this would take it back to 1923. There is likewise no evidence as to who took it down, when it was taken down, or the reason therefor. It appears to have been almost exactly on a deed line between two parcels of the parcels shaded in green, both of which are prima facie titled in plaintiffs' predecessors and through whom plaintiffs claim ownership. (Plaintiffs' Exhibit No. 1, Defendants' Exhibit No. 2, Defendants' Exhibit No. 12, Plaintiffs' Exhibit No. 15)

Defendants' title to the property outlined in red, exclusive of the portion marked "x", stems solely from a deed datd January 10, 1947, from Weeter Investment Company, a corporation. (Defendants' Exhibit No. 15) There is no chain of title to the corporation. (TR. 45) Defendant, RAISA WALKER, testified that at the time the deed was executed her father caused a survey of the property to be made. (TR. 47) A reading of the description makes it obvious that it was obtained from a survey. That deed does not include the "x" property in dispute.

Defendants' Exhibit No. 2 which is the survey prepared by defendants' surveyors, shows the fence line to be in substantially the same place as shown on Plaintiffs' Exhibit No. 1.

Plaintiffs' predecessors in interest back to the year 1936 testified that they never acquiesced in the fence line as being the boundary between plaintiffs' and defendants' lands. Mrs. Eunice Young said that in 1940

she told defendants' predecessor in interest that he was on her land and had no right to be there. (TR. 65) At that time it was open land. (TR. 67)

In 1955, the land in dispute was sold to James C. Cordner, (TR. 72) and Mrs. Sheryl Cordner, wife of James Cordner, testified that shortly after they purchased the land she told Mrs. Raisa Walker, one of the defendants, that she owned the disputed property and was paying taxes on it, to which Mr. Walker said "we don't care how long you have been paying on it." (TR. 73, 74) Mrs. Cordner further testified that the fence had never been accepted as the line dividing the property as far as she was concerned or her family. (TR. 76)

The disputed property was then sold to Eugene and Afton B. Crandall and the dispute with respect to the property continued until their deaths. (TR. 80.81)

STATEMENT OF POINTS

I

THERE IS NO EVIDENCE WHATEVER FROM WHICH A FICTION CAN BE INDULGED IN THAT THE ORIGINAL FENCE WAS ERECTED WITH A MUTUAL INTENT TO MARK AN AGREED BOUNDRY BETWEEN PLAINTIFFS' LAND AND THE LAND CLAIMED BY THE DEFENDANTS.

II

THERE IS NO EVIDENCE FROM WHICH IT CAN BE PRESUMED OR INFERRED

THAT THE TRUE BOUNDARY BETWEEN THE LAND NOW CLAIMED BY DEFENDANTS AND PLAINTIFFS' LAND WAS EVER UNCERTAIN OR IN DISPUTE AT THE TIME THE ORIGINAL FENCE WAS ERECTED.

III

THERE IS NO EVIDENCE OF MUTUAL ACQUIESCENCE IN THE FENCE AS A BOUNDARY LINE FOR ANY PERIOD OF TIME.

ARGUMENT

POINT I

THERE IS NO EVIDENCE WHATEVER FROM WHICH A FICTION CAN BE INDULGED IN THAT THE ORIGINAL FENCE WAS ERECTED WITH A MUTUAL INTENT TO MARK AN AGREED BOUNDARY BETWEEN PLAINTIFFS' LAND AND ANY LAND CLAIMED BY DEFENDANTS.

The doctrine of boundary by acquiescence has been considered by the Supreme Court on many occasions, and it does not appear that the cases are materially in conflict as to the principles upon which the doctrine is based, or upon the circumstances required to invoke its application. *BRIEM v. SMITH,* 100 U. 213, 112 P. 2d 145; *GLENN v. WHITNEY,* 116 U. 267, 209 P.

2d 257; *HUMMEL v. YOUNG*, 1 U. 2d 237, 265 P. 2d 410; *RINGWOOD v. BRADFORD*, 2 U. 2d 119, 269 P. 2d 1053; *KING v. FRONK*, 14 U. 2d 135, 378 P. 2d 893; *FUOCO v. WILLIAMS*, 18 U. 2d 282, 421 P. 2d 944; *CARTER v. LINDNER*, 23 U. 2d 204; 460 P. 2d 830; and *JOHNSON v. SESSIONS*, 25 U. 2d 133, 477 P. 2d 788.

Fundamentally, the doctrine is based upon the fiction that at some time in the past adjoining landowners were in dispute or uncertain as to the location of the true boundary between their properties, and that they settled their differences by agreeing upon the fence or other monument as a dividing line between them, which became binding on them and their successors. *GLENN v. WHITNEY* (supra). In *FUOCO v. WILLIAMS*, (supra), the court restated the doctrine to require minimally:

(1) Occupation up to a visible line marked by monuments, fences or buildings

(2) Mutual *acquiescence in the line as the boundary* [emphasis supplied]

(3) For a long period of years

(4) By adjoining landowners

The court in the FUOCO case emphasized that the "acquiescence" required was of mutual knowledge, recognition and acquiescence in the line as being the boundary between the properties. The court said on page 286:

"In order to establish a boundary by acquiescence, it is not necessary that the acquiescence should be manifested by a conventional agreement, but recognition and acquiescence must be mutual, and both parties must have knowledge of the existence of the line *as a boundary line.* In the instant case, there is no mention of Fuoco's predecessors in interest, and there is no direct evidence of their knowledge of the existence or their recognition and acquiescence in the ditch as a boundary line. In the instant case any inference of recognition and acquiescence in the ditch as the boundary by individuals, not record owners, who formed the Fuoco tract is immaterial. The record contains insufficient evidence to support a finding of mutual recognition and acquiescence in the ditch *as a boundary.*" [emphasis supplied]

This court said in ***HUMMEL v. Young,*** (supra), in affirming a Utah County case where the District Court refused to apply the doctrine of boundary by acquiescence, that there must be some reasonable basis in the evidence from which it can be implied that the fence was built to mark the boundary line pursuant to an agreement between adjoining owners.

As it does not appear from any evidence in the record of this case as to when or why the fence was constructed or that there was any dispute between the original landowners on either side of the fence as to their

true property line at the time it was erected, the fiction of an agreed boundary line cannot be indulged in. On the contrary, the fence line is located substantially on the title line between parcels making up the land claimed by the plaintiffs, and there is nothing in the record from which it can be presumed or inferred that the fence was intended for any purpose other than to mark the title line between two of the parcels of land which now comprise the land owned by the plaintiffs and to which they seek to have their title quieted. Likewise, the irregular shape of plaintiffs' land which would remain if the "x" parcel were removed, the fact that defendants' house is located some 49 feet from the claimed boundary line while plaintiffs' house is located about 2 or 3 feet from the line, certainly will not support a presumption or fiction that plaintiffs' predecessors "agreed" to the old fence line as the boundary between their properties.

POINT II

THERE IS NO EVIDENCE FROM WHICH IT CAN BE PRESUMED OR INFERRED THAT THE TRUE BOUNDARY BETWEEN THE LAND NOW CLAIMED BY DEFENDANTS AND PLAINTIFFS' LAND WAS EVER UNCERTAIN OR IN DISPUTE AT THE TIME THE ORIGINAL FENCE WAS ERECTED.

In *CARTER v. LINDNED,* (supra), this court said: