1973

Keith J. Lane And Lea N. Lane : Petition Of Plaintiffs And Appellants, Keith J. Lane And Leah. Lane, For Rehearing

In The Supreme Court of the State of Utah

KEITH J. LANE and
LEA H. 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. 12868

PETITION OF PLAINTIFFS AND APPELLANTS, KEITH J. LANE AND LEA H. LANE, FOR RE-HEARING

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TO THE HONORABLE SUPREME COURT OF THE STATE OF UTAH:

The plaintiffs and appellants, KEITH J. LANE and LEA H. LANE, respectfully request a re-hearing in the above entitled cause upon the following grounds.

I

THE FACTS STATED IN THE OPINION OF THE SUPREME COURT ARE NEITHER ADEQUATE TO POINT UP THE LEGAL IS-

SUES RAISED BY THE APPEAL, NOR DO THEY REFLECT THE CONTROVERSY BETWEEN THE PARTIES, AND THE DECISION THEREON IS IN ERROR.

II

DEFENDANTS' CLAIMS AGAINST THE PLAINTIFFS ARE FACTUALLY PREDICATED ON THE THEORY OF ADVERSE POSSESSION, WHICH THEORY IS PRECLUDED BY THE FAILURE TO PAY TAXES, AND THE MINIMAL FACTUAL REQUIREMENTS TO SUSTAIN DEFENDANTS' TITLE OR RIGHT TO POSSESSION UNDER A THEORY OF "BOUNDARY BY ACQUIESCENCE" ARE PATENTLY ABSENT.

III

THE DECISION OF THE COURT RESULTS IN A GROSS MISCARRIAGE OF JUSTICE, AND IS CONTRARY TO THE LAW AS ENUNCIATED IN PRIOR DECISIONS OF THIS COURT.

We, Clair M. Aldrich and V. Pershing Nelson, do hereby certify that the firm of Aldrich & Nelson are attorneys for the plaintiffs and appellants, petitioners herein, and that we are members of said firm; that we have carefully examined the decision of the Supreme Court herein, and in our opinion there is good reason to

believe that the judgment is erroneous and should be re-examined.

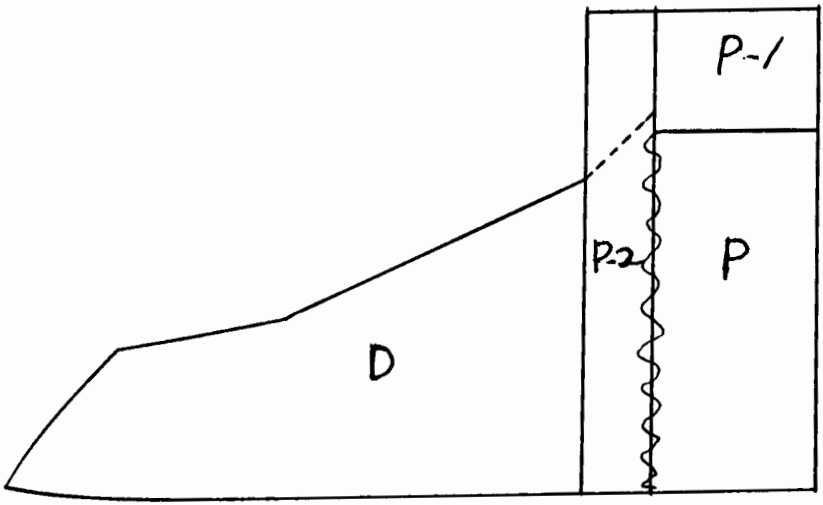
Clair M. Aldrich
V. Pershing Nelson

ARGUMENT

POINT I

THE FACTS STATED IN THE OPINION OF THE SUPREME COURT ARE NEITHER ADEQUATE TO POINT UP THE LEGAL ISSUES RAISED BY THE APPEAL, NOR DO THEY REFLECT THE CONTROVERSY BETWEEN THE PARTIES, AND THE DECISION THEREON IS IN ERROR.

The following diamgram is illustrative of the undisputed factual situation:



In the above diagram, "D" illustrates the property which is covered by a deed from R. V. Walker as Presi-

dent of Weeter Investment Co., to Raisa Walker, defendant and a daughter of Glen P. Weeter, who also signed the deed as Secretary-Treasurer. That deed, which is defendants' Exhibit 13, is the only title, color or otherwise, which the defendants have to the "D" property. There is no chain of title to Weeter Investment Co., or the defendants.

Record title to the property identified on the diagram as "P", "P-1", and "P-2" is in plaintiffs' immediate predecessor under whom plaintiffs claim, and which property came down in three separate chains of title. The "P-2" property below the broken line is the property in dispute in this lawsuit. The wavy line on the diagram indicates an old fence line dating back 48 years or more which obviously once marked the boundary between parcels "P" and "P-2".

At the time defendants obtained the Weeter Investment Corporation deed to the "D" property in 1947, they had the property surveyed. Presumably, the survey description which they secured from their surveyor corresponds with the deed description which they used. They did not go to the wavy line on either the survey or the deed description as being the "boundary" of their property, although the old fence separating the "P" properties was admittedly very well known to them at the time of the survey and for many years prior thereto. They went only to the property line of plaintiffs' predecessors, and, therefore, the conclusion is inescapable that even the defendants don't claim the fence line to

be a division fence between their property and the plaintiffs. Their claim was and has to be based upon adverse possession.

The owners of the "P", "P-1" and "P-2" properties from 1936 to the present all testified that there never was any acquiescence in the old fence line as being a boundary between the properties owned by them and the "D" property claimed by the defendants. They each said that they always claimed ownership of the "P-2" property. There was no testimony to the contrary. They have paid all taxes assessed against the property, which taxes have always been assessed separately from the "D", "P", and "P-1" parcels.

In their pleadings, defendants originally claimed ownership of the "P-2" property on the theory of adverse possession. But, at the time of the trial, presumably for the reason that plaintiffs have always paid the taxes on the property and defendants have never paid any taxes whatever, defendants changed their theory to "boundary by acquiescence".

Notwithstanding the change in theory, however, defendants' evidence went solely to matters of "adverse possession", and there is not one scintilla of evidence in the record suggesting or supporting any fiction that the previous owners or claimants erected the old fence to establish the correct boundary between parcels "D" and "P".

The court's opinion implies that an increase in prop-

erty values suddenly impelled the plaintiffs to claim property which for numerous years previous thereto they had been willing to let their neighbors have. Such is simply not the case. In the first place, there is not one iota of evidence that the values of the property in the area where these properties are located have increased, or if they have increased, that the increased values are or were any motivation to the plaintiffs to bring this action. The facts are that under the courts' decision, the home of the plaintiffs is now some two or three feet from their property line, while the home of the defendants is some 40 feet from their property line, and the close proximity of plaintiffs' home to the defendants' property line substantially interferes with the plaintiffs use and occupancy of their home. Defendants have constructed a clothes line practically on the property line, just a few feet from plaintiffs' window which is annoying to plaintiffs to put it mildly.

POINT II

DEFENDANTS' CLAIMS AGAINST THE PLAINTIFFS ARE FACTUALLY PREDICATED ON THE THEORY OF ADVERSE POSSESSION, WHICH THEORY IS PRECLUDED BY THE FAILURE TO PAY TAXES, AND THE MINIMAL FACTUAL REQUIREMENTS TO SUSTAIN DEFENDANTS' TITLE OR RIGHT TO POSSESSION

UNDER A THEORY OF "BOUNDARY BY ACQUIESCENCE" ARE PATENTLY ABSENT.

If the facts claimed by the defendants are carefully analyzed, their thrust is that defendants and their predecessors have occupied the "P-2" property adverse to the true owner for more than 48 years, and defendants have thereby acquired title. This theory might be valid if it were not for *Sections* 78-12-11 *and* 78-12-12, *Utah Code Annotated,* 1953, which among other things, requires the payment of all taxes levied and assessed against the property which, of course, defendants have not done. There are no facts whatever which could even remotely suggest, sustain, or support any fiction that sometime, somehow, somewhere, the true boundary between adjoining land owners was in dispute and the correct boundary was marked by a fence and then acquiesced in as the boundary between them. This case is not a "boundary by acquiescence" situation because the fence does not now and never has marked anything but a boundary between two parcels of property always owned by the plaintiffs and their predecessors, never owned by the defendants, and never acquiesced in by either plaintiffs or defendants as anything more than a fence separating parcels "P" and "P-2".

POINT III

THE DECISION OF THE COURT RESULTS

IN A GROSS MISCARRIAGE OF JUSTICE, AND IS CONTRARY TO THE LAW AS ENUNCIATED IN PRIOR DECISIONS OF THIS COURT.

The court has held in effect that a "squatter" who has no record title whatever, and who has never paid any taxes on the land, and who moves up to an old fence line existing between two parcels of property owned by his neighbor, can prevail over his neighbor who is a record owner of the property, and who has paid a valuable consideration for it, who has always paid the taxes thereon, and who at all times has believed, knows, and understands, that the fence line marks nothing except a division of his own property. It is submitted that under the factual situation of this case, there is no rule of law or requirement of justice compelling plaintiffs to go to court to retain title to their property as against a neighbor who plants a few shrubs and constructs a clothes line on it, so long as they pay the taxes assessed against it. None of the cases referred to in the briefs heretofore submitted by the parties hold otherwise.

CONCLUSION

In conclusion it is the plaintiffs and appellants position that in the interest of equity and fairness they ought to have the opportunity to further present and

fully argue the matters to the court. For this purpose, a re-hearing is respectfully requested.

Respectfully submitted,

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