1955

Maybell F. Sizemore et al v. George Newell Jensen et al : Brief of Appellants

Utah Supreme Court

Albert J. Colton; Fabian, Clendenin, Moffat & Mabey;

IN THE SUPREME COURT

of the

STATE OF UTAH

ALLIED MATERIALS COMPANY, et al.,

Defendants and Appellants

vs.

SALT LAKE, GARFIELD & WESTERN RAILWAY CO.

Plaintiff and Respondent

Case No. 8372

BRIEF OF APPELLANT

Albert J. Colton of
FABIAN, CLENDENIN, MOFFAT & MABEY

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STATEMENT OF FACTS

The facts in this case are undisputed.

Plaintiff and its predecessors in title operate a railroad on trackage extending west from the city limits of Salt Lake City. In 1897, Plaintiff's predecessor instituted condemnation proceedings to increase the width of its right-of-way by 33½ feet for a length of 899.25 feet. By a decree dated December 6, 1897, the District Court condemned this land and awarded it to the railroad. Such decree was not recorded by the Railroad in the office of the County Recorder as required by law, (Title 78-34-15 UCA 1953 — Comp. Laws of Utah 1888, §3856) until November 6, 1952, almost 55 years later,

and not until after Defendant Allied had purchased its land. [Exhibit 2, p. 68-70.]

On August 9, 1909, two deeds were executed by certain predecessors in title to Defendants (Exhibit 2, p. 23 and 24) covering a large piece of property in sections 3 and 34, and including the property now owned by Defendants. One deed contained, after the legal description of the properties in both sections, this recitation:

> "* * * Less that portion of said land awarded to the Saltair Beach Railroad Company for right-of-way and also less that portion of said land deeded to the Western Pacific Railway Company."

The other contained a similar provision. Subsequently, the portion of the land covered by these deeds was broken up into many smaller portions. No subsequent conveyance in Defendant's chain of title refers to this decree. (Exhibit 2) Plaintiffs claim that this recitation made by a stranger placed Defendants on constructive notice of Plaintiffs right under the decree of 1897.

Plaintiff or its predecessor at some undetermined time had erected a single track line along its right-of-way and had placed pole lines on each side of this track holding up overhead electric wires. (R. p. 14) The pole lines cross property which is both outside and inside the claimed right-of-way of Plaintiff (e.g. Plaintiff has never taken any steps to acquire, either judicially or by conveyance, the property over which its poles run directly east of Defendant's land.) (R. p. 45) The poles of Plaintiff are 8 or 9 feet within the boundary as set forth in

the legal description of Defendant's property. (R. p. 54-55) The sole objects ever placed by Plaintiff on the property in dispute are the poles and guy and trolley wires. Plaintiff claims that the physical presence of these objects gave Defendants constructive notice of the claimed fee simple interest of Plaintiff under the decree of 1897.

On June 4, 1951, Defendant, Allied Materials Company acquired a piece of property 200 feet wide for a valuable consideration. (Exhibit 2, p. 67) The deed description designated a lot of depth of 660 feet, which was the depth of the lot prior to the 1897 condemnation award, and it therefore conflicted with the railroad's claim. This depth has been used in all descriptions since 1897. Defendant Allied had no actual knowledge of any claimed interest of the railroad to the property. It had had an abstract prepared and examined, and had had the property surveyed. Defendant Allied subsequently constructed a fence along the pole line and stored materials within the enclosure. Shortly thereafter, the railroad made demand upon defendants to remove the fence, and on November 6, 1952, recorded the decree of 1897. (Exhibit 2, p. 68) On October 30, 1953, Allied conveyed the property by the same description to defendant Ketchum Builders Supply Company. (Exhibit 2, p. 72) Plaintiff filed an action praying that title be quieted in it on the basis of its unrecorded decree, and that Defendants be ejected from such property. (R. p. 1-3). Defendant's answered claiming among other things, that they

were purchasers for value in good faith without notice. (R. p. 4-7C)

On the basis of these facts, the trial Court, sitting without a jury, held that defendants had purchased the property with constructive notice of the interest of the railroad, such notice being given both by the record and by the physical facts. Defendants appeal from both findings as to notice. (R. p. 64) There being no dispute as to the facts, Defendants ask this Court to hold that as a matter of law these facts do not justify a finding of constructive notice.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT ERRED IN FINDING THAT DEFENDANTS HAD CONSTRUCTIVE RECORD NOTICE OF THE DECREE OF 1897.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE USE OF THE PROPERTY MADE BY PLAINTIFF GAVE DEFENDANTS CONSTRUCTIVE NOTICE OF PLAINTIFF'S CLAIMED FEE INTEREST.

POINT III

THE TRIAL COURT ERRED IN INCLUDING FINDINGS UNSUPPORTED BY THE RECORD.

A. THE DECREE INCLUDES LAND NOT CLAIMED BY DEFENDANTS, BUT BY THIRD PARTIES.

B. THERE IS NO PROBATIVE EVIDENCE OF THE PAYMENT OF TAXES BY PLAINTIFF OVER THE DISPUTED LAND.

ARGUMENT

Defendants believe the problem here transcends ownership of a 33½ foot strip of land. It involves the setting of a standard of care in title examination which has great significance to all purchasers and the legal profession as a whole.

POINT I

DEFENDANTS DID NOT HAVE CONSTRUCTIVE RECORD NOTICE OF THE DECREE OF 1897.

The railroad did not record its decree with the county recorder prior to the purchase of the property by defendants, and defendants had no actual knowledge of the railroad's alleged interest. Defendants, therefore, claim to be purchasers in good faith for value without notice of such decree, (Utah Code Annotated, 1953, § 57-3-3). The railroad claims that defendants had not actual, but constructive notice of their claimed interest, both by the record and by the physical facts. In urging the existence of constructive record notice, the railroad must rely upon the recitation in third party's deed of 1909, which was recorded.

What is the basis for constructive record notice? Pomeroy has stated:

> Such notice must "..... find its ultimate foundation and only support in motives of policy and expediency." 2 Pomeroy, *Equity Jurisprudence,* 4th Ed. (1918) p. 1364.

The question of constructive record notice should be considered in the light of our recording statutes and the avowed policies behind them.

Such statutes incorporate within themselves the concept of estoppel.

> "Registry statutes are legislative extensions of the doctrine of estoppel. They forbid those who have, and yet withhold from the record, their muniments of title, from asserting the title these muniments disclose against others who have innocently purchased the land from him who appears by the record to be the owner while the holders of the real title silently conceal it. They rest upon and enforce the equitable proposition that he who knowingly conceals his ownership when he ought to disclose it shall not assert it to the detriment of his neighbor who has acted in reliance upon his silence." *Boynton vs. Haggart,* (1903, CCA 8) 120 Fed. 819, at 823.

In the light of this policy, the author of a leading article on this question has stated that the burden of proof of such notice should be placed upon the negligent non-recorder.

> A "means of attaining [the desired end of such recording statutes] would be by providing for the divestment of an unrecorded title in favor of a subsequent purchaser, who should therefore, as respects all matters of substance and procedure, be treated as the deliberately appointed favorite of the statute; (3) that to the utmost possible extent such purchaser should be protected in relying upon the record, and the burden of proof in litigation between him and the negligent non-recorder of the prior deed should invariably be upon the latter . . . ."
>
> Philbrick, *Limits of Record Search, and Therefore of Notice,* 93 U. of Pa. Law Review, 125 at p. 127

"Notice is an equity doctrine. As such it must rest on fairness and reasonableness. As respects whom? Manifestly, the subsequent purchaser." Philbrick, Ibid, p. 132.

"If, in dealing with the recording problem, the party to be favored is the subsequent purchaser, certain ineluctable conclusions follow. One is that the courts should constantly and consistently put the burden of proving notice on the prior Grantee, both in inquiry notice and in doubtful cases of record notice. Another conclusion is that *such purchaser should not be defeated by a doctrine of notice that is unreasonable in the burden it puts on him;* and this either as respects to requirement of an unreasonable search of the record, or as respects what puts him on inquiry, or as respects the nature or extent of the inquiry to be made." (emphasis added)

Philbrick, Ibid, page 155.

This burden is not met by vague or ambiguous record recitation.

"Nobody would question the statement that recitals in deeds in a purchaser's chain of title bar bona fides only when the matter referred to, when incorporated into the reciting deed, reveals the hostile and superior right with reasonable certainty. Vague or ambiguous records give no notice * * * It is not enough to confront him [the purchaser] with a legal problem, a solution of which by a court perhaps few could predict."

Philbrick, Ibid, p. 271.

Indeed, as one standard text has stated:

"The power of one who records an instrument to impose upon third persons dealing with the property the duty of searching elsewhere for matters

> pertinent to the instrument recorded is, and clearly ought to be, a rather limited one."
>
> 82 A.L.R. p. 412.

This court has repeatedly held that constructive notice will be determined by the use of the test of the "reasonably prudent man," *O'Reilly v. McLean,* 84 Utah 551, 37 P. 2d 770, (1934); *LeVine v. Whitehouse,* 37 Utah 228, 109 P. 2d (1910).

The above considerations should be kept in mind in any determination of what is reasonable and prudent.

The deed of 1909 covered an area much larger than that now claimed by defendants. At the end of the description covering this much larger piece of property, it is stated:

> "less that portion of said land awarded to the Saltair Beach Railroad Company for right of way, and also less that part of the land deeded to the Western Pacific Railroad Company."

Such reference is clearly both vague and ambiguous. It does not outline the parties to the action, nor does it set forth the property covered by the decree referred to. A purchaser is not notified merely by suspicious or speculative inferences. *U.S. v. Routt County Coal Co.* (1918, CCA8), 248 F. 485. The court in this case, in disregarding arguments as to alleged constructive notice, said, "the fact . . . is as susceptible of an innocent explanation as a fraudulent one."

It is appellant's contention that the existence of a reasonable ground for *disregarding* a recitation which might refer to a conflicting property reference is enough

to destroy any constructive notice which might otherwise be implied. In the case of a negligent non-recorder, the rule is not what one *might* have discovered, but only what one had no reasonable excuse for *not* discovering.

In the instant case there are two convincing reasons why a person could reasonably assume that the reference could be disregarded.

The land covered by the 1909 deed was a large parcel on each side of the railroad tracks. This large parcel was gradually divided and conveyed in smaller bits. The abstract of the defendants, of course, contains only those instruments which included defendant's land. As these parcels got smaller, references to the decree disappeared. This could quite reasonably lead a title examiner to the conclusion that such reservation in the 1909 deed referred to property not covered by the abstractor's certificate, which was therefore, omitted as no longer relevant. Thus, for example, the decree might well have affected land to the west of the defendants' property, in which event, it would not have appeared in defendants' abstract even if it had been of record.

More concretely, the 1909 deeds conveyed property in Section 34 (including the disputed property) and in Section 3, immediately to the south of this land. It is not clear which parcel the exception clause refers to. As the Western Pacific Railway tracks run through Section 3 (Exhibit 1) it must be assumed that the recitation "less that portion of said land deeded to the Western Pacific Railway Company" refers to this property

alone. (The fact that defendants' abstract does not contain this deed is perfectly consistent with the analysis, because it is irrelevant to defendants if it does not deal with their property). Is it not reasonable to assume that the reservation as to the Saltair Beach Railroad applied to the Section 3 land as well? Section 3 also abutted the Saltair trackage. This analysis is confirmed by a subsequent deed of both the Section 34 and Section 3 properties (abstract, Exhibit 2, Page 49) where the parcels are clearly divided, the property being described as follows:

> 1. Commencing at the Southwest corner of the Southeast ¼ of Section 34, Township 1 North, Range 1 West, Salt Lake Meridian, running thence East 54½ rods; thence North 40 rods; thence West 54½ rods; thence South 40 rods to the beginning.
>
> 2. All of Lot 2, Section 3, Township 1 South, Range 1 West, of Salt Lake Meridian, less railroad and streets.

The reservation "less railroads and streets" obviously applies only to the Section 3 land.

A second reason why a reasonable man would not pay attention to the 1909 deed is the fact that the Utah law requires and did require at the time of the 1897 decree that in the case of a condemnation award "A copy of the judgment *must* be filed in the office of the Recorder of the County, and thereupon the property described therein shall vest in the plaintiff for the purpose therein specified." (Title 78-34-15, UCA, 1953; 2 Comp. Laws of Utah 1888 §3856). (Emphasis added.)

One can properly assume that the law has been complied with and that such a decree was recorded. If the decree had been recorded as required by law and it did not cover defendant's land, it would not, of course, have appeared in defendants' abstract and there would be no reason for further inquiry as to any reference to it. In the light of the statutory requirements and the absence of such a decree in the instant abstract, defendants can quite properly assume this to have been the case.

Plaintiff, by failing to comply with a law making mandatory the recordation of its decree, held, because of its own act, no claim of record to the disputed property. The existence of the statutory duty of record and a presumed compliance therewith is certainly a sufficient reason to discount vague and to defendants, ambiguous recitations by third parties as to plaintiff's claim.

True enough, defendant could conceivably, operating on some premonition, have gone to the Clerk of the District Court and run the index to the parties litigant to determine all cases in which the railroad's predecessor was a party prior to August 9, 1909, to procure the files of such actions, and to search them for property covered by the legal description in defendants' deed, but to torture such conduct into that of a reasonably prudent man is to pervert the function of the recording statutes. Such a requirement is to twist the law from placing the burden of giving notice upon the negligent non-recorder to requiring arduous research from the innocent purchaser.

Even when apprised of the existence of such a decree the record shows that it took six man hours by trained abstractors to find the document in question. (R. p. 42) Such pains cannot be required of the reasonably prudent man.

This is a practical world. Attorneys who examine abstracts are practical men. In expecting them to certify to the state of a title, certainly some limits must be placed on the search which is required of them. To force the title examiner to arduously trace down every possible conflict, even when good reasons exist for completely disregarding it, would make the duties of and responsibility for abstract examination something that only attorneys with unlimited time, or large title insurance companies with their comprehensive physical facilities, could assume.

In assuming what is "reasonable," is it not relevant that in all of the various transactions since 1909 the legal description has never been modified? The depth used has always been 660 feet, which conflicts with plaintiff's claim. One can only assume that title examination even at that time placed no one on sufficient notice of plaintiff's claim to modify the legal description. Each previous party has boldly warranted this full description. One of the most convincing tests of reasonableness is surely the action taken by others faced with the identical problem.

The law must never stray too far from what a layman calls "common sense" for it is upon this that the

great strength of the common law is buttressed. "Constructive" notice is a legal fiction. Its sole justification is a belief that no reasonable man would have acted otherwise. To protect the railroad's negligence of 50 years by a vague reference placed of record by a third party does not, it is submitted, come within this concept. It is, therefore, submitted that the Trial Court erred in finding that appellants were placed on constructive notice of the railroad's interest.

POINT II

THERE IS NO POSSESSION OF PLAINTIFF OVER THE DISPUTED LAND WHICH GIVES CONSTRUCTIVE NOTICE OF A CLAIMED FEE INTEREST.

The Trial Court has further found that the physical facts gave the appellants notice of the railroad's claimed fee interest. The only physical facts that could lead to this could be (a) the proximity of the railroad tracks to the disputed property, although not upon it, or (b) the existence of poles, and guy and trolley wires upon the disputed property.

As to the presence of the trackage, questions of this nature generally arose at the turn of the century when railroads were acquiring or expanding their rights-of-way. Two decisions of that period quite clearly point out that adjoining owners to railroad property were charged with notice of the railroad's ownership only to the extent of actual use. In *Varwig vs. Cleveland CC. & St. L. Railroad Company,* 44 NE. 92, (1896) the Supreme Court of Ohio said:

"And this is carrying the doctrine of presumption far enough. In no aspect of the case could he be found to assume that the company had acquired the right to lay additional track. Had the company placed its release on record at the proper time, that, under the statute, would have been notice. Having chosen to keep it off the record for more than six months, and until after its Grantors sold to a bona fide purchaser, that company cannot now be heard to assert that the title of that purchaser is impaired by its unrecorded release. The statute but adopts the principal of equity which holds that he in consequence of whose negligence a fraud has been committed shall sustain any resulting loss, and the rule is just, wise and salutary." p. 95

In the case of *Chicago, Rock Island and Pacific Railway Company vs. Welch,* (Neb.) 118 NW 1116, (1908), a railroad acquired a strip of land in 1890 which was 100 feet north and 200 feet south of the center of its tracks. It did not record the document showing acquisition of this property until 1904. In the meantime, a plat was recorded by a municipality in 1891 which overlapped with the property acquired by the railroad. The town sold this property to the defendant in 1891. The defendant recorded his deed in the same year and built upon the property. The Supreme Court of Nebraska held the defendant to be a bona fide purchaser and held that the admission that the railroad had operated the track since before the date of defendant's acquisition was not notice

to the world of the limits of its grant. In a companion case, *Chicago, Rock Island and Pacific Railway Company vs. Welch,* (Neb.) 118 NW 1117, the court held that the recitation in a previous contract that land was "subject, however, to the easement of said railroad in its right-of-way" was still not enough to impart constructive notice.

Would the existence of poles some eight feet within the disputed property give any additional notice of a fee interest?

Merrill, in his work on notice has stated:

> "[Possession] 'is sometimes notice of the real right and title of the possessor, and sometimes not,' *dependant upon the extent to which the particular possession seems inconsistent with the apparent title.* It is to be used 'not blindly but according to the surrounding circumstances affecting the rationale of the doctrine of notice.' Ordinarily the administration of the rules is in the hands of the court, where the evidence is undisputed, ***Since the sole office of possession is to arouse inquiry, it has no effect in determining the nature of the search nor where it should be made . . . It is a common statement that an equivocal possession will not suffice as a source of inquiry." 1 *Merrill on Notice,* Section 102, p. 125-127. (Emphasis added.)

Defendants concede that the existence of poles upon property gives notice of an alleged pole line *easement* because that particular possession is inconsistent with Defendant's apparent title *to this extent.* But this is as far as such notice goes. There is nothing inconsistent with the existence of a non-record pole line easement and

an owner's title. If the existence of a pole line were notice of a claimed fee interest of an even greater area every title examiner of Salt Lake residential property would have to include a trip to the Utah Power and Light Company as a standard part of his title procedure. Obviously, this is not the case. Utah home owners have safely assumed such non-record pole lines to be supported only by easements.

Physical possession is notice of a claimed interest of a nature necessary to support the type of possession in question. Overhanging eaves are not notice of a claimed fee interest. A five story building is notice of more than a mere easement.

The problems of any other analysis are obvious. Assuming arguendo that a pole line is notice of a claimed fee interest, what is the extent of the land so claimed? The few feet on which the poles rests? The strip 20 feet wide? 30 feet wide? Is one pole placed in a corner of a large tract notice of a claimed fee interest in the entire property? Obviously not.

The problem might be approached by asking what sort of prescriptive right could the railroad get by maintaining such pole line and wires for the required statutory period. (e.g. What interest has the railroad acquired in the property to the east of appellant, where they have never condemned the property and over which their pole line now runs). Can there be any doubt that a pole line obtains nothing more than a prescriptive easement, entitling its owner only to enter upon the property for

the reasonable maintenance and repair of said poles?

One of the principal characteristics of an easement is the absence of all rights to participate in the profits of the soil charged with it. As a standard text has stated in giving examples of such an interest:

> "For example, the right of an owner of an estate to erect and maintain, or cause to be erected and maintained, for his own benefit, *a line of telegraph poles* over the estate of another is held to constitute an easement." 17 Am. Jur. p. 924, Easements, Section 2. (emphasis added)

In discussing what forms of physical user give notice of a claimed easement which may be discovered by reasonable inspection, the same text states:

> "Examples of apparent easements include canals and ditches, chimney flues, ferry landings, light and air, pipes, *poles and wires,* private ways, privies, supports of encroaching structures and water rights." 17 Am. Jur. p. 1019, Easements, Section 130. (emphasis added)

Other cases have held pole lines to be notice of mere easements. *New York, New Haven and Hartford Railroad Company vs. Russell,* (1910 Conn.) 78 A 324; *Indianapolis and C. Traction Company v. Arlington Teleph. Co.,* (1911 Ind.), 95 NE 280.

Respondent railroad has never fenced the property in question (despite the requirement in the decree of condemnation that this be done). It has, at most exerted an easement interest.

Certainly there is no evidence of acts of "unequivocal

character indicating a claim of ownership." *Day vs. Steele,* Utah 184 Pac. (2d) 216, 219. The full limits of the railroad claim, could, of course, have been clearly set forth for all to see if the railroad had decided to place them of record. In the absence of such a precaution the notice given by acts of possession must be viewed restrictively.

It is, therefore, submitted that the Trial Court erred in finding that the pole lines, guy wires, and trolley wires of the railroad gave constructive notice of a fee interest in the land in question.

POINT III

CERTAIN FINDINGS OF FACT OF THE TRIAL COURT ARE UNSUPPORTED BY THE RECORD.

A. The Decree covers land not under litigation.

The Trial Court has decreed that plaintiff is owner of a strip of property 899.25 feet by 33½ feet (Decree, par 1). This description would include land which is not now and never has been owned or claimed by Defendants, whose claimed interest is a strip only 200 feet in length. The description in the decree should be restricted to the title of the property claimed by defendants.

B. There is no probative evidence that Plaintiff paid taxes over the property.

The Trial Court found that the taxes on the disputed property were paid by the railroad. It is submitted that the sole evidence as to the payment of taxes by the railroad was that taxes were paid over the "right-

of-way" of plaintiffs, such "right-of-way" not being described as to width. Whether the particular land in dispute is part of such "right-of-way" is the general question under litigation. Therefore, such evidence has no value and such finding is not justified.

CONCLUSION

We submit, accordingly, that under the uncontradicted facts of this case, the lower court did err in finding that:

(1) the recitations in the 1909 deeds could reasonably give constructive record to defendants of the Decree of 1897.

(2) the physical acts of plaintiff with regard to such land gave defendants constructive notice to defendants of the Decree of 1897.

(3) the findings and decree of the court cover more property than that actually claimed by defendants and by reciting payments of taxes by plaintiff which are unsupported by the evidence.

Respectfully submitted,

Albert J. Colton of
FABIAN, CLENDENIN, MOFFAT & MABEY