

Meade v. Watson

Supreme Court of California, Department Two

October 22, 1885

No. 8876

Reporter: 67 Cal. 591; 8 P. 311; 1885 Cal. LEXIS 702

THOMAS MEADE, Appellant, v. MARTIN WATSON, Respondent

Prior History: [***1] Appeal from a judgment of the Superior Court of the county of Stanislaus.

Disposition: The Court -- For the reasons given in the foregoing opinion the judgment is reversed with directions to overrule the demurrer to the complaint.

Case Summary

Procedural Posture

Plaintiff property owner appealed from a judgment of the Superior Court of the County of Stanislaus (California) that sustained defendant adjoining owner's demurrer to the property owner's complaint in which the property owner sought to recover a certain sum that represented one half the value of a partition fence and to foreclose a lien for that amount as permitted by 1855 Cal. Stat. 154, as amended by 1860 Cal. Stat. 141.

Overview

The property owner alleged that he erected a fence that partitioned his land from that of the adjoining owner's land, that the fence was a good, strong, substantial and lawful stone fence of specific dimensions, and that the fence, along with the adjoining fence erected by the adjoining owner was sufficient to prevent ingress and egress of stock. Therefore, pursuant to 1855 Cal. Stat. 154, and as amended by 1860 Cal. Stat. 141, the property owner sought one half the value of the fence he built that divided their respective lands, and to which the adjoining owner attached his fence. The court reversed the judgment that granted the adjoining owner's general demurrer. The court reasoned that the purpose of the 1855 Cal. Stat. 154 was to protect an enclosure, and the complaint sufficiently stated a cause of action that a lawful fence under that statute was constructed. It was not necessary that the property owner identify the fence built as one of those enumerated in the statute. Finally, the property owner made a valid demand for payment when he presented the fence's length in rods, its value per rod, and demanded one half of the total cost.

Outcome

The court reversed the judgment that sustained the adjoining owner's general demurrer to the property owner's complaint in which he sought to foreclose on a lien for one half of the value of a partition fence that divided their property. The court directed that the demurrer was overruled.

Syllabus

The facts are stated in the opinion.

Counsel: *Wright & Hazen*, for Appellant.

W. E. Turner, for Respondent.

Judges: Searls, C. Belcher, C. C., and Foote, C., concurred.

Opinion by: SEARLS

Opinion

[*591] [**311] This is an action to recover the sum of \$ 280, [*592] with interest and counsel fees, and to foreclose a lien for one half the value of a partition fence.

The appeal is from a judgment in favor of defendant, on a demurrer to the complaint.

In addition to his general demurrer, defendant sets forth as special causes why the complaint is not sufficient, that the fence alleged to have been constructed by plaintiff is not one of the kinds of fence declared to be a lawful fence by the act of the legislature of the State of California, entitled "an act concerning lawful fences," approved April 27, 1855, and the acts supplementary thereto.

B. That there is no allegation in said complaint that the fence erected by plaintiff is as strong, substantial, [***2] and as well calculated to protect enclosures as either of the kinds of fence, by the said act declared a lawful fence. C. That it appears that neither of the fences described in the complaint is a lawful fence within the meaning of the aforesaid act of the legislature.

The allegations of the complaint essential to a decision on the demurrer are, that the plaintiff and defendant are adjoining land-owners, that plaintiff erected upon the line between his land and that of defendant, a good, strong, substantial, and lawful stone fence, three and one half feet high, two feet wide at the base and one foot wide at [**312] the top, compact and regular in construction, etc. The complaint then proceeds to aver that certain other coterminous land-owners erected fences, which together with his and certain fences erected by defendant, served to "and did and now does form a perfect and sufficient enclosure of all said premises, and sufficient to, and the same and the whole thereof did, and now does, prevent the ingress of stock upon, or the egress of stock from said premises and the whole thereof."

The land of defendant thus enclosed is not divided by a partition fence from that of Abbott, [***3] Shoemaker, and Tuck, adjoining land-owners, but is enclosed in one common enclosure with their land.

The land in question is situated in the county of Stanislaus, and is therefore in one of the counties governed by the act entitled "an act concerning lawful fences," approved April 27, 1855 [*593] (Stats. 1855, p. 154), and an act amendatory and supplementary thereto, approved April 3, 1860. (Stats. 1860, p. 141.)

These acts are retained in force by the provisions of section 19 of the Political Code, and the counties to which they are applicable are not subject to the provisions of [section 841 of the Civil Code](#). (*Gonzales v. Wasson*, 51 Cal. 297.)

The Act of 1855, after prescribing the height and mode of construction of lawful fences, when of wire, of post, and rail, and various other material, proceeds as follows: --

"Section 2. Any fence which by reliable evidence shall be declared as strong, substantial, and as well suited to the protection of enclosures as either of the above described, shall be a lawful fence in all the counties of this State, except Sonoma, Napa, El Dorado, and Marin."

The fifth section of the Act of 1855 was amended in 1860 (Stats. 1860, p. [***4] 141) to read as follows: --

"When a fence has been erected by any person on the line of his land, and the person owning the land adjoining thereto shall make, or cause to be made, an enclosure on the opposite side of such fence, so that such fence may answer the purpose of enclosing his ground also, such person shall pay the owner of such fence already erected, one half the value of so much thereof as serves as a partition fence between them," etc.

The ultimate object of a lawful fence is to so enclose land as to prevent the ingress and egress of such domestic animals as are usually nurtured and confined thereon, and to protect the premises enclosed from unlawful encroachment.

At the common law no man is bound to fence his lands against the cattle of another, but each owner is bound to restrain them, and is answerable for any trespass they may commit upon the lands of another. The word "close" is purely technical, and relates to the interest in the soil and to its invisible boundaries, and not to those artificial barriers often erected around land.

The whole duty of erecting division and boundary fences in the absence of agreement or prescription, is regulated by statute, and [***5] as will be seen by our statutes as quoted, lawful fences may consist either of the specific structures enumerated, or of any other barrier "which, by reliable evidence, shall be declared as [*594] strong, substantial, [**313] and as well suited to the protection of enclosures as either of the above described."

Keeping in view, then, the object of a lawful fence, viz., to protect an enclosure, we are of opinion the language of the complaint in this cause sufficiently alleges that the fence constructed by plaintiff, and for the value of which he seeks to recover, was and is a lawful fence.

It is not one of the enumerated fences mentioned in the statute, but is described as a stone wall of given dimensions, constructed in a given manner, and is according to the complaint, a "good, strong, substantial, and lawful stone fence, . . . and with the other fences now does form a perfect enclosure of all said premises, and sufficient to . . . and now does prevent the ingress of stock upon or the egress of stock from said premises, and the whole thereof."

A fence which forms a perfect enclosure and is sufficient to turn stock which is good, strong, and substantial, and built of [***6] stone, must, we think, be the equivalent of the lawful fences specifically described in the statute.

The statute as amended in 1860 does not in terms provide that line or division fences shall be lawful fences; but the law having defined what is meant by a *lawful fence*, we must presume that when fences are mentioned elsewhere in the statute, lawful fences are intended. (*Enright v. S. F. & S. J. R. R. Co.* 33 Cal. 230.)

We do not conceive it to be necessary to show that all the fences surrounding and enclosing the lands of defendant are lawful fences within the meaning of the

67 Cal. 591, *594; 8 P. 311, **313; 1885 Cal. LEXIS 702, ***6

statute. If they have been adopted by him in completing his enclosure, and serve to enclose his land, and if plaintiff's fence complies with the requirements of the law, it must be held sufficient; otherwise a party enclosing his land could always prevent a recovery for fences constructed by others on his lines by omitting to build as provided by statute.

So, too, the fact of defendant connecting his fences with those already constructed so as to form an enclosure of his land with that of such others, must be construed as tantamount to an agreement on his part within the doctrine of *Gonzales* [***7] *v. Wasson*, 51 Cal. 295.

[*595] The road laws retained in force by the Code are not subject to the objection of being special legislation, and therefore obnoxious to the Constitution. They were in force before the adoption of our present Constitution; and that instrument only applies to statutes passed after its adoption. (*People v. Jobs*, 7 Colo. 475; *Ex parte Burke*, 59 Cal. 6.)

The demand of payment by plaintiff was sufficient.

The complaint shows the length of the division fence to be 320 rods, that the value thereof, at the time the

enclosure was made, was \$ 1.75 for each and every rod thereof, and that one half the total value was and is \$ 280; that on the 14th day of October, 1881, plaintiff demanded payment of said sum from defendant, which was refused, etc. Nothing further was required to constitute a valid demand.

Counsel for respondent claims that if a recovery can be had from defendant in this case, he will be equally liable to the other persons [**314] whose fences form portions of the general enclosure within which his land is situated. A reference to the statute (Stats. 1860, p. 141) will show that it is only for a proportionate part of the [***8] value of *partition fences* that a recovery can be had.

We think the judgment should be reversed and the court below directed to overrule the demurrer.

The Court -- For the reasons given in the foregoing opinion the judgment is reversed with directions to overrule the demurrer to the complaint.