ROMERO V. HERRERRA, 1924-NMSC-062, 30 N.M. 139, 228 P. 604 (S. Ct. 1924)

ROMERO
vs.
HERRERRA et al.

No. 2796

SUPREME COURT OF NEW MEXICO

1924-NMSC-062, 30 N.M. 139, 228 P. 604

August 22, 1924

Appeal from District Court, Bernalillo County; Hickey, Judge.

Suit by Andres Romero against Felipe Herrera and others. From a judgment for defendants, plaintiff appeals.

SYLLABUS

SYLLABUS BY THE COURT

1. Where all parties at the close of a jury trial move the court for a directed verdict, they are deemed to have waived their right to a trial by jury, and to have agreed that the court shall pass upon the facts.

2. Under such circumstances, findings of fact made by the trial court will not be disturbed on appeal, if they are supported by substantial evidence.

3. A decision on a prior appeal becomes the law of the case upon a subsequent appeal, and is binding upon the litigants.

4. The erroneous admission of evidence in a trial before the court without a jury is not reversible error unless it affirmatively appears that the court took such evidence into consideration in deciding the case.

5. In a case in ejectment where prior possession is the controlling issue, witnesses may not express their opinion as to who had such possession, as that invides the province of the court or jury, as the case may be. They should only testify to facts from which the question may be determined.

COUNSEL

N. B. Field and M. J. Helmick, both of Albuquerque, for appellant.

Marron & Wood, of Albuquerque, for appellees.

JUDGES

Bratton, J. Parker, C. J., and Botts, J., concur.

AUTHOR: BRATTON

OPINION

*{*139}* **{1}** OPINION OF THE COURT This is a suit in ejectment instituted *{*140}* by the appellant to recover possession of a described tract of land situated in Bernalillo county 187 yards wide by 1,500 yards long. This is the second time the case has been before this court. The opinion rendered on the former appeal may be found at 27 N.M. 559, 203 P. 243. The facts are fully stated there, and it is needless to repeat them here. At the conclusion of the second trial, all parties moved the court for an instructed verdict. The appellant's motion was denied; the appellees' motion was granted; an instructed verdict in their favor was returned, upon which judgment was rendered. The appellant has appealed.

{2} 1. Appellant contends that he affirmatively established a legal title under the following facts proven by him, viz.: That more than 30 years prior to the institution of this suit, Venceslao Chaves fenced the land in question, claiming to own the same; that the trustees of the Atrisco grant failed to take any legal steps to question such action on Chaves' part; that later, and for a valuable consideration, Chaves executed a mortgage upon said land to Pedro Perea, and that, subsequent thereto, Chaves and his wife conveyed the same by deed to Perea; that thereafter Perea conveyed it by deed to the appellant; that this deed was lost, and many years thereafter Perea's heirs executed a substitute or lieu deed conveying the same to appellant, in which the loss of the original was full recited; that during all of said times, and up to the time appellees dispossessed him, appellant and his predecessors in interest had possession of the land in question. Under these facts, it is contended that he proved a good title in himself. These grounds were incorporated in appellant's motion for a directed verdict. That there was an issue of fact with reference to the kind, character, and duration, as well as the existence of possession by the appellant and his predecessors in interest, is plainly to be seen from the statement of facts appearing in the opinion upon the former appeal, and it is admitted by counsel for both parties in their respective *{*141}* briefs, that the evidence upon this question on the subsequent trial was not materially different from that given on the previous one. This court expressly held, in such former opinion, that an issue of fact was presented with reference to the possession of the land, and that holding is the law of the case upon this appeal, and is binding upon this court, as well as the litigants. Davisson v. Citizens' National Bank, 16 N.M. 689, 120 P. 304; McBee v. O'Connell, 19 N.M. 565, 145 P. 123; State ex rel. Garcia v. Board of Commissioners, 22 N.M. 562, 166 P. 906, 1 A. L. R. 720; First National Bank v. Cavin, 28 N.M. 468, 214 P. 325. Possession under this claim of ownership being essential, and there being an issue of fact with reference thereto, the motion of all parties for a directed verdict operated to

waive their right to a trial by jury, and to constitute the trial court as the trier of the facts. In other words, the parties deemed to have waived their right to a jury trial, and are bound by the findings, if supported by substantial evidence. Home Savings Bank v. Woodruff, 14 N.M. 502, 94 P. 957; De Burg v. Armenta, 22 N.M. 443, 164 P. 838. We follow these cases, which are clearly in harmony with the decided weight of authority throughout American jurisprudence. This may be readily seen by referring to the many cases cited in the note to Manska v. San Benito Land Co., 18 A. L. R. 1430 (1433). So we have this situation -- by the law of the case declared on the former appeal, an issue of fact existed with reference to the possession of the disputed land on the part of the appellant and his predecessors in interest. It was clearly essential that he establish this phase of his case in order to recover. Section 3364, Code 1915; Manby v. Voorhees, 27 N.M. 511, 203 P. 543; Hoskins v. Talley et al. 29 N.M. 173, 220 P. 1007. By their motions for a directed verdict, the parties are presumed to have waived their right to have the jury determine the issues of fact, and elected to agree upon the trial judge to pass upon them. The finding of the court, being supported by substantial evidence, will not be disturbed on appeal -- *{*142}* a rule too well established to require or even merit the citation of authorities.

{3} 2. Appellant strongly urges that, at the time the common lands located within the Atrisco grant were conveyed to the corporation, he owned and was in possession of the land involved here; that it being privately owned land, the corporation acquired the legal title thereto as a naked trustee only, and that it held such legal title for his use and benefit as the actual owner. He relies upon Williams v. Lusk et ux., 28 N.M. 147, 207 P. 576, where this general doctrine was declared; but the bar to appellant's prevailing under it is that the trial court found against him upon the issue of his possession. Without possession he could acquire no title, as the muniments under which he claims could serve only as color of title under which he might acquire the land by adverse possession. Without possession, he could acquire no title.

{4} 3. Appellant further asserts that, aside from his legal title, he was entitled to recover upon his prior possession alone. He asserts in this connection that the appellees were naked trespassers, and that, in ejectment cases where no legal title is shown in either party, the one showing prior possession will be held to have the better right, and hence, entitled to recover. With this statement of abstract law we are in accord; but the difficulty with appellant's position is its application to this case. As we have previously seen, the trial court found against him upon his issue of prior possession, and, for the reasons we have previously suggested, he is bound by that finding. For this reason, he is cut off from recovering upon this theory.

{5} 4. It is next urged that the court erred in admitting in evidence the deeds from the trustees of the Atrisco grant to certain of the appellees. From what we have said, the trial of this case finally resolved itself into one before the court without a jury. In such cases, the erroneous admission of evidence is not reversible error, unless it affirmatively appears that the *{*143}* court took such evidence into consideration in deciding the case. Radcliffe v. Chaves, 15 N.M. 258, 110 P. 699; Halford Ditch Co. v. Independent Ditch Co., 22 N.M. 169, 159 P. 860; Crawford v. Gurley, 23 N.M. 659, 170

P. 736; Grissom v. Grissom, 25 N.M. 518, 185 P. 64; Espy v. Union Trust & Savings Bank 29 N.M. 225, 222 P. 200. It does not appear that the trial court took this evidence into consideration in deciding the case. Hence, there is no reversible error shown. The admission of certain other evidence is assigned as error. What we have said here disposes of that matter.

{6} 5. Appellant's counsel asked several witnesses, who had actual possession of the land at specific times, explaining that what he meant by possession was "possessio pedis" -- having his feet on the ground. To each of these questions, the trial court sustained an objection upon the theory that the answer involved a mixed question of law and fact; that it was a question for the jury; and that to admit such evidence would invade the province of the jury. Obviously, the court was correct. Possession of the land was an important, if not the controlling, fact in the case, and was the principal question to be decided by the jury. In such a case, it is certainly not one for witnesses to express their opinion upon, but instead they should testify to the various facts from which the jury may reach its conclusion. To permit witnesses to testify is simply to allow them to invade the province of the jury. They may testify to any independent fact, which will throw light upon the question of possession, such as who built fences upon the land, cultivated it, erected other improvements, grazed their stock thereon, and other kindred facts, from which the jury might decide who had possession. Had possession not been one of the direct issues in the case for final determination by the jury, but merely an incidental one, perhaps the objection would not have been tenable, but in this kind of a case, it is for the jury and not witnesses to say who had possession during the material times. *{*144}* From what we have said, it follows that the judgment should be affirmed, and it is so ordered.