Shultz
v.
Department of the Army, United States of America

10 F.3d 649 (9th Cir. 1993)

Paul Shultz filed a quiet title action claiming a public right of way across Fort Wainwright. His claims was that an RS 2477 right of way, or other forms of easements, existed prior to establishment of the army base. The Federal District Court ruled that no right of way existed, or in the alternative, the statute of limitations for Shultz to bring a quiet title action against the Army had expired. A three judge panel of the Ninth Circuit Court of Appeals reversed the decision of the District Court.

FACTS: The panel's factual recitation on pages 652 and 653 follows:

> Shultz owns property to the northeast of Fort Wainwright and east of Fairbanks. To get to Fairbanks, he must cross the base. Fort Wainwright is situated on land acquired by the federal government in a series of purchases and withdrawals beginning in 1937. All of the acquisitions were made "subject to valid existing rights." Shultz traces his title through George Nissen who homesteaded in the first half of the century and through Nissen's successors. Nissen was a German immigrant who made entry on the property in October 1907, built his cabin the following month and, by February 1908, established residency. He was among a handful of homesteaders occupying land along the Chena River and for a while raised potatoes and other vegetables with great success. He transported a portion of his crop to market in Fairbanks every year. Nissen left the area in 1918. The homestead patent, for which he had filed in 1914, was issued in 1924.
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> In the early days of homesteading the routes to Fairbanks across present day Fort Wainwright were difficult to travel. At trial one witness described swimming horses in the summer across sloughs lacking bridges. These same sloughs served as frozen highways in the winter. Much of the land surrounding Shultz' property, especially to the north, is swampy, due to the underlying permafrost that prevents the melted snow from draining. In Alaska, more than in most locations, the season dictates the nature and means of passage. The trial involved the introduction of extensive evidence of the various historical routes across the land now occupied by the Army.... No other land route is available. Without access through Fort Wainwright, Shultz is landlocked.

The modern base roads essentially follow the river and "[i]n part they follow the same course as the trails and wood paths used by early settlers in the Chena River area." Page 654. In 1981 the Army instituted a pass system for the base. Mr. Shultz refused to obtain a pass. Ultimately he filed the quiet title action in 1986.

Three major issues were addressed by the decision: Mr. Shultz's standing to bring the quiet title action, the validity of the RS 2477 claim, and the statute of limitations to bring the action.

STANDING: The Army challenged Shultz's right to bring the litigation on the grounds that Shultz did not have standing, or the legal right, to bring a quiet title action for any roads that did not abut his property. Its contention was that since Shultz was not an abutter to the roads on the base, he did not have "a 'special and vital interest' in roads that do not abut his property." At page 653. The panel dismissed that argument and ruled that Shultz did have standing because he:

> has a "particularized" interest in crossing the base to reach roads that lead to his property. Not to have access to those roads would "affect [him] in a personal and individual way" by sealing him off from his property. Second, Shultz seeks to quiet title as against the Army which asserts an unrestricted right to regulate access to Fort Wainwright's roads. A clear causal connection exists between his claim and the restrictions he challenges. Finally, were Shultz able to prove that the combination of roads leading to his property do constitute public rights of way the "favorable decision" would redress the injury he asserts. [Citations and footnote omitted].

At page 653.

RS 2477 RIGHT OF WAY: The panel determined that Alaska's conditions presented unique situations that relate to RS 2477 rights of way.

> Due to its geography, its weather, and its sparse and scattered population, Alaska's "highways" frequently have been no more than trails and they have moved with the season and the purpose for the transit--what traveled best in winter could be impassable knee-deep swamp in summer; what best accommodated a sled was not the best route for a wagon or a horse or a person with a pack. By necessity routes shifted as the seasons shifted and the as the uses shifted What might be considered sporadic use in another context would be consistent or constant use in Alaska. We conclude that as long as the termini of the right of way are fixed (the homesteaders' cabins on one end, Fairbanks on the other), to establish public right of way the route in between need not be absolutely fixed (as it might be in other settings).... Right of access is the issue, not the route. [Footnotes omitted].

At page 655

Although RS 2477 is a federal grant, acceptance of the grant is a matter of state law. In referring to Standard Ventures, Inc. v. Arizona, 499 F.2d 248, 250 (9th Cir. 1974), Sierra Club v. Hodel, 848 F.2d 1068, 1083 (10th Cir. 1988), and Fisher v. Golden Valley Electric Association, Inc., 658 P.2d 127, 130 (Alaska 1983), at page 655, the panel stated: "An RS 2477 right of way comes into existence 'automatically when a public highway [is] established across public lands in accordance with the law of the state.' Whether a right of way has been established is a question of state law." However, doubts to the extent of the RS 2477 right of way must be construed in favor of the government.

Moreover, at pages 655 and 656, the court recognized two methods under Alaska law to establish RS 2477 rights of ways:

> [B]efore a highway may be created, there must be either [1] some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or [2] there must be public user for such a period of time and under such conditions as to prove that the grant has been accepted.

Hamerly v. Denton, 359 P.2d 121, 123 (1961). "To prove RS 2477 rights by the second of these methods, a claimant must show "(1) that the alleged highway was located 'over public lands,' and (2) that the character of its use was such as to constitute acceptance by the public of the statutory grant." Hamerly, 359 P.2d at 123. Shultz at page 656.

The panel determined that A.S. 19.45.001(9) "broadly defines 'highway' to include a 'road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof.'" At page 656. Lands that have been withdrawn or entered are not public lands available for an RS 2477 claim.

Public user is necessary to create the acceptance.

> Although the law of RS 2477 rights of way suggests that "infrequent and sporadic" use is insufficient, Hamerly, 359 P.2d at 125, and that "regular" and "common" use by the public is necessary, Kirk v. Schultz, 110 P.2d 266, 268 (Idaho 1941), and that travel across the route may not be "merely occasional," the test is what is "substantial" under the circumstances, Ball v. Stephens, 158 P.2d 207, 210 (Cal. 1945).

At page 656.

In finding a foot path was sufficient to establish an RS 2477 right of way under Alaska law, the panel found: "we have noted the manner of travel (by foot or beast or vehicle) is legally irrelevant to the RS 2477 determination. What matters is that there was travel between two definite points." At page 658. Footnotes 10 and 11 on page 658 expand on the preceding quote in regard to the Army's contention that since a neighbor, who entered his property later than Nissen, had to build a road to his homestead there was no basis for a road to Nissen's property. The panel stated:

> Both the judge and the Army clearly misunderstood the import of A.S. 19.45.001(9) for RS 2477 law. Such a right of way need not be "buil[t]" or constructed'. Nor need it be "susceptible to wagon or motor vehicle use". An unimproved trail suffices as a "road" for the purposes of this law. The government pose the problem incorrectly. It argued to the court that "if you're going to find an RS-2477, you have to know not only that he got from Fairbanks to his property, but how he did it." As long as it is clear that Nissen traveled overland, how he did it is immaterial.

Public Prescriptive Easement: The fact that the public used a route does not automatically qualify it as an RS 2477. It must cross public lands that were not withdrawn or reserved prior to establishment of the use. While the Panel did not find that all segments of the trail were established under RS 2477, it did rule that Shultz was not required to show that all portions of the trail were created under RS 2477. The panel concluded Alaska law allows for public prescriptive easements. It cited Dillingham, and listed the three tests for prescriptive easement as stated in McGill v. Wahl, 839 P.2d 393 397 (Alaska 1992): “To establish a prescriptive easement a party must prove that (1) the use of the easement was continuous and uninterrupted; (2) the user acted as if he or she were the owner and not merely one acting with the permission of the owner; and (3) the use was reasonably visible to the record owner.” The panel dismissed the lower court’s finding that no public prescriptive easement existed. As to the route along the Chena River the panel stated at page 661:

> To assert a public easement by prescription, the public need only act “as if [it] were claiming a permanent right to the easement.” Swift, 706 P.2d 296. Since overland travel to Fairbanks from the homesteads of the base clearly required some kind of right of way, all interested parties were on notice that an easement was being established. [Citations omitted]. Moreover, the public nature of the route, and its shared use, reinforce Shultz’s claim that at the very least an easement by prescription took hold. The route was there. The homesteaders used it. No one challenged their right.”

Quiet Title Action: The Army alleged that Shultz did not bring his quiet title action for the easement claim within the 12 statute of limitations under 28 §

U.S.C. 2409a(g). Even though the military base was established in 1937, the panel found that Shultz was not put on notice that Army disputed the right of way until it blocked the road in 1981. Consequently, his suit, filed in 1986 was within the statute of limitations.

NOTE: The above opinion was withdrawn by the 9th Circuit.

Opinion 1996 WL 532312 (9th Cir.(Alaska)) decided September 20, 1996, in its entirety states:

> The government's petition for rehearing is granted, the opinion of November 30, 1993 at 10 F.3d 649 is withdrawn, and the following opinion is substituted in its place.
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> Paul G. Shultz appeals the district court's judgment in favor of the government in his quiet title action under 28 U.S.C. § 2409a. Schultz argued that he has a right-of-way across Fort Wainwright to get back and forth between Fairbanks and his property under either R.S. 2477, 43 U.S.C. § 932, or Alaska common law, or both. Because we ultimately agree with the district court that Shultz has not sustained his burden to factually establish a continuous R.S. 2477 route or a right-of-way under Alaska common law, we affirm the district court. We do not reach Shultz's argument that the district court erred by holding that his action was time barred by 28 U.S.C. § 2409a(g).

Circuit Judge Alarcon's dissent was:

> I respectfully dissent.
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> I would deny the petition for a rehearing and reverse the district court's judgment for the reasons set forth in Judge Fletcher's scholarly opinion in Shultz v. Department of the Army, 10 F.3d 649 (9th Cir. 1993).