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J. Kenneth Davies and Joseph T. Davies v. Vivian M. Bezzant and Eva Jean Cornwell : Petition for Rehearing

Utah Supreme Court

Dallas H. Young, Jr.; Ivie and Young; Attorneys for Respondents.
Clair M. Aldrich; Aldrich and Nelson; Attorneys for Appellants.

IN THE SUPREME COURT

OF THE STATE OF UTAH

J. KENNETH DAVIES and JOSEPH T. DAVIES, Plaintiffs and Respondents, -vs- VIVIAN M. BEZZANT and EVA JEAN CORNWELL, Defendants and Appellants.	Case No. 14049

PETITION FOR REHEARING

Petition for rehearing of Decision entered November 5, 1975, by the Supreme Court

CLAIR M. ALDRICH
ALDRICH & NELSON
43 East 200 North
Provo, Utah 84601
Attorneys for Appellants

DALLAS H. YOUNG, JR.
IVIE AND YOUNG
48 North University
Provo, Utah 84601
Attorneys for Respondents

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PETITION FOR REHEARING

Appellants respectfully request the Court to recall the decision filed herein on November 5, 1975, and to reconsider this case in its entirety for the following reasons:

I

THE DECISION APPEARS TO CONTAIN A PATENT CONTRADICTION ON ITS FACE.

II

THE DECISION UPHOLDS A BASIC AND FUNDAMENTAL ERROR MADE BY THE TRIAL JUDGE IN THAT NOT ONLY IS THERE NO "SUBSTANTIAL EVIDENCE", BUT NO EVIDENCE AT ALL THAT DEFENDANTS' PREDECESSOR WANTED TO BUY ADDITIONAL GROUND, OR THAT THEY EVER AGREED WITH RESPONDENTS' PREDECESSOR TO PAY ANY ADDITIONAL MONEY WHATEVER. ON THE CONTRARY, THE RECORD SHOWS THAT THEY DID NOT AGREE TO PAY ANY MORE MONEY.

III

THE DECISION DOES NOT ADEQUATELY OR FAIRLY SET FORTH UNDISPUTED PERTINENT FACTS NECESSARY TO A PROPER UNDERSTANDING OF THE CASE

IN RELATION TO THE LAW AND TO A FAIR AND PROPER ADJUDICATION OF THE CONTROVERSY.

IV

THE DECISION DOES NOT ADDRESS ITSELF TO THE BASIC LEGAL QUESTION PRESENTED ON THE APPEAL AND THAT IS WHETHER, AS A MATTER OF LAW, A CLAIM FOR A MONEY PAYMENT BY ONE PARTY, FIRST MADE ABOUT TWO YEARS AFTER THE FENCE WAS PLACED, RESISTED AND DENIED TO BE OWING BY THE OTHER, WITH THE PROBLEM UNRESOLVED AND EXTENDING OVER A PERIOD OF LONGER THAN TWENTY YEARS, PRECLUDES THE APPLICATION OF THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE.

V

THE DECISION APPEARS TO INTRODUCE A NEW ELEMENT INTO THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE IN THAT IT RECITES THAT "THE DEFENDANTS HAVE USED THE LAND IN QUESTION, BUT HAVE NEVER PAID ANY TAXES THEREON." THAT TAXES ARE OR MIGHT BE A PROBLEM IN BOUNDARY BY ACQUIESCENCE CASES HAS NEVER BEEN A FACTOR IN ANY OF THE PRIOR CASES.

ALDRICH & NELSON
By Clair M. Aldrich
Attorneys for Appellants

ARGUMENT

Points I and II will be treated together.

POINT I

THE DECISION APPEARS TO CONTAIN A PATENT CONTRADICTION ON ITS FACE.

POINT II

THE DECISION UPHOLDS A BASIC AND FUNDAMENTAL ERROR ON THE PART OF THE TRIAL JUDGE IN THAT NOT ONLY IS THERE NO "SUBSTANTIAL EVIDENCE", BUT NO COMPETENT EVIDENCE AT ALL THAT DEFENDANTS' PREDECESSOR EVER WANTED TO BUY ADDITIONAL GROUND, OR THAT THEY EVER AGREED WITH RESPONDENTS' PREDECESSOR TO PAY FOR ANY ADDITIONAL GROUND. ON THE CONTRARY, THE RECORD SHOWS THAT THEY DID NOT AGREE TO PAY ANY MORE MONEY.

The last sentence of the third paragraph of the Decision provides:

"The corners of the proposed purchase were staked out by the then respective owners, but no agreement was ever reached and no payment ever made for the desired land." (Underscoring supplied)

Paragraph 5 of the Decision provides:

"There was a dispute as to what was said and done at the time the corner stakes were set out. However, the trial court found that 'the fence line on the south and east sides of the land in dispute was erected pursuant to an agreement to purchase the land, which agreement was never performed'." (Underscoring supplied)

Both of those statements cannot be correct, nor can the two statements be reconciled. Appellants believe that the statements contradict each other.

There was no dispute whatever as to what was said and done when the stakes were set for the corners of the property Elder was to have. Elder was the only witness that even testified as to that phase of the case. He had purchased a corner lot and the stakes were set so that his property abutted upon the west line of the street that was to have been installed. That there was to have been a street there is admitted by the respondents. (Tr. 42). Also see respondents' Exhibit No. 5.

The claim that there was supposed to be some kind of a payment for the additional ground didn't come to light until about two years after the boundary line had been agreed upon and the fence line had been erected. The witness, Mr. Neff Tippets, did not reside in the state at that time and did not appear in this matter until some time after the death of his father. The record does disclose that at some point after he became involved

in the matter the witness, Mr. Neff Tippets, did claim that there was money owing for the additional ground, and for an insurance policy. However, no agreement was ever reached as to the amount to be paid nor did appellants or their predecessor ever agree that any money was owing, nor did they ever agree to pay any more money.

POINT III

THE DECISION DOES NOT ADEQUATELY OR FAIRLY SET FORTH UNDISPUTED PERTINENT FACTS THAT ARE NECESSARY TO A PROPER UNDERSTANDING OF THE NATURE OF THE CASE IN RELATION TO THE LAW AND TO A FAIR AND PROPER ADJUDICATION OF THE CONTROVERSY.

The following facts are not in dispute:

1. Appellants' predecessor purchased property that was to be a corner lot in a proposed subdivision abutting a street then existing on the north and abutting a proposed street on the east side thereof.

2. Early in 1950 Elder built a home on the property, which said home faced in an easterly direction.

3. In the fall of 1950, Elder met on the ground with the then owner of the abutting property and the same person from whom Elder had received his deed, for the express purpose of locating his corners in relation to the proposed road so that he could fence the property that he was supposed to have acquired. The corners were fixed by the parties on the ground and the fence was erected in 1950.

4. The senior Mr. Tippets, from whom appellants' predecessor had purchased the ground and who had agreed on the

corners, died in late 1951. The witness, Mr. Neff Tippets, was out of the state at that time and came into the picture only sometime after the death of his father.

5. Mr. Neff Tippets, on several occasions until about 1963, tried to get more money for the ground, but neither the appellants nor their predecessors ever agreed that any additional money was owing, nor did they agree to pay any additional money.

6. The respondents acquired a deed to the property in 1968, but no right to possession of the land in question was ever asserted by the respondents or their predecessors until this action to quiet title was commenced in 1972.

7. The undisputed facts in this case clearly bring the matter within the ambit of the Court's well established requirements for proof of boundary by acquiescence:

(1) Occupation up to a visible line marked definitely by monuments, fences or buildings;

(2) Acquiescence in the line as a boundary;

(3) For a long period of years;

(4) By adjoining owners.

There is no contention here that the fence was built for some purpose other than as a boundary line. Compare Ringwood v. Bradford, 2 Utah(2) 119, 269 P(2) 1053, where the fence had been erected to control cattle.

Here appellants' predecessor bought and respondents' predecessor sold him a lot that was represented to be a corner

lot in a proposed subdivision. On that representation a house was built on the lot facing easterly toward a proposed street. The subdivision plat had not been filed, and never was. However, the then owner of the lot met on the ground with the owner of the abutting ground, who was the very person from whom he had received his deed, and they then and there marked his corners to coincide with the street that was to be completed, and which never was installed.

The fence was placed where it was authorized to be placed and the fence served as dividing and boundary line from 1950 until this suit was filed in 1972, and during that period it was never questioned.

A visible, persisting boundary existing over a long period of time is convincing evidence of intended or acquiescence in boundary. King v. Fronk, 14 Utah(2) 135, 138; 378 P(2) 893.

POINT IV

THE DECISION DOES NOT ADDRESS ITSELF TO THE BASIC LEGAL QUESTION PRESENTED ON APPEAL AND THAT IS WHETHER, AS A MATTER OF LAW, A CLAIM FOR A MONEY PAYMENT BY ONE PARTY, FIRST MADE ABOUT TWO YEARS AFTER THE FENCE WAS PLACED, RESISTED AND DENIED TO BE OWING BY THE OTHER, WITH THE PROBLEM UNRESOLVED AND EXTENDING OVER A PERIOD OF SOME TWENTY YEARS, PRECLUDES THE APPLICATION OF THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE.

Until the lawsuit was filed in this instance it does not appear that the respondents or their predecessors ever contended that the fence was not a boundary line.

Some two years after the line was agreed upon by the then record owners of the adjacent lands, the son of the original owner commenced trying to collect some money for the land

in question. No one ever paid him any money for the land, nor did they ever agree that any money was due or owing. He quit trying to collect in 1963.

Aside from on several occasions trying to collect some money, the respondents and their predecessors did nothing to claim the land in question or to reclaim the same for over 22 years. This Court has said that it is basic and sound legal philosophy that at some time or another the claimant may not disturb an ancient and continuous employment of the property without affirmative objection, albeit the record owner claims previously to have been the owner thereof. King v. Fronk, supra.

The boundary line in this case was established by agreement between the then record owners. Blanchard v. Smith, 123 Utah 119, 255 P(2) 729.

POINT V

THE DECISION APPEARS TO INTRODUCE A NEW ELEMENT INTO THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE IN THAT IT RECITES THAT "THE DEFENDANTS HAVE USED THE LAND IN QUESTION, BUT HAVE NEVER PAID ANY TAXES THEREON." THAT TAXES ARE OR MIGHT BE A PROBLEM IN BOUNDARY BY ACQUIESCENCE CASES HAS NEVER BEEN A FACTOR IN ANY OF THE PRIOR CASES.

Unlike an adverse possessor, a claimant under boundary by acquiescence is not required to pay taxes on or improve the disputed land. King v. Fronk, supra, and see Boundary by Acquiescence, 3 Utah Law Review 504 N.1 (1953).

CONCLUSION

The Decision entered on November 5, 1975, should be reconsidered by the Court and a new decision should be entered

reversing the decision of the trial court and directing that a judgment be entered in favor of the appellants.

Respectfully submitted,

CLAIR M. ALDRICH
ALDRICH & NELSON
43 East 200 North
Provo, Utah 84601
Tel: 373-4912
Attorneys for Defendants-Appellants