

2000

# J. Kenneth Davies and Joseph T. Davies v. Vivian M. Bezzant and Eva Jean Cornwell : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

J. KENNETH DAVIES and JOSEPH  
T. DAVIES,

Plaintiffs and Respondents,

-vs-

VIVIAN M. BEZZANT and EVA JEAN  
CORNWELL,

Defendants and Appellants.

Case No. 14049

BRIEF OF APPELLANT

Appeal from the Judgment of the Fourth Judicial District Court  
for Utah County, Honorable George E. Ballif, Judge

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## TABLE OF CONTENTS

	Page
NATURE OF THE CASE.....	1
DISPOSITION IN LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	1
STATEMENT OF FACTS.....	2
ARGUMENT.....	5
POINT I. THE TRIAL COURT ERRED IN NOT HOLDING THAT THE DEFENDANTS DO HAVE TITLE TO ALL OF THE DISPUTED LAND UNDER THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE.....	5
POINT II. THE RELEASE BY EUGENE D. OLIVER WAS TOTALLY INEFFECTIVE.....	8
POINT III. FINDINGS OF FACT NUMBERS 5 AND 16 ARE NOT SUPPORTED BY ANY COMPETENT EVIDENCE WHATEVER.....	8
CONCLUSION.....	10

## Cases Cited

Ekberg v. Bates, 121 Utah 123, 239 Pac. (2) 205.....	6
Johnson v. Sessions, et al., 25 Utah (2) 133, 477 Pac. (2) 788.....	6
Johnson Realty Co. v. Neilson, 10 Utah (2) 380, 353 Pac. (2) 918.....	6
King v. Frank, 14 Utah (2) 135, 378 Pac. (2) 893.....	6
Lane v. Walker, 29 Utah (2) 119, 505 Pac. (2) 1199.....	7
Motzpuz v. Carrol, 7 Utah (2) 237, 322 Pac. (2) 391.....	6
Nunley v. Walker, 13 Utah (2) 113, 369 Pac. (2) 117.....	6
Ringwood v. Bradford, 2 Utah (2) 119, 269 Pac. (2) 1053..	6
Universal Investment Corporation v. Kingbury, 26 Utah (2) 35, 484 Pac. (2) 173.....	6

J. KENNETH DAVIES and JOSEPH  
T. DAVIES,

-VS-

VIVIAN M. BEZZANT and EVA JEAN  
CORNWELL,

Defendants and Appellants.

BRIEF OF APPELLANT

## NATURE OF THE CASE

Plaintiff filed an action to quiet title to a portion of the residential property encompassed within defendants' fence line. Defendants counterclaimed under the doctrine of boundary by acquiescence and sought to have the property within the confines of the fence line quieted in them.

## DISPOSITION IN THE LOWER COURT

The lower court found in favor of the plaintiffs and entered a judgment quieting title in the plaintiffs.

## RELIEF SOUGHT ON APPEAL

Appellants seek to have the Supreme Court reverse the decision of the trial court and to order a judgment entered quieting title in the appellants.

#### STATEMENT OF FACTS

In 1948 and prior thereto B. L. Tippets and Sophie E. Tippets, his wife, were record owners of a larger parcel of realty situated in Orem, Utah. In 1948 the Tippets entered into some kind of a contract with one Wayne Beaman to subdivide and develop the property. The terms and conditions of that agreement are not disclosed in this record.

Elder was an employee of Beaman and in 1949 he made arrangements to purchase a homesite in the development. (Tr. 18). The lot that Elder selected was on a hillside that sloped quite abruptly to the west and at the time that he purchased the property it was with the understanding that the lot would abut a street on the north and a street on the east. (Tr. 19-20). (Also, the Beckman Survey Exhibit 5). Mr. Neff Tippets also understood that there was to be a street running north and south on the east side of the property Elder was to get. (Tr. 42).

Elder acquired a deed directly from B. L. Tippets and wife in 1950, and in that year he built a home on the property. The home was built facing east on the crest of the hill. (Tr. 19). After the home was built and in the fall of 1950, Elder met on the ground with B. L. Tippets, Wayne Beaman, and with a Mr. Anderson who owned property across the street to the north, and at that time they established the corners of the property that was to belong to Elder. In 1950 Elder built a fence around the property on the lines that had been agreed upon. (Tr. 20). That fence has been continuously in place since it was originally built. (Tr. 19).

Elder lived on the property for about four years and during that period no one other than the Elders had any use, occupation or possession of any of the premises within the fence line. (Tr. 21). In August of 1954, Elder sold all of the property on a Uniform Real Estate Contract to Eugene D. Oliver and defendant, Eva Jean B. Oliver, (now Young), his wife. (Ex.3). Elder deeded his original description to Olivers in 1960. (Ex.4).

The Olivers took possession of the property about September 1, 1954, and resided there together until their divorce was filed. A divorce decree was entered May 8, 1962, and an amended decree was entered June 27, 1962. (Judicial notice of Civil #24,610 in Utah County). In the divorce decree the possession of the home was awarded to Mrs. Oliver until two children then aged 10 and 11 years attained their majority. Mr. Oliver was required to make all payments coming due on the mortgage, which he failed to do.

In the fall of 1962 Beneficial Industrial Loan Corporation, the holder of the mortgage, filed an action to foreclose and that company bid the property in on January 10, 1963. (Ex.10).

After the foreclosure sale Eva Jean Oliver made arrangements with her parents, Vivian M. Bezzant and Della Bezzant, his wife, to get the property back from Beneficial. On the 23rd of April, 1963, Eugene Oliver quit claimed his redemption right to Beneficial, (Ex. 11), and on May 15, 1963, Eva Jean Oliver likewise quit claimed her redemption right to Beneficial. (Ex. 12). By deed dated May 14, 1963, Beneficial conveyed to Bezzant and

wife. (Ex. 13). The Bezzants later conveyed to Eva Jean.

Eva Jean Oliver, now Young, has been in possession of the property since about September 1, 1954, to the present time, (Tr.11), and all during that period no one but the occupant of the property has ever had any use, occupancy, or possession of any of the property within the fence line. (Tr. 11).

By an instrument entitled "Release" signed on August 8, 1963, Eugene D. Oliver purported to release his interest in the property in question to Sophie E. Tippets.

Tippets sold part of the property to Davies in 1961, and the parcel in question was added to that sale in 1967. (Tr. 47). Davies filed this action in November of 1972.

There is a half-circle driveway into the premises from the street abutting on the north. The entry from the street is on the property in dispute and there is no other way to get from the front of the house to a street. (Tr. 10). The proposed street abutting to the east was never installed.

Tippets started a procedure in 1953 to "reclaim" from Beaman and that action was completed in 1954. (Tr. 43).

Elder claims that he bought and paid for the whole parcel including the land in dispute. (Tr. 22).

There does not appear to have been any problem until after Mr. B.L. Tippets died in November of 1951. (Tr. 29). Mr. Neff Tippets had a telephone conversation with Beaman and Elder sometime after his father's death and they talked about what had to be done if a deal could be worked out. (Tr. 30). He

communicated with Elder again in 1955, but Elder did not reply to his letter. (Tr. 30). Neff Tippetts had a conversation with Mr. Oliver in 1958, (Tr. 33), and he wrote Mr. Oliver a letter in 1961, (Tr. 35 and Ex. 6), to which Mr. Oliver never replied. (Tr. 38).

#### ARGUMENT

##### POINT I

THE TRIAL COURT ERRED IN NOT HOLDING THAT THE DEFENDANTS DO HAVE TITLE TO ALL OF THE DISPUTED LAND UNDER THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE.

The evidence is not disputed that Elder bought a lot in a proposed subdivision and that his lot was to abut on two streets, one on the north and one on the east. It is not disputed that Elder's house was built on a hill sloping to the west, nor that the house faces in an easterly direction. There is likewise no dispute that Elder met on the ground with B. L. Tippetts, the record owner of all abutting property, with Beaman, and with a Mr. Anderson, who owned property across the street, and that they set the corners of the property which Elder was to have. It is not disputed that Elder built a fence around his property on the lines that had been set in the fall of 1950, nor that the fence has remained in place. It is not disputed that the defendants and their predecessors have had the sole and only use and occupation of the property continuously since the fence line was installed, a period of some 22 years, before this lawsuit was filed.

The trial court viewed the premises and in Finding of Fact No. 13 it is stated:



"The Court finds that the property in dispute is enclosed by a substantial fence on the south and east sides thereof and that outbuildings have been constructed thereon. The court finds that the value of the defendants' property will be significantly and adversely affected by the defeat of their claim to the property in question."

In a long line of cases the Supreme Court of Utah has established four requisites for establishing a boundary by acquiescence:

- (1) Occupation of property to a visible line marked by monuments, fences or buildings;
- (2) Mutual acquiescence in the line as the boundary;
- (3) For a long period of time;
- (4) By adjoining owners.

Nunley v. Walker, 13 Utah (2) 113, 369 Pac. (2) 117; Ringwood v. Bradford, 2 Utah (2) 119, 269 Pac. (2) 1053; Johnson Realty Co. v. Neilson, 10 Utah (2) 380, 353 Pac. (2) 918; Motzpus v. Carrol, 7 Utah (2) 237, 322 Pac. (2) 391; Ekberg v. Bates, 121 Utah 123, 239 Pac. (2) 205.

In Johnson v. Sessions, et al., 25 Utah (2) 133, 477 Pac. (2) 788, the Court adopted the language in King v. Frank, 14 Utah (2) 135, 378 Pac. (2) 893, stating:

"Boiled down, it seems to us that the establishment of a boundary line by acquiescence may be predicated upon the existence of a visibly monumented line persisting for at least 20 years or upwards, shown specifically or circumstantially, in order to meet or exceed the requirement of acquiring rights by prescription....."

In Universal Investment Corporation v. Kingsbury, 26 Utah (2) 35, 484 Pac. (2) 173, the majority of the court held

that the fence line prevailed even although the strip in question had not been conveyed to the plaintiff or his immediate predecessor.

In the more recent case of Lane v. Walker, 29 Utah (2) 119, 505 Pac. (2) 1199, the court unanimously held that the fact that the plaintiffs may not have intended the fence to be a boundary line did not preclude a determination that a boundary by acquiescence had been established along the line of the fence. The court stated:

".....The test to establish the boundary by 'acquiescence' necessarily need not be based on mutual 'intent'. 'Intent' is not synonymous with 'acquiescence' in these cases. 'Acquiescence' is more nearly synonymous with 'indolence', or 'consent by silence', - or a knowledge that the fence or other monument appears to be a boundary, but that no one did anything about it for 48 years."

Because of the location and slope of the street on the north side of the property, if the east 57 feet is taken away, defendants' remaining property will be effectively blocked from access to a street.

Elders' deed was from B. L. Tippetts and wife. The record does not disclose when the plan to install the street on the east was abandoned. It may well have been that Tippetts had decided as early as the fall of 1950 not to put the street in, and he may have reasoned that he could placate Elder by extending the lot line some 57 feet so that Elder would have access to the street on the north. There is no indication in the

evidence that B. L. Tippetts ever requested any payment for the additional ground.

#### POINT II

THE RELEASE BY EUGENE D. OLIVER WAS TOTALLY INEFFECTIVE.

In his Memorandum opinion the Judge ruled that the acquiescence in the fence line around the disputed property has only occurred since 1963, the date defendants obtained title to the land and their predecessor, Eugene D. Oliver, having released his interest therein to plaintiffs' predecessor.

The release by Eugene D. Oliver had no force or affect whatever. Mr. Oliver lost any possessory right he had when the decree of divorce, signed and entered in May of 1962, became final. In addition thereto he had quit claimed any interest that he may have had by his quit claim deed dated April 23, 1963, in favor of Beneficial Industrial Loan Corporation. (Ex. 11).

The release to Mrs. Sophie Tippetts was not made until August 8, 1963, which was even after his redemption rights under the foreclosure sale of January 10, 1963, has expired. (Ex. 9).

#### POINT III

FINDINGS OF FACT NUMBERS 5 AND 16 ARE NOT SUPPORTED BY ANY COMPETENT EVIDENCE WHATEVER.

Finding No. 5 and 16 are as follows:

"5. Before the Beamans' contract came in default and after the deed from Tippetts to Elder, Tippetts, Beaman, and Elder agreed upon a sale of the land in dispute from Beaman and Tippetts to Elder."

"16. The Court finds 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."

Elder took the position that he originally bought a lot that abutted a street on the north and a street on the east. After Elder constructed his home he met on the ground with Tippetts, Beaman and another man from across the street and by mutual agreement they there, at that time, set the corners for the property Elder was to have and Elder proceeded to erect his fence on those lines. The east line of the property given to Elder at that time coincides with the west line of the street that was supposed to be installed. (Ex. 5).

There is no indication whatever that there was any discussion as to a price for the additional ground. There is no evidence that Elder agreed to pay for the ground and there is no evidence that B. L. Tippetts ever fixed a price or that he or Beaman ever tried to collect any additional money. The only reference to a claimed sum is Mr. Neff Tippetts' letter of May 21, 1961, where he wanted Oliver to pay \$250.00 for the land and an old bill of Elder's for \$25.00, plus \$25.00 interest on Elder's personal bill, making a total of \$300.00. (Ex. 6). Oliver never responded to that letter. (Tr. 38). Neither the defendants nor any of their predecessors ever agreed to pay anything for the additional land.

The evidence does show that on several occasions Mr. Neff Tippetts tried to get either Elder or Oliver to agree to

pay some additional money, however, he was never successful in getting any such agreement, nor in collecting any money. Had he been sure of his position and serious in his contention that money was, in fact, due he should have sought to reduce his claim to judgment or sought to recover possession of the land in dispute. He sold the property without attempting to clear it up and his purchasers waited from 1967 to 1972, some five (5) years, before they attempted to do anything.

#### CONCLUSION

This is clearly a case which falls within the doctrine of boundary by acquiescence and the decision of the lower court should be reversed and that court should be directed to enter a judgment in favor of the appellants.

Respectfully submitted,

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