

1969

Alvie Carter v. M. A. Lindner And Erma M.
Lindner, His Wife; And W. A. Wood And Arrah B.
Wood, His Wife : Brief of Appellant

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

ALVIE CARTER,

Plaintiff and Respondent,

vs.

M. A. LINDNER and ERMA M.
LINDNER, his wife; and W. A.
WOOD and ARRAH B. WOOD, his
wife,

*Defendants, Cross Claimants
and Appellants,*

vs.

FRANK R. DOVER and SHIRLEY
MAY DOVER, his wife,

*Defendants, Cross Defendants
and Respondents.*

Case No.
11578

APPELLANTS' BRIEF

Appeal from a Judgment of the Third Judicial District Court,
Salt Lake County
Hon. Stewart M. Hanson, Presiding

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FILED
JUN 27 1969

Clk. Supreme Court, Utah

TABLE OF CONTENTS

	Page
Statement of Kind of Case	1
Disposition in Lower Court	2
Relief Sought on Appeal	2
Statement of Facts	2
Statement of Points	4
Argument	5
1. The Trial Court Erroneously Failed and Refused to Enforce The Agreement of the Parties Locating the Boundary Line	5
2. The Trial Court's Finding That There Was No Uncertainty As Between the Parties as to the Location of the Boundary Line is Not Supported by any Evidence.	10
Conclusion	11

Authorities Cited

69 A.L.R. 1433	6
12 Am. Jur. 2, Section 81	8
11 C.J.S., p. 641, Section 67.....	8

Cases Cited

Ekberg v. Bates, 121 Utah 123, 239 P.2d 235	7, 8
Kandlik v. Hudek, 365 Ill. 292, 6 N.E. 2d 196	7
Kitchen v. Chantland, 130 Iowa 618, 105 N.W. 367	8
Loustalott v. McKeel, 157 Cal. 634, 108 P. 707	6, 7
Moniz v. Peterman, 220 Cal. 429, 31 P.2d 353	7, 8
Nunley v. Walker, 13 Utah 2d. 105, 369 P.2d 117....	7
Roberts v. Brae, 5 Cal. 2d 356, 54 P.2d 698	7
Southern Countries Gas Co. v. Eden, 118 Cal App. 582, 5 P.2d 654	7
Tripp v. Bagley, 74 Utah 57, 276 P. 912	6
Vowinckel v. Clark & Sons, 217, Cal. 258, 18 P.2d 58	7
Welborne v. Kimmerling, 46 Ind. App. 98, 89 N.E. 517	9

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M. A. LINDNER and ERMA M.
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MAY DOVER, his wife,

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APPELLANTS' BRIEF

STATEMENT OF KIND OF CASE

This is an action to quiet title to a parcel of land in Salt Lake City which is involved in a boundary line dispute.

DISPOSITION IN LOWER COURT

The trial court quieted the plaintiff's title to the property in disregard of an express agreement which established the present fence as the boundary line.

RELIEF SOUGHT ON APPEAL

The appellants seek to reverse the judgment of the trial court and to obtain an order directing the court to amend its decree to declare that the existing fence establishes the boundary line.

STATEMENT OF FACTS

The parties to this suit will be referred to by their names. The two parcels of land involved in the boundary line question will be referred to as the "Carter property" and the "Lindner and Wood property."

In 1955 Lindner and Wood purchased a house and lot fronting on Seventh South just West of Second West. (R. 60) It adjoins property on the East which had been owned by Lindner and Wood since 1944 and adjoins on the West property which the plaintiff Carter has contracted to purchase from the defendants and cross defendants Frank R. Dover and Shirley May Dover, his wife. (R. 15, 16) See the map, Exhibit D-6. It will be noted that the Lindner and Wood property adjoins the Carter property on both the East and South sides of the latter. At the time Lindner and Wood

purchased the property mentioned above a man named Robert Dover owned the Carter property and lived in a house situated thereon. (R. 62, Exhibit P-1, Entry No. 30, Exhibit P-2) Robert Dover died before this case was filed.

Mr. Lindner met with Robert Dover on or near the property which Lindner and Wood purchased in 1955 soon after the purchase was made. (R. 62) Mr. Lindner asked if Mr. Dover knew where the property line was so that he wouldn't have to go to the expense of surveying it. Mr. Dover showed him the line and said, "You can put your fence right here." (R. 63) Later during the same year Lindner and Wood constructed a six-foot chain link fence with steel posts set into the ground with cement on the location indicated by Mr. Dover. (R. 61, 63) Mr. Dover was there when the fence was constructed. (R. 70) The property inside the fence was used by Lindner and Wood for storing trucks and parts. (R. 64) Mr. Lindner testified that no one questioned the location of the fence until about a year before the suit was filed. (R. 64-65)

Frank R. Dover, a nephew of Robert Dover, and one of the cross defendants in this case, testified that he had a conversation with Mr. Lindner about the fence line in 1957: "I asked him how he had put this fence up so close to the buildings which we had still on the property, and he says we was on his property on the east side and so, therefore, he had moved the fence up to offset the footage of the side of his on

the east boundary.” (R. 75) Mr. Dover also testified that Mr. Lindner said, “If you want it (the fence moved, you will have to take me to court to get moved.” (R. 76) Mr. Lindner did not recall the conversation with Mr. Frank R. Dover. (R. 81) The trial court found that the “fence was erected pursuant to a conversation with Robert Dover in which Dover gave the defendants permission to erect the fence there.” (Finding No. 6, R. 30) It also found that there was no dispute or uncertainty between the parties as to the location of the boundary line; that in 1957 Frank R. Dover requested the removal of the fence; that Lindner and Wood refused to move it; that Carter requested the removal of the fence after he came into possession but the request was refused; and “. . . That neither Robert Dover, Frank R. Dover nor the plaintiff has acquiesced in the fence as their South boundary line for any period of time.” (R. 30) The trial court quieted the title of the Dovers to the disputed land South of the fence subject to the contract of sale to the plaintiff and ordered the removal of the fence. The court did not award any damages to the plaintiff. (R. 32, 33) Lindner and Wood appealed. (R. 36) The plaintiff filed a document entitled, “Respondent’s Statement of Points on Appeal.” (R. 41)

STATEMENT OF POINTS

1. The trial court erroneously failed and refused to enforce the agreement of the parties locating the

boundary line.

2. The trial court's finding that there was no uncertainty as between the parties as to the location of the boundary line is not supported by any evidence.

ARGUMENT

1. THE TRIAL COURT ERRONEOUSLY FAILED AND REFUSED TO ENFORCE THE AGREEMENT OF THE PARTIES LOCATING THE BOUNDARY LINE.

We contend that the boundary line between the Lindner and Wood property and the Carter property was established by an agreement between Mr. Lindner and Robert Dover in 1955 which was performed by the erection of a substantial fence. The agreement is binding on the successors to Robert Dover and the court erred in refusing to enforce it. The abstract of title in evidence, Exhibit P-1, shows the width and length of the Carter property and the starting point is tied to the Northeast corner of Lot 7, Block 12, Plat "A". The South end of the Carter property is 123 feet 9 inches from the starting point. Both abstracts, Exhibit P-1 (Entry 30) and Exhibit D-13 (Entry 60) show that the North-South line between the Carter and Linder and Wood tracts was to be mid-way between two houses. There is nothing in the record to show the

location of the starting point with respect either to the South boundary or to the center of Seventh South Street. There is no evidence that there had ever been a survey of the property before the boundary line was established by agreement and Mr. Lindner testified that he sought the agreement as to the location of the boundary line and the fence in order to avoid a survey. (R. 63)

The rule of law applicable to this case is well stated as follows:

“It is a well settled principal of law that a boundary line may under certain circumstances, be permanently and irrevocably established by parol agreement of adjoining owners. When there is doubt or uncertainty, or a dispute has arisen, as to the true location of a boundary line, the adjoining owners may by parol agreement establish a division line; and, where the agreement is executed and actual possession is taken under such agreement, it is conclusive against the owners and those claiming under them.” 69 A.L.R. 1433.

See also *Tripp v. Bagley*, 74 Utah 57, 276 P. 912; *Loustalott v. McKeel*, 157 Cal. 634, 108 P. 707.

Where a boundary line is uncertain and the adjoining owners establish a line by oral agreement, the contract will be valid notwithstanding the mistake of one of the parties, provided there be no concealment or

unfair dealings by the opposite party that would affect the contract.

Loustalott v. McKeel, supra.

An oral argument is not necessary. Where the parties regard a fence as marking the true boundary line an agreement may be inferred or implied from the conduct of the parties.

Ekberg v. Bates, 121 Utah 123, 239 P.2d 235; *Vowinckel v. Clark & Sons*, 217 Cal. 258, 18 P.2d 58; *Moniz v. Peterman*, 220 Cal. 429, 31 P.2d 353; *Southern Countries Gas Co. v. Eden*, 118 Cal. App. 582, 5 P.2d 654; *Roberts v. Brae*, 5 Cal. 2d 356, 54 P.2d 698; *Kandlik v. Hudek*, 365 Ill. 292, 6 N.E. 2d. 196.

The Utah Supreme Court has held in line with the great weight of authority that a boundary is uncertain if the parties do not actually know where it is. The fact that it can be ascertained by measurement or survey makes no difference. In the case of *Nunley v. Walker*, 13 Utah 2d 105, 369 P.2d 117, the court said:

“It is well recognized in this state that if the owners of adjoining real property have occupied their respective premises up to a boundary line which is visibly marked by fences, buildings, walls, copings or other monuments for a long period of time and that they have mutually recognized such monuments as marking the boundary line between their respective properties, the law will conclusively presume or imply an agree-

ment fixing the boundary line in accordance with such monuments. It is true that if there is no uncertainty as to the location of the true boundary line the parties may not, knowing where the true boundary line is, establish a boundary line by acquiescence at another place. *But if the parties do not know where the actual boundary line is, even though they could have readily ascertained that fact by a survey, a boundary line by acquiescence may be established.* Under the foregoing rules of law on this question, a judgment in favor of the plaintiff may be affirmed." (Emphasis added)

See also *Ekberg v. Bates*, supra.

"To show establishment by an agreed boundary by joint construction of a fence, there need be no dispute as to the location of the true boundary in sense of a quarrel or ill feelings between the parties." *Moniz v. Peterman*, 220 Cal. 429, 31 P.2d 353.

The period of time a boundary line fence is acquiesced in is especially important in *cases based only on acquiescence and not on an oral agreement*. The rule is that acquiescence in the boundary fixed by oral agreement need not be for the full statutory period required in cases of adverse possession; acquiescence for a reasonable period short of that time may be conclusive.

11 C.J.S. p. 641, Sec. 67

12 Am. Jur. 2d, Section 81

In the *Loustalott* case cited above the period was seven years. In *Kitchen v. Chantland*, 130 Iowa 618,

105 N.W. 367, the period was ten years. In *Welborne v. Kimmerling*, 46 Ind. App. 98, 89 N.E. 517, the period was six months. The important thing is that the oral agreement must be executed.

Successors are bound by an executed oral agreement establishing a boundary line. *Ekberg v. Bates*, supra.

It is clear from the foregoing that the following elements must be established and have been established in this case.

1. *Uncertainty*. This is established in this case by the undisputed fact that Mr. Lindner had not had the property surveyed or even measured. (R. 63) It is also clear that neither party knew where the actual boundary was. Mr. Lindner asked Robert Dover where he should put the boundary fence and the location was indicated on the ground. (R. 63) Furthermore, the location of the starting point does not appear in the record with respect to any known point such as a street or sidewalk. The location of the east property line was fixed by two houses. See the abstracts, Exhibits P-1 (Entry 30) and D-13 (Entry 60). According to Mr. Frank R. Dover the South line was located where it is because of adjustments on the uncertain East line. (R. 75)

2. *Oral Agreement*. This is established by the testimony of Mr. Lindner.

3. *Execution of the Oral Agreement.* This is established (a) by the construction of a six-foot chain link fence set in concrete, and (b) by use of the property within the fence for 12 years.

2. THE TRIAL COURT'S FINDING THAT THERE WAS NO UNCERTAINTY AS BETWEEN THE PARTIES AS TO THE LOCATION OF THE BOUNDARY LINE IS NOT SUPPORTED BY ANY EVIDENCE.

As indicated above, the trial court affirmatively found (Finding No. 7) that there was no dispute or uncertainty between the parties as to the location of the boundary line. The evidence is clear and uncontradicted that Mr. Lindner did not know the boundary lines of the property he purchased. This is very evident by the question he asked of Mr. Dover in 1955, "Do you know where your property line is so that I won't have to go to the expense of surveying it?" (R. 63) He had not had the property surveyed. (R. 69) We quote the following:

"Q. Mr. Lindner, at the time Mr. Dover indicated the place where the fence was to go, had the property surveyed?

A. No, sir.

Q. Did you know personally where the boundary line was between what is now the Carter property and that property you bought?

A. Not in the back we didn't. The only thing we went by when we put the fence up was the

copper tag in the sidewalk, and we surveyed, run a straight line back for the fence on the east side over there, and I asked Mr. Dover where we could put the fence in the back of this, to go to the west, and that is where we put it.

Q. And when you asked Mr. Dover that were you asking him to indicate the boundary line?

A. Well, it was my intention to, to ask him if he knew where the boundary was at, and he said 'Right about here, a foot or so.'". (R. 69-70)

It seems to us that the only theory under which the court could have disregarded entirely the agreement fixing the boundary line is that there was no uncertainty or dispute as to the true boundary as shown by the County records. The importance of the error of the court in making the finding of no uncertainty complained of is, therefore, evident. As indicated in the argument under Point 1, this court has held that a boundary line does not have to be disputed in order to make effectual the establishment of a boundary line by acquiescence. The location need only be uncertain. The same rule and reasoning would apply if the boundary line is established by agreement. The rule of *Nunley v. Walker*, cited above, should have been followed here because there obviously was uncertainty as to the location of the boundary line.

CONCLUSION

The trial court erred by failing to recognize and enforce an agreement establishing an uncertain bound-

ary line. The uncontradicted evidence shows that the agreement was made between owners of two adjoining properties fixing the definite location of the fence and that the oral agreement was fully executed by (1) the construction of a six-foot chain link fence set in concrete and (2) by use by Lindner and Wood of the property up to the fence for twelve years. The judgment of the trial court should be reversed and the court should be directed to enter a decree establishing the fence line as the boundary line between the adjoining properties.

Respectfully submitted,
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