1969

Alvie Carter v. M. A. Lindner And Erma M. Lindner, His Wife; And W. A. Wood And Arrah B. Wood, His Wife : Appellants' Reply Brief

Utah Supreme Court

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' REPLY BRIEF

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

E. J. SKEEN
R. C. SKEEN
522 Newhouse Building
Salt Lake City, Utah 84111
Attorneys for Appellants

MILTON V. BACKMAN
RALPH J. MARSH
1111 Deseret Building
Salt Lake City, Utah 84111
Attorneys for Respondents

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Respondents argue that testimony concerning an agreement establishing the boundary line in question was not admissible because of the "dead man" statute, and also that there had not been sufficient "acquiescence" by respondents to establish a boundary line. In

addition, the respondent, Carter, by cross appeal contends that the trial court erred in refusing to award damages.

ARGUMENT

1. THE "DEAD MAN" STATUTE HAS NO APPLICATION TO THE FACTS OF THIS CASE.

It is contended by Carter and Dover that the "dead man" statute, section 78-24-2(3), Utah Code Annotated, 1953, effectually prevents the defendant, Lindner, from testifying as to the agreement with Robert Dover for the location of the boundary fence.

The "dead man" statute has no application to this case. It will be noted that by its express language it applies to civil actions " . . . when the adverse party in such action, suit or proceeding claims or opposes, sues, or defends, as guardian of an insane or incompetent person, or as the **EXECUTOR OR ADMINISTRATOR, HEIR, LEGATEE OR DEVISEE OF ANY DECEASED PERSON**, or as guardian, assignee or grantee, directly or remotely, of such heir, legatee or devisee, as to any statement by, or transaction with, such deceased, insane or incompetent person, or matter of fact whatever . . . " (emphasis added)

The grantee mentioned in the statute must be a "grantee, directly or remotely, of *such heir, legatee or devisee*". (emphasis added).

In the case of *Anderson v. Johnson,* 121 Utah 173, 239 P.2d 1073, one Marie T. Johnson, a daughter of the deceased person, who defended as a *grantee* under a deed recorded the day before her father died was not within the purview of the "dead man" statute and was a competent witness. The Supreme Court said:

> " . . . In applying the provisions of the above statute, the court took the view that Marie T. Johnson, one of the respondents, was defending as an heir. If Marie were defending as an heir, she would have been defending for the benefit of the estate of the deceased. However, this she clearly was not doing. She claimed that property as a grantee and not for the benefit of the estate . . . "

See also *Grieve v. Howard,* 54 Utah 225, 242, 180 P. 423, in which the court said:

> " . . . As the defendant, Mark Howard, was not opposing or defending as guardian, executor, administrator, heir, legatee or devisee of the deceased, or as guardian, assignee, or grantee of such heir, legatee or devisee, we cannot understand how the testimony of appellant was prohibited, even if it *was* concerning a fact equally within the knowledge of the witness and the deceased. A reasonably careful analysis of this statute will conclusively demonstrate that, in view of the relation and character of the parties, the matter was not within the statute. As we understand the situation, defendant was defending not as an heir of the deceased, but as a grantee under the deed executed by her. The relation was not such as to entitle him to object

to the testimony on the grounds that it was prohibited by the statute. *Miller v. Livingstone*, 31 Utah at page 435, 88 Pac. 338; 40 Cyc. 2270 to 2275, inclusive . . ."

The testimony of Mr. Lindner as to the agreement for the location of the fence without survey was clearly admissible. In this case there was no *heir, legatee or devisee* involved. Mr. Carter's immediate predecessor did not acquire title as an heir but as a grantee under a Quit Claim Deed dated December 7, 1957, Exhibit P-2. In this suit no one sued or defended as a guardian or as executor, or administrator, heir, legatee or devisee of any deceased person as required by the statute. The agreement was immediately acted upon by the construction by the defendants of a permanent fence which has marked the boundary since 1955.

2. THE BOUNDARY LINE WAS ESTABLISHED BY AGREEMENT AND PERFORMANCE OF THAT AGREEMENT.

The boundary line was established by agreement between Mr. Lindner and respondents' predecessor, Robert Dover, in 1955. The construction of a six-foot chain link fence with posts set in concrete in 1955 (R. 17, 19) is evidence of the performance of the agreement.

Respondent seems to suggest that the principle of boundary by agreement is the same as the principle of boundary by acquiescence except for the agreement and uncertainty at the time of agreement. (Respondents' Brief, p. 7).

Uncertainty or dispute as to the boundary line is an element of both boundary by agreement, and boundary by acquiescence as is pointed out in ***Brown v. Milliner,*** 120 Utah 16, 232 P. 2d 202, at page 207 and followed in ***Ekberg v. Bates,*** 121 Utah 23, 239 P.2d 205. It is also stated that where there is no uncertainty or dispute as to the true boundary neither oral agreement nor acquiescence is sufficient to establish the boundary.

The rule of boundary by acquiescence is further stated in ***Brown v. Milliner,*** supra:

> " . . . We have further held in this state that in the absence of evidence that the owners of adjoining property or their predecessors in interest ever expressly agreed as to the location of the boundary between them, if they have occupied their respective premises up to an open boundary line visibly marked by monuments, fences or buildings for a long period of time and mutually recognized it is the dividing line between them, the law will imply an agreement fixing the boundary as located, if it can do so consistently with the facts appearing, and will not permit the parties nor their grantees to depart from such line . . . "

Thus, where there is no express agreement the evidence of acquiescence is used to imply the agreement. However:

> " . . . A review of the Utah cases involving boundary disputes reveals that it has long been recognized in this state that when the location

> of the true boundary between two adjoinig tracts of land is unknown, uncertain or in dispute, the owners thereof may, by parol agreement, establish the boundary line and thereby irrevocably bind themselves and their grantees."—Brown v. Milliner, supra.

Under respondents' suggestion, there would be no difference between boundary by acquiescence and boundary by agreement except for an agreement. They would still require the same proof for both. This is not in agreement with the authorities which use acquiescence to *imply* the agreement where there was no agreement.

In cases where the agreement relied upon for the boundary is oral, the agreement " . . . is not within the statute of frauds when the true line is uncertain or in dispute, because such agreement is not regarded as passing title to land but 'determines the location of the existing estate of each, and, when followed by possession and occupancy, binds them, not by way of passing title, but as determining the true location of the boundary line between their lands.' *Berghoefer v. Frazier,* 150 Ill. 577, 37 N.E. 914". *Tripp v. Bagley,* 74 Utah 57, 276 P. 912.

See also *Schleining v. White,* 163 Colo. 484 431 P.2d 458 (1967).

The "acquiescence" which respondent suggests is necessary is really a showing of performance of the agreement by recognizing the boundary and thus making the parol agreement enforceable.

Mr. Lindner's erection of the fence and the occupation and possession of the area up to the fence (R. 64) shows performance of the agreement making it an executed agreement. Mr. Lindner also stated that he had received no complaint concerning the location of the fence until just before this suit was filed, some twelve years before the fence was completed (R. 65). There is no evidence of any objection, complaint or disagreement with the location of the fence by Robert Dover from 1955 to his death. In addition, it should be noted that Frank Dover testified in 1957, two months before Robert Dover's death, that he, Frank Dover, complained to Mr. Lindner about the location of the fence (R. 75). However, Robert Dover died in 1957 (R. 73) and the quit claim deed conveying the land in question to Frank Dover, Exhibit P-2 through which he claims an interest in this land was not executed until December 7, 1957 and it was not recorded until January 7, 1958. If Frank Dover talked to Mr. Lindner about the fence as he testified, two months before Robert Dover's death, it would have had to have been some time before Frank Dover had acquired any interest in the land and thus could not be taken as an objection by any party in interest as to the location of the boundary line. It also is interesting to note that nothing more was said or done about the location of the boundary until 1967 when this suit was filed. Mr. Dover never objected while he owned the property.

Mr. Carter is a successor in title to one who has entered into an executed agreement as to the location

of a boundary line and as such is bound by that agreement. *Schleining v. White,* supra; *Brown v. Milliner,* supra.

3. THE TRIAL COURT PROPERLY DENIED DAMAGES.

Respondents, in their brief, have advanced no theory upon which Carter is entitled to recover any damages.

The trial court in Finding of Fact No. 6 (R. 30) found "that such fence was erected pursuant to a conversation with Robert Dover, who gave defendants permission to erect a fence there." This finding is supported by the evidence. Lindner testified as to the agreement between himself and Robert Dover under which the fence was constructed. The location of the fence and boundary is further supported by the fact that no controversy arose during Robert Dover's life.

If respondent, Carter, claims damages as a result of trespass, he has failed to establish it. A trespasser is one who make an unauthorized entry on another's property. 87 C.J.S. 956. Here, the entry was authorized.

If damages are claimed for failure to pay rent, there has been no showing of an agreement or contract to pay rent and no showing of facts from which an obligation may be implied.

CONCLUSION

In view of the uncontroverted testimony as to the agreement, the performance of the agreement by construction of the fence, the occupation of the area up to the fence, and the twelve-year period between the agreement and this suit, the boundary line has been established by an executed agreement. This case must be reversed with directions to enter a judgment in favor of the Lindners and the Woods quieting their title to the disputed land.

Respectfully submitted,

E. J. SKEEN
R. C. SKEEN

Attorneys for Appellants