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Dallas B. Johnson and Jessie W. Johnson, His Wife v. R.H. Sessions and Hazel June Dean : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DALLAS B. JOHNSON and
JESSIE W. JOHNSON, his wife,
Plaintiffs and Appellants,

vs.

R. H. SESSIONS and HAZEL JUNE
DEAN, *Defendants and Respondents.*

Case No.
12072

BRIEF OF APPELLANT

Appeal from a Judgment of the Third District Court
Salt Lake County, State of Utah
Honorable Stewart M. Hanson, Judge

PUGSLEY, HAYES, WATKISS, CAMPBELL & COWLEY
PHILIP C. PUGSLEY

400 El Paso Gas Building
Salt Lake City, Utah

Attorneys for Appellants

DANSIE, ELLETT and HAMMILL
DON E. HAMMILL

5085 South State Street
Murray, Utah

Attorneys for Respondents

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BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

In August of 1969, plaintiffs Dallas B. Johnson and Jessie B. Johnson, his wife, initiated an action in the Third District Court in and for Salt Lake County to quiet title to a strip of land located between their property and the property of defendant R. H. Sessions. Plaintiffs also prayed in their complaint for an order

requiring the defendant to remove certain improvements which he had erected on the strip of land and for damages as a result of defendant's past use of the property. In December of 1969 the court granted plaintiffs' motion and added as a party defendant Hazel June Dean, who also has some interest in the property of defendant R. H. Sessions.

DISPOSITION IN THE LOWER COURT

On March 25, 1970, the case was tried to the court, sitting without a jury. Testimony and documentary evidence were presented, the matter was argued and submitted, and the court thereupon entered its Memorandum Decision on March 26, 1970. The decision was in favor of the defendants and against the plaintiffs. Contrary to the mandatory provisions of Rule 52(a) of the *Utah Rules of Civil Procedure*, no findings of fact and conclusions of law have yet been entered. However, inasmuch as the Memorandum Decision refused to plaintiffs the relief requested in their complaint, they have taken this appeal.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek relief from the effect of the decision of the trial court. The Memorandum Decision is inconsistent with the facts presented in the course of the trial and the applicable law pertaining thereto. Plaintiffs ask

that the decision be reversed and that a judgment be entered granting to them the relief requested in their complaint.

STATEMENT OF FACTS

Plaintiffs purchased the property on which they reside in December of 1961 (T-2). They have been in possession of the property continuously since that time and they have regularly paid the taxes on the property (T-4). The deeds by which plaintiffs acquired their property and the abstract of title which they received at the time of the purchase covered all of Lot 42, Block 2, Hillcrest Subdivision (Exhibits 1-P, 2-P, and 3-P).

In June of 1969 plaintiffs hired the firm of Coon, King and Knowlton to make a survey of their property. The survey was completed under the personal direction of Hooper Knowlton, Jr., a consulting engineer and land surveyor (T-18) and a drawing (Exhibit 5-D) was thereafter prepared of the property. The survey revealed that the defendants' garage, driveway, and garden (at the rear of the property) all encroach on property properly contained in Lot 42, all of which property was purchased by the plaintiffs (T-5, 19, 20, 21). The width of the encroachment varies from about 8½ inches to 2½ feet (T-20, 21) and has an average width, over the length of plaintiffs' property, of approximately 2 feet (T-5, 21).

The record is silent on when defendants' garage and driveway were constructed. However, defendant

R. H. Sessions testified that in 1948 a fence was erected separating the two adjoining pieces of property (T-25). He was not asked and did not say whether the fence erected at that time was in the same place as the present fence and retaining walls.

In 1962 and 1963, plaintiffs constructed concrete retaining walls along the then existing fence line in the front and back of defendants' garage (T-8, 27). Defendant Session agreed to the erection of the retaining walls and apparently allowed plaintiffs to come on his property in connection with the construction (T-7, 8, 26).

Defendant R. H. Sessions testified to a conversation with Ira Coult in 1948 concerning the fence to be erected (T-25, 26). However, the testimony of Sessions did not indicate where the fence was to be erected, whether the parties knew the location of the true boundary line or whether Mr. Coult had such an interest in the property that he could properly agree to anything concerning it.

ARGUMENT

POINT I

THIS HONORABLE COURT HAS, THROUGH A SERIES OF CASES, DEFINED THE SPECIFIC REQUIREMENTS OF A "BOUNDARY LINE BY ACQUIESCENCE." DEFENDANTS' PROOF WAS NOT SUFFICI-

ENT UNDER THESE WELL-ESTABLISHED REQUIREMENTS AND THE TRIAL COURT ERRED IN FINDING THAT SUCH A BOUNDARY LINE BY ACQUIESCENCE HAD BEEN ESTABLISHED.

Plaintiffs' proof clearly showed that they are the record owners of all of Lot 42, including a strip approximately two feet in width which is presently being occupied by the defendants. The burden then shifted to defendants to somehow justify their occupancy of plaintiffs' property. The trial court, in its Memorandum Decision, concluded that the fence line has been established as the boundary between the adjoining pieces of property "by long acquiescence," apparently basing its decision on the legal theory of "boundary line by acquiescence."

The Honorable Court has, in a number of cases, considered the requirements for establishing that the boundary between adjoining pieces of property is in a location other than where the property descriptions contained in the pertinent recorded documents pertaining to the two pieces of property would place it. The following must be established:

1. That at one time there was uncertainty or a dispute between the landowners concerning the true location of a boundary line;
2. This uncertainty must have been resolved by a mutual agreement recognizing some visible marker or line as the boundary; and

3. The agreement and the new boundary established thereby must then be mutually acquiesced in for a considerable period of time thereafter.

[*Tripp v. Bagley*, 74 Utah 57, 276 P. 912, 69 A.L.R. 1417 (1928) and cases cited therein.]

These requirements have been further refined and discussed in a series of decisions, including some that are particularly pertinent to the instant case. In the case of *Glenn v. Whitney*, 116 Utah 267, 209 P.2d 257 (1949), the court held that

. . . there must be some uncertainty or a dispute between the adjoining owners as to the location of the true boundary line before a fence which they subsequently erect to resolve their differences and in which they acquiesce for a long period of time, may be taken as the agreed boundary line.

The court stated that being ignorant about the line is not equivalent to uncertainty and then went on to say that,

The mere fact that a fence happens to be put up and neither party does anything about it for a long period of time, will not establish it as the true boundary.

The record in this case is totally devoid of proof relating to any uncertainty ever having existed as to the location of the true boundary line. As indicated in the Statement of Facts, the only thing that was testified to by defendant Sessions was that a fence was erected between the two pieces of property in 1948. He did not say whether or not that fence was erected in the same place

as the presently existing fence and retaining walls. He was not asked and he did not say whether the location of the true boundary line was known or unknown at that time. Thus, there was no showing by the defendants that any uncertainty or dispute ever existed with reference to the true location of the boundary line.

The second requirement of a "boundary line by acquiescence" is that the uncertainty or dispute must be resolved by an agreement, presumably between the adjoining landowners, recognizing some visible line as the boundary. Here again, defendants' proof was lacking on this essential requirement. Defendant Sessions referred (T-25, 26) to a conversation and an agreement with someone named Ira Coult, who was then occupying the property now owned by plaintiffs. In view of the provisions of *Utah Code Annotated* 78-24-2(3) (1953), there is considerable question about whether the trial court should have allowed this particular testimony to stand. However, even if it was properly allowed, it is still not helpful since there is no designation of where the fence was to be and what relationship, if any, such fence had to the presently existing fence and retaining walls.

Even if the testimony of defendant Sessions concerning the conversation which he allegedly had with Ira Coult had been specific as to where the fence was to be erected, plaintiffs submit that their rebuttal evidence clearly showed that Ira Coult had no authority to make any kind of a binding agreement with regard to the property now owned by plaintiffs.

Mary Sears Coult Endsley was called as a witness and she testified that in 1948, when defendant Sessions allegedly had the conversation just referred to with Ira Coult, Mr. Coult was living there as a “renter” (T-34). She stated further that the property had previously belonged to Joe Coult, Sr. When he died in 1938, five children survived him (T-34). If, as the testimony of Mrs. Endsley suggests, Joe Coult, Sr. left no will, each of the five surviving children succeeded to an equal, undivided interest in the property [*Utah Code Annotated* 74-4-5(2) (1953)].

Thus, in 1948, at the time of the alleged conversation and agreement between Ira Coult and defendant Sessions, Ira Coult had only an undivided one-fifth interest in the property. He was also the tenant of the persons owning the balance of the interest in the property. Unless he is specifically empowered to do so by the other owners, one of a number of tenants in common cannot make any kind of a binding agreement respecting the commonly owned property. Particularly is this true where the effect of the alleged agreement would be to give away a significant portion of the total property (on T-5 plaintiff testified that the strip in question constituted approximately one-twentieth of his total property. This testimony was not contradicted and was confirmed by Mr. Knowlton, the surveyor, on T-19, 20, 21).

As indicated above, the defendants had the burden of proving the establishment of a “boundary line by acquiescence.” They failed to prove the first two re-

quirements established by this Honorable Court and plaintiffs submit that they also failed to establish the third requirement—long mutual acquiescence and recognition of a specific, visible marker or line as the boundary.

The first time, chronologically, that the record clearly speaks of some visible marker *in the same location as the presently existing fence and retaining walls* is in 1962. It was in that year that the plaintiffs constructed at the front and rear of their property retaining walls, which retaining walls still stand. Defendant Sessions did not say where the fence allegedly discussed with Ira Coult in 1948 was to be erected or where or when it was finally erected. Between 1948 and 1962 the location of the fence could have been changed any number of times. Thus, the *only* evidence in the record as to the length of time that a visible marker has existed along the line that defendants now seek to have declared the boundary is that presented by plaintiff, and it goes back only to 1962.

In the case of *King v. Fronk*, 14 Utah 2d 135, 378 P.2d 893 (1963), the opinion of the Court contained an analysis which was clearly marked “dictum.” This analysis concluded that twenty years was the proper period to be used as a “yardstick” in these cases. All of the justices concurred with the opinion of the court and it thus appears that there was general agreement with the appropriateness of this particular guideline.

The record in the instant case does not establish the existence of “a visible marker or line” in the location that defendants have attempted to establish as the boundary line earlier than 1962. This eight-year period is less than half of the period referred to in the *King v. Fronk* decision as the “yardstick.”

The Utah decisions have recognized that under certain circumstances a rebuttable presumption of a boundary line by acquiescence arises. If the party seeking to establish a boundary line by acquiescence introduces competent evidence on each of the elements, the burden then shifts to the other party to overcome the presumption. However,

. . . if the party claiming title by acquiescence fails to carry his burden and raise the presumption, then there is no case at all. [*Fuoco v. Williams*, 15 Utah 2d 156, 389 P.2d 143 (1964), 18 Utah 2d 282, 421 P.2d 944 (1966)].

Here the defendants did not introduce competent evidence on *any* of the required elements of a boundary line by acquiescence. In addition, plaintiffs, in their rebuttal evidence, further negated defendants' case by showing that Ira Court had no authority to enter into any agreement respecting the boundary line.

One other very recent decision of this Court should be noted. In the case of *Carter v. Lindner*, 23 Utah 2d 204, 460 P.2d 830 (1969), the Court held that where one property owner gave an adjoining property owner permission to build a fence in a particular location and

where there was no uncertainty as to the true location of the boundary at the time of the giving of permission, no boundary line by acquiescence could be established.

Without a dispute and uncertainty as to the true location of the boundary line there can be no boundary line by acquiescence under an oral agreement between adjoining property owners.

Thus, even if in 1948 Ira Coult did validly give permission for defendant Sessions to build his fence on the line in question, he may have done so knowing where the true boundary was and, under these circumstances, there would only have been created a temporary right to use the property and not a boundary line by acquiescence. When defendants failed to affirmatively show that uncertainty existed as to the true boundary in 1948, they failed to establish an essential element of their case.

Plaintiffs clearly established their legal, record ownership of the disputed strip of land. Defendants then had the burden of establishing a right to the land under the equitable theory of boundary line by acquiescence. However, they failed to prove a single one of the essential elements of this equitable theory. They thus failed to meet their burden of proof.

POINT II

THE EQUITABLE DOCTRINE OF "ESTOPPEL" HAS, IN THE AREA OF BOUNDARY DISPUTES, BEEN FORMALIZED AND IS

THE BASIS OF THE CONCEPT OF "BOUNDARY LINE BY ACQUIESCENCE". PLAINTIFFS' CONDUCT WAS NOT SUCH THAT THEY SHOULD BE ESTOPPED FROM ASSERTING THEIR LEGAL OWNERSHIP OF THE PROPERTY IN QUESTION.

In its Memorandum Decision the trial court held that the new boundary line had been established by "long acquiescence" and that "plaintiffs should be estopped from now asserting that the line, as established by the fence, is not the correct and proper boundary line, in view of their own conduct." The lower court thus sought to base its decision on both the theory of boundary line by acquiescence and on the principle of estoppel.

In 12 *Am. Jur.* 2d "Boundaries" §89 is found a discussion of the application of the principle of estoppel to boundary line problems. The recognition by courts of equity of a boundary line in a location other than where the properly recorded documents would place it is an application of the principle of estoppel, and such recognition occurs where it would be "inequitable" for parties to attempt to insist on the "true line" as the proper boundary.

Utah, along with other states, has formalized the doctrine of estoppel as applied to boundary disputes and has developed specific guidelines concerning when the doctrine should be applied. These guidelines are identified under the heading "boundary line by acqui-

escence". This concept is an application of the doctrine of estoppel and constitutes the *single manner* in which the doctrine of estoppel is to be applied to boundary line disputes. Plaintiffs submit that, with regard to boundary line questions, the doctrine of estoppel has not been given recognition by this Court other than through the principle of "boundary line by acquiescence". Thus, estoppel cannot constitute a separate ground upon which to base the trial court's decision. Unless all of the requisites of "boundary line by acquiescence" are present, the doctrine of "estoppel" has no application in these cases.

However, even if the doctrine of estoppel is entitled to separate recognition, the conduct of plaintiffs was not such as to estop them from claiming the full extent of the land they purchased. In 12 *Am. Jur.* 2d "Boundaries" §89 is the following language regarding estoppel.

It is essential to the doctrine of equitable estoppel generally that the party sought to be estopped should have had knowledge of the facts, or at least that he should have had the means at hand of knowing all the facts or have been in such a position that he ought to have known them; this rule applies with particular force where the case involves title to land or a dispute as to a boundary and there was no negligence of the party sought to be estopped in failing to assert his right.

In the instant case the plaintiffs purchased their property in December of 1961. They did not know that the

defendants were using and claiming a portion of their property until June of 1969, when they paid to have a survey prepared. Within three months of the date of the discovery of the encroachment, the present action was initiated.

Plaintiffs had no way of knowing that defendants were using their property until the completion of the survey. As soon as they discovered the encroachment they took prompt and proper action to enforce their legal rights. As the above quotation from *Am. Jur.* indicates, estoppel is properly applied only where a party *knows the necessary facts* and then fails to do anything for an unreasonable length of time.

Plaintiffs' conduct was entirely reasonable under the circumstances and estopping them from recovering the property which they purchased would be inappropriate and inequitable.

CONCLUSION

Plaintiffs clearly established their legal title to the strip of property in question. Defendants then failed to introduce competent evidence on any of the essential requirements of a "boundary line by acquiescence". Also, in view of the facts of the case, a decision in favor of defendants on the theory of "estoppel" cannot be justified. The trial court thus erred in deciding the issues in favor of defendants and against the plaintiffs.

Plaintiffs pray for reversal of the decision of the trial court and for a decision granting to them the relief improperly refused them by the lower court.

Respectfully submitted,

**PUGSLEY, HAYES, WATKISS,
CAMPBELL & COWLEY**

Attorneys for Appellant