1977

D. Clark Williams v. Merrill L. Oldroyd, Gerald Carter and John A. Canto : Brief of Respondent

Utah Supreme Court

V. Pershing Nelson; Attorneys for AppellantsWilliam G. Fowler; Attorneys for Respondent

IN THE SUPREME COURT OF THE [illegible]

D. CLARK WILLIAMS,

Plaintiff and Respondent,

vs.

MERRILL L. OLDROYD, [illegible]
and JOHN A. CANTO,

Defendants and [illegible]

[illegible]

Appeal from the [illegible]
District [illegible]
Honorable [illegible]

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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vs.	)	Case No. 15313
MERRILL L. OLDROYD, GERALD CARTER and JOHN A. CANTO, Defendants and Appellants.	)	

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action for damages in trespass and to quiet title to certain real property located in Utah County, Utah. Defendants denied generally and counterclaimed to quiet title to said property in defendant Gerald Carter, seeking reformation of certain deeds on the alleged bases of mutual mistake and boundary by acquiescence.

DISPOSITION IN THE LOWER COURT

The case was tried without a jury in the Fourth Judicial District Court, before the Honorable Allen B. Sorensen, District Judge. By stipulation in open court, the action was dismissed against defendant Merrill L. Oldroyd. On February 14, 1977, Findings of Fact and Conclusions of Law

were made and judgment entered against the remaining defendants. Defendants then filed a Motion to Amend Findings of Fact and Conclusions of Law or, in the Alternative, for a New Trial. This motion was denied on June 13, 1977, and defendants Gerald Carter and John A. Canto have appealed from the entry of judgment and denial of the motion.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment.

STATEMENT OF FACTS

The facts set out in appellants' brief, although correct in most respects, are incomplete in that they fail to set out all material evidence presented at trial. Such failure creates a serious problem, since this appeal is essentially an attack upon the sufficiency of evidence to support findings made by the trial court. A great portion of the testimony adduced at trial was vigorously disputed. In order to enable this court to determine whether the trial court had sufficient evidence to find as it did, a more complete summary of the evidence must be provided. Accordingly, respondent presents the following Statement of Facts:

This dispute concerns a parcel of real property located north of U.S. Highway 50-6 in Spanish Fork Canyon. Respondent D. Clark Williams was raised on the property now in dispute, it being the old family homestead (Tr. 44). In 1935, Williams gained title to a substantial amount of

acreage in the area, including the disputed property and surrounding land (Tr. 50). From that time until the present, he has paid all taxes on the property in dispute (Tr. 51). On May 22, 1954, Williams conveyed a portion of his property to himself, Clifton Huff and Dennis L. Prince, a partnership doing business as Skyline Enterprises (Plaintiff's Exhibit 12). Williams retained property adjoining the "Skyline" property on the north and east. This retained property included land on both sides of Tie Fork Creek, which runs roughly parallel to the eastern Skyline boundary.

The deed conveying the Skyline property describes it as a rectangular parcel 300 feet deep and 1,560 feet long, bordering the northerly edge of U.S. Highway 50-6. Unbeknown to anyone for over 20 years, the deed description contained a latent ambiguity in that the initial metes-and-bounds call conflicts with the call to the highway (Tr. 7, 10, 13, 21, etc.). This ambiguity was discovered in 1974, when Williams commissioned a survey by Engineering Associates (Plaintiff's Exhibit 16). Following the generally accepted survey assumption that a call to a fixed monument (in this case, the highway) prevails over a conflicting metes-and-bounds call, Engineering Associates set the point of beginning in the northerly highway line and thereby established the boundary line. The survey showed that the easterly Skyline boundary lies approxi-

mately 100 feet west of Tie Fork Creek (Tr. 19) and that the northerly boundary lies 300 feet north of and parallel to the highway.

A map (Defendants' Exhibit 21) prepared for appellants by Surveying Associates, Inc., graphically illustrates the deed discrepancy and the area in dispute, and it is reproduced herein as Appendix 1. The map shows the actual deed description in red lines, the description as adjusted by Engineering Associates in blue lines, and the area claimed by appellants in yellow lines (the easterly yellow line following Tie Fork Creek). The disputed area has been shaded in yellow for illustrative purposes.

Following the May 22, 1954 conveyance, Skyline Enterprises built a motel, service station and cafe on its property. Williams, who was an active member of the partnership and a principal stockholder and president of the partnership's successor corporation, Skyview Enterprises, Inc. (Tr. 112), testified that Skyline Enterprises never occupied the area now in dispute (Tr. 113), and the record is devoid of evidence that Skyline Enterprises, rather than Williams himself, as owner of the adjoining land, allowed anyone to go upon the disputed area.

Following the 1954 conveyance, in addition to paying property taxes, Williams made the following uses of the disputed area:

(a) He granted a pole line easement to Utah Power

& Light Company in August 1954 (Plaintiff's Exhibit 44);

(b) In a conveyance of certain other lands to the Spanish Fork Livestock Association in 1961 (Plaintiff's Exhibit 1), he expressly excepted therefrom the property conveyed to Skyline Enterprises, and in addition, retained "...all that land within the premises between the northerly boundary of U.S. Highway 50-6, and the southerly boundary of D&RGW Railroad...," viz., the disputed property;

(c) He parked in the disputed area while deer hunting (Tr. 90) and held a family reunion on the property (Tr. 97);

(d) He planted crested wheatgrass and other grasses (Tr. 149); and

(e) He obtained a permit in 1973 to clean, repair or deepen an existing well (Plaintiff's Exhibit 20), in order to build a summer home and ready the land for developers (Tr. 48-49).

In 1961, Dr. Merrill Oldroyd, a defendant in the original action, purchased stock in Skyview Enterprises, Inc., which now owned the Skyline property. Oldroyd testified at trial that before he bought into the corporation, Williams represented to him that the Skyline boundaries were as represented by the yellow lines in Appendix 1, i.e., along Tie Fork Creek to the east and the D&RGW Railroad right-of-way to the north, inter alia

(Tr. 238239). Williams flatly denied having made these representations (Tr. 119).

Subsequently, Dr. Oldroyd and his family became the owners of all the stock of Skyview Enterprises, Inc. (Tr. 119-220, 239); and on July 16, 1963, the corporation entered into a contract to sell the Skyline property to Lloyd Horlacher and Elda Horlacher. According to the Horlac testimony, Williams made boundary representations to them which were identical to those he had allegedly made to Oldroyd (Tr. 207, 215, 261). Again, Williams stoutly denied ever having made the representations (Tr. 121, 122).

At the time the Horlachers went into possession, Williams moved to Salt Lake City and did not return to the property until 1970 (Tr. 122, 124). During the interim, the Horlachers placed trailer hookups precisely along the easterly deed boundary and north into the disputed area, cleared some brush from the disputed area, placed a couple of outhouses along the creek, and attempted to plant the disputed area with lawn seed, which did not grow (Tr. 18, 217-21). The Horlachers never notified Williams of these infringements on his property (Tr. 220).

In 1966, Mrs. Horlacker (since divorced) assigned her interest in the real estate contract to her son, appellant Gerald Carter (Defendants' Exhibit 36). Carter went into possession of the Skyline property at that time and remai on the property through the commencement of this action.

When Williams returned to his property in 1970, he discovered that certain electrical hookups were in the disputed area. He told Carter that he, Carter, was trespassing and requested that he remove the posts, all but one of which were subsequently pulled out (Tr. 124).

In 1973 a dispute arose over the boundary between the Skyline property and Williams' land. At that time Williams and Carter paced off the deed footage (Tr. 92). Although apparently agreeing that the Skyline property was 300 feet deep, the parties disagreed concerning the easterly boundary, Williams arguing that it ran west of the creek (Tr. 93). Carter then offered to buy the disputed property from Williams (Tr. 93); in fact, Carter admitted at trial that he offered to buy the disputed property from Williams on at least two occasions (Tr. 309, 315).

In the summer of 1974, ignoring Williams' claim to the property, and ignoring the footages which he and Williams had paced off, Carter employed appellant Canto to grade the disputed area, together with part of the Skyline property. During the course of grading the Skyline property, but before commencing work on the disputed land, Canto parked his equipment in the disputed area. Williams happened to come by (although living in Spanish Fork, Tr. 43, he used the property extensively for outings with his daughter, Tr. 105) and told Canto that Canto's equipment and camp were on his property. Williams testified that had he known that Canto

intended to tear up the property, he would have forbid him to begin work (Tr. 129).

Canto, following Carter's instructions, proceeded to grade the disputed area in August 1974. In the course of grading, he totally removed the vegetation and topsoil (up to 17 inches in places) from the disputed area (Tr. 152 and Plaintiff's Exhibit 22), altered the area's drainage into the stream (Tr. 142), and buried a patch of willows at streamside (Tr. 145). As a result, undesirable weeds have taken over (Tr. 159) and the stream has become polluted (Tr. 154).

On August 16, 1974, Williams discovered the damage when he commissioned the Engineering Associates survey (Tr. 94). He immediately commenced this lawsuit, seeking to quiet title and recover damages in trespass.

At trial Williams presented evidence of damages on two theories: cost of restoration and diminution in market value. To support his testimony, as landowner, concerning the damage done by grading, Williams relied on expert testimony by Grant Williams, a land management expert, and Esben Baadsgaard, a licensed real estate broker who presented testimony concerning sales of similar parcels of land. Appellants offered no rebuttal evidence on the issue of damages.

Following trial, at which the action was dismissed against defendant Oldroyd, the court ruled in favor of

plaintiff Williams, quieting title to the disputed property in Williams and granting him damages in the sum of $6,690.00, representing the property's diminution in value as a result of the trespass. Defendants Carter and Canto have appealed this ruling.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY REFUSED TO REFORM THE SUBJECT DEED AS REQUESTED BY APPELLANTS.

Appellants' first contention in seeking reversal is that the trial court's refusal to reform the subject deed was in error, because (1) the deed description is erroneous; (2) the evidence shows that the parties to the original (May 22, 1954) deed were mutually mistaken in giving and taking an instrument containing an erroneous description, and (3) Dr. Oldroyd, the Horlachers and Carter relied on alleged boundary representations by Williams in occupying the disputed area.

In analyzing appellants' contentions, it is important to note four basic rules of appellate review to which this court has staunchly adhered: (1) that the appellate court indulges the findings and judgment of the trial court with a presumption of validity and correctness; (2) that the appellate court reviews the record in a light favorable to those findings and judgment; (3) that it does not disturb the findings and judgment if they find substan-

tial support in the evidence, and (4) that it requires appellant to sustain the burden of showing error. R. C. Tolman Const. Co. v. Myton Water Ass'n., 563 P.2d 780, 782 (Utah 1977).

The rationale underlying this broad deference to the trial court is explained in the leading deed reformation case of Sine v. Harper, 118 Utah 415, 222 P.2d 571, 581 (1950):

> The trial court is in a more favorable situation to deal with many of the imponderables arising in a trial of an action than we are. We acknowledge his vantage point on such things as demeanor and credibility and we realize that the "live show" he watches is far more effective in disclosing the ultimate truths than are the typewritten pages of a transcript. We appreciate his better opportunities for searching out inaccuracies, untruths, exaggerations and concealed bias or interest and if we are to fully accept his advantageous position we must allow him some latitude in giving weight to elements we are unable to evaluate.

A review of the lengthy transcript of the instant case reveals that nearly every material fact, except evidence concerning damages, was disputed, especially with respect t testimony concerning Williams' alleged boundary representations to Dr. Oldroyd and the Horlachers (see, e.g., Tr. 119-22, 214, 238, 261). Under such circumstances, this co should not lightly substitute its judgment for that of the trial court.

After weighing the witnesses' conflicting testimony, the trial court ruled as follows in its Memorandum Decis

of January 27, 1977: "The court does not find sufficient facts to order reformation of the deed, . . ." [emphasis added]. The decision comports with the long-standing rule in Utah that a deed will be reformed only upon a clear and convincing showing, as opposed to a mere preponderance, that the parties were mutually mistaken in the execution and delivery of an instrument at variance with their intent, and that the party seeking reformation has not been guilty of neglect in the execution of the deed, or of laches in seeking relief. Naisbitt v. Hodges, 6 Utah 2d 116, 307 P.2d 620 (1957), and cases cited therein. The "clear and convincing" standard is defined in Sine v. Harper, supra, as follows:

> That proof is convincing which carries with it, not only the power to persuade the mind as to the probable truth or correctness of the fact it purports to prove, but has the element of clinching such truth or correctness. Clear and convincing proof clinches what might be otherwise only probable to the mind. 22 P.2d at 581.

Appellants simply have not met this rigorous burden of proof.

First, appellants argue that since the deed description is erroneous, it should be reformed along lines corresponding to their alleged possession. Granted, the deed description contains a latent ambiguity [(i.e., one which does not appear on the face of the instrument, but is shown to exist when the description is applied to the property itself, 23 Am. Jur. 2d, Deeds, § 251 (1965)], in that although the par-

cel described is obviously a rectangle 1,560 feet long and 300 feet deep, the initial metes-and-bounds call conflicts with the call to the northerly line of U.S. Highway 50-6. Such an ambiguity does not, however, require the drastic remedy of reformation. Instead, the trial court chose merely to rely on a basic rule of construction in cases involving boundary disputes, i.e., that fixed monuments (in this case, the highway) take precedence over calls of courses or distances. Scott v. Hansen, 18 Utah 2d 303, 422 P.2d 525, 527 (1966). Following this rule, the court allowed the boundary line to remain unchanged and did not, as appellants contend, ". . .reform the deed which it said it would not reform." (Appellants' Brief, 12)

Of course, had the court desired, it could have effected a reformation by following the survey description contained in the Engineering Associates' survey commissioned by Williams (see Surveyor's Certificate, Plaintiff's Exhibit That description is simply the original boundary line adjusted to give precedence to the call to U.S. Highway 50-6. Such a boundary line--running west of Tie Fork Creek and south of the railroad right-of-way--conforms precisely to the mutual intent of the parties to the original deed.

Quibbling over a latently ambiguous deed description, however, will not resolve this controversy. As the Surveyors Associates' survey (Defendants' Exhibit 21 and Appendix 1 herein) clearly demonstrates, appellants claim a substan-

amount of land (yellow lines on exhibit) lying outside both the original deed description (red lines) and the description as corrected to conform to the highway call (blue lines).

In a roundabout effort to substantiate their claim to this unconveyed parcel, appellants argue (Appellants' Brief, 12-13) (1) that following the original conveyance from Williams to Skyline Enterprises, the partnership occupied the disputed area, as did its successor corporation, Skyview Enterprises, Inc.; (2) that in 1960 or 1961, Williams induced Dr. Oldroyd to buy into the corporation by representing the boundaries to be as appellants claim; and (3) that Williams, who no longer owned any interest in the Skyline property, made similar representations to the Horlachers in 1963. None of these allegations, even if true, would rise to the level of a pre-existing agreement between Williams, as grantor, and himself and his associates, doing business as Skyline Enterprises, as grantees. For example, assuming arguendo that deer hunters and construction workers were allowed to park their vehicles and equipment in the disputed area in the early Skyline days, as testified by Carter (Tr. 293), the record contains no evidence that these uses were permitted by Skyline Enterprises, rather than by Williams as sole owner of the property. A hypothetical example will illustrate this point: Suppose deer hunters had approached Williams while Williams was tending the Skyline gas station,

and had received permission to camp on the disputed property. Was the permission granted by Williams on behalf of Skyline, or by Williams as Skyline's neighbor and the property's sole owner? The record is inconclusive.

A more significant gap in the record is the absence of any of the original grantees, other than Williams, as witnesses at trial. If appellants were truly serious about seeking reformation on the basis of a pre-existing agreement, why did they fail to call Clifton Huff as a witness (Dennis Price being deceased)? After all, the issue in reformation proceedings is what the parties to the instrument mutually intended, not what subsequent takers may spec late years after the fact. The trial court was bound to lc at the transaction as of the time of execution, 66 Am. Jur. Reformation of Instruments, § 5 (1973); without any evidenc relating to that point in time, the court could hardly be expected to reform the deed on the basis of vague inferenc and self-serving reconstructions.

Moreover, appellants' attempt to reconstruct an inference of pre-existing agreement and mutual mistake is dependent upon findings that Skyline Enterprises actually did make the alleged boundary representations. In fact, however, each of those allegations was vehemently denied by Williams at trial (Tr. 113, 119, 121-22), and his deni was bolstered by appellant Carter's admission (Tr. 309, that on at least two occasions, he attempted to buy the

disputed property from Williams.

Apparently, Judge Sorensen chose to believe respondent rather than appellants, as is shown by his Memorandum Decision and by the court's Findings of Fact entered on February 14, 1977, which stated, at paragraph 5:

> There is no evidence to support a finding that plaintiff and the partnership, dba Skyline Enterprises, intended any boundary between their lands other than [the deed boundary as corrected by survey], nor is there sufficient evidence to support a finding that Skyline Enterprises occupied, possessed or claimed any of the lands lying north or east of said boundary.

The above finding is exactly contrary to the facts selected by appellants, and appellants must rebut that finding in order to obtain a reversal on appeal. Their position in this respect is identical to that of the appellants in First Western Fidelity v. Gibbons and Reed Co., 27 Utah 2d 1, 492 P.2d 132 (1971), in which the court stated, 492 P.2d at 133:

> Where the appellant's position is that the trial court erred in refusing to make certain findings essential to its right to recover, and insists that the evidence compels such findings, it is obliged to show that there is credible and uncontradicted evidence which proves those contended facts with such certainty that all reasonable minds must so find. Conversely, if there is any reasonable basis, either in the evidence or from the lack of evidence upon which reasonable minds might conclude that they are not so convinced by a preponderance of the evidence, then the findings should not be overturned [Emphasis added].

Not one of appellants' asserted facts is undisputed in the record; to the contrary, it is evident that Judge Sorensen had a reasonable basis in evidence for his finding that there was no pre-existing boundary agreement at variance with the original deed.

Finally, even if this court were to accept appellants' view of the facts respecting boundary representations and occupation of the disputed area, appellants should nonetheless be denied reformation because Oldroyd, the Horlachers and Carter were all inexcusably negligent in taking their respective property interests without questioning the obvious discrepancy between the alleged representations and the deed descriptions. A glance at any of the instruments sought to be reformed reveals that the property is a perfect rectangle 1,560 feet long and 300 feet deep bordering on the highway--not the irregularly-shaped chunk which appellants claim was represented to be their property by Williams. Nonetheless Oldroyd took a deed from Skyview Enterprises, Inc., bearing the identical description as the initial deed; Oldroyd entered into a real estate contract with the Horlachers for the same described property; and the Horlachers assigned their interest to Carter using the same description--and not one of these people ever bothered to read the instrument he took (Tr. 226, 242, 255), to discuss the matter seriously with Williams, to commission a survey, or even to pace off the deed footages.

Under Utah law, the issue of inexcusable negligence as a defence to reformation is a question of fact to be decided on a case-by-case basis. Petersen v. Eldredge, 122 Utah 96, 246 P.2d 866 (1952). As a general rule, however, a finding of inexcusable neglect requires (1) breach of legal duty by the party seeking reformation, (2) causing prejudice to the other party. McMahon v. Tanner, 122 Utah 333, 249 P.2d 502 (1952); see generally Annot., 81 A.L.R. 2d 7, 31-32 (1962). It is evident that Dr. Oldroyd's failure to correct the alleged descriptional error when he contracted with the Horlachers was a breach of his duty to convey clear title. Furthermore, Williams has been prejudiced by the breach of duty in that it ultimately resulted in the trespass which impelled this lawsuit.

The conduct of Oldroyd, the Horlachers and Carter with respect to the conveyances in question suggests only two possible conclusions: either they were inexcusably negligent in taking erroneous instruments, or they received exactly what they paid for. In either case, the trial court's decision should be affirmed and reformation denied.

POINT II

THE TRIAL COURT PROPERLY REFUSED TO QUIET TITLE TO THE DISPUTED PROPERTY IN APPELLANTS ON THE BASIS OF ACQUISITION BY ACQUIESCENCE

It has been long recognized in Utah that when the true boundary between adjoining tracts of land is unknown, uncertain or in dispute, the respective owners may by parol

agreement establish the boundary line and thereby irrevocably bind themselves and their grantees. See, e.g., Brown v. Milliner, 120 Utah 2d 16, 232 P.2d 202 (1951). Appellants claim that Williams' alleged boundary representations to Oldroyd and the Horlachers constituted such a parol agreement, thereby establishing the claimed boundary.

Of course, as recently reaffirmed by this court in Hobson v. Panguitch Lake Corporation, 530 P.2d 792 (Utah 1975), where the existence of such a boundary agreement is in dispute, a boundary may not be established solely on the basis of an oral agreement, as such an agreement may violate the Statute of Frauds. See also Strickley v. Hill, 22 Utah 257, 62 P. 893 (1900).

Instead, the court has endorsed the common law doctrine of boundary by acquiescence, whereby boundary disputes are resolved through an orderly system of presumptions. The initial burden of proof lies with the party claiming bound by acquiescence, who must prove four elements in order to raise a presumption that a boundary agreement exists. The elements are: (1) occupation up to a visible line marked definitely by monuments, fences or buildings, (2) acquiesc in the line as a boundary, (3) for a long period of years (4) by adjoining land owners. Fuoco v. Williams, 15 Utah 156, 389 P.2d 143 (1964). If the claimant can thus establish the presumption of an agreement, the burden shifts to the other party to rebut the presumption by competent ev

dence. However, as emphasized by the court in Fuoco v. Williams, supra,

> . . . if the party claiming title by acquiescence fails to carry his burden and raise the presumption, then there is no case at all. 389 P.2d at 145.

The court must first, then, analyze each of appellants' arguments in the light of the foregoing four elements.

First, appellants insist that beginning in May 1954, Skyline Enterprises and later Skyview Enterprises, Inc., occupied the disputed area up to the claimed boundary. However, as outlined in Point I of this brief, Williams (who was a member of the Skyline Enterprises partnership) denied such occupation; and this court is bound to view disputed facts in a light favorable to him, giving deference to Judge Sorensen's Memorandum Decision, wherein he did not find "sufficient believable facts to establish a boundary by acquiescense [sic]. . . ." Moreover, the record is devoid of evidence that Skyline Enterprises, rather than Williams as Skyline's neighbor, occupied the property. Absent evidence of occupation by Skyline and Skyview while respondent had an interest in those entities, occupation of the disputed area by appellant Carter's predecessors in interest could not have begun earlier than 1963, when Williams left the property.

Furthermore, the requisite occupation must border on a visible line marked definitely by monuments, fences or

buildings. Appellants claim that a fence along Tie Fork Creek operated as such a visible line (Appellants' Brief, 24). The record clearly illustrates, however, that the fence was used to hold cattle and horses, rather than to fix a boundary (Tr. 97, 1977). Use of the fence for livestock control continued throughout the time that Williams' brother and expert witness, Grant Williams, was on the property (Tr. 176), a period extending from 1954 through 1967 (Tr. 166-167). As emphasized in appellants' main case for the point, Baum v. Defa, 525 P.2d 725, 727 (Utah 1974), the period of time that a fence exists for livestock contro purposes ". . . will not constitute part of the 'long perio of time' requisite to establish a boundary by acquiescence. Accordingly, the alleged occupation, if any, did not begin until at least 1967.

Second, appellants fail to show the requisite acquiesc by respondent. Williams testified that he was unaware of a encroachment by the Horlachers or Carter before 1970, as he had left the property when the Horlachers took possession 1963 (Tr. 122). Without knowledge, he could not acquiesce. Immediately upon returning, he told Carter that Carter was trespassing by placing trailer hookups in the area now in dispute (Tr. 124). Later, when Canto parked his caterpill in the area before grading the property, Williams told hi that he was camped on Williams' land (Tr. 129). These fa negate any allegation of acquiescence.

Finally, appellants have failed to show acquiescence in the line as a boundary for the required period of years. Acquiescence, if any, began no earlier than 1963 (when Skyview Enterprises, Inc. conveyed the property to the Horlachers) and ended when Williams commenced this action, a total of 11 years. In a lengthy discussion of the period of time required under boundary by acquiescence, this court, in King v. Fronk, 14 Utah 2d 135, 378 P.2d 893 (1963), pointed out that as a general rule, the prescriptive period of twenty years is the appropriate yardstick. The court could find only two decisions [one of which, Eckberg v. Bates, 121 Utah 123, 239 P.2d 205 (1951), is heavily relied upon by appellants] which had allowed a period of less than twenty years to perfect title by acquiescence. In both, the circumstances indicated an ancient boundary obviously existing for a period in excess of the prescriptive period. The court concluded as follows:

> Boiled down, it seems to us that establishment of boundary by acquiescence may be predicated upon the existence of a visibly monumented line persisting for at least twenty years or upwards, shown specially or circumstantially, in order to meet or exceed the requirements of acquiring rights by prescription.
>
> . . . The parade of cases to date calls on equity to flex its muscles only to pull the period below twenty years in the rarest of cases involving the doctrine of boundary by acquiescence. 378 P.2d at 897.

The circumstances of the instant case, including the absence of any ancient boundary, clearly do not justify

shortening the acquiescence period to infer an agreement which never, in fact, existed.

However, even if this court were to find that appellants have presented sufficient evidence to raise the presumption that a binding agreement existed, Williams' evidence provides a compelling rebuttal. Between the time that he conveyed his property to Skyline Enterprises and the time he commenced this action, Williams paid all taxes on the disputed property (Tr. 51), granted a pole line easement over the disputed property to Utah Power & Light Company (plaintiff's Exhibit 44), excluded both the Skyline property and the disputed property, separately, in a conveyance of other lands to the Spanish Fork Livestock Association (Plaintiff's Exhibit 1), parked in the disputed area (Tr. held a family reunion there (Tr. 97), planted the area (Tr. 149), and obtained a permit to clear an existing well on t property (Plaintiff's Exhibit 20). Plainly, Williams neve acted in keeping with the alleged "agreement." Neither, i appears, did appellant Carter, who admitted that he attemp to buy the disputed property from Williams on at least two occasions (Tr. 309, 315). The irrestible conclusion is that the attempt to prove boundary by acquiescence is mere a recently-fabricated smoke screen for a naked trespass.

POINT III

THE TRIAL COURT'S AWARD OF DAMAGES TO RESPONDENT WAS PROPER UNDER THE CIRCUMSTANCES

The trial court awarded damages to Williams in the sum of $6,690.00, on the basis that appellants' trespass had reduced the fair market value of the land from $6,000.00 per acre to $3,000.00 per acre. Williams' evidence of damages at trial included his own estimate, as landowner, of the property's value (Tr. 202); evidence of market value by Esbern Baadsgaard, a licensed real estate broker (Tr. 180-87); evidence of soil, plant and stream destruction by Grant Williams, a forestry and land resources expert (Tr. 147-65); and evidence of topsoil replacement cost by Alfred Johnson, a topsoil hauler (Tr. 58-59). By contrast, appellants offered only the testimony of appellant Canto, a cat-skinner, whose "professional opinion" (Appellants' Brief, 30) was that there was no difference in soil condition before and after grading. Absent any significant rebuttal testimony, the trial court was bound to award damages on the basis of the only evidence offered, viz., that of respondent Williams.

Appellants attack the court's damage award on three bases. First, they argue that Williams' testimony, that the property was worth $6,000.00 per acre before the trespass and half that afterwards (Tr. 202), was improperly admitted, as it was unsupported by evidence of property values or surrounding circumstances. It should be noted

that Williams' testimony was received without objection;* therfore, its admission, even if erroneous, would not constitute grounds for reversal. Rule 4, Utah Rules of Evidence (1971). However, the admission of Williams' testimony was patently proper. This court was repeatedly stated that

> . . . an owner of property is always entitled to testify as to its value, and to express an opinion as to its value in condemnation proceedings. An owner does not have to qualify as an expert, nor be engaged in buying and selling real estate.

Provo River Water Users Ass'n. v. Carlson, 103 Utah 93, 133

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*The transcript reads as follows:

> Q. [by Mr. Fowler] Do you have an opinion, Mr. Clark [sic] as to the value of the disputed property prior to the grading?
>
> A. Yes, it would be around --
>
> MR. NELSON: Just a minute. I object on the ground that no sufficient foundation has been laid.
>
> MR. FOWLER: It's been established, Your Honor --
> THE COURT: Just a minute. He may answer. I think under the law of this state the owner of property can always testify to its value. I don't think it's a good rule of law, Mr. Fowler, but I think it is the law. Do you agree it is the law?
>
> MR. NELSON: I am not certain, Your Honor, but will demur to your ruling (Tr. 202)

The record thus indicates that the initial objection was withdrawn and not raised again, nor did appellants' counsel move to strike the witness' answer.

P.2d 777, 782 (1943); see also Utah State Road Comm. v. Johnson, 550 P.2d 216, 217 (Utah 1976). That the instant case is not a condemnation case is irrelevant, as the court in either instance is attempting to arrive at a basis for awarding damages.

The above general rule has been limited somewhat by the holdings in Utah State Road Comm. v. Johnson, supra, and Utah State Road Comm. v. Steele Ranch, 533 P.2d 888 (Utah 1975), which ruled that a landowner's testimony lacks probative value if he is not particularly familiar with the property (e.g., if he has come into ownership of property by inheritance and has no realistic idea of its value). The limitations of these cases, however, are no impediment to admissibility in the instant case. Williams was raised on the property (Tr. 44), established a business adjacent to it (Tr. 109), and was intimately familiar with common uses of the property and how those uses (primarily recreation) were affected by the trespass (Tr. 106-106). His testimony thus carries great probative weight, and the court's award, based thereon, should not be disturbed.*

Appellants next contend (Appellants' Brief, 28-29)

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*It should be noted that Williams' appraisal was very modest in comparison with that of his expert witness, Baadsgaard, who placed the property's worth at $23,000.00 to $26,000.00 before the trespass (based on subdivision into four lots worth $5,500.00 to $6,500.00 apiece, Tr. 183-85), and $3,000.00 afterwards (Tr. 186).

that the admission of evidence based on the property's value as a potential summer home site was improper. Appellants cite no authority for their proposition, which is contrary to the prevailing rule, as stated in 22 Am. Jur. 2d, Damages, § 133 (1965):

> It is the qualities and attributes of the real estate which affect its value. To the extent that other uses of the land in question would be more profitable, these other uses may be considered by the court to the extent that they affect the present value of that land. This may be true even though plaintiff has not taken advantage of that value. . . .

Moreover, the record indicates that Williams had taken initial steps to prepare the property for subdivision, including obtaining a well permit (Tr. 104) and discussing the possibilities of re-zoning with a local official (Tr. 132). Obviously, use of the property for summer homes was being seriously contemplated.

Finally, appellants argue that since the Horlachers and Carter improved the property before it was graded, the damages should be reduced to reflect their efforts. In light of Williams' desire to build summer homes in a natural setting on the property, it is questionable whether putting in a trailer court and outhouses constituted "improvements." Moreover, appellants' argument fails to account for the differences in soil and plant condition before and after the trespass, as illustrated by the testimony and exhibits of Williams' expert witness, Grant Williams (Tr. 155); nor

does it account for the extensive damage caused to the stream bed, including alteration of the property's natural drainage (Tr. 142), burying willows located at streamside (Tr. 145), and, in Baadsgaard's words, giving the creek ". . . the appearance of a ditch rather than a stream (Tr. 187)."

In sum, Williams has not sought to take advantage of improvements allegedly made by the Horlachers and appellant Carter. Instead, he has merely sought compensation for a wrongful trespass which, although instigated by the Horlachers, came to a head with the bulldozing done by Canto at Carter's insistence, thereby converting property once ideal for Williams' purposes into what is now essentially a desert (Tr. 153).

If the court committed any error, it was in refusing to award damages to Williams on the basis of restoration cost, rather than diminution in value, evidence having been submitted to support both theories.

The relative merits and appropriateness of these two measures of damages received extensive treatment in Brereton v. Dixon, 20 Utah 2d 64, 433 P.2d 3 (1967), the court concluding as follows, 433 P.2d at 5-6:

> . . . [T]he injured party [should have] the benefit of whichever of the two rules will best serve the objective . . . of giving him reasonable and adequate compensation for his actual loss as related to his use of the property. This more flexible approach avoids a rigid application of either rule where it would result in confering a favor on the wrongdoer at the expense of the victim; and it allows the owner of the property which has

> been damaged the privilege which should be his of having the decision as to how he desires to use his property, by giving him the amount of damage he suffers on the basis of that use. If he wants to maintain a fruit orchard, a wood lot, or even a primitive area, though his property may be more valuable if turned into an industrial or residential purpose, that should be his prerogative; and if it is wrongfully destroyed or damaged, the wrongdoer should pay for the actual damage caused.

This pronouncement, although dealing with injury to trees, not the land itself, adheres to the rule of the Restatement of Torts, Second, Section 929, which allows plaintiff to elect, within certain limits, the measure of damages which will most fully compensate him for a wrongful invasion of his real property. Section 929, comment b, is particularly applicable to the instant case:

> Even in the absence of value arising from personal use, the reasonable cost of replacing the land in its original position is ordinarily allowable as the measure of recovery. Thus, where a ditch is dug without right upon the land of another, the other normally is entitled to damages measured by the expense of filling the ditch, if he wishes it filled. If, however, the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, unless there is a reason personal to the owner for restoring the original condition, damages are measured only by the difference between the value of the land before and after the harm. [Emphasis added]

It is evident that appellant had such a personal reason for restoring the property to its original condition, namely to make it a retirement retreat or a suitable site for summer homes. Replacement cost would thus appear to be

proper measure of damages. The record indicates that a representative restoration of topsoil would require approximately 2,450 tons (Tr. 164-65). Alfred Johnson, a topsoil hauler, testified that the cost of hauling topsoil would be $50.00 per truckload (25 tons), plus $40.00 per trip for truck service, based on mileage from Spring Lake (Tr. 58-59). A total of 98 trips would be required (Tr. 165). Thus, replacement cost, exclusive of costs of spreading the topsoil and reseeding, would total approximately $8,820.00, substantially more than the damages awarded by the court.

Under similar circumstances, the Colorado Supreme Court, in Bobrick v. Taylor, 467 P.2d 822 (Colo. 1970), held that the cost of replacement of soil was an appropriate measure of damages in a trespass action, notwithstanding the claim of defendant contractor that the proper measure of damages would be the difference in market value of the land before and after the alleged trespass. See also Engler v. Hatch, 472 P.2d 680 (Colo. App. 1970), in which the court allowed damages of $1,000.00 based upon cost of reseeding and restoration cost following a trespass, although plaintiff failed to prove that the market value of his land was in any way diminished by the trespass. By refusing to award damages on the basis of restoration cost, the trial court in the instant case showed considerable leniency toward appellants.

The court also showed some kindness in refusing to award punitive damages to Williams for Carter's willful and malicious destruction of property. The evidence clearly shows that Carter understood Williams' claim to the area now in dispute and acknowledged Williams' ownership long before he employed Canto to grade the property: On at least two occasions, he offered to buy the property from Williams (Tr. 93, 309, 315); he saw Williams use the disputed area for a family reunion (Tr. 318); and he ran a line of trailer hookups precisely along the eastern Skyline boundary, as described in the deed (Tr. 18, 315). Nonetheless, utterly disregarding Williams' ownership right, he graded the property, ruining it and causing a long-drawn litigation which has prevented Williams from putting the property to profitable use.

These circumstances fit all the criteria for an award of punitive damages, as discussed by the Utah Supreme Court in Kesler v. Rogers, 542 P.2d 354, 359 (Utah 1975):

> In considering the problem of punitive damages and the arguments thereon, it is well to have in mind the purposes of punitive damages. They are: a punishment of the defendant for particularly grievous injury caused by conduct which is not only wrongful, but which is wilful and malicious so that . . . mere recompense for actual loss is inadequate . . .; and also that such a verdict should serve as a wholesome warning to others. . . .

In Kesler, the defendant claimed land and cattle under an instrument which erroneously conveyed more than was in-

tended. The defendant gained knowledge of the error, yet persisted in claiming the land and cattle. At trial, the plaintiff was awarded $25,000.00 actual damages and $10,000.00 punitive damages. On appeal, the judgment was affirmed with a reduction of $5,000.00 in punitive damages, the court considering it pertinent to affirmance that defendant's malicious conduct had caused a long and vexatious litigation, during the course of which plaintiff was deprived of his rightful property.

The evidence in the instant case forces the conclusion that Carter's conduct was equally outrageous as that decried in Kesler. At best, Carter was consciously indifferent to plaintiff's rights and to the consequences of grading plaintiff's property, such gross negligence calling for an award of exemplary damages, 22 Am. Jur. 2d, Damages, §§ 249, 252 (1965). At worst, Carter acted wantonly and maliciously.

Despite the foregoing statements concerning restoration cost and punitive damages, respondent Williams intends to abide by the trial court's judgment, which represents a just and equitable resolution of the parties' dispute.

CONCLUSION

The decision and judgment of the trial court, quieting title to the disputed property in respondent Williams and awarding him damages arising out of the trespass and des-

truction of his land, are amply supported by competent evidence. Conversely, appellants have failed to demonstrate reversible error by the trial court with regard to any of their contentions. They have failed to meet their burden of proof respecting deed reformation and acquisition of property by acquiescence, and they have failed to justify their lack of rebuttal evidence concerning damages.

The trial court's decision and judgment merit affirmance in every respect.

Respectfully submitted,

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Appendix "1"