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

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

D. CLARK WILLIAMS, Plaintiff and Respondent, v. MERRILL L. OLDROYD, GERALD CARTER, and JOHN A. CANTO, Defendants and Appellants.	Case No. 15313

BRIEF OF APPELLANTS

Appeal from the Judgment of the Fourth Judicial District Court for Utah County, Honorable Allen B. Sorensen, Judge

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NATURE OF THE CASE

This is an action for trespass and to quiet title to certain real property located in Utah County, Utah. The defendants denied any trespass or damage, and counterclaimed to quiet title to said property in defendant Gerald Carter, and to reform various deeds, on the basis of erroneous deed descriptions and prolonged acquiescence in established natural and man-made boundary lines.

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 was entered against 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. Defendants Gerald Carter and John A. Canto now appeal from the entry of judgment and denial of the motion.

RELIEF SOUGHT ON APPEAL

Appellants respectfully ask the Court:

1. To reverse the judgment of the trial court and to enter a judgment quieting title to the disputed property in appellant Gerald Carter.
2. To find that a boundary by acquiescence has been established consisting of the Denver and Rio Grande Railroad right-of-way on the north, an existing fence line adjacent to Tie-Fork Creek on the east, U.S. Highway 6 on the south, and the west boundary of a pond on the west.
3. To reform and correct the basic deed and subsequent conveyances in the chain of title to conform with the true intention of the parties at the times of their execution.

STATEMENT OF FACTS

The evidence developed in the case shows that on or about May 22, 1954, the plaintiff, in concert with Clifton Huff and Dennis L. Prince, formed a partnership under the name and style of Skyline Enterprises, and on the same date the plaintiff and his then wife, Evelyn J. Williams, conveyed by warranty deed to D. Clark Williams, Clifton Huff, and Dennis L. Prince, a partnership doing business as Skyline Enterprises, a metes and bounds description of a tract of land purporting to comprise 10.74 acres in Section 14, Township 10 South, Range 6 East,

Salt Lake Base and Meridian. (Exhibits "27" and "12") The partnership constructed and operated a motel, service station, and restaurant facility on the property described in said deed, with camping facilities and areas for deer hunters, sportsmen, and travelers extending in and upon the land which is disputed in this action. (Tr., pp. 109, 293)

The deeded description set out in the conveyance of May 22, 1954, is itself erroneous, and, if literally followed, would embrace a large portion of U.S. Highway 6 on the south, and thereby change the northern border consistent therewith. (Tr., pp. 7, 10, 13, 21, 66, 69, 85)

A map of the land in question prepared from a survey by Surveying Associates, Inc., was introduced by defendants and received in evidence as Exhibit "21", which purports to show, within the yellow lines, the possession survey of land claimed by the defendants and, by the blue lines, the deeded tract as adjusted to eliminate the conflict with U.S. Highway 6. That portion of the land bounded in yellow lines and located generally north and east of the blue lines on the plat constitutes the disputed area. The northern part of the yellow line follows an existing fence line and the south side of the Denver and Rio Grande Railroad right-of-way, and the eastern end of the yellow line follows a fence along Tie-Fork Creek. The west end of the northern and western yellow line also follows, generally, the west boundary of a pond. The southern boundary line marked in yellow follows the north edge of U.S. Highway 6.

The evidence further shows that subsequent to the

formation of the above-mentioned partnership, two of the parties thereto, including the plaintiff, and Wallace Gardner, as a successor in interest of Dennis L. Prince, formed a corporation under the name and style of Skyview Enterprises, Inc., and transferred the property to that corporation by the same erroneous description by which it was originally conveyed to the partnership by the plaintiff. (Exhibit "8")

Sometime prior to January, 1961, the plaintiff endeavored to interest the defendant, Merrill L. Oldroyd, in the corporation and urged him to purchase the stock of Wallace Gardner. (Tr., pp. 117, 233, 234, 239) In conversations between the plaintiff and the defendant, Merrill L. Oldroyd, on that occasion, the plaintiff represented to the defendant, Oldroyd, that the corporation was the owner of a tract real property bounded on the north by the right-of-way line of the Denver and Rio Grande Railroad; on the east by a fence adjoining Tie-Fork Creek; on the south by U.S. Highway 6; and on the west by a pond, which is the precise description shown on Exhibit "21" bounded in the yellow lines. (Tr., pp. 238-239) In reliance on these representations as to the property owned by the corporation, the defendant, Oldroyd, purchased shares in the corporation and the corporation thereafter occupied, claimed, and utilized all of the land embraced within said boundaries as depicted on Exhibit "21" within the yellow lines, without any objection, dispute, or question on the part of the plaintiff. (Tr., p. 239)

Sometime prior to July 16, 1963, the defendant,

Oldroyd, and his family, became the owners of all of the stock of Skyview Enterprises, Inc., including the stock of the plaintiff. (Tr., pp. 119-120, 239)

On or about July 16, 1963, Skyview Enterprises, Inc., as a corporation, entered into a contract for the sale by that corporation and the purchase by D. Lloyd Horlacher, and Elda Horlacher, of the premises and property theretofore owned and claimed by the corporation. (Exhibit "42") In January of 1966, D. Lloyd Horlacher assigned his interest under said contract to Elda Horlacher.

Both Mr. and Mrs. Horlacher testified that prior to their purchasing the property from Skyview Enterprises, Inc., they also had conversations on the land with the plaintiff, Williams, who was then operating the property for the corporation, at which time they requested that the plaintiff point out the physical boundaries of the land owned by the corporation, whereupon Williams again represented to them, on two separate occasions, that the property was bounded on the north by the right-of-way line of the Denver and Rio Grande Railroad; on the east by a fence adjoining Tie-Fork Creek; on the south by U.S. Highway 6; and on the west by a pond, the substantial portion of which description is enclosed by a long-existing fence and is depicted on Exhibit "21" as that land bordered in yellow lines. (Tr., pp. 207, 215, 261)

In his pleadings, plaintiff admitted making the aforesaid representations both to the Horlachers and to Oldroyd. In his reply to the counterclaim of the defendants, under his Third Defense, plaintiff admits that "any statement or commu-

nication made by him relative to any land claimed by the defendants within Section 14, Township 10 South, Range 6 East, Salt Lake Meridian, was true and correct." (Emphasis added.) In his Fourth Defense, plaintiff further admits that "any statement communication made by him relative to any land claimed by the defendants within Section 14, Township 10 South, Range 6 East, Salt Lake Meridian, was made in good faith and was made with probable cause for believing the truth of any statement or communication made." (Emphasis added.)

The Horlachers, while in possession of the property, further improved the disputed land by erecting toilets next to Tie-Fork Creek on the east, by installing electrical outlets on the north, and by cleaning, grading, and seeding the disputed area. (Tr., pp. 217-218, 219, 297-298)

Mrs. Horlacher and her son, Gerald Carter, lived and worked on the property while it was operated both as a partnership and corporation by the plaintiff, from about the years 1954 to 1956, she as a cook, and he as a part-time service station operator. Both were familiar with that property which was occupied used and claimed by both the partnership and the corporation, which included that land embraced within the yellow lines and within the fence lines and railroad and highway rights-of-way and the pond, as depicted on Exhibit "21". (Tr., pp. 292-293, 294)

On or about January 11, 1966, Mrs. Horlacher entered into an agreement to sell and assign her contract, dated July 16, 1963, with Skyview Enterprises, Inc., to her son,

Gerald Carter and his wife, as assignees and buyers. (Exhibit "36") The defendant, Oldroyd, consented to that agreement and assignment on or about January 21, 1966, as the assignee from Skyview Enterprises, Inc., of the seller's interest under said contract. The defendant, Gerald Carter, and his wife then went into possession and have continued to occupy and claim the property since on or about January 11, 1966. (Tr., pp. 221, 296-297)

The defendant, John A. Canto, testified that in July of 1974, he had a conversation with the plaintiff on the property. The plaintiff wanted to employ Canto to do some work on the plaintiff's property. Canto said that he could not do it until he had finished a job for Carter. When the plaintiff inquired as to how long this would take, Canto described the work as leveling Carter's land to Tie-Fork Creek on the east and the railroad right-of-way on the north. The plaintiff made no mention to Canto of any claim of ownership to that land, nor did he object in any way to his doing the work. In fact, later, while the work was in progress, the plaintiff came by on several occasions while Canto was on the land with his equipment leveling the disputed area, and the plaintiff waved to him, but at no time made any objection to his working on the land. (Tr., pp. 271-274)

Mr. Carter testified that he has consistently occupied, claimed, operated, and used the premises and property bounded on the north by the railroad right-of-way, on the east by a fence adjacent to Tie-Fork Creek, on the south by U.S. Highway

6, and on the west by a pond, which is the same property depicted within the yellow lines on Exhibit "21". He further testified that at no time did he occupy or operate the property under a lease or any other tenancy arrangement with the defendant, Oldroyd, but only as a contract purchaser. (Tr., pp. 298-299, 305-306)

Mr. Carter confirmed the fact that while he was on the property with his mother, Mrs. Horlacher, from about 1954 to about 1956, he observed the use being made of the property by the partnership and corporation, which included the land within the disputed area. (Tr., pp. 293, 294) He testified that from the time he took over the property, he also rented camper spaces throughout the entire disputed area, and had as many as thirty-five (35) campers and trailers in the disputed area, at given times, not counting tents or horse trailers and other vehicles. All of the campers and users of this area, including Dennis L. Prince, who was one of the orig partners with the plaintiff when the land was acquired, improve and operated in 1954, did so with Carter's permission, and the permission of his predecessors in interest. (Tr., pp. 297-299

Mr. Carter further testified that the plaintiff never did contact him nor raise any question with regard to the boun of the property until sometime in the year 1972. (Tr., p. 301) At that time, there had been a survey made which indicated that the east boundary line of the property in question might extend east of Tie-Fork Creek by approximately 33 feet. When this information was given to the plaintiff

by Mr. Carter, the plaintiff told Mr. Carter that he (the plaintiff) had always understood that the east line of the property was Tie-Fork Creek, and advised Mr. Carter to go to a place across the street north of the courthouse and get some quit-claim deeds, and he would straighten out the description. (Tr., pp. 301-302)

In another conversation between the plaintiff and the defendant, Carter, in about June of 1973, the plaintiff asked Carter if he (Carter) would like him (Williams) to come over and spray some weeds in the now disputed area. (Tr., pp. 303-304) Mr. Carter also testified that he graded, harrowed, and planted part of the disputed area with grass, and has cut and maintained it since about 1966, and always understood the boundaries of the property to be those depicted by the yellow lines on Exhibit "21". (Tr., pp. 304-305)

The first intimation that plaintiff claimed title to the disputed land occurred immediately prior to the commencement by him on September 11, 1974, of his action for alleged trespass by the defendants, praying for general and punitive damages and for injunctive relief. Subsequently, by amended complaint, the plaintiff added to his complaint a prayer that the title to the disputed land be quieted in him. The defendants, by way of answer to the amended complaint, denied that the plaintiff is the owner of the disputed land, and further denied that any trespass had been committed by the defendants or damage sustained by the plaintiff as a result thereof.

By way of affirmative defenses and counterclaim against the plaintiff, the defendants alleged that the property in question was originally conveyed by the plaintiff and his then wife to the predecessors in interest of the defendants, and that the description in said deed and in subsequent deeds of the same property was erroneous and did not conform to the description of the land intended to be conveyed by the parties, and actually occupied and claimed by them. The defendants also prayed for injunctive relief against the plaintiffs; that the title of the defendant, Carter, to the disputed property be quieted in him on the basis of the doctrine of boundary by acquiescence; and that the original deed from the plaintiff be reformed and corrected to accurately describe the land intended to be conveyed by the plaintiff and received by the predecessors in interest of the defendants; and for general damages, including damage for slander of title and punitive damages.

Immediately after the commencement of the trial, the defendant, Gerald Carter, was stricken by illness and hospitalized. The case proceeded without him, and the evidence and testimony on behalf of the plaintiff was taken and received, and all evidence on behalf of the defendants was also taken and received, except for the testimony of the defendant, Gerald Carter, which was reserved and the trial continued pending his recovery.

On December 15, 1976, trial was reconvened for the purpose of receiving the testimony of defendant,

Gerald Carter. Following his testimony, upon stipulation in open court, the action was dismissed against defendant, Oldroyd. Defendants Carter and Canto now appeal from the entry of the adverse judgment and ruling in this case.

ARGUMENT

POINT I

IT WAS ERROR FOR THE COURT TO REFUSE TO REFORM THE DEED IN ACCORDANCE WITH THE INTENTION OF THE PARTIES.

In its memorandum decision of January 27, 1977, the trial court declared that it did not find "sufficient facts to order reformation of the deed, exhibit 12." The court erred in this finding for the following reasons:

First, the deed description itself is erroneous. If literally followed, it includes a substantial portion of U.S. Highway 6 within its boundaries, and extends beyond to the south side of the highway. (Tr., pp. 7, 10, 13, 21, 66, 69, 85) The court was perplexed by this and asked Mr. Neeley, a registered land surveyor, the following question:

> Q. (By the court) I can understand, Mr. Neeley, the two different surveyors taking the 1560 foot by 300 foot rectangle and not coming out in the same place. But do you have any explanation as to how they both come out in the middle of the state highway? Do you have an explanation at all? (Tr., p. 85, line 10)

Mr. Neeley succinctly replied,

> A. Faulty descriptions is all I can say, Judge. (Tr., p. 85, line 16)

Although the deed description, "along the state road", is presumed to carry title to the center of the

highway, (See Hummel v. Young, 1 Utah 2d 237, 265 P. 2d 410 (1953); Annot., 2 A.L.R. 6 (1919), supp., Annot., 49 A.L.R. 2d 982 (1956)), the parties clearly did not intend to convey property on the opposite side of the highway, to which they held no title. By shifting the deed description northward to border along the north edge of the highway, the trial court, in effect, already has reformed the deed which it said it would not reform. Thus, the claim that the deed cannot be reformed is nonsense, since it must be reformed from the original description, in order to border along the edge of the highway.

Second, the trial court also cited the Restatement of Contracts § 504 (1932), which states:

> Except as stated in §§ 506 and 509-511, where both parties have an identical intention as to the terms to be embodied in a proposed written conveyance, assignment, contract or discharge, and a writing executed by them is materially at variance with that intention, either party can get a decree that the writing shall be reformed so that it shall express the intention of the parties, if innocent third persons will not be unfairly affected thereby.

It is clear from the record that both parties were mutually mistaken with respect to the faulty deed description. After the conveyance from the plaintiff to himself and his partners doing business as Skyline Enterprises, on or about May 22, 1954, the partnership operated and occupied a tract of land bounded on the north by the right-of-way line of the Denver and Rio Grande Railroad; on the east by a fence adjoining Tie-Fork Creek; on the south by U.S. Highway 6; and on the west by a pond, which is

the land circumscribed by the yellow line on Exhibit "21". This fact alone confirms that it was the intention of the plaintiff to convey that property within the yellow lines on Exhibit "21" when he executed the warranty deed of May 22, 1954.

This intention on the part of the grantors and grantees in said deed is bolstered by the further evidence in the record that when the plaintiff attempted to interest the defendant, Oldroyd, in coming into the corporation in the latter part of 1960 or the early part of 1961, he responded to the question of the defendant, Oldroyd, as to what property was owned by the corporation, by pointing out the physical boundaries thereof on the ground and describing the tract as bounded on the north by the right-of-way line of the Denver and Rio Grande Railroad; on the east by a fence adjoining Tie-Fork Creek; on the south by U.S. Highway 6; and on the west by a pond, and it was manifestly the understanding of the defendant, Oldroyd, when he bought into the corporation, that the corporation owned that property. (Tr., pp. 238-239)

The evidence further shows that the same representations were made by the plaintiff to Mr. & Mrs. Horlacher, the predecessors in interest of the defendant, Carter, prior to the time when they purchased the property from Skyview Enterprises, Inc., in July of 1963 (Tr., pp. 207, 215, 261), and both Oldroyd and the Horlachers relied upon those representations in purchasing, respectively, their interests in the

corporation and the property thereof.

Most importantly, in his reply to the counter-claim of the defendants, under his Third and Fourth Defenses, the plaintiff admitted that the representations made by him to Oldroyd and the Horlachers as to the physical boundaries of the property were true and correct, and were made in good faith with probable cause for believing them to be true. Thus, the reality of these representations, the reliance of the parties thereon, and the intention of the parties in contracting with respect to the property cannot be denied. A mutual mistake in the deeded description is clearly shown.

It should be noted, further, that in asking for reformation of the deed, the defendants are asking only that the deed be reformed to conform to the boundary descriptions of the property intended by the parties, and are not asking for more, but, in fact, less land than is conveyed by the deed. However, even if they were asking for more land, this would not be a sufficient basis for denying the application to reform. See Roberts v. Hummel, 69 Nev. 15 243 P. 2d 248 (1952).

This Court, in Mawhinney v. Jensen, 120 Utah 142, 232 P. 2d 769 (1951), has said that before any instrument can be reformed, it is necessary that there be pre-existing terms on which the minds of the parties have agreed. Because the parties clearly intended that the property be bounded by the natural and man-made boundary lines, as previously discussed, said requirement is fully satisfied

this case.

In McMahon v. Tanner, 122 Utah 333, 249 P. 2d 502 (1952), the Court had before it an application to reform an instrument and there held that, although unknown to one of the parties, an instrument contains a mistake rendering it at variance with the prior agreement of the parties, and the other party seeks to take advantage of that mistake, equity will reform the instrument so as to make it conform to the agreement of the parties.

It should be borne in mind that the plaintiff in this case was not only one of the grantors in the original deed, dated May 22, 1954, but was also one of the grantees therein and in conjunction with the other grantees occupied and operated the property up to the physical boundaries circumscribed by the yellow lines on Exhibit "21", rather than to the precise deeded boundaries depicted by the blue lines on Exhibit "21".

This Court has also taken the position that a written contract will be reformed to express the agreement of the parties where proof of the mistake is clear, definite, and convincing, and where he who seeks relief is not guilty of inexcusable negligence in executing the instrument and makes timely application for the relief sought. Peterson v. Eldredge, 122 Utah 96, 246 P. 2d 886 (1952); Naisbitt v. Hodges, 6 Utah 2d 116, 307 P. 2d 620 (1957).

In Naisbitt v. Hodges, supra, this Court held that all that is required for there to be "clear and

convincing evidence" sufficient to support reformation of a deed is that evidence exists whereby this Court can say that the trial judge acted as a reasonable man in finding that proof of the facts asserted is greater than a mere preponderance. 6 Utah 2d at 122, 307 P. 2d at 624. That case was a proceeding to reform a deed, brought by the grantees' successors in interest, as in this case, against the grantor. This Court held that the evidence sustained a finding that the original parties to the deed intended to include an additional 130 foot strip in the conveyance, but that in describing the property in the deed they made a mutual mistake of fact.

The case of Janke v. Beckstead, 8 Utah 2d 247, 332 P. 2d 933 (1958), is quite similar on its facts to the case at bar. In that case, the purchasers sought to reform a deed to conform to what they alleged was the intention of the parties. The record disclosed that the grantors had employed their uncle as their agent to deal with the property and had endowed him with authority to act in their behalf; that the sellers and the buyers, at the time the sale was made and the documents executed, intended that the purchaser should have a particular tract of land with a frontage of 140 feet and depth of 200 feet undiminished by any easement or right-of-way; and that the parties were mutually mistaken in believing that the documents executed and delivered did convey such tract of land. This Court held that the deed should be reformed under the circumstances.

The Court further held that evidence tending to vary the description in a deed which otherwise contained no latent ambiguities is admissible to vary that description, notwithstanding the parol evidence rule, when reformation of the instrument is sought. See also, Intermountain Farmers Ass'n v. Peart, 30 Utah 2d 201, 515 P. 2d 614 (1973); Kesler v. Rogers, 542 P. 2d 354 (Utah, 1975).

These doctrines on the question of reformation of deeds generally prevail throughout the United States. See, e.g., Geoghegan v. Dever, 30 Wash. 2d 877, 194 P. 2d 397 (1948); Thorsteinson v. Waters, 65 Wash. 2d 739, 399 P. 2d 510 (1965); Morrissey v. Achziger, 147 Colo. 510, 364 P. 2d 187 (1961); Aja v. Appleton, 86 Nev. 639, 472 P. 2d 524 (1970).

In summary, this basic deed in the chain of title is subject to reformation on two grounds: First, because of the erroneous description, the trial court has already reformed it by moving the deed description northward so as to be bounded along the north edge of U.S. Highway 6. Second, in view of the representations made by plaintiff to both Oldroyd and the Horlachers as to the natural and man-made boundaries of the property, and the subsequent reliance by defendants and their predecessors in interest on such representations, in using and occupying the entire property up to said boundaries, the deed should be reformed to conform to the intention of the parties thus manifested, and it was error for the trial court to refuse to do so.

POINT II

THE TRIAL COURT ERRED IN FAILING TO FIND A BOUNDARY LINE ESTABLISHED BY ACQUIESCENCE ALONG THE NATURAL AND MAN-MADE BOUNDARIES OF THE PROPERTY.

In its memorandum decision in this case, the trial court also declared that it did not find "sufficient believable facts to establish a boundary by acquiescense [sic.] other than that establishing a rectangular area 300 feet by 1560 feet adjacent to the highway." As previously discussed, the erroneous deed description, if literally construed, places the boundary lines of the property so as to include a major portion of U.S. Highway 6, as well as property on the opposite side of the highway. In order to find the existence of a boundary line adjacent to the highway, the trial court had to reform this deed description, and somehow find acquiescence in such a boundary line. This finding is totally unsupported by the evidence, and it was error for the trial court so to rule.

The rule for establishing boundary by acquiescence requires that contiguous landowners occupy their property up to a visible line marked by monuments, fences, or buildings and mutually acquiesce in that line as a boundary for a long period of time. Under these circumstances, the Court is required to presume existence of a binding boundary agreement, unless the party who attacks the same proves by competent evidence that there actually was no agreement or that there could not have been. A formal or conventional

agreement is not required. See, Brown v. Milliner, 120 Utah 16, 232 P. 2d 202 (1951); Ekberg v. Bates, 121 Utah 123, 239 P. 2d 205 (1951); Motzkus v. Carroll, 7 Utah 2d 237, 322 P. 2d 391 (1958); Harding v. Allen, 10 Utah 2d 370, 353 P. 2d 911 (1960); Johnson Real Estate Co. v. Nielson, 10 Utah 2d 380, 353 P. 2d 918 (1960); Nunley v. Walker, 13 Utah 2d 105, 369 P. 2d 117 (1962); King v. Fronk, 14 Utah 2d 135, 378 P. 2d 893 (1963); Riter v. Cayias, 19 Utah 2d 358, 431 P. 2d 788 (1967); Johnson v. Sessions, 25 Utah 2d 133, 477 P. 2d 788 (1970); Universal Inv. Corp. v. Kingsbury, 26 Utah 2d 35, 484 P. 2d 173 (1971); Lane v. Walker, 29 Utah 2d 119, 505 P. 2d 1199 (1973); Olsen v. Park Daughters Inv. Co., 29 Utah 2d 421, 511 P. 2d 145 (1973); Wright v. Clissold, 521 P. 2d 1224 (Utah, 1974); Hobson v. Panguitch Lake Corp., 530 P. 2d 792 (Utah, 1975). See generally, Note, Boundary by Acquiescence, 3 Utah L. Rev. 504 (1953).

Let us examine each element individually with respect to the establishment of a boundary by acquiescence. First, concerning occupation up to a visible line: It is clear from the evidence that ever since May 22, 1954, when the plaintiff conveyed the property to himself and others, as partners doing business under the name and style of Skyline Enterprises, he and his colleagues as grantees, and defendants as their successors in interest, have occupied, claimed, and operated the property up to the physical boundaries delineated by the yellow line on Exhibit "21". This embraces a period of more than twenty (20) consecutive

years. The partnership and later, the corporation, provided camping facilities and services for deer hunters, sportsmen, and travelers upon the disputed land during the period when it was controlled by Skyline Enterprises and Skyview Enterprises Inc. (Tr., pp. 109, 293) After January, 1961, when the defendant, Oldroyd, bought into the corporation, and subsequently, after July 16, 1963, when the property was purchased by the Horlachers and ultimately conveyed to the defendant, Carter, all parties recognized and acquiesced in the physical boundaries shown by the yellow lines on Exhibit "21".

The Horlachers and Carter all exercised full control over the property up to the natural and man-made boundary lines. They allowed deer hunters to come in and camp on the disputed area, the property was graded without any objection from plaintiff, and improvements were made on the property itself. Such occupation and use by defendants has continued up to the commencement of this action.

Second, with respect to mutual acquiescence in the boundary lines: The area circumscribed by the yellow lines on Exhibit "21" follows the natural contours of the land, e.g., the boundary line of Tie-Fork Creek, the railroad right-of-way, the edge of the pond, and the edge of U.S. Highway 6. As previously discussed, plaintiff on more than one occasion represented to the Horlachers, Oldroyd, and Carter that the boundary lines of the property were precisely those which are bounded by the yellow lines on Exhibit "21". More importantly, plaintiff admitted in his own pleadings

that such representations were true and correct, and were made in good faith with probable cause for believing them to be true. Plaintiff is estopped from denying that such representations were made, and is bound by these admissions in his pleadings. Therefore, acquiescence in such boundaries is clearly shown.

During the testimony of Mr. Horlacher, the court initially sustained objections to the testimony concerning plaintiff's oral representations about the boundary lines. The ostensible ground for sustaining the objection was that there was no evidence that Horlacher had made the purchase of the property directly from the plaintiff himself. For some reason, the court felt that where it was not shown that plaintiff owned the property at the time of the representations, the representations themselves were not competent. For example:

> THE COURT:***There is no evidence that he made the purchase from Mr. Williams, Mr. Nelson.
>
> MR. NELSON: But he made it on the basis of representation, and that has to do with reference--
>
> THE COURT: Suppose representations were made by Santa Claus?
>
> MR. NELSON: It has a bearing, your Honor, on showing the various representations that have been heretofore made in conflict with what Mr. Williams now claims to be the boundaries of the property to show that he made inconsistent and complete contradictory statements as to where the boundaries of the property were, and they impeach Mr. Williams's [sic.] testimony.
>
> THE COURT: Mr. Williams didn't make the sale to this man.
>
> MR. NELSON: But he made representations to him, and we can show any representations he made to anybody, if it was John Doe, as to where the

property lines were.

THE COURT: I have ruled. (Tr., p. 208, lines 6-25)

The court subsequently allowed similar testimony to come in, but with tongue in cheek, and was obviously still of the same opinion expressed in its prior ruling, and made subsequent comments indicating that it thought little of the evidence. For example, upon renewal of the objection, the court stated: "I will tell you your objection may be well taken, but I am going to let him answer." (Tr., p. 214, line 23)

There appears to be no legal authority for the proposition that only a landowner can make representations with respect to boundary lines of property, nor that such representations can be made by a landowner only to his immediate grantee. Plaintiff was a former owner of the property when he made such representations and was the owner of the contiguous tract; further, he admitted in his pleadings the truth and accuracy of the representations made. Although the evidence was admitted, finally, over objection, the court was clearly influenced by its earlier ruling and persisted in its reasoning expressed therein, and it was error to refuse to fairly consider this clearly competent evidence in its judgment.

The great preponderance of the evidence, as testified to by the Horlachers, Dr. Oldroyd, and Mr. Carter, clearly shows acquiescence in the boundary lines depicted by the yellow lines on Exhibit "21", and subsequent undisturbed and undisputed occupation and control by the Horlachers

and Carter of the disputed property. More importantly, the plaintiff never objected to the exercise of such control. He only waved to defendant Canto while Canto was grading the property. He asked permission of Carter to spray weeds on the property. After the sale of the property in 1954, he removed the old family cabin from the disputed area and placed it on his retained property on the east side of Tie-Fork Creek. (Tr., pp. 131, 132, 298) The preponderance of credible evidence presented by the defendants in this case clearly shows mutual acquiescence in the aforementioned boundary lines. The finding by the court of a rectangular boundary adjacent to the property is unsupported by any substantial evidence, and the court erred in so finding.

Third, with respect to a long period of time: Many of the cases have held that occupation of respective tracts by adjoining landowners for a "long period of time" is equated with the prescriptive period of twenty (20) years. However, the cases do not uniformly hold to a twenty (20) year minimum. Each case is decided on this point on the basis of the facts. For example, in Hobson v. Panguitch Lake Corp., supra, the Court held that only under unusual circumstances would a period less than twenty (20) years be sufficient to create a boundary by acquiescence. In that case, because the land was in a remote area and the acquiescence endured for only ten (10) years, the Court held that this was not sufficient. However, in the case of Ekberg v. Bates, supra, the Court held that boundary

by acquiescence was established over a period of eight (8) years.

In the instant case, the acquiescence has actually endured since 1954, during part of which period the plaintiff wore two hats. He was the grantor in the original deed and also one of the grantees, and, during that time, both the partnership and the corporation exercised full control over the entire property up to the boundary lines included within the yellow lines on Exhibit "21". Since 1963, when the defendant, Oldroyd, became the sole owner of Skyview Enterprises, Inc., and sold the property to the Horlachers, the plaintiff has been completely out of the picture and the property has been occupied exclusively by the defendants for more than thirteen (13) consecutive years, and, up to the date of initial proceedings in this action, continued to be so occupied and controlled.

Since the conveyance by the plaintiff to the partnership known as Skyline Enterprises, on or about May 22, 1954, the fence along Tie-Fork Creek has operated as and has been recognized by all of the parties as the boundary line between them. The rule, announced by the Court in the case of Baum v. Defa, 525 P. 2d 725 (Utah, 1974), is to the effect that a fence, although originally created as a barrier and not as a boundary, can become a boundary by acquiescence after the parcels of land on either side have been conveyed to separate parties; and,

significant to the case now before the Court, the Baum case also held that this was true, notwithstanding the fact that the fence ran in a zigzag manner, apparently not conforming to the deeded description.

The case of Olsen v. Park Daughters Inv. Co., supra, is also particularly in point. In that case, property was conveyed by a metes and bounds description which in no way conformed to the meandering line of the Provo River, and subsequent tax notices and conveyances all appeared to utilize such deeded description, in spite of the fact that the parties actually occupied and claimed property up to a fence running along the meander line of the river. The Court in that case held that boundary by acquiescence had been established, notwithstanding the rather obvious discrepancy between the deeded description and the physical line of the meandering river.

In the absence of an actual survey, lay grantees seldom know or are capable of knowing whether or not a particular metes and bounds description conforms to the physical boundary lines actually occupied and claimed by virtue of fences and other structures and monuments. Especially here, where defendants relied upon plaintiff's oral representations concerning the boundaries, defendants had no reason to doubt the accuracy of the deeded description.

Fourth, with respect to adjoining ownership of the land: Two events are of particular significance on this point. First, when defendants' possession survey indicated

that the boundary of the property might extend some 33 feet east of Tie-Fork Creek, plaintiff, undoubtedly worried that he might lose this footage, told Mr. Carter that he had always understood that the east line of the property was Tie-Fork Cre and advised Mr. Carter to go to a place across the street nort of the Utah County Courthouse, and get some quit-claim deeds, and he (plaintiff) would straighten out the description. (Tr., pp. 301-302)

Second, at the time of his conveyance to the partnership in 1954, plaintiff owned a small family cabin located on the disputed property. Subsequent to his conveyance to defendants' predecessors in interest, plaintiff moved that cabin off the disputed property, across Tie-Fork Creek, onto plaintiff's own property. (Tr., pp. 131, 132, 298) These acts coupled with plaintiff's oral representations, clearly indicate plaintiff's recognition of the natural and man-made boundary lines depicted by the yellow lines on Exhibit "21".

The burden of proof in the plaintiff's action to quiet title rests on him, and that burden must be met on the strength of his own title, and not because of any weakness in that of the defendants. Olsen v. Park Daughters Inv. Co., supra. That burden was not carried in this case. The court's finding of a boundary adjacent to the highway, consisting of a rectangular parcel, is wholly unsupported by the evidence, and constitutes reversible error.

POINT III

THE TRIAL COURT ERRED IN AWARDING MONEY DAMAGES TO PLAINTIFF.

In its memorandum decision dated January 27, 1977, the court found as follows:

> This court is of the view that the measure of damages to plaintiff's property by reason of removal of the top soil is the difference in value before and after the trespass. The only evidence, uncontradicted in the record, is that the property was worth $6,000.00 per acre before the soil disturbance and $3,000.00 per acre afterwards.
>
> Plaintiff is granted judgment for $3,000.00 per acre for land distrubed [sic.].

The measure of damages in a case of this type is the difference in value immediately before and immediately after the damage has been committed. See, Cleary v. Shand, 48 Utah 640, 161 P. 453 (1916); Brereton v. Dixon, 20 Utah 2d 64, 433 P. 2d 3 (1967); Pehrson v. Saderup, 28 Utah 2d 77, 498 P. 2d 648 (1972).

However, in assessing damages against the defendants, the trial court failed to take into account two vital points which nullify the award of damages made in this case.

First, the court states that the only evidence, "uncontradicted in the record," was that the property was worth $6,000.00 per acre before the alleged trespass, and $3,000.00 per acre afterwards. This finding was based solely upon the flat, unsupported assertions of the plaintiff, as recorded in the transcript:

Q. Do you have an opinion, Mr. Clark [sic.], as to the value of the disputed property prior to the grading?

A. It would be around $6,000.00 an acre.

Q. Do you have an opinion as to its value after the grading?

A. It would cut the value in half. (Tr., p. 202)

This self-serving testimony by plaintiff was totally unsupported by any evidence of property values or surrounding circumstances. It was merely a statement of his opinion as to how much the property was worth. Such bald assertions have not been admitted by the courts as competent evidence concerning the value of damaged property. See, e.g., Utah State Road Comm'n v. Johnson, 550 P. 2d 216 (Utah, 1976); Burke v. Thomas, 313 P. 2d 1082 (Okla., 1957).

The crucial point of plaintiff's testimony, however, is not so much that plaintiff himself testified as to its value, but that he did so upon a patently erroneous assumption. Plaintiff testified that he desired to build summer homes upon the disputed area, as well as upon his own property, across Tie-Fork Creek. (Tr., pp. 104-105) The subsequent testimony by plaintiff's realtor witness, Mr. Baadsgaard, was also based upon valuation of the property as a potential site for summer homes.

The property, however, is currently zoned by Utah County for services and trade. The existing motel, restaurant, and service station upon the property all comply with such zoning restriction. Summer homes are not permitted under current zoning law. Therefore,

plaintiff's testimony as to the value of the property for summer home lots, as well as Baadsgaard's testimony as to the "highest and best use" of the property being for recreational home sites, is based upon a legal impossibility. Since the property cannot be so used, and is only available for trade and services use, the valuation of the property must be adjusted consistent therewith. The work done on the land by defendants Carter and Canto clearly improved the same for the use for which it was zoned and employed.

Baadsgaard admitted (Tr., p. 188) that the property was zoned for services and trade. He also admitted that the use of the property as a trailer park and camping area, which is the precise use made by the defendants, would be an appropriate and proper use of the property under the present circumstances. (Tr., pp. 188-189, 192-193)

Second, the court based the award of damages upon the value of the property immediately before and immediately after the alleged trespass. In so doing, the court failed to take into account the radical improvements which defendants, and their predecessors in interest, had made upon the property prior to the alleged trespass of which the plaintiff complains. Mr. Horlacher testified that, when he purchased the property in 1964, there was a "big field of wild thorn bushes," which he was obliged to grade and clear off the property. (Tr., p. 217) The Horlachers then, after grading the property, proceeded to put in a trailer court and restrooms to accommodate

visiting campers and deer hunters. (Tr., pp. 217-218) Thus, it is clear that during the Horlachers' occupation of the property, its condition and appearance was substantially improved. (Tr., p. 221) If, therefore, there was any trespass at all, which the defendants do not concede, it first occurred when Mr. Horlacher cleared the thorn bushes and improved the property in or about 1964.

Defendant Canto, an earth mover and land leveler, also testified that, in his professional opinion, there was very little difference in the condition of the property before and after the grading work which he performed. (Tr., p. 277)

It therefore appears that plaintiff desires to take advantage of the substantial improvements made upon the property by defendants and their predecessors in interest in measuring the alleged damages before and after the supposed trespass. On the contrary, if any damages at all exist, they should be assessed with respect to the original "trespass", when the Horlachers first graded and removed the thorn patches upon the property. Plaintiff should not be allowed to profit unjustly by the work performed by defendants' predecessors under an alleged trespass, and then seek redress for allegedly undoing part of the improvements so made by subsequent grading. The before-and-after test, if applied at all, should relate to the condition of the land before and after the initial alleged trespass, and not to some other selected date.

Because the court, in its award of money damages

plaintiff, failed to consider the aforementioned factors, such award constituted reversible error. In the alternative, if any damages were incurred, they should be assessed so as not to reward plaintiff for the substantial improvements performed by defendants upon the land, but rather on the basis of the condition of the property in its original state, complete with the thorns, as compared to its condition after the 1974 grading.

CONCLUSION

The great preponderance of evidence in this case clearly demonstrates the occupation, use, and control by defendants and their predecessors in interest, and acquiescence therein by plaintiff, of the entire property bordered by the natural and man-made boundary lines: e.g., the Denver and Rio Grande Railroad right-of-way on the north, an existing fence line adjacent to Tie-Fork Creek on the east, U.S. Highway 6 on the south, and the west boundary of a pond on the west.

There is no credible evidence to sustain the finding by the trial court of a rectangular parcel bordering on the highway. The original deed description itself is erroneous, placing the property so as to embrace a major portion of U.S. Highway 6. There is simply no basis for finding a rectangular parcel, adjusted northward to correct the faulty description, a large portion of which then crosses over the railroad tracks and right-of-way. Such finding, itself constituting a reformation of the deed, bears no resemblance

to the property actually intended to be conveyed, and subsequently occupied and used for over twenty (20) years by defendants and their predecessors in interest.

There is no credible evidence to support the finding and conclusion of the trial court with respect to trespass by the defendants or any damage to the plaintiff resulting therefrom, and the court erred in its interpretation of the applicable rules of evidence. The court erred further in its ruling on admissibility and in its attitude with respect to the critical testimony of the Horlachers and Dr. Oldroyd, relating to representations made by the plaintiff concerning the identification of the land owned, operated, and controlled by Skyview Enterprises, Inc.

Appellants respectfully submit that these findings by the trial court constitute clear error, and request that the judgment and award of damages to plaintiff be reversed. Appellants further request that the original deed and all subsequent conveyances in the chain of title be reformed to conform to the true intention of the parties, and that title to the property along the aforementioned boundary lines be quieted in appellant Gerald Carter on the basis of boundary by acquiescence.

Respectfully submitted,

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