2001

Fred N. Hobson v. Panguitch Lake Corporation : Unknown

Utah Supreme Court

IN THE SUPREME COURT
OF THE STATE OF UTAH

FRED N. HOBSON and MARY HOBSON, his wife,

Respondents,

-vs-

PANGUITCH LAKE CORPORATION, ET AL.,

Appellants,

-vs-

DERRAL CHRISTENSEN, ET AL.,

Respondents,

-vs-

DELLA D. MARSDEN, ET AL.,

Respondents.

CASE NO.
13615

NEWLY UNCOVERED CASES OF HOBSON RESPONDENTS

APPEAL FROM THE JUDGMENT OF THE SIXTH JUDICIAL DISTRICT COURT FOR GARFIELD COUNTY, STATE OF UTAH
Honorable Ferdinand Erickson, Judge

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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FRED N. HOBSON AND MARY HOBSON, his wife,	)	
Respondents,	)	
-vs-	)	
PANGUITCH LAKE CORPORATION ET AL.,	)	
Appellants,	)	CASE NO. 13615
-vs-	)	
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Respondents,	)	
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NEWLY UNCOVERED CASES
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Because Appellant in its oral argument as well as in its Reply Brief filed just before hearing challenges a Rule of Property of long standing in this state and widely accepted in American Land Jurisprudence we respectfully ask the Court's consideration of these authorities uncovered after examining the Reply Brief.

Intrinsic to a determination of this case is the necessity to distinguish between *boundary by acquiescence*[1] and *boundary by parol agreement*[2].

We have great respect for and accept as a rule of property *boundary by acquiescence* and Utah's long line of cases which synthesize it. Those cases define the rights of the parties where there has been a long period of acquiescence in a fence line but no proof that there was any agreement as to its location or that the *parol agreement* resolved a pre-existing dispute.

However, none of the cases developing *boundary by acquiescence* had as part of its material facts the existen of an actual agreement between the parties. It is only the *boundary by acquiescence* cases which Appellant, Panguitch Lake Corporation, cites.

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[1] Accurately defined by Justice Crockett in *Park Daughters Investment Company, 29 U2d 421, 511 P2d 145.*

[2] *Brown vs. Milliner, 120 U 16, 232 P2d 202; Tripp vs. Bagl 74 U 57, 267 P 912; Rydalch vs. Anderson, 37 U 99, 107 P*

I. *BOUNDARY BY PAROL REAFFIRMED IN BROWN VS. MILLINER*[1] *DOES NOT REQUIRE A "LONG PERIOD OF ACQUIESCENCE" AND IS SUPPORTED ALMOST UNANIMOUSLY BY THE AUTHORITIES.*

In oral argument and in its Reply Brief Panguitch Lake Corporation claims *Brown vs. Milliner, 120 U 16, 232 P2d 202,* is *dicta* in this pronouncement:

> "A review of the Utah cases involving boundary disputes reveals that it has long been recognized in this State that when the location of the true boundary between two adjoining tracts of land is unknown, uncertain or in dispute, the owners thereof, may, by parol agreement, establish the boundary line and thereby irrevocably bind themselves and their grantees."

That statement, clearly requiring no long period of acquiescence, is not only not *dicta* as we will demonstrate hereinafter, but represents the great weight of authority.

All the following cases hold that a period of acquiescence less than the statutory period for adverse possession is sufficient to establish *boundary by parol* where a fence line is agreed upon between the parties.

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[1] *120 U 16, 232 P2d 202.*

ALA. *Guy vs. Lancaster, 34 So.2d 10, 250 Ala 256.*

ARK. *Havlik vs. Freeman, 218 SW2d 364, 214 Ark 761.*

FLA. *(U.S.C.A applying Florida law) International Paper Co. vs. Bridges, 279 F2d 536.*

GA. *Collins vs. Birchfield, 110 SE2d 368;*
Clay vs. Stanfield, 119 SE2d 564;
Hethcock vs. Padgett, 122 SE2d, 213.

IDA. *Campbell vs. Weisbrod, 45 P2d 1052.*

ILL. *Ginther vs. Duginger, 129 NE2d 147; 6 Ill 2d 4*
Cienki vs. Russell, 75 NE2d 372, 398 Ill 77;
Skinner vs. Furman, 88 NE2d 867, 404 Ill 356.

KAN. *Spencer vs. Supernois, 268 P2d 946, 176 Kan 13*
Appeal of Moore, 252 P2d 875, 173 Kan 820.

MICH. *Becker vs. Weaver, 202 NW2d 439;*
Cochran vs. Milligan, 101 NW2d 292;
Jackson vs. Deemar, 127 NW2d 856;
Johnson vs. Squires, 75 NW2d 45, 344 Mich 687;
Escher vs. Bender, 61 NW2d 143, 338 Mich 1.

NEB. *Phillips vs. Horn, 196 NW2d 382, 188 Neb 304.*

NEW MEX. *Sanchez vs. Scott, 516 P2d 667, 85 N.M. 695*

WASH. *Johnston vs. Monahan, 469 P2d 931.*

WISC. *Thiel vs. Damarau, 66 NW2d 747, 268 Wis 76.*

Some of these cases hold that there need be no period of acquiescence if the boundary is fixed by an agreement resolving a bona fide controversy based upon doubt concerning the true line followed by erection of a

permanent boundary.

No case we have found requires acquiescence or possession beyond the statutory period for adverse possession.

Kerigan vs. Thomas, 281 So.2d 410, says that all that is required is:

> "Sufficient time to show a settled recognition of the permanent boundary."

The Michigan case of *Becker vs. Weaver* holds that there is no legal justification for imposing the minimum statutory time where the boundary is based upon a parol agreement.

A mutual promise to abide by the results is sufficient consideration for an agreement between co-terminus owners of land as to an uncertain boundary line. *Guy vs. Lancaster, 34 S02d 10, 250 Ala 256.*

The parol agreement is not a violation of the Statute of Frauds because it does not transfer an interest in land but is a determination of the location of the existing estates. *Tripp vs. Bagley, 74 U 57, 276 P 912. See Brown vs. Milliner, 232 P2d at 207.*

Tripp vs. Bagley holds that there are two ways a

fenceline may establish a boundary in employing this language:

> * * * It is therefore clear that defendants' claim to the land in controversy must stand or fall either upon an express agreement *fixing the boundary line OR upon acquiescence in the boundary line between the land owned by Plaintiff and that owned by Defendant.* [*74 U at Page 66.*]

No Utah case is to the contrary.

In their Reply Brief the Appellants insist that all the foregoing statements are merely dictum. This is simply not true.

Mere possession of real property without payment of taxes will *never* ripen into title (78-12-12 UCA 1953); therefore this Court to support the doctrine of *boundary by acquiescence* was obliged to adopt, as an essential predicate, *boundary by parol.* How has the Court done so? By clothing long acquiescence with a *presumption that a contract in fact existed.*

Thus, the only office which "long acquiescence" ful fills is the two-fold purpose to provide (1) an irrebutable presumption that a parol agreement was entered into and (2) A rebuttal presumption that said agreement

was consummated due to a dispute or uncertain concerning location of the true boundary. *Motzkus vs. Carroll, 7 P2d 237, 322 P2d 391.*

Justice Crockett's concurring opinion in *Hummel vs. Young, 1 P2d 237, 265 P2d 410,* is to the effect that an express contract is not necessary to the establishment of a *boundary line by acquiescence,* implying that if an express contract is proved a long period of acquiescence is not essential

Contrary to being a *dictum* the identical statements in *Brown vs. Milliner, Tripp vs. Bagley and Rydalch vs. Anderson* that the parties may, by parol agreement, establish the boundary line and *thereby* irrevocably bind themselves and their grantees, those statements are an intrinsic element of the *ratio decedendi* of the rule of *boundary by acquiescence.*

The doctrime of *boundary by parol agreement* is a part of the *ratio decedendi* in all these Utah cases because in none was there any evidence of an agreement, oral or otherwise. In *no* case ever decided by this Court was

there presented an accumulation of facts where all of the elements of *boundary by parol* were present.

Thus, the rule of *Brown vs. Milliner, Tripp vs. Bagley and Rydalch vs. Anderson* that when a parol agreement is executed by erection of a fence it will be enforced, is a pivotal element the Court must utilize in order to make a perfected property right out of land affected by the rule of *boundary by acquiescence*. To get from the point of an unwritten establishment of the respective estates between co-terminus owners to the point where the fence, having been acquiesed in for a "long period of time" determines the boundary, the Court must somewhere along the line imply, infer, or establish by presumption, that there was an agreement between the parties.

Thus, *Rydalch, Tripp* and *Brown* synthesize this rule:

> *If there is no actual proof of the elements of boundary by parol, then a long period of acquiescence in the fence supplies the presumption of an agreement between the parties.*

In the case now before the Court all the essential elements of *boundary by parol agreement* are proved without contradiction or qualification:

1] Hobson and Marsden were adjoining proprietors (R.252, 293-295)

2] Hobson wanted to know where his lines were going to be (R.248, 146)

3] Hobson wanted a survey (R.146)

4] Marsden declined assuring Hobson he "knew his land well" (R. 146)

5] A boundary was agreed upon between the parties (R.185)

6] The boundary line was clearly marked on the ground by a third party while the adjoining proprietors were present (R.140-225)

7] A substantial permanent fence was established along the line (R.185-188, 276)

8] Both parties rely on the fence (R.400)

9] The fenceline is torn down ten years later unilaterally by the Defendants (R.353, 354)

10] The fence stood as the boundary up to which both parties occupied for much longer than Utah Statute of Limitations for adverse possession (78-12-5 et seq. UCA 1953).

In additional to those facts, Hobson built a subdivision using the established fenceline as his west

boundary (R.400), sold lots from said subdivision staked on the ground as though the west boundary of his subdivision were the west boundary of the sectional subdivision (R.401, 402). Hobson had no reason to suspectotherwise. Hobson paid taxes on an increased assessment (R.402) and upon lots which were actually within this disputed tract of land (R.265-290; 403).

Ringwood vs. Bradford, 2 U2d 119, 269 P2d 1053; Jensen vs. Bartlett, 4 U2d 58, 286 P2d 804 and Ekberg vs. Bates, 121 U 122, 239 P2d 205, are all cases where there was insufficient evidence of one of the elements of *boundary by parol agreement* and the Court applied the presumption or *indulged the fiction* that the absent elements or those which have not been supported by the proof were present.

"Acquiescence" in those cases only supplies a presumption that there was an agreement at a time when the true location of the boundary was unknown, uncertain, or in dispute.

If a boundary can be established by a presumption why cannot the same boundary be established by actual

proof of the facts presumed.

We respectfully submit that the rule of *Brown vs. Milliner, Tripp vs. Bagley, Rydalch vs. Anderson* is no *dictum* but is an established, settled law of this state, an important rule of property therein, and in harmony with the overwhelming weight of authority.

CONCLUSION

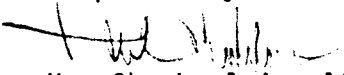
Boundary by parol agreement is an integral part of this Court's well-established rule of *boundary by acquiescence.*

Because mere possession without payment of taxes will never ripen into title (78-12 UCA 1953) this Court, to support the doctrine of *boundary by acquiescence* was obliged to adopt, as an essential predicate, *boundary by parol.* This Court has done so by clothing long acquiescence with a presumption that a parol agreement existed - which was the product of uncertainty, doubt or dispute between adjoining proprietors, and which culminated in erection of the boundary fence.

If *boundary by parol agreement* is rejected,

boundary by long acquiescence is destroyed.

Respectfully submitted.



Ken Chamberlain, Attorney for
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SERVED the within and foregoing Brief of Newly Uncovered Cases upon the following by mailing two (2) full, true, and correct copies thereof, U. S. Mail, Postage Prepaid, this 26th day of November, 1974:

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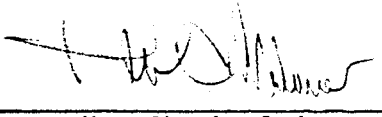

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