

2001

Glen L. Hall and Verona W. hall, husband and wife v. Grace M. Bingham : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

GLEN L. HALL and VERONA W.
HALL, husband and wife,

Plaintiffs-Appellants,

vs.

GRACE M. BINGHAM,

Defendant-Respondent.

Case No.

13646

BRIEF OF APPELLANTS

Appeal from the Judgment of the 2nd Judicial District
Court, in and for Weber County, State of Utah
Honorable Calvin Gould, Judge

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PARKER, THORNLEY,
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MAY 31 1974

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

GLEN L. HALL and VERONA W. HALL, husband and wife, <i>Plaintiffs-Appellants,</i>	}	Case No. 13646
vs.		
GRACE M. BINGHAM, <i>Defendant-Respondent.</i>		

BRIEF OF APPELLANTS

STATEMENT OF NATURE OF CASE

This is an action to establish boundary line between adjacent properties based on long established fenceline ratified by written agreement.

DISPOSITION IN LOWER COURT

Defendant-Respondent filed a Motion for Summary Judgment based on records filed in the proceedings and the transcript of proceedings had in the court on the 24th day of October, 1973, and exhibits entered therein. The case was heard by the Honorable Calvin Gould, who

issued a bench ruling on February 20, 1974, in favor of respondent holding in effect that a Warranty Deed executed by Plaintiffs-Appellants in 1962 precluded Appellants from claiming old fenceline as boundary line, even though said line was subsequently ratified and re-established by written agreement executed contemporaneously with the execution of the Warranty Deed.

RELIEF SOUGHT ON APPEAL

Appellants-Plaintiffs ask that the judgment of the lower court be reversed and the case remanded for trial.

STATEMENT OF FACTS

Appellants and Respondent are adjacent land owners. Appellants purchased their property some time in the year 1937 (R. 63, Line 10). Respondent purchased the property adjacent and north of Appellants' land in April of 1972 (R. 77, Lines 11 and 12). Appellants built a home on the property in which they have resided for the past 13 years (R. 63, Lines 12 and 13). The property had been separated by an old fence in existence prior to 1950 (R. 60, Lines 11 and 12; R. 82, Lines 2 through 5; R. 83, Lines 11 through 12; R. 84, Lines 1 through 2). Appellants had planted an orchard, shrubs and lawn on their side of the fence, all visible to Respondent prior to the time of her purchase (R. 84, Lines 18 through 25; R. 85, Lines 1 through 20). The Appellants in 1962 executed a deed conveying title to Simmons and Wiberg the property claimed by the Respondent. At or about the same time of signing said Deed,

Simmons and Wiberg executed an agreement by and through their Secretary-Treasurer, Ruth E. Simmons, (R. 257) acknowledging, acquiescing in, and accepting the existing fenceline as the dividing line between the properties.

ARGUMENT

POINT I.

SUMMARY JUDGMENT IS A DRASTIC REMEDY AND SHOULD BE GRANTED ONLY WHEN UNDER THE FACTS VIEWED MOST FAVORABLE TO THIS APPELLANT HE SHOULD NOT RECOVER AS A MATTER OF LAW.

In *Auto Lease Company v. Central Mutual Insurance Co.*, (1958) 7 Utah 2d 336, 325 P. 2d 264, the Utah Supreme Court said at page 265,

“The Motion for Summary Judgment is, in effect, a demurrer to the contentions of the adverse party, saying: ‘Conceding the facts to be as you claim, there is no basis for a recovery’.”

The position of the Utah court is also very clearly spelled out in *Welchman v. Wood*, 9 Utah 2d 25, 337 P. 2d 410, decided by the Utah Supreme Court in 1959, the court said at page 411,

“Summary Judgment is a drastic remedy and the court should be reluctant to deprive litigants of an opportunity to fully present their conten-

tions upon trial. It should be granted only when under the facts viewed in the light most favorable to the plaintiff he cannot recover as a matter of law."

The evidence before the court viewed most favorable to appellant shows an old existing fence line long acquiesced in and subsequently acknowledged by written agreement to be the true boundary line between the properties of Appellants and Respondent.

THE VITAL ISSUE in the case at bar is whether a written agreement by adjacent property owners, ratifying, acquiescing in and re-establishing an old fenceline boundary as the true boundary between the properties can be nullified by a deed executed concurrent with said written agreement, said deed unknowingly bearing a different boundary description than intended and contained in the agreement, contrary to the intentions, desires and actions of the parties.

Respondent's position is that the deed executed concurrently with the written agreement nullifies the written agreement and controls the boundary regardless of the intent of the parties to the agreement.

If Respondent's position prevails, agreements of contracting parties become unstable and cannot be relied upon, thereby sustaining form over substance. In the instant case, Appellants' and Respondent's predecessor in interest entered into an agreement acquiescing in and ratifying a boundary line. Respondent now seeks to nullify that written agreement and acquiescence on a

technicality. If Respondent's position is upheld, boundary line agreements between adjacent land owners will become unreliable.

In *International Paper Company v. J. T. Bridges*, the United States Court of Appeals Fifth Circuit (1960), 279 F. 2d, p. 536 said:

"Appealing from the judgment, appellant is here insisting that there were and are in the case genuine issues of material facts and that, in disposing of the cause by summary judgments, the district judge deprived the plaintiff of a trial upon the issues tendered by it in its pleadings and supported by its affidavits. These issues were and are: (1) whether the lines which plaintiff claims as the true boundary between it and defendant is the true line, as established by the Harris Survey in 1821, under which both plaintiff and defendant claim; (2) whether, if it is not the true line as originally established, it is the boundary line between plaintiff and defendant, established by agreement and acquiescence; and (3) whether plaintiff's affidavits made and tendered an issue of prior possession which, though controverted by the affidavits of the defendant, could be resolved only by trial.

"We find ourselves in full agreement with these contentions. The suit is in its essence a boundary suit, and in its determination on this record, summary judgment had no place."

The United States Court of Appeals Fifth Circuit went on to say:

“In granting the motion for final summary judgment, the court incorrectly resolved as matter of law factual controversies presented by the conflicting affidavits filed by plaintiff and defendant, which could only be resolved on a trial.”

Appellants are entitled to a trial to present evidence of their claims that an old fenceline is the true line between the parties, and whether, if not the true line as originally established, it is the boundary line established by subsequent agreement and acquiescence. The evidence put forward to the court can only be resolved by trial.

POINT II.

THE BOUNDARY LINE BETWEEN TWO ADJOINING LAND OWNERS MAY BE ES- TABLISHED BY WRITTEN AGREEMENT.

“Where the boundary line between two adjoining land owners is uncertain, they may agree on a division line between them, and when executed each will own up to this line as if it were a natural boundary, or as if their deeds or grants called for it, particularly if the agreement is evidenced by a writing signed by the parties thereto.”
11 C. J. S., Boundaries, Section 64, p. 636.

In *Finley v. Funk*, 35 Kan. 59, 16 P. 15, the Supreme Court of Kansas on page 19 said:

“This agreement is somewhat ambiguous in its terms, but the majority of the court are of the opinion that it is valid, and that the petition states a cause of action. The view taken by the

court is that all the provisions of the agreement must be taken together; and if, by any reasonable construction, it can be upheld, it should be done. By this agreement the parties sought to settle a perplexing question of boundaries, and avoid what may might be a protracted and expensive litigation. The agreement is one they had a right to make, and its purpose is looked upon by the courts with favor. It has been said, in a case where disputed boundary lines were involved, that 'it is the policy of the law to allow parties to settle and adjust doubtful and disputed facts between themselves; and, when such a matter, which before was uncertain, has been established by agreement between the parties upon good consideration passing between them, *they are not permitted afterwards to deny it.*' *Bosberg. v. Teator*, 32 N. Y. 567."

The Kansas Court further said:

"The fact that the parties entered into an agreement is evidence that they desired as far as possible to waive and dispense with formalities; and, even if the agreement were formally defective, the court should seek to uphold it, and carry out the obvious intent of the parties."

In the above case there was a lapse of two years between the time of the agreement (June 11, 1884) and the date of the court decision (October 7, 1886). A written agreement here did not require any appreciable time lapse to become enforceable.

In 12 Am. Jur. 2d, p. 613 and 614, it is stated:

"It is well settled that where the boundary lines of adjoining land owners are not definitely known or their location is in dispute, such owners may establish the lines either *by a written agreement*, conveyance, or parole agreement. Such boundary lines may also be established by the parties' mutual recognition of, and acquiescence in, certain lines as the true boundary lines, the courts being reluctant to interfere therewith after the lines have been permitted to exist over such a period of time that satisfactory proof of the true lines is difficult."

In the case at bar when the evidence is viewed most favorable to Plaintiffs-Appellants, we have a fence established by long acquiescence, later reaffirmed by written agreement, and further acquiesced in, all which entitled Plaintiffs-Appellants to a trial. Defendant-Respondent should be estopped to deny that the fence line established and acquiesced in by her predecessors in interest, is the true boundary between Appellants and Respondent.

Respondent would negate the written agreement between Appellants' and Respondent's predecessor in interest for lack of consideration. However, "Doubt and uncertainty constitute consideration for an oral agreement establishing a boundary line." 69 A. L. R. p. 1456.

POINT III.

THE COURT BELOW ERRED IN FINDING
THAT THERE COULD NOT HAVE BEEN
A BOUNDARY BY ACQUIESCENCE.

A warranty deed was executed by the Appellants to Simmons and Wiberg, predecessors in interest to the Respondent (R. p. 67, Lines 5 through 7). A written agreement had been entered into between the said Simmons and Wiberg, and Appellants dated March 13, 1962 (R. p. 67, Lines 1 through 3). This makes a period of 11 years of acquiescence since the date of said deed and agreement and the purchase by Respondent.

In *Ekberg, et ux. v. Bate, et ux.*, (1951), 121 Utah 123, 239 P. 2d 205, at page 208, the Utah Supreme Court said:

“In the instant case as we have pointed out above, there was a period of actual acquiescence for more than seven years (the Utah limitations period for adverse possession) before appellants acquired their title and under all circumstances shown herein there was a sufficient length of time to establish the line so that appellants are precluded from claiming that it is not the true line.”

The Utah Supreme Court has also stated its position concerning boundary by acquiescence in *Brown v. Milliner*, (1951), 120 Utah 16, 232 P. 2d 202, p. 207, as follows:

“We have further held in this state that in the absence of evidence that the owners of adjoining property or their predecessors in interest ever expressly agreed as to the location of the boundary between them, if they have occupied their respective premises up to an open boundary line visably marked by monuments, fences or buildings for a long period of time and mutually

recognized it as the dividing line between them, the law will imply an agreement fixing the boundary as located, if it can do so consistently with the facts appearing, *and will not permit the parties nor their grantees to depart from such line.* Holmes v. Judge, 31 Utah 269, 87 P. 1009, . . . In Holmes v. Judge, supra, we declared that the doctrine of boundary by acquiescence 'rest upon sound public policy, with a view of preventing strife and litigation concerning boundaries' and that 'While the interest of society require that the title to real estate shall not be transferred from the owner for slight cause, or otherwise than by law, *the same interests demand that there shall be stability in boundaries*' . . ."

The Utah Supreme Court has long upheld boundaries established by acquiescence. In the instant case the record indicates that there was an old fence of at least 23 years and in addition that there had been subsequent written agreement predating the claim by the Respondent by 11 years. In the *Ekberg* case, cited above, 8 years was found to be sufficient time for the establishment of a boundary by acquiescence under the circumstances of that case. The lower court in the case at bar in ruling from the bench acted arbitrarily and capriciously in granting Defendant's motion for summary judgment.

In boundary by acquiescence cases, each case is distinct and must be resolved on its own facts. Plaintiffs-Appellants should be granted a trial to present their claims. The Utah Supreme Court in *Ekberg v. Bates* cited above said:

"The length of time necessary to establish a boundary line by acquiescence has never been definitely established in this jurisdiction. *Each case must usually be determined on its own facts.* In other jurisdictions there have been statements made which indicate that the length of time should be at least that prescribed by the Statute of Limitations. See headnote to Annotation, 69 A. L. R. p. 1491; *Birdsley v. Crane*, 52 Minn. 537, 54 N. W. 740; *Johnson v. Trump*, 161 Iowa 512, 143 N. W. 510; and *Kesler v. Ellis*, 47 Idaho 740, 278 P. 366, 367, in which case the court there said: "* * * 'While the authorities are hopelessly confused and generously uncertain as to the time the acquiescence as to the location of the boundary line should continue in order to satisfy the rule, it is but logical to say that such acquiescence must continue for a period of not less than five years, thus conforming to the period established by the statute of limitation in cases of adverse possession. * * *'"

POINT IV.

COURTS HAVE LONG ACCEPTED THE PRINCIPAL THAT PARTIES SHOULD BE ALLOWED TO MAKE THEIR AGREEMENTS AND THEREBY BE BOUND BY THEM TO LIMIT THE CONSTANT AND EVER-PRESENT POSSIBILITY OF FUTURE LITIGATION.

In 69 A. L. R. p. 1485 the problem is well analyzed as follows:

“And it has been held that the rule applies, although the period of acquiescence in such agreed boundary has not been long enough to confer rights by limitation. *Coleman v. Smith* (1881), 55 Tex. 254. In that case it was said: ‘The validity of an agreement for the settlement of the boundary does not depend at all upon accuracy with which the line is run. Whether the parties were right or wrong in their belief that the line they established and agreed upon as the boundary of their lands was precisely where it ought to be, or where the original surveyor made it, was wholly immaterial. It was enough if there were doubt or dispute between them about it, and they determined to settle it upon that basis. If absolute exactness in defining the line were necessary to render such an agreement binding, it is not easy to perceive how it could be attained. Different surveyors with different instruments might locate the true line at different places. An agreement made today upon the survey of one might be set aside tomorrow upon that of another, perhaps no less skillful or accurate. This would be to make agreements nugatory; whereas they are to be encouraged, favored, and upheld, especially in these cases of doubtful boundaries. Such cases are proverbially vexatious, and breed ill blood; and they are very apt to arise in this country. It is notorious that surveys have been hitherto very loosely made, and often by incompetent surveyors. Lines have been insufficiently marked in corners designated by perishable objects. In the settling of the country and the destroying axe of the settler and time, have obliterated the path of the surveyor and destroyed the monuments he made. And so, when the lines he ran cannot now be

run, and the boundaries he fixed have become of doubtful identity, and the parties to be effected by them have mutually agreed that here he fixed his lines and set their bounds, *such agreement should be held conclusive; not subject to be set aside or reopened upon any subsequent discovery that possibly a mistake was made in that agreement as to the true locality'.*"

The Utah Supreme Court stated in *Provonsha v. Pitman*, (1957), 6 Utah 2d 26, 305 P. 2d 486, p. 487 that:

"... If by that time a boundary by acquiescence has been established, and we think it had, under principles heretofore announced by this court, *succeeding Grantees could not marshall their disagreements or misunderstandings to destroy that established boundary.*"

The agreement of parties concerning a boundary line, long acquiesced in, or placed in writing have been and should be upheld by the courts to give stability to their agreements and to property lines acquiesced in for a period of few or many years.

POINT V.

DEFENDANT-RESPONDENT HAD NOTICE OF PLAINTIFFS-APPELLANTS' CLAIM ON THE LAND IN QUESTION PRIOR TO PURCHASE AND SHOULD BE ESTOPPED TO DENY PLAINTIFFS' CLAIMS.

That there was ample evidence of a claim by Plain-

tiffs-Appellants of the land in question is evident from the record (R. 78, Lines 18 through 21; R. 82, Lines 2 through 5; R. 84, Lines 1 and 2, Lines 11 through 13, Lines 17 through 25; R. 85, Lines 1 through 5).

In 66 Am. Jur. 2d, p. 441:

“* * * But mere failure to record an instrument does not work an estoppel where the person asserting the estoppel was charged with notice of the true state of the title. * * *”

In 66 Am. Jur. 2d, p. 445 it is stated:

“* * * The words ‘bona fide purchaser,’ therefore, when introduced into the recording acts, were intended to be in accordance with the established meaning. To entitle one to the protection provided for bona fide purchasers by the recording acts, it has been held to be essential: (1) that he be the purchaser of the legal as distinguished from an equitable title; (2) that his purchase was in good faith; (3) that he parted with a valuable consideration therefor by paying money or other thing of value, assuming a liability, or incurring an injury; and (4) *that he had no notice, and knew no facts sufficient to put him on inquiry as to the other's equity, either at the time of purchase, or at or before the time he paid the purchased money, or otherwise parted with such value.*”

The Utah Supreme Court in *Salt Lake, Garfield and Western Railway Co., a corporation v. Allied Materials Co., a corporation, Ketchum Builders Supply Co., a cor-*

poration, (1955), 4 Utah 2d 218, 291 P. 2d 883, p. 886, quoted from 39 Am. Jur., Sec. 18, p. 242 as follows:

“Possession of land is notice to the world of every right that the possessor has therein, legal or equitable; it is a fact putting all persons on inquiry as to the nature of the occupant's claims as well as the claims of the persons under whom he occupies. *Possession is notice, however, of only such facts as inquiry of the occupant would naturally disclose, * * ** Where a purchaser is in possession under an unrecorded deed, his possession is notice of his title, * * *.”

The Utah Court goes on to say:

“Defendants made no inquiry of plaintiff although the plaintiff's railroad ran adjacent to defendants' land and notwithstanding plaintiff's poles, guy wires and trolley wires were within the description of defendants' land.

“We are of the opinion that defendants had constructive notice of the claims and rights of plaintiff in and to the land in question by reason of the poles, guy wires and trolley wires on the premises claimed by the defendants and by reason of the reservation recited deeds from defendants as predecessor in title.”

Respondent having had constructive notice which would readily have revealed to them upon reasonable inquiry any and all claims of appellants should be estopped from denying that the old fenceline in existence at the time of their purchase is in fact the true boundary between the parties.

CONCLUSION

The Appellants urge that the decision of the lower court be reversed and the matter remanded for trial. It is abundantly clear from the evidence which has been made part of this record, including the transcripts of the hearings, that there has been an old fence line long acquiesced in as the boundary line between the property owners and their predecessors in interest; which acquiescence and subsequent written agreement ratify and further acquiescing in said boundary line should not be lightly ignored, cancelled or vacated by the court. There are sufficient facts and law before the court to entitle Appellant to a trial on the issues. Granting summary judgment in the instant case was capricious and arbitrary and not justified by the evidence before the court. The lower court decision should be reversed.

Respectfully submitted,

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