

1949

# John B. Glenn v. Lawrence G. Whitney and Dottie F. Whitney : Brief of Appellant

Utah Supreme Court

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Bullen & Bell; Attorneys for Appellant;

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IN THE

# SUPREME COURT

OF THE

## STATE OF UTAH

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JOHN B. GLENN, also known as  
J. B. GLENN,

Appellant, Plaintiff,

vs.

LAWRENCE G. WHITNEY and  
DOTTIE F. WHITNEY, his wife,  
Respondents, Defendants.

APPELLANT'S  
BRIEF

Case No. 7280

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Appeal from the District Court of the First Judicial  
District of the State of Utah, in and for the  
County of Box Elder

**FILED**

1919

BULLEN & BELL,  
Attorneys for Appellant.

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CLERK, SUPREME COURT, UTAH

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Respondents, Defendants.

No. 7280

This is an appeal from the Findings of Fact, Conclusions of Law and Decree of the District Court of the First Judicial District of the State of Utah, in and for Box Elder County, in favor of the defendants, Lawrence G. Whitney and Dottie F. Whitney, his wife. The Court by its Decree denied the relief prayed for in the plaintiff's Complaint and granted the prayer of defendants' Answer.

## STATEMENT OF FACTS

The controversy in this case concerns the ownership of an irregularly shaped tract of land 80 rods long and approximately 192 feet wide at one end and 180 feet wide at the other, situated in Box Elder County, Utah. This tract of land lies between the plaintiff's property and the property of the defendants with both claiming title thereto. The plaintiff, John B. Glenn, filed his Complaint on December 15, 1947, in the District Court of the First Judicial District of the State of Utah, in and for the County of Box Elder, seeking to quiet title to his property, including the strip in question, situated in Box Elder County, State of Utah. The defendants' Demurrer to the Complaint was duly overruled, and the defendants filed their Answer. The Answer in substance admitted that the plaintiff owned certain property, but alleged that a division fence was the true dividing line between the properties of the plaintiff and the defendants. A Reply was duly filed by the plaintiff, which admitted that the defendants owned property lying to the east of the property of the plaintiff, but denied the other allegations of the Answer. Upon the issues thus joined, trial was duly had, which resulted in the Court denying the plaintiff any relief and granting the relief requested by the defendants, which in effect awarded the disputed strip to the defendants.

The properties in question are all situated in Box Elder County in Township 14 North, Range 5 West of the Salt Lake Base and Meridian. In order to save needless repetition, the Township will be omitted hereafter, and

it will be assumed that the Sections referred to, unless otherwise indicated, are Sections within this Township. The parties, plaintiff and defendants, are farmers, with the defendants owning land in Section 20, and the plaintiff owning land in Section 19. By stipulation of counsel, it was agreed that the line in question in the suit was the line separating the south half of the north half of Section 19 with the south half of the north half of Section 20, but it was agreed that in determining the true location of that line, reference would have to be made to other lines in the various surrounding Sections (Tr. 2). On May 29, 1947, the plaintiff employed Mr. W. H. Griffiths, the County Surveyor for Box Elder County and a Registered Engineer and Land Surveyor of the State of Utah, to make a survey of plaintiff's property holdings in Section 19, including the line in question (Tr. 8). Mr. Griffiths previously, on a different occasion, had surveyed the west line of Township 14 North, Range 5 West of the Salt Lake Base and Meridian in 1930. In making the resurvey requested by the plaintiff, Mr. Griffiths obtained the original government survey notes and from the surveys prepared the map which was introduced into evidence as plaintiff's Exhibit "C". Mr. Griffith's survey indicated that the true division line of the property should be the line "E-A", as marked on the map. The line "E-A" at point "F" on the map is 180 feet further to the east than the fence in question. The line "E-A" at point "G" is 192 feet to the east of the fence. His survey, therefore, indicated that the fence line was over onto the property of the plaintiff. The plaintiff also introduced other testimony to substantiate

the results of the survey of Mr. Griffiths. The defendants did not introduce testimony by any surveyor to contradict the testimony of Mr. Griffiths. The defendants introduced evidence showing that the fence in question had been in existence in its present location since 1919 (Tr. 75 and Stipulation Tr. 014). However, the defendants' own evidence showed that the fence in question was not built by the owners of the contiguous land, but that it was built by the witness Mr. Bishop, who owned land to the south. Mr. Bishop did not own either piece of land adjoining the fence. He merely put up the fence as a temporary measure to control his horses which were grazing in the south half of Section 19. Furthermore, no attempt was made by Mr. Bishop to put the fence on the true line, and he did not attempt to locate the government corner. There was no dispute between the adjoining land owners at the time the fence was built. Neither adjoining land owner had anything to do with the building of the fence, and there was no uncertainty as to where the true line was (Tr. 73, 74, 75, 76). The Court decreed that the fence was the true dividing line between the land of the plaintiff and the land of the defendants.

### ASSIGNMENT OF ERRORS

Appellant assigns the following errors of the Court below:

ERROR NO. 1: The Court erred in failing to decree that the line "E-A", as shown on plaintiff's Exhibit "C", was the true boundary line between the property of the plaintiff and the property of the defendants, and



in failing to decree that the title to the land between the line "G-F" and line "E-A" is in the plaintiff.

ERROR NO. 2. The lower Court erred in making its Conclusions of Law and Decree in favor of the defendants, since the Findings of Fact are insufficient as a matter of law and since they do not support or justify the Conclusions of Law and Decree.

ERROR NO. 3: The Court erred in its Conclusion of Law No. 2 wherein the Court concluded that the fence line in question was the true division line between the properties of the plaintiff and defendants.

ERROR NO. 4: The Court erred in its Conclusion of Law No. 3 wherein the Court concluded that the defendants were entitled to a Decree as prayed for in their said Answer.

ERROR NO. 5. The Court erred in its Conclusion of Law No. 3 wherein the Court concluded that the defendants were entitled to costs in their behalf expended.

ERROR NO. 6: The Court erred in entering its Decree in favor of the defendants.

ERROR NO. 7: The Court erred in Paragraph 2 of the Findings of Fact wherein the Court found that the fence in question had been mutually recognized since its erection as the boundary line between the properties of the plaintiff and the defendants, and that the owners of the adjoining lands have occupied their respective premises up to said fence as originally erected.



This finding is not sustained by the evidence but is contrary to the evidence.

ERROR NO. 8: The Court erred in permitting the defendants' counsel to cross-examine the plaintiff's witness prior to the close of the direct examination of the witness (Tr. 9).

ERROR NO. 9: The Court erred in sustaining objection to the evidence of the east boundary line of Section 20 (Tr. 66, 67 and 68).

Argument on Assignment of Error No. 1  
Line E-A is the Correct Boundary Line

Mr. Griffiths testified that he surveyed the west line of Township 14, Range 5 West in 1930, and again in 1947 he surveyed the area in question. In making these two surveys he used the original government survey notes (Tr. 9) which were introduced into evidence as plaintiff's Exhibit "B". These notes were unusual since they disclosed that the government surveyor worked east from the west township line of 14 instead of the usual practice of going from the east to the west (Tr. 10). The original survey included only the first two tiers of sections 6 and 5 down through 31 and 32, plus a portion of the next tier of sections to the east (Tr. 10). The balance of Township 14 was surveyed from the east to the west and the corrections made where the two surveys joined (Tr. 65). In making his resurvey, Mr. Griffiths followed the government surveys, and he, too, worked from the west to the east.

In his survey of 1930, Mr. Griffiths located from the

field notes, three government corners on the west line of Township 14 (Tr. 12). He found the stone at the southwest corner of the Township and the stone at the northwest corner of the Township (which is still there) (Tr. 12). He also found the corner of the northwest corner of Section 19 (Tr. 13, 41). Prior to 1930, he found the government corner at the northwest corner of Section 18. He also testified that he found a straight line running between these corners (Tr. 16, 50), and that a fence line was found on this straight line and the fence line which formed the west line of Township 14 in making his survey in 1947 (Tr. 15). The government corner common to Sections 17, 18, 19 and 20, and the government corner common to Sections 19, 20, 29 and 30 could not be found (Tr. 7).

Mr. Griffiths found a county road running in a north and south direction along the east boundary of Sections 32, 29, 20 and 17 (Tr. 27, 28). This County Road is on a straight line (in the area in question) and is practically parallel to the west Township line of Township 14 (Tr. 27, 28, 21). The Township line and the County Road are approximately two miles apart. Mr. Griffiths stated that to his own knowledge the County Road has been there for twenty years. He made inquiry concerning the County Road and found that it had been accepted as the boundary between land owners in all sections (Tr. 29, 30, 62). Mr. Fred Doutre was called as a witness for the plaintiff and he testified that the County Road was in when he first came to the Blue Creek before 1915 and in its present place. He also testified that it is a

straight road and has been farmed right up to the road (Tr. 69).

Using the west township line as one boundary and the County road as the other boundary, Mr. Griffiths measured the distance between these two lines at three different points (Tr. 42). He found that the distance through the two miles on the south boundary of Section 19 was 10,629 feet; and that the distance through the two miles on the south of Section 30 was 10,677 feet (Tr. 21). He also measured the distance between the west township line of Township 14 and the County road on the north boundary of Section 19, but since there was no fence clear through the entire distance between the two lines, he used the fence marked "C-D" (Exhibit "C" of plaintiff) to measure the distance between the County Road and the west township line at the north boundary of Section 19 (Tr. 21, 22). This distance was 10,669 feet (Tr. 23, 43).

If the fence line in question ("G-F") is used as the boundary between Section 19 and Section 20, then Mr. Griffith's measurements showed that the south boundary of Section 20 (Mr. Whitney) had 5456 feet in it while the south boundary of Section 19 (Mr. Glenn) had only 5173 feet. The government notes called for 5276 feet in the south boundary of Section 19 and 5326 feet in the south boundary of Section 20. Mr. Griffiths then divided the total distance found at the south boundary of Sections 19 and 20 (between the County road and the west township line) on a proportional basis using

the distances called for in the government notes in making the proportional division (Tr. 20, 37, 39). The dividing point was marked "A" on Exhibit "C". With this division, the south line of Section 19 is 5310 feet long while the south line of Section 20 is 5320 feet long (plaintiff's Exhibit "C").

A similar calculation was made regarding the north boundary of Section 19 and the north boundary of Section 20. Mr. Griffiths used the distances called for in the government notes to make a proportional division of the 10,669 feet (Tr. 23). The division point is marked "E" on the plaintiff's Exhibit "C". Line "E-A" is the division line established by Mr. Griffiths's surveys. He found that the fence line "G-F" was 192 feet west of line "E-A" at point "G" and 180 west at point "F" (Tr. 26). Using line "E-A", Section 19 and Section 20 would be full sections (Tr. 26) with a little excess in each. Mr. Griffiths tested line "E-A" and found that if extended further south it would coincide with the fences in the other sections as they went across the valley (Tr. 27). Projecting fence line "G-F" to the south showed a great variance from the section line on the south side of the valley (Tr. 27).

The defendants did not offer any evidence by any other surveyor that would contradict the results obtained by Mr. Griffiths. There would seem to be a good reason for the defendants' failure to produce a surveyor. An examination of the field notes of the original government surveys, together with the testimony of Mr. Griffiths would indicate that Mr. Griffiths had done every-

thing possible to locate the correct boundary line between the properties in question. It is true that he labored under difficulties. For example, no government corners were found on the County road. Obviously, if a County road passes between two sections, the stone marking the government corner will have to be removed. Therefore, Mr. Griffiths followed the usual rule and resorted to secondary information in completing his survey. His results are in accordance with the law and are the only evidence which the Court has to base its Decree as to where the proper boundary line is. Mr. Griffiths, in resorting first to the monuments in place and secondly to information he was able to obtain in applying the measurements of the government survey, was following the law as announced by this Court (*Henrie vs. Hyer*, 70 Pac. 2d 155). Furthermore, when he ascertained that there were more than two full sections between the Township line and the County road, he followed the law as set forth in *Roach vs. Dahl*, 35 Pac. 2d 993, in dividing the excess on a proportional basis, using the distances called for in the government notes in making the division. This is in accordance with the surveyor's duty to relocate upon the best evidence available the courses and lines at the same place where originally located (8 Am. Jur. Sec. 102, at page 819.)

As an alternative to the procedure followed by Mr. Griffiths in ascertaining the location of the division line between these properties, the Court had available a second method which it could have followed. Mr. Griffiths definitely located the west boundary line of this

township and stated that he had found the government corner (among other corners on this line) in his 1930 survey at point "B" on plaintiff's Exhibit "C" (the north-west corner of Section 19). With the field notes calling for the north line of Section 19 to be 79.89 chains long, and the south line of Section 19 to be 79.94 chains long, the Court could have decreed that these two distances should be followed using the township line as a starting point, therefore determining the true division line at a position slightly west of the position determined by Mr. Griffiths. Under this method, the Section 19 would exactly equal the measurement of the government survey. Although this procedure is a definite possibility, it is submitted that under the case authority cited above, the line "E-A" as computed by Mr. Griffiths, should be the true boundary line of the parties.

### **Argument on Assignment of Error No. 2**

In assigning Error No. 2, it is the position of the appellant that the Findings of Fact taken as a whole are insufficient as a matter of law to justify and support the Conclusions of Law and Decree entered by the Court. A reading of the rather brief Findings of Fact will disclose that no mention therein is made of any dispute as to the true boundary line at the time the fence in question was erected. In short, the apparent theory of the respondent is that by merely showing that a fence line has been in existence for a period of twenty years or more, that the fence line automatically becomes the boundary between the respective property holders on each side thereof. It is submitted that such is not the

law in this jurisdiction (Home Owner's Loan vs. Dudley, 141 Pac. 2d 160; Peterson vs. Johnson, 34 Pac. 2d 697; Briem vs. Smith, 112 Pac. 2d 145; Tripp vs. Bagley, 276 Pac. 912). The absence of any finding of fact on any uncertainty as to the location of the true boundary line, and the absence of any finding of fact regarding any dispute as to the true boundary line at the time the fence was erected, can be explained very easily. Mr. Bishop, who was called by the defendant (Tr. 72 to Tr. 78), testified that the fence line in question was placed there by Mr. Bishop, who did not own either piece of land adjoining the fence. He did not attempt to place the fence on the true government survey line. There was no dispute between the contiguous land owners as to the line separating their properties. The adjoining land owners were not consulted and had nothing to do with the placing of the fence line. Mr. Bishop was a witness for the defendant, and his evidence on these points was not disputed and, therefore, cannot be denied by the defendant. His evidence, in the light of the Utah cases on the point, seems conclusive of the question.

In the case of Willie vs. Local Realty Company, 175 Pac. 2d 718, this Court summarized the rule relating to the establishment of boundaries by acquiescence and stated as follows: "The vital question is whether the adjacent owners when they fixed the line or acquiesced in its being fixed were uncertain or in dispute about the location of the actual line."

### **Argument in Assignment of Errors No. 3, 4, 5 and 6**

Assignment of errors No. 3, 4, 5 and 6 may well be



grouped together since the arguments in support of these assignments of error are applicable to each. Furthermore, the argument as to Assignment of Error No. 1, and the argument as to the Assignment of Error No. 2, go to the heart of the question raised by Assignment of Errors No. 3, 4, 5 and 6. Reference is made to such arguments, and in order to conserve space, they will not be repeated here.

The defendants cannot claim title to the land lying between fence line "G-F" and line "E-A" by adverse user, since the defendants did not show that they paid taxes on that area as required by Section 104-2-12, Utah Code Annotated, 1943, see also *Smith vs. Nelson*, 197 Fac 2d 132. The defendants failed to introduce any evidence whatsoever on the question of the payment of the taxes by them.

### **Argument on Assignment of Error No. 7**

It is the appellant's position that in finding that the owners of the adjoining land occupied their respective premises up to fence line "G-F" (paragraph 2 of the Findings of Fact), and that the fence line had been mutually recognized as the boundary line, the Court committed error. Mr. William W. Whitney, the plaintiff's own witness, and the plaintiff, Lawrence G. Whitney, both testified that a portion of the area line east of fence line "G-F" was never even cultivated until 1934 or 1935 (Tr. 82, 85 and 86.) It is difficult to see how there can be an acquiescence in the fence line "G-F" for a period in excess of twenty years, when the defendants themselves admitted that they had not even broken

up a portion of the ground near the fence line until 1934 and 1935. It is submitted that this finding of fact is not in accordance with the defendants' own evidence.

### **Argument on Assignment of Error No. 8**

Under the pretext of a voir dire examination, the counsel for the defendants examined Mr. Griffiths concerning the results of his survey even before Mr. Griffiths had an opportunity to testify as to his survey (Tr. 7 and 9). It is submitted that this examination, which was objected to by the plaintiff, was improper at this state of the testimony of Mr. Griffiths, and that it was prejudicial in that it prevented the plaintiff from presenting in an orderly fashion the evidence of Mr. Griffiths concerning his survey.

### **Argument on Assignment of Error No. 9**

The Court refused to permit evidence to be introduced as to the general repute regarding the County road as the east boundary line of Section 20 (Tr. 66, 67 and 68). The Court sustained an objection to questions as to the repute in the community as to the east boundary of the Whitney property (the County road). The plaintiff offered five witnesses concerning the same and their testimony was refused (Tr. 67, 68). Where no other evidence can be obtained, reputation evidence as to a boundary line is admissible, 8 Am. Jur. Sec. 95 at Page 813; Roach vs. Dahl, 35 Pac 2d 993. It is submitted that the necessity for using reputation evidence as to the east boundary of Section 20 was clearly shown by the record, and that it was also shown by the record

that such evidence was reliable in view of the position of the road in reference to the west boundary line of Township 14. It is submitted that it is error for the Court to sustain an objection to the proffered testimony.

The plaintiff respectfully submits that the judgment of the trial Court should be reversed, remanding the case and directing the trial Court to enter judgment in favor of the plaintiff and decreeing that the line "E-A" divides the south half of the north half of Section 19 from the south half of the north half of Section 20, and that plaintiff be awarded costs expended in the trial Court and on this appeal.

Respectfully submitted,

BULLEN & BELL, Attorneys for  
plaintiff and appellant.

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