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

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

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

Plaintiff and Appellant

vs.

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

Case No.
7280

RESPONDENT'S BRIEF

FILED

APR 1 1949

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CLERK, SUPREME COURT, UTAH

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STATEMENT OF FACTS

In as much as my statement of facts will differ somewhat from that of the Plaintiff and Appellant, I believe that it will be better if a separate statement of facts be made up regarding the same.

This action was commenced by the Plaintiff and Appellant, filing the short form of complaint for quieting

title to his South $\frac{1}{2}$ and the South $\frac{1}{2}$ of the North $\frac{1}{2}$ of Section 19, Tp 14 N, Range 5 West, SLM, (Record 01). A general demurrer of the defendants was overruled, (Record 03). The defendants then answered (Record 05) in substance stating that the Plaintiff's are the owners of certain land in section 19, which is west of the land that defendants own in section 20 and that separating said land is a fence that has been in existence for more than 30 years, which division fence is on line with other division fences set along similar section lines to the south, and that said fence dividing the lands of the plaintiff and defendant in the said sections 19 and 20, as now existing and which has existed for more than thirty years, is the true division line dividing the properties of the plaintiff and defendant. Also that the plaintiff and his predecessors in interest have acquiesced in said division line since it was originally created more than thirty years ago, and that they have by their said acquiescence agreed that said division line is the true division line between said sections and are now estopped from denying the same. The prayer asked that the fence as constructed be determined by the court as the true division line between said sections; and that the plaintiff be estopped and enjoined from denying the same and for costs. (Record 05 and 06).

To this the plaintiff replied by general denial, (Record 08).

Upon the pleadings so formed the matter went to trial. In as much as the record contains numerous references to sections and common section corners which can only be properly followed by the use of a township map the defendant and respondent has had placed in the back of the

brief on a sheet that has been folded in, a township map, which when the sheet is properly unfolded, the township map is reviewable at all times while checking this brief.

Respondent agrees with appellant that by stipulation, (Tr.2) 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. Also that there was a written stipulation entered into (Record 014) which stipulated: "That the fence referred to in paragraph 2 of defendants Answer was in existence and in its present location on the 11th day of January, 1923, and said fence has been in existence in its present location since that date." It is also referred to in the (Transcript page 3).

From the pleadings so made and from the evidence produced at the hearing the court found in favor of the defendant and against the plaintiff and in its findings of fact found that plaintiff is the owner and in possession of the S $\frac{1}{2}$; Lot 2; and the SE $\frac{1}{4}$ of NW $\frac{1}{4}$; and S $\frac{1}{2}$ of NE $\frac{1}{4}$ of Section 19, and the defendants are the owners and in possession of the N $\frac{1}{2}$ of Section 20, both in Tp 14 N, R 5 W, SLM, and that Section 19 lies immediately West of Section 20. Also that in the Spring of 1919 a division fence was erected between the properties now belonging to the defendants in Section 20 and the properties now belonging to the plaintiff in Section 19, and that said fence has been kept and maintained in its original position since that time. That said division fence is on a line with other fences set along similar section lines running South to the South end of Township. (Underscoring added by defendant). That the lo-

cation of any markers of the original government surveys for the corners common to Sections 19, 20, 29 and 30; and Sections 17, 18, 19 and 20, township and range aforesaid, cannot be located or determined; that the plaintiff and his predecessors, and the defendants and their predecessors being the owners of said adjoining lands have occupied their respective premises up to the said fence as originally erected and as now standing and have mutually recognized the said fence as the boundary line since its said erection.

As and for its conclusions the court found that each party was the owner of the lands claimed and described by each. That both the plaintiff and defendant and their predecessors have acquiesced in the location of the division fence line and that said fence as now located is the true division line between the parties and that the defendants are entitled to a decree as prayed for in their said answer. A decree was entered accordingly.

ARGUMENT

The defendants and respondent will address their argument in the same order as the assignment of errors set out by appellant. The respondent claims, in regard to the assignment of error No. 1, the following: That at the conclusion of the case the plaintiff had presented no evidence to the Court upon which it might enter a decree that the line EA as shown on plaintiff's exhibit "C" was the true boundary line between the properties of the plaintiff and defendant. That the evidence produced by the plaintiff was conflicting. That the evidence produced by the plaintiff by stipulations and his own witnesses determined that the present boundary line had been acquiesced in for the

prescriptive period. Also as a matter of law the Court was bound to find in favor of the defendant and against the plaintiff.

We support the above with the following: Exhibit "B" offered by Plaintiff was received (Tr-10) and consists of the Field notes of two government surveys covering certain parts of Township 14 N. Range 5 West, SLM. From a careful examination of this exhibit you will find that the first part are the field notes of one Troskolawski made under a contract dated February 28th, 1856. You will also find that he made some measurements along the west line of Tp 14 N, Range 5 West, and covering some sections for two miles east of it. Also that all of his marks which designated quarter sections, half sections or section corners were made by digging a hole and making a mound from the contents there of. In the corner of the photo is a pencil number indicating the page. On pages 83 and 84 are the east and West distances that were found by that surveyor for the north and south sides respectively of Section 19. On page 88 is found the east and west distances that were found by that surveyor for the north and south sides respectively for section 20. However the balance of this same exhibit offered by the plaintiff contain the field notes of Henry Fitzhugh which was made May 13th, 1887. Turning to page 143 of his notes he states at the bottom "I ran this random resurvey line a distance of 6 miles to the corner to Tps 14 and 15 N, Rs 5 & 6 W. I am unable to find any trace of any of the original corners." On the next page he goes on to say that he returns to his beginning point and begins his resurvey. He makes no mention of any marker that he used for designating his beginning point, but each

quarter corner, half section corner or section corner determined by him thereafter he marks it by the use of limestone rock which was buried in the ground and it contained certain markings upon it and it was cut in rectangular shape and the dimensions were given. In some instances he also raised mounds and dug holes which he describes. On page 150 he describes what he did for the Northwest corner of the township as follows: "No trace of old corner. Set Limestone 18 x 10 x 6 inches, 12 inches in ground for cor to Tp 14 and 15 N, Rs 5 & 6 W. Marked 6 notches on each edge. Dug pits 24 x 18 x 12 ins lengths wise on each line N. E. S. & W. of stone—6 ft dist raised mound of earth 2½ ft high 5 ft base alongside." The exhibit then skips a number of pages, as far as numbering is concerned and starts on a line between sections 32 and 33 in the said township and goes north to the North end of the township. **There are no measurements shown in the re-survey of the north or south boundaries of either section 19 or 20.** Continually, however he restates that there is no trace of old survey.

Now back to Mr. Griffiths the surveyor for the plaintiff. On page 64 of Tr. he was asked (on the Fitzhugh Survey of 1887) "Did he establish and quarter sections to the land that we have or any corner of the land?" and he answered, "No." He was then asked about other surveys made in this township (Tr.-64) and he answered, "Well, now, I wrote to the Department of Interior in Salt Lake and asked for all the notes of any surveys made on the two tiers of sections east of the Township 14 and 5 North, and this is the statement of the recorder. Now I can't go beyond

that.”

Q. “I see. You didn’t bring, though, with you, any survey that fixed and established the Township line to the east?”

A. “No, because I didn’t think it was any good.”

Mr. Griffiths, however, on cross examination, (Tr. 30 to 34) was asked about his knowledge pertaining to the rule laid down in the case of *Henrie v. Hyer et al*, 192 Utah 330, 70 Pac 2d, 154, which rule is stated on page 157 as follows:

“The general rule is that if the monuments of the original government surveys cannot be located and a survey is necessary it must be made from the East and not from the west boundary of the township.”

“Resort should be had, first, to the monuments placed at the various corners when the original government survey of the land was made, provided they are still in existence and can be identified, or can be relocated by the aid of any attainable date. But if this cannot be done and a survey becomes necessary, this must be made from the east, and not from the west, boundary line of the township.”

From his cross examination he appears to be fully acquainted with the rule, yet from his testimony quoted above he did not bother to get any data on the east line of the township, but preferred to start from the West with a full knowledge that it was contrary to adopted procedure.

Again when I say that plaintiff’s evidence was conflicting and that he presented no evidence upon which the

court could enter a decree finding that the line EA as shown on plaintiff's Exhibit "C" was the true boundary line between the properties of the plaintiff and defendant, I wish to call the Courts attention to this. That Exhibit "C" is a map made up by Mr. Griffiths, Plaintiff's surveyor, and this according to his own statement is what is it based upon.

1st. The point of beginning was the West boundary of the Township 14 North Range 5 West and not the east boundary (Tr-9).

2nd. The survey for the making of the map was made 29th of May, 1947 (Tr-8) but was only made for the purpose of determining if the plaintiff had, within the boundaries that were established, the land that he had purchased. (Tr. 14).

3rd. That any survey of the township line (the west boundary) was made 17 years before in 1930. (Tr. 8, 12, 13).

4th. That he made no recheck of his purported survey made 17 years previous. (Tr. 50-51).

5th. That he offered no evidence whatsoever of how the original survey was made, or identified any of the monuments mentioned in the field notes, but in substance asked the court to assume it was correct, even after the court had advised him and his counsel that he could testify what he had done and the court would determine whether or not the survey was correct. (Tr. 12 to 17).

6th. That upon his cross examination of the two government surveys of the field notes of his Exhibit "C" (Tr.

54 to 56) he admits that Troskalawski surveyed the township line (West boundary of 14 North) in 1856 and that Fitzhugh resurveyed it in 1887. That Fitzhugh in 1887 could find no trace of the first survey made in 1856. That Fitzhugh in 1887 set the West Township line that plaintiff relies upon, but did not measure or resurvey the particular lands in dispute.

7th. That upon his exhibit "C" Plaintiff uses the east and west distances for the boundaries of sections 19 and 20, the lands in question (Tr. 18) being the distances that were measured in the original survey of 1856, and for his own convenience a beginning point to go east from, being the West township line that was established in 1887. Isn't this conflicting. Isn't it just logical and good plain horse sense to say to plaintiff, "If you are going to use material and distances obtained in a survey for the outside boundaries of two sections that you will also have to use the beginning point in that same survey." "You cannot take convenient parts of one survey where the beginning points of that survey have been lost or obliterated and apply them to a different survey beginning point and hope to take away another man's property rights by such a con-ning use thereof."

8th. Mr. Griffith measured East approximately 2 miles to a road, which he assumed according to his own testimony was on a section line (Tr. 36-51-52) to obtain the total east and west distances of sections 19 and 20 and then attempted to prorate these distances to establish a new dividing line between the litigants. He was also asked (Tr. 45-46) if he had taken any other sections into con-

sideration except 19 and 20 in establishing his new line and he said no. (Section 19 being plaintiffs land and section 20 being Defendants). Whereupon he was asked, "Now if Whitney owns 21, and if your survey had gone from 20 over to the southeast corner of 21, and 21 was short, who would be entitled to the land that is excess?" and he avoided the question the best he could.

9th. Then again plaintiff's Exhibit "C" shows the fence line in question, which is marked GF, and that fence line continues South to the end of the township line in keeping with other fences in that direction. His testimony also shows (Tr. 39 and 40) that this fence to the South at point G continues to travel in line with other fences to the end of the township. You will also notice from his map that there are no fences running to the North, the fence line being on an irregular course from point G. I submit and my contention is that in as much as Mr. Griffiths has not given any testimony as to how the original survey was made in 1930 and that in as much as he did not identify any monuments upon the line that he considers the west township line with the monuments described in the field notes of the resurvey made in 1887. And in as much as he did not measure from the east township line to the west as he was bound to do. And in as much as, according to his own testimony, he relied upon assumptions as to the location of the county road. And in as much as he has attempted to use certain convenient parts of two surveys to accomplish his purpose in preparing the map described as Plaintiff's Exhibit "C" that his testimony cannot be relied upon for any purpose whatsoever. That being the case then there is no other evidence that the court might

use to grant the relief that the plaintiff was seeking.

Plaintiff in his brief (Page 9) mentions that defendant did not offer any evidence by another surveyor to contradict Mr. Griffiths. He seems to forget that he has the burden of proof, and that if we consider that what he has offered is no proof, that it is our privilege to so consider it and forgo the trouble of rebutting it.

Now, in regard to the fact that the evidence produced by plaintiff by stipulations and his own witnesses determine that the present boundary line had been acquiesced in for the prescriptive period, and that as a matter of law the court was bound to find in favor of the defendant and against the plaintiff. We call the Court's attention to the Stipulation, (Record 014) which stipulates that the fence has been in its present location since the 11th day of January, 1923. Also, to A. W. Bishop's testimony (Tr. 72 and 73) that he built the fence on the East side of Section 19 and joined to a fence that was one-quarter mile North, and that the fence was built in line with other fences to the South in that township, and that this fence was built shortly after Mr. Bishop bought the land which was October 10, 1918.

Then, we have the testimony of the plaintiff himself (Tr. 101) where the attorney for plaintiff asked him: "I'll ask you whether or not there has been any dispute with regard to the fence," and the answer was, "Yes, I have been trying to have the fence corrected for a long time." "How long?" "Well, I guess around 20 years." (Under-scoring added).

Now, if the plaintiff himself claims that there has

been a dispute for more than 20 years and has failed to do anything about it until now, then the rule of acquiescence for the prescriptive period has by his own testimony become applicable. Thompson on "Real Property, Permanent Edition," Volume 6, in the following articles covers this point of law:

Article No. 3308: "Effect of long acquiescence in dividing line—

Where the exact location of a boundary line is not definitely known a dispute involving the boundary line must be determined by looking into the conduct of the parties with reference thereto. Thus long acquiescence by the owners of adjoining lands in the location of the dividing line between their lands may in effect, establish such a line, if the acquiescence be for a period of time equal to that fixed by the statute of limitations. In the absence of direct evidence, an uncertainty in the location of a boundary line and an agreement fixing the line may be deduced from the circumstances and inferred from the conduct of the parties, particularly from long acquiescence, but the acquiescence must be in regard to a fence or monument as a boundary line, and not merely as to its existence as a barrier. In general, acquiescence depends upon words, declarations, or silence of the parties thereto, or inferences and presumptions of their conduct and exists where a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that, under the circumstances

of the case, the other party may fairly infer that he has waived or abandoned his right. Where it was shown by uncontradicted evidence that the parties and their predecessors in title acquiesced in the dividing line for several years, such acquiescence operated to establish the line. It has been said that a supposed boundary line, long acquiesced in, is better evidence of the true location of the line than any survey made after the original monuments have disappeared. "The acquiescence in such cases affords ground not merely for an inference of fact, to go to the jury as evidence of an original parol agreement, but for a direct legal inference as to the true boundary line. It is held to be proof of so conclusive a nature that the party is precluded from offering any evidence to the contrary."

Article 3310. "Time of acquiescence in the absence of agreement and under agreement—

The distinction should be kept in mind that acquiescence in a boundary line without any agreement is not conclusive unless it is continued under circumstances of adverse occupation long enough to give title by prescription; while acquiescence in a boundary line which, by reason of uncertainty or dispute, the parties have established by agreement, need not be continued for any definite time. Acquiescence in a wrong boundary line will not establish it as the true, line, but such acquiescence for a long period of time is evidence that such line is the true line. It has been held that a boundary may be

established by acquiescence for a period of twenty, fifteen, ten and seven years.”

Article 3315. “Position of old fences in ascertaining boundary lines—

An ancient fence may be competent evidence of the location of a boundary line, particularly where corners have been obliterated or original monuments cannot be found. The position of old fences may be considered in ascertaining disputed boundaries, and the conduct of the parties with reference to such fences may be such as to authorize the conclusion that the fences were established by agreement of the parties, or have been recognized by them for such a length of time as to determine the line of ownership between the parties.

Fences built by adjoining lot owners on the line of the street according to stakes set by the surveyors soon after the original survey was made, and maintained for forty-five years, are better evidence of the location of such line than a new survey, made forty years after the original survey, which changes such line. Ancient fences built on what were supposed to be boundary line of the tract of land in dispute and maintained for at least thirty years are held to fix the correct boundaries, as against modern surveys conflicting therewith and with each other; but the weight accorded fences of the true line between tracts of land is not so great where such line was not at any time marked by original monuments. Evidenced that a fence was built ac-

according to stakes set by a surveyor who made the original plat and that said fence has been maintained on substantially the same line for more than forty years, was held to warrant the holding that the fence was built on the true line. Evidence that there was a very ancient fence between the lots of adjoining owners, and that the fence had been maintained as it now stands for about forty years, and that during such time the owners have openly and continuously held possession under a claim of right up to the line of such fence, warrants a finding that the fence was erected by agreement of the parties; and a slight variation from the position of the boundary line as described in a deed made sixty years ago, when the land was of little value, does not affect the conclusiveness of the evidence. Where the landowner entered into possession of land and enclosed the same, erecting a fence between such land and the land of an adjoining owner, and continued to maintain such fence and use the land up to the fence for a period of forty years, with the knowledge and acquiescence of the successive owners of the adjoining land, such fence as held to mark the boundary line, even though the fence was erected through a mistake as to the true line."

Article 3316: "Correcting mistake of parties in locating division line—

Discrepancies of any nature may arise from true error, that is, deviations from correctness due to imperfections of the human sight and touch, im-

perfections in the construction or adjustment of instruments, and to the conditions under which the observation is made; or, from mistakes, that are blunders, which have their source in the human mind. If a mistake has been made by the parties in locating a division line or fence, this may be corrected, if it has not been acted upon for too long a time and no injustice will be done. The mistake must, however, be a material one, and it must be corrected before rights have been acquired by presumption. Thus, where a division fence between lands of adjoining owners had been standing for more than twenty-one years, it constitutes the boundary line between them, although it is crooked and the deeds of both parties call for a straight line between acknowledged land marks."

AS TO ASSIGNMENT OF ERROR NO. 2

In this assignment of error, counsel for plaintiff has submitted a number of cases found on page 12 of his brief, and I wish to take up those cases one by one for the purpose of showing the Court that they have no application and are not in point with the matter before this court:

First is the case of Home Owners Loan Corp. v. Dudley et al, 141 P 2d 160. The facts in dispute in that case so far as rule of long acquiescence in a fence are not in point with the dispute that we have before this court, and as a consequence the rule given has no application here whatsoever and has not upset the established law in any regard whatsoever.

The fence in question was a fence along the East side of highway and was put up when the lands on both sides of the highway were owned by the same person, and there was a fence erected along the West side of said highway (page 166). It was erected to protect the property on each side, not to establish a boundary, and as the court there expressed itself in regard to the theory of acquiescence in that case, to-wit: "Such contention lacks both factual and legal merit." The Court further said:

"The fact is that one time the highway went through the properties of appellant. She owned lands on both sides. It could hardly be said that a highway boundary line fence could have been erected to settle a dispute between adjoining land owners when the lands on both sides of the highway were owned by the same person."

The case of *Peterson v. Johnson*, 34 Pac 2d 697, referred to in plaintiff's brief is clearly not in point with that in our case. In that case plaintiff brought suit to quiet title to about 18 acres of land in Sevier County, and defendant denied plaintiff was owner and claimed he owned about one acre of said land. At the trial there were certain stipulations entered, one of which involved a deed from the county to plaintiff. The evidence also involved a fence that had been in existence but was allowed to fall apart at different intervals, and when erected, was upon lands belonging to the Public Domain.

"The record (page 698) is silent as to when the land now claimed by plaintiff was segregated from the public domain."

The Court further said: "The mere fact that defendants' predecessors in title enclosed within his fence a strip of land not covered by his deed and that such fence has been maintained for a long period of time does not vest title in such land to the defendant. *Tripp v. Bagley* supra, moreover, one may not acquire title to any part of the public domain by enclosing the same within his fence or by adverse possession. *Utah Cooper Co. v. Eckman*, 47 Ut 165, P. 178. Defendant having thus failed to establish any title to the property in dispute, it follows that he has no just cause to complain because he was not granted any affirmative relief."

The case of *Briem v. Smith*, 112 Pac 2d 145. This case is a dispute over the boundary line of a city lot. The fence that was originally built had disappeared at the time the suit was filed except the front section. The case further shows that since the erection of the fence through sales made, one and the same person became the owner of both lots in question, and then he resold one of the lots by a metes and bounds description. The Court in the very beginning said:

"Defendants' claim is based on the rule long recognized by this court that 'where the owners of adjoining lands occupy their respective premises up to a certain line which they mutually recognize as the boundary line for a long period of time, they and their grantees may not deny that the boundary line thus recognized is the true one.' *Tripp v. Bagley* 74 Ut 57, 276 P 912 at page 916 69 A L R 1417

citing numerous cases. However, the question of acquiescence is one to be decided from the particular facts and circumstances of the case. Thompson on Real Property, Perm Ed. Vol 6 Art. 3309. From a careful analysis of the facts in the instant case, we conclude that the general rule does not apply here and that the judgment of the lower court should be reversed."

The case of Tripp v. Bagley, 276 Pac. 912: On page 914 of said case is set out a diagram showing the location of the fence there erected which it was claimed could not be moved. The true line ran North and South and the fence was west of the true line and was clearly out of place. That fact that it was out of place was clearly discernable to any person by observation and followed the following course as shown by the diagram:

Beg. on the North boundary line of Lot 4, th. South 69 deg East 244 feet, th. South 2 deg 50 min West 1165 ft, th. South 57 deg 15 min East 288 feet. to a pt. where it intersects the true line extending South.

At the time the fence was constructed the land in and about the vicinity of the dispute had not been surveyed, the fence being erected in about 1870 and the survey not having been made until 1882, but the fence location was not changed after the survey was made even though it was plain to anyone's eyes that the fence did not follow any particular government survey line and patents were issued to different parties on both sides of the correct survey without regard to the fence lines. There was a dispute over leav-

ing the fence in its present location and a corrected fence was attempted to be put up at one time, but, jerked down. The respective parties on each side of the correct line had paid taxes upon the land in question, which, when the case was heard, made it impossible for the defendants who were trying to claim the land up to the old fence to establish title by adverse possession because they had not paid the tax upon the same. The Court said on page 916:

“So far as the length of time is concerned, the fence claimed by defendants as marking the boundary line has been established for a sufficiently long period to support defendants’ claim. It was erected in about the year 1870, and, according to the testimony of defendants, it has remained in the same location until the suit was begun in 1922. According to the rule laid down by the textwriters and practically all of the adjudicated cases where the question is discussed, one of the requisites necessary to the establishment of a boundary line other than the true boundary line between adjoining land owners by oral agreement or acquiescence, in the absence of adverse possession or estoppel, is that the location of the true boundary sought to be thus established is or has been uncertain or in dispute. In 1 Tiffany, Real Property (2d Ed.) No. 294, the law is thus stated:

‘An agreement between adjoining owners as to the location of a boundary line, though merely oral, is not, it is generally conceded, invalid as being within the Statute of Frauds, provided the

agreement is followed by actual or constructive possession by each of the owners up to the line so agreed upon, and provided further, that the proper location of the line is uncertain or in dispute; the theory being that the agreement does not, in such case, involve any transfer of title to land, but merely an application of the language of the instruments under which the owners claim. On the other hand, it has been held that, if the boundary line is not doubtful or in dispute, an oral agreement for its change is invalid, this involving an actual transfer of land, within the statute.'

"In 9 C. J. No. 117, p. 233, the law is thus stated: 'In order to establish the validity of a parol agreement establishing a boundary it is necessary that there shall be doubt and uncertainty as to its true location. The reason is that, where there is no uncertainty as to the boundary lines, a parol agreement fixing boundary lines in disregard of those fixed by the deeds is void under the statute of frauds, as it amounts to a conveyance of land by parol.'

"To the same effect is 1 Thompson on Real Property No. 3103, 3104, pp. 194, 195.

An examination of the numerous cases cited in the footnotes to the above texts convinces us that the texts are supported by the great weight of judicial authority.

(2) Counsel for defendants cite and rely upon

the rule announced by this court in the following cases: *Holmes v. Judge*, 31 Utah, 269, 87 P. 1009; *Moyer v. Langton*, 37 Utah, 9, 106 P. 509; *Rydalch v. Anderson*, 37 Utah, 99, 107 P. 25; *Young v. Hyland*, 37 Utah, 229, 108 P. 1124; *Farr v. Thomas*, 41 Utah, 1, 122 P. 906; *Binford v. Eccles*, 41 Utah, 457, 126 P. 333; *Christensen v. Beutler*, 42 Utah, 392, 131 P. 666; *Tanner v. Stratton*, 44 Utah, 253, 139 P. 940; *Warren v. Mazzuchi*, 45 Utah 612, 148 P. 360; *Van Cott v. Casper*, 53 Utah, 161, 176 P. 849. In these cases the rule is announced and reiterated that, where the owners of adjoining lands occupy their respective premises up to a certain line which they mutually recognize as the boundary line for a long period of time, they and their grantees may not deny that the boundary line thus recognized is the true one. The general rule thus repeatedly enunciated has become the settled law in this jurisdiction. However, the question of determination in this case is whether the facts here bring it within the general rule or constitute an exception thereto."

You will not that the last paragraph quoted above, which is as follows:

"However, the question of determination in this case is whether the facts here bring it within the general rule or constitute an exception thereto," and they held that this case was an exception for the reason that the fence was erected prior to any survey having been made and prior to the time they had acquired title in the land, and from the evidence they did not get title until a year after it had been

surveyed, and after they had the survey made, they knew where the correct boundary line was. There was never any dispute as to where the correct boundary was, and well knowing where the correct boundary line was, they could not from that premise establish a line different than the correct boundary without a deed of conveyance from one party to the other conveying the land up to the fence if one intends the other have the land up to said point.

The Court said again on page 918:

“An oral agreement, however, fixing a dividing line between adjoining landowners is not within the statute of frauds when the true line is uncertain or in dispute, because such agreement is not regarded as passing title to land but ‘determines the location of the existing estate of each, and, when followed by possession and occupancy, binds them, not by way of passing title, but as determining the true location of the boundary line between their lands.’ *Berghoefer v. Frazier*, 150 Ill. 577, 37 N. E. 914.”

Consequently, this case that plaintiff seems to take so much stock in does not upset or change the doctrine of acquiescence in Utah, but merely determines the facts of that case were such that the doctrine of acquiescence did not apply in that case. The doctrine of acquiescence considers that the true location of the line is **uncertain or in dispute**.

While it is uncertain or in dispute, each of the parties had accepted a certain line dividing their estates and each

had used the lands up to the said line for a period of years—in this state, 20 years—so that the Court will then say that because of your past dealings with your neighbor and acquiescence in where the supposed boundary line is that it becomes by your acquiescence the true boundary line between said properties.

AS TO ASSIGNMENT OF ERRORS 3, 4, 5, AND 6

The plaintiff seeks to raise the question that the defendants failed to introduce any evidence whatsoever on the question of payment of taxes by them in so far as it affects the little strip of land that plaintiff claims. It is not defendants contention that we get any land by adverse possession, which would, if we did, require us to support our adverse possession with the payment of tax. Our contention is that the fence line is the true division line between sections 20 and 19, and the court so held that it was. It being the true division line, no question of adverse possession can arise because all land to the East of the division line is within our own boundaries and is part and parcel of our Section 20. We are not trying to get any part or parcel of Section 19, but are merely claiming that the fence line is the actual dividing line between the two sections, and that all of Section 19 is still in the plaintiff and under his control.

AS TO ASSIGNMENT OF ERROR No. 7

Defendants admit that the witnesses Wm. W. Whitney and the defendant Laurence G. Whitney both testified that there ws some of the land up to the fence that had not been cultivated, but the reasons given were that he did not ob-

tain the heavy duty equipment until 1934 or 1935, and from then on more of the land was worked. The fact of the matter is, that along this fence line in question an abrupt hill rises from the South side towards the North, and that this hill is so steep that it cannot all be farmed or planted to grain. All of the land right up to the fence that can be conveniently planted, is and has been planted and was planted prior to the time when Mr. Whitney purchased the land in 1927 (Tr. 79).

It is difficult for defendants to understand why plaintiff feels that it is necessary for defendant to plow all of the land East of the fence. If defendant plows up to the fence and plants that that he has plowed up to the fence, the fact that he leaves certain high ground along part of the fence growing in mountain grasses for pasture for the use of livestock still would not change the proposition that each used the land up to the fence during all of the period of years required for acquiescence and would and should not show error in regard to paragraph 2 of the Findings of Fact.

AS TO ASSIGNMENT OF ERRORS No. 8

This matter was tried before the Court and under the right of voir dire examination, Mr. Griffiths was asked certain questions as shown in the Transcript 7 and 9, the Court ruled that defendants' counsel had the right. No objection was made at the time by plaintiff's counsel. Plaintiff's counsel merely made a comment.

The court having heard the entire evidence, the rights of the plaintiff herein were not injured thereby.

AS TO ASSIGNMENT OF ERROR No. 9

Defendants take issue with counsel for plaintiff when he states that the Court refused to let evidence be introduced in regard to the general repute of county road as the East boundary line of Section 20 (Tr. 66, 67 and 68.) The Court, if it will turn to transcript 68, will notice that there was no foundation laid for any such testimony to be introduced, and that the lower Court sustained the objection to the manner in which it was offered, and then it was not again raised in regard to the testimony of Fred Doutré, but passed up by counsel for plaintiff. Plaintiff having failed to lay the foundation for such evidence and no offer having been made, he cannot now claim that the Court committed error, but what he should do is criticise himself for not making the proper record.

CONCLUSION

As a summary, defendants contend that from the evidence offered by the plaintiff, which is conflicting, uncertain and improper, and from the stipulations and testimony of plaintiff, the Court had no alternative but to find the issues in favor of the defendants and against the plaintiff, and counsel for defendants respectfully requests that this Court sustain the holding of the lower court and grant to the defendants their costs in their behalf expended.

Respectfully submitted,

WALTER G. MANN,

Attorney for Defendants
and Respondents