

1978

Lucile M. Hale v. Ralph Frakes : Brief of Plaintiff-Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LUCILE M. HALE, an Individual,)	
)	
Plaintiff-Appellant,)	
)	
vs.)	Case No. 15771
)	
RALPH FRAKES, an Individual,)	
)	
Defendant-Respondent,)	

BRIEF OF PLAINTIFF-APPELLANT

Appeal from a Judgment and Decree
of the District Court of Box Elder County, Utah
Honorable VeNoy Christoffersen, Judge

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FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

LUCILE M. HALE, an Individual,)
)
 Plaintiff-Appellant,)
)
 vs.) Case No. 15771
)
 RALPH FRANKS, an Individual,)
)
 Defendant-Respondent,)

BRIEF OF PLAINTIFF-APPELLANT

NATURE OF THE CASE

This is an appeal from a decision which found no cause of action in Plaintiff-Appellant's Complaint alleging boundary by acquiescence.

DISPOSITION IN THE LOWER COURT

The District Court of the First Judicial District in and for the County of Box Elder dismissed Plaintiff-Appellant's Complaint upon a finding of no cause of action. The Complaint asked for damages and injunctive relief requiring Defendant-Respondent to replace an old fence line and also ordering Defendant-Respondent from further preventing or interfering in any manner with Plaintiff-Appellant's use of said real property. The Complaint was grounded on the theory of boundary by acquiescence and adverse possession. The District Court focused on the former theory as shall this brief.

The Court in a memorandum decision found that there was no acquiescence and dismissed the Complaint with prejudice.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks reversal of the District Court of instructions sufficient to direct the District Court to enter judgment in favor of Plaintiff-Appellant, to grant the injunctive relief sought in the Complaint, and to award damages as the District Court deems proper

FACTS FOUND UPON THE RECORD (R)

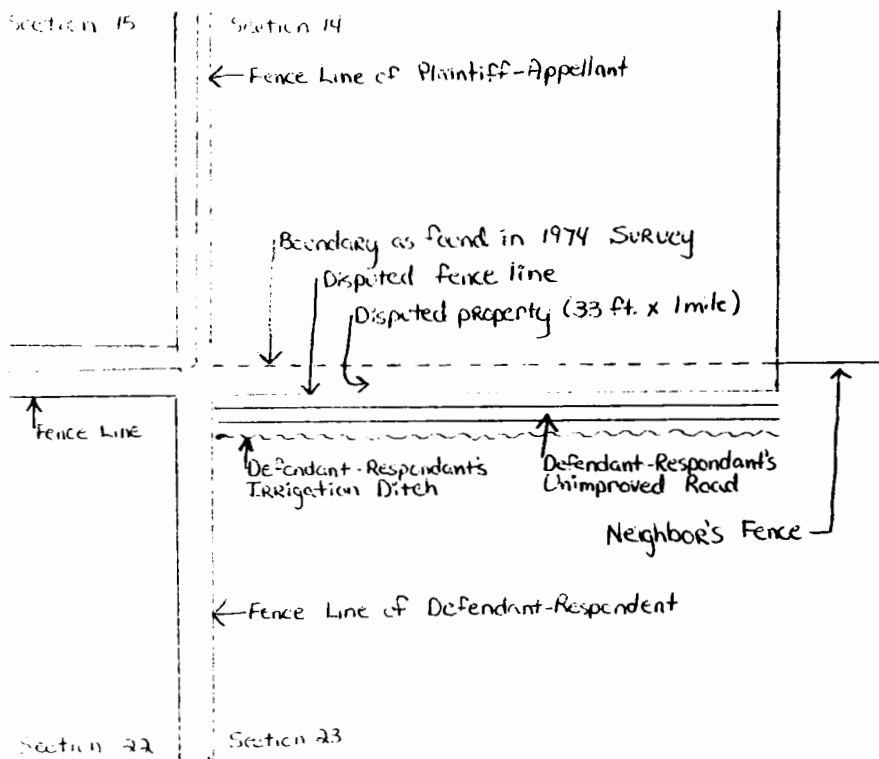
AND

THE REPORTER'S TRANSCRIPT OF PROCEEDINGS (T)

FACT SUMMARY

A strong fence built long ago stood upon certain property. Neither Plaintiff-Appellant's living predecessors in title nor Defendant-Respondent's living predecessors in title can remember when the fence came into existence, or when an even older fence built in the same place was erected. On or about May 18, 1973, Plaintiff-Appellant purchased the land north of the fence and subsequent to that Defendant-Respondent purchased the land south of the fence. Then in 1974, without prior warning, the Defendant-Respondent uprooted the ancient monument which had divided the two properties for over forty years. This dispute concerns only

that certain strip of land which lies between what is now found to be the true boundary of Section 14 by a survey made after the fence was removed and the fence line. The following free hand sketch is a diagram of the disputed area.



ANNOTATED FACTS:

Respondent's witness, Mr. John Newman, testified at trial that he is the predecessor in title to Respondent and held title to the disputed land now found to be in Section 23 (T-120). Mr. Newman first became familiar with the disputed fence line in 1933 when he was assigned the task of rennovating an older fence (T-139). Though he testified that the fence was built only to control livestock and that he considered the fence to be off the property line (T-50), he admitted that, despite his awareness of a boundary dispute, he constructed the fence precisely over the other fence (T-155). Since that time he admitted that he has never disputed nor interferred in the exclusive use of the property north of the fence by Appellant nor her predecessors in title (T-152). But he claims to have maintained to neighbors that he always considered the fence to be off his true boundary line (T-137). There was no substantiating testimony to that effect.

The testimony of Orval Peterson, brother of Ronald Peterson who is Appellant's immediate predecessor, testified that from the time he was a little boy working for his father the fence was there (T-37) and family operations were always carried on right up to the fence (T-38). Orval did not personally remember there being a dispute regarding the fence as the boundary line (T45). He did recall, though, that a predecessor, A. E. Roche, had had some trouble and

lost some land back in the twenties, but the testimony is very sparse as to details (T-43). He always considered the fence to be the boundary line, and though it may have been built for the additional purpose of holding cattle (T-43), he always farmed right to the fence (T-44).

Dennis Larkin, another farmer in the area, confirmed that the fence was of ancient origin, and he personally knew that the fence had been there for at least thirty-five (35) years (T-47).

A survey was made in 1974 by the County Surveyor after Respondent had removed the disputed fence, and it revealed that the fence was some thirty-three (33) feet south of the line which the survey ascertained to be the true line between Sections 14 and 23. The survey was performed to locate the section corner of Sections 14, 15, 22 and 23 at the request of another engineer-surveyor from Tremonton, Utah. The County Surveyor testified that because original monuments are necessary to establish a corner and "make it authentic and legal" (T-100), he looked for a monument where all now know that Sections 14, 15, 22 and 23 meet, but could not find the monument because the spot lies in the middle of a county road (T-110). He also testified that a land owner would not have found a marker, either; like himself, the landowner would have to establish one (T-110).

The witness explained the difficult labors he went through to locate the corner. He found a marker stone one mile directly west of the disputed corner, another rock one

mile south of the corner lying on the ground in disoriented fashion (T-102), and another large stone one mile east of the disputed corner, which stone was large, irregularly placed and covered with mud (T-103). He did not find a monument to the north of the disputed corner and concluded that it had probably been obliterated for many years (T-103). After locating the stones which served as monuments, he proceeded to check out his measurements by "tying down the fences", meaning, he started measuring distances in accordance with where the people had established boundaries themselves through the use of fences (T-104); but, he added that no consideration is given to roads or ditches in determining section corners (T-117). After a series of measurements, he put his information together (T-104), and using his best judgment as a surveyor and his authority as the County Surveyor (T-114), he marked the section corner.

The disputed fence line was about thirty-three (33) feet south of what the County Surveyor determined to be the true boundary. The surveyor did not use the disputed fence as a reference point from which to work when he "tied down the fences" but testified that he would have used it had it existed (T-112). He further states that the disputed fence's location would not have changed his ultimate decision; he would have taken the fence to be the south side of the right of way (T-113).

He did not testify as to how he deduced that a right

of way existed; there are no easements or records on the land in dispute in either Section 23 or Section 14.

(R-Defendant's Exhibit No. 11, Plaintiff's Exhibits Nos. 5, 6, and 7).

Several items in Plaintiff-Appellant's abstract conspicuously evidence a right of way for road along the western boundaries of her land. There are none which show easements or rights of way along the southern boundary though there are deeds containing boilerplate that the conveyance is subject to easements and rights of way of record. There is one irregularity in the chains of title, though. In Plaintiff's Exhibit No. 5, Item No. 10, there is an Affidavit by A. E. Roche by which he reaffirms that he never owned an interest in land in Section 23; this is dated May 26, 1954 and refers to the May 24, 1926 Quit Claim Deed, which is Plaintiff's Exhibit No. 7, Item No. 17, in which Roche quit claimed to a strip of land in Section 23. Both of these documents refer to land in Section 23 and do not speak of easements in Section 14.

The physical features of the surrounding area offer no strong clue that the fence had been mislocated. There were no survey monuments which were readily visible from which to start measurements. The fence line lined up well with the south side of a county road to the west which ran east and west (R-Plaintiff's Exhibit No. 4). A road and ditch of Defendant-Respondent were located south of the disputed fence line.

ARGUMENT

POINT I

A CLAIM TO LAND UNDER THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE REQUIRES THAT THE CLAIMING PARTY ESTABLISH FOUR ELEMENTS: (A) THE LINE MUST BE OPEN, VISIBLE AND MARKED BY MONUMENTS, FENCES OR BUILDINGS, (B) MUTUAL ACQUIESCENCE IN THE LINE AS THE BOUNDARY, (C) FOR A LONG PERIOD OF YEARS, (D) BY ADJOINING LANDOWNERS. ESTABLISHMENT OF ALL FOUR ELEMENTS CREATES THE PRESUMPTION OF A LEGALLY BINDING AGREEMENT AS TO THE BOUNDARY, WHICH PRESUMPTION MUST BE OVERCOME BY SPECIFIC EVIDENCE THAT THERE WAS NO AGREEMENT. HOLMES V. JUDGE, 31 U. 269, 87 P. 1009 (1906), TRIPP V. BAGLEY, 74 U. 57, 276 P. 912 (1928).

A. THE LINE MUST BE OPEN, VISIBLE, AND MARKED BY MONUMENTS, FENCES OR BUILDINGS.

This requirement of an open, visible and well marked boundary finds its roots in the early landmark cases which established the doctrine of boundary by acquiescence. Holmes v. Judge, supra, Brown v. Milliner, 120 U. 16, 232 P.2d 202 (1951). The requirement that the boundary be open, visible or well-marked by monuments is a method of testing whether the claimant's to disputed land have reasonably believed that such monuments are the actual boundaries of their land. When the Court finds that no one could reasonably believe that a particular line was the boundary, the doctrine of boundary by acquiescence is denied. Tripp v. Bagley, supra. The Court in Tripp found that the claimed boundary line, a zig zag fence built upon the prairie, could not possibly have been regarded as the boundary by reasonable men. But reasonableness is determined from the circumstances of each case as Baum v. Defa, 525 P.2d 725 (1974) makes clear. In Baum, the Court noted that even a zig zag

line can be the boundary of land acquired by acquiescence, especially if it is tied to natural monuments as it was in Baum.

The facts of the instant controversy satisfy this first requirement. The disputed boundary had been marked by an ancient fence whose origin dates past the memory of any of the disputants or their predecessors in title.

The trial court found that reliance on the ancient fence was not justified. In his memorandum decision, the Court stated that "the section lines can be determined with very little effort" and that it was obvious from the surrounding fences that the disputed fence encroaches two (2) rods onto Respondent's property. These conclusions of the Court come and can come only after having had the benefit of the testimony of several witnesses, especially the testimony of the County Surveyor. But Appellant's had no such testimony nor schooling in surveying with which to locate their boundaries. The testimony at trial, especially that of the County Surveyor, shows that reliance on the existing fences as boundary markers is not unreasonable. The County Surveyor testified that even if Appellant had looked for a section corner monument, she would not have found one but would have had to establish one as he did. He testified that in establishing such a corner he presumes the fences to make property boundaries, and it is from this presumption that he operates in taking measurements to interpolate the correct location of markers. Such interpolation was possible only after the

County Surveyor had searched for and found only three of four markers, two of which were ordinary stones found lying on the ground, all at least a mile from the disputed corner.

The cross examination of Appellant by Respondent's attorney at trial attempted to show that Appellant had failed to heed the legal description of the deed by which she claimed title to her land. Apparently, the thrust of his cross examination was that all, no matter what the circumstances may be, should be held to a duty to locate boundaries with the knowledge of surveyors, and that that knowledge would have immediately alerted Appellant and all others like her to the fact that, despite an ancient fence line, the true boundary was some thirty-three (33) feet north of the fence line.

To require conduct consistent with such high levels of knowledge is too much. This fact is apparent when it is realized that the County Surveyor performed his task of locating the section corner at the request of another engineer-surveyor who lived in a nearby town. The other surveyor needed the section corner in order to start his survey. Knowledge rising to the level of a surveyor's surveyor is an unreasonable requirement to make of land owners, especially when a fence has stood on the presumed boundaries for longer than any living soul can remember.

Further, nothing in the three chains of title through which Appellant holds title to her land can be construed as notice to her that the fence line could not reasonably be her boundary. The deeds make specific mention of a right of way for road imposed on the west side of the property. Any

reference to a right of way for road along the southern boundary is conspicuously missing from deeds affecting the southern boundary. Such conspicuous absence of a right of way for road in light of the conspicuous presence of a right of way for road creates a strong, justified impression that rights of way to the south do not exist and there are no problems regarding the boundary. Respondent's whole argument is that Appellant knew the fence line was off the true boundary to provide for a right of way for a road which was to be built. Neither Appellant nor her predecessors had actual or constructive knowledge of such a right of way, and it strains the limits of reasonableness for Respondent to claim that he has waited and is now still waiting for a road which has been over forty years in coming.

There are two irregularities which appear in Appellant's abstracts which consist of an Affidavit and a Quit Claim evidencing that A. E. Roche, a predecessor of Appellant, relinquished his claim to land in Section 23. That dispute occurred in the 1920's at a time when none of the witnesses who are predecessors in title here would have had first hand, clear knowledge of the nature of the dispute. In addition, the Quit Claim Deed and Affidavit become meaningful only if the true boundary to Section 23 was known to the relevant parties. Because section lines do not exist in nature on the face of the land, it would be only reasonable for Appellant and her predecessors in title to even more confidently assume that, though there was once a dispute to the boundary line,

that that dispute had been settled and the fence stood as a memorial of its settlement. It is not reasonable to assume that after a victory in a dispute over one's own boundaries that the victor would then rebuild the fence upon the exact line which marked the claim of the other's encroachment.

B. THERE MUST BE MUTUAL ACQUIESCENCE IN THE LINE AS THE BOUNDARY.

The name of the doctrine suggests that there must be some sort of dispute or controversy or uncertainty as to the true location of the boundary. Tripp v. Bagley, supra. Were it not so, one party could not acquiesce or give in to the assertions of another. The requirement of dispute or uncertainty is often implied as a matter of law as the Utah Courts have made clear.

"In some of the opinions of this Court on the subject of disputed boundaries, there are statements to the effect that the location of the true boundary must be uncertain, unknown or in dispute before an agreement between the adjoining land owners fixing the boundary will be upheld, citing Tripp v. Bagley, supra, in support thereof. Such statements should be understood to mean that if the location of the true boundary line is known to the adjoining owners, they cannot by parol agreement establish the boundary elsewhere. As was pointed out in the Tripp case, such an agreement would be in contravention of the statute of frauds. But the Tripp case does not require a party relying upon a boundary which has been acquiesced in for a long period of time to produce evidence that the location of the true boundary was ever unknown, uncertain or in dispute. That the true boundary line was uncertain or in dispute and that the parties agreed upon the recognized boundary as the dividing line will be implied from the parties' long acquiescence." (Brown v. Milliner, supra, at 208).

The implication by law of a dispute or uncertain

boundary may or may not be needed in the instant case because Respondent's witness and predecessor testified that he thought there was an actual dispute clear back in 1933 when he first became acquainted with the fence. During cross examination he admitted that though he thought there was a dispute as to the fence's location that went back in time for two generations, he built a new fence over an even older fence whose creation dated back at least through the thirties. Further, since the time of his construction of the fence he admitted that he did in fact acquiesce in the use of the land on the north side of the fence from 1933, and that since 1933 he never disputed nor interfered with the exclusive use of the property by his neighbors.

Respondent maintains, though, that he never agreed to nor intended the fence to be or become a boundary line, but that he has always considered the fence to be a barrier to animals and nothing more. In Brown, though, the Court clarifies that the doctrine of boundary by acquiescence does not require an express agreement as to the fence as the boundary.

"We have further held in this state that in the absence of evidence that the owners of adjoining property or their predecessors in title ever expressly agreed as to the location of the boundary between them, if they have occupied their respective boundaries up to an open boundary line visibly 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 U. 269, 87 Pac. 1009." (Brown, supra, at 204).

In the later case of Hummel v. Young, 1 U. 2d 237, 265 P.2d 410 (1953) the Court restates the Brown rule that even if there is no proof of agreement of the fence as the boundary, such agreement will be implied by law if the boundary was clear, visible and marked by monuments and mutually recognized as the dividing line if the facts allow a reasonable reference of agreement. In Hummel such a reasonable inference of agreement was not found from the factual situation. Justices Wade and Crockett wrote interesting concurrences in that case.

"...The talk of an agreement is merely the legal or roundabout method used by the Courts in holding that acquiescence alone is sufficient and it is immaterial whether such an agreement was ever reached. To that effect is Holmes v. Judge, one of our earliest and most carefully considered cases.... We quoted with approval from Baldwin v. Brown, [16 N.U. 359, at page 363] as follows:

* * * The acquiescence in such cases affords ground, not merely for an inference of fact to go to the jury as evidence of an original parcel agreement, but for a direct legal inference as to the true boundary line * * * .
[Emphasis in original].

This quotation clearly holds...that the true boundary line will be inferred...as a matter of law, and that evidence that there was no agreement is inadmissible because it is immaterial. (Hummel v. Young, supra, at 413)."

In Hummel and the later case of Ringwood v. Bradford, 2 U. 2d 119, 269 P.2d 1053 (1954) the Court recognizes that there are certain situations where the law will allow the presumption to be rebutted. If the parties knew that the line they acquiesced in was not the true boundary line or if they temporarily set a boundary with the express understanding that the boundary would be later determined, and possibly if

the line was acquiesced in by mistake, the presumption will not hold. But both cases make it clear that the mere proof of a lack of agreement is not alone sufficient to rebut the presumption.

In the instant case the facts reasonably allow the presumption of the law to stand. Relying heavily upon Wright v. Clissold, 521 P.2d 1224 (1974) Respondent argues that the fence was built entirely for the control of animals and not built to settle a boundary dispute; he argues that Wright is exactly the same as the instant case. Respondent's reliance upon the Wright case stems primarily from that case's discussion between fences built as animal barriers and fences built to settle boundaries. Apparently Respondent feels that this fact would put his case into one of the exceptions recognized in Hummel and Ringwood. Respondent's attorney elicited testimony that the fence was built solely as an animal barrier and not as a boundary division. But the facts involved in Wright are substantially different from those here. In Wright though the fence line dated back to 1933, it appears that before its purchase by Defendant in 1946 (Defendant is claiming the land by asserting acquiescence) the fence was used only to hold cattle and did not serve as a division between adjoining land owners simply because there were no neighbors whose boundaries had to be defined. Whereas, for as far back as memory goes, the fence in the instant case has been relied on as a boundary line. Two years after his purchase the Defendant in Wright was advised

that the fence was not the boundary and after his attempt to buy the disputed parcel failed, Defendant continued in his use of the land for only another twenty (20) years before suit was brought. This was a much shorter period than is involved in the instant dispute. There was even testimony at trial that the Defendant in Wright once admitted in 1962 that he did not own the disputed parcel and that he used it on the owner's permission; while here, Appellant never made such a confession but has always maintained that she owned to the fence.

Further, in Appellant's research, the only case which ever cites Wright v. Clissold is the case of Baum v. Defa, 525 P.2d 725 (1974). In Baum the Court refers to the Wright holding regarding fences built solely as animal barriers and then adds an important clarification that fences built initially as animal barriers may later become property division lines.

"On the other hand, if the property on either side of such a fence is conveyed to separate parties, so that there comes into being separate ownership of the tracts on either side, and the circumstances are such that the parties should reasonably be assumed to adopt the fence as the boundary between their properties, then from that time on, the time during which the fence continues to exist, should be regarded as going toward the fulfilling the time requirement for the establishment of boundary by acquiescence." (Baum, supra, at 727).

In Baum the separate ownership of properties on each side of the fence continued for only twenty-six (26) years and involved a zig zag fence, but the Court still found that a boundary by acquiescence had been created. In the instant

case, ownership has been for a much longer time and the fence is straight and easily presumed from the circumstances existent at the time that the respective property owners started using the fence as a division line to be the division between Sections 13 and 14.

The 1974 Baum case in which Justice Crockett was joined by Chief Justice Callister and Justices Henroid, Ellet, and Tuckett relied heavily upon the policy which undergirds the doctrine.

"The doctrine of boundary by acquiescence derives from realization, ancient in our law, that the peace and good order of society is best served by leaving at rest possible disputes over long established boundaries. Its essence is that where there has been any type of recognizable physical boundary, which has been accepted as such for a long period of time, it should be presumed that any dispute or disagreement has been reconciled in some manner." (Baum, supra, at 726).

In summary of this element, it is established from the evidence that the fence stood for over forty years and served as the division between the adjoining properties. Respondent's predecessor admitted that he has never interfered with Appellant's use of the land, and Appellant and her predecessors testified that they always used the land right to the fence as their own; though the fence may have been constructed to hold animals, it has since served as the recognized division between the two properties for over forty years.

C. THE FENCES MUST STAND FOR A LONG PERIOD OF YEARS.

The laws requires the existence of the division line for

agreement. The period required will depend on the circumstances, but unless unusual circumstances exist, twenty years is usually considered the minimum. Hobson v. Panguitch Lake Corp, 530 P.2d 792 (1975). In Baum v. Defa, supra, the Court found that a period of twenty-six (26) years was enough. As has been pointed out before, the fence line in the instant dispute is over forty (40) years old.

D. THE DIVISION LINE MUST EXIST BETWEEN ADJOINING LANDOWNERS.

The fourth requirement in establishing a boundary by acquiescence requires that the division line must exist between adjoining landowners. Whether the adjoining landowners must establish the entirety of the long holding period themselves or whether present landowners may "tack" the period of possession of their predecessors in title has never been clearly decided in Utah on the doctrine of boundary by acquiescence, though it is clear for adverse possession.

The doctrine of boundary by acquiescence is quite similar to U.C.A. 78-12-10, adverse possession "under claim not founded on written instrument or judgment" and the rule of tacking should follow the adverse possession rule. In fact, the annotations to that section include a heading labeled "Boundary by Acquiescence".

The Utah Courts follow the general rule requiring privity between those who wish to tack holding periods. In Homeowner's Loan Corporation v. Dudley, 105 U. 208, 141 P.2d 160 (1943), the Court at 168 cites the A.L.R. annotation. At 46 A.L.R. 792 - 799 the general rule is "that a deed does not of itself

create privity between the grantor and the grantee as to land not described in the deed, but occupied by the grantor in connection therewith, although the grantee enters into possession of the land not described and uses it in connection with that conveyed". In the instant case, the land which Appellant now claims is technically land not found within the deed's description and thus, at first blush, it appears that Appellant will not be allowed the benefit of the long period of continuous holding of her predecessors. But this rule does not apply here. This is because the deed description by itself is not adequate to locate the property boundaries unless those boundaries are marked by something: Section lines do not appear in nature upon the face of the earth. Appellant and her predecessors reasonably and naturally assumed that their deed's descriptions conveyed property which ran right up to the fence which they thought marked the southern boundary of Section 14. The A.L.R. annotation recognizes this situation and at 793 the limitations to the general rule is outlined.

"The foregoing rule is very strictly limited (see the following subdivision of this annotation), and, while broader language may be found in some cases, it is apparently applicable to those cases only wherein the deed itself is relied on solely to create privity, and there is no circumstance showing an intent to transfer the possession of any property beyond the calls of the deed."

At 797 the annotation quotes Naher v. Farmer, 60 Wash. 600, 111 P. 768 (1910) which illustrates the well-recognized limitation and allows tacking of a predecessor's holding period.

"While it is true that the deeds which passed title to the successive owners described only Lot 4, there was nothing to indicate the boundaries of that lot upon the ground except as it was enclosed and employed. It appears that the owner,

from the time of the purchase by Mr. Broughton in 1898 down to the time of this action, believed that Lot 4 was the tract of land within the enclosure, and possession of the enclosed premises was held openly and exclusively, and the conveyances made thereof as Lot 4. Under these circumstances the description in the deed must be held to include the land in dispute."

The Court here is asked to authoritatively adopt the same line of reasoning it has applied to adverse possession to the doctrine of boundary by acquiescence. Such reasoning seems to have been applied in the 1963 case of King v. Frank, 14 U.2d 135, 378 P.2d 893 (1963). In that case the same District Court as the District Court in the instant case held that the proof did not justify the claim by acquiescence to the disputed land. The Supreme Court reversed the District Court and granted the land to the claiming party, but neither Court ruled directly on the issue of tacking. The claiming party had not held the land for over twenty (20) years, but was still in the process of purchasing it under contract from one who acquired the land in 1945, which period is only sixteen (16) years to the date of the first protest by the acquiescing party in 1961. In 1961, the acquiescing party had held the land personally for thirteen (13) years. The Court there reviews cases which discuss the length of period needed to create the presumption and states that "...it seems to us that establishment of boundary by acquiescence must be predicated upon the existence of a visibly monumented line persisting for at least twenty (20) years or upwards...(King, supra, at 897)". The Court in King required at least twenty (20) years, but the disputants had held the land personally for less than

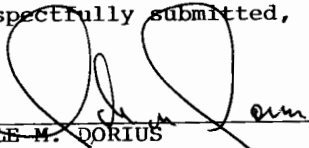
that period, though their chains of title went back for thirty-five (35) years. King tacitly permitted tacking, but a definitive statement in the instant case on the issue of tacking will do much to clarify the requirements of the doctrine of boundary by acquiescence.

CONCLUSION

The elements required to establish as a matter of legal implication a boundary by acquiescence were all clearly present and undisputed here. The fence line had been a (1) visible monument which (2) Respondent and his predecessors allowed to stand as the property division line (3) for a period of at least forty (40) years (4) between their interests and those of Appellant and her predecessors.

The legal presumption was established at trial, and as a matter of law the lower Court should have ruled in Appellant's favor. Appellant hereby prays for a reversal of the lower decision which was clearly against the evidence.

Respectfully submitted,



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CERTIFICATE OF SERVICE

SERVED the foregoing Brief of Appellant by mailing two copies thereof, postage prepaid, to WALTER G. MANN, MANN,

HADFIELD & THORNE, Attorneys for Respondent, 35 First Security

Bank Building, Brigham City, Utah 84302, this 18 day of
October, 1978.



DALE M. DORIUS