

1978

Lucile M. Hale v. Ralph Frakes : Brief of Defendant-Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Walger G. Mann; Attorney for Defendant-Respondent;

Dale M. Dorius; Attorney for Plaintiff-Appellant;

Recommended Citation

Brief of Respondent, *Hale v. Frakes*, No. 15771 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/1236

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

| | | |
|----------------------|---|----------------|
| LUCILE M. HALE, | : | |
| Plaintiff-Appellant | : | Case No. 15771 |
| vs. | : | |
| RALPH FRAKES, | : | |
| Defendant-Respondent | : | |

BRIEF OF DEFENDANT-RESPONDENT

APPEAL FROM A JUDGMENT AND DECREE OF
THE DISTRICT COURT OF BOX ELDER COUNTY,
UTAH. HONORABLE VENOY CHRISTOFFERSEN,
DISTRICT JUDGE, PRESIDING

WALTER G. MANN of
Mann, Hadfield and Thorne
35 First Security Bank Building
Brigham City, Utah 84302
Attorney for Defendant/Respondent

DALE M. DORIUS
29 South Main Street
Brigham City, Utah 84302
Attorney for Plaintiff/Appellant

FILED

NOV 15 1978

TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| STATEMENT OF NATURE OF CASE | 1 |
| DISPOSITION IN LOWER COURT | 1 |
| RELIEF SOUGHT ON APPEAL | 3 |
| STATEMENT OF FACTS | 3 |
| ARGUMENT | 18 |
| POINT I: THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE DOES NOT APPLY AND THE RESPECTIVE PARTIES SHOULD BE AWARDED THEIR LEGALLY DESCRIBED TRACTS OF PROPERTY | 18 |
| CONCLUSION | 27 |

AUTHORITIES CITED

PAGE

Cases Cited:

| | |
|---|--------|
| <u>Brown v. Milliner</u> 120 V.16, 232 P.2d 202 (1951) | 22 |
| <u>Florence v. Saracino</u> No. 15166 (1978) | 25, 26 |
| <u>McBride v. McBride</u> No. 15378 | 27 |
| <u>Tripp v. Bagley</u> 74 V.57, 276 P.912 (1928) | 22, 23 |
| <u>Wright v. Clissold</u> 521 P.2d 1224 (1974) | 24, 25 |

IN THE SUPREME COURT OF THE
STATE OF UTAH

| | | |
|----------------------|---|----------------|
| LUCILE M. HALES, | : | |
| Plaintiff-Appellant | : | Case No. 15771 |
| vs. | : | |
| RALPH FRAKES, | : | |
| Defendant-Respondent | : | |

BRIEF OF THE DEFENDANT-RESPONDENT

NATURE OF CASE

This case involves a claim of title by appellant to a two rod wide strip of land running east and west along the north side of Section 23 and being within its boundaries.

DISPOSITION IN LOWER COURT:

The Honorable VeNoy Christoffersen, having viewed the property at the request of the plaintiff-appellant, after the hearing was held, found and determined that the fence line in question was established by defendant-respondent's predecessors upon the property owned by the defendants at a point running east a certain distance from the north-west corner of Section 23 and commencing approximately

two rods south of the north line of Section 23, all in anticipation that a public road would be created four rods wide running east and west along the north side of 23 and the south side of Section 14.

The court also found that said proposed two rod right of way at one time had been the subject of litigation in Civil No. 3978 in the District Court of Box Elder County (Findings 4) and that the fence was built to protect against trespassing animals when said road was to be used. Also, that plaintiff's predecessors knew that the fence was on the defendant's property and was not a boundary line fence, and was not intended as a boundary line fence. That any view of the property and particularly at the intersection to the corners common to Sections 14, 15, 22, and 23 plainly reveals that the fence line claimed by plaintiffs as the property line is an incursion into defendant's property of about two rods and was not to be a boundary line between plaintiff's and defendant's property. (Findings 5).

That there was no acquiescence by the parties or their predecessors that said fence was ever the true or agreed line between said parties. (Findings 6)

That said fence so established on defendant's property by defendant's predecessors was defendant's property and could be removed at his will. (Findings 8)

That the defendant was granted a judgment dismissing plaintiff's complaint, no cause of action (Judgment and Decree) and by said decree the section lines and corners were declared as fixed by the County Surveyor. (Judgment and Decree and Defendant's Exhibit #10)

RELIEF SOUGHT ON APPEAL:

Defendant-Respondent requests this court to uphold the decision of the trial court.

STATEMENT OF FACTS:

The properties involved are located upon the intersecting corners of four sections; namely 14, 15, 22 and 23 with the plaintiff's property being located in Section 14 with its southwest corner being the southwest corner of Section 14 and the defendant's property being located in Section 23 with its northwest corner being the northwest corner of Section 23. There are established county roads between all properties on said common corner except between Sections 14 and 23 and there has been a history of trying to establish one here for a great many years.

The plaintiff bought her property in Section 14 and received a deed (Plaintiff's Exhibit #1) dated the 18th

of May, 1973, conveying only property in Section 14. She received three abstracts of title (Plaintiff's Exhibits 5,6 and 7). At the trial her attention was called to Item 17 of said abstract (Exhibit #7). This item shows a stranger in her chain of title by the name of A. E. Roche and wife giving a quit-claim deed to one of her predecessors in interest, to-wit: Peter C. C. Peterson, covering not only a portion of the land that she was buying but also the following:

"Also commencing at the northwest corner of Section 23, Township 11 North, Range 4 West, SLM, thence South 2 rods, thence East 82 rods, thence North 2 rods, thence West 82 rods to place of beginning."

This deed was dated May 24, 1926 but was not recorded until November 27, 1950.

Her abstract (Plaintiff's Exhibit #7) also shows on Item 20, that on June 25, 1946 Peter C.C. Peterson and wife conveyed to Ervin C. Peterson, in her chain title the property in Section 14 only, but did not include the two rod strip that was shown in the previous deed going to him in Section 23. Her abstract (Exhibit #7) Item 21, shows that Ervin C. Peterson and wife on November 25, 1950 mortgaged a portion of the property she was purchasing to Bear River State Bank and in this mortgage

they did include the two rod strip in Section 23, even though they had received no deed for the same from Peter C. C. Peterson. Item 40 of said abstract shows that Ervin C. Peterson and wife conveyed on July 19, 1965 to Ronald Peterson and wife, the plaintiff's immediate predecessor, land in Section 14 only and conveyed nothing in Section 23. Plaintiff's Exhibit #6 being one of her abstracts shows (Item 17) Ronald Peterson and wife acquiring the 20 acre tract in the extreme southwest corner of Section 14. The deed from Ronald Peterson and wife to the plaintiff (Plaintiff's Exhibit #1) is shown in plaintiff's abstract (Exhibit #7) at Item 46 (Exhibit 5) at Item 27 (Exhibit 6) at Item 32.

Defendant's abstract of title, (Defendant's exhibit 11) has a history to the title to Section 23. The abstract is in two parts. It has pages 1 to 61 and then pages 1 to 30 and covers the north half of the north half of said Section 23.

This abstract shows items that affect this two rod right of way in Section 23 as follows:

(a) Item 40 of the first numbering is a deed, dated February 16, 1942 from Wesley Dunn and wife to John D. Newman and wife which conveyed a tract as follows:

"Beginning at a point 30 rods west of the northeast corner of Section 23 T.11.N.R.4.W.SLM, thence West 117 1/2 rods, thence South 80 rods, thence East 117 1/2 rods, thence North 80 rods to the place of beginning. Containing 59 acres more or less, subject to a strip of land two rods wide on and along the north side for road, also subject to tile drain across said land to land lying to the west thereof. Also conveying a right of way along the north side of said Section from the above described tract to the northwest corner of Section. (Underlinings added).

Also beginning two rods South of of the Northwest corner of said Section, thence running East 16 rods, thence South 10 rods, thence West 16 rods, thence North 10 rods to place of beginning, containing 1 acre, more or less. Together with all water rights used upon in connection with said land."

It is interesting to note the last description is a one acre tract in the northwest corner of said section is for a house and out buildings, but the description starts two rods south of the northwest corner and goes east and south leaving the two rod right of way still to the north of this tract.

(b) Item 47 is another deed from Wesley H. Dunn and wife to John D. Newman and wife and this is a two rod right of way that begins six rods west of the northwest corner of the northeast 1/4 of the northeast 1/4 of

Section 23 and runs west 113 1/2 rods.

(c) Items 59 and 60 are the order authorizing administratrix's deed to the north 1/2 of the north 1/2 Section 23 to John D. Newman which would include the right of way.

(d) Under Item 1 of the second set of numbering in said abstract, A. E. Roche and wife who had no record title whatsoever quit-claimed to Peter C.C. Peterson this right of way strip two rods wide within Section 23. Item 2 following it shows Ervin C. Peterson and his wife mortgaging to Bear River State Bank their lands in Section 14 and also the two rods in Section 23. Then in Item 3 it shows a partial release of mortgage issued from the Tremonton Branch First Security Bank of Utah N.A. and down below it says as successor to the Bear River State Bank to this two rod strip in Section 23. This release was issued to Ervin C. Peterson and wife and recorded for the benefit of the Newmans, the owners of the land in Section 23, according to the testimony at the hearing. (T.124 Lines 22-25). This was done so that Mr. Newman could mortgage his land without a lien upon that two rods in question on the north side of his section.

How Mr. Roche came into the picture is explained by John Newman's testimony. (T.130 Lines 18-22). On page 131 of the transcript a Civil File No.3978 entitled "Alman L. White and Mary A. White vs. A. E. Roche and Alice Roche, defendants", dated December 10, 1925, was introduced and the court was requested to take judicial notice of it. The court's attention was called to the action which was brought to enforce or terminate a certain contract that is shown in said civil action as Exhibit "A". This Exhibit "A" was an agreement to purchase a two rod right of way by A. E. Roche and describes it as:

"Beginning at the northwest corner of Section 23, T.11.N.R.4.W. SLM, thence East 83 rods, thence South 2 rods, thence West 83 rods, thence North 2 rods to point of beginning."

Provided:

"It is expressly agreed and understood that the right to travel and use for all legitimate purposes is the intention and purpose of this agreement, but the title to property remains in the parties of the first part."

Then there were provisions for building fences.

The fence built was offset two rods from the defendant-respondent's north property line. The defendant is buying on contract this particular land in Section 23

from John Newman. John Newman testified in this case.

In the Transcript page 129 line 14 we have:

"Q. And in 1933, the year you were married, and you worked for W. H. Dunn, was there livestock being run in these two sections?

A. Right.

Q. Were you employed to do a particular chore at that time in regard to the livestock?

A. I was employed to put the fence in on the first 80 rods there."

Transcript page 130 Line 4 we have:

"Q. And what did you build it for?

A. For sheep.

Q. Was it in line with the south fence on the West of this highway going west?

A. Yes.

Q. The fence that you run to the east?

A. Yes.

Q. At the time you built that Mr. Dunn owned both pieces of land?

A. Both pieces, yes.

Q. Was there any fence from there running east?

A. An old one.

Q. An old fence?

A. Yes.

Q. And do you know who might have built that old fence?

A. A. E. Roche.

Q. Was A. E. Roche at one time buying this piece of property?

A. Yes.

MR. MANN: Now, if the court please, I guess you take judicial notice of court files.

THE COURT: If it's a court file."

Transcript Page 131 Line 1:

MR. MANN: I offer in at this time Civil #3978..."

On the theory of whether or not there had been any acquiescence that the fence line established by John Newman was a division line, he was asked this question.

(TR. 137 Line 19).

"Q. Have you ever agreed with anybody in Section 14 or claimed that they had anything in 14 that any fence that was established up here was the division line between you and the man to the north?

A. No. No, that was just a fence for cattle.

Q. Did that fence act to keep cattle from getting in on your property?

A. Yes."

Transcript Page 138 Line 16:

"Q. If a highway is built or a roadway is built up between these sections, then any fences that were or had been here, would they be on the south side of the highway?

A. Yes.

Q. Practically in the place where they are now?

A. Right.

Q. In regard to that desire to have a road up here, did that have anything to do with you not attempting to tear down this fence that was what you considered on your property?

A. Yes.

Q. And why?

A. Well, thought we'd get a road, there would be no use of tearing the fences down. We had it sheep tight, you see.

Q. And if you tore fences down you'd have to put it back up?

A. Yes."

On redirect examination of Mr. John Newman (TR.150 Line 12) talking about the fence that had been built on Section 23:

"Q. Was it considered by you to be on the property line between you and--

A. No, no, it was off the property line.

Q. And had you told those people continuously at different times that it was not on the property line?

MR. DORIUS: I'm going to object unless he lays some foundation.

MR. MANN: Well, he can say "yes" to it.

THE COURT: Well, he can say "yes" or "no" and then if you want to lay a foundation, time and place as to when he did.

MR. MANN: I might not have to unless I know.

A. Yes.

Q. Who are the parties that you did tell that to? Which parties?

A. Oh, Hunsaker, Ronald.

Q. When you say Ronald--

A. Ervin Peterson.

Q. And Ronald, is that Ronald Peterson?

A. Ronald Peterson.

Q. Has there been a dispute about that line ever since you've been connected with it?

A. For two generations.

Q. I think I asked you, but I'm not sure. Did you expect at some time there would be a county road come up through that property?

A. Yes, I was hoping there was. It would straighten out all our troubles."

And again as to whether or not it was intended as a boundary we have in TR. 152 Line 3:

Q. Was it every intended by you that that would be a boundary?

A. Never."

To avoid repetition there are numerous other statements about the fence (TR. 155 and 156). The defendant-respondent received an abstract of title to his property in Section 23 and immediately took it to an attorney for an examination. (TR.158). He says he was concerned with whether or not

there was an easement of two rods on the north side of his property. (TR. 159-23).

"Q. And where did you consider that two-rod easement was on your property?

A. North of the fence line."

He was asked whether or not he had had a conversation with the Hales' people. He said he did - he couldn't remember the exact date, but it was after the time when he had removed the fence.

At TR. 160 Line 23 we have:

"A. Well, he wanted me to put the fence back and I told him I wouldn't do it because it was on my property and it said right in my abstract that the line was over two rods and that he didn't own the fence, never did own it, and wasn't any good anyway and I wasn't going to put it back. And he said, "Well, I'll get a lawyer and I'll take you to court and I'll make you put it back.

I says, "Well, that's your privilege, if you want to do that go ahead." And I told him that it was right in his abstract if he read it. I asked him if he had an abstract and he said yes.

I said, "Well, it should be right in there. Tells about that right of way." And he just ignored me, and that was the end of the conversation."

He testified (TR.162) that he considered the fence to be on his property and also considered that the two rods on the other side was left for a roadway and that he wanted a roadway through there. He was also asked

about the 80 rods that he owns in Section 23 that lies to the east of the east end of the Hales' property in Section 14 (TR.162 Line 23):

"Q. Was there an old fence in that property when you went on it?

A. Yes, there was.

Q. And was it offset at all from the Hales property to the north before it traveled east?

A. Yes, set over at least 32 feet.

Q. And had that fence been in there for a long length of time?

A. Well, to my knowledge it looked like it had been there several years."

He testified that he took that fence out (TR.163) and the individual that owned the property to the north of him which was the owner of land in Section 14 immediately east of the Hales' property and to the section line assisted him in putting a new fence in and that it was put back exactly where it was. He also testified that standing on the east fence that was reconstructed by him and his neighbor that it appeared that said fence line, if extended westerly, would hit the center of the road in the next section west. (TR.162 Lines 23-25).

He was asked (TR. 164) whether the Haleses ever came to him before buying and asked where

the division line was and he said, "No, they had not". He was asked on cross-examination (TR.166 Line 22) whether he knew when he bought the property that there had been a dispute on the boundary line and he said he did know. At the conclusion of the case (TR. 177 Line 11) the court said it wanted to view the property, read the abstracts and the court case of 1922. He directed the parties to submit briefs and then there would be time granted for arguments.

The court after viewing the property, checking the abstracts and the 1922 court case, and reading the written briefs, issued its Memorandum Decision (Record 0048) and at the bottom of the first page said:

"A view of existing fence lines that exist on both sides of the property for quite a distance would indicate that this fence line is an incursion into defendant's property of about two rods that is different from other fence line. Also, the history of the titles of both this property and other adjacent properties would indicate that the present difficulties arise from previous attempts to release property of sufficient width, in this case a total of four rods for the purpose of establishing a roadway to be built in the future.---

In viewing the overall picture of what the parties, especially the predecessors in interest of the parties, were doing, one can see why there would be a fence for a long period of time existing

that would encroach onto the defendant's property as fixed by deed and survey. That there was really no acquiescence by the adjacent property owners that was the true boundary line, and further, that the section lines can be determined with very little effort, and that plaintiff's claim of their fence being two rods south of the line which is different from her deed, would appear apparent if observation of that fence line in conjunction with the others were made."

It was plain to the court that from the view of the premises anyone could see that there was an incursion into the property of the defendant as compared with the other existing fence lines of neighboring property owners. From a reading of the transcript of plaintiff's testimony, it is plain to see that she attempted on every occasion to avoid any knowledge of any other fences, particularly on the east end of her property where there was an offset of about 33 feet. She did, however, bring in Orville E. Peterson as one of her witnesses and he knew about offset fence. (TR. Page 40 Lines 1-8). He knew that A. F. Roche, the individual that had issued quit-claim deeds to one of the predecessors of the plaintiff, at one time operated some property in there and knew that he had lost the property. Donald Hales, a son of plaintiff, said that they determined the property from what the real estate man told

them. (TR.66 Lines 21-23). Again on TR. 67 Line 17 he said that they relied on what the real estate man told them and nothing else. Weldon Albert Males, the husband of the plaintiff, said that in the fall of 1973 Frakes came over and said he had some property on their side of the fence. (TR. 69 Line 22). He admitted that on the east end of his property that there was an indented fence line, but said that he does not recall observing it when he purchased the property. (TR. 71 Lines 19-25). He also said he relied on the real estate man when he bought the property. (TR. 78 Line 1-7).

The court had the opportunity to listen to each and all of the witnesses and observe their manner of testifying. He had a view of the property and the things that would be apparent to any ordinary prudent individual. He had read and taken Judicial notice of the litigation in file 3978. He had the benefit of the briefs which were very extensive and furnished by each of said parties and made his Memorandum Decision thereafter.

ARGUMENT

POINT I

THE DOCTRINE OF BOUNDARY BY
ACQUIESCENCE DOES NOT APPLY
AND THE RESPECTIVE PARTIES
SHOULD BE AWARDED THEIR LEGALLY
DESCRIBED TRACTS OF PROPERTY.

Respondent essentially agrees that the four elements set out by appellant constitute the requirements for establishment of a boundary by acquiescence. However, the evidence produced at trial does not establish these four elements and the failure to prove any one of these four elements is a failure to show a boundary by acquiescence. The four requirements stated by appellant are listed below followed by a summary of the evidence produced at trial concerning each point:

(a) THE LINE MUST BE OPEN, VISIBLE AND
MARKED BY MONUMENTS, FENCES OR BUILDINGS.

The evidence and testimony produced at trial show that respondent's predecessor in interest constructed a fence well within the boundaries of his legally described tract for the purpose of controlling livestock and to avoid the necessity of building a new fence when an anticipated county road was constructed. To this effect see the Transcript Pages 129 and

130; also Exhibit A Civil No. 3978, which evidences an easement covering the disputed property.

(b) MUTUAL ACQUIESCENCE IN THE LINE AS THE BOUNDARY.

On this point the record is replete with evidence that the appellant's predecessors in interest knew where the true boundary line was and sought to obtain and in fact did obtain deeds to the disputed area from parties who had no title to the property. (TR. 26 Line 16-24; also pages 123, 124 and 125; also Plaintiff's Exhibit #7 Item 17). Further, that appellant's predecessors in interest obtained a quit-claim deed from a party having no interest in the property on May 24, 1926, and that said instrument was not recorded until November 27, 1950. The record also shows that plaintiff's predecessors in interest attempted to mortgage the disputed property at one time, and when a demand was made for release of the same, it was given on August 20, 1953. (TR. 125 to 125; Defendant's Exhibit #11 Item 3 second series of numbering).

(c) FOR A LONG PERIOD OF YEARS.

This requirement is that the acquiescence

must continue for a long period of years. However, the record developed at trial fails to show acquiescence even for a short period. There was testimony that the respondent's predecessors believed or hoped that a public road would be established (TR. 138 Lines 11-25) and that they desired to avoid the inconvenience of tearing down a fence which was sheep tight and relocating it when the road was actually constructed. (TR. 139 Lines 1-8).

(d) BY ADJOINING LAND OWNERS.

The trial record indicates that the parties have never agreed that the said fence built by respondent and his predecessors on a strip of land two rods south of respondent's true boundary should be recognized as the property boundary line. On the contrary, testimony indicated that respondent and his predecessors have always claimed that the fence was constructed for the purpose of holding cattle. (TR. 137 Lines 19-25; TR.146 Lines 12-19). There was also testimony that respondent and his predecessors had told the predecessors of appellant continuously that the fence was to hold livestock

and was not on the property line (TR.150-152 Line 6), and that the fence was never intended to be a boundary line between the properties.

The appellant did not at any time in the trial proceedings establish elements (b), (c) or (d). Appellant is apparently relying on the theory that by establishing element (a) then elements (b), (c) and (d) will be presumed. This is clearly not the law and overlooks the evidence that appellant's predecessors in interest were trying to obtain instruments showing some title to the land in dispute over a long period of years. Such instruments attempting to show title in the land would not be necessary unless there was a continuing dispute between the parties. The appellant cannot consistently maintain that she and her predecessors in interest believed that Section 14 extended to the fence line when the record and evidence produced at trial clearly shows several recorded documents whereby appellant's predecessors in interest attempted to obtain title to a two-wide strip of land in Section 23.

In order to establish element B appellant desires to have the court imply that there was an agreement fixing the boundary between the parties. This is sometimes allowed but the court in

Brown v. Billiner 120 W.16, 232 P2d 202 (1951),

qualified this procedure as follows:

"...the law will imply an agreement fixing the boundary as located, if it can do so consistently with the facts appearing..." p.207 (emphasis added)

Under the circumstances referred to, it is impossible to imply an agreement consistent with the facts appearing.

The land mark case Tripp vs. Bagley 276 P.912 determined in 1928 is strictly against the plaintiff. The diagram shown in the Tripp vs. Bagley case P.914 clearly shows where the true line was. It also shows a zig-zag course of where the property had been fenced and occupied up to. The owners of the adjoining land occupied their respective properties up to the zig-zag line where the fence had been erected and did so for many years (about 52 years.) It appears that at all times they knew where the true and correct line was and the respective parties paid taxes on their lands up the true line. They had acquiesced in the zig-zag line for many, many years, but the court held that when they knew where the true line was, then acquiescence would not be controlling. The court also held that even though the one party had been in

possession of that portion of land under his control up to the zig-zag fence, and had not paid the taxes on any portion of it, he could not get adverse possession. The facts in the Tripp vs. Bagley case are in respondent's favor, and the doctrine that case laid down is still law. In the instant case everyone knew where the true line was and knew that there was a lane two rods wide that was suppose to come from the defendant's property. They connived and maneuvered and put deeds and mortgages on record showing their actual knowledge of it. If they had a knowledge of it, then they could not by any period of time get any title either by adverse possession or by acquiescence because the true line was always known. The record is clear that the defendant and his predecessors built the fence. They built it two rods south of the true line for the purpose of protecting their own livestock and for the purpose of excluding others from coming in on their property. There was a roadway contemplated by the parties to be established up between the two sections. The irrigation ditches that irrigated the defendant's property, which also ran east and west, were also established off this two rod right of way so that they would not have to be disturbed when the road finally came into existence.

In the case of Wright vs. Clissold 521 P.2d 1224, the plaintiff was the owner of approximately 440 acres. Included within the plaintiff's record of title was an area of approximately 2 1/4 acres to which the defendant had asserted a claim under the doctrine of boundary by acquiescence. The case was decided in favor of the plaintiff and the defendant appealed. The fence between the properties has been up for many, many years. There was some similarity in that case to the one before the court. In that case the defendant's deed did not include the disputed area. Neither they nor their predecessors in interest had paid taxes thereon. The fence had been there for many years, but the court found in Page 1226 lefthand column:

"The parties and their predecessors in interest neither treated the fence line as a boundary nor did they acquiesce in said fence as a boundary between the parties."

The circumstances are the same in our case. The predecessors of the plaintiff knew where the correct line was and with that in mind they obtained a deed from an individual who actually never owned title. They even used that same description to cause a mortgage to go on record, but later repented and released it, well knowing that they owned nothing in Section 23 and

all their holdings were in Section 14. There was absolutely no proof that the parties ever intended that the fence built by the defendant's predecessors to hold the cattle was intended as a boundary line fence.

In the Wright case P.1227 lefthand column the court held:

"The doctrine of boundary by acquiescence cannot be invoked in the instant action, since there was evidence that clearly implied that the fence was not built pursuant to an agreement between adjoining land owners. The evidence indicated that the fence was constructed to control cattle and not to locate a boundary which was in doubt or uncertain. In fact, the evidence indicated that the person building the fence situated it upon his own land, and there was no neighbor to consult."

This court's most recent pronouncement regarding the doctrine of boundary by acquiescence involved a factual situation very similar to the present dispute. In the case of Florence vs. Saracino (No. 15166) filed June 14, 1978, the Florences claimed property covered by their legal description and Mr. Saracino claimed property not covered in his legal description, but between his true boundary line and a fence which had existed for many years. A 1976 survey showed that the old fence varied from the true boundary by distances of from 10 to 28 feet. The trial court in that case

found that the doctrine of boundary by acquiescence arises only when the true boundary is either unknown, uncertain or in dispute; none of which had been proved. All members of this court, including Justice Crockett in his concurring opinion, agreed that:

"A fence may be obtained between adjoining proprietors for the sake of convenience without the intention of fixing boundaries. Thus agreement to or acquiescence in the establishment of a fence, not as a line marking the boundary, but as a line for other purposes or acquiescence in the mere existence of the fence as a mere barrier, does not preclude the parties from claiming up to the true boundary line."
(Emphasis added)

The trial court in the present dispute found that the fence had been established for purposes of live-stock control or simply as a barrier, but not as a line marking the boundary. In applying the court's holding in Florence vs. Saracino to the present dispute, it thus appears clear that no boundary by acquiescence was established and that plaintiff-appellant has no legal or equitable claim to the disputed property.

From the foregoing it is clear that the trial judge correctly applied the principles of law to the evidence presented; therefore, the only question remaining is whether the evidence contained in the record is sufficient to support the decision of the trial judge.

In the Utah Supreme Court's most recent pronouncement on this subject a unanimous court stated:

"Defendants contend that the evidence adduced does not support the findings of fact made by the trial judge, and in any event, since this is a case in equity, that we should make our own determination of the facts.

While it is the responsibility of this Court to review the evidence in equity cases, it will not disturb the findings of fact made below unless they appear to be clearly erroneous and against the weight of the evidence. In conducting our review of the evidence we are of course mindful of the advantaged position of the trial judge who sees and hears the witnesses and we are constrained to give due deference to his decisions by reason thereof." McBride vs. McBride No. 15378 filed June 8, 1978.

In the instant case the trial judge had not only the benefit of observing all of the witnesses and documents and other testimony in evidence produced at trial, but also the opportunity to view the property which is the subject of this dispute. In accordance with this court's long established standards, the trial judge should thus be accorded great deference in his decision.

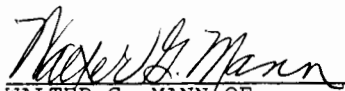
CONCLUSION

Plaintiff-appellant has failed to establish the requisite elements of a boundary by acquiescence in this case. The record is replete with evidence

that there was never any acquiescence in the fence as a property boundary and that both parties' predecessors in interest knew where the true boundary was located.

The law is clear that acquiescence in the establishment of a fence for some purpose other than as a boundary line does not preclude the parties from claiming up to the true boundary line. The respondent therefore requests that the District Court's judgment be affirmed and that respondent be awarded its costs.

Respectfully submitted



WALTER G. MANN (OF
MANN, HADFIELD AND THORNE
Attorneys for respondent
35 First Security Bank Building
Brigham City, Utah 84302

CERTIFICATE OF SERVICE

SERVED the foregoing Brief of Defendant/Respondent
by ^{delivering} mailing two copies thereof, postage prepaid, to
DALE DORIUS, attorney for Plaintiff/Appellant,
P. O. Box U, Brigham City, Utah 84302, this 15
day of November, 1978.


Walter G. Mann