1979

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

Utah Supreme Court

Walger G. Mann; Attorney for Defendant-Respondent;
Dale M. Dorius; Attorney for Plaintiff-Appellant;

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
IN RESPONSE TO DEFENDANT-RESPONDENT'S BRIEF

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

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A. RESPONDENT'S BRIEF IS LARGELY UNRESPONSIVE TO APPELLANT'S BRIEF

Respondent's brief is, in large part, unresponsive to the argument of Appellant. It is clear that 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 boundary, (c) for a long period of years, (d) by adjoining landowners. The 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). This brief shall point out how Respondent's brief is largely unresponsive to the issues of law involved.

B. RESPONDENT NEVER RESPONSIVELY DENIES THAT THE LINE HAS BEEN OPEN, VISIBLE AND MARKED BY MONUMENTS, FENCES OR BUILDINGS

Appellant's brief relates the law as being that ancient monuments may be relied upon as actual boundaries if, under the facts, reliance upon such is reasonable. Reliance may even reasonably be placed in zigzagging lines when it appears that the line is reasonably the boundary. Respondent does not responsibly deny the existence of an ancient fenceline but only recites that the fence was built on Respondent's property and that a prior law suit involved this disputed land. Testimony of both parties-litigant at trial established beyond doubt that the fence and its predecessor fence were of very ancient origin.

Though it is not made clear in Respondent's brief, his recitation that the fence was built upon his land and that there has been a previous suit regarding the disputed land probably goes to whether the parties could have reasonably relied on the fence as a boundary. By his recitations Respondent attempts to show that reliance was

not reasonable, because Appellant had actual and or constructive knowledge that the true boundary was not marked by the fence.

But in Appellant's brief the argument develops the fact that no ordinary man would have known from the legal descriptions of his deed that the fence was misplaced by two rods. Even a surveyor's surveyor presumes that fences are correctly placed until his calculations are complete and his determinations final. Further, nothing in Appellant's chain of title recites that her land is subject to an easement for road along the disputed boundary. Recitations regarding an easement for road along the West side are conspicuous and by such conspicuousness create the justified impression that if there were an easement to the South it would have been mentioned, and also, irregularities in the chains of title create the impression that, in light of past courtroom contest regarding the boundary, any disputes concerning the boundary must have been settled and the fence had memorialized the settlement.

None of the instant disputants nor their still living predecessors in title had first hand knowledge of the suit. Neither are they put on constructive notice of the result of

such suit unless it is somehow noted in their chains of title. The relevant documents relate that Appellant's predecessors quitclaimed interest in and to land in Section 23, but Appellant and her predecessors all reasonably assumed that the fence marked the border of Section 14 and 23. It is expressly for this type of dispute that the doctrine of boundary by acquiescence should be applied to resolve boundary desputes in favor of the long-lived status quo.

The Tripp v. Badley, supra, doctrine is directly applicable here. The doctrine lays down no rules on what geometric forms lines must follow; it simply states that above all else, reliance on the disputed line must be reasonable. Though it would be unreasonable to rely on the fence as the boundary now that an authoritative survey has been performed, it was not unreasonable when the interested parties first started using the land as farm land.

C. THERE HAS BEEN BOTH FACTUAL AND IMPLIED IN LAW MUTUAL ACQUIESCENCE IN THE LINE AS THE BOUNDARY

Contrary to Respondent's bold assertion, factually, there was no evidence presented at trial that Appellant's predecessors in interest actually knew where the true

boundary line was or even that they suspected that the fence may have been misplaced. It is true that Respondent's predecessor did claim that he had said something about the fence not being on the property line, but it was not shown at trial what he said or how it was said. If something truly was said, it is clear that it never brought home to his neighbors what his argument was. To the contrary, Appellant's witness testified that from the time he was a small boy working on his father's farm, they always farmed right to the fence line: They claimed up to where they thought the section line was and always considered it as their land. But, very importantly, Respondent's predecessor in title also admitted under cross examination that not once in the long history of the fence did he ever interfere with his neighbors' exclusive use of the land on the opposite side of the fence, even though he was personally aware that there was a dispute as to the exact boundary. In any sense of the word there was a true, actual acquiescence to the fence as the boundary line.

As regarding the implied in law acquiescence, respondent does not answer Appellant's argument that a true and actual acquiescence is not even required, but that if the parties

> "...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 it will not permit the parties nor their grantees to depart from such line. Homes v. Judge, 31 U. 269, 87 P. 1009." Brown v. Milliner, 120 U. 16, 232 P.2d 202 at 204. (See also, Hummel v. Young, 1 U.2d, 237, 265 P.2d 410, Ringwood vs. Bradford, 2 U.2d 119, 269 P.2d 1053).

from the fact that a fence line has existed for an extended length of time arises the legal presumption that the fence line exists where the parties have deemed the boundary line to exist.

Further, Respondent does not ever respond to the Wright v. Clissold, 521 P.2d 1224 (1974) and the Baum v. Defa, 525 P.2d 725 (1974) line which asserts that fences built solely to control animals and not as boundaries can become boundaries when

> ....the property on either side of such a fence is conveyed to separate parties, so that there comes into being separate ownership of the tracks 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 the instant dispute the period of time contemplated by the Baum holding began sometime before the early 1930's.

The key to why Respondent does not respond to such arguments lies in his continued insistence that the deeds of Appellant describe land in Section 14 and never give title to land in Section 23. From this, Respondent assumes that Appellant can never reasonably believe that the fence is the boundary, because it is clearly located in Section 23. It is now clear that the fence is in Section 23, but only because a surveyor's surveyor found a true Section corner after trudging miles in all four directions and finding obscure markers covered with mud, which no ordinary man would have recognized for anything more than mud-covered stones. At the time Appellant's predecessor and Appellant were working the land the fences were the best clue to where the boundary lay, especially in light of their ancient existence and the undisturbed use of the land right up to the fence and the lack of clear objection from the Respondent or his predecessor.

D. THE FENCE HAS INDISPUTABLY STOOD FOR A PERIOD OF YEARS

There is no doubt that the fence has been in existence at least since 1933, and there was also another fence in existence before 1933 upon the same location. This fact

is established by Appellant's witnesses and by Respondent's predecessor who was the one who constructed the fence in 1933 over the pre-existing fence.

E. THE FENCE HAS INDISPUTABLY STOOD BETWEEN ADJOINING LANDOWNERS

There should be no argument here that the Appellant and Respondent are adjoining landowners. Respondent does not take issue with the argument made in Appellant's brief that, as an adverse possession, the parties should be allowed to tack the holding periods of their successors in title.

F. CONCLUSION

The four elements required to establish a claim to land by the doctrine of boundary by acquiescence were all established at trial. The (1) line certainly was visible and (3) stood for at least forty years (4) between the adjoining landowners. Elements one, two and four are factually indisputable. The major dispute lies in the second requirement that (2) there must be an acquiescence in the line as the boundary. Factually, there has been such an acquiescence. The testimony of Appellant and her predecessors in title, Orval Petersen, was that there was never any doubt in their minds that the fence marked the true boundary. Without the aid of an official county

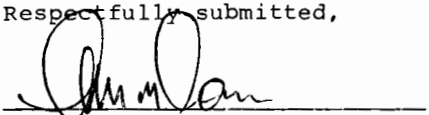
survey it was more than reasonable to assume that the fence was the true boundary-this is precisely what the Courty Surveyor would have done according to his testimony. Regardless of what any of the parties-litigant have been thinking, for as far back as any living soul remembers, Appellant and her predecessors have never enjoyed less than complete, undisturbed use of all the land right to the fence.

Also, as an implication of law there has been such acquiescence for the law presumes agreement upon finding that a monument has served as the effective boundary for many years. In order to overcome the presumption the law requires more than a showing of no agreement. Respondent's predecessors did testify, though, that he had told Appellant's predecessor that he did not consider the fence to be the boundary line, but those to whom he reputedly told this were men who were conspicuously dead or absent at trial. The brother of one who was supposedly told that the fence was off the line testified at trial that he was not aware that there was any dispute to the boundary and that he, his brother and father had always farmed right to the fence.

Respondent never answers the argument now clearly established in Utah law that a fence, though built to hold animals - a purpose other than marking a boundary - becomes a fence marking a boundary by acquiescence when the tracks enter different hands than those which first built the fence and the fence is later used as a dividing line, such is the case here.

Upon the law and the facts the trial court has erred. Therefore, Appellant renews his prayer for a reversal of the court below.

Respectfully submitted,



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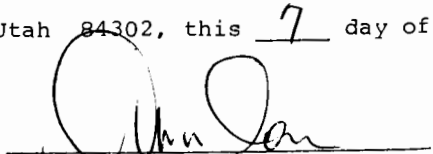
CERTIFICATE OF SERVICE

SERVED the foregoing Brief of Appellant by mailing two copies thereof, postage prepaid, to WALTER G. MANN, MANN, HADFIELD & THORNE, Attorney for Respondent, 35 First Security Bank Building, Brigham City, Utah 84302, this 7 day of February, 1979.



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