

2001

Lavon E. Payne, Addie Payne v. Walter T. Stewart, Ruth Stewart : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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LAVON E. PAYNE and
ADDIE PAYNE, his wife,

Plaintiff and Respondent

Case No. 14349

vs.

WALTER T. STEWART and
RUTH STEWART, his wife,

Defendant and Appellant.

BRIEF OF APPELLANT

Appeal from the Judgment of the District Court of Utah County,
State of Utah, entered on October 24, 1975.

The Honorable Allen B. Sorensen, Judge

WALTER T. STEWART
Defendant-Appellant, Pro Se

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MAR 5 1976

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STATEMENT OF NATURE OF CASE

Plaintiffs-Respondents, Paynes, sued their adjoining land owners, Defendants-appellants, Stewarts, to quiet title to a strip of land used as a lane or road. This land is described in Stewarts' deed, but Paynes claim boundary by acquiescence. Plaintiffs further demanded that defendants remove certain bridges and a cattle loading ramp adjoining and partially on the property in question.

Stewarts counterclaimed alleging that they had an easement of ingress and egress in said lane or road. Stewarts also sought to have the plaintiffs enjoined from using a well which had been allegedly opened unlawfully and which may adversely affect defendants' own culinary well.

DISPOSITION OF CASE IN LOWER COURT

The trial court granted fee simple title to the strip of land in dispute to Plaintiffs-Respondents holding that Defendants-Appellants had acquiesced in the boundary as alleged by plaintiffs. The trial court further ordered the Defendants-Appellants to remove bridges and a cattle chute which were partially located on the property in dispute and denied Defendants-Appellants any use in the road or lane. The court made no finding with respect to Defendants claim that the well be shut down.

NATURE OF RELIEF SOUGHT ON APPEAL

Defendants-appellants seek reversal of the ruling that plaintiffs have acquired a portion of defendants' property by acquiescence. Defendants-appellants also seek reversal of the ruling of the trial court to the extent that said ruling denies defendants-appellants an easement of the lane in

question for access to a portion of their property. Defendants seek a ruling preventing plaintiffs' use of the said illegal well.

STATEMENT OF FACTS

Defendants-Appellants, Stewarts, are owners of what is commonly known as the Stewart Ranch which has been owned by the Stewart family since 1852. Plaintiffs-Respondents, Paynes, purchased an adjoining farm in 1942. Paynes claim that an area approximately 25 feet wide and 370 feet long along the southwest side of the 40 acre farm has been acquired by them through the acquiescence of the defendants. (See Plaintiff's Exhibit 2 and the area shaded in green). This area has been used continuously since settlement of the area as a road or lane. Among other things, this road was used as an access to property which had in the past been known as the Andrew Stewart farm. After Andrew Stewart died, Mrs. Stewart farmed the property herself and in some years leased the property out.

Some time after 1942, plaintiffs purchased the Andrew Stewart property. (Tr. 29, 30 and 142) Originally, fences were located along both sides of the roadway but the west fence was removed at some undetermined time. (Tr. 162) This roadway is an extension to the county road known as 4000 West. The oiled portion of this road ends just west of the Stewart home at a place marked "end of oil" on plaintiffs' Exhibit No. 2. From there, the roadway and irrigation ditch turns to the southeast approximately 90 to 100 feet, crossing the section line described as South 0°13'27" west into the area shaded as green on plaintiffs' Exhibit 2. This green shaded area is described in defendant's deeds but not in plaintiffs' deeds. This is the area claimed by Paynes.

In 1966, Stewarts moved to the property and thereafter moved their corrals from the former location to the present spot (marked with an "A" on Plaintiffs' Exhibit 1). The defendants constructed two bridges and a cattle chute across an irrigation ditch which runs along the lane or property in dispute in order to gain access to the corrals. Plaintiffs brought the instant action to prevent defendants' use of the lane.

POINT I

THE COURT ERRED IN HOLDING THAT THE BOUNDARY
BETWEEN THE TWO PROPERTIES HAD BEEN
RECOGNIZED AS BEING LOCATED ALONG THE LINE
CLAIMED BY PLAINTIFFS SINCE TERRITORIAL DAYS

The trial court found that the line claimed by plaintiffs has been recognized by the parties and their predecessors in interest as the boundary between the properties since territorial days (Rec. at 15). This holding failed to take into consideration the fact that the question before the court was limited to defendant's acquiescence, if any, since 1942. Opposing counsel stated at trial that "Our claim is that we have had exclusive possession since 1942" (Tr. at 8). Plaintiffs' complaint put only the period of plaintiffs' occupation in issue - not that of any predecessor and the parties presented evidence on this question.

There was testimony with respect to the use of the road prior to 1942, but this testimony was primarily to show the existence of gates, fences, and bridges as they existed in 1942 and since. The undisputed evidence at trial showed that the adjacent land owners during the 1920's and 1930's did not consider the existing fence to be the boundary (Tr. 146 and 161). In fact, during that period, there were fences on both sides of the road so one

party would not have occupied the road more than any other (Tr. at 142, 146 and 162). Moreover, during the 1930's the lane used to lead to a third farm. This lane was used as the only access to that farm until plaintiffs purchased that farm some time after 1942 (Tr. 42-43).

It was concluded by plaintiffs' own counsel that there was common useage in the area during the 1930's with the agreement of the adjacent land owners (Tr. at 178).

Plaintiffs' complaint makes no allegation or claim since territorial days. Plaintiffs' counsel REPRESENTED at trial that their claim was only since 1942. The trial court's ruling was therefore in error that the lane was recognized as being plaintiffs' and plaintiffs' predecessors' property since territorial days.

POINT II

BOUNDARY BY ACQUIESCENCE DOES NOT APPLY WHEN
THERE IS NO UNCERTAINTY AS TO THE LOCATION
OF THE TRUE BOUNDARY LINE

Before a boundary can be established by acquiescence, the location of the actual boundary must be in dispute or unknown. Without this element, if plaintiffs are to obtain an interest in defendants' land, it must be by way of adverse possession or prescriptive use. In the instant case, the actual boundary was known by both parties.

Plaintiff LaVon Payne was aware shortly after he acquired the property of the actual location of the property line (Tr. at 38). At one time he informed defendants' mother that the property line ran right through her house (Tr. at 79). It is equally clear that defendant Stewarts knew of

the location of the property line (Tr. at 189).

The question of whether adjacent land owners establish a boundary by acquiescence when the actual boundary is known was decided by the Utah Supreme Court in Tripp v. Bagley, 74 Utah 59, 276 Pac. 912, 69 A.L.R. 1417 (1928). Therein, the court stated:

"It thus becomes of controlling importance to determine whether two adjacent land owners may establish a boundary line between their lands by oral agreement or by acquiescence for a long period of time, when there is no uncertainty as to the location of the true boundary line, and where it is known by them at all times, that the boundary sought to be established is not the true boundary line." 74 Utah 69-70

The issue of the instant case is similar. In Tripp v. Bagley, the Utah Supreme Court held that co-terminous landowners could not establish a valid boundary line by parol agreement or acquiescence if the location of the true line were known. 74 Utah 71-72.

There was no evidence introduced at trial tending to show that the actual boundary was ever unknown by plaintiffs or defendants. In fact, the evidence was to the contrary. Thus, in the instant case, boundary by acquiescence does not apply and plaintiffs' case must stand or fall on the doctrines of adverse possession or prescriptive use.

POINT III

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT A
NEW BOUNDARY HAS BEEN ESTABLISHED THROUGH OPERATION
OF THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE

Plaintiffs did not prove elements necessary to establish boundary by acquiescence. These elements include:

1. Occupation up to a visible line marked definitely by monuments, fences or buildings.

2. Acquiescence in the line of the boundary by adjoining land owners.

3. For a long period of years.

See Fuoco v. Williams, 15 Utah 2d 156, 157; 389 P.2d 143, 145 (1964); See also Nunley v. Walker, 13 Utah 2d, 105; 369 P.2d 117 (1962); Brown v. Milliner, 120 Utah 16, 232 P.2d 202 (1951); Baum v. Defa, 525 P.2d 725 (1974); See also note "Boundaries by Agreement and Acquiescence in Utah" 1975 Law Review, 224.

Each of these elements will be explored to show that the evidence does not support a finding that these elements were established:

1. Occupation up to a visible line marked definitely.

In Harding v. Allen, 10 Utah 2d 370, 353 P.2d 911 (1960), the Utah Supreme Court held that in order to show occupancy it must be shown that the claiming party:

" . . . occupied it thus at such reasonable intervals and during a period within which a boundary by acquiescence might be acquired, as to have knowledge of the physical facts that through passage of time, might create rights in others, to his land under the doctrine, with an opportunity to interrupt their fruition." 10 Utah 2d at 373.

Plaintiffs' claim to occupation is that they have used the lane, but it was stipulated at trial by plaintiffs that many other people had used the road as well. (Tr. at 178).

Plaintiffs installed a gate across the lane at a time not indicated in the record. By plaintiff LaVon Payne's own statements, however, it is clear that the purpose of this gate was not to serve as possession or occupancy but only to keep pheasant hunters out during the pheasant hunt.

Once in a while Mrs. Payne would see cattle in the lane, apparently on the county roadway further north, and he would return and close this gate. All in all, the gate would be closed approximately ten times in an entire year (Tr. at 91-92).

2. Acquiescence in the Line of the Boundary.

Acquiescence in the line of the boundary requires conduct "nearly synonymous with 'indolence' or 'conscience by consent' or 'consent by silence' or a knowledge that a fence or other monuments (appear) to be a boundary, - but no one did anything about it." Lane v. Walker, 29 Utah 2d 119, 505 P.2d 1199 at 1200 (1973).

It was undisputed at trial that the adjacent landowners used the strip of land in question during the 1920's and 1930's (Tr. at 159 and 142). In 1942, plaintiffs purchased the property adjacent to the Stewart farm. Sometime later, a fence that had bordered the lane on the Payne side of the road was apparently removed (Tr. at 162). If this act is to be asserted as the beginning date of the alleged occupancy, the Stewarts must have had some knowledge of the fact. On the contrary, fence lines in the area are only for purposes of separating farmed land from roadways and as a general rule are not recognized as boundary lines. (Tr. at 107-108). By plaintiff LaVon Payne's own admission, however, no one was living at the Stewart home when he had purchased his land. (Tr. at 216). Defendant Walter Stewart was a bomber pilot from 1942-1946 (Tr. at 187). From and after the 1940's the undisputed evidence showed that the farm was rented to such tenants as Carl Lindstrom, Bob Jensen and Art Hansen (Tr. at 190).

These tenants had no power or ability to acquiese in the location of a boundary other than the actual boundary line. Fuco v. Williams, 18

Utah 2d 282, 286, 421 P.2d 944 (1969). See also 11 C.J.S. Boundaries § 79 p. 652. During the 1920's and 1930's access to some of the Stewart property had occurred by using the strip of land in dispute, crossing the irrigation ditch by way of a moveable bridge and going through gates that had been constructed for this purpose (Tr. at 190). The tenants leasing the farm, however, had no need to use the lane, however, because their own properties were adjacent to the Stewart farm and they had better access over their own lands (Tr. at 190).

During the period that the farm was leased, it is difficult to imagine what the Stewarts should have done to interrupt the claimed acquiescence. The tenants who ran the farm had no need to use the road. Moreover, as long as the farm was leased, the Stewarts had no need to use the road. The fact that the fence was torn down on the Payne side of the road did not require the Stewarts to affirmatively rebuild it, in order to prevent the beginning of an acquiescence.

As stated in Glenn v. Whitney, 116 Utah 267, 273; 209 P.2d 257, 360 (1949), and quoted with approval by the Utah Supreme Court in Ringwood v. Bradford, 2 Utah 2d 119, 121; 269 P.2d 1053 (1954):

"The theory under which a boundary line is established by long acquiescence along an existing fence line is founded on the doctrine that the parties erect the fence to settle some doubt or uncertainty which they may have as to the location of the true boundary, and the (sic) compromise their differences by agreeing to accept the fence line as the limiting line of their respecting lands. The mere fact that a fence happens to be put up and neither party does anything about it for a long period of time will not establish it as the true boundary. Peterson v. Johnson, 84 Utah 89, 34 P.2d 697; Tripp v. Bagley, supra."

3. For a Long Period of Years

Plaintiffs allege in their amended complaint that they have had exclusive possession of the road in question for approximately 40 years. Plaintiffs' counsel conceded at trial, however, that the claim begins in 1942. Plaintiffs first purchased the property in 1942 but did not actually move to the property until 1949 or 1950 (Tr. at 100-101). Tenants rented the Stewart farm for a considerable period of time (Tr. at 190). It seems clear, therefore, that no period of acquiescence can begin to run until 1966 when defendants moved back to the Stewart farm (Tr. at 175).

Defendant Walt Stewart conceded that Mr. Payne had maintained the lane most of the time since 1966, but it was undisputed that Stewart had put some gravel on the road. Mr. Payne also admitted that Stewart told him he intended to gravel part of the area for a parking space (Tr. at 92-93).

In 1972, Mr. Stewart began construction of a bridge across the irrigation ditch at the location of the gate opening onto the lane that had been built in the 1930's. (Tr. 179 and 189-190). Thus, any acquiescence that might have begun in 1966 was halted in 1972 - a period of only six years.

On the other hand, plaintiffs are unable to show any time when the fence along the east side the lane began to be acquiesced in as being the boundary line. (Tr. at 140-142). In the 1920's and 1930's both landowners used the lane as well as the operators of the Eliza or Andrew Stewart farm (Tr. at 142-143). After 1942 when plaintiffs purchased their land there was no evidence introduced that showed that the Stewarts knew or should have known that Paynes claimed the strip of land in question from 1942 through 1966.

There being no substantial evidence to the contrary, plaintiffs failed to meet their burden of proof that defendants had acquiesced in the boundary as claimed by plaintiff.

POINT IV

PLAINTIFFS ARE ESTOPPED FROM DENYING DEFENDANTS ACCESS TO THE LANE

The trial court erred in ruling that defendants had no right to use the lane. By plaintiffs' own admission, LaVon Payne suggested in the latter part of the 1960's that it would be wise for Stewarts to move their corrals from where they were located to the south corner of their property (the present location of the corrals is marked by an "A" on Plfs' Exh. 1). Any other access to these corrals at their new location is infeasible (Tr. at 198).

In 1972, Walt Stewart began the construction of the bridge at the location of the gate that had been built in the 1930's. Mr. Payne admitted that he came and saw a pile of gravel next to the ditch where this bridge was going to be constructed. During the construction of the bridge, Payne drove by many times within a few feet of where the bridge was being constructed and the parties waved at each other (Tr. at 195). LaVon Payne admits that he saw construction of the permanent bridge (Tr. at 221). It was undisputed that it was approximately two and one-half years from the date of trial from the time when Stewart had moved his corrals from the north part of the house down to the southwest part of the property. Construction on the corrals began in 1972, probably during the month of May, and

continued thereafter. (Tr. at 190) Plaintiffs' complaint was filed in June of 1974. During this period of time, there was no evidence that would inform Stewart that he could not use the lane, the cattle chute, and bridges he was constructing, except a suggestion at one point by Payne that Stewart construct a road elsewhere after the work was well underway.

It is clear from reviewing the photographs (Defs. Exhs. 3 and 4, Plfs. Exhs. 11 and 12) that the cattle chute and bridges were constructed at considerable expense and effort. To require their removal would be unconscionable inasmuch as the corrals were moved to their present location at the suggestion of the plaintiff, Mr. Payne.

It is not a necessary element of estoppel in this case that at the time of Payne's suggestion that Stewart move his corrals, that plaintiffs then intended to prevent Stewart's subsequent use of the road. Estopping conduct may "consist in the subsequent attempt to controvert the representation and get rid of its effects." 28 Am.Jur. Estoppel and Waiver §43.

There is no dispute herein but that Payne suggested that the corrals be moved, that the corrals were in fact moved and that the only available access without traveling a considerable distance or removing the trees and lawn of the Stewart yard was the strip of land that makes up the lane. Defendants should not now be barred from using the lane and the lower court's judgment denying plaintiffs use of the roadway in question should be reversed.

POINT V

THE COURT ERRED IN PERMITTING PLAINTIFF CONTINUED USE OF THE WELL IN QUESTION

In 1934, Payne's predecessor in interest, Tucker, drilled a deep well near the Stewart property line. The well adversely affected the Stewart

well and was capped for over 15 years (Tr. at 111-112). This left the Tucker (later Payne) home a two-inch culinary well which supplied plenty of water (Tr. at 168). Subsequently, both homes were connected to the deep well without a permit from the State Engineer even though the well had not been used for over 15 years (Tr. at 225). In 1970, Payne disconnected the Stewart home from the well (Tr. at 203).

The plaintiffs admittedly did not obtain a permit from the State Engineer to hook onto the well (Tr. at 225). Since defendants have now been prevented from using the deep well by Mr. Payne, their own water source is put in jeopardy by Payne's use of the deep well (Tr. at 166 and 147).

Utah Code Annotated, Section 73-1-4 clearly provides that water not used or abandoned for five years reverts to the public. See also, Murray City v. Whitmore, 107 Utah 445, 154 P.2d 748 (1944). The well should be capped until a permit therefor issues from the State Engineer.

CONCLUSION

Defendants should be allowed to use the lane on the basis that they have not acquiesced in Payne's ownership thereof.

To hold that the defendants' belief, reliance, and occupation up to the fence line, without more, are controlling in a boundary dispute, would be to ignore the statutory guides for adverse possession since she did not pay the taxes on that portion of land which she claims. 2 Utah 2d 119 at 123, 269 P.2d 103 (1954).

Defendants are further entitled to use the lane based upon the equitable doctrine of estoppel.

Plaintiffs should be required to discontinue use of the deep well near defendants' property, or get a lawful permit from the State Engineer

This would afford defendants the opportunity to be heard as to the effect of this well on their own well.

Respectfully submitted,

WALTER T. STEWART
Defendant-Appellant, Pro Se

MAILING CERTIFICATE

SERVED the foregoing Brief of Defendant-Appellant by mailing two copies thereof, postage prepaid, to M. Dayle Jeffs, Jeffs & Jeffs, Attorney for Plaintiffs-Respondents, 90 North 100 East, Provo, Utah 84601, this _____ day of _____, 1976.
