

1952

Henry Hummel and Mabel D. Hummel v. William Young and Mad M. Young : Brief of Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

HENRY HUMMEL, and MABEL D.
HUMMEL, his wife,

Respondents,

vs.

WILLIAM YOUNG, and MAUD M.
YOUNG, his wife, et al.,

Appellants.

Case No.
7849

BRIEF OF APPELLANTS

Appeal from Fourth Judicial District Court
of the State of Utah, Honorable R. L. Tuckett, Judge.

FILED

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INDEX

	Page
APPELLANTS' BRIEF	
STATEMENT OF FACTS	1-4
APPELLANTS' POINTS	4-5
ARGUMENT	5
POINT I. THE COURT ERRED IN FAILING TO FIND THAT THE COMMON PREDECESSOR IN TITLE OF BOTH APPELLANTS AND RE- SPONDENTS INTENDED TO CONVEY PROP- ERTY TO APPELLANTS LYING SOUTH AND WEST OF 9TH SOUTH STREET AND STATE HIGHWAY IN PROVO, UTAH, BY HIS CONVEYANCE IN 1924, AND THAT RESPONDENTS ARE BOUND BY THAT PRIOR CONVEYANCE	5-7
POINT II. THE COURT ERRED IN FAILING TO FIND THAT THE FENCE ERECTED BY APPELLANTS IN 1928 HAS BEEN RECOG- NIZED AS A DIVIDING LINE BETWEEN APPELLANTS' AND RESPONDENTS' PRED- ECESSORS IN TITLE FROM THAT TIME UNTIL 1951 WHEN THIS SUIT WAS BROUGHT AND THAT SAID FENCE HAS BECOME A BOUNDARY FENCE WHICH CANNOT BE MOVED BY RESPONDENTS	7-14

INDEX—Continued

	Page
POINT III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE COURT'S FINDING THAT THE APPELLANTS OCCUPY ANY OF RE- SPONDENTS' LAND	14-16
CONCLUSION	16

CASES CITED

Ekburg vs. Bates, 239 P. 2d 205	8, 13-14
Brown vs. Millner, ... U. ..., 232 P. 2d 202	9
Larsen vs. Onesite, 21 U. 38, 59 P. 234	8

OTHER AUTHORITIES

11 Corpus Juris Secundum p. 650	12
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STATEMENT OF FACTS

The trial of this case resulted in the establishment of these facts among others: That the respondents and the appellants obtained their respective properties from the same predecessor, namely, A. H. LeVitre and Lydia LeVitre, who obtained the entire property in question in this law suit from Olof L. Hedenberg and Annie E. Hedenberg, his wife, by a warranty deed dated September 19, 1922, with the following description:

“Commencing 21 chains West and 14.50 chains
South of the Northeast Corner of Southeast $\frac{1}{4}$ of

Sec. 7, Township 7 South, Range 2 East of the Salt Lake Base and Meridian; Running thence South 1 degree West 4.87 chains; thence South 89 degrees East 7.71 chains more or less to the Street line; thence North 29 degrees West 5.62 chains more or less along the Street line to the intersection of the Street running East and West; thence North 89 degrees West along said Street line 4.90 chains, more or less to the place of beginning, the same being a part of the Southeast $\frac{1}{4}$ of Section 7, containing an area of 3.07 acres."

On the sixth day of May, 1924, in a deed dated of that date and recorded on the same date, A. H. LeVitre and Lydia LeVitre, his wife, conveyed the property which is now the appellants' property to Henry Clavel and S. Perkowski who conveyed the property to the appellants herein in 1925. On the eighth day of May, 1924, the property which is now the respondents' property was conveyed by A. H. LeVitre to Lydia LeVitre, however, both A. H. LeVitre and Lydia LeVitre executed various mortgages and other security instruments from that time against the property of respondents until 1936. Then the respondents' property through successive transfers came to the respondents sometime in 1945 and the dispute between these parties arising sometime in 1951, as a result of a purported survey by the respondents.

At the time the appellants purchased their property in 1925, there was a street on the east (which is still there) known as the State Highway and a street on the north of their property known as Ninth South Street in Provo, Utah, (which street is still there). At the time of purchase of the property by the appellants in 1925, there was a fence

separating the property on the north from the street, which fence is still there, and on the south of appellants' property there was no fence at all. The evidence further shows that sometime in 1925 after the appellants purchased the property that Mr. LeVitre and Mr. William Young, one of the appellants herein, went out upon the ground and Mr. LeVitre made marks on the fence at the east and on the west of appellants' property as being the mark setting off the south boundary of the appellants' property.

The evidence further shows that Mr. and Mrs. LeVitre owned the property which is now the respondents' property and occupied the same until 1936. This fact is shown both by the testimony of appellant, William Young, and by the fact that the respondents' property was mortgaged several times and satisfaction of the same was shown as being executed in Provo, Utah, until 1936 (see Abstract of Title). The evidence also shows without dispute that the appellants, William Young and Andrew Young, built the fence in question on the line pointed out by Mr. LeVitre in 1928, in the month of April or May. That a certain person by the name of Chris Peterson who had purchased property to the south of the LeVitre property purchased the wire and posts but had no part in building the fence or locating it where it was built in 1928, and where it is today. That the appellants, William Young and Andrew Young, built the fence as a boundary fence and that the LeVitres occupied and possessed the property until 1936, at which time it was conveyed to one of respondents' predecessors in title. The evidence also shows by the testimony of William Young that measurements were taken of appellants'

property from the old fence on the north of his property to the old fence on the south of his property at both ends and that the distance measured was 126 feet.

The evidence in this case is undisputed that there was no survey of the property in question made by either of the parties or known by either of the parties from the time appellants purchased their property in 1925, until the respondents allegedly had a survey made in 1950. There is no other evidence concerning the location of appellants' south boundary except as previously stated. It is also a fact worthy to be mentioned, that the respondents purchased their property in 1945, after having made a physical inspection of the property, together with an observation as to the location of the existing fences and that their purchase was made thereafter. That respondents assumed and used the existing fences as boundaries until 1951, when they made demand upon appellants to move their fence.

APPELLANTS' POINTS

POINT I.

THE COURT ERRED IN FAILING TO FIND THAT THE COMMON PREDECESSOR IN TITLE OF BOTH APPELLANTS AND RESPONDENTS INTENDED TO CONVEY PROPERTY TO APPELLANTS LYING SOUTH AND WEST OF 9TH SOUTH STREET AND STATE HIGHWAY IN PROVO, UTAH, BY HIS CONVEYANCE IN 1924, AND THAT RESPOND-

ENTS ARE BOUND BY THAT PRIOR CONVEYANCE.

POINT II.

THE COURT ERRED IN FAILING TO FIND THAT THE FENCE ERECTED BY APPELLANTS IN 1928 HAS BEEN RECOGNIZED AS A DIVIDING LINE BETWEEN APPELLANTS AND RESPONDENTS' PREDECESSORS IN TITLE FROM THAT TIME UNTIL 1951 WHEN THIS SUIT WAS BROUGHT AND THAT SAID FENCE HAS BECOME A BOUNDARY FENCE WHICH CANNOT BE MOVED BY RESPONDENTS.

POINT III.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE COURT'S FINDING THAT THE APPELLANTS OCCUPY ANY OF RESPONDENTS' LAND.

ARGUMENT

POINT I.

THE COURT ERRED IN FAILING TO FIND THAT THE COMMON PREDECESSOR IN TITLE OF BOTH APPELLANTS AND RESPONDENTS INTENDED TO CONVEY PROPERTY TO APPELLANTS LYING SOUTH AND WEST OF 9TH SOUTH STREET AND STATE

HIGHWAY IN PROVO, UTAH, BY HIS CONVEYANCE IN 1924, AND THAT RESPONDENTS ARE BOUND BY THAT PRIOR CONVEYANCE.

It is to be noted from the evidence that in 1922, when the predecessor of the parties hereto, A. H. LeVitre and Lydia LeVitre, received their property, it was described as set out in the facts showing metes and bounds in part as follows:

“Thence South 89 degrees East 7.71 chains, more or less, *to the Street line*; thence North 29 degrees West 5.62 chains, more or less, *along the street line to the intersection of the street running East and West*; thence North 89 degrees West along said street line 4.90 chains, more or less, to the place of beginning.”

This deed shows a recognition of the existing streets and described the property in relation thereto. The importance of this being that the predecessors in title of respondents and appellants received only the property inside the natural boundaries established by State Street on the east and Ninth South Street on the North. The property conveyed in 1924, to appellants' predecessor in title failed to show the limitation of the existing streets. Likewise, the conveyance at a later time of the property of respondents to their predecessor, Lydia LeVitre, likewise failed to show the limitation of the existing streets. However, it would appear to be a matter of fundamental law that the deeds in question must be construed to include only a sale of property owned by the grantors and that certainly it was not the intention

of the grantors of appellants to convey property out in the existing streets and then through another line of deeds, encroach upon the property necessary to make the full measure of property conveyed to appellants. The grantors by their actions and acquiescence have shown what the intention of their conveyance was.

Another way of saying this is that certainly Lydia LeVitre cannot through her successors in title derogate from her grant to the appellants herein. The testimony shows that the width of the property north and south between the old fence on the north and the old fence on the south of appellants' property is 126 feet which is almost the exact measurement of appellants' property given by their deed. Thus we see that the appellants are occupying only the amount of ground given to them by their deed bounded on two sides by existing streets and that to permit the respondents to move the fence on the south would result in the reduction of property given to appellants by respondents' predecessor in title.

POINT II.

THE COURT ERRED IN FAILING TO FIND THAT THE FENCE ERECTED BY APPELLANTS IN 1928 HAS BEEN RECOGNIZED AS A DIVIDING LINE BETWEEN APPELLANTS AND RESPONDENTS' PREDECESSORS IN TITLE FROM THAT TIME UNTIL 1951 WHEN THIS SUIT WAS BROUGHT AND THAT SAID FENCE HAS BECOME A BOUNDARY FENCE

WHICH CANNOT BE MOVED BY RESPONDENTS.

Perhaps the most important question which arises in this case is the one concerning whether or not the building of a fence by appellants herein in the year 1928 upon the line pointed out by A. H. LeVitre and the maintenance of that fence until the present time brings this case within the rules established by the decisions of our courts concerning the establishment of boundaries by practical location, or acquiescence. The appellants do not admit and I do not believe the evidence compels us to concede that the appellants occupied any of the respondents' deeded ground, but we shall turn our attention to the question just propounded.

Beginning with the case of *Larsen vs. Onesite*, 21 U. 38, 59 P. 234, where it is said:

“where adjoining land owners and their predecessors in title have occupied their lands to a given line, and have treated such line as a boundary between their land for twenty years, neither owner can claim beyond such line.”

To the case of *Ekborg vs. Bates*, 239 P. 2d 205, ... U. ..., our courts have recognized the doctrine of boundary by practical location and by acquiescence. In this case the undisputed evidence shows that some time after the purchase of the property in question by appellants that A. H. LeVitre, the common predecessor in title of the parties hereto, actually pointed out the marks on the east and west fence, respectively, of the appellants' property which would mark the south boundary of said property. That the appellants

built the fence along said line in the spring of 1928 and that the appellants and respondents and their predecessors cultivated and used the land to the respective sides of the fence without ever at any time disputing the fact that it was indeed the boundary. The evidence shows that the appellants built chicken coops along said fence, planted trees and shrubbery along said fence, and planted fruit trees and cultivated the disputed strip of ground. The evidence also shows that the respondents' predecessors, the LeVitores, built sheds on the south side of said fence, including a garage. That the successive owners of the respondents' property purchased said property and occupied the same without making any survey and without ever raising any question as to the boundary between the two properties until the respondents herein brought their action. Acquiescence in the maintenance of a fence or boundary is essentially negative in form and thus where the parties have occupied and improved their respective properties on each side of the fence without protest for a period of over seven years, then the doctrine of acquiescence is to be applied.

In the case of *Brown vs. Millner*, . . . U. . . ., 232 P. 2d 202, it is said as follows:

“We have further held in this state that in absence of evidence that the owners of adjoining property or their predecessors in interest ever expressly agreed as to the location of the boundary between them, if they have occupied their respective premises 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.

“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 vs. Bagley*, 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 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.*

“The line must be open, visible, marked by monuments, fences or buildings and recognized as the boundary for a long term of years. It was expressly stated by the court in the case of *Holmes vs. Judge*, that there was no evidence how the fence and building which were recognized as the boundary came to be erected, or that there was ever any dispute between the adjoining owners concerning the location of the true boundary, or that any question was ever raised as to its location until shortly before the plaintiff commenced his action.”

In this case we have the evidence before the court as to how the fence was built and we have the undisputed testimony that it was built pursuant to an agreement between A. H. LeVitre and William Young, who was the common grantor in the chain of title of both the parties hereto. This evidence certainly is sufficient within itself to show a practical location of the boundary between the two properties in question. However, we have the additional facts that the fence was built on a line pointed out by Mr. LeVitre and that the respective owners and successive owners of the respondents' property beginning with A. H. LeVitre and Lydia LeVitre down to the present respondents occupied the property to the south without question as to proper location of said fence and, in fact, the present respondents purchased the property with the full understanding that the fence on the north marked the north boundary of their property.

As pointed out in the above Millner case and in the portion particularly italicized, we see that the courts announced the doctrine that it is not necessary for the party relying upon the doctrine of acquiescence to show that there was ever any dispute or doubt as to the location of the true boundary. In this case we have the fact that when the property was purchased by appellants there was no fence in existence on the south to mark the division between their property and the property retained by the LeVitres. Certainly, from an actual, practical consideration there was uncertainty as to the location of the boundary in this case. The additional facts of the building of the fence along the line pointed out by Mr. LeVitre and

the long acquiescence by the parties hereto and their predecessors to that line and the recognition of it as the boundary certainly reinforces the evidence produced by the appellant, William Young, that there was, indeed, an agreement establishing the fence in question as the boundary line.

It is also to be noted in summary that the property occupied by appellant is the same amount as called for by his deed and that the original deed of the grantors, A. H. LeVitre and Lydia LeVitre, clearly places the property inside the existing streets which bound the property on two sides. Under these facts it would seem proper to apply the doctrine of practical location to establish the boundary on the line where it is today.

As concerns the establishment of a boundary by practical location, the general law is as set out in 11 Corpus Juris Secundum, Page 650 as follows:

“Practical location is but an actual designation by the parties on the ground of the monuments and bounds called for by their deeds. To constitute a practical location of a line, the mutual act and acquiescence between the parties is required. It is in fact merely the result of an agreement or acquiescence between the parties shown by the location of monuments and marks on the ground.

“A practical location made by the common grantor of the division line between the tracts granted is binding on the grantees who take with reference to that boundary. The line established in that manner is presumably the line mentioned in the deed, and no lapse of time is necessary to establish such location, which does not rest on ac-

quiescence in an erroneous boundary, but on the fact that the true location was made, and the conveyance in reference to it."

In the most recent pronouncement by our Supreme Court found in *Oscar F. Ekberg et ux. vs. Von D. Bates, et ux.*, 239 P. 2d 205, ... U. ... , (1951) said:

"In the instant case, the evidence is undisputed that the original picket fence was built by a man who owned both appellants' and respondents' tracts of land at that time and therefore it is apparent it was not erected to mark a boundary line. For the portion of that time during which both tracts were owned by the same person, there could be no boundary by acquiescence. However, the court made another finding in which it found that when the board fence was erected in 1927, the true boundary line was still uncertain and in dispute and that this fence was erected as a boundary fence and acquiesced in as such by the parties hereto and their grantors up until the time this suit was brought."

"The length of time necessary to establish a boundary line by acquiescence has never been definitely established in this jurisdiction. Each case must usually be determined on its own facts. In other jurisdictions there have been statements made which indicate that the length of time should be at least that prescribed by the statute of limitations. In the case of *Kesler vs. Ellis*, 47 Idaho 740, 278 P. 366, the court said: "* * * while the authorities are helplessly confused and generally uncertain as to the time the acquiescence as to the location of the boundary line should continue in order to satisfy the rule, it is but logical to say that such acquiescence must continue for a period of not less than five years, thus conforming to the period established by

the statute of limitations in cases of adverse possession * * *."

"In the instant case as we have pointed out above, there was a period of actual acquiescence for more than 7 years (the Utah limitations period for adverse possession) before appellants acquired their title and under all the circumstances shown herein that was a sufficient length of time to establish the line so that appellants are precluded from claiming that it is not the true line."

"It is true that since Ekberg, Jr. has been the owner of the property he has verbally protested that the fence was not the true boundary line and therefore he probably did not actually acquiesce in it, still he did not take any action to assert ownership until this suit was commenced about 14 years after he acquired the title. Under all these circumstances we are of the opinion the court did not err when it found that the board fence was the boundary line by acquiescence."

It would appear that under both doctrines that the appellants have established their right to occupy and use the property up to the existing fence on the south and that said fence should be considered as the boundary between the properties of respondents and appellants.

POINT III.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE COURT'S FINDING THAT THE APPELLANTS OCCUPY ANY OF RESPONDENTS' LAND.

As previously indicated appellants do not concede that they occupy any of the respondents' ground. The surveyor,

Frank Jones, testified (Beginning on page 29, line 17 to page 33, line 30) that in the sections of land there is usually an overage or a shortage of ground in respect to a surveyor's section of 80 chains on each side; That Section 7 has such an overage; That this fact often causes uncertainty in actually laying a description out on the ground; That he assumed that the overage was not considered in the Hummel and Young deeds because when he checked the Peterson deed (Tract 3 in Exhibit J) without using the overage it coincided with the existing fence lines on the Peterson tract; That there is a conflict between the Hummel and Peterson deeds.

The point to be made by this line of argument is that the evidence of the respondents' surveyor fails to satisfactorily show that his platting and staking of Hummel and Young deeds was correct in that he reasoned that because tract 3 was apparently surveyed without considering the overage in the section so were tracts 1 and 2. Yet at the same time he shows a conflict between the descriptions of tracts 1 and 2 with tract 3. Tracts 1 and 2 extend out into the street on the east, and tract 1 extends out into the street on the north when laid out using the surveyor's assumption. The original LeVitre deed used the streets on two sides to show that the surveyor had used distances with a compensation for the overage in the section.

It is notable that by using the two streets as two sides the appellants occupy only the amount of property specified in their deed.

Certainly Mr. Jones said nothing more than that by assuming that the Hummel and Young descriptions were

made without taking into consideration the overage in Section 7 they do not coincide with the existing fences. Certainly it cannot be said that this is conclusive proof that the Young property (tract 1) encroaches on the Hummel property when we have such sure facts in the two streets which bound the Young property on two sides. These two streets appear in the LeVitre deed received from Hedenberg in 1922, which were left out of the deeds of appellants' and respondents' predecessors' deeds possibly by inadvertance but most certainly not for the purpose of conveying part of those streets by those deeds.

CONCLUSION

It would seem that this is one of those cases which helps to high-light the virtue of the principle of repose announced by our Court.

In the face of uncertainty in the Survey (the surveyor said he did not know how the original descriptions were made but assumed certain unprovable facts) and of long years of acquiescence in the existing fences by all parties concerned it could hardly be in the interest of justice to permit the shifting of these boundary lines. If the doctrine of repose is to have any practical value, then it must be applied to such a case as this. The passage of time obliterates the evidence of men's agreements and all we can find is the salient facts that in this case a fence was built and respected by everyone for some 24 years as the boundary between two pieces of property. Even the respondents purchased their property after visual inspection (without a

survey) and after being satisfied with its size and shape and upon the assumption that only that land inside the fences was being purchased. So the respondents purchased their land and lived there almost six years when by chance it was suggested that evidence might be found which would show that the existing fences were not in harmony with the technical description in their deed.

It is submitted that respondents are not entitled to the judgment given them in the lower Court, and it should be reversed with directions that their action be dismissed.

Respectfully Submitted,

PETER M. LOWE,

Attorney for Appellants.