

1952

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

Utah Supreme Court

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In the Supreme Court of the State of Utah

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

vs.

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

CASE
NO. 7849

BRIEF OF RESPONDENTS

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

FILED

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STATEMENT OF CASE

The respondents by their complaint (R. 3) claimed the ownership of the property located at 926 Springville Road in Provo, Utah, and that the appellants owned property adjoining them on the North. Respondents complained further that appellants had trespassed on their ground by building a fence South of the appellants' deeded property line and had enclosed behind that fence a portion of the respondents' land; that the respondents discovered the trespass by a re-

cent survey of these properties and notified appellants and began moving the fence back to the true deeded boundary line; and that appellants threatened to do violence if respondents moved the fence and refused to permit them to do so. The respondents sought an injunction, damages, and to have their title quieted. The appellants in their answer (R. 8) generally denied that they had trespassed upon the respondents' ground and set up several defenses to respondents' claim: (1) The seven-year statute of limitations and adverse possession of the ground behind their fence for more than the statutory period, (2) that the fence in question was built in 1928 as a result of a settlement of dispute between appellant William Young and A. H. LeVitre and Lydia C. LeVitre, predecessors of respondents, over the boundary between their properties, (3) that appellants cultivated and occupied all of the land up to the fence since it was built from the North, and that respondents and predecessors have done likewise on the South side, and (4) that the parties have at all times since the fence was built treated it as the boundary between their properties and that it was located as such boundary. A trial was had before the court, sitting without a jury, in which the issues raised by the pleadings were resolved against defendants and judgment given for plaintiffs. From this judgment appellants appeal .

STATEMENT OF FACTS

We cannot agree entirely with counsel's "Statement of Facts" as set forth in appellants' brief. There is no citation to the record in the brief. We prefer to state the facts fully and cite the record in support of same. The respondents by Warranty Deed acquired the premises described in para-

graph 2 of count one of their complaint on April 27, 1945, and same is identified on their Exhibit "J" as Tract 2 (R. 106), and contains 1 acre of land together with improvements thereon. The appellants own the premises adjoining the respondents on the North containing 1.04 acres of land, together with improvements, the same being designated as Tract 1 on plaintiffs' Exhibit "J", appellant William Young having acquired the same by Warranty Deed from one Cavel in about the year 1925 (D. Ex. 1—R. 106). There is a presently existing wire division fence between the respective properties of the parties, but the same is not on the boundary line described in their respective deeds (Tr. 19). This wire fence was built by the appellant, William Young, probably in 1928 (Tr. 46-7), while Lydia C. LeVitre was the record owner of the respondents' premises. The respondents caused a survey of their property, as well as that of the appellants, to be made in September of 1950, and the same shows that the division fence encroaches upon respondents' land along the North side thereof about 6 feet on the East end and 10.9 feet on the West end and deprives respondents of about .08 of an acre of their ground which is enclosed on appellants' side of the fence (Tr. 18-20).

For several weeks before the fence was built the appellant William Young was being damaged by the trespassing cows and horses of one Chris Peterson, who was the owner of the parcel of land adjoining that of the respondents on the South, which was designated as Tract 3 of the plat, plaintiffs' Exhibit "J" (Tr. 46-47). The fence was built pursuant to an arrangement between the appellant William Young and Chris Peterson, whereby the latter furnished the post and wire and the former built the fence (Tr. 47). The fence was put on a line appellants claim was designated by

A. H. LeVitre shortly before the fence was built in 1928 (Tr. 49). A. H. LeVitre had conveyed respondents' property (Tract 2) on May 8, 1924, to Lydia C. LeVitre, some 4 years prior to the fence being built (Tr. 42). Neither A. H. LeVitre nor Lydia C. LeVitre lived on Tract 2 at the time the fence was built (Tr. 59-60).

The appellant, William Young, testified that he always thought he had built the fence in question on his true deeded line, and never knew any different until the respondents had the survey made in September, 1950. The appellant, William Young, testified as to what land he claimed after he acquired Tract 1 in 1925, as follows (Tr. 69-70):

"Q. Now when you acquired your property in 1925, what property did you intend to claim?

A. Property I intended to claim?

Q. Yes.

A. One and four-hundredths acres, of course.

Q. And that was the property described in your deed?

A. Yes sir.

Q. Did you ever intend to claim more property than was described in your deed?

A. No sir.

Q. Did you ever intend to claim any land not described in your own deed? At that time?

A. Why, no I didn't. Why should I?

Q. Did you ever intend to claim any land described in your neighbor's deed on the south?

A. No, I didn't.

Q. The only land that you ever did intend to claim, or ever have claimed, was the land described in your deed; is that correct?

A. Yes."

Although upon being questioned by his counsel after the above evidence was adduced from him on cross-examination, the appellant, William Young, further testified as follows (Tr. 72):

"Q. Have you ever intended to claim less property than that which is enclosed by the fences there at the present time?

A. No sir.

Q. You intend to claim all that's inside the fences?

A. Yes sir.

Q. So that when you said that you intend to claim only the described property, you understood that the described property was inside the fences?

A. Yes sir.

Q. The fences enclosing that described property?

A. Yes sir. Just what is in there. One and four-hundredths acres.

Q. So when you say that you intended only to claim the property described by your deed, **that is what you think is enclosed by the fence?**

A. Yes sir.

Q. And you have intended to claim all that's inside the fence?

A. Yes sir."

But on re-cross-examination the appellant finally testified on this matter as follows (Tr. 74):

"Q. Now of course your claim is that the fence enclosed only the property that was described in your deed; isn't that right?

A. Yes."

Thus, the appellant shows no adverse claim to plaintiffs' .08 acre piece of land that lays behind the fence he had built in 1928.

Appellants claimed in their answer that (R. 9):

" . . . the fence was built in the spring of 1928 as a result of the settlement of a dispute as to the location of the boundary between William Young, and A. H. LeVitre ad Lydia C .LeVitre, the plaintiffs' predecessors in title, and that said fence was built as the boundary between the property of defendants and the property of plaintiffs' predecessors;"

But the appellants failed to adduce any evidence to support this claim. In this connection the defendant, William Young, testified as follows (Tr. 65-67):

"So that there was never any dispute between you and LeVitre about where the boundary line between you was?

A. No sir.

Q. That is your north line and his south line?

A. Yes. My south line is his north line.

Q. Your south line is his north line?

A. Yes.

Q. You say there wasn't any dispute about that?

A. No.

Q. You had your deed to yours?

A. Yes, one and four-hundredths acres, that's all.

Q. And he had his deed to his?

A. Yes.

Q. You both bought from the same people, didn't you?

A. No. LeVitre sold to Cavell and Cavell sold to me.

Q. When was the first time anything came up about the boundary line between you and Mr. LeVitre?

A. We never had anything about the boundary line between LeVitre and I. Never had any trouble about it until now.

Q. Did you ever make any agreement about it?

A. No.

Q. No agreement about it?

A. No agreement, no.

Q. Did you ever discuss it with LeVitre?

A. Yes. When first moved there he used to come around when I was building chicken houses and talk around. We were pretty good friends, I thought.

Q. I mean did you ever discuss the matter of this boundary with him?

A.. Yes, but wouldn't discuss it every day.

Q. You never had any differences about it?

A. No.

Q. Never any dispute about it?

A. No.

Q. There was never any uncertainty about it at all?

A. No.

Q. And of course there was no agreement between you and LeVitre concerning it?

A. Not any more than told us where it was, and told me where the points were, and that's where I put the fence.

Q. Now tell us about that.

A. That's all there is to tell.

Q. I mean these points that you mentioend.

A. Well, showed me where they were, a big tree on one side and had a mark on the fence at the bottom on the other.

Q. Did he tell you at that time that a survey had been made?

A. A what had been made?

Q. A survey had been made?

A. Yes.

Q. He told you at that time?

A. Yes.

Q. About when was that?

A. Oh, along in '25, after I bought the place.

Q. 1925?

A. Yes.

Q. There was never any written agreement between you and Mr. LaVitre?

A. No.

Q. You say there was no occasion for it?

A. No, not that I know of.

Q. No dispute or any uncertainty as to where the line was?

A. No."

There is no evidence that Lydia C. LeVitre or A. H. LeVitre acquiesced in the fence as the boundary between Tract 1 and Tract 2 after same was built by appellant William Young in 1928. The record shows that the LeVitres had moved away from Tract 2 (Tr. 59-60) and perhaps did not know the fence had been built. The evidence is that Ernest Farrer acquired title to Tract 2 by Warranty Deed on August 24, 1936, from Lydia C. LeVitre (Tr. 42) and conveyed it away to one William O. McMeen and wife on September 15, 1944 (Tr. 43), but there is no evidence whatsoever that Ernest Farrer ever recognized or acquiesced in the fence as the boundary between Tract 1 and Tract 2, and the record is silent as to any acquiescence on the part of McMeen for the year he owned Tract 2 before conveying same to the plaintiff on April 27, 1945. The record positively shows that respondents did not recognize the fence as the boundary line between their property and appellants' property. They caused the survey to be made in September, 1950, (Tr. 6 and 18) well within 7 years after they took possession, and upon discovery that appel-

lants' fence was encroaching on their property, took steps to put the fence on the deeded line that resulted in this lawsuit (Tr. 7-11). The record further discloses that upon demand by respondents, the Gas Company permitted plaintiffs to move the fence North to the deeded line in connection with the piece of Tract 1 that had previously been conveyed to it by appellants (Tr. 9).

The most that can be said on this record in support of appellants' claimed acquiescence theory is that appellant Wiliam Young built the fence in question in 1928 in order to protect his gardens from the trespassing animals of Chris Peterson, and that the fence has remained where it was built dividing Tract 1 and Tract 2 ever since.

There is no evidence that the appellants have ever paid any taxes whatsoever on the .08 of an acre in dispute in this lawsuit, and the record positively shows that the respondents and their predecessors have always paid the taxes thereon (Tr. 5) (R. 106).

STATEMENT OF POINTS

I. APPELLANTS' APPEAL RAISES ONLY THE QUESTION AS TO THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE COURT'S FINDING THAT "APPELLANTS OCCUPY ANY OF RESPONDENTS' LAND."

II. THE COURT COMMITTED NO ERROR IN MAKING THE FINDINGS HEREIN OR IN THE APPLICATION OF THE LAW THERTO.

ARGUMENT**POINT I**

APPELLANTS' APPEAL RAISES ONLY THE QUESTION AS TO THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE COURT'S FINDING THAT "APPELLANTS OCCUPY ANY OF RESPONDENTS' LAND."

Utah Rules of Civil Procedure, Rule 52(b), provides as follows:

"Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial."

Under this rule appellants had a right to move the court for an amendment of or additional findings. This they failed to do. They were not thereby precluded from thereafter raising a "question of the sufficiency of the evidence to support the findings." But it would seem that appellants are thereby precluded from raising any question as to the court's failure to make additional findings. Especially is this true since the court made findings on all issues raised by the pleadings. Points I and II made by appellants in their brief are based on alleged error in fail-

ing to make findings and therefore they are not before the court on this appeal.

Appellants' Point III assails the court's finding that "the appellants occupy any of the respondents' land" upon the ground that the evidence is insufficient to support same. Evidently counsel refers to finding 4 (R. 12), which is as follows:

"That the defendants have trespassed upon and taken a portion of the plaintiffs' above described land on the North side thereof by constructing a fence thereon South of defendants' boundary line and enclosing said portion of plaintiffs' land behind said fence unlawfully and in violation of the plaintiffs' ownership of their above described lands."

The argument is that the surveyor did not take into account the overages in section 7, where the land in controversy lies. Appellants' counsel seems to say that there was uncertainty affecting the survey of the appellants' and respondents' lands (Tract 1 and Tract 2—Ex. J) because the surveyor failed to consider the overages of section 7 when he surveyed it. That this is not the record is shown by the surveyor's final words on the matter (Tr. 36-37) as follows by Mr. Ballif on redirect:

"Q. Now you were acquainted at the time you made the survey with the discrepancies in Section 7?

A. Yes, I have the actual measured distance between every section corner that there is record of in the County.

Q. And in making this survey, you took that discrepancy into consideration?

A. I did.

Q. And you determined that the property to the

south, the Peterson property had been surveyed. And did your survey coincide with that?

A. I did not determine that the Peterson property had been surveyed by actual information as to who it had been done by, but I assumed it had been surveyed because of the fact that my findings on the ground actually checked with the boundary line in their description.

Q. So that you found the south fence of Hummels' substantially on the deeded description line?

A. It is on the Peterson deed, not the Hummel."

The testimony of the surveyor (Tr. 17-41) amply sustains the assailed finding. Indeed there is no evidence in the record to the contrary.

POINT II

THE COURT COMMITTED NO ERROR IN MAKING THE FINDINGS HEREIN OR IN THE APPLICATION OF THE LAW THERETO.

In our Statement of Facts, *supra*, we cited appellants' testimony to show that the fence in question was not built pursuant to an agreement between him and LeVitre. But counsel in appellants' brief makes the unsupported claim that there was such an agreement (Br. of A 11 and 12). Another claim made by counsel which the evidence fails to support is that "respondents and their predecessors cultivated and used the land . . . to the fence . . ." The fact is LeVitre, the common predecessor to both parties, never cultivated or used the land in question (Tr. 58). There is no evidence that LeVitre built sheds or a garage along the South side of the said fence (Tr. 51). The orchard on appellants' side of the fence was planted only five years

ago (Tr. 61) and these trees are North of the deeded boundary line and on appellants' deeded land (Tr. 63). With these corrections our statement of the facts reflects the record in this case. The record amply sustains the court's findings. It is our position that the conclusions and judgment follow the law applicable to this factual situation.

At the trial respondents claimed the true boundary between Tracts 1 and 2 (Ex. J) to be the deeded line, and appellants claimed it was the fence. Appellants based their claim upon three grounds: (1) the statute of limitations and adverse possession for more than 7 years, (2) that the predecessors of both parties made an oral agreement as to the disputed boundary line pursuant to which the fence was built, and (3) that respondents' predecessors have acquiesced in the fence as the boundary since the same was built in 1928. Appellants failed to adduce evidence sustaining either of these claims, and the court so found.

We believe that the law governing this case is established by *Tripp v. Bagley*, 74 U. 57, 267 P. 912. In that case the plaintiff held the title to a piece of land. Defendant held the record title to an adjoining parcel. Both of these parties were on the land prior to patent. An irregular fence was put up by the plaintiff's predecessor in title in the year 1870 to enclose land to be used for garden purposes. Later on defendant's predecessor in title came on the land and same was used jointly by them. Subsequently a survey was made and the boundary line between the properties in question was established. This boundary line showed record title to the disputed land to be in plaintiff's predecessor. The fence line was not changed and the parties went ahead using the land jointly for vegetable gar-

dens. Plaintiff brought action in 1922 claiming the ownership of the land. The trial court found for the defendant on the theory that the fence boundary had been acquiesced in for a long period of time. On appeal the Supreme Court reversed the decision, holding that the title to the land behind the survey line fence still rested in the plaintiff.

In this case the defendant endeavored to establish title to the disputed land (1) by adverse possession, (2) by oral agreement that the fence should be the boundary line, and (3) that the parties and their predecessors had acquiesced in the boundary for a long period of time. These are substantially the claims made by the defendants in the case at bar. On each of these contentions the court held against the defendant and had the following to say:

"It is clear that defendants have failed to establish title to the land in controversy by adverse possession, because neither they nor their predecessors in title ever paid any taxes thereon.

". . . . It is therefore clear that defendants' claim to the land in controversy must stand or fall either upon an express agreement fixing the boundary line, or upon acquiescence in a boundary line between the land owned by plaintiff and that owned by defendants.

"So far as length of time is concerned, the fence claimed by defendants as marking the boundary line has been established for a sufficiently long period to support defendants' claim. It was erected in about the year 1870, and, according to the testimony of defendants, it has remained in the same location until this suit was begun in 1922. According to the rule

laid down by the textwriters and practically all of the adjudicated cases where the question is discussed, one of the requisites necessary to the establishment of a boundary line other than the true boundary line between adjoining landowners by oral agreement or acquiescence, in the absence of adverse possession or estoppel, is that the location of the true boundary sought to be thus established is or has been uncertain or in dispute”

The record in the instant case shows that the LeVitre had moved away from the premises before appellants built the fence in question and perhaps knew nothing of it.. It further conclusively appears that there was no uncertainty as to the boundary even when LeVitre owned Tract 2, some four years before appellant Young built the fence. And the record further discloses that there was no agreement, oral or written, between appellants and Lydia C. LeVitre nor A. H. LeVitre, her husband, that the fence should be built where same was built in 1928 or that it should be the boundary between Tract 1 and Tract 2 (Ex. J). The most that can be sustained from the evidence is that shortly before appellant Young built the fence in 1928 A. H. LeVitre, who was then a stranger to the title of Tract 2, designated where the fence should be by referring to a tree and a back fence . The conclusion is inescapable that the fence in question never was intended as a boundary when it was built. It was erected to keep Petersons livestock from damaging appellants' garden.

Brown v. Millner, (1951) 232 P2d, 202, is one of the very recent utterances of the Utah Supreme Court on the question of boundary disputes . It involved a disputed tract of land in Summit County. Appellant claimed title

to the land in dispute under a deed while the respondent claims title under the doctrine of boundary by acquiescence and by adverse possession. Appellant appealed from a judgment quieting title to the disputed area in the respondent and the holding of the lower court was reversed with directions to enter judgment in favor of the appellant. The court refused to apply the doctrine of "boundary by acquiescence" contended for by respondent, and said:

"A review of the Utah cases involving boundary disputes reveals that it has long been recognized in this state that when the location of the true boundary between two adjoining tracts of land is unknown, uncertain or in dispute, the owners thereof may, by parol agreement, establish the boundary line and thereby irrevocably bind themselves and their grantees. Rydalcch v. Anderson, 37 Utah 99, 107 P. 25; Tripp v. Bagley, 74 Utah 57, 267 P. 912. In the latter case this court pointed out that when the location of the true boundary is known to the adjoining owners any parol agreement between them establishing the boundary elsewhere would be an attempt to transfer an interest in realty without complying with the statute of frauds. But, we stated, if the location of the true boundary is not known to the adjoining owners, a parol agreement between them fixing its location is not regarded as transferring an interest in land but merely determining the location of existing estates.

"We have further held in this state that in the 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. *Holmes v. Judge*, 31 Utah 269, 87 P. 1009. . . . However in that case we were careful to mark off the limits of the rule. Said the court:

'We do not wish to be understood as holding that the parties may not claim to the true boundary, where an assumed or agreed boundary is located through mistake or inadvertence, or where it is clear that the line as located was not intended as a boundary, and where a boundary so located has not been acquiesced in for a long term of years by the parties in interest.'

". . . . Does the fence which was constructed constructed by the defendant in the old channel constitute a boundary line from which the parties may not now depart? That question must be answered in the negative. No claim is made by the defendant that he erected the fence pursuant to an express agreement with the plaintiff's father, who was then the owner of tract #1, as to where the boundary should be located. Nor can it be implied that such an agreement ever took place as in *Holmes v. Judge*, supra, and the cases following it cited above. The defendant, who personally built the fence, does not contend that he ever as much as had a discussion with the plaintiff or his father concerning the location of the boundary between them. He testified, and his wife corroborated him, that when he had finished building the fence the plaintiff came along and inquired what he (the defendant) was doing and that nothing more was said. Were the record silent as to the circumstances surrounding the erection of the fence there might be room to imply that it was built in pur-

suance of an agreement between the adjoining owners as to the location of the boundary between them, such as was done in *Holmes v. Judge*, supra. But in the instant case, as in *Peterson v. Johnson*, supra; *Home Owners' Loan Corporation v. Dudley*, supra; and *Glenn v. Whitney*, supra, there is no room under the evidence for such an implication to be drawn. Thus we conclude that the doctrine of boundary by acquiescence has no application under the evidence."

Neither is there any room for the doctrine of *Brown v. Millner* to be applied to the facts of the case at bar. There was no agreement on the part of Lydia C. LeVitre that the appellant should build the fence when or where it was built. Both she and her husband, A. H. LeVitre, had moved away from Tract 2 before the fence was built and had no knowledge of it. There is no evidence that Ernest Farrer, who acquired title to Tract 2 from Lydia C. LeVitre, or William O. McMeen, who acquired title to same from Farrer, ever lived on the property or knew of the fence, let alone acquiescing in same as the boundary. The record shows positively that respondents never acquiesced in the fence as the boundary for the 7 year period established by *Ekborg v. Bates*, 239 P2d 205. They acquired the property April 27, 1945, and caused the survey to be made in September, 1950, which resulted in this lawsuit.

CONCLUSION

The findings of the court are amply sustained by the evidence, and upon the record and the law the judgment should be affirmed.

Respectfully submitted,
GEORGE S. BALLIF,
Attorney for Respondents