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Marvin D. Bagley

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Objective Uncertainty in Boundary by Acquiescence: *Halladay v. Cluff*

Locating boundaries between adjoining tracts of land has been a continual source of dispute and litigation in Utah and other jurisdictions.¹ To facilitate dispute resolution, courts have employed the doctrine of boundary by acquiescence. The doctrine presumes that when a recognizable physical boundary has existed between adjoining tracts of land for a long period of time any dispute over the boundary has been resolved.² This avoids controversy and prevents litigation.³

Attempting to settle prior inconsistent case law, the Utah Supreme Court held in *Halladay v. Cluff*⁴ that "objective uncertainty" must exist in the record title or in "reasonably available survey information" before the doctrine of boundary by acquiescence can be applied.⁵ This new requirement gives record title priority over previously recognized on-the-ground boundaries, which tends to encourage rather than discourage litigation.

I THE *Halladay* CASE

In 1947 defendants Perry and Norma Bigelow purchased a 231-by-59-foot parcel of real property in Provo, Utah. In 1948 defendant Norma Cluff purchased a neighboring parcel of approximately the same dimensions.⁶ When the Bigelows and Cluff purchased the lots, a fence surrounding the two lots included an additional 52 ½-feet behind the rear property line of the two lots. This extension apparently resulted from the assumption that the 231-foot depth of the lots extended from the edge of the street fronting the lots rather than from points across the street as indicated in the legal description.⁷ In 1958 plaintiffs Mack and

1. Note, *Boundaries by Agreement and Acquiescence in Utah*, 1975 UTAH L. REV. 221.

2. *Baum v. Defa*, 525 P.2d 725, 726 (Utah 1974); Note, *supra* note 1, at 224.

3. *Hobson v. Panguitch Lake Corp.*, 530 P.2d 792, 794 (Utah 1975); *Olsen v. Park Daughters Inv. Co.*, 29 Utah 2d 421, 425, 511 P.2d 145, 147 (1973).

4. *Halladay v. Cluff*, 685 P.2d 500 (Utah 1984).

5. *Id.* at 507.

6. *Id.* at 501.

7. *Id.*

Merle Halladay, who already owned property on the opposite side of the fence, purchased the fifty-two-foot strip of disputed property.⁸

The Bigelows and Cluff assumed they owned the fifty-two-foot strip in their backyards. Accordingly, they cultivated gardens and built and maintained chicken coops on the property.⁹ On one occasion in the 1950's, Mr. Halladay informed Mr. Bigelow that the Halladays claimed the disputed property. On several occasions in the 1970's, Mr. Halladay asked Mr. Bigelow not to use the disputed parcel. The Halladays and Cluff did not discuss the property line until shortly before the litigation commenced.¹⁰

In 1956 the Bigelows paid for a survey that indicated they did not own the disputed parcel. However, the Bigelows and Cluff believed the survey to be erroneous. In 1975 Cluff obtained a plat that also indicated that the Bigelows and Cluff did not own the disputed fifty-two-foot strip.¹¹ In 1979 the Halladays commenced this action to quiet title to the property. The Bigelows and Cluff counterclaimed to quiet title in themselves on the ground of boundary by acquiescence. The district court held for the Bigelows and Cluff, and the Halladays appealed to the Utah Supreme Court. The Halladays claimed boundary by acquiescence does not apply when the location of the boundary is not disputed or uncertain.¹²

The Utah Supreme Court reversed the trial court, holding that a party who claims boundary by acquiescence must show "objective uncertainty" regarding the true location of the boundary.¹³ The court reasoned that boundary by acquiescence did not apply in this case since neither the Bigelows nor Cluff had record title to the disputed property.¹⁴

In concluding that objective uncertainty is a requisite element of boundary by acquiescence, the court examined its earlier cases and noted that while it had required dispute or uncertainty in many recent cases, it had ignored the element in others.¹⁵ Cases that required dispute or uncertainty were split on

8. *Id.*

9. *Id.*

10. *Id.* at 502.

11. *Id.* at 501-02.

12. *Id.* at 502.

13. *Id.* at 507.

14. *Id.*

15. *Id.* at 508-04. Much of the confusion regarding the element of dispute or uncer-

the question of whether dispute or uncertainty should be measured objectively or subjectively. In some cases the court required dispute or uncertainty to be traceable to an objectively determinable ambiguity in a deed or survey.¹⁶ However, in other cases the court found mere lack of knowledge sufficient.¹⁷

The court reasoned that the interest in encouraging reliance on property dimensions as recorded in the county records outweighed the interest in confirming boundaries that have been recognized on the ground for a long period of time. Thus, the court opted for an objective test that made objective uncertainty an element of boundary by acquiescence. Although the requirement of dispute or uncertainty is not new to boundary by acquiescence in Utah, the court's requirement and definition of objective uncertainty will significantly effect future boundary by acquiescence cases.

Justice Howe authored a spirited dissent criticizing the majority's objective uncertainty requirement. He argued that "[s]uch a requirement [is] entirely foreign to the doctrine of boundary by acquiescence because the basis of the doctrine is that the law *implies* that there once existed uncertainty and dispute and that the adjoining landowners mutually agreed upon the marked boundary in settlement."¹⁸ Justice Howe reasoned that the implication of uncertainty and settlement is essential to the doctrine "because due to the passage of time, there is often little or no evidence available [regarding] the erection of the boundary marker."¹⁹ Justice Howe further argued that "proof of uncertainty or dispute is not and never has been an 'ingredient' or element of a cause of action for boundary by acquiescence."²⁰ Rather, such proof has only been required in boundary by agreement cases.

tainty is attributable to the intermingling of the requirements of boundary by acquiescence and the requirements of boundary by agreement. Originally the element was mentioned only in connection with boundary by agreement. Beginning with *Tripp v. Bagley*, 74 Utah 57, 276 P. 912 (1928), the Utah Supreme Court referred to uncertainty or dispute as an element of boundary by acquiescence. Since that time, Utah cases have been inconsistent in their treatment of the element of dispute or uncertainty.

16. *Glenn v. Whitney*, 116 Utah 267, 273, 209 P.2d 257, 260 (1949); Note, *supra* note 1, at 231-32.

17. *Ekberg v. Bates*, 121 Utah 123, 127, 239 P.2d 205, 207 (1951) (quoting *Willie v. Local Realty Co.*, 110 Utah 523, 531, 175 P.2d 718, 723 (1946)).

18. *Halladay*, 685 P.2d at 511 (Howe, J., concurring & dissenting).

19. *Id.* at 512 (Howe, J., concurring & dissenting).

20. *Id.* at 510-11 (Howe, J., concurring & dissenting).

II. ANALYSIS

The requirement of objective uncertainty invites increased litigation and thereby defeats the basic rationale for adopting boundary by acquiescence. Making objective uncertainty an element of boundary by acquiescence causes previously recognized on-the-ground boundaries to be uncertain. Consequently, landowners may initiate litigation to increase the acreage of their property.²¹ Boundary disputes presumed to have been settled prior to the *Halladay* case may now be reopened and litigated.

A. *The Doctrine of Boundary by Acquiescence*

The doctrine of boundary by acquiescence has four consistent elements in Utah case law: (1) occupation up to a visible line marked by monuments, fences, or buildings; (2) with mutual acquiescence in the line as a boundary; (3) for a long period of time; (4) by adjoining landowners.²² To prove the first element, the party claiming boundary by acquiescence must show that the respective parties either actually or constructively occupied the land on each side of the claimed boundary.²³ The plaintiff must also show that the boundary line itself is visibly and permanently marked on the land by fences, buildings, or other monuments.²⁴ The second element, mutual acquiescence, requires a showing that the owners accepted the line as a boundary.²⁵ Showing that the parties actually intended or agreed that the line be a boundary is not necessary. The party claiming boundary by acquiescence need only show that the parties allowed the boundary to stand for a long period of time.²⁶

At least one state has held that the statutory period for adverse possession (generally seven years) is sufficiently long to satisfy the third element, which requires a long period of time.²⁷ However, the Utah Supreme Court has held "[o]nly under unusual circumstances would a period less [than 20 years] be

21. Of course a judicial change would not alter the legal description found in the record title, but it would increase the on-the-ground acreage available for use.

22. *Goodman v. Wilkinson*, 629 P.2d 447, 448 (Utah 1981); *Fuoco v. Williams*, 18 Utah 2d 282, 284, 421 P.2d 944, 946 (1966).

23. *Harding v. Allen*, 10 Utah 2d 370, 373-74, 353 P.2d 911, 913-14 (1960).

24. *Fuoco v. Williams*, 18 Utah 2d 282, 285, 421 P.2d 944, 946 (1966).

25. *Lane v. Walker*, 29 Utah 2d 119, 120, 505 P.2d 1199, 1200 (1973).

26. *Id.*

27. *Lamm v. McTighe*, 72 Wash. 2d 587, 434 P.2d 565 (1967).

deemed sufficient.²⁸ The fourth element requires a showing that the acquiescence is by adjoining landowners.²⁹ Thus, the doctrine does not apply if the alleged boundary belongs to a single owner or if the lands of different owners are separated by a strip of land belonging to a third person.

Some Utah cases additionally have required that the adjoining landowners dispute, or be uncertain over, the true location of the boundary.³⁰ As previously noted, the issue in *Halladay* was whether this uncertainty is a required element of boundary by acquiescence and, if so, whether the uncertainty must be traceable to an objectively determinable ambiguity in a deed or survey or whether mere lack of knowledge is sufficient.³¹

1. *The rationale*

The basic reason for applying the doctrine of boundary by acquiescence is that it avoids litigation. The good order of society requires stability in the ownership and occupation of land. Therefore, courts have sought to avoid litigation and controversy by declining to disturb long-established boundary lines that have been accepted by the concerned parties.³² In *Baum v. Defa*³³ the Utah Supreme Court said:

The doctrine of boundary by acquiescence derives from realiza-

28. *Wood v. Myrup*, 681 P.2d 1255, 1258 (Utah 1984) (quoting *Hobson v. Panguitch Lake Corp.*, 530 P.2d 792, 795 (Utah 1975)); *King v. Fronk*, 14 Utah 2d 135, 141-42, 378 P.2d 893, 897 (1963).

29. Note, *supra* note 1, at 228-29.

30. *Madsen v. Clegg*, 639 P.2d 726 (Utah 1981). *But see* *Goodman v. Wilkinson*, 629 P.2d 447 (Utah 1981) (making no mention of a showing of uncertainty or dispute). Other jurisdictions that recognize boundary by acquiescence are split on whether dispute or uncertainty is a required element of the doctrine. Dispute or uncertainty is not required in New Mexico, *Sproles v. McDonald*, 70 N.M. 168, 173, 372 P.2d 122, 126 (1962), or Washington, *Lamm v. McTighe*, 72 Wash. 2d 587, 593, 434 P.2d 565, 569 (1967). But it is required in Idaho, *Lisber v. Krasselt*, 94 Idaho 513, 516, 492 P.2d 52, 55 (1962).

31. *Halladay*, 685 P.2d at 503-05. Early cases were also inconsistent regarding this rule. *See* *Glenn v. Whitney*, 116 Utah 267, 209 P.2d 257 (1949), which required the element of dispute or uncertainty and held that "lack of knowledge as to the location of the boundary is not synonymous with uncertainty." *Id.* at 272-73, 209 P.2d at 260. The court in *Ekberg v. Bates*, 121 Utah 123, 239 P.2d 205 (1951) (quoting *Willie v. Local Realty Co.*, 110 Utah 523, 531, 175 P.2d 718, 723 (1946)), rejected this objective measurement in favor of a subjective test in which "a boundary line may be 'uncertain' or 'in dispute' even though it is capable of being readily ascertained." *Ekberg*, 121 Utah at 127, 239 P.2d at 207.

32. *Hobson v. Panguitch Lake Corp.*, 530 P.2d 792, 794 (Utah 1975); *Baum v. Defa*, 525 P.2d 725, 726 (Utah 1974).

33. 525 P.2d 725 (Utah 1974).

tion, ancient in our law, that peace and good order of society is best served by leaving at rest possible disputes over long established boundaries. Its essence is that where there has been any type of a recognizable physical boundary, which has been accepted as such for a long period of time, it should be presumed that any dispute or disagreement over the boundary has been reconciled in some manner.³⁴

A second, less frequently invoked, rationale for the doctrine is that it minimizes conflict with the statute of frauds, which forbids the transfer of an interest in real property without a written conveyance.³⁵

The court in *Halladay* indicated that requiring objective uncertainty would minimize reliance on boundary by acquiescence and thereby advance both rationales.³⁶ Arguably, requiring objective uncertainty does advance the statute of frauds rationale. However, close analysis of the doctrine indicates the requirement will result in increased litigation. Therefore, the basic rationale of preventing litigation is defeated by the objective uncertainty requirement.

2. *Definition of objective uncertainty*

Although some Utah cases have required dispute or uncertainty, objective uncertainty was not a settled element of boundary by acquiescence prior to *Halladay*. In making objective uncertainty an element of the doctrine, the court said, "[D]ispute' is not proved by a mere difference of opinion, and 'uncertainty' is not proved by a mere lack of actual knowledge of the true location of the boundary."³⁷ The court then formulated the following test:

Under the rule as we have defined it here, the property line on the record title cannot be displaced by another boundary unless it is shown that during the period of acquiescence there was some objectively measurable circumstance in the record title or in the reasonably available survey information (or other technique by which record title information was located on the ground) that would have prevented a landowner, as a practical

34. *Id.* at 726.

35. *Madsen v. Clegg*, 639 P.2d 726, 728 (Utah 1981); *Tripp v. Bagley*, 74 Utah 57, 71-72, 276 P. 912, 917-18 (1928).

36. *Halladay*, 685 P.2d at 505.

37. *Id.* (citing *Glenn v. Whitney*, 116 Utah 267, 273, 209 P.2d 257, 260 (1949)).

matter, from being reasonably certain about the true location of the boundary.³⁸

The court's definition of objective uncertainty requires a determination of whether there was "reasonably available survey information." This phrase appears to originate, and is defined, in the *Halladay* case:

In general, when survey information is reasonably available (such as when reliable survey control points are accessible to the land and survey costs are not disproportionate to the value of the land) so that it is reasonable to expect the parties to locate their boundary on the ground by surveys, the courts should be less willing to apply the doctrine of boundary by acquiescence. This reasonable availability of survey information obviously varies from place to place and from time to time. However, it can be said in general that survey information is more available and its cost is less likely to be disproportionate in relation to the value of the land in the city and platted areas than in rural or wilderness areas.³⁹

The court's requirement of objective uncertainty and its definition of "reasonably available survey information" complicate the doctrine of boundary by acquiescence. Utah courts will now have to determine whether the land is rural or urban and whether the cost of a survey is disproportionate to the value of the land. These inquiries tend to encourage and prolong litigation rather than prevent it, thereby contravening the primary rationale for boundary by acquiescence.

B. Applying the Element of Objective Uncertainty

The pre-*Halladay* rule of boundary by acquiescence was based on the policy of confirming boundaries that had been recognized on the ground for a long period of time. In contrast, the *Halladay* court's requirement of objective uncertainty is based on the policy of encouraging reliance on the dimensions shown in the county records.⁴⁰ By shifting the emphasis from established boundary lines to county records, the *Halladay* court has

38. *Halladay*, 685 P.2d at 505. The Utah Supreme Court recently quoted this language in reaffirming that objective uncertainty is a necessary element in boundary by acquiescence. *Stratford v. Morgan*, 689 P.2d 360, 364 (Utah 1984).

39. *Id.* at 504.

40. *See id.*

undermined the previous rationale and presumption of boundary by acquiescence.

1. *Movement of on-the-ground boundaries*

Boundary by acquiescence cases generally arise in two situations. In the first situation the true location of the boundary is not ascertainable because of some uncertainty in the record title or survey and a boundary was erected which may or may not be the true boundary.⁴¹ In the second situation the true boundary is ascertainable but the physical boundary was erected somewhere other than on the true boundary.⁴²

In the first situation, the additional requirement of objective uncertainty makes no difference. If the other four elements of the doctrine are satisfied, the on-the-ground boundary will be allowed to stand regardless of the requirement of objective uncertainty. In the second situation, the requirement of objective uncertainty makes a difference. If objective uncertainty is not required and the other four elements are met, the on-the-ground boundary is allowed to stand. However, if objective uncertainty is made an element of the doctrine, the on-the-ground boundary will be moved because objective uncertainty was not present, even though the other four elements of the doctrine may be met.

When objective uncertainty is made an element of the doctrine, the property owner in the second situation who could increase his acreage by moving the on-the-ground boundary is encouraged to bring action to quiet title to the additional property. Prior to *Halladay*, the landowner had no incentive to file a quiet title action because if the other four elements of the doctrine were satisfied, the on-the-ground boundary could not be moved. However, the objective uncertainty requirement allows one landowner to take possession of property previously occupied by another landowner, thus creating an adversarial situation. Since the landowner whose acreage will be decreased by the move has occupied the land for over twenty years, he will not likely give up the property without litigation.

41. See *Nunley v. Walker*, 13 Utah 2d 105, 110-11, 369 P.2d 117, 120-21 (1962); *Jensen v. Bartlett*, 4 Utah 2d 58, 60, 286 P.2d 804, 806 (1955).

42. See *Halladay*, 685 P.2d at 501-02; *Goodman v. Wilkinson*, 629 P.2d 447, 448 (Utah 1981); *Hales v. Frakes*, 600 P.2d 556, 557 (Utah 1979).

2. *Reasonably available survey information*

The court's definition of "reasonably available survey information" also encourages litigation. The definition requires courts to inquire into the value of the property in dispute, the costs of the survey in proportion to the value of the property, and the nature of the property—whether rural or urban.⁴³ If the doctrine of boundary by acquiescence is restricted to the traditional four elements, adjoining landowners can predict with reasonable certainty how a court will rule on a boundary dispute. Therefore, in many cases litigating the dispute is unnecessary. However, since the *Halladay* court's definition of reasonably available survey information requires a factual determination involving several variables, parties will not be able accurately to predict how a court will rule on a dispute. As a result, parties will initiate litigation and hope the court will determine the facts in their favor.

The factual variables the court must consider are subject to change over time. This may cause inconsistent results that tend to increase litigation. Situations could arise in which a court will not require a survey because the cost of the survey is disproportionate to the land, even though a survey would resolve the ambiguities in the record title. Since the ambiguity is not resolved, objective uncertainty will be found and the on-the-ground boundary will not be moved. Further, because property values frequently vary, a court facing a similar boundary dispute a year later may require a survey if the increased value of the land now makes a survey feasible. In that situation the ambiguity would be resolved and there would be no objective uncertainty. The cases would be resolved differently simply because the land increased in value. Such inconsistent results will make it difficult for landowners to predict how the court would rule on their disputes. Therefore, the parties will seek litigation rather than settling on the basis of prior cases.

Additionally, the definition of reasonably available survey information requires the court to make so many factual determinations that it increases not only the amount of litigation but also the length of time spent litigating. In contrast, requiring only the traditional four elements of boundary by acquiescence

43. *Halladay*, 685 P.2d at 504.

would discourage litigation and thus further the traditional purpose of the doctrine of boundary by acquiescence.

III. CONCLUSION

The decision in *Halladay* is a significant development in the doctrine of boundary by acquiescence. The Utah Supreme Court added the requirement of objective uncertainty to the four previously recognized tests. This marks a shift away from the traditional deference afforded long-recognized on-the-ground boundaries and toward protection of property dimensions as recorded. Although reliance on county records is a legitimate policy consideration, in the boundary by acquiescence context the new requirement tends to increase litigation, thus defeating the traditional rationale for boundary by acquiescence.

Marvin D. Bagley