

1952

Moses Slarghard v. Donald N. Smith et al : Reply Brief

Utah Supreme Court

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#7869

IN THE SUPREME COURT

STATE OF UTAH.

MOSES BLANCHARD

Plaintiff and Appellant : REPLY BRIEF.

vs

DONALD E. SMITH, et al,

Defendants and Respondents.

Permission from Court first granted, comes
now appellant and notes some flagrant misstate-
ments of fact by respondent as follows:(pages
and lines refer to respondent's brief.)

(1), Page 3, lines 2-7:"Although plaintiff so
states on page 2 of his brief, nevertheless none
of the property so distributed by decree of
distribution was surveyed during probate(tr.86.8

-Not correct. The citation given does not sup-
port that statement. The executrix, Mrs. Perry,

testified that she brought her attorney, W.B.

Wagon, a small sketch showing how she wanted

the estate property distributed; that he told

he would have to have it surveyed, and that

he had it surveyed. The petition for distribution

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Clerk, Supreme Court, Utah

and the degree of distribution both show a
surveyor's description by acres and bounds. That
property was not so described before (see abstract
pg. 4).

(3), P. 1, first 3 lines of last par.: "At the
time or shortly after plaintiff purchased his
property he wanted to know the boundary lines.
No one knew them. (tr. 4, 5, 60, 65-66)". Not true.
No witness so testified. The citations given
do not support that statement.

(3), Middle of p. 4: "Plaintiff never used or
claimed any part of the property north of fence."
- Not correct. Plaintiff and his two sons posi-
tively testified that they used the north side
of fence for many years to haul best pulp,
hay, and forerrick horses to pull hay into
their barn. (tr. 60, 66, 69-71).

(4), Page 1, first line: "After fence was built
plaintiff built his house." Although plaintiff
positively testified that he did not build that
fence, that it was there when he came (tr. 37);
that he never had anything to do with having the
property surveyed (tr. 76); yet counsel continues
to say that plaintiff built that fence.

This time counsel asserts that plaintiff built that fence before he built his house, although he cited as star witness, Mr. Perry, to the contrary: (page 17, appellant's brief.)

(3), Middle of page 8: "Each have always paid for tax sidewalks and sewer improvements according to the frontage of respective tracts they were in possession of (tr. 31). - not true. The citation given does not support that statement. The undisputed evidence is to the contrary, - that assessments were made on the record title, as the trial court announced he would find and as counsel then agreed; thus - Court: "I'll make findings that each party has paid taxes on the descriptions as shown by the abstracts down through the years. Now about special improvements? Same way?" Mr. Farnsworth: "Same way." Mr. Heinrich: "I agree to that." (tr. 35).

(4), Page 8, last line: "The \$15.00 then remained unpaid to Logan City, plaintiff paid it and upon learning of it defendant offered to repay him (tr. 32)." - Not true. No such testimony. The citation does not support such statement.

impression. The \$16.50 was paid by plaintiff as consideration for the quit-claim deed from Logan City (ex "p"). Defendants had nothing to do with that deal; it was all completed before plaintiff and his son, George, tried to effect a settlement with . Smith.

(7), middle of page 6: "Appellant claims that because Logan City conveyed to him there was a mutual mistake of fact." - Not true. Appellant claims there was a mutual mistake of fact because both parties mistakenly believed that the south one rod was plaintiff's property.

Thus: Mrs. Anna Perry: "I thought and I naturally thought too that the south rod was his property. My father used it for years and years." (Ex 66). Moses Blanchard: "I didn't know that Logan City owned it at that time. I figured Tiller owned this one rod to the south and so did Tiller. I knew I was supposed to have 4 rods..I was 1/2 of 1/2 rod. (tr. 46-7).

(8), Near bottom of page 6: "If Logan City never paid any taxes thereon, nor did these

defendants and their predecessors who owned the excess in the block, then why is the court not correct? - Counsel knows that no taxes are assessed against city property. Counsel also knows that no claim was made and no evidence was produced in the trial to show that there is excess in that block, nor that the defendants or their predecessors in interest owned any excess. Such an assertion, made for the first time on appeal, seems another clear attempt to throw dust and mislead this court.

(8), second line from bottom, page 6: "He, appellant, only paid taxes on the property he was in possession of." - Not correct. He paid taxes through the years on his deeded premises; each tax assessment, both general and special, always described his premises by notes and books, as the same was deeded to him. (Ex. "F", "G").

Those descriptions included 18 ft. north of the fence which plaintiff was not in possession of. The fact that plaintiff paid no taxes on the south rod of city property, or the fact that

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Logan City charged only \$18.50 for that rod, are not matters or equities which concern the defendants, nor should inure to their benefit, for they are total strangers to that 1 rod deal between Logan City and plaintiff. Suppose the City had charged \$150.00? (which is approximately the amount Logan City has lost in general and special taxes on that one rod); or suppose the City had conveyed to a third person and he in turn had demanded \$300.00 of the plaintiff for that one rod? Surely such facts cannot affect the relative rights between plaintiff and defendants. Appellant contends as a matter of equity and justice, if the court is going to award the north 15 feet to defendants, they should at least be required to refund the taxes which plaintiff has paid thereon. If they had been willing to do that, there would have been no law suit.

(10), Page 8, first 3 lines, under: "The balance of the testimony quoted on page 9 and top of page 10 is trolxy. 'That one rod fooled us all, I am satisfied about that.' 'When did you

find out about that? These answers are based upon the correctness of counsel's question".- Why is it "tricky" to quote a witness correctly? The question asked plaintiff was not my question but was asked by counsel's main witness, Mrs. Anna Perry; nor does counsel correctly quote her question, as the Court will observe.

(11), Page 9, lines 5-7: "either abstract shows Logan City to be the owner of the 1 rod. The abstractor testified Logan City never had title so far as his search reveals." Not true; and besides we submit it is immaterial, as no issue is raised in the pleadings concerning title to that 1 rod. But as a matter of fact, both abstracts show (in the printed part) that the area embracing said 1 rod was first conveyed by the U.S. to M.B. Preston, Mayor of Logan City.

Witness, Crockett, the abstractor, also changed his testimony after examining the old plans. The trial court wanted to know whether the 1 rod "was included within the tract (pasture lot 7)- conveyed by M.B. Preston to Alice M. Johnson (part of which she later conveyed to Oliver G. Tiller).

Crockett: "I would say that the 1 rod would be south of Mrs. A. Benson tract (Tr. 64). This shows that Logan City had not previously conveyed away the area of the 1 rod tract and hence had a full right to quit-claim it to the plaintiff in 1948. But again we point out that the question whether the City's deed to the plaintiff is valid or not, is outside of the issues and therefore immaterial. We did show definitely that the 1 rod was never conveyed to Halver O. Tiller deceased. Yet, as we have pointed out (pg. 5) of our brief the court nevertheless erroneously found: "That Halver O. Tiller was the true owner of said one rod strip."

(12), Page 10, lines 1-3: "w hen plaintiff went into possession of property between fence lines, he got what he bargained for", -Our answer is: 1st, plaintiff testified he knew he was short 2 1/2 feet between fence lines; And, Counsel here admits that the disputed fence was up when plaintiff went into possession. -Just what the plaintiff contends. Counsel thereby also admits that plaintiff was right when he testified that he

Building that fence.

Counsel chided plaintiff for not having that fence moved, if he knew it was 8 feet over on his ground, and also that he used the north side as a drive-way, although he had only 8 ft. there. Plaintiff answered: "We used the north side of the fence. No one objected. We never bothered to know just exactly where the right line was as long as we were good neighbors. When they put the curb and gutter in, we had it surveyed and this thing came to a head... (tr. 25).

(13), Facell, middle par.: "In Trip v. Bagley... there were no permanent improvements placed in reliance upon an established fence boundary line. Neither were there in case at bar. The fact that plaintiff built his chicken coop, coal shed, etc. up to that fence cannot avail defendant of any equity or advantage. Neither defendants nor their predecessors in interest constructed any improvements on the 19 ft. in dispute, nor did any act whatsoever "in reliance upon that fence as an established boundary line. "Defendant Smith admitted that he knew he bought only 4 rods that he never measured his ground (tr. 10-15)

just took it for granted that fence was on the line (although his lot was 5 rods 8 feet wide.)

In *Frip v Bagley*, supra, this court said: "A person may not avail himself of the conduct, acts, language or silence of another, under the doctrine of equitable estoppel, unless such person has been misled thereby.... The defendants and their predecessors in interest have received the rents and profits from the land, they have no improvements thereon, while the plaintiff and his predecessors have paid the taxes thereon. In such case the defendants are not in a position to invoke the doctrine of equitable estoppel against plaintiff in support of their claim to the land in dispute."

That statement applies to facts in case at bar.

Defendants and their predecessors; they have had the use and benefit of the 19 feet in dispute; have paid no taxes and have made no improvements thereon. All through the years the plaintiff has been assessed with and paid all taxes thereon.

(14). Top of page 13: "The quotes (on page 12) are so different from facts in case at bar that the quotes cannot possibly have any meaning so far as this case is concerned." - We submit that the particular facts which constitute the mutual mistake are not important, but it is important to decide what rule of law

and through the years been guided by , a clear mistake of fact. The plaintiff for years believed the south 1 rod was his property and thus acquiesced in that old fence as being approximately on the boundary line (within 2 ft.) In 1948 the plaintiff learned that he had been acting under a mistake of fact; -that the south 1 rod was not his property; that the old board fence was not just 2½ feet in on his ground, but 10 feet. Under such facts may the plaintiff claim to the true boundary line, as provided and specified in the respective deeds? In addition to the law we cite on pages 11 and 12 of our brief, we also want to cite and rely upon the two cases cited by counsel at the hearing: *Dragan v Russell* 237 P. 2d 231 (Utah), and *Lekberg v Bates* 229 P.2d 225 (Utah), and also that other recent case, *Glenn v Whitney* 202 P. 2d 257, 260 (Utah), cited in the *Dragan* case, for we believe these cases support appellant's contention, in case at bar.

In the *Glenn* case, *supra*, this Court said:

"If it was not clear before the case of
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 was clearly recognized

there and in all such cases in point handed down subsequent to it...that there must be some uncertainty or dispute between the adjoining owners as to the location of the true boundary line before a fence which they subsequently erect to resolve their differences and in which they acquiesce for a long period of time, may be taken as the agreed boundary line. Using the terms "uncertainty" and "dispute" loosely, we might say the parties here were uncertain as to the location of the boundary line inasmuch as neither of them had attempted to locate it prior to the survey made by the plaintiff. This, however, is not "uncertainty" as this term was meant to be used in this connection for as is said in *Thomson on Real Property*, sec. 3309:

'If an owner ignorant of his true boundaries, by mistake acquiesces in a line as a true boundary, he and his grantee are not thereby precluded from afterwards claiming to the true line, and it has been held that one who has no knowledge that the adjoining owner has encroached upon his land cannot be held to have lost his rights by acquiescence in such occupancy no matter how long continued, for one cannot waive or acquiesce in a wrong while ignorant that it has been committed, especially where each party has equal means of ascertaining the correct line.'

"Thus lack of knowledge as to the location of the true boundary is not synonymous with uncertainty. This being true, it cannot be said that the parties here were uncertain as to the true location of the boundary line apart from an assumption that some existing fences separating the lands of other owners in the area might mark the section lines."

As we have heretofore pointed out, there is no evidence of any dispute in case at bar; the witnesses all agree that the parties had always been friendly, that there never had been any mention or any discussion of the fence or the boundary line between them. The court expressly found: "Neither the defendants nor their predecessors in interest ever knew that there was any thought of dispute of the property line." There is no evidence of any uncertainty or indefiniteness, but the evidence is to the contrary. We pointed this out in appellant's brief; counsel makes no answer, except the fence "has been there over 40 years." He can cite no testimony showing any agreement, nor any dispute, nor any uncertainty, for there is none in the record.

Not only is there no evidence of any agreement, nor of any uncertainty, but we submit that the court's findings on these points are insufficient. In paragraph 2 we read:

"That at the time of said conveyance to plaintiff, Edith A. Tiller, the grantor, plaintiff, the grantor, and George Tiller, who

then became adjoining land-owner with plaintiff and who was then a minor, a small boy, were in doubt as to the location of the boundary line between their said lands, neither of them assuming to know the location thereof. There was no fence line separating plaintiff's property on the north when he purchased his land and the line was therefore unknown and uncertain."

In *Glenn v Whitney*, supra, this Court said:

"lack of knowledge as to the location of the true boundary is not synonymous with uncertainty."

In answer to plaintiff's contention that there is no evidence that plaintiff ever agreed to the fence as a boundary line, counsel cites *Brown v Milliner*, supra, and *Draper v Cassel*, supra, to the effect that no evidence of express agreement as to location of boundary is necessary, where the parties "have occupied their respective premises as to an open boundary line visibly marked by monuments, fences, or buildings for a long period of time and mutually recognized it as a dividing line between them, in such case the law will imply an agreement fixing the boundary as located." Counsel pays no attention to the limitation or qualification also

stated in the rule, - "IF IT CAN BE SO CON-
SISTENTLY WITH THE FACTS APPEARING."

To submit that the law cannot and should not infer or imply an agreement when it affirmatively appears there was no agreement. George Tiller testified that he and plaintiff were good friends; he did not claim that he and the plaintiff ever had any agreement or understanding that the fence should be the boundary line. The plaintiff testified: "I never had a word of discussion with George Tiller that the fence would be the line between us." (tr. 38). Under such facts, and when it was also agreed by all of the witnesses and the court found that there had never been any dispute as to the fence or the boundary line, if the law still infers an agreement, then the two fundamentals upon which this rule of boundary by acquiescence is bottomed: (1) dispute or uncertainty as to the location of the true boundary, and (2), settlement or compromise of their differences by agreement.

the boards, as unimportant in the future.

Then in order to fix a boundary and acquire title to a neighbor's land, it will only be necessary to convince the trial court that a certain fence has been recognized as a boundary fence for 7 years, - then the law will infer that there was dispute or uncertainty and that the parties settled their differences by agreeing upon the fence as the cor. or boundary line between them. It will not be necessary to bring suit in adverse possession, nor to pay taxes, and the statute of frauds in such cases may also be inoperative, if only there is an old fence which it can be claimed has been recognized as a boundary fence for seven years, (to which the time is now shortened.)

To submit that is not the law of boundary by acquiescence and would lead to almost confusion; that if it affirmatively appears that there was no dispute and no agreement, the law will not infer that there was one; that all

acquiescence must be shown to exist, as this court said in *Shberg v Bates*, *supra*, "The vital question is whether the adjacent owners when they fixed their line or acquiesced in its being fixed were uncertain or in dispute about the location of the actual line."

Likewise in *Willie v Healty Co.*, *supra*, 178 P 2nd 718, 725, this Court said: "In order to establish a boundary by long acquiescence it is necessary that there be a dispute over the line or uncertainty as to its location," (15), pg. 16, lines 4-6: "Appellant seems to labor under the impression that in order for there to be a 'dispute' it is necessary that there be a fight or a quarrel".-No, not necessarily, but it is necessary that there be a dispute as to the true boundary line, as the two cases last above cited hold.

(16), Page 21, lines 7-10: "Counsel next stated that the court found: 'plaintiff's property was distributed in accordance with the survey directed by the late E. C. Daugherty.' I am unable to find any such finding by the court."

the court found that with W. Tiller deeded to plaintiff, August 1, 1894, "describing plaintiff's property in accordance with survey directed by the late J. S. Vaughan." This not only clears the point that the Tiller property was surveyed during probate, but also shows that plaintiff had nothing to do with making that survey- just as he testified.

(17), Page 22, lines 14-16. Here counsel pretends to copy our quote of Mrs. Perry's testimony. But counsel omits her very important admission: "I don't know who did it." Then Mrs. Perry admits that she doesn't know who built it. Because, she shouldn't at the same time insist that the plaintiff built it (because she and her young brother couldn't and did not have the means to build it), especially when the plaintiff positively testified that he didn't build it, that it was there when he bought his premises.

TO SUMMARIZE: Appellant contends that this Court should order and direct as follows:

1. That judgment be entered quieting title in his premises as described in the complaint.

2. That defendant's counterclaim be dismissed both as alleging: (a) adverse possession, -because defendants failed to prove exclusive adverse possession through the years, failed and also/ to prove that they had paid taxes on the land.

(b) Defendant's counterclaim should also be dismissed, as alleging boundary by acquiescence because: (1) defendants failed to prove the necessary requisites: that the boundary line was indefinite, uncertain, or in dispute, or that the plaintiff had ever agreed to the fence in question as a boundary line. (The court expressly found that there had never been any dispute and failed to find sufficiently that the boundary line was uncertain or indefinite, or that plaintiff had ever agreed to the fence in question as a boundary line. The great weight of the evidence supports plaintiff's testimony that the fence was there when he came, George Tiller to the contrary, but he was then a small boy; Mrs. Perry finally admitted that she didn't know who built the fence.)

ences must also fail because: (A), through the years plaintiff has acted under a mistake of fact, in acquiescing in that fence as being approximately on the boundary line, in believing that the south 1 rod was his property. That this was a mutual mistake of fact, as Mrs. Perry & the executor believed the same; that said mistake was not discovered until 1948 when the property was surveyed.

(B), that defendant's claim of boundary by acquiescence must also fail, because through the years plaintiff has known that the fence was not on the boundary line, that it was in 2 1/2 feet even assuming that the south 1 rod was his property.

4. That the mere fact that the defendants and their predecessors in interest have for many years been in possession of the 18 feet in question north of the fence, even though that fence has been acquiesced in as a boundary fence, will not operate as a conveyance of the 18 feet in question; for land cannot be conveyed from one person to another by merely a change in possession, eventhough such

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change in possession continues for a long
period of time, *Tripp v Bagley*, *supra*.

Respectfully submitted,

Leon Fennesbuck.

Attorney for Plaintiff and Defendant.