1980

Victor Brown, Et al. v. Leon Peterson and Peterson Development Co : Brief of Appellants

Utah Supreme Court

STEVEN H. STEWaRT; Attorney for Respondents;M. RICHARD WALKER; Attorney for Appellants;

IN THE SUPREME COURT

OF THE STATE OF UTAH

VICTOR BROWN, et al,

Plaintiffs and
Appellants,

vs.

No. 16785

LEON PETERSON and PETERSON
DEVELOPMENT CO.,

Defendants and
Respondents.

APPELLANTS' BRIEF

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE DAVID K. WINDER, Judge

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STATEMENT OF THE NATURE OF THE CASE

This is an action involving a dispute of ownership to a strip of land approximately 70 feet by 969 feet located between the Plaintiffs' property on the west and Defendants' property to the east. The Plaintiffs claim that their predecessors in title acquired ownership of the disputed strip of land through boundary line by acquiescence establishing an "old fence" line which had defined the boundary between the properties for more than forty-five (45) years as the boundary line; and that said predecessors then conveyed ownership to Plaintiffs through deeds which have legally transferred title to Plaintiffs. The Defendants claim that their title is based upon surveys and deeds from their predecessors.

DISPOSITION IN LOWER COURT

The case was tried to the Court. The Trial Court entered judgment quieting title to the disputed strip to the Defendants, concluding that Plaintiffs could not have relied upon the "old fence" as their boundary line because they were charged with actual or constrictive notice of the recorded boundary line of MEADOW COVE NO. 2 SUBDIVISION when they purchased.

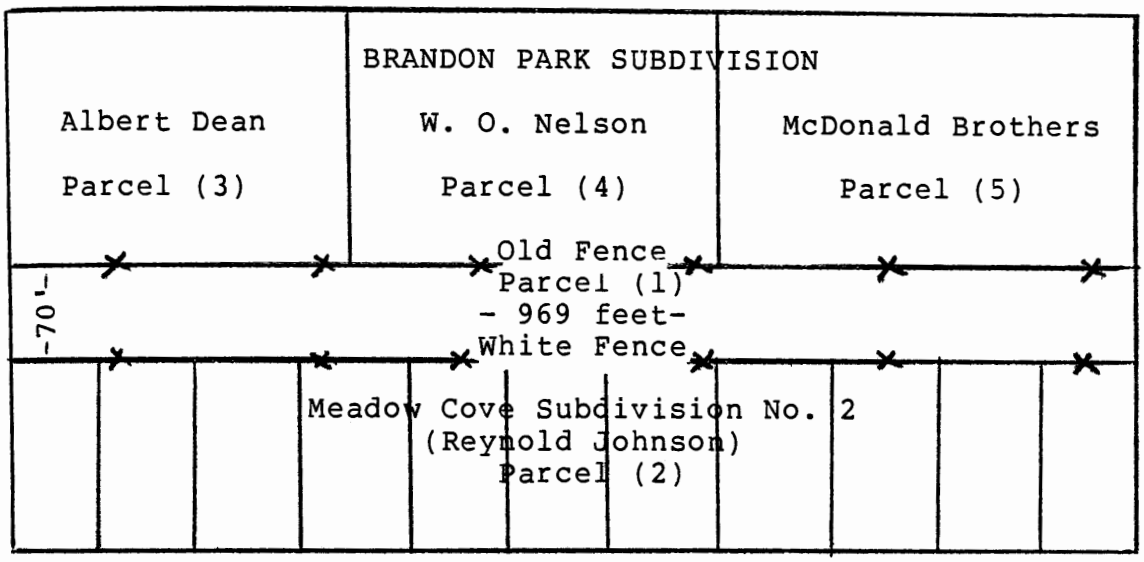
RELIEF SOUGHT ON APPEAL

The Plaintiffs seek reversal of the judgment and to have judgment entered in their favor as a matter of law, or that failing, the granting of a new trial.

STATEMENT OF FACTS

This action involves a dispute as to the ownership of a strip of land 70 feet by 969 feet, shown on the plat hereafter as Parcel (1):

Plat of Property



The Plaintiffs are owners of lots in MEADOW COVE NO. 2 SUBDIVISION, PARCEL (2) on the plat. MEADOW COVE SUBDIVISION was developed by PORTER BROTHERS in 1973 and, upon the advice of their surveyor, BUSH & GUDGELL [Record, p.12], PORTER BROTHERS accepted the east property line of the subdivision to be approximately seventy (70) feet west of the "old fence" which they had thought to be the east property line when they purchased the property [Record, p.188, 189], even though the subdivision plat does not agree with Johnson's deed description [Record, p.295]. Until PORTER BROTHERS developed MEADOW COVE SUBDIVISION in 1973, all the property shown as Parcels (1), (2), (3), (4), and (5), were open fields, divided by the "old fence" [Record, p.214, 215].

The "old fence" was built prior to 1925 when ALBERT DEAN moved onto Parcel (3) [Record, p.205], and when ALBERT DEAN purchased Parcel (3) in approximately 1935, he was informed that the "old fence" was the west boundary of his property [Record, p.206]. During the time he owned it, he farmed west to the "old fence" [Record, p.199] which was understood to be the boundary line. Upon selling the property to SOFFES in approximately 1965 [Exhibit, P-16], DEAN informed the SOFFES that they were buying property to the "old fence" [Record, p.201].

By Stipulation, it was shown that W. O. NELSON, the owner of Parcel (4), occupied, used, and farmed the land west to the "old fence" understanding the "old fence" to be the west boundary line of their property [Record, p.314, 315] for a period from 1947 through 1967.

McDONALD BROTHERS acquired Parcel (5) in 1955 [Record, p.319] by a deed which specifically limits the warranty deed [Exhibit P-20] to "That part of the above property situated within the present existing fence lines...". Until May of 1978 [Deed Exhibit P-21], McDONALDS occupied, farmed, or used the property west to the "old fence" [Record, p.320].

On the west side of the "old fence", REYNOLD JOHNSON purchased the property in 1943 [Exhibit D-5]. He testified that he was told that he was acquiring everything east

to the "old fence" [being all of parcels (1) and (2)] [Record, p.212]. During the entire time JOHNSON owned the property, he occupied, used, and farmed the property east to the "old fence" [Record, p.213], using the ditch which parallels the "old fence" to irrigate his crops [Record, p.214].

REYNOLD JOHNSON deeded to SOUTH MOUNTAIN LAND COMPANY in 1971 [Exhibit P-14], telling the buyer they were buying to the "old fence" on the east [Record, p.217]. JOHNSON at no time had the property surveyed, neither when he purchased it nor when he sold it [Record, p.222], but relied solely on the location of the fences to define the boundary.

No evidence to the contrary was introduced by Defendants. The uncontroverted evidence shows that, for a period covering at least forty-six (46) years from 1925, when ALBERT DEAN testified the "old fence" to be the boundary between these properties and all adjoining owners, on both sides of the fence, acquiesced in the fence line as the boundary line [Record, p.205], until 1971 when BUSH & GUDGELL platted MEADOW COVE NO. 2 SUBDIVISION, in spite of the discrepancies in the deeds [Record, p.293-295] as defined by the engineer, GEORGE APOSHIAN, and affirmed by Defendants' engineer, CLARENCE BUSH [Record, p.402].

The surveyors agreed that the deeds on both sides of the "old fence" failed to close and had errors in the descriptions [Record, p.293, 380, 402]. On the east side of the

old fence, both surveyors, Plaintiffs' and Defendants', agreed that the description for Parcel (3) overlaps into MEADOW COVE NO. 2 SUBDIVISION by twenty-six (26) feet [Record, p.381, 382]. The description on Parcel (4) came with two different descriptions [Record 385, 386], and, if they were to use the main description (another description was in parenthesis) there was again a sixty-eight (68) foot gap [Record, p.386] which is the width of the disputed strip, and would have complied closely to the "old fence"

Regarding Parcel (5), the McDONALD tract, Defendants' counsel admitted that Defendants had a problem there [Record, p.391], and Defendants' own surveyor testified that the legal description under which the Defendants obtain Parcel (5) only goes to the "old fence" [Record p.391, 395] and does not go to the 40-acre line (white fence); yet the Trial Court has quieted title for Defendants to the seventy (70) feet west of the "old fence" without any evidence or legal basis for the claim, confirmed by the 1962 deed to McDONALD BROTHERS, their predecessor, which provided:

> Grantors only warrant that part of the above described property situated within the present existing fence lines now located upon the property, and as located by an official survey of the property made by Bush & Gudgell Engineers, 263 South 2nd East Salt Lake City, Utah, and grantors do not warrant title of the above property situated outside of the fence lines. [Exhibit P-20]

thus confirming that the "old fence" was confirmed as the boundary line between these properties as per the Quit Claim Deeds from JOHNSON and PORTER BROTHERS.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO RULE ON THE ISSUE OF BOUNDARY BY ACQUIESCENCE

In the Amended Pre-Trial Order, it was ordered that the issues to be decided were as follows:

> a. The Plaintiffs' claim title to the disputed property, based upon the doctrine of boundary line by acquiescence. [Record, p.56]

The Plaintiffs claiming that boundary line by acquiescence had vested ownership in Plaintiffs' predessor in interest, and that the interest of the prior owners has been conveyed to the Plaintiffs heretofore by proper deeds. [Record, p.56]

> b. Defendants claim title to the disputed property on the basis of surveys made by BUSH & GUDGELL ENGINEERS, Salt Lake City, Utah, based upon descriptions contained in applicable deeds. (Emphasis added) [Record, p.57]

And the Court ordered that the above order "Shall supercede the pleadings herein, and shall govern the trial of this action." [Record, p.57]

Contrary to the Pre-Trial Order, an examination of the Findings of Fact and Conclusions of Law shows that the issue of boundary by acquiescence was ignored, and the Court erroneously made findings which infer that Plaintiffs were claiming to have gained title to the disputed strip of land through their purchase of lots in MEADOW COVE NO. 2 SUBDIVISION [Findings of Fact, Nos. 2,3,4,5,6,7; Record, p.66]; also, Conclusions of Law, Nos. 1 and 2; Record, p.68].

The parties stipulated during trial [Record, p.249, 250] that the Plaintiffs were relying upon their ownership to the disputed strip solely through the Quit Claim Deeds from REYNOLD JOHNSON [P-15] and PORTER BROTHERS [Exhibit D-9], through which it is alleged the boundary line by acquiescence was established.

The Court so agreed that the entire case should stand or fall on the issue of whether the Plaintiffs' predecessors in interest acquired ownership of the disputed strip of land [Record, p.242, lines 3-9 and lines 23-24].

After three days of receiving evidence concerning the boundary by acquiescence issue, the Court erroneously failed to rule on the issue of whether or not Plaintiffs' predecessors in interest gained ownership of the disputed strip through boundary by acquiescence, in violation of the Amended Pre-Trial Order, and the overwhelming burden of the evidence.

The courts have made clear that, where the Pre-Trial order purports to state the issues to be tried, the trial should be confined to such issues, and other issues should be eliminated from consideration. The Utah Rules of Civil Procedure, Rule 16, provides:

> The court shall make an order which recites t action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The Court in its discretion may establish by rule a pre-trial calendar on which actions may be placed be placed for consideration as above provided. (Emphasis added.)

In this case, the Pre-Trial Order was stipulated to by both parties without objection. This policy is stated also in 62 AM JUR, Pre-Trial Conference, §34, p.666:

> ...the court may and should exclude evidence in support of other issues;...no findings of fact can be made upon other issues...

See also KAISER ALUMINUM & CHEMICAL SALES v. LORDS, 460 P.2d 321, 23 U.2d 152 (1969); 22 ALR 2d, 599, 603 §2.

In opposition to the Court's Amended Pre-Trial Order, no findings were made on the issue of boundary by acquiescence, and Findings of Fact Nos. 1 and 2, and Conclusions of Law Nos. 1 and 2 [Record, p.66] base the denial of Plaintiff's claim upon Plaintiff's notice of the specific boundaries of MEADOW COVE NO. 2 SUBDIVISION when, in fact,

Plaintiff's claim of title has nothing to do with their purchase of lots in MEADOW COVE NO. 2 SUBDIVISION, but relies on the title of their predecessors gained through boundary by acquiescence [Record, p.250]. The Court's Findings and Conclusions are erroneous and in violation of the amended Pre-Trial Order.

II. THE UNCONTROVERTED EVIDENCE SHOWS THAT BOUNDARY BY ACQUIESCENCE ACCRUED TO PLAINTIFFS' PREDECESSORS IN INTEREST

The legal doctrine of boundary by acquiescence has been recognized in Utah and clearly defined. In an article in the UTAH LAW REVIEW, Volume 1975, Spring, No. 1 at page 224, the doctrine of boundary by acquiescence and the Utah cases defining the same were reviewed and discussed. This Court has made clear that a boundary established by acquiescence is binding not only on the acquiescing owners, but also on their grantees [JOHNSON v. SESSIONS, 25 U.2d 133, 477, P.2d 788 (1970)], and it may not be changed by renewing an old dispute [PROVONSHA v. PITMAN, 6 U.2d 26, 305 P.2d 486 (1957)].

In the landmark case of FUOCO v. WILLIAMS, 15 U.2d 156, 389 P.2d 143 (1964), this Court defined the elements for establishing boundary by acquiesce, stating:

> [1] This court over a period of years has formulated four elements which must be shown by the person claiming title by acquiescence in order to raise the presumption that a binding agreement exists settling a dispute or uncertain boundary. These elements are: (1) occupation up to a visible line marked definitely by monuments, fences or buildings and (2) acquiescence in the line as the boundary (3) for a long period of years (4) by adjoining land owners.

The evidence introduced during the trial in this matter showed, without any rebutting evidence: Element (1) the occupation of the property on both sides of the "old fence" with the owners using and farming their respective land up to the "old fence"; Element (2) that the owners understood that the legal descriptions were defective, but accepted and acquiesced in the "old fence" as the boundary line.

With each owner having understood the "old fence" to be the boundary between the properties [Record 198, p.211, 314] and one owner, McDONALD BROTHERS [Parcel (5)], even had notice in their deed [Exhibit P-20] that the warranty deed did not warrant title to anything outside the fences located by BUSH & GUDGELL, and CLARENCE BUSH then testified that the McDONALD deed went to the "old fence" [Record, p. 395]

Element (3) that the acquescence was for a long period of time at least covering from 1925 when ALBERT DEAN moved to Parcel (3) [Record, p.204] testifying that the "old fence" was in place at that time [Record, p.198]. And with

each of the principal owners on both sides of the fence acknowledging this fence to be the boundary without question or contrary evidence until in 1973, when BUSH & GUDGELL surveyed for PORTER BROTHERS, and decided to locate the east property line of MEADOW COVER NO. 2 SUBDIVISION approximately seventy (70) feet west of the "old fence". Accordingly, the boundary fence had been recognized and acquiesced as the "old fence" for at least forty-eight (48) years; and Element (4) the acquiescence was evidenced by all the adjoining landowners, REYNOLD JOHNSON [Parcels (1) and (2)], ALBERT DEAN [Parcel (3)], W. O. NELSON [Parcel (4)], and by the actual deed of McDONALD BROTHERS [Parcel (5)]. Thus all four elements of boundary by acquiescence were established.

Not one witness was introduced by the Defendats to refute the existence of the four elements of boundary by acquiescence, although this Court has ruled in KING v. FRONK, 14 U.2d 135, 378 P.2d 893 (1963), that if these four elements exist, then it is incumbent upon him who assails the title by acquiescence to show by competent evidence that a boundary was not thus established.

This Court has made clear that the doctrine of boundary by acquiescence applies, even though the adjoining owners could not show that the acquiescing parties had ever agreed on the boundary's location. Once the elements of the doctrine are established, the Court presumes that the par-

ties, at some earlier time, had entered into an express agreement to establish the line. FUOCO v. WILLIAMS, supra.; NUNLEY v. WALKER, 13 U.2d 105, 369 P.2d 117 (1962); HUMMEL v. YOUNG, 1 U.2d 237, 265 P.2d 410 (1953); ELSBERG v. BATES, 121 Utah 123, 239 P.2d 205 (1951); BROWN v. MILLINER, 120 Utah 16, 232 P.2d 202 (1951).

This Court has further made clear that a fence still may be recognized as a boundary line even though the fence is old, the wires down, and the posts rotted away. JOHNSON REAL ESTATE CO. v. NIELSON, 10 U.2d 380, 353 P.2d 918 (1960). In the present case, the fence was old and sometimes testified to be in poor repair, but remained as a clearly definable fence line, even to the time of trial [Record, p.280] and in addition, is paralleled by an irrigation ditch which runs along the west side of the "old fence" [Record, p.207, 213].

Accordingly, all four elements of boundary line by acquiescence were shown to exist, without a single item of rebutting evidence; and yet the trial court failed to make a finding or judgment regarding this, the Plaintiffs' only issue of boundary by acquiescence, and should be required to enter judgment in accordance with the Pre-Trial Order to decide whether the line was established by acquiescence.

III. BOUNDARY BY ACQUIESCENCE HAVING OCCURRED, OWNERSHIP HAS NOW PASSED TO THE PLAINTIFFS

The uncontroverted evidence shows that the boundary line of the "old fence" was established by acquiescing owners many years prior to the time BUSH & GUDGELL ENGINEERS in 1973, first decided to establish the east line of MEADOW COVE NO. 2 SUBDIVISION. This Court, in the case of PROVONSHA v. JOHNSON, 6 U.2d 26, 305 P.2d 486 (1956), dealt with a boundary dispute, such as the instant case, which arose after the fence had been in place for some 35 or more years. The Court held as p.29:

> If by that time a boundary by acquiescence had been established, as we think it had, under principles heretofore announced by this court, succeeding grantees could not marshall their disagreements or misunderstandings to destroy that established boundary.

Again the uncontested evidence shows that from at least 1925 until 1973, the "old fence" was established as the boundary line by acquiescence. The owner who occupied, farmed, and used the disputed strip at the time the boundary line was established, was REYNOLD JOHNSON, who in 1943 purchased the land without survey and defined by his predecessor to go east to the "old fence" [Record, p.211].

Having established the bundary line, JOHNSON became the owner of the disputed strip of land. When JOHNSON deeded

the land to (BUCHANAN) SOUTH MOUNTAIN LAND CO., in 1971 [Exhibit P-14], the legal description he used did not describe the disputed strip. Therefore, the ownership of the disputed strip either remained with JOHNSON, or it passed to SOUTH MOUNTAIN LAND CO., and then to PORTER BROTHERS, the developers of MEADOW COVE NO. 2 SUBDIVISION. If ownership remained with JOHNSON, JOHNSON then conveyed it to Plaintiffs by his quit claim Deed [Exhibit P-15]. If ownership of the disputed strip passed to PORTER BROTHERS, by virtue of the series of deeds, it still is now vested in the Plaintiffs because PORTER BROTHERS also deeded Quit Claim to the Plaintiffs [Exhibit D-9].

Therefore, if boundary by acquiescence occurred, and there is no contrary evidence, the actions of BUSH & GUDGELL, or the Defendants, cannot alter the already established boundary line, the "old fence" and the trial court's ruling, without any contrary evidence, would allow a trial court to terminate the effect of the doctrine of boundary by acquiescence in Utah. The trial court should be required to rule on the issue of boundary by acquiescence.

IV. THE DECISION OF THE TRIAL COURT IS UNSUPPORTED BY THE EVIDENCE

In order for the trial court to quiet title to the disputed strip of land, Defendants must introduce evidence of

a legal claim to the disputed strip. The Defendants purchased their property in three pieces, shown heretofore on the plat as Parcels (3), (4), and (5). The description contained in Defendants' deeds show that Parcel (3) overlaps into MEADOW COVE NO. 2 SUBDIVISION by twenty-six (26) feet, which does include that portion of the disputed strip [Record, p.382].

The Defendants' description for Parcel (4) contained two descriptions. The primary set of distances left the west boundary line sixty-eight (68) feet short of the MEADOW COVE NO. 2 SUBDIVISION, being almost identical to the "old fence" line [Record, p.386]. Only by using a secondary set of distances which were in parentheses [Record p.386, lines 7-11] could the surveyor get the description to comply with the "40-acre line" or rear of MEADOW COVER NO. 2 SUBDIVISION [Record, p.386, lines 1-11].

However, on Parcel (5), the McDONALD tract, the Defendants' attorney admitted Defendants have problem with that piece [Record, 391, lines 8-9 and 17-20]. Further, Defendants' engineer, CLARENCE BUSH, testified that the deed by which the Defendants acquired Parcel (5) [Exhibit D-27] fits the "old fence" and does not include the disputed stip to the 40-acre (or MEADOW COVE NO. 2 SUBDIVISION) line [Record p.395].

No evidence was introduced by the Defendants to show any legal claim that Parcel (5) extended west of the "old fence" to include that portion of the disputed strip. Yet the trial court granted a quiet title judgment to Defendants the entire disputed strip of land, without requiring Defendants to show any evidence of ownership of that portion of the property. Even if the court had found that the boundary line had not been established by acquiescence, the judgment was in error because Defendants showed no evidence of title to the South.

Accordingly, the Defendants failed to sustain their burden. This Court has ruled that in quiet title actions, a party must prevail on the strength of their own title. MICHAEL v. SALT LAKE INVESTMENT CO., 345 P.2d 200, 9 U.2d 370 (1959); MERCUR COALITION MINING v. CANNON 112 Utah 13, 184 P.2d 341 (1947); HOMEOWNERS LOAN CORPORATION v. DUDLEY, 105 Utah 108, 141 P.2d 160 (1943). Even if the Plaintiffs had failed to prove boundary by acquiescence, the Defendants were not entitled to a quiet title judgment without showing title to the entire strip.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the trial court's judgment should be reversed, and judgment entered for the Plaintiffs; or, in the alternative, a new trial ordered.

DATED this 17th day of March, 1980.

WALKER & HINTZE, INC.

By M. Richard Walker
M. RICHARD WALKER

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 1980, a true and correct copy of the foregoin Appellants' Brief was mailed, postage prepaid, to:

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