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Karl Jensen and Georgina K. Jensen v. Earl H. Bartlett et al : Brief of Respondents

Utah Supreme Court

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Case No. 8308

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IN THE SUPREME COURT
of the
STATE OF UTAH

KARL JENSEN and GEORGINA K.
JENSEN,

Respondents,

—vs.—

EARL H. BARTLETT and SARAH E.
BARTLETT, His Wife, and HYRUM
RUSSELL EGGETT and MARY MAR-
GARET EGGETT, His Wife,

Appellants,

BRIEF OF RESPONDENTS

GEORGE K. FADEL

Attorney for Respondents

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Case No. 8308

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

This is a boundary line dispute case.

STATEMENT OF FACTS

Respondents agree with the statement of facts of appellants except in the following particulars:

1. On Page 2 of appellants' brief, that last paragraph indicates that respondents acquired title April 11, 1936; however it should be added that respondents were in possession of the tract as purchasers under contract in September 1931 (R 77).

2. On Page 4 appellants state that to establish the fence line as the boundary would create a deficiency in appellants' land of an additional 73.92 feet and give respondents a gain of 73.92 feet. Without arguing the materiality of the assertion at this point, it should also be stated that Highway No. 1, shown on Defendants' Exhibits 7 and 14, which is the main highway leading into Bountiful City, while not officially platted and surveyed in North Mill Creek Plat, is a 99 foot street cutting through part of respondent's tract. If the fence line is the established boundary then Highway No. 1 will minimize respondent's loss by reason of the highway. Defendant's Exhibit 14 is not a copy of the document presented in Court, although it is a similar graphical arrangement. Highway No. 1 was shown on the document presented in court with dotted lines, not solid lines.

3. At the top of Page 9, appellants state that the dispute involves about 68 feet frontage, whereas respondents contend that there is 73.92 feet frontage involved. Appellants apparently base the contention of 68 feet frontage upon the presumption that Mr. Harding testified the location of the old fence to be 2924.09 feet west from the Southeast corner of Section 30, whereas a careful analysis

of plaintiff's Exhibit C, the map prepared by Mr. Harding, and his testimony in the record, shows that the reference line used by Mr. Harding is 2924.09 feet West. A careful reading of Mr. Harding's testimony (R 91 and 92) shows that the 2924.09 feet is the distance west to his projected reference line, whereas a due North to South line through the old charred stump which is the only remaining post of the old fence is 4.26 feet east of the reference line (R 92). Hence a line due North and South from the old charred stump is West 2924.09 feet less 4.26 feet which makes it West 2919.83 feet. The Findings of Fact and Decree state the line to be West 2918.49 feet. Respondents have no objection to the amendment of this finding and would have done so previously if the matter had been called to the attention of the trial court or respondents' attorney. The appellants' surveyor Mr. Bush found the steel stake shown on Exhibit "C" as being West 3005.05 feet (R114); the old fence line was 83.3 feet plus 1.36 feet (to bearing line) plus 4.26 feet to due north line, or 88.92 feet east of the steel stake, which makes Mr. Bush's location of the old fence West 2916.13 feet from the Section corner, although Mr. Bush never actually measured the distance between the steel stake and the old fence line; but these measurements are shown on Exhibit "C". Appellant's counsel informed the court that the old fence was 87 feet east of the steel Stake (R146).

4. On Page 16 of Appellant's brief, the last sentence of the first paragraph states:

There were some raspberry bushes along the fence, *and at an earlier date the land east of the fence was excavated to obtain clay for a brick factory.*

Also, the appellant, Eggett, testified on cross examination (R 137):

Q. When did you first occupy the land just east of the fence?

A. May, 1936.

Q. At the time you occupied the land immediately east of the fence, describe the condition of the land.

A. Well, it was just a brick yard you might say, hollows and holes. The west end was leveled and had been farmed, right next to the fence had been farmed.

This mention of the brick yard is important for the reason that as early as May 11, 1892 as shown on pages 9a and 10 of respondent's abstract of title, (Plaintiff's Exhibit "A") until May 1, 1917, Page 26 of Abstract, the conveyances and mortgages described respondents' tract as follows:

Beginning at the Southwest corner of Lot 2 Block "L" North Mill Creek Plat; *thence East on the South line of said Lot 35.5 rods to what is known as the brick yard claim; . . . etc.*

This description also appears in appellants' abstract (Deft. Ex. 10) at Page 16, in a document dated November 23, 1893.

POINTS

I

THE FINDING OF THE TRIAL COURT THAT THE FENCE LINE WAS THE ESTABLISHED AND AGREED BOUNDARY BETWEEN THE PARTIES IS FULLY SUPPORTED BY THE EVIDENCE.

II

THE FINDING OF THE TRIAL COURT ON THE LOCATION OF THE OLD FENCE IS SUPPORTED BY THE EVIDENCE.

ARGUMENT

I

THE FINDING OF THE TRIAL COURT THAT THE FENCE LINE WAS THE ESTABLISHED AND AGREED BOUNDARY BETWEEN THE PARTIES IS FULLY SUPPORTED BY THE EVIDENCE.

In this case there was no evidence of any express agreement in locating the fence line. The test for establishment of a boundary by acquiescence is reviewed by this Court in the case of Ringwood, et al, vs. Bradford, 2 Utah 2d 119, 269 Pac 2d 1053. The elements therein stated which give rise to a presumption of an agreement settling an uncertain or disputed boundary, are:

(1) occupation to a 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 owners.

This presumption may be rebutted by

(1) Proof there was actually no agreement by the parties

(2) Proof that there could not have been a proper agreement.

Factors showing the latter include the following:

- (a) no dispute or uncertainty over boundary,
- (b) line not intended as a boundary,
- (c) no parties available to make an agreement and
- (d) possibly mistake or inadvertence in locating the boundary line.

(1) OCCUPATION TO A VISIBLE LINE MARKED DEFINITELY BY FENCES AND BUILDINGS.

The evidence is undisputed that an old fence line separated the tracts. Alexander Winward who was in possession of the respondent's tract as purchaser from the record owner, Atkin, testified that he took possession of the tract in December, 1916; that the east boundary of

the tract was marked by a barbed wire fence having cedar posts set 15 feet part; that the fence was in good condition (R 150).

Mr. Brauer, a neighbor, observed the fence from 1916 or 1917; the fence appeared to be old at the time he first observed it; there were posts every 10 or 12 feet having barbed wire strands upon them (R 56).

Mrs. Eva Peterson, daughter of the respondents, first saw the tract in October 1931; at that time she observed it as being a fence of barbed wire and posts, with a growth of bushes along the fence line and appeared to be an old fence (R 64 and 65). Her father, the respondent Karl Jensen testified similarly (R 77).

Appellant, Hyrum Russell Eggett testified that he first occupied the land east of the fence in May 1936 (R 137) at which time there was a fence line on the West end of the property he purchased from the Moss family, which fence stayed in existence until removed by Mr. Bartlett (R 135).

Mr. Earl Bartlett, husband of Sarah Eggett Bartlett, testified that he purchased the 53 foot tract immediately east of the fence from Mr. Eggett and received a deed dated May 1, 1946 (Deft. Ex. 1) (R 129); that at that time he acquired the property and until May 1951, he assumed that the fence was the boundary line (R 131).

(2) ACQUIESCENCE IN THE LINE AS THE BOUNDARY.

Mr. Winward testified that he occupied from 1916, all of the property within the boundary of the fence (R150); that Henry Moss was in possession of the property east of the fence at the time Winward first took possession; that the land west of the fence was cultivated and used for alfalfa, vegetables, melons, and potatoes (R 151); that some time in 1917 someone moved the fence about 30 to 50 feet west; that Winward telephoned Mr. Moss and notified him that the fence would have to be put back where it was before or litigation would result (R 153); that within a day or two from the time the fence was moved, Winward replaced the same fence in its original position which was easily identified by the irrigation ditch, difference in elevation, and vegetation (R 153); that Winward remained in possession of the premises until 1927 and knew of the premises for a couple of years after that and during the entire period of his possession and knowledge, the fence was never moved again; that during the entire period from 1917 to 1927 he farmed the land immediately west of the fence line and no one else occupied the land west of the fence line or made any further claim thereto (R154).

Mrs. Eva Peterson testified that she and her husband occupied the Jensen tract for Mr. Jensen in October 1931 (R 64); that in the early spring of 1932 they planted 800 fruit trees and some strawberries; that they planted fruit trees up to the fence line with only an irrigation ditch between the first row of trees and the fence line; that the same trees planted in 1932 are still growing on the premises (R 65); that the Jensens took care of the trees

and picked all of the fruit since 1932 (R 65-66); that when she first came on to the land, Mr. Moss occupied the land east of the fence and planted hay along the east side of the fence, but at no time did Mr. Moss come over to the west side of the fence (R 66); that after Mr. Moss, the property of the appellants was occupied by Mr. Eggett (R 67); that Mr. Eggett cultivated the land east of the fence but made no use of the land west of the fence; that after Mr. Eggett, the property was occupied by the Bartletts who planted raspberries immediately east of the fence and built a chicken coop immediately adjoining the east line of the fence (R 68); that up until Mr. Bartlett purchased 15 feet of land west of the fence from the respondents, the fence line had not been disturbed (R 69).

The respondent Karl Jensen testified that Mr. Moss occupied the land east of the fence and planted alfalfa east of the fence at the time Jensen first came on to the tract west of the fence; that Jensen planted trees as close as four or five feet from the fence; that there was an irrigation ditch right close to the fence between the fence and the orchard, and the ditch was as near to the fence as it could go without disturbing the posts (R 78); that the ditch was used solely and exclusively for irrigation of the Jensen tract (R 79); that Mr. Bartlett negotiated for the purchase of fifteen feet west of the fence from Jensen for a driveway; the conveyance of the fifteen feet was made July 21, 1950 (Deft's. Ex. 2); that Mr. Jensen never had any argument about the fence with Henry Moss who owned the property east of the fence after Jensen came on to the property (R 86).

Hyrum Russell Eggett, appellant, testified that he purchased the tract east of the fence line from the Moss

family; that there was a fence line on the west side of the property he bought from Moss which he thought to be the west boundary (R 135); that the fence stayed in existence until it was removed by Bartlett after purchasing the 15 feet from Jensen (R 135); that Eggett first occupied the land east of the fence in May 1936 (R 137); that Eggett assumed the fence line to be the correct boundary until Mr. Bush made the survey (R 136) that at the time Eggett first occupied the land in May 1936, the land just east of the fence was leveled and had been farmed right next to the fence (R 137).

Earl H. Bartlett, appellant, testified that he first occupied the land immediately east of the fence line in February 1946; that in 1946 he built a chicken coop against the fence line; that raspberries had already been planted just east of the fence line before he occupied the land (R 133); that he purchased 15 feet of land from Jensen as per Defendant's Exhibit 2, believing he was getting 15 feet immediately west of the fence line (R 131); that thereafter he made some measurements in April, 1951, and first determined there was a difference between the fence line and what he determined to be the true boundary (R 132); that thereafter Mr. Bush was employed to make a survey (R 132).

The undisputed testimony shows that except for a matter of 2 or 3 days in 1917, there was never any dispute over the fence line as being the boundary, from before 1916 until after May 1951. That the owners of the respective tracts for this period of more than 35 years, were in possession occupying and using the land up to the fence line. Defendant's Exhibits #16 and #17 are photos taken

March 16, 1954, which show the now large fruit trees planted in rows and cared for by the respondents on the disputed tract.

(3) THE FENCE LINE EXISTED FOR A LONG PERIOD OF YEARS.

There is no evidence as to who built the fence in the first instance. Mr. Winward said the fence was already located and had growth of bushes around it when he first saw the fence in December, 1916 (R 150). Mr. Brauer first saw the fence in 1916 and it appeared then to have already been there a long time (R 57); that the fence remained in place from 1916 until Bartlett removed the same (R 57). This testimony of Winward and Brauer is not controverted. Mrs. Peterson (R 64 and 65), and Mr. Jensen (R 78 and 79) testified that the fence remained in existence from September 1931 until removed by Bartlett after the purchase of July 21, 1950. Appellants, Mr. Eggett, (R 135) testified that the fence stayed in existence from the date of his occupation, May 1936, (R 137) until the fence was removed by Bartlett.

(4) THE OCCUPATION AND ACQUIESCENCE WAS BY ADJOINING OWNERS.

The evidence reviewed supra in connection with "(2) ACQUIESCENCE IN THE LINE AS A BOUNDARY" shows that the appellants' tract from some time before 1916 was occupied and farmed immediately east of the fence line by Henry Moss, the Moss Family, Hyrum Russell Eggett, Earl H. and Sarah E. Bartlett, all of whom are successive record title holders to the tract east of the fence.

The respondents' tract was occupied and farmed immediately west of the fence by Mr. Winward in 1916 as purchaser under contract from Mr. Atkin, the record owner; then from 1931 it was occupied and farmed by Mr. Jensen, as owner of the property thereafter.

THE PRESUMPTION OF BOUNDARY AGREEMENT WAS NOT REBUTTED.

There was no evidence regarding the initial construction and location of the fence nor any evidence as to why it was originally constructed or by whom. The absence of evidence of an express agreement or positive evidence that the fence was placed other than pursuant to an agreement, brings this case within the doctrine of implied agreement as stated by the Supreme Court in *Holmes v Judge*, 31 Utah 269, 87 P. 1009 and reaffirmed in many cases thereafter. The doctrine as restated in *Brown v Milliner* 232 P2d 202, and *Hummel v Young*, 1 Utah 2d 237, 265 P2d 410, is as follows:

“ . . . that in the absence of evidence that the owners of adjoining property or their predecessors in interest ever made an express parcel agreement 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 building 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.”

THE PRESUMPTION WAS NOT REBUTTED BY ANY PROOF THAT THERE COULD NOT HAVE BEEN A PROPER AGREEMENT.

A. DISPUTE OR UNCERTAINTY OF BOUNDARY.

In this case there is no evidence that a "true line" can be established according to an original official survey.

Mr. Harding, a civil engineer and surveyor whose surveyor's license is No. 279, testified that he was employed by respondents to locate the old fence line with respect to a known monument (R 89); that he located the fence line with respect to the Southeast corner of Section 30, (R 91); that the monument at the Southeast corner of Section 30 is a United States Government Monument reset in 1952 (R 92); that he has been surveying in Bountiful since 1932 and is well acquainted with surveys in Bountiful; that there are no monuments which mark the corners of Lot 2, Block "L", North Mill Creek Plat; that there are no monuments at all to represent the North Mill Creek Plat in this area; that the Southwest corner of Lot 2, Block "L" North Mill Creek Plat cannot be located with reference to any known monument in existence (R 93 and R 98).

Mr. C. C. Bush, a surveyor whose license is No. 1073 testified that he was employed by appellants to survey the Eggett property (R 107); that the reference point he used on the ground was the Southeast Corner of Section 30 (R 108); that he located the Southwest Corner of Lot 2 Block "L" by fence lines and by the plat of North Mill Creek survey (R 110); that he found some spikes and pins in the highway which had been used by other sur-

veyors, but none of these were together and none marked the actual corner; that he never found any monument marking the corner of Lot 2 (R 112); that the plat in the recorder's office shows the distance from the east line of Section 30 running west to the Southwest corner of Lot 2, Block "L" to be 53.16 chains to which should be added a width of a street which he "assumed" to be 66 feet wide, making the distance 53.16 chains plus 66 feet (R 111) which equal 3574.56 feet; that however, the road which he assumed to be 66 feet could be a two-rod road (R 119); that the street which he assumed to be a 66 foot street was never opened and he did not determine by inspection or survey who is in possession of that strip (R 123); that a deed on page 5 of appellants' abstract, Exhibit 10, recites the distance from the Southwest corner of Lot 2 east to the section line as being 216 rods, or 3564.0 feet, (R 116) and the deed is dated August 20, 1874. Hence there is a difference of 10.64 feet between the recitation of this deed and the information on the plat.

The purported plat of Block "L" of which Exhibit 14 was intended to be a duplicate, was in no way an official plat or any authentic indication of the location of the corners of Lot 2 or Block "L". Mr. Bush admitted that the plat was undated, never contained a certificate, does not show by whom it was prepared or from what information it was prepared, and that he knows of no monuments marking the corners of Blocks "K", "L" or 39 (R 123). Mr. Bush assumed that the red lines shown on Exhibit 14 were section lines (R 124 and 125). Mr. Bush also acknowledged that the distances showed on Exhibit 14 revealed that from the Southwest corner of Block "L" east to the section line was 53.16 chains plus the unop-

ened road, whereas from the Northwest corner of Block "L" east to the section line the distance was 52.71 chains plus the unopened road (R 126). Thus a difference of .45 chains or 29.7 feet between the east-west distance on the South of the block as compared with the north side of the block. It is very doubtful that any official survey which in all other respects appears to be rectangular would carry such variations and fractional distances, and who is to say which corner of the block is properly designated with respect to a known section corner.

Mrs. Bourne of the Davis County Recorder's office testified that she had been employed in the recorder's office for about 6 years (R 127); that the plat marked Exhibit 14 was in that office a long time before she was there (R 128). Respondents refused to stipulate that Exhibit 14 was an official record. The fact that a document appears in the office of the county recorder does not constitute the same as being an official record. Exhibit 14 is captioned "BOUNTIFUL TOWNSITE" and shows not only the area known as North Mill Creek Plat, but the original Bountiful Townsite. Exhibit 14 contains subsequent markings which indicate that at one time it may have been used as a diagrammatic ownership plat. There are no markings on Exhibit 14 which indicate when it was recorded or that it was ever in fact recorded. The original Exhibit 14 as presented in court is vastly different from Exhibit 14 and Exhibit 7 filed in the record as purported copies. Respondent is endeavoring to obtain an actual photostat or reproduction of the Exhibit 14 presented in the trial of this cause.

From the foregoing analysis, it appears conclusively that there was no way a survey could have established the

true boundary. The admission of the appellants of an overlap of 37 feet in land east of the subject land is further indication of inaccurate surveys and non-availability of survey monuments, and charges appellants with notice thereof and the uncertainty of descriptions in the area. An examination of a typical description in appellants' Abstract Exhibit 10 at Pages 11 and 27 show ties with intersections of street lines and adjoining properties by names of owners, further indicating an absence of proximate survey monuments in North Mill Creek Plat.

B. THERE WAS NO PROOF THAT THE FENCE WAS EVER INTENDED OR REGARDED AS ANYTHING BUT A BOUNDARY.

C. DURING THE PERIOD OF MEMORY OF ALL WITNESSES CALLED, BOTH SIDES OF THE FENCE WERE OCCUPIED BY OWNERS OF THE RESPECTIVE TRACTS.

D. THERE WAS NO EVIDENCE THAT THE FENCE WAS LOCATED BY MISTAKE OR INADVERTENCE.

There was no evidence adduced as to who constructed the fence or the circumstances surrounding its construction except that it was in place as an apparent old fence as early as 1916. However, as early as May 11, 1892, as recited in the statement of facts, the recitation in the deeds carry the distance from the Southwest corner of Lot 2 Block "L" east 35.5 rods "*TO WHAT IS KNOWN AS THE BRICKYARD CLAIM*". This shows that as early as May 11, 1892, it was the intention that the respondents' tract should extend east to the brick yard claim. The evidence

of both parties showed that a brick yard once was located east of the fence line (R 137) (R 155). Mr. Winward answered upon cross examination by appellants that the fence could have been put up to separate the property from the brick yard, but he did not know this to be a fact (R 156).

COMMENT UPON CASES CITED BY APPELLANTS

Appellants cite *Hummel v Young* and *Ringwood v Bradford* (App Brief 22) as authority in support of their case, however the facts in those cases are vastly different from this case.

In those cases cited by appellants the true boundary was, apparently, readily located by a survey from official monuments; not so in this case. In the cases cited there was evidence that the fences were intended to enclose or exclude livestock; that the person building the fence intended to build it on his own land without consulting his neighbor; that after the fences were built, there was no one in either case on the adjoining property who was in a position to complain. In this case there was no direct evidence as to who built the fence or why, and there was evidence that at least since 1916, owners of the respective tracts occupied the land up to the fence line under apparent claim of right and treated the same as a boundary line.

II

THE FINDING OF THE TRIAL COURT ON THE LOCATION OF THE OLD FENCE IS SUPPORTED BY THE EVIDENCE.

The trial court found the old fence as being located 2918.49 feet West from the Southeast Corner of Section 30, Township 2 North, Range 1 East (R 33).

Taking the evidence of the defendants-appellants we find as follows:

Mr. Bush, appellants' surveyor found the steel Stake which is 3 feet East of Strong's driveway (R 113) and as shown on Exhibit "C", to be 3005.05 feet West of the section line (R 114). 3005.05 ft.

Mr. Evans, appellants' counsel, explained to the court that the old fence was 87 feet east from the steel stake (R 146). 87.00 ft.

Distance from section line to old fence,
West 2918.05 ft.

Thus the appellants' own evidence would place the fence even farther east than the finding of the trial court places it. The findings of the trial court places the fence line West 2918.49 feet from the section line.

CONCLUSION

It is respectfully submitted that the Findings, Conclusions and Decree of the trial court are fully supported by the evidence and are proper in every respect, and that the judgment of the trial court should be affirmed.

Respectfully submitted,

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