

1981

## Julia Hottinger and Lamont Dastrup v. Ethel R. Jensen : Brief of Appellants

Utah Supreme Court

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### Recommended Citation

Brief of Appellant, *Hottinger v. Jensen*, No. 18147 (Utah Supreme Court, 1981).  
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IN THE SUPREME COURT OF THE STATE OF UTAH

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JULIA HOTTINGER and  
LAMONT DASTRUP,

Plaintiffs and  
Appellants,

vs.

Case No. 18147

ETHEL R. JENSEN,

Defendant and  
Respondent.

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Appeal from a Judgment of the Sixth Judicial District  
Court, Sanpete County, the Honorable Don V. Tibbs presiding.

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BRIEF OF APPELLANTS  
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FILED

DEC 28 1981

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Clerk, Supreme Court, Utah

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	1
QUESTION PRESENTED . . . . .	2
STATEMENT OF THE FACTS . . . . .	2
ARGUMENT . . . . .	3

### POINT I

APPELLANTS HAVE NEVER ACQUIRED IN THE FENCELINE AS THE BOUNDARY . . . . .	3
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### POINT II

THE LEGAL BOUNDARY NOT DISPUTED . . . . .	6
CONCLUSION . . . . .	6,7

## TABLE OF AUTHORITIES

CASES:	PAGE
<u>Carter v. Lindner</u> , 23 U.2d 204, 460 P.2d 830 (1969) . . . . .	6
<u>Fuoco v. Williams</u> , 18 U.2d 282, 421 P.2d 944 (1966) . . . . .	3,4
<u>Hales v. Frakes</u> , 600 P.2d 556 (Ut. 1979) . . . .	5,6
<u>Hartman v. Potter</u> , 596 P.2d 653 (Ut. 1979) . . .	6
<u>Hobson v. Panguitch Lake Corp.</u> , 530 P.2d 792 (Ut. 1975) . . . . .	3
<u>King v. Fronk</u> , 14 U.2d 135, 378 P.2d 893 (1963) . . . . .	7
<u>Wright v. Clissold</u> , 521 P.2d 1224 (Ut. 1974) . .	3

### QUESTION PRESENTED

Under the doctrine of "Boundary by Acquiescence", may acquiescence in a certain fenceline as a boundary be imputed to adjacent landowners who affirmatively state that said fence has never represented the boundary to their property and who subsequently survey their property to determine the actual boundary? And where the party claiming acquiescence originally deeded the property and should have known the true location of the boundary.

### STATEMENT OF THE FACTS

In 1958 Respondent conveyed by deed certain property to Appellants' predecessors in interest. The property consisting of approximately 14 acres adjoined in part property retained by Respondent. At the time of the original conveyance there existed a certain fenceline. Respondent states that said fence was considered to be the boundary of the two properties. Two of Appellants' predecessors state that they also believed the fence to be the boundary. The deed however described property beyond the fenceline. There is no statement from

Appellants' immediate predecessor as to the boundary, but Appellants themselves have stated that at no time did they consider the fenceline to be the boundary of that portion of their property. Appellants purchased the property in 1973. In 1980 Appellants caused their property to be surveyed and found that the boundary was beyond the fenceline in question. Appellants initiated suit to regain the use and enjoyment of that portion of their property and it is the adverse judgment in that suit that is now being appealed.

### ARGUMENT

#### POINT I

APPELLANTS HAVE NEVER ACQUIESCED IN THE FENCE-LINE AS A BOUNDARY TO THEIR PROPERTY.

The test used most frequently by Utah Courts in considering a claim of boundary by acquiescence consists of four parts. 1) Occupation up to a visible line marked definitely by monuments, fences or buildings, 2) Acquiescence in the line as the boundary, 3) For a long period of years, 4) by adjoining landowners. Fuoco v. Williams, 15 U.2d 156 389 P.2d (1964).

Appellants and Respondents are adjoining landowners in that part of Appellants approximately 14 acres borders on three sides Respondent's property. Respondent has been and is now in possession of property up to the fence in question. Appellants' predecessors in interest recognized the fence as a boundary for a period of fifteen years. In Hobson v. Panguitch Lake Corp., 530 P.2d 792 (Ut. 1975) the court stated that only under unusual circumstances would a claim of Boundary by Acquiescence be considered for a period of less than twenty years. The Hobson case is similar in that the fence was recognized by Plaintiffs and Defendant's predecessors in interest for ten years, which the court held to be insufficient.

Recognition of and acquiescence in the boundary must be mutual, Fuoco, supra Wright v. Clissold, 521 P.2d 1224 (Ut. 1974). The question then arises as to whether acquiescence may be inferred to Appellants actions for the additional five years that would seem to be required to establish a claim of Boundary by Acquiescence. While it is possible to draw such an inference from a party's inaction it is Appellants position that the trial court erred in making such an inference in this case.

In Hales v. Frakes, 600 P.2d 556 (Ut. 1979) the court reviews several Utah cases which discussed an inference of acquiescence and concluded that mere occupation up to a boundary is not sufficient to establish that the other party has acquiesced in that boundary. In this case Appellants have stated that they did not recognize the fence as a boundary. There is also no statement as to Appellants' immediate predecessor's understanding of the boundary. Approximately six years after purchasing the property Appellants had it surveyed at a cost of over \$1,000.00. This would also indicate that they never considered the existing fence to be the boundary. The parcel of land owned by Appellants is approximately 14 acres and borders the property of numerous other landowners on various sides. It would be unfair to assume that Appellants attention should be so closely drawn to a fence which comprised of only a small portion of the boundary of their property.

It is the burden of the party claiming acquiescence to establish the elements of that claim, and "Where there is no proof of acquiescence in the line as a boundary there can be no boundary by acquiescence. And a failure to meet any one



of the elements of the doctrine defeats the boundary".

Hales, supra.

## POINT II

THE LEGAL BOUNDARY IS NOT DISPUTED.

Where the true location of the boundary is known there can be no boundary by acquiescence. Carter v. Lindner, 23 U.2d 204, 460 P.2d 830. Although Respondent states she believed the fence to represent the true boundary as the grantor she should have known its actual location. An unambiguous description of the property in a deed is prima facie evidence of the grantor's intent to convey that property. Hartman v. Potter, 596 P.2d 653 (Ut. 1979). It is inequitable to place the burden of the loss on a party who relied on said deed instead of the party who, by her agent, caused the deed to be drawn up. Hales, supra also states that each party is presumed to own the land described in their deed.

## CONCLUSION

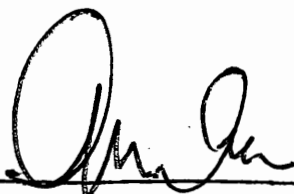
"Each case involving acquiesced in boundary must be viewed in light of its own facts, equity, and public

policy." King v. Fronk, 14 U. 2d 135, 378 P. 2d 893  
(1963).

It would seem inequitable under the facts of this case to impute acquiescence in the boundary to Appellants and for such inferred acquiescence make them have the burden of another's mistake. For these reasons it is respectfully requested that the lower court decision be reversed.

DATED this 22 day of December, 1981.

Respectfully submitted,

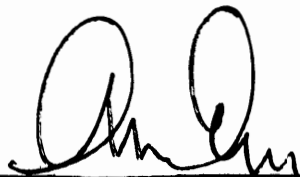


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CERTIFICATE OF MAILING

SERVED the foregoing Brief of Appellants by mailing two copies thereof, postage prepaid, to PAUL R. FRISCHKNECHT, attorney for Respondent, at 50 North Main Street, Manti, Utah 84642, this 22 day of December, 1981.



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