

1982

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

Utah Supreme Court

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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-

ETHEL R. JENSEN,

Defendant  
and Respondent.

Case No. 18147

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

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BRIEF OF RESPONDENT

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Clerk, Supreme Court, Utah

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## ISSUE PRESENTED

Whether the requirements of "Boundary by Acquiescence" are satisfied in the factual situation where a common owner conveys away part of his estate and for 15 years the abutting owners agreed to, knew and understood a certain fence line was the boundary but where the present abutting owners, purchased the disputed property without knowing the fence line was the boundary, but who nevertheless made no claim to any property beyond said fence until some 7 years had elapsed in addition to the stated 15 year period.

## STATEMENT OF FACTS

Respondent owned certain property in 1958; in that same year, Respondent conveyed a portion of said property to Ray and Georgia Jones. The property in question was subsequently conveyed and sold by Jones' to N.E. Anglin, and subsequently conveyed and sold by Anglin to Denton A. Dove. In 1973, Dove sold the property in question to LaMont Dastrup and Julia Hottinger, Appellants in this case.

The facts are undisputed that when the property was sold in 1958 it was agreed and understood that the boundary between the portion that was sold to Jones' and that remaining to the Respondent was the most obvious and visible cedar post and

net wire fence line in question. When Jones' sold the property to N.E. Anglin it was agreed, known and understood that the fence line in question was the boundary line. When Anglin subsequently sold the property to Dove, it was agreed, known and understood that the fence line was the boundary line. When the property was sold by Dove to LaMont Dastrup and Julia Hottinger, the Appellants in this case in 1973, there is no representation as to where the boundary line was, but the fence was treated as the boundary line.

When Appellants acquired the property in 1973 they made no claim to any property opposite the Appellants side of the fence in question until 1980, when a survey was performed and an assertion was made by Appellants to ownership of property opposite their side of the fence in question. The fence line in question has been acquiesced in as a boundary line between the Appellants, their predecessors in interest and the Respondent from 1958 to 1980.

The disputed property in question has been used by Respondent since 1945 when she acquired it as a lawn and part of a yard on the east side of her home, and also as a garden spot to the south of her home. The garden area has been frequently tilled and of course the lawn and yard part has been maintained. In 1980 Appellants performed a survey and determined that their deeds called for property on Respondent's side

of the fence, whereupon claim was made by Appellants to property on Respondent's side of the fence up to within a few feet of her home.

### ARGUMENT

#### Point I

ALL REQUIREMENTS OF THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE HAVE BEEN SATISFIED.

The law seems to be clear in the State of Utah that the necessary elements for establishment of "Boundary by Acquiescence" are as follows:

- [a] Occupation to a visible line marked by monuments fences or buildings.
- [b] Acquiescence in the division line as the property.
- [c] Acquiescence for a long period of time.
- [d] Acquiescence by adjoining land owners.

Holmes -vs- Judge, 31 Utah 269, 87 P. 1009 (1906); Tripp -vs- Bagley, 74 Utah 57, 276 P. 912 (1928); Brown -vs- Milliner, 120 Utah 16, 232 P.2d 202 (1951).

When the preceding requirements are met, a presumption arises that the parties have agreed that the boundary should be the one in which they acquiesced, wholly apart from whether or not an actual agreement was made. However, in spite of proof that these prerequisites exist, the presumption is a rebuttable one. Holmes -vs- Judge, (supra).



In Lane -vs- Walker, 29 Utah 2d 119, 505 P.2d 1199 (1973); the Utah Supreme Court in the application of the "Boundary by Acquiescence" doctrine, when it was urged upon the Court that there was no evidence showing the fence was mutually intended to be the boundary, the Court said:

"To this we say that the test to establish the boundary by "acquiescence" necessarily need not be based on mutual "intent". "Intent" is not synonymous with "acquiescence" in these cases.

"Acquiescence" is more nearly synonymous with "indolence", or "consent by silence" . . ."

In the instant case from 1958 to 1973, the adjoining property owners agreed, knew and understood that the boundary between them and the Respondent was the fence line in question. In 1973 when Appellants acquired the property, their acquiescence in the fence line as the boundary, continued until the survey was taken in 1980, at which time they made claim to the disputed property. The trend of the law in Utah favors the time period to exceed 20 years except in unusual circumstances. Hobson -vs- Panguitch Lake Corporation, 530 P.2d 792 (Utah 1975); Fuoco -vs- Williams, 18 Utah 2d 282, 421 P.2d 944 (1966). The Utah Supreme Court has lessened that requirement and in a case involving an acquiescence for less than 8 years, the Court held that "Boundary by Acquiescence" doctrine was applicable with less



than 8 years being sufficient to establish the acquiescence.  
Ekberg -vs- Bates, 239 P.2d 205 (1951).

Under the facts of the instant case, there was acquiescence in the fence line as the boundary from 1958 to 1980 when the survey was taken. The law is clear in the State of Utah that where the above referred to four elements exist as the necessary prerequisites for establishing a valid boundary by acquiescence, the burden of proof in establishing the rebuttable presumption is clearly on the party who challenges the presumption created in "Boundary by Acquiescence". King -vs- Fronk, 14 Utah 135, 378 P.2d 893 (1966).

The cases cited by Appellants, Hobson -vs- Panguitch Lake Corporation, (supra); Halls -vs- Frakes, 600 P.2d 556 (Utah 1979); and Wright -vs- Clissold, 521 P.2d 1224 (Utah 1974); are distinguishable from the instant case.

In the Hobson case (supra), the agreement establishing the fence line was made by a party who did not own the property at the time the agreement was made.

In the Halls case (supra), the fence was erected off the true boundary line not by agreement, but for specific purposes of allowing for an expected road to be constructed and to control livestock.

In the Wright case (supra), the fence was erected not to establish a boundary, but to control cattle.

In the instant case, Appellants predecessors in interest

expressly agreed, knew and understood that the fence in question was the boundary and Appellants by their conduct or lack of it, treated the fence line as the boundary until 1980.

In Hobson (supra), the Court stated:

"The very reason for being of the doctrine of boundary by acquiescence or agreement is that in the interest of preserving the peace and good order of society and quietly resting bones of the past, which no one seems to have been troubled or complained about for a long number of years, should not be unearthed for the purpose of stirring up controversy, but should be left to their repose . . . ." Id. at 794.

## Point II

### EQUITY DEMANDS AFFIRMING THE LOWER COURT'S DECISION.

Based upon the stipulated facts, it is clear that Appellants predecessors in interest and the Respondent agreed, knew and understood that the well marked and visible fence line in question was the boundary respected by each party. When Respondent, now over 80 years of age, intended to convey to Jones' in 1958, the intent was to make the fence line the boundary. Unfortunately, when a third party prepared a deed setting forth a meets and bounds description for execution

by Respondent and conveyance to Appellants' predecessors in interest, the meets and bounds description did not comport to the intent of the parties. Unfortunately, the Respondent was without sufficient expertise to determine from the description that it was in contradiction to the parties intent.

The Appellants' predecessors in interest and the Appellants who acquired the property in 1973 to 1980, always understood and by action treated the boundary line between the parties as the fence line. They never possessed or made any claim to the disputed property until 1980 when a survey was taken. A finding for the Appellants would result in a lose of the Respondent's lawn and trees and garden spot, and put the property boundary within a few feet from the Respondent's home, which was certainly not the intention, and would create an unfair result to the Respondent.

#### CONCLUSION

It is the Respondent's contention that the four pre-requisites to establish "Boundary by Acquiescence" have been established. That acquiescence has continued for in excess of 20 years, or that if it has not, the facts create an unusual circumstance thereby lessening the generally viewed 20 year requirement and 15 years being sufficient to establish the doctrine. That Appellants have failed to rebut the presumption

created by the Respondent meeting the prerequisites.

Respondent respectfully requests the lower court's decision be affirmed.

DATED this 19 day of January, 1982.

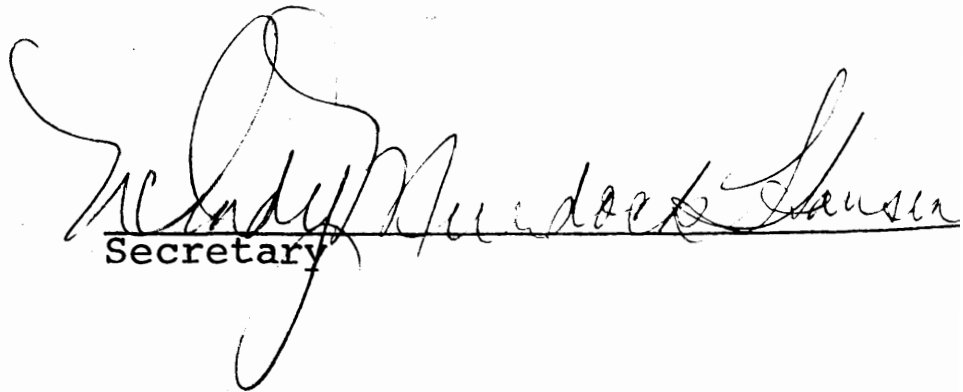
Respectfully Submitted,



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#### MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of Respondent's Brief to: Dale M. Dorius, Esquire, Attorney at Law, Post Office Box U, 29 South Main Street, Brigham City, Utah, 84302, postage fully prepaid thereon, this 19th day of January, 1982.

  
Secretary