

1960

# Glen F. Harding v. Mary Allen : Brief of Appellant

Utah Supreme Court

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Case No. 9176

**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

FILED  
FEB 15 1960

GLEN F. HARDING,

Clerk, Supreme Court,

*Plaintiff and Appellant*

vs.

MARY ALLEN,

*Defendant and Respondent*

**APPELLANT'S BRIEF**

Howell, Stine and Olmstead  
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**APPELLANT'S BRIEF**

**I.**

**THE APPEAL**

This is an appeal from a judgment of the District Court of Weber County, Utah, Judge John F. Wahlquist, presiding, tried without a jury. The parties will be referred to as in the court below.

**II.**

**STATEMENT OF FACTS**

This case involves a boundary line dispute. Glen F. Harding, the owner of some real property on the

Northeast corner of 23rd Street and Ogden Avenue, in Ogden, Utah, and whose north line adjoins the south line of certain real property owned by Mary Allen brought this suit to quiet title to his property as described in his deeds. Plaintiff had purchased his property in two parcels. The first parcel, the west 66 feet of his property, was purchased from Mary Weller, April 7, 1951 (Ex. A, Page 85), and the second parcel, the east 49.5 feet, was purchased from Joseph H. Hunter, June 30, 1951 (Ex. B., Page 47).

Defendant Mary Allen purchased her property, which fronts on Ogden Avenue, on December 11, 1937, and has occupied the property constantly since that time. (Tr. 39).

Dividing plaintiff and defendant's properties, a wood fence begins on the east corner of the true common boundary line, and runs thence some 83 feet westerly on a bias to the south; this fence terminates 1.9 feet south (and on plaintiff's side of) the true boundary line, and 30 feet short of the western end of the properties. (Ex. C).

At the time defendant originally purchased her property, there was a fence existing along the same line as the present fence, and extending beyond the west end of the present fence about 4 to 6 feet to a tree. No evidence was given as to the origin of this fence. About 1½ years after defendant acquired the property this tree was knocked down by a truck, and the west terminus of the fence reverted to somewhere near its present location (Tr. 81, 86).

During this time, the west section of plaintiff's

property (the Weller property) was occupied by a house and garage. The east section (the Hunter property) was unoccupied (Tr. 59). A double driveway from Ogden Avenue serviced the defendant's property and the Weller property. The evidence was in conflict as to whether this was divided, or was one large driveway used for both properties. However, two of defendant's witnesses indicated it to be one large driveway. (Tr. 37, 65, Ex. 3).

This situation existed without interruption until 1946 or 1947, when Mr. Hunter, the owner of the east section, informed defendant he had the property surveyed, and that defendant's fence was on Hunter's property. To this defendant replied that when the fence was replaced it would be corrected (Tr. 90). Sometime thereafter, defendant and her sons replaced the fence with the present one. In doing so, they placed it on the same line as the earlier fence. Nothing further transpired between defendant and Hunter regarding the boundary and the Hunter tract remained vacant.

When plaintiff purchased his property, this reconstructed fence was perhaps 8 feet short of the tree that marks its present terminus. Plaintiff testified there was nothing in this 8 foot space, and defendant testified that some wire was strung from the end of the fence to the tree (Tr. 9, 62). This vacant area was then filled by a section of picket from defendant's rear fence.

When plaintiff acquired the property in 1951, no survey had been made. Plaintiff removed the house on the Weller section and began construction of his commercial structure. In 1953 or 1954, plaintiff erected the garage on his property and added the fence shown in

defendant's Exhibits 1-7. This fence ran easterly from the Ogden Avenue sidewalk to the west end of defendant's fence, and was in place from 6 months to a year or better (Tr. 20, 54). During this same period of time plaintiff had his first survey made, which showed the fence south of the true boundary (Tr. 20-21). Thereafter, the fence erected by plaintiff was removed, plaintiff and defendant had discussions as to location of the boundary, and the matter culminated in the filing of this suit May 14, 1957 (Tr. 21, 22, 58).

Trial was had without a jury before the Hon. John F. Wahlquist on October 15, 1959, and the court resolved the issues in favor of defendant and against plaintiff and entered judgment thereon October 28, 1959. From this judgment plaintiff takes this appeal.

### III.

#### STATEMENT OF POINTS

1. The evidence does not support the findings of fact or the judgment.

### IV.

#### ARGUMENT

This proceeding is an equitable one, and this court should review both the law and the facts as reflected in the record. *Tripp v. Bagley*. 74 Wash. 57, 276 Pac. 913.

Unless a boundary by acquiescence was established subsequent to plaintiff's purchase of these properties

in 1951, each section of plaintiff's property must be considered individually in attempting to evaluate the evidence supporting the fenceline. It is thus important to weigh the evidence of acquiescence since 1951.

It is without dispute that the fence has there existed, and that defendant occupied her premises up to the fence line during this period. It would also seem that prior to the survey (circa 1954), plaintiff acquiesced in the line indicated by the fence; however, upon learning of the true location of the boundary, plaintiff could and did no longer acquiesce in the fence line to establish the boundary. Factually he did not acquiesce because the evidence shows he took down the fence he erected, but beyond this, as a matter of law he could not acquiesce. See 3 Utah Law Review, Boundary by Acquiescence, at Page 510, where the author states:

“It is clear that actual knowledge of the true boundary prevents uncertainty”,

citing *Tripp vs. Bagley*, 74 Utah 57, 276 Pac. 913, wherein this court stated at Page 70:

“We further remark that, if adjoining land owners acquiesce in a division line other than the true line, with knowledge of the location of the true line and with design and purpose of thereby transferring a tract of land from one to the other, such acquiescence alone will not operate as a conveyance. Land cannot be conveyed from one person to another by merely a change in possession, even though such change in possession continues for a long period of time.”

If any acquiescence can be claimed against plaintiff, therefore, it is only from the time he purchased,



1951, to the time of this knowledge (circa 1954), and falls far short of the period of acquiescence required. Thus in order to establish acquiescence, it will be necessary to go back prior to plaintiff's ownership and since the property was then in two separate tracts, each must be considered separately.

First, the Hunter tract, which adjoins defendant's property for 49.5 feet. The uncontradicted evidence shows that from November 1937 to the present a fence existed dividing the two properties; that the fence started on the east point of the common boundary and ran westerly with a southern bias into the Hunter tract. No evidence was offered concerning the origin of this fence, and up until plaintiff's purchase in 1951, the property was vacant and unoccupied. While the point has never been ruled on directly, we think that under Utah law no boundary by acquiescence can be established during a period of time when the other property is vacant and occupied. The recent case of *Ekberg v. Bates* 121 Utah 123, 239 Pac. 2nd 205, lays down the foundation of the doctrine as follows:

"In *Brown v. Milliner* 120 Utah 16, 232 P. 2nd 202, 207, which is the latest expression of this court in a case involving a boundary line dispute, many of the cases decided by this court on that question are reviewed and we reaffirm the doctrine that the owners of adjoining tracts whose true boundary lines are unknown, in dispute or uncertain may by parol agreement establish boundary lines which are binding on themselves and their successors in interest but concluded that it did not apply to the facts in that case. We also said therein '\* \* \* that in the absence of evidence that

the owners of adjoining property or their predecessors in interest ever expressly agreed 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 buildings 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, \* \* \* '. (Italics added)

This statement of the law is quoted in 3 Utah Law Review, Boundary by Acquiescence at Page 505, and the author lists as one of the four elements of the doctrine "*Occupation up to a visible line marked definitely by monuments, fences or buildings.*" (Italics added)

The case of *Hummell vs. Young*, 1 Utah 2nd 237, 265 Pac. 2nd 410, is perhaps most clearly in point on the question of occupation up to the fence line. In that case the fence was erected by a party when the land on the other side was unoccupied, and was done without consultation with the other owner. The possibility of an express agreement as to fence location was thus excluded; and further, this evidence left no room to imply such an agreement.

The Court said that the case was similar to *Home Owners Loan Corporation v. Dudley*, 105 Utah 208, 141 P. 2d 160, in which case the fence was erected at a time when a common owner had the land on both sides of the fence, thus leaving no room for the implication of an agreement fixing the boundary. We submit the evidence

regarding the Hunter tract falls directly under the holding of the Hummel case, since the fence relied on was erected and the claimed acquiescence occurred while the Hunter tract was vacant and unoccupied.

The evidence is substantially different on the Weller tract. This tract was occupied from the time defendant originally purchased until the time suit was filed. The time requirement of the doctrine would seem to be satisfied. However, there are several other facts here which seem sufficient to resist application of the doctrine.

First is the point that since defendant in 1946 knew the fence was off line on the Hunter boundary, she also knew it was off on the Weller property and therefore there could be no acquiescence after that time, for reasons previously submitted, namely, that knowledge of the true line precludes uncertainty, and uncertainty is essential to the doctrine of boundary by acquiescence.

Secondly, plaintiff earnestly contends that the fence in existence between the Weller tract and defendant from 1937-1951 was not sufficient to constitute "a visible line marked definitely by monuments, fences or buildings". The Weller lot is 66 feet wide along defendant's land. The only time the fence has extended farther west than it presently is, was a period of about 1½ years immediately after defendant's purchase of the property. During this 1½ year period some of defendant's evidence showed the fence to within 12 feet of the sidewalk, but defendant herself (Tr. 40, Exs. 2 and 3) and her witnesses (Tr. 33, 79) placed it farther east than that. Also it is undisputed that the fence was several feet short of the tree it presently connects with at the time

plaintiff purchased and for some undisclosed time prior thereto.

The sum total is that from 1939-1954 the farthest extension of the fence was to the tree 30 feet short of the western boundary. Thus of the 66 feet, 36 feet was fenced and 30 feet unfenced at all times, with no visible marker dividing the property on the unfenced portion. A little over one-half of the area was fenced, and this was on a bias rather than an east-west line. It is interesting to note that the first solid fence post in the ground is located 41.5 feet east of the west boundary, approximately the location that plaintiff testified the fence terminated when he purchased his property. (Ex. C.)

Defendant relies on testimony to the effect that the extension of the fence line would approximately bisect the double driveway at the curb to establish a fence line. This driveway is shown in Ex. 3, and there is no marking of any kind upon it to indicate where the boundary is claimed to be. It is difficult to tell from looking at it where the center of the driveway is. We submit the testimony shows that as to this westernmost area of the adjoining properties, not only was there no "visible line definitely marked" but on the contrary both neighbors were using it in common for an access drive!

One further point that should be considered is this: The western end of the fence was destroyed by defendant's son driving a vehicle in the driveway next to the house, (Tr. 81). The true boundary is only 7 ft. 9 inches from the Allen home (Ex. C). The fence corresponds with the true boundary on the east and

moves into plaintiff's property only as it moves westerly.

We think this is strong evidence that the fence is in its present position not because adjoining landowners agreed on the boundary in such position, but because a fence along the true boundary would not allow vehicles room to use the driveway between the fence and the house on the Allen property. It would appear that the fence was originally placed on the true line (the fact that the east end of the fence is directly on the true line would indicate the true boundary was known at the time it was erected). We think this is strong evidence that the fence was never originally placed there as a boundary, but was placed on the true line; that as motor vehicles and trucks were used in defendant's driveway of necessity the fence was broken down and moved to the south in order to permit these vehicles access along the driveway. The fence was gradually 'bent' to the south and was replaced or rebuilt along the lines of the fence as moved. What else accounts for one end being right on survey and the other a substantial distance off? Of course, this argument is to some extent conjecture, but we submit it fits the facts in evidence far better than the assumption or implication that the adjoining land owners ever agreed to its present location as a boundary.

The foundation of the doctrine of Boundary by Acquiescence is set out in *Glenn vs. Whitney*, 116 *Utah* 267, 209 *Pac. 2d* 257, where this court said:

"The theory under which a boundary line is established by long acquiescence along an existing fence line is founded on the doctrine that the

parties erect the fence to settle some doubt or uncertainty which they may have as to the location of the true boundary, and to compromise their differences by agreeing to accept the fence line as the limiting line of their respective lands. The mere fact that a fence happens to be put up and neither party does anything about it for a long period of time will not establish it as the true boundary.”

Further amplification is found in *Brown v. Milliner*, 120 *Utah* 16, 232 *Pac.* 2d 202:

“In *Holmes v. Judge*, supra, we declared that the doctrine of boundary by acquiescence ‘rests upon sound public policy, with a view of preventing strife and litigation concerning boundaries’ and that ‘while the interests of society require that title to real estate shall not be transferred from the owner for slight cause, or otherwise than by law, these same interests demand that there shall be stability in boundaries’. However in that case we were careful to mark off the limits of the rule. Said the Court: ‘We do not wish to be understood as holding that the parties may not claim to the true boundary, where an assumed or agreed boundary is located through mistake or inadvertence, or where it is clear that the line as located was not intended as a boundary, and where a boundary so located has not been acquiesced in for a long term of years by the parties in interest.’”

Boundary by acquiescence is a limited doctrine, and must not be enlarged beyond its original scope and purpose. Defendant has not met these required standards of the doctrine as above enumerated, but has at most shown nothing more than a unilateral belief in the fence

as a boundary. The evidence and the physical facts militate against a finding of boundary by acquiescence.

V.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed, and remanded to the trial court with instructions to enter judgment as prayed in plaintiff's complaint.

Respectfully submitted,

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*Attorneys for Plaintiff*