1960

Glen F. Harding v. Mary Allen : Brief of Respondent

Utah Supreme Court

Huggins & Huggins; Ira A. Huggins; Attorneys for Respondent;

Case No. 9176

IN THE SUPREME COURT

of the

STATE OF UTAH

GLEN F. HARDING,
Plaintiff and Appellant,

—vs.—

MARY ALLEN,
Defendant and Respondent.

RESPONDENT'S BRIEF

HUGGINS & HUGGINS
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CITATIONS & AUTHORITIES

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I

RESPONDENT'S BRIEF

II

STATEMENT OF FACTS

Appellant's statement of facts are essentially correct, but as herein supplemented, and in some instances controverted, as follows:

The fence existing between plaintiff's and defendant's properties had existed in its then location for a long time prior to December 11, 1937, when defendant acquired her property. Transcript 74.

At the time of her purchase the fence extended to a tree approximately 10 to 12 feet east of the west property line of plaintiff's and defendant's property. Transcript 14, 16, 45, 66, 67, 70, 72 and 81.

Two separate driveways existed at the time defendant purchased her property, one on either side of the fence line with the fence separating them. Transcript 45. When water was piped into the defendant's home a hydrant had been placed and continuously thereafter retained on the fence line approximately 30 feet east of the west property line. Transcript 18, 44.

When the crossover at the curb was constructed for ingress to and egress from plaintiff's and defendant's properties prior to 1937, the exact date being unknown, it was placed, so far as can be determined, exactly one-half north of the fence line extended to the west and one-half on the south side thereof, the center being in line with the fence manifestly for the convenience of the occupants of the two properties. Transcript 82, 86.

If any presumption can be indulged in, the presumption would be that the crossover was installed in its present location at the instance of the property owners and for their convenience, no one else would have any

interest therein or be served thereby. There is no evidence that the owners and occupants of the property on either side of the fence ever interferred with the use of the property on the other side of the fence except one of plaintiff's witnesses indicated an occasional slipping over on to plaintiff's side slightly south of the fence line when the driveway was slick. That the fence line, extended through, as found by the trial court, and was marked by visible evidence such as fence, monuments, or buildings, when plaintiff purchased his property, is evidenced by the fact that in the construction of his buildings and retaining walls he followed through from east to west just slightly south of the line claimed by the defendant and that he himself directed or had placed one panel of fence to replace wire at the west end of the present terminus shortly after he acquired his property. Transcript 10 and 47, defendant's Exhibit 4. Prior to that he had discussed the property line with one George Carsons. Transcript 13 and 14. Plaintiff's retaining wall is a permanent concrete wall dug down some distance in the slope and existing approximately 3 to 3½ feet north of his commercial buildings leaving a wall or catwalk for light into basement rooms. Transcript 13 and 14.

The foundation for his garages, being permanent in nature, were placed continuously on a diagonal direction, bearing to the south following the fence line and plaintiff erected a fence along the south side of the property claimed by defendant of his own volition shortly after he purchased his property, i.e. in the spring of 1952, or 1953.

Transcript 14, 25, 49, 57. Defendant's Exhibits 1, 3, 5, 6 and 7.

The north wall of a garage or building on the Weller property, in existence when plaintiff purchased his property, and long prior thereto, was along said fence line and formed a part of the dividing line. Transcript 31, 36, 37, 41, 42, 46, 66, 68 and 69.

Several years prior to plaintiff's acquisition of his property, in approximately 1946, the then owner of the east 49½ feet, Mr. Joseph H. Hunter, plaintiff's grantor, knew that the fence did not follow the survey line. Plaintiff's predecessor took no steps to change the location of said fence. Subsequently defendant repaired or partly replaced said fence on the existing line and Hunter made no complaint about it. Transcript 89 and 90.

III

STATEMENT OF POINTS

1. THE EVIDENCE SUPPORTS THE FINDINGS OF FACT AND THE JUDGMENT.

IV

ARGUMENT

It is the law of this state that this court will not disturb the findings and order of the trial tribunal if there is substantial basis in the evidence to support its action, Teamsters, Chauffeurs and Helpers of America, Local

Unions No. 222 and No. 976, Plaintiffs, versus Board of Review, Department of Employment Security, of the Industrial Commission of Utah, et al, defendants, decided January 20, 1960.

> "This court will indulge considerable credit to the findings of the trial court because of his advantaged position and will not disturb them unless the evidence clearly preponderates against the findings."

Peterson vs. Holloway, 8 Ut. 2nd 328 334 P. 2d 559. Nathan G. Chugg vs. Dale Chugg et al., 7-20-59.

A consideration of all the evidence in the case makes it clear and convincing that it was generally known that the fence line which has existed for more than 20 years prior to the filing of plaintiff's complaint ran on a bias to the south and not due east and west as shown by the deeds; that all of the occupants of the land on both sides of that fence line knew of its existence and recognized it as the dividing line since prior to defendant's acquisition of her property. There is no evidence that anyone ever attempted to change that dividing line. While it appears to be true that Hunter, plaintiff's predecessor, did not occupy the east 49½ feet of plaintiff's property as a home, he nevertheless occupied it in the sense that he actually and actively maintained, controlled and considered it and shortly after acquiring it in 1946, had it surveyed. Something it must be assumed, about the fence line must have indicated to him a doubt as to the location of the true line because he had it surveyed and discovered then

that it was not on the fence line. He called that fact to defendant's attention but made no move or effort to change or relocate the fence — notwithstanding repairs to and replacement of parts thereof shortly thereafter made. And by his very actions, or failure to act, acquiesced in its then location.

His knowledge of the facts and his acquiescence therein are imputed to his grantee (plaintiff) Hummell et al vs. Young et al, 1 Ut. 2nd 237, 265 P. 2d 410. The evidence is conclusive that there was acquiescence in the fence line established for more than 20 years prior to the filing of this action with full knowledge that the fence was not upon the true line since 1946, 11 years prior to the filing of the suit. Hunter acquiesced by taking no action to change the location. His grantee, plaintiff, acquiesced by installing permanent and costly construction completely along and immediately south of the fence line from east to west. Mrs. Weller, plaintiff's predecessor to the west 66 feet, acquiesced as did Spendlove, her predecessor, in the use and operation of the two driveways, one on either side of the fence between the two properties down to within 10 or 12 feet of the west line and in the installation and use of the crossover for ingress to and egress from their respective properties on the west.

This court said in Ekberg vs. Bates, 239 P. 2d 205:

> "We further pointed out in Brown vs Milliner Supra (232 P. 2nd 202 added) that in the absence of evidence that the owners of adjoining property

> or their *predecessors in interest,* ever made an express agreement 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 it will not permit the parties nor their grantees to depart from such line.*" (Italics ours.)
>
> "This is so because the doctrine of boundary by acquiescence rests on sound public policy of avoiding trouble and litigation over boundaries."

This rule is sometimes referred to as the doctrine of boundary by acquiescence. The rule is recognized and implied in Holmes vs Judge, 87 P. 1009, and in a long line of subsequent cases all cited in Brown vs. Milliner, 120 Ut. 16, 232 Pac. (2) 202-7. Briem vs. Smith, 112 P. 2d 145, Jensen vs. Bartlett, 4 Ut. 2nd 58, 286 Pac. 2nd 804.

The court further said in the Hummell case:

> "The court in such cases indulges in the fiction that at some time in the past the adjoining owners were in dispute or uncertain as to the location of the true boundary and that they settled their differences by agreeing upon the fence or other monument as the dividing line between the properties."

Certainly that fiction can and should be indulged in in the instant case "consistently with the facts appearing."

There is no evidence to the contrary, and by so indulging in such fiction no violence will be done to any evidence. It seems to the writer that no other presumption could be reached under the evidence down to the filing of the action which occurred at a date many years after such presumption arose by reason of the actions of the adjoining property owners.

This court listed as a requisite to acquiescence "mutual recognition." Brown vs Milliner Supra. Acquiescence for a period of 8 years was held sufficient to satisfy the rule establishing fence lines as a property line in Ekberg vs. Bates, 239 P. 2d 205. The court saying in part:

> "In the instant case, as we have pointed out above, there was a period of actual acquiescence for more than 7 years (the Utah limitations period for adverse possession) before appellant's acquired their title and under all the circumstances shown herein that was a sufficient length of time to establish the line so that appellants are precluded from claiming that it is not the true line."

The language of this court in the case of Holmes vs. Judge, Supra, indicates that the presumption of an agreement under the fiction of acquiescence may not be rebutted and it is further indicated in other cases decided by this court that "in all cases" where the previously noted pre-requisites are present, a binding boundary agreement will be implied. True, these statements may be dicta but indicate the thinking of this court, Farr Development Company vs. Thomas, 41 Ut. 1, 122 P. 906,

where quoting from the Holmes vs. Judge case Supra, this court said:

> "We said all that is necessary to be or that can be said by us on the question that where owners of adjoining lands have occupied the respective premises up to a certain line which they and their predecessors in interest recognized or acquiesced in as their boundary line for a long period of time neither they nor their grantees or privies in estate will be permitted to deny that the boundary line so recognized and acquiesced in is the true line of division between their properties."

See also Banford vs. Eccles, 51 U 453, 126 P. 333, Young v. Highland, 37 Utah 229, 108 P. 1124, Moyer vs. Langton, 37 U 9, 106 P. 508.

No good could be served now to compel the establishment of a different division line. Appellant has constructed costly and permanent buildings and walls along the fence line. It would be ridiculous to suppose that he would go to the expense of reconstructing these buildings and/or walls if he should prevail in this appeal. The most that would be accomplished would be to save face in having filed the action, and to jeopardize respondent's property by making it impossible of ingress to and egress from and cause bitterness and bickering between the parties, which this court has sought to avoid. Holmes vs. Judge, 31 Ut. 269, 87 P. 1009, Blanchard vs. Smith, 255 P. 2d 729.

V

CONCLUSION

It is respectfully submitted, therefore, that the facts and the law amply support the findings, conclusions and judgment of the trial court and that they should be affirmed.

Respectfully submitted,

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