

1993

Jacobs v. Hafen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

MARK JACOBS,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	Case No. 930023-CA
)	
WILFORD L. HAFEN and JOANN B.)	
HAFEN, his wife,)	
)	Priority No. 16
Defendants/Appellees.)	

BRIEF OF APPELLEES

Appeal from the Sixth Judicial District Court
of Kane County
Honorable Don V. Tibbs presiding

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DETERMINATIVE STATUTES AND RULES

The interpretation of the following Statutes and Rules is believed to be determinative of the issues addressed in Point VI. A of this brief.

UCA §57-4a-4 (1) (d):

(1) A recorded document creates the following presumptions regarding title to the real property affected:

*
*
*

(d) delivery occurred notwithstanding any lapse of time between dates on the document and the date of recording.

Rule 52 (a), Utah Rules of Civil Procedure.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of facts and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

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BRIEF OF APPELLEES

I. JURISDICTION

The Supreme Court has jurisdiction in this matter pursuant to U.C.A. §78-2-2 (1953, as amended). The Utah Court of Appeals has jurisdiction pursuant to U.C.A. §78-2a-3(2)(k)(1953, as amended).

II. ISSUES ON APPEAL

Did the trial court err in quieting title to property under the doctrine of boundary by acquiescence, where the deed segregating title to the property parcels was executed in 1973, and recorded in 1983.

1. Mr. Jacobs challenges the sufficiency of the evidence supporting the trial court's finding that separate ownership of the property had been established in 1973.

2. Mr. Jacobs contends that the trial court committed error in concluding that one element of boundary by acquiescence, i.e., "for a long

period of time", had been met, because it was for eighteen-and-one-half years.

The Appeals Court reviews factual findings of the trial court, giving great deference to the trial court's view of the evidence. A presumption arises concerning the validity of the trial court's findings and judgment. The appeals court will set aside such factual findings only if they are clearly against the weight of the evidence, clearly erroneous, or induced by an erroneous view of the law. Scharf v. BMG Corp., 700 P2d 1068, 1070 (Utah 1985); Jeppson v. Jeppson, 684 P2d 69, 70 (Utah 1984); State in Interest of K.K.H., 610 P2d 849, 851 (Utah, 1980); Smith v. Linmar Energy Corp., 790 P2d 1222, 1224 (Utah App 1990); Schindler v. Schindler, 776 P2d 84, 88 (Utah App 1989); Jensen v. Brown, 639 P2d 150, 152 (Utah 1981); URCP, Rule 52 (a).

The trial court's determination as to the applicable law is reviewed for correctness. Where there is substantial, competent, admissible evidence to support the conclusions reached, the appeals court will not disturb the conclusions. The evidence and the inferences that fairly and reasonably are drawn therefrom must be viewed in a light most favorable to the judgment entered. Scharf v. BMG Corp., 700 P2d at 1070, 1071; Bush v. Coult, 594 P2d 865, 866 (Utah 1979); Van Dyke v. Chappell, 818 P2d 1023, 1024 (Utah 1991); Nielsen v. Chin-Hsien Wang; 613 P2d 512, 514 (Utah 1980); Reimschiessel v. Russell, 649 P2d 26, 27 (Utah 1982).

III. STATEMENT OF THE CASE

Opposing Counsel's statement of the nature of the case is accurately reflected.

IV. STATEMENT OF FACTS

In addition to Mr. Jacobs' statement of facts, the Hafens believe the following facts or clarifications are necessary for an adequate review of this matter.

1. The Hafens claim of title dates back to April 15, 1973, when Castle Creek Properties executed a Warranty Deed to E&F Investment Company, Inc., and Joe Hutchings. Trial exhibit 18. (this deed affected the property in sections 35 and 36, and is reproduced in the Addendum).

2. E&F Investment Company, Inc. and Joe Hutchings conveyed the same property, by two separate warranty deeds to Santa Clara Heights, Inc., on April 1, 1979. Trial exhibits 16 and 17.

3. Santa Clara Heights, Inc. conveyed the property by warranty deed to Wilford L. Hafen on October 21, 1982. Trial exhibit 15. Mr Jacobs' brief, at page 4, and the trial transcript at page 42, indicate that the Hafens purchased this property in October, 1988. This is an apparent error, as the deed is dated October, 21 1982 and recorded January, 31 1983.

4. The deed Mr. Jacobs states conveyed property in all four sections from Castle Creek Properties to Security Title Company on April 9, 1981, (see Mr. Jacobs' brief at page 6), only conveyed the Kane County property in sections one and two. See Tr. 30 and Trial exhibit 2.

5. Mr. Jacobs' surveyor had surveyed the area in 1979, 1985 and in 1992. Tr. 19; Findings of Fact No. 8.

6. This area of property is known as the Swapp Pasture and is

entirely fenced. All the surrounding area is open range and has no fences, except along the highway. Tr. 43-44.

7. The property was used basically for grazing from 1952 to the present. Tr. 46-47.

8. Mr. Hafen was never asked by anyone not to use the entire fenced area. Tr. 46, 53-54.

9. Title companies had been utilized during this time. Two title companies were in Mr. Jacobs' chain of title. Findings of Fact No. 9, Tr. 30-31, Trial exhibits 2 and 4.

10. Each of the trial courts specific Findings of Fact are incorporated herein, and are included in the Addendum.

V. SUMMARY OF ARGUMENT

A. The evidence was sufficient to establish that separate ownership of the property was established in April, 1973.

The trial court found that separate ownership was established in 1973 as to three of the four parcels and earlier for the Section two property, and that the acquiescence was for a sufficiently long period of time. Findings of Fact No's 3, 7, 10, and 11. In order to overturn a Finding of Fact, a party must first marshal all the evidence supporting the finding and then demonstrate that when viewed in the light most favorable to the trial court, the evidence is clearly insufficient to support that finding. Scharf v. BMG Corp., 700 P2d at 1070; Schindler v. Schindler, 776 P2d at 88; Smith v. Linmar Energy Corp., 790 P2d at 1224. Mr. Jacobs only contests the factual findings that separate ownership was established in

1973 and that the acquiescence had been for a long period of time. He has not marshaled any of the evidence and demonstrated that, when viewed in the light most favorable to the trial court, such evidence was clearly insufficient to support these findings. Failure of Mr. Jacobs to outline the evidence in this fashion should be dispositive of his contest to the factual issue. College Irr. v. Logan R and Blacksmith F., 780 P2d 1241, 1244 (Utah 1989); Scharf v. BMG Corp., 700 P2d at 1070, 1071; Marchant v. Park City, 771 P2d 677, 682 (Utah App 1989). Mr. Jacobs argues there are no facts supporting the courts determination that eighteen-and-one-half years was a sufficiently long period of time. Again, Mr. Jacobs failed to marshal any of the evidence and show that the court was clearly erroneous. Such facts include the 40-50 years existence of the fence, the parties utilizing title companies and surveyors on several occasions, no changes in the fence being made even though 3 surveys had been done by the parties and the unfenced open range surrounding this property.

In any event, if the 1973 deed were the only fact in evidence concerning when ownership of the property separated, the date of this deed would be presumed to be the operative date. Recording of deeds is of no import, insofar as the passing of title is concerned. Wickwire v. City and Borough of Juneau, 557 P2d 783, 785 (Alaska 1976); Matter of Laue's Estate, 225 Kan 177, 589 P2d 558, 563 (1979); Huntington City v. Peterson, 30 Utah 2d 408, 410, 518 P2d 1246 (1974). If delivery were an issue, the burden to establish non-delivery of the deed rested on Mr. Jacobs. He did not present any evidence on the subject. Hackett v. Hackett, 429 P2d 753, 757 (Okla 1967); White v. White, 149 Colo 166, 368 P2d 417, 419 (1962); Controlled Receivables, Inc. v. Harman, 17 Utah 2d 420, 423, 413 P2d 807 (1966).

B. Mr. Jacobs has contested only two factual findings, i.e., separate ownership of property in 1973 and that acquiescence was for a long period of time.

All other factual findings of the trial court are presumed correct and supported by the record. Likewise, Mr. Jacobs has only argued that one element under boundary by acquiescence has not been met, i.e., the "long period of time". Therefore, the other three elements are established by the trial court's record, i.e., (1) Occupation up to a visible line marked by monuments, fences or buildings, (2) Mutual acquiescence in the line as a boundary, and (3) by adjoining landowners.

C. The trial court correctly concluded that the boundary had been acquiesced in for "a long period of time".

The elements of boundary by acquiescence are succinctly set forth in Staker v. Ainsworth, 785 P2d 417, 420 (Utah 1990). Those elements include:

1. Occupation up to a visible line marked by monuments, fences or buildings;
2. Mutual Acquiescence in the line as a boundary;
3. For a long period of time;
4. By adjoining landowners.

Mr. Jacobs has only challenged the third numbered element. The Supreme Court has held that a 15-year-time period is not sufficient to establish a boundary. The Supreme Court has pointed out that there is no exact time requirement and that the circumstances of each case must be considered. However, 20 years is generally accepted as a sufficiently long period of time and a lesser period is sufficient where unusual circumstances are shown. See Parsons v. Anderson, 690 P2d 535, 539

(Utah 1984); Hobson v. Panguitch Lake Corporation, 530 P2d 792, 795 (Utah 1975). This court reviews conclusions of law for correctness; in so doing, the court must review "the record for the purpose of ascertaining whether there is substantial, competent, admissible evidence to support the conclusions reached. If so, this court is precluded from disturbing it." Bush v. Coult, 594 P2d at 866. See also Nielsen v. Chin-Hsien Wang, 613 P2d at 514; Scharf v. BMG Corp., 700 P2d at 1070, 1071.

Accepted facts in this case include: 1. the fence existed for over 40-50 years, 2. Mr. Jacobs' predecessors in interest had quit claimed the property on several occasions, utilizing a title company, however had only issued one warranty deed to the property, and that deed went to Mr. Hafen's predecessors in interest in 1973, 3. At least three surveys of the property were done in the late 70's and early 80's, 4. The fence line remained unchanged even though the property owners had utilized title companies and surveyors, and 5. This parcel of property is fenced, while the surrounding area is unfenced open range.

The trial courts findings and subsequent conclusion that a sufficiently long period of time had elapsed was amply supported by the evidence, was correct, and should be upheld.

VI. ARGUMENT

A. The trial court properly held that the ownership of the property became separate in 1973, and was for a long period of time.

The trial court made factual findings that the property had different owners in 1973, and that the acquiescence was for a long period of time. See Findings of Fact No. 3, 7, 10, and 11. Mr. Jacobs argues that

the evidence was not sufficient to support these facts. He argues that the deed, while being dated April 15, 1973, was not recorded until March 28, 1983. Mr. Jacobs thus concludes the court committed error in making this finding of fact and likewise argues that the eighteen-and-one-half intervening years was not a long time.

These Findings of Fact are entitled to a presumption of validity and may not be lightly set aside. Rule 52 (a), Utah Rules of Civil Procedure states in part: "Findings of Fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous". See also; Scharf v. BMG Corp., 700 P2d at 1070; Judd Family Limited Partnership v. Hutchings, 797 P2d 1088, 1090 (Utah 1990); Schindler v. Schindler, 776 P2d at 88, Smith v. Linmar Energy Corp., 790 P2d at 1224, College Irr v. Logan R. and Blacksmith F., 780 P2d at 1244. These cases likewise support the view that an appellant, when attacking factual findings, "must marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings". Scharf v. BMG Corp., 700 P2d at 1070. The trial court's factual finding that the property ownership divided in 1973 is not erroneous at all. Mr. Jacobs' attempt to overturn this fact falls far short of the burden he must overcome to have this court reject this fact. Initially, the only fact marshaled by Mr. Jacobs is the deed dated April 15, 1973, and recorded in 1983. No other facts are delineated indicating other evidence the court could reasonably rely upon in determining that 1973 was the date ownership was divided, or that it was of a sufficiently long time.

The evidence shows ample and reasonable support for the courts findings.

There were 4 separate warranty deeds executed by the subsequent owners, of the property in sections 35 and 36, prior to the first deed of 1973 being recorded. This logically indicates those owners' assumption of their immediate rights of ownership and of the delivery of their deeds prior to actual recording. These warranty deeds are as follows:

1. The deed dated April 15, 1973 from Castle Creek to E&F Investment and Joe Hutchings. Trial exhibit 18;

2. E&F Investment and Joe Hutchings executed 2 separate deeds dated April 1, 1979 to Santa Clara Heights. Trial exhibits 16 and 17;

3. Santa Clara Heights deed to Mr. Hafen, dated October 21, 1982. Trial exhibit 15;

Each of these deeds were received into evidence upon the stipulation of counsel. Tr. 48-50. Other evidence supporting the courts findings include:

4. Mr. Hafen's use of the property as his own and others use of the property for grazing prior to his purchase, and the lack of anyone informing Mr. Hafen he could not use the entire fenced pasture property. Tr. 46-47, 53-54. The taking possession of and using property, without objection of neighbors or others, is reasonable evidence of immediate delivery of the deeds and of the acquiescence in the boundary line.

5. The fence line had been in existence for 40-50 years. Findings of Fact 3 and 5. Naturally, it takes 2 different property owners to acquiesce in a boundary. However, the long time existence of this fence prior to the actual division of the property, accompanied by the original owner conveying one parcel away and thereafter not contesting his grantees use and possession of the property within the fence line, is reasonable support for the court's finding of acquiescence for a long time.

6. Three surveys had been done on the property. Findings of

Fact No. 8. No challenge to the fence line or ownership was asserted, even though the surveys were done, and corners, quarter corners, etc. were established.

7. The parties did not take action to change the fence line, even though they had utilized the services of title companies and surveyors. Findings of Fact No. 9.

8. The property was fenced as a pasture and the surrounding land was unfenced, open range. Tr. 43-44. Together with point 5 above, this was the only fence around. It is apparent that all associated with the property simply accepted it as the boundary, especially after 1973, when the property in sections 35 and 36 was conveyed to others. Open range is accepted as such - open. When a fence is built, those who have access to the area, use the area, or have ownership therein, would naturally presume that the particular fenced area is owned by someone and that the fence marks that property line. Everything else still remains open range, unmarked by fences or boundaries of any kind.

9. Mr. Hafen had never been advised of any disputes concerning the fence line or of his full use of the pasture property. Tr. 46-47, 53-54.

10. Mr. Hafen building a house on the property. Tr. 46.

The property was reconveyed by subsequent owners on several occasions prior to the actual recording of the first deed. The act of ownership, wherein a party conveys away his rights, and does so by warranty deed himself, is reasonable evidence that the 1973 deed transferred ownership at that time and not at a point after three owners have already conveyed the property again. The owners use and possession of the property, prior to the recording of the deeds is also reasonable

evidence that title passed at the time of the date of the deed and not upon recording. See, 23 Am Jur 2d, Deeds §§ 159, 163 (grantees possession of the deed or of the property creates a strong presumption of delivery of the deed). The number of different owners, the multiple surveys and other listed evidence show the reasonableness of the trial court's findings. Indeed, such Findings are clearly correct, not erroneous.

Mr. Hafen has not marshaled the evidence to be used as a sword against him in aid of Mr. Jacobs' appeal. The recitation of these items of evidence, however, do show that if Mr. Jacobs had marshaled the evidence, the trial courts factual findings were still based upon reasonable, competent testimony and should be upheld.

By analogy, Mr. Jacobs' argument, is procedurally the same as in the Scharf v. BMG Corp., case and should be dealt with in a similar fashion. Therein, the court stated:

Erickson makes numerous arguments based on the facts as he presented them to the trial court, rather than on the facts as found by that court. However, at no point does he even discuss the detailed findings entered by the lower court that contradict his factual assertions. With respect to these matters, we take as our starting point the trial court's findings....

The court then set forth the standard of review and the need to marshal the evidence, and then stated:

Erickson has not begun to carry that heavy burden. Nowhere does he marshal the evidence supporting his version of the facts, much less the evidence supporting the trial court's findings. Under these circumstances, we decline to further consider Erickson's attack on the factual findings.

Id. at 1069-1070.

The trial court's factual findings, in all particulars, but specifically relating to the passage of a long period of acquiescence and the divergence of ownership in 1973, should be upheld as being supported by the evidence presented.

If the 1973 deed were the only fact in evidence concerning this property, the date of the deed would be presumed to be the operative date. Courts have long held that recording of deeds is irrelevant, as far as when title passes. Title passes upon delivery of the deed, not on the recording date. Many courts have held that where the date of the deed's execution is shown, a presumption arises that the deed was delivered on that date. See Wickwire v. City and Borough of Juneau, 557 P2d at 785; Matter of Laue's Estate, 589 P2d at 563; Huntington City v. Peterson, 30 Utah 2d at 410; Gross v Gross, 781 P2d 284, 285 (Mont 1989). The Court in Gross v Gross, 781 P2d at 285 stated, "When a deed is executed a presumption arises that delivery occurred and that recording the deed strengthens that presumption. We conclude that this presumption can only be overcome by clear and convincing evidence." (citing 23 Am Jur 2d, Deeds, § 172 and Controlled Receivables, Inc. v Harman, 17 Utah 2d 420, 413 P2d 807). See also, 23 Am Jur 2d, Deeds, § 157 ("...in the absence of evidence to the contrary, a deed is presumed to have been delivered at the date of the instrument. This presumption is strengthened if the date of acknowledgment is the same as that of the deed".), § 165 ("Upon recording, the presumption of delivery relates back to the date of the execution of the deed".). In Utah, a presumption arises by law, that once a deed has been recorded, the law presumes that delivery occurred, notwithstanding any lapse of time between the date of the instrument and the date of recording. U.C.A. §57-4a-4(1)(d) (1953, as amended).

Mr. Hafen introduced the 1973 deed (trial exhibit 18). The deed, on its face, shows that it was executed on April 15, 1973. This date appears above the grantors signatures and was written again in the notary portion of the deed. As it concerns the physical execution and delivery of this deed, this was the evidence produced at trial. Tr. 49-50. Mr. Jacobs argued in closing arguments that no one knew when delivery occurred and thus the 1983 recording date should be accepted as the date of delivery. Mr. Jacobs did not present any evidence rebutting that delivery occurred on April 15, 1973. It was Mr. Jacobs' burden to establish non-delivery of the deed, if that were in dispute. Having not produced any such evidence, the trial court properly could hold that the deed was delivered at the time it was executed. See Hackett v. Hackett, 429 P2d at 757; White v. White, 368 P2d at 419; Controlled Receiveables, Inc. v. Harman, 17 Utah 2d at 423.

The 1973 deed, of course, was not the only evidence before the trial court. The other facts, concerning the subsequent owners use of the property and their own conveyance of the property before recording, bolster the trial courts holding that April 15, 1973 was the operative date of this deed.

B. Non-contested issues, facts and conclusions are not in dispute on this appeal.

Mr. Jacobs argues two points: First, that the trial court committed error when it held that ownership of the property became separate in 1973 and second, that a long period of acquiescence had passed. The trial court entered several other findings, which have not been addressed or disputed by Mr. Jacobs. Such issues, whether they be factual findings or legal conclusions, should not be disturbed by this court.

In particular, 3 of the 4 elements of boundary by acquiescence have not been challenged, i.e., occupation up to a visible line, by adjoining property owners, and mutual acquiescence in that line as a boundary. Having not challenged the other facts, they should be accepted by this court as proper and valid.

C. The trial court correctly concluded that the boundary had been acquiesced in for "a long period of time".

The boundary by acquiescence has existed for more than 18-and-one-half-years. The first deed was dated April 15, 1973 and Mr. Jacobs filed this action on November 4, 1991. Record 1. Our courts have declared that a general time frame for boundary by acquiescence is 20 years, but that 15 years is not sufficient. However, our court has stated that there is no exact time requirement, and that the circumstances of each case must be considered. Where unusual circumstances are shown, a lesser time period is sufficient. See Staker v. Ainsworth, 785 P2d at 420; Hobson v. Panguitch Lake Corporation, 530 P2d at 795; Parsons v. Anderson, 690 P2d at 539. The elements for a boundary by acquiescence, as shown by the above cases include:

1. Occupation up to a visible line marked by monuments, fences or buildings.
2. Mutual acquiescence in the line as a boundary.
3. For a long period of time.
4. By adjoining landowners.

The real legal issue presented thus rests on the element of the eighteen-and-one-half year time period. The District Court found and held that such time was sufficient. This court reviews conclusions of law for correctness, in so doing, the court reviews "the record for the purpose of

ascertaining whether there is substantial, competent, admissible evidence to support the conclusions reached. If so, this court is precluded from disturbing it". Bush v. Coult, 594 P2d at 866. See also, Nielsen v. Chim-Hsien Wang, 613 P2d at 514; Scharf v. BMG Corp., 700 P2d at 1070. The factual circumstances which may have been somewhat unusual and used to justify less than a 20-year use included:

1. The fence had existed for 40-50 years.
2. Mr. Jacobs' predecessors in interest, had quit claimed all of the property on several occasions, utilizing a title company, however had only issued one warranty deed to the property in sections 35 and 36, and that deed went to Mr. Hafen's predecessors in interest in 1973.
3. Three surveys were done on the property in the late 70's and early 80's.
4. Property owners left the fence as it had existed, even though they had used the services of title companies and surveyors.
5. This parcel is fenced, while the surrounding property is unfenced open range.
6. Mr. Hafen built a house on the property.
7. Several title changes occurred in the chain of title of both parties.

The Staker v. Ainsworth Court stated,

There is no indication in the record that any predecessor in interest behaved in a fashion inconsistent with a belief that the fence line was the boundary.... Additionally, there is no indication that any landowner ever notified his neighbor of a disagreement over the true boundary.

Id. at 420-421. The present case is consistent factually. In considering all

of these facts, the trial court did not err in the legal conclusion reached. Under the correction-of-error standard, our court does not consider and weigh the evidence de novo. As stated in Owen v Owen, 579 P2d 911,913 (Utah 1978), "Whether the justices of this Court, or any particular justice, would have arrived at the same conclusion as the trial judge, or whether some other trial judge would have done so is not the test of its validity." Id. at 913. See also T.R.F. v Felan, 760 P2d 906, 909 (Utah App 1988).

This court has stated that where unusual circumstances are shown, a lesser period than 20 years can suffice to show boundary by acquiescence. This court has not yet defined what unusual circumstances would be required in these situations. The trial court took the facts listed above into account. One or two of the listed facts standing alone may or may not be so unusual as to support the finding that a long period of time had elapsed. However, when taking all of the facts into account, it is easy to see how the trial court determined that an acquiescence for a long time had passed. A few of these facts seem to be quite unusual in the context of this case. Mr. Jacobs' property in sections 1 and 2 has had at least 6 different owners during this eighteen-and-one-half year time period, 2 of which were title companies. Tr. 30-33, Trial exhibits 2, 4, 5, and 9. There were at least 3 surveys done, 2 of which were done in 1979 and 1985. The section corner of sections 1, 2, 35, and 36 is the same location and lies within the fenced pasture. This last fact becomes unusual in the context of this case because the surveyors use section corners as base points, and such are marked as section corners on the ground. Mr. Jacobs' surveyor found this corner and it was marked with a USGLO Brass cap, as well as a separate rebar and cap marker. Trial exhibit 14. His survey in 1979 was

for the purpose of locating section corners. Tr. 24. With the section marker visible and clearly marked, the fence clearly not along the section line, surveys having been done, and 2 title companies in the chain of Mr. Jacobs' title, still none of the property owners challenged the fence, as it existed, as the true boundary. These circumstances, together with the other facts, show that the trial court had "substantial, competent, admissible evidence to support the conclusions reached". The 18-1/2 years was a sufficiently long period under the facts and circumstances of this case to prove a boundary by acquiescence.

CONCLUSION

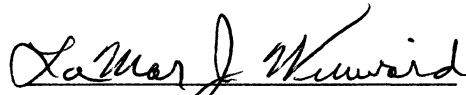
The trial court entered two factual findings which Mr. Jacobs disputes. One, that ownership of the property separated in 1973 and two, that a long period had elapsed. Mr. Jacobs failed to properly marshal the evidence and show that these facts were clearly erroneous. These facts should not be set aside.

Mr. Jacobs argues that the evidence overall does not support a conclusion of boundary by acquiescence, specifically as it relates to the element of the acquiescence occurring for a long time.

Mr. Jacobs believes there are no unusual circumstances to vary from the general 20-year-time period to the eighteen-and-one-half year period as found by the trial court. The facts show otherwise. The interrelationship of the facts in the context of this case were unusual. The trial court properly accepted the evidence presented, the evidence was substantial and competent.

The conclusion that a boundary by acquiescence had been established was correct and should be upheld by this court. The trial court's judgment should be affirmed.

Respectfully submitted this 3rd day of February, 1993.



LaMar J Winward

Attorney for Defendants/Appellees.

MAILING CERTIFICATE

This is to certify that I mailed four true and exact signed copies of the above and foregoing Appellees' Brief, on this 3rd day of February, 1993 to:

Phillip L. Foremaster
247 Sugar Leo Road
St. George, Utah 84770-7944



LaMar J Winward

ADDENDUM

Warranty Deed, dated April 15, 1973 (Trial Exhibit 18)

Findings of Fact and Conclusions of Law

Judgment

Amended Judgment

Warranty Deed, dated April 15, 1973 (Trial Exhibit 18)

Recorded at Request of Southern Utah Title Co. March 28, 1983

at 9:00 A.M. M. Fee Paid \$6.00 Maxine D. Hatch County Recorder

By Dep. Book Page Ret. 190283

Mail tax notice to E. & F. Investment Co. Address 608 South Main - St. George, Utah
Joe Hutchings 84770

WARRANTY DEED

CASTLE CREEK PROPERTIES, a Limited Partnership consisting of Dean R. Jeffs, Lloyd Hayes, Fred Hugle and Larry Smith, General Partners

grantors

of Kaysville County of Davis, State of Utah, hereby

CONVEY and WARRANT to E & F INVESTMENT COMPANY, INC., a Utah Corporation, as to an UNDIVIDED ONE-HALF INTEREST; and JOE HUTCHINGS, as to an UNDIVIDED ONE-HALF INTEREST.

of St. George, Utah 84770 grantees
for the sum of
the following described tract of land in \$10.00 & other valuable consideration-----DOLLARS,
Garfield County,
State of Utah:

PARCEL 1: The W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 36,, Township 37 South, Range 6 West, SLB&M.

PARCEL 2: BEGINNING at the Southeast corner of Section 35, Township 37 South, Range 6 West, SLB&M and running thence North 2640.0 feet to the East quarter corner of said Section 35; thence West 208.0 feet, more or less, to the East right-of-way line of Highway U.S. 89; thence Southerly along said right of way line a distance of 2634.2 feet, more or less, to the South line of said Section 35; thence East 135.5 feet, more or less, to the point of beginning.

TOGETHER with two and one-half (2 $\frac{1}{2}$) gallons per minute of water right from Diversion Point #20, as shown on page 18, Sevier River Decree, with the Utah State Water Engineer.

WITNESS, the hands of said grantors, this 15th day of April, A. D. 1973,

Signed in the Presence of

Maxine D. Hatch Dean R. Jeffs

STATE OF UTAH
County of Washington

ss.

On the 15th day of April, A. D., 1973 personally

appeared before me Dean R. Jeffs and Fred J. Hugle, General Partners of Castle Creek Properties, a Limited Partnership

the signers of the within instrument, who duly acknowledged to me that they executed the same.



Howard Allan Carter
Howard Allan Carter, Notary Public

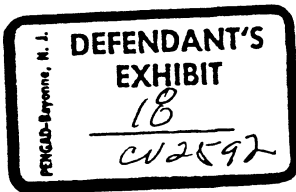
My Commission expires July 19, 1974 My residence is St. George, Utah 84770

Certificate

COUNTY OF GARFIELD)
) SS
STATE OF UTAH)

I, LES BARKER ^{DEPUTY} duly elected, qualified and acting County Recorder in and
for Garfield County, State of Utah, do hereby certify that the foregoing is a true copy of
WARRANTY DEED ^{ENTRY NO: 190283} recorded (of filed) 28TH day of MARCH 1983
and now of record in my office, Book 279 Page 326

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the
Recorder, at the city of Panguitch, Utah, this 31ST day of JULY 1992



Les Barker
GARFIELD COUNTY RECORDER
DEPUTY

Findings of Fact and Conclusions of Law

LAMAR J WINWARD - A3528
Attorney at Law
150 North 200 East, Suite 204
St. George, Utah 84770
(801) 628-1191

H. Ramsay

IN THE SIXTH JUDICIAL DISTRICT COURT
IN AND FOR KANE COUNTY, STATE OF UTAH

MARK JACOBS) FINDINGS OF FACT and
) CONCLUSIONS OF LAW
Plaintiff,)
)
vs.)
)
WILFORD L. HAFEN, and JoANN) Civil No. 2592
B. HAFEN, his wife.)
)
Defendant.)

The above entitled matter came on for trial before the Court sitting without a jury on August 3, 1992, before the Honorable Don V. Tibbs, District Court Judge. Plaintiff was present in person and represented by counsel, Philip L. Foremaster. The Defendant was present in person and represented by counsel, LaMar J Winward. The court heard the testimony of the witnesses, reviewed the evidence submitted and being fully advised in the premises now finds as follows:

FINDINGS OF FACT

1. That the Defendants are the legal owners of property located in Sections 1 and 2 of T 38 S, R W 6, SLBM, such property being located in the Swapp pasture and is identified by the fence line of the Swapp pasture. That property is in the surveyors plat

outlining the fence line on trial exhibit 1. Said property is approximately 1450 feet by 390 feet.

2. The north boundary line of Section 1 and 2 is the county line between Garfield and Kane County, Utah. The property in Section 2 also borders U.S. Highway 89. The Defendants are also owners of real property located in Garfield County being in Section 35 and Section 36, T 37 S, R 6 W, SLBM

3. The dividing line between the properties has been established as a fence line which has been in existence for a number of years, being more than 40 to 50 years. However, the property owners have been different only since 1973 as to the Section 35, 36 and Section 1 properties. Section 2 properties were held by other parties in the early 70's and before.

4. That an existing fence is located on the section 1 and 2 property and its location is described on the surveyors plat - trial exhibit #1.

5. The evidence at trial indicates that the fence has been in existence for an extensive period of time, probably exceeding 40 or 50 years.

6. The court finds that the recorded chain of title as shown by the Garfield and Kane County records and by the deeds presented at trial show that the property of Defendants and Plaintiffs located in Sections 1, 35, and 36, was in common ownership in 1973, however, the ownership was divided at that time by a warranty deed from Castle Creek Properties, conveying the Section 35 and Section 36 property to others.

7. Separate ownership has been established since 1973. The Plaintiff's predecessors in interest have conveyed all of the subject property by quit claim deed, back and forth with a title company, even though they conveyed the Section 35 and 36 property to Defendant's predecessors in interest by warranty deed in 1973.

8. At least 3 surveys were done of the subject property in the late 70's and early 80's.

9. The property owners did not take any action concerning the existence of the fence line surrounding the Swapp pasture, even though the owners had utilized the services of title companies and surveyors throughout this period of time.

10. The court finds that the fence line surrounding the Swapp pasture was a visible line.

The Court finds that the adjacent property owners mutually acquiesced in that fence line as a boundary.

The court finds that the fence line which was acquiesced in as the boundary was for a sufficient period of time, being at least 18 years by the adjacent property owners.

11. The court finds that the fence line was acquiesced by adjacent property owners since at least 1973 as to the Section 35, 36 and Section 1 properties and for a period of time before 1973 for the Section 2 property.

12. The Defendants are entitled to a decree quieting title in the property located within the fence line in Sections 1 and 2.

The Court having entered its findings of fact now enter its

CONCLUSIONS OF LAW

1. That the Plaintiff is entitled to a decree and judgment of this court quieting title on the property described in Sections 1 and 2 located within the Swapp pasture fence line and against the Plaintiffs, which judgment should provide that the Defendant is the owner and entitled to possession of said property and that Plaintiffs have no right, title, or interest therein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED this 1st day of September, 1992.

BY THE COURT:



DON V. TIBBS
District Court Judge

Judgment

LAMAR J WINWARD - A3528
Attorney at Law
150 North 200 East, Suite 204
St. George, Utah 84770
(801) 628-1191

H. Ramsay

IN THE SIXTH JUDICIAL DISTRICT COURT
IN AND FOR KANE COUNTY, STATE OF UTAH

MARK JACOBS) JUDGMENT
)
Plaintiff,)
)
vs.)
)
WILFORD L. HAFEN, and JoANN) Civil No. 2592
B. HAFEN, his wife.)
)
Defendant.)

The above entitled matter came on for trial before the Court sitting without a jury on August 3, 1992, before the Honorable Don V. Tibbs, District Court Judge. Plaintiff was present in person and represented by counsel, Philip L. Foremaster. The Defendant was present in person and represented by counsel, LaMar J Winward. The court having entered its Findings of Fact, Conclusions of Law, now therefore,

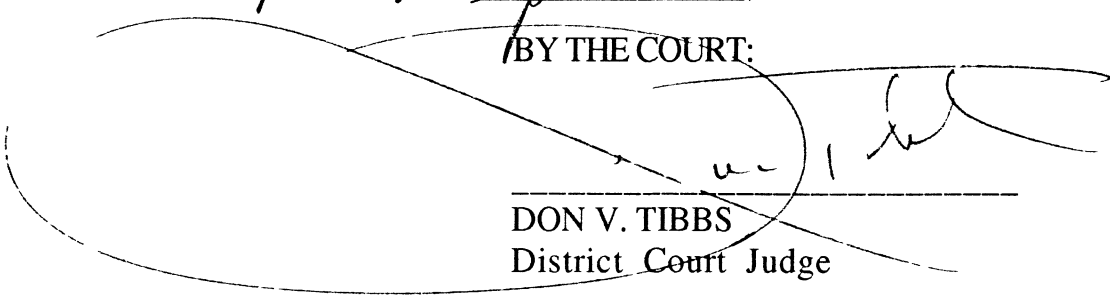
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant, Wilford L. Hafen and Joanne B. Hafen are the owners of and entitled to the possession of the following described real property located in Kane County, State of Utah, located in Section 1 and 2 of T 38 S, R 6 W, SLBM, being that portion of said sections

particularly described on the surveyors plat. Said description shall be reduced to a metes and bounds description and entered as part of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED the Plaintiff has no interest whatsoever in and to the above described real property.

DATED this 1st day of September, 1992.

BY THE COURT:


DON V. TIBBS
District Court Judge

AFFIDAVIT OF MAILING

On the 1st day of September, 1992, I mailed a true and correct copy of the above and foregoing Findings of Fact & Conclusions of Law and Judgment to the following, postage prepaid from offices at Manti, Utah:

Mr. LaMar J. Winward
Attorney at Law
150 North 200 East
Suite 204
St. George, Utah, 84770

Mr. Phillip L. Foremaster
Attorney at Law
247 Sugar Leo Road
St. George, Utah
84770-7944


Carole B. Mellor
6th District Administrator

Amended Judgment

LAMAR J WINWARD - A3528
Attorney at Law
150 North 200 East, Suite 204
St. George, Utah 84770
(801) 628-1191

H Ramsey

IN THE SIXTH JUDICIAL DISTRICT COURT
IN AND FOR KANE COUNTY, STATE OF UTAH

MARK JACOBS) AMENDED JUDGMENT
)
Plaintiff,)
)
vs.)
)
WILFORD L. HAFEN, and JoANN) Civil No. 2592
B. HAFEN, his wife.)
)
Defendant.)

The above entitled matter came on for trial before the Court sitting without a jury on August 3, 1992, before the Honorable Don V. Tibbs, District Court Judge. Plaintiff was present in person and represented by counsel, Philip L. Foremaster. The Defendant was present in person and represented by counsel, LaMar J Winward. The court entered judgment in favor of the Defendants to certain real property located in Kane County, State of Utah and provided by way of said judgement that the property description be reduced to a meets and bounds description and included as part of the judgment. The property description having been reduced to a meets and bounds description and the court having previously entered its Findings of Fact and Conclusions of Law, now therefore

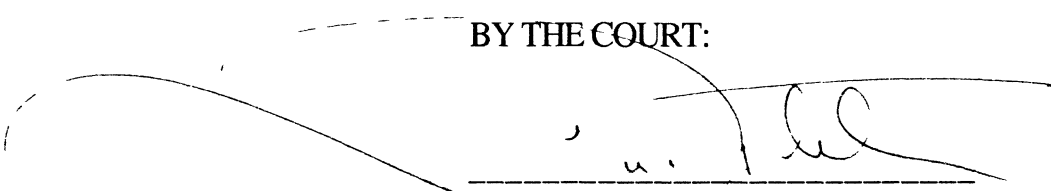
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant, Wilford L. Hafen and Joanne B. Hafen are the owners of and entitled to the possession of the following described real

property located in Kane County, State of Utah, located in Section 1 and 2 of T 38 S, R 6 W, SLBM, and more particularly described as follows:

Beginning at the Northwest Corner of Section 1, Township 38 South, Range 6 West, Salt Lake Base and Meridian, and running thence North 89°51'31" East 1,306.39 feet along the Section line to an existing fence line; thence South 1°47'57" East 392.68 feet along said fence line to a fence corner; thence North 87°27'59" West 897.02 feet along a fence line to a fence corner; thence South 5°36'47" West 41.25 feet along a fence line to a fence corner; thence North 87°00'13" West 542.98 feet along a fence line to the Easterly right-of-way line of U.S. Highway 89; thence North 1°50'36" West 362.59 feet along said right-of-way line to the North line of Section 2, Township 38 South, Range 6 West; thence South 89°56'49" East 135.36 feet along said line to the point of beginning. Containing 12.37 acres, more or less.

DATED this 8th day of October, 1992.

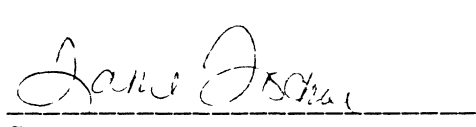
BY THE COURT:


DON V. TIBBS
District Court Judge

MAILING CERTIFICATE

This is to certify that I mailed a true and exact unsigned copy of the above and foregoing Amended Judgment, postage prepaid, on this 13 day of October, 1992 to:

Phillip L. Foremaster
247 Sugar Leo Road
St. George, Utah 84770-7944


Secretary