

1983

Thomas A. Dobrusky And Peggy M. Dobrusky v.
Victor K. Isbell, Celia A. Isbell, Mervin R. Iverson,
Sherrie Iverson, Dell Stewart Family Trust,
Southern Utah Title Company, Iron County,
Lockhart Finance Company, Roger C. Olson,
Carlene Ann Olson, Ruth Walker, Rodney Adams,
Thomas A. Dobrusky Pension Plan, And Eckhoff
Watson & Preator Engineer : Appellant's Brief

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IN THE SUPREME COURT
OF THE STATE OF UTAH

THOMAS A. DOBRUSKY and)
PEGGY M. DOBRUSKY,)
)
Plaintiffs-Appellants,)
)
vs.)
)
VICTOR K. ISBELL, CELIA A.)
ISBELL, MERVIN R. IVERSON,)
SHERRIE IVERSON, DELL STEWART)
FAMILY TRUST, SOUTHERN UTAH)
TITLE COMPANY, IRON COUNTY,)
LOCKHART FINANCE COMPANY,)
ROGER C. OLSON, CARLENE ANN)
OLSON, RUTH WALKER, RODNEY)
ADAMS, THOMAS A. DOBRUSKY)
PENSION PLAN, and ECKHOFF)
WATSON & PREATOR ENGINEERS,)
)
Defendants-Respondents.)

Case No. 19381

APPELLANT'S BRIEF

Appeal from Judgment of Fifth Judicial District Court
of Iron County,

Honorable J. Harlan Burns, District Judge, Presiding

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FILED

DEC 2 1963

Clk. Supreme Court, Utah

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Statutes:

Utah Code Annotated, 1976-77 ed., 1977

Utah Code Annotated, 1952-53 ed., 1953
as amended

Other Sources:

McCormick, Evidence, 2d ed., 1967

Wigmore, Evidence, 73d ed., 1941

STATEMENT OF FACTS AND NATURE OF THE CASE

The purpose of this proceeding is to determine the location of the boundary between the property owned by Plaintiffs and property of defendants.

TRIAL IN THE LOWER COURT

The trial was tried in the Court sitting without a jury.

Tr. 1.

By agreement of the parties, prior to trial, any water rights which may exist were not in dispute in this proceeding and the Court was not making in reference to the location of water rights of the parties, if any. (R. 67).

By stipulation of the parties, all claims between Plaintiffs and defendant, Bankhart Finance Company were resolved prior to trial. (R. 36).

The Court prior had previously dismissed the counterclaim of defendants, L. Ross and Dell Stewart Family Trust against plaintiffs. (R. 36).

By stipulation of the parties, the crossclaims of defendant, L. Ross and Dell Stewart Family Trust against Plaintiff, Bankhart, were settled by agreement of the parties prior to trial. (R. 36).

By agreement of the parties prior to trial, both parties waived their respective damage claims. (Tr. 4). The purpose of the trial was a determination of the boundary between the registered land owners.

The Court entered judgment from which this appeal was taken declaring the boundary line between plaintiffs' and defendants' properties to be the survey line shown upon a 1949 deed between William L. Adams and Harold Mitchell.

PLINTIFFS' POINTS ON APPEAL

The plaintiffs-appellants seek a reversal of the judgment, or in the alternative, a new trial.

STATEMENT OF FACTS

Plaintiffs and defendants are owners of real property located in Iron County, state of Utah. The property which is the subject matter of this litigation includes a narrow strip of property in which both plaintiffs and defendants claim ownership.

The properties of the parties in interest were originally part of a 122 acre tract of mountain grazing land, more particularly described as follows:

The West 1/2 of lot 4, all of lot 5, of Section 10, and West 1/2 of lot 11, all of range 14 of Township 36 South, Range 12 West, Salt Lake Meridian. (R36).

William L. Adams, defendants' predecessor in interest, owns an undivided 44 62 interest; H. Harold Mitchell, plaintiff's predecessor in interest, owns an undivided 44 62 interest; and the Lyman family, which is not involved in this litigation, owned an undivided 44 62 interest. (Exhibit 6).

The owners of the tract subsequently decided to partition the property. A log fence was constructed by the Adams and Lyman to divide the Lyman property on the east side of the tract from the remainder owned by Mitchell and Adams. That is the fence which now separates the Lyman property (hereinafter referred to as "the Lyman parcel") from property to the east. That fence was built prior to 1949. (Tr. 6, 41).

In 1948, the owners determined to partition the Lyman and Adams portion of the tract. (Tr. 45). The deeds to effect the partition were eventually delivered in September, 1949. (Exhibit P-4). Mr. Mitchell was to receive approximately 19 acres of the property which remained after separating the Lyman parcel and Adams was to receive the remainder. During that year, the mesh wire fence (the subject of this action, on the west side of the Dobrusky tract) was constructed by Mr. Mitchell. (Tr. 54-55, 61-62).

Mr. Harold Mitchell offered testimony at trial that he met with William G. Adams in 1948 and discussed possible divisions for a line to partition the property. After being unable to agree on several proposed divisions, they finally agreed that Mr. Mitchell would receive a strip 19 feet wide to the west of the then-existing Adams-Lyman log fence (Tr. 44). They measured the distance from the log fence at several locations along its length and marked the points for the west boundary of the parcel which was to

belong to Mr. Mitchell. (Tr. 54-55, 61-62). Mr. Mitchell then built the wire fence at that location at his own expense since Mr. Adams had already paid a portion of the cost of constructing the bar fence. (Tr. 60).

At the time the location of the wire fence was measured, Mr. Mitchell suggested that a survey of the property be made to determine the exact location of the fence. Mr. Adams declined to have such a survey, saying that a measurement from the existing lot corner was accurate enough for him to determine the boundary. (Tr. 54-55, 62). Since no survey was made at the time, neither party knew the exact location of the surveyed boundary and they agreed that the wire fence would be the boundary between their properties. (Tr. 64, 110).

Based on a strict calculation of the area to which Mr. Mitchell was entitled for his undivided 1/3rd, he should have received 19 acres plus 8 square rods upon the partition. At the time the deeds were finally delivered in September, 1949 (Tr. 55), Mr. Adams said that although the deed reflected only 19 acres he was sure that Mr. Mitchell would not mind so that the boundary could be on a whole number of rods from the bar fence. Mr. Mitchell testified that he did not mind so long as the description in the deed did not then or ever require crossing the wire fence. Adams then agreed that it would not. (Tr. 54-55). The deed was never changed because neither party thought it significant

ther with. (Tr. 62-66).

When it allowed plaintiffs to proffer evidence under Rule 5, Fed Rules of Civil Procedure, the trial court excluded the testimony of J. Harold Mitchell, based upon its interpretation of the Stan Reed Man's Statute (Utah Code Annotated 24-21-203, 1953, as amended). (Tr. 46-53).

The wire fence was constructed at a location which crossed 100 ft. from the existing log fence on the east side of the Adams-Mitchell parcel. (Tr. 16, 31, 54-55). The wire fence has been in existence at the same location since that time. (Tr. 28). The wire on the fence was laid down (although still attached to metal and cedar posts) each fall to protect it from winter snows and was wired up again each spring during the entire period from construction of the fence in 1943 through 1973 or 1971. (Tr. 30, 56-57, 71). During the entire period, Mr. Mitchell and his son used and occupied the Dolrusky parcel up to the wire fence for grazing in conjunction with their ranching operation. (Tr. 56, 70).

The Adams tract was also used for grazing purposes and was occupied for that purpose by the various owners and their lessees up to the wire fence. (Tr. 88-89). Title to the Adams tract was deeded by William L. Adams to three of his sons in November, 1949. Ex. P-6, P-7, P-8) (Tr. 52-53). An undivided interest in the property was acquired by Thomas Watson Adams in 1960. In 1978 the Adams parcel was

subdivided and became known as Ireland Meadows Estates Subdivision. The subdivision plat was filed in January, 1978.

Plaintiffs purchased their parcel in Iron County in 1969 and subsequently constructed a summer residence there. In conjunction with that construction, plaintiffs installed a culinary water system which uses water from a spring located in the disputed area and included various pipes and a large storage tank which are also located in the disputed area. (Tr. 28-29). Plaintiffs have continued to use their property for that purpose to the present time. (Tr. 26).

A survey made by the developers of the Ireland Meadows Estates Subdivision in late 1977 revealed that the fence line between the Adams and Bonrasky parcels (the wire fence which was constructed in 1948) is not in the same location as the surveyed line between the properties. (Tr. 94-97). None of the parties, nor their predecessors in interest, were aware that there was a difference between the fence line and the surveyed line until that time. (Tr. 64-117). Plaintiffs first became aware of the difference in June or July of 1978 when the subdivision map was submitted to the County Planning Commission for approval. (Tr. 31). On September 11, 1978, they filed with the Iron County Recorder a notice that they claimed interest in the area of lots 1-7 of the subdivision located east of the fence (where the water tank and culinary system were located) and that they

the boundary line is the true boundary. (Tr. 32) (Ex. 1). The boundary was set by the subdivision plat, and the defendant protested the location of the boundary line as the existing line between the two parcels. (Tr. 17, 18).

The property in dispute is a wedge-shaped area, bounded on the west by the fence and on the east by the survey line. On the south boundary, the fence and survey line are approximately 20 feet apart. (Tr. 21). The fence runs toward the north, across on the northerly portion of the properties and are approximately 3 feet apart in the opposite direction on the north end. Plaintiffs' well and an auxiliary system are located in the disputed area. (Ex. 1-2, 4-5).

The plaintiffs commenced the present action to determine the location of the boundary line between property owned by plaintiffs and that owned by defendants, and for an order quieting title in that property. Plaintiffs claim that the boundary line is located along the fence line which separates the properties. They base their claim upon the oral agreement between William L. Adams and J. Harold Stuedy, or alternatively, upon application of the judicial doctrine of "boundary by acquiescence." Defendants claim that the boundary line is located along the surveyed line contained in the deed and records description of the parcels. The parties also claimed damages against one

another for the purpose and for the benefit of the party.

After the trial of the cause by the jury, without a jury, the court held that the boundary between the properties of the plaintiffs and the defendants was the surveyor line based upon the 1868 deed between William L. Adams and J. Harold Mitchell. The court found that the evidence before it did not support a conclusion that the parties intended the wire fence to be the boundary line between their properties. The court further found that the fence did not establish a boundary by acquiescence. (R. 11)

By stipulation of the parties prior to trial, any water rights which may exist were not in dispute in the litigation and the court made no findings with reference to the water rights of the parties. (R. 11)

FOOTNOTES

J. HAROLD MITCHELL'S TESTIMONY CONCERNING HIS AGREEMENT WITH WILLIAM L. ADAMS THAT THE WIRE FENCE WOULD SEPARATE THE BOUNDARY BETWEEN THEIR PROPERTIES IS NOT BARRED BY THE SO-CALLED DEADMAN'S STATUTE AND WAS LEGALLY EXCLUDED BY THE 1938 CASE.

Plaintiffs contend that the wire fence, constructed by J. Harold Mitchell in 1938, is the boundary line between the property of plaintiffs and that of defendants by an express parcel agreement which was made by Mr. Mitchell and William L. Adams, both at the time the fence was constructed and at the time the deed was delivered to effect the

of 1949. Although it allowed plaintiffs' admission of the testimony of Mr. Mitnell concerning the location of the boundary line, the trial court ruled that this evidence must be excluded under the provisions of Utah's statute (Utah Code Annotated Section 78-24-2(3), 1953) (C. 53). However, this statute is clearly inapplicable to protect defendants in this case for two reasons: (1) The statute, by its very terms, does not apply to defendants; and (2) a long line of cases of this Court have held the statute inapplicable to cases such as the case at bar.

A. DEFENDANTS DO NOT COME WITHIN THE LITERAL STATUTORY LANGUAGE OF THE UTAH DEADMAN'S STATUTE SINCE THEY ARE NOT DEFENDING AS "EXECUTOR OR ADMINISTRATOR, HEIR, LEGATEE OR DEVISEE" OF THEIR DECEASED PREDECESSOR IN INTEREST.

Section 78-24-2(3), which is at issue in this appeal, reads in its entirety:

The following persons cannot be witnesses:
(3) A party to any civil action, suit or proceeding, and any person directly interested in the event thereof, and any person who, through or under whom such party or interested person derived his interest or share or any part thereof, when the adverse party in such action, suit or proceeding claims or opposes, sues, or defends, as guardian of an insane or incompetent person, or as the executor or administrator, heir, legatee, or devisee of any deceased person, or as guardian, assignee or grantee, directly

or remotely, of such heir, legatee or devisee, as to any statement, act, or transaction with such deceased, insane, or incompetent person, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such insane, incompetent or deceased person, unless such witness is called to testify thereto by such adverse party so claimant or opposing, suing or defending in such action, suit or proceeding. Stat. Code Annotated, §78- 24-2(3), 1953)

J. Harold Mitchell, as the person from whom plaintiffs derived their title, may potentially be prohibited from testifying on behalf of plaintiffs concerning agreements made by him with William L. Adams, defendants' predecessor in interest. As shown by the probate file which was presented to the trial court, William L. Adams died in 1944. (Tr. 53) Mr. Mitchell is, however, prohibited from testifying concerning those matters only if the matter is defended by an adverse party who is within one of the classes enumerated in the statute:

- (1) guardian of an insane or incompetent person;
- (2) executor or administrator, heir, legatee, or devisee of any deceased person; or
- (3) guardian, assignee or grantee, directly or remotely, of such heir, legatee, or devisee.

Defendants do not come within any of these categories.

plaintiffs are not entitled to employ the statute to exclude the testimony of Mr. Mitchell concerning his dealings with Adams. It is clear that none of the defendants is the executor, administrator, or competent person. It is equally clear that none of them are an executor, administrator, legatee or devisee of William L. Adams. That leaves the defendants who are entitled to exclude the testimony if they defend the litigation as a guardian, administrator, trustee, directly or remotely, of an heir, legatee or devisee of William L. Adams.

The controverted evidence presented at trial was that William L. Adams was not the owner of the tract which is the subject of this action at the time of his death. That was established by the certified copies of deeds introduced by plaintiffs showing that William L. Adams deeded the tract to three of his sons in 1949 (Ex. 1-6, P-7, P-8), by the file in the probate of the estate of William L. Adams showing that Adams did not own the property at his death (Tr. 53), and by the testimony of D. Watson Adams that the property had been given away by William L. Adams during his lifetime. Therefore, the defendants cannot be defending this action as executors, administrators, heirs, legatees or devisees of William L. Adams. The property never passed to an heir, legatee or devisee of William L. Adams because he did not own it at his death. The defendants are, rather, successors of grantees of Adams and are defending the litigation in that capacity.

Defendants assert that the statute's restrictions apply even though their predecessor in interest, William Adams, did not have any interest in the subject property at the time of his death. They argue that the fact that Mr. Adams deeded the property away prior to his death cannot preclude them from being "successors of heirs" under the statute. (Tr. 12-13). Rather, they assert that all the statute required is that they be successors of "heirs or heirs" of the deceased, even though the particular piece of property in question did not, at any time, enter into proceedings. (Tr. 44).

Such an interpretation is contrary to both a literal reading of the statute and this Court's interpretation of the provision. The statute specifically provides that testimony is excluded only if "the claimant party is plaintiff, action . . . does or defends as . . . heir, legatee, legatee or devisee." (emphasis added). It is illogical to interpret this provision to mean that, although defendants are not claimants as heirs or devisees, legatees, or devisees, the provisions of the statute should be applied because defendant might be an heir, legatee, or devisee as respects to property other than the subject matter of the lawsuit. This Court has raised and rejected such a construction on other occasions.

In Grieve v. Howard, 14 Fla. 2d, 137 So. 2d 100, 101,

plaintiff's claim that she wanted to set aside a deed to her late husband's real estate, and executed prior to her death, in favor of her son, under the Deadman's Statute which forbids testimony by witnesses made by the decedent, or anyone who has been admitted at the time of the execution of the will, or a party thereto, that the testimony could not be given by the statute, even though the defendant was a surviving heir, a sole surviving mother, since he "was not plaintiff or defendant, guardian, executor, administrator, heir, devisee or legatee." 140 P. at 429. In reversing the district court's decision, the Court said:

As we understand the situation, defendant was admitted to the land of the deceased, but was admitted under the deed executed by her. Her relation was not such as to entitle him to object to the testimony on the grounds that it was restricted by the statute. If the plaintiff was entitled, the court erred in excluding it and the plaintiff was prejudiced thereby. 11.

As the district court found the defendant was a "bodily heir" of the decedent, he was not defendant in that capacity to admit the property in question in the litigation. As such, he could not claim the protection of the Deadman's Statute.

The Court affirmed a strict construction of the Deadman's Statute in Japaneses Highlands, Inc. v. Harper, 190 P.2d 481 (1948), where it refused to extend the statute to the estate of the deceased person himself

(rather than only assignment of heirs, legatees, and devisees of the deceased). In that case, plaintiff, who was the assignee of a real estate contract between the decedent and defendant's predecessor in interest, sought specific performance of the contract. The defendants asked to preclude the execution of the contract, but sought to introduce prior statements of the deceased which allegedly amounted to an abandonment of the contract. The plaintiff urged that the statements should be excluded under the Deadman's Statute, even though they concerned a person who came within the literal reading of the statute. In response to this argument, the Court stated:

Plaintiffs' claim of error in admitting evidence of the statement of Karl B. Hale about abandonment of the contract is based on the ground that it should be barred by the so-called dead man's statute. That statute excludes testimony of person who "sue or defend, as . . . executor or administrator, heir, legatee or devisee of . . . a deceased person" and confines the exclusion to a ". . . guardian, assignee or grantee . . . of such heir, legatee or devisee." Plaintiff concedes that it is not the assignee nor any of those three, but it is an assignee of the deceased person (Karl B. Hale) himself and that the terms of the statute do not literally apply to its relationship to Karl B. Hale. But it argues that in logic and fairness the statute should be broadly construed in accordance with its general purpose and thus include an assignee of the deceased person. True, that argument may have validity in some statutory situations, it is not so here. This is so for the reason that, as this court has previously ruled, because this statute is one of exclusion of otherwise proper evidence, it

and the contract and required strictly
compliance with its terms. 191 F.2d at 185.

In *Wright v. Johnson*, 121 Utah 173, 239
P.2d 101, the parties, who claimed
to be the rightful heirs rather than heirs,
contended that the law of the decedent's State and
the terms of his will and the conditions with the
will imposed by the trustee, the sons of the deceased,
had caused the trustee to grant their sister title
to the property, known to all as joint tenants
with right of survivorship. The defendant sought to
prevent the trustee from appointing regarding their
administration with their father concerning the property.
The court affirmed the lower court on the ground that the
decedent was in sole title and thus the testimony
was taken by the decedent's State. This Court
affirmed the:

...affirming the decision of the [decedent's
State], to apply the law that Marie T.
[decedent], he of the respondents, was defending as
heir, if Marie were defending as an heir, she
could not be appointed for the benefit of the
estate of the decedent. However, this she clearly
was not doing. She listed the property as a
trust for the benefit of the estate.
191 F.2d at 184.

The result in this case is the same as the
one reached in *Johnson*. By its own terms, Section 73-24-
101, as amended, is the work of David Mitchell

concerning agreements made with will beneficiaries, should not do so because defendant's heirs, defendant's children, successors of heirs, legatees or devisees and their heirs, as successors of his grantors. The statute is to be strictly applied and should not be construed so as to exclude the testimony. Plaintiffs are entitled to have the testimony admitted and considered by the court. They were substantially prejudiced by its exclusion.

B. EXCLUSION OF THIS TESTIMONY IS INCONSISTENT WITH BOTH THE PURPOSE OF SECTION 78-24-2(3) AND A LONG LINE OF CASES OF THIS COURT, INVOLVING THIS PROVISION AS APPLICABLE ONLY TO WITNESS BY OR AGAINST THE ESTATE OF THE DECEASED.

The purpose of the Decedent's Statute is to protect the estate from false or fraudulent claims by creditors and, therefore, limited in its application to suits brought by or against the estate for its representative where the estate is a party. It is not the purpose of this statute, as defendants have asserted (Tr. 10), to protect parties from the type of testimony which is at issue in the present case. The Utah statute was written to create a very narrow exclusion and has consistently been so construed by this court.

The purpose of Section 78-24-2(3) was set out by this Court in Maxfield v. Gainsbury, 114 Utah 290, 172 P.2d 107 (1946):

the purpose of the statute is to guard against the temptation to give false testimony in regard to a transaction with a deceased person by the surviving party, when the transaction is involved in a lawsuit and death has sealed the mouth of the other party . . . It was never intended that this section should be used for the purpose of suppressing the truth. On the contrary, the statute's sole purpose is to prevent the proving by false testimony of claims against the estate of a deceased person. 172 P.2d at 125 (emphasis added).

The Court has further noted, in Miller v. Livingstone, 31 Utah 411, 88 P. 338 (1906), that

the scope of the rule excludes the testimony of the survivor of the transaction with a decedent when offered against the latter's estate. The statute in this regard is intended to protect the estates of deceased persons from assaults "and relates to proceedings wherein the decision sought by the party so testifying would tend to reduce or impair the estate . . ." 88 P. at 344 (emphasis added).

See also, Carnesecca v. Carnesecca, 572 P.2d 788 (Utah 1977) ("Its purpose was not to suppress truth but to prevent the proof of claims against an estate of a deceased person . . ."); Zion's First National Bank v. Fennemore, 655 P.2d 1111 (Utah 1982) (The factual determination is whether "the witness had an interest adverse to the deceased or her estate").

The rationale for such a strict application of the rule is expressed by the Court in Timpanogos Highlands, Inc. v. Utter, Supra, where the Court stated:

This is not a case of a party, who is not a party and is not a party to the proceedings, who is not a party to one of the parties of the proceedings, who is not a party to the proceedings, who is not a party to the proceedings, who is not a party to the proceedings, who is not a party to the proceedings.

And in Porter v. Walker Park and Trust Co., 1907, 170 Cal. 416, 100 Cal. 2d 1015, 34 P. 2d 612:

This statute in its true construction is not testing which right is of higher rank in determining the ultimate rights of the parties, but, should be narrowly construed.

Moreover, the Court has consistently held that even in controversies among heirs concerning the estate, the statute still has no application unless the estate is a party to the action or there is a direct assault upon the estate:

The statute in this regard is intended to protect the estates of deceased person from "assaults" and relates to proceedings wherein the decision sought by the party so testifying would tend to remove or impair the estate and does not relate to the relative rights of the heirs or devisees as to the distribution of an estate in a proceeding by which the estate itself is in no way to be reduced or impaired. Miller v. Livingston, 31 Cal. 41, 22 P. 2d 1066.

See also, Stants v. Stants, 17 Cal. 470, 226 P. 677 (1924), wherein the Court noted that "the statute has no application where the controversy raised between the heirs and merely involves questions relating to their respective rights as such, and where there is no direct assault upon the

...," and the Court has added, as it has
said, "with a view to creating a very narrow
rule to otherwise proper testimony." It should be
applied in its original terms and this Court has
so identified it.

It is, of course, a matter of propriety, if such a narrow application
of the Federal's Statute is demonstrated by the observation
that its use and purpose is in its favor with practically
all commentators and the entire line of Utah cases cited
above. McDougal, in his treatise (Evidence 2nd Ed. Section
401-44), states:

"But commentators agree that the expedience
of refusing to listen to the survivor is, in
the words of Bentham, a "blind and brainless"
technique. In seeking to avoid injustice to
one side, the statute-makers have ignored the
equal possibility of creating injustice to
the other.

See also 11 Wigmore on Evidence Section 578 at 822-823)

and:

"As a matter of policy, this survival of a
part of the now discarded interest
qualification is deplorable in every respect;
for it is based on a fallacious and exploded
assumption, it leads to as much or more false
testimony than it prevents, and it encumbers
the profession with a profuse mass of barren
troubles over the interpretation of mere
facts.

The rationale for such a trend by this Court and the
others is that the rule is burdensome and more often

leads to the exclusion of the truth than in preventing it's testimony. As this Court stated in Maxfield v. Edinburg, supra, "it was never intended that this section should be used for the purpose of suppressing the truth."

To allow the Deadman's Statute to bar testimony of a transaction where the estate is not a party and the plaintiff was a witness to the transaction, is unconscionable and inconsistent with the decisions of this Court. Exclusion of the testimony of J. Harold Mitchell was not justified by either the literal language of Section 24-24(3), nor its statutory purpose set out by this Court, and constitutes reversible error. No matter how the respondents attempt to characterize this transaction, the claim here is not against the estate of William L. Adams. The estate is not a party and application of the Deadman's Statute is not appropriate.

POINT II

J. HAROLD MITCHELL'S TESTIMONY CONCERNING HIS ORAL AGREEMENT WITH WILLIAM L. ADAMS IS PROPER EVIDENCE TO BE CONSIDERED BY THE COURT UNDER THE WELL-ESTABLISHED DOCTRINE OF BOUNDARY BY ACQUESCENCE.

Defendants have suggested that the testimony of J. Harold Mitchell, even if not excluded under the Deadman's Statute, would be inadmissible as evidence of an oral agreement. (Tr. 54). However, it has been consistently recognized by this Court that evidence of an oral agreement

agreement with a proper claim of boundary by acquiescence is not recognized by either the Statute of Frauds or the Parol Evidence Rule.

2. The Statute of Frauds

Although the Statute of Frauds, Utah Code Annotated, Section 25-1-1, 1953, is amended, provides that no interest in land may be created "other than in writing," it is well recognized in this state that the Statute of Frauds does not prevent the establishment of "boundary by agreement" or "boundary by acquiescence." In Rydalch v. Anderson, 37 Utah 29, 107 P. 25, 29 (1910), this Court held:

Agreements of this character are not within the statute of frauds, because they are not considered as extending to the title. They do not operate as a conveyance so as to pass title from one to the other, but proceed upon the theory that the true line of separation is in dispute and to some extent unknown, and in such case the agreement serves to fix the line to which the title to each extends.

See also, Tripp v. Bagley, 74 Utah 57, 267 P. 912 (1928). This rule was recently reaffirmed in Madsen v. Clegg, 639 P.2d 726, 728 (Utah 1981):

The doctrine of boundary by acquiescence has long been recognized, and when the location of the true boundary between adjoining tracts of land is unknown, uncertain or in dispute, the owners thereof may, by parol agreement, establish the boundary line and thereby irrevocably bind themselves and their grantees.

this rule is clearly consistent with the decisions of the courts which have considered the issue. *Forwood v. Williams*, 104 Id. 34, 657 P.2d 1007 (1983); *Attorney v. Williams*, 104 Kan. 32, 605 P.2d 16 (1980); *Incorporated v. United*, 80 Kan. 672 (Tenn. App. 1980); *Harsh v. McTibbitt*, 10 Kan. 30 (1907), 47 P.2d 56 (1936).

Although the court has said that a landowner may not claim a boundary "solely on the basis of an oral agreement," *Leeson v. Bangitch Lake Corp.*, 530 P.2d 192, 794 P.2d 118 (1975), where the boundary is unknown, uncertain or in dispute, evidence of the oral agreement does not violate the Statute of Frauds. It is not necessary that there have been a dispute concerning the boundary line, but only that the line be "uncertain" or "unknown."

Moreover, the Court has ruled that the fact that the parties will have determined the "true line" by an agreed survey does not bar application of the doctrine:

It is true that if there is no uncertainty as to the location of the true boundary line, the parties may not, knowing where the true boundary line is, establish a boundary line by acquiescence at another place. But if the parties do not know where the actual boundary line is, even though they could have readily ascertained that fact by a survey, a boundary line established may be established. *Manley v. Walzer*, 177 Kan. 24 (1955), 248 P.2d 117, 122 (1962) (see Willis add.).

In *Ekoerg v. Bates*, 287 P.2d 100 (Tenn. App. 1955), the parties' acquiescence dispute was very similar to the present dispute.

plaintiffs claimed that the boundary between their properties was a fence which was erected pursuant to an agreement. The plaintiffs argued that at the time the fence was erected the parties could have determined the true line of property, the element of line certainty necessary was not present. In rejecting that contention, the Court stated:

It is true that the line called for by the deed could have easily been ascertained by a survey. However, a boundary line may be 'uncertain' or 'in dispute' even though it is capable of being readily ascertained. The real question is whether the adjacent owners when they fixed the line or acquiesced in its being fixed were uncertain or in dispute about the location of the actual line. 239 Ill.2d at 187.

The critical inquiry, therefore, is not whether the parties could have ascertained the location of the boundary, but whether they in fact knew its precise location.

Furthermore, the Court has held that, even if it cannot conclusively demonstrate that the parties were uncertain about the location of the true boundary at the time of their agreement, such uncertainty will be presumed from a long history of acquiescence:

In some of the opinions of this court on the subject of disputed boundaries, there are statements to the effect that the location of the true boundary must be uncertain, unknown or in dispute before an agreement between the adjoining landowners fixing the boundaries will be upheld, citing *Tripp v. Bagley*, supra in support thereof. Such statements should be understood to mean that if the location of

the true boundary line is known to the adjoining landowners, they cannot by a verbal agreement establish the boundary elsewhere. As was pointed out in the Tripp case, such an agreement would be in contravention of the statute of frauds. But the Tripp case does not require a party relying upon a boundary which has been acquiesced in for a long period of time to produce evidence that the location of the true boundary was ever unknown, uncertain or in dispute. That the true boundary was uncertain or in dispute and that the parties agreed upon the recognized boundary as the dividing line will be implied from the parties long acquiescence. Brown v. Milliner, 232 P.2d 202, 120 Utah 16 (1951) (emphasis added).

In Lane v. Walker, this Court further noted that it need not be shown that the parties intended mutually that the fence be the boundary if there is "indulgence" or "consent by silence" or "a knowledge that a fence . . . appears to be a boundary,--but that no one did anything about it for 48 years." 29 Utah 2d 119, 505 P.2d 1199, 1200 (1973).

As these rules are applied to the facts of the present case, it is clear that the Statute of Frauds does not bar Mr. Mitchell's testimony. To satisfy the demands of the Statute of Frauds, it is sufficient if plaintiffs show either (1) that the parties were uncertain as to the location of their boundary line at the time of their agreement or (2) that there was a long period of acquiescence (as defined by the Court in Lane v. Walker, supra).

It is undisputed that the properties of plaintiffs in

properties were originally held in tenancy in common by J. Edgar Mitchell, plaintiffs' predecessor in interest, and Joseph Adams, defendants' predecessor in interest. In 1947, the parties determined to partition their properties. (Tr. 39)(Tr. 45). The deeds which memorialized their agreement were finally exchanged in September, 1949. (Exhibit F-4) (Tr. 43). Subsequent to that agreement, Mr. Mitchell constructed the wire fence along the line which the parties then agreed would serve as the boundary between their properties. (Tr. 54-55, 61-62).

It is further undisputed that at the time of the agreement to build the fence to serve as the boundary, the parties did not know the location of the metes and bounds line, described in their deeds. No survey was taken, although Mr. Mitchell suggested that one be done. (Tr. 54). Neither party knew that the fence was not erected on the deed line (Tr. 64, 108, 118). The discrepancy was first discovered when defendants surveyed the property in 1977. (Tr. 91-92).

Since the properties were partitioned by properly executed deeds, the oral agreement between Mr. Mitchell and Mr. Adams does not go to the title of the property, but only to the establishment of the boundary between their properties. The parties were clearly "uncertain" as to the location of the deed line and, therefore, the Statute of Wills does not bar the testimony of the parties' oral

the papers thereof may, by parol evidence, establish the boundary line and thereby irrevocably bind themselves and their grantors. (emphasis supplied)

See also, Ekberg v. Bates, 230 P.2d 205 (Utah 1951); Bray v. Milliner, 120 Utah 16, 262 P.2d 207 (1951); Rydberg v. Anderson, 37 Utah 99, 127 P. 35 (1910); Trigg v. Kottig, Utah 57, 270 P. 912 (1928).

In a similar vein, the Court has recognized an exception to the parol evidence rule in reformation cases:

It is the Church's contention parol evidence must be excluded if the description of the property is definite and certain. We reject this view, and hold parol evidence is admissible in an action for reformation; to show the writing did not conform to the intent of the parties. Jensen v. Manila Corporation of the Church of Jesus Christ of Latter-Day Saints, 565 P.2d 63 (Utah 1977).

See also, Neeley v. Kelson, 600 P.2d 379 (Utah 1976); Reynolds v. Pace, 533 P.2d 120 (Utah 1975); Resler v. Rogers, 542 P.2d 354 (Utah 1975). The Court has, therefore, recognized exceptions to the general principle set forth in the parol evidence rule when the exclusion applied for would be inconsistent with the nature of the claim asserted. As is clearly the case in boundary and acquiescence cases, of every nature, the theory of these cases asserts that it was not the intention of the parties to be bound by the deed, but rather by oral agreement. And, as

... particularly to their heirs (ostensibly to protect their heirs from the written document) would be tantamount to repudiation of the doctrine of boundary by acquiescence. ...
...
...
... even if the well-established boundary by acquiescence exception were not recognized, it is not necessary to say that the parol evidence rule, even in its general application, would yield the result propounded by the defendants. This Court set out the parameters of the parol evidence rule in Utah in Security Leasing Co. v. King, Inc., 22 Utah 2d 242, 461 P.2d 460 (1969):

where parties have negotiated and reduced their intentions to a writing to which they have both assented as a complete and accurate representation of their understanding, evidence of antecedent or contemporaneous agreements are not ordinarily admissible to vary or contradict the terms of that writing. Id. at 461.

See also Youngren v. John L. Lloyd Construction Co., 22 Utah 2d 267, 450 P.2d 985 (1969); Painford v. Rytting, 22 Utah 2d 111, 461 P.2d 769 (1969). However, the Court cautioned against abuse of the rule to exclude evidence when such would be inappropriate in light of the purpose of the rule:

While the premise upon which that rule is based--the preservation of the integrity of the written instruments--is valid as a generality, caution should be observed in order that competent and relevant evidence is not excluded under specious pretexts as to its proper application. Id.

The actions of the parties at the time the deed was finally exchanged indicate that they did not fully understand the documents "as a complete and accurate representation of their understanding." When the deeds were exchanged, the description in the deed represented less than the amount of property Mr. Mitchell was entitled to receive upon partition of the property. Mr. Mitchell testified as to his discussion with Mr. Adams about the discrepancy as follows:

Q. (By Mr. Mitchell) When you got the deed it called for 19 acres?

A. Right.

Q. All right. As I calculate ten sixty-thirds of a hundred and twenty, that comes to nineteen acres plus about seven and a half square rods. Is that correct?

A. Right.

Q. Why the discrepancy? Well, did you and Mr. Adams have any discussion about the discrepancy?

A. When he presented the deed he said, "I didn't think you'd mind, that's such a small amount. We had approximately 19 rods and that's 19 acres, of course." I said, "I don't particularly mind, provided it does not now or at any time involve any fence change." He said, "Agreed." (Tr. 55-56).

The parties agreement upon partition of the property, therefore, was not fully and accurately represented in the deed. Thus, the parol evidence rule would not bar oral testimony as to the parties' agreement.

Furthermore, the rule only applies to prior or contemporaneous agreements which vary or contradict the terms of the written document. However, the agreement was

agreement or a subsequent agreement (i.e. an oral agreement or a written document) and, therefore, is not subject to the parol evidence rule. The deed which was prepared in 1949 was to memorialize the decision to partition the property which was made in 1948. Mr. Mitchell testified that "he was slow getting the deed to me. We had been in a hurry to get it." (Tr. 55). Mr. Adams and Mr. Mitchell had agreed that Mitchell could just measure 19 rods from the lot fence to establish his boundary. Since it was a subsequent agreement, the parol evidence rule would not even apply. The testimony is proper and should be admitted and considered by the court.

CONCLUSION

The testimony of J. Harold Mitchell, concerning his oral agreement with William L. Adams that the boundary between their properties would be the wire fence, and which was excluded by the trial court, is proper evidence and should have been considered by the court. Mr. Mitchell is a competent witness concerning that agreement, since the terms of the Statute of Frauds do not apply to the defendants, who are being treated as successors of grantors and not successors of a grantor. Furthermore, the evidence of the oral agreement is admissible under either the statute of frauds or the parol evidence rule. Plaintiffs urge this Honorable Court to reverse the judgment below and remand this case for

a new trial.

Respectfully submitted

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