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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

RESPONDENT'S BRIEF

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

Honorable J. Harlan Burns, District Judge, Presiding

* * * * * * * * * * * * * * *

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Clerk, Supreme Court, Utah

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STATEMENT OF NATURE OF CASE

This is an action to determine the location of the boundary line between real property owned by Plaintiffs and that owned by Defendants.

DISPOSITION IN THE LOWER COURT

This case was tried to the court sitting without a jury. After hearing the evidence, the court determined that the boundary line between the properties owned by Plaintiffs and Defendants was in fact the boundary line set forth in the deed from William L. Adams and Lizy W. Adams to J. Harold Mitchell as described in Plaintiff's exhibit 4.

RELIEF SOUGHT ON APPEAL

The Defendants-Respondents seek affirmance of the judgment of the lower court.

STATEMENT OF FACTS

Except as hereinafter set forth, the Defendants-Respondents accept the statement of facts as set forth in the Appellant's Brief at Pages 2 through 8.

Beginning at page 3, third paragraph, of the Appellant's Brief, Appellant states as facts statements which were excluded by the court at trial based upon Plaintiff's objections which were sustained by the court. The Appellant sets forth as facts in his brief those statements made by Harold Mitchell with respect to conversations he allegedly had with William L. Adams who is deceased. It cannot properly be said that the items set forth beginning with the third paragraph of page 3 and continuing through the first paragraph of page 5 are facts. The statements made therein merely reflect a proffer made by the Plaintiffs-Appellants at trial after the court had ruled that such evidence was inadmissable under the Dead Man's Statute, heresay, parol evidence and the Statute of Frauds.

The evidence is clear that J. Harold Mitchell at his own expense in 1948 constructed the wire mesh fence, which is the subject of this lawsuit, for the purpose of containing his sheep and that said fence was used as a livestock fence. (TR PP.45 & 54-55) The evidence is clear from Mr. J. Harold Mitchell that he built the fence prior to the time that the deed to the property was exchanged between Mr. Adams and Mr. Mitchell. (TR P.55) The wire fence in fact has been in existence since 1948. (TR PP.55-56)

The court, based on the Defendant's Motion to Strike, and pursuant to its ruling that such evidence was inadmissable under the Dead Man's Statute, parol evidence rule, the Statute of Frauds, and heresay excluded all testimony by J. Harold Mitchell as to statements made by Mr. Adams prior to the exchanging of the deed. The evidence is clear that the wire fence was built by J. Harold Mitchell at his expense and without any help or participation of Mr. Adams. (TR P.69, Ln. 10-20). After stating that he had erected the fence without any help of Mr. Adams, in 1948, Mr. Mitchell then testified that the deed (P.4) from Mr. Adams to Mr. Mitchell was prepared and given to him on or about the date on the deed which is September 15, 1949. (See ex. P.4; TR. P.60, Ln. 15-20). Mr. Mitchell further stated that he read the description on the deed, and although he felt there was a problem with the description, he did not ask Mr. Adams to revise the deed but went ahead and recorded the deed with the property description the way it was. (TR P.61, Ln. 1-7) Mr. Mitchell further testified that he knew there was no description in the deed having any reference to an existing fence line. (TR P.61, Ln. 8-10) Mr. Mitchell further testified that at the time he accepted the deed from Mr. Adams and had it recorded it was his intention that he only receive the property described in the deed and that what is described in the deed is all that he expected to receive at that time. (TR P.67, Ln. 15-23) Mr. J. Harold Mitchell further testified that while there had never been any protests over the

use of the fence as a boundary, he had never talked to the owners on the other side of the fence about the use of the fence as a boundary. (TR P. 58, Ln. 1-6). At page 6 of Appellant's Brief, Appellant makes the statement "None of the parties or their predecessors in interest, were aware that there was a difference between the fence line and the survey line until that time." (Referring to a survey made in 1977.) Appellant then cites the transcript at pages 64 through 110, or 46 pages of the transcript. This statement made by the Appellant assumes that there is evidence other than that of J. Harold Mitchell that the fence line in fact was considered to be the boundary line. However, the testimony in the case was that the only person who ever considered the fence line to be the boundary line was J. Harold Mitchell, and Mr. Mitchell admitted in his direct examination that he had not discussed the fence as a boundary line with the owners on the other side of the fence. (TR P. 56, Ln. 4-6). Thus we have a situation where Mr. J. Harold Mitchell in his own mind is considering the fence line as a boundary, but never conveys this thought to any other persons, and then counsel for Appellants states that none of the parties nor their predecessors in interest were aware there was a difference between the fence line and the survey line until the survey of 1977. Appellant's Brief at page 6. There was no issue in the case in this regard and it is not a fact that no one considered there was a difference between the fence line and the survey line until 1977. No one except Mr. Mitchell ever considered the fence as the boundary line until the Notice of Interest was filed by the Plaintiffs in this action.

Thus the only facts which are at issue in the case, and which were not excluded as a result of the court's evidentary ruling, were that the owners of the property by deed conveyed to J. Harold Mitchell in September, 1949, a portion of the property. The fence, which is the subject matter of this litigation was erected in 1948 and was in existence at the time of the deed being drawn issued and recorded, but there is no reference in the deed to the fence line being any part of the property line to separate the property of the parties.

ARGUMENT

Point I

J. HAROLD MITCHELL'S TESTIMONY CONCERNING STATEMENTS OF WILLIAM L. ADAMS OFFERED FOR THE PURPOSE OF SHOWING THAT THE BOUNDARY LINE BETWEEN THE PROPERTY IS OTHER THAN AS DESCRIBED IN THE DEED FROM WILLIAM L. ADAMS TO J. HAROLD MITCHELL WAS PROPERLY EXCLUDED BY THE TRIAL COURT.

At trial, the Plaintiffs offered evidence from J. Harold Mitchell with regard to conversations that Mr. Mitchell claimed to have had with his grantor, William L. Adams, prior to and contemporaneous with the preparation execution and recording of the deed of September 15, 1949 (P.4). Mr. Mitchell claimed that prior to the preparation of the deed, Mr. Adams agreed that the wire mesh fence which had been erected by J. Harold Mitchell would be the boundary line between the property, and that notwithstanding the metes and bounds set forth in the deed, that Mr. Adams agreed at the time of delivery of the deed that the fence line in fact would be the property line.

Defendants properly objected to the testimony of J. Harold Mitchell with respect to the claimed conversations he had had with Mr. Adams on the basis of the Dead Man's Statute, the parol evidence rule, and heresay. (TR. P. 54, Ln. 6-9).

What we have in the present case is a situation where a party to a deed which was executed and recorded approximately 35 years ago comes into court and attempts to vary the terms of the deed by giving testimony that the grantor of the deed, who is deceased, made an agreement with him that notwithstanding the language of the deed, the boundary line was to be other than as described in the deed. Acceptance in this case, of parol evidence with respect to such an agreement that the boundary line set forth in the deed is other than as set forth, would give to the grantee properties other than those set forth by the terms of the deed. This is the very type of situation which the Utah Supreme Court in the case of <u>Maxfield v. Sainsbury</u>, 10 Utah 281, 172 P. 2d 122 (1946) held was covered by the Dead Man's Statute. The court in the <u>Sainsbury</u> case said that the purpose of the Dead Man's Statute was to guard against the temptation to give false testimony in regard to a transaction of a deceased person by the surviving party when the transaction was involved in a lawsuit

and death had sealed the mouth of the other party. It is clear in this case while the Defendants are in fact heirs of William Adams, the property in question did not go to the Defendants by way of intestate succession or by a Will but was deeded to the Defendants prior to the death of William Adams. Appellant argues that for the Dead Man's Statutes to apply, the property in question must pass either by Will or intestate succession. However, the statute does not so say, but states merely that the class of persons to whom it applies are those who are heirs of the dead person, or grantees of heirs of the dead person, a situation which clearly is present in this case. In order for the court to determine whether or not the Dead Man's Statute would properly exclude said evidence, the court must determine the policy matters involved and decide whether or not it is a necessary prerequisite to assertion of the Dead Man's Statute that the heirs receive property either by Will or by operation of law at the death of the owner, or whether or not they merely need be within the statutory class of heirs of the deceased party before they can assert the Dead Man's Statute.

As stated in the Sainsbury case, supra, the purpose is to preclude the temptation to give false testimony with regard to a transaction by a surviving party where the mouth of the deceased party is sealed, then it would seem that the evidence in this case was properly excluded in line with said legislative and judicial policy.

However, even if the court were to determine that the Dead Man's Statute does not properly apply in this case, the said evidence proffered by Plaintiff is properly excluded as heresay, under the Statute of Frauds, and as parol evidence offered for the purpose of varying the terms of an unambiguous deed.

It is a universally accepted proposition that where the description of the properties conveyed in a deed is definite, certain, and unambiguous, extrinsic evidence cannot be introduced to show that it was the intention of the grantor to convey a difference tract. Nor can either party show by extrinsic evidence that more or less property than that described in the deed was intended to be passed by the parties. See Generally 23 AM. Jur.2d Deeds, §250. Neither parol evidence nor surrounding facts and circumstances can properly be considered for the purpose of adding to, detracting from, or varying the terms of a deed which is plain.

certain and unambiguous with respect to the estate conveyed thereby. See Neeley v. Kelsch, 600 P. 2d 979 (Utah 1979), VanCott Jacklin, 63 Utah 412, 226 P. 460 (1924); French v. Brinkman, 35 Cal. RPTR. 289, 387 P. 2d 1 (1963); Potter v. Northern Natural Gas Company, 201 Kansas 528, 441 P. 2d 802 (1968); Rock v. B. 149 Mont. 449, 429 P. 2d 634 (1967); McSpaden v. Mahony 431 P. (Okla. 1967). A most recent Utah case with respect to this question is the case of Neely v. Kelsch, supra, wherein the court considered the question of whether or not extrinsic evidence could be admitted for the purpose of varying the deed which in fact had been recorded. In that case the court held that in fact where the case was one for reformation of the deed based on mutual mistake, which is not the issue in this case, parol evidence could be received to prove that in fact there had been a mistake but that the mistake must be proved by clear and convincing evidence. In the present case we merely have a situation where 35 years after the fact, a party now seeks to assert that a deceased grantor agreed that a deed which had been prepared and was recorded would not in fact set forth the boundaries of the property, but that the property would be bounded pursuant to an agreement made between himself and the grantee which was never reduced to writing and which was in conflict with the expressed description set forth in the deed.

At page 29 of Appellant's Brief, Appellant cites the case of Security Leasing Company v. Flintco for the proposition that the terms and intentions of a party to a writing are merged into the writing itself. This is a commonly accepted principle of law and the parol evidence rule is designed to protect the proposition that the agreements of a party are in fact merged into the written document. In this case, it is clear and undisputed that the parties agreed a portion of the property was to be partitioned off and deeded to J. Harold Mitchell by William Adams. The testimony is further clear and the evidence is undisputed that Mr. Adams on his own took measurements and erected a fence by himself at his own cost and subsequent to its erection used the fence for the purpose of containing live stock to be grazed on his property. The evidence is undisputed that the fence was in existence for at least a year prior to the

time that the deeds were prepared and recorded. Mr. Mitchell now wishes to testify that at the time the deeds were presented, he recognized that the deeds did not describe the property that he felt should be his, but that notwithstanding this fact, and notwithstanding the fact that it would be a relatively simple task to use the fence line as part of the description of the property being conveyed, he accepted the deed as it was given to him, accepted the fact that it conveyed the property that he felt he was entitled to, and that he then went and recorded the deed notwithstanding the alleged verbal agreement he claims he made with Mr. Adams. The testimony in the case is undisputed that the fence was used as a livestock fence from the time it was erected in 1948 until approximately the mid 1970's and that the fence was taken up and put down annually at the convenience of the parties and for the purpose of containing livestock. There is no evidence in the case other than from the mouth of J. Harold Mitchell that anyone other than J. Harold Mitchell ever considered the fence to be a boundary fence.

Therefore, it is respectfully submitted that the court properly excluded the testimony of J. Harold Mitchell with respect to the alleged agreements he had with the grantor which would vary the property description as set forth in the deed. It stretches the credibility of everyone to think that where the alleged boundary fence was in existence at the time the deed was prepared, that if the parties in fact intended the boundary line to be the fence, it would not have been described in the deed as in fact being the boundary line between the properties. Where in fact the fence existed at the point in time when the deed was prepared, and the fence was not described as the boundary, but the boundary was described by surveyed metes and bounds, such clearly argues for the proposition that it was never the intention of the parties that the livestock fence be the boundary line. It was clearly the intention of the parties that the property described in the deed was in fact the property being conveyed and the fence was never considered, at the time, by the grantor as the boundary.

POINT II

PLAINTIFFS-APPELLANTS DID NOT ESTABLISH THAT THE FENCE LINE WAS IN FACT THE ACQUIESSED IN BOUNDARY LINE BETWEEN PROPERTY

Appellants claim that the evidence in the case shows that the livestock fence erected in 1948, by J. Harold Mitchell was acquiessed in by the Defendants and their predecessors in interest of such a long period of time that the said fence in fact became the boundary line between the two properties. The evidence which was admitted in the case shows that in the Spring or early Summer of 1948 the property in question was owned jointly by William Adams and J. Harold Mitchell, each having an undivided interest in the whole. J. Harold Mitchell on his own took measurements and constructed a fence to contain his sheep in an area of roughly 19 acres. On September 15, 1949, the property was partitioned by deed, and the deed having been delivered to J. Harold Mitchell was then recorded. Mr. Mitchell's share of the undivided whole was set forth by a metes and bounds description and no reference to the fence was contained in the deed. The fence was taken up and put down annually and used as needed until 1978 as a livestock fence. It was put up when needed, and let down when not needed. No discussions were ever had between J. Harold Mitchell and any of Plaintiss's prede-cessors with respect to the fact that the fence was a boundary during the period from 1949, after the recording of the deed, and 1978. The Plaintiffs in this case have the burden to estab-all the necessary elements to show boundary by acquiescence before they can prevail on their claim that the fence line is the boundary line between the properties of the Plaintiffs and the Defendants. Leo M. Bertagnole, Inc. v. Pine Meadows Ranches, 639 P.2d 211 (Utah 1981). In the case of Madsen v. Clegg, 639 P.2d 726 (Utah 1981) the court stated:

> 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. However, when the true

boundary is known, any parol agreement of the owners establishing the boundary line elsewhere is void and unenforceable by virtue of the Statute of Frauds, which requires a conveyance of real property to be in writing.

This court had determined that the absence of an express agreement as to the location of the boundaries between adjoining owners, the law will imply an agreement fixing the boundary as located, if it can do so consistently with the facts appearing. However, when the evidence fails to support any implication that a fence has been erected by adjoining owners pursuant to an agreement between them as to the location of the boundary, the doctrine of boundary by acquiescence has no application. In an earlier case this court cautioned:

> We do not wish to be understood as holding that the parties may now claim to the true boundary, where an assumed or agreed boundary is located through mistake or inadvertance, or where it is clear that the line that's located was not intended as a boundary, and where a boundary so located has not been acquiessed in for a long term of years by the parties in interest.

In the instant case, Plaintiff showed that no uncertainty or dispute existed concerning the location of the boundary line at the time the 1904 fence was constructed. The 1904 deeds to Plaintiffs and Defendants predecessors unmistakably defined a boundary which takes a substantial jog northward at its eastern end. Defendant has raised no question concerning the validity of these deeds; nor has he shown any subsequent conveyance by Plaintiff or his father which might cast doubt on Plaintiff's present title. The trial court did not include in its findings any indication that the boundary was disputed when Plaintiff's father built the fence or that the fence was intended originally as a boundary line. In the absence of any initial uncertainty concerning the ownership of the property in question, the Doctrine of Boundary by acquiescence has no application.

Even if the trial court has found that uncertainty existed concerning the correct boundary line, it could not have resolved such uncertainty on the basis of Defendant's

> acquiescence theory, because the evidence simply fails to support any finding on an agreement between the parties. 639 P.2d 729-30 (emphasis added)

In the present case the evidence is clear. The fence was put up initially for stock control, not as a boundary. At the time of its erection, there was no uncertainty as to a boundary. At the time that J. Harold Mitchell constructed the fence, his interest was "an undivided interest" in the whole parcel. The division of the property and the preparation of the deed granting to him his portion of the undivided interest did not take place until over a year later. At the time that the fence was constructed, J. Harold Mitchell had an undivided interest in property on both sides of the fence line. This court has held that in a situation where the same party owns property on both sides of a fence at the time the fence is constructed, it cannot be said that the fence is a boundary. As observed by this Honorable Court in Homeowners Loan Corporation v. Dudley, 105 Utah 208, 141 P.2d 160, 166 (1943):

> It could hardly be said that a highway boundary line could have been erected to settle a dispute between adjoining land owners when the lands on both sides of the road were owned by the same person.

The same can be said in the instant case. It cannot be said that a livestock fence erected prior to the division of properties was erected for the purpose of settling a boundary dispute when no dispute existed at the time the fence was erected and when both parties held an undivided interest on both sides of the fence. The property was actually partitioned by deed over one year later and no reference to the fence is made in the deed. If in fact the agreement was that the fence line should be the boundary and such agreement was in fact reached prior to the preparation of the deed, then that fence should have been used and described in the deed as in fact being the property line between the parties. The evidence simply [illegible] not support the proposition that the fence erected in 1948 was erected for the purpose of settling a boundary dispute between

adjoining land owners as required by the doctrine of boundary by acquiescence. The unrefuted testimony was that over the years the main purpose of the fence was to contain cattle. Where a fence is used to contain cattle and is not intended as a boundary, it cannot set the boundary no matter how long you place or what uses you make of the property on either side. See Leon v. Dansie 639 P.2d 730 (Utah 1981); Florence v. Highline Equipment Co., 581 P.2d 998 (Utah 1978). In the Florence case, the court stated:

> A fence may be maintained between adjoining proprietors for the sake of convenience without the intention of fixing boundaries. Thus agreement to or acquiescence in the establishment of a fence, not as a line marking the boundary, but a line for other purposes or acquiescence in the mere existence of the fence as a mere barrier, does not preclude the parties from claiming up to the true boundary line. 581 P.2d 1000.

The same situation exists in this case. The fence was erected as a convenience to separate animals. It was run from tree to tree. It was not straight. (TR P.22) The fence was not permanent but was taken up in the Spring and put down in the Fall and maintained off and on for a period of 30 years as a means of separating animals, a "barrier" as it were for the convenience of the parties. It existed when the partition of the properties was made and the deed prepared. It still exists as fence posts. There is not one shred of evidence in the case that all of the parties involved ever treated it or agreed or acquiessed in the fact that it be treated as a boundary. In Ringwood v. Bradford, 2 Utah 2d., 119, 269 P.2d 1053 (1953), the Utah Supreme Court stated with regard to boundary by acquiescence:

> The theory under which a boundary line is established by long acquiescence along an existing fence line is founded on the doctrine that the parties erect the fence to settle some doubt or uncertainty which they may have as to the location of the true boundary and

> the (sic) compromise by agreeing to accept the fence line as the limiting line of their respective lands. The mere fact that a fence happens to be put up and neither party does anyting about it for a long period of time will not establish it as the true boundary. 269 P.2d 1054 citing Allenn v. Whitney, 116 Utah 267, 273, 209 P.2d 257, 260. See Peterson v. Johnson, 84 Utah 89, 34 P.2d 697. (emphasis added)

In the case of Fuoco v. Williams, 15 Utah 2d, 156, 389 P.2d 143 (1964), the court sets out the four elements necessary to the Plaintiff's proof where the Plaintiff would assert boundary by acquiescence. These elements are:

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

The Plaintiff in this case has failed to meet the elements required to show a boundary by acquiescence as set forth in the Fuoco case, supra. There is not evidence in the case that anyone other than J. Harold Mitchell ever considered the fence line to be a boundary line. In fact, the evidence says clearly that all parties used the fence merely as a means of separating their live-stock. There is no evidence that the Adams' family ever acquiesced in the fence line as a boundary or that the fence line was erected as a means of settling a boundary dispute between adjoining land-owners. In fact J. Harold Mitchell testified that he had never discussed with any of the grantees or anyone else who owned the property west of him the fact that he considered the fence to be a boundary. (TR. P. 57, Ln. 25-P. 58, Ln. 6) The evidence in the case does certainly not perponderate in favor of a finding of "acquiescence" in the line as the boundary for a long period of years by adjoining landowners

The whole concept of the doctrine of Boundary by Acquiescence presupposes the existence of adjoining landowners who rather than go through the expense of surveying the boundary line between their properties, agree to a boundary line and then construct

some monument which they use to show the boundary line between their properties and that they thus acquiess in said boundary for a long period of years until the point is reached where both parties are by operation of law precluded from claiming that the boundary that they have previously agreed to is not in fact the boundary which separates their property.

In the present case that situation simply does not exist. What we have in the present case is a situation where in fact the property is jointly owned by J. Harold Mitchell and William Adams. As a means of separating out to Mr. Mitchell his undivided interest in the properties, the parties agree that a deed will be prepared and that the property share of Mr. Mitchell will be deeded to him. Prior to the time that the deed is prepared, the livestock fence has been erected and used as a means of containing livestock, Mr. Mitchell's, for a period of at least one year. The deed is then prepared and presented to Mr. Mitchell as his portion of the property by Mr. Adams. Mr. Mitchell would then have us believe that while he objected to the description, he told Mr. Adams that as long as the fence was the property line, he would accept the deed and have it recorded knowing that the property described therein was set forth with a metes and bounds description. No other person was privy to this alleged conversation and Mr. William Adams is now deceased and his mouth is forever closed from denying the existence of this alleged agreement to which Mr. Mitchell appears willing to testify. Even were Mr. William Adams alive the whole purpose and intent of the parol evidence rule and the Statute of Frauds would preclude a party from testifying that such was the case. Clearly if the parties intended that the fence were to be the property line, such would have and should have been described in the deed. Subsequent purchasers are allowed to rely on the deed as recorded absent clear indications to the contrary. The fact that there existed for 30 years a livestock fence which was put up in the Spring and taken down in the Fall on a reasonably regular basis over a period of years would not be sufficient to put one on notice that said fence was the boundary because it was apparent that the whole purpose of the fence was a cattle guard to separate

cattle and sheep belonging to the parties using the property for grazing purposes. The fact that Mr. Adams is now dead and cannot even appear at trial to deny the existence of these alleged oral parol agreements that the property line is other than as described in the deed, argues for application of the parol evidence rule and the Statute of Frauds in this case. The clear evidence is that the parties accepted the metes and bounds description as set forth in the deed and Mr. Mitchell by accepting the deed and recording, based on the metes and bounds description, cannot now come in and claim that the boundary line is other than what is set forth in said deed.

CONCLUSION

Wherefore it is respectfully submitted that the court ruled properly in the case and that the judgment of the trial court holding that the property line between the properties is as described in the deed of September 15, 1949 should be affirmed and the Respondents should be awarded their costs incurred herein.

Respectfully submitted this 15th day of May, 1984.

SUMMERHAYS AND WELLS

By ______________________
Edward T. Wells
Attorney for Respondents

CERTIFICATE OF MAILING

I hereby certify, that on the 16th day of May, 1984, I mailed two copies of Respondent's Brief, postage pre-paid to:

Harold D. Mitchell
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