1966

Music Service Corporation, A Corporation v. Cleo Walton : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

MUSIC SERVICE CORPORATION,
a Corporation,
Plaintiff-Appellant,

vs.

CLEO WALTON,
Defendant-Respondent.

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE
DISTRICT COURT FOR SALT LAKE COUNTY
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IN THE SUPREME COURT OF THE STATE OF UTAH

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Case No.
10704

BRIEF OF RESPONDENT

Statement of the Kind of Case

This is an action quieting title to a strip of land located along the adjoining boundary lines of the parties' property.

Disposition In Lower Court

This case was tried to the court, judgment rendered in favor of defendant, and plaintiff takes his appeal.

Relief Sought on Appeal

Plaintiff seeks a reversal of the trial court's judgment with judgment in its favor as a matter of law ordered and a remand to the lower court for assessment of damages in favor of plaintiff and against defendant.

Statement of Facts

Defendant is unable to agree with the statement of facts as contained in plaintiff's brief and will therefore restate the facts with the purpose in mind of giving to the court a narrative statement accurately presenting the evidence on which the trial court relied in finding in favor of defendant and against plaintiff.

Parties to this action are the owners of adjoining tracts of land located at approximately 200 West 3900 South Street, Salt Lake County, Utah. The tract owned by plaintiff is located on the east and the tract owned by defendant is located on the west. Exhibit D-11, an aerial photograph, accurately shows the general location of the property with the building on it which is denominated P. L. Henderson & Sons, Inc., being the plaintiff's property, and the property with the wrecked cars on it is the defendant's property.

Defendant purchased the property in May, 1959 and since that time has occupied it continuously and has used the property which is in dispute during the whole period of time. (R. 110-A, R. 115) Shortly after Walton purchased his property, P. L. Henderson bought the property to the east, his actual purchase being in February, 1960. He occupied the property from February, 1960 to February, 1965. (R. 81) When Henderson purchased the property there was a fence along the west borderline of the property purchased. It was not a chain link fence, but was denominated as a hog wire fence. Henderson replaced the hog wire fence with the chain link fence. (R. 82) At the time he replaced the chain link fence there were two fences west of the barbed wire fence, one approximately 10 to 12 feet further west, and 18 feet further from that fence was a fence for Walton's dogs. (R. 82) Henderson removed the two fences that were west of the dog fence. In the spring of 1960 Mr. Henderson and Mr. Walton met at the property and Mr. Henderson took down the fences, filled in the property with a bulldozer, and installed the chain link fence. (R. 83) At the time of the installation of the chain link fence, Henderson claimed that the line on his property was 10 feet further west from the place where the chain link fence was erected. Walton did not agree that

Henderson owned that additional 10 feet. (R. 84) Henderson had no further use for the ground to the west of the chain link fence, and after the dispute Henderson placed the chain link fence in a place that was satisfactory to him. (R. 85) From the time the chain link fence was placed on the property, Walton occupied the property to the west of the chain link fence. The location of the fence was satisfactory to Walton. One of the old fences was on the line where Henderson ran his chain link fence. (R. 87) Defendant Walton testified that he was willing to have the chain link fence mark the boundary and that he considered it the boundary since it was placed in by Mr. Henderson. (R. 112)

The County Recorder's plats do not reveal any land separating the Walton land from the Henderson land. (See Exhibit D-10) The land purchased by defendant formerly belonged to one David Hansen and had been surveyed by a licensed surveyor and witness, Arnold W. Coon, in May, 1959. (R. 95 and 96) Mr. Coon prepared Exhibit D-12. Examination of various maps of the property, Mr. Coon testified, showed a confusion between the properties as to where the property lines existed. (R. 99) Coon's survey revealed that the present chain link fence is on the line of the fence which was most easterly of the

two fences identified by Henderson. The witness Coon testified that he had examined the old plats of the land between the two pieces of property, and the chain link fence and the westernmost fence, and that there was no deed to show ownership to that strip of land, that his examination went back four or five years. (R. 101 - 102) Coon further testified that the Henderson property would be approximately 3 feet wider when the chain link fence is used as its west boundary than the description contained in Henderson's deed. The strip between the two properties, when the Henderson property is measured from the east boundary line and the Walton property is measured from its west boundary line, is approximately 12 feet. (R. 103-104)

Witness Jean Hansen testified that she had been familiar with the property in dispute from 1948 until 1961, and no use was made of the property between the two fences during those years. (R. 106-107) She testified that there was sufficient distance between the two old fences to lead a horse through, "but nothing but a horse went through as long as I remember." (R. 107) She further testified that the strip was completely obstructed by vines and bushes in 1961. Mrs. Hansen was present when the old fences were taken out and the new fence placed there by Mr. Henderson. (R. 108)

On the 13th of February, 1964 P. L. Henderson & Sons, Inc. quit-claimed to White Investment Company, Inc. a strip of ground immediately west of the chain link fence, 9.24 feet in width. (See Exhibit P-4) On the 14th of December, 1964 M. Kenneth White and Ada Marie White, his wife, obtained a deed from C. W. Wilkins and Lucy A. Wilkins, his wife, covering a strip of land 11.48 feet wide, which appears to be along the area now in dispute. (See Exhibit P-1) The description in the Wilkins' deed, however, refers to old fence lines and the testimony is without dispute that on the 14th of December, 1964, the date the deed bears, there were no old fence lines in the area where the property is locatd which is disputed. The old fences which had been in prior to 1960 had been removed, the new chain link fence constructed, and the area filled in and was being used by defendant Walton.

Neither P. L. Henderson nor Wilkins, according to the evidence, have any chain of title to the land which is in dispute. Court found that at the time of the deed by Wilkins to White, Wilkins did not own the property described and had no chain of title to the property giving any color of title to Wilkins, and that the Wilkins' deed is what is denominated as a "wild deed". The court found that P. L. Henderson and defendant Cleo Walton had agreed that the

chain link fence built by Henderson would mark the boundaries between their properties and each has occupied to the chain link fence since the time it was constructed, that because of the P. L. Henderson-Walton agreement that the chain link fence would mark the boundary line of the property, the quit claim deed from Henderson to White Investment did not convey any property since Henderson had no property in the land west of the chain link fence. (See Findings of Fact) The court then quieted title to Walton in the strip of land west of the chain link fence, which is described and given a meets and bounds course in the Conclusions of Law and in the Decree of the court.

The court further found that the plaintiff had suffered no damages by reason of Walton's occupancy of the land to the west of the chain link fence. From this judgment the appeal is taken.

ARGUMENT

Point I

PLAINTIFFS HAVE NOT ESTABLISHED ANY TITLE TO THE STRIP IN DISPUTE

The evidence on which the trial court could rely shows that since 1948 the strip of land which is approximately 12 feet wide and which lies east of the meets and bounds of defendant's ground and west of the meets and bounds description of plaintiff's ground, was not occupied or used until Henderson, plaintiff's predecessor in interest, removed the fences and put up his chain link fence. Since that time in 1960 defendant has occupied and used the strip. (R. 106-107) No deed to the strip was of record and the County Recorder's plat does not show any gap between the parties' adjoining property lines. (See Exhibit D-10) White, predecessor in interest to plaintiff, attempted to establish a right to the strip by obtaining a deed from C. W. Wilkins and Lucy A. Wilkins describing a strip 11.48 feet wide in December, 1964, (See Exhibit P-1) and also obtained a quit claim deed from Henderson to the strip on the 13th of February, 1964. Neither Wilkins nor Henderson had any title to the strip as disclosed by their deeds. (R. 101-102)

In 1960 when Henderson went on the property, the dispute as to where the west line of his property ran as it related to the east line of Walton's property, arose. The testimony is without dispute that Henderson and Walton met in the vicinity of the property line and in the disputed property and Henderson made his claim, Walton disputed the claim, and they agreed that the chain link fence should be run in its present location. This divided the 12 foot strip, 3 feet to Henderson and 9.4 feet to Walton. Since 1960 Henderson occupied to the chain link fence on the east, Walton occupied to the chain link fence on the west.

With no record title and no title by reason of adverse possession, plaintiffs cannot and have not established any title to the strip of land.

Point II

DEFENDANTS HAVE ESTABLISHED TITLE BY BOUNDARY LINE AGREEMENT

The evidence indicates that the descriptions of the adjoining properties leave a strip approximately 12 feet in width between the plaintiff's and defendant's property. This strip is not shown on the County Recorder's plats and there was no chain of title to the strip presented for the trial court's consideration.

Plaintiff's predecessor in interest, Henderson, and defendant Walton divided the 12 foot strip, 3 feet to Henderson and 9 feet to Walton, and along this dividing line Henderson constructed the chain link fence.

This boundary line by agreement is completely undisputed. Henderson testified that he removed all the old fences and put in the chain link fence, and therefore he cannot claim that this line was not a satisfactory property line. Walton consented and so testified to the Henderson fence construction. He has continued since 1960 to the time of the filing of the action and to the present time in possession so that there is a boundary line by agreement clearly marked by a fence which has been recognized for a number of years.

The earliest American case that respondent has been able to find which discusses the principle here involved was decided by the Superior Court of Delaware in the fall session of 1847. It is entitled *James Lindsay vs. Peter Springer, 4 Del. 547 (Harrington's Report)*. It is exactly in point on the fact that the adjoining parties discovered a strip of land between their two lines which was not covered by the deed of either. They agreed to divide the strip and marked the line, moving their fences on to the line so agreed upon. Later one of the parties attempted to renege on this agreement, saying that the surveyor had made a mistake and that he would not abide by the new fence line. The defendant argued that because the establishment of the boundary line was by parol agreement, it would not be conclusive unless it was acquiesed in by the parties for a period of at least twenty years. The court, in disposing of this contention, stated as follows: (P. 550)

> "If a written agreement were made, under circumstances similar to those which existed in the present case, to establish and abide by a boundary line, which is immediately located by the parties, pursuant to such agreement; no doubt the parties would be bound by it, as well after the lapse of one year, as of twenty years. But as the contract in such cases is not required to be in writing, (*Boyd's Lessee vs. Graves, 4 Wheat. 517; Kip vs. Norton, 12*

> *Wend. 130)* an express parol agreement fairly made in a like case, by virtue of which the boundary is established and immediately followed up by possession, would have the same effect, of precluding the parties of afterward controverting it. The lapse of twenty years is merely matter of evidence to establish a particular fact."

A subsequent case reviewing and reciting the law on boundary lines is *Farr vs. Woolfolk, 118 Ga. 277, 45 SE 230.* In this case an argument was made that the statute of frauds prohibited the establishment of a boundary line by parol agreement between adjacent property owners. The Supreme Court of Georgia held otherwise and in disposing of this question stated as follows:

> "This rule has been thus stated: 'Where the boundary line between two estates is indefinite or uncertain, the owners may by parol agreement establish a boundary line and the line thus defined will afterwards control their deeds, notwithstanding the statute of fraud.' *4 Am. and Eng. Enc. L. (2d Edition).* See, also, *5 Cyc. 931.*"

The earliest case respondent has discovered exactly in point in the western jurisdictions is *Cavanaugh vs. Jackson, 91 Cal. 580, 27 P. 931.* This case involved a parol agreement to establish a dividing line between adjoining plots. The Supreme Court of

California, P. 931, stated the rules in the following language:

> "It is well settled that where the owners of contiguous lots by parol agreement mutually establish a dividing line, and thereafter use and occupy their respective tracts according to it for any period of time, such agreement is not within the statute of frauds, and it cannot afterwards be controverted by the parties of their successors in interest."

The earliest Utah case which discusses the principles involved in boundary lines by agreement or acquiescence is *Holmes vs. Judge, 31 U. 269, 87 P. 1009*. In this case there was no evidence concerning the original parties' intentions or agreements at the time the boundary line fences and improvements were constructed. The Supreme Court of Utah discussed at some length the fact that a party may agree as to the boundary line of their properties, and if possession is taken immediately and monuments erected to mark the boundary line, it will govern the true property line. It held that long acquiescence in such lines might establish an agreement where other evidence does not exist to establish it. Held that the line thus shown by improvements and fence and acquiesced in by the owners for a long period of time, was the true boundary. A subsequent Utah case,

Young vs. Hyland, 37 U. 229, 108 P. 1124, the Utah Supreme Court reaffirmed the principles announced in *Holmes vs. Judge, supra*, and citing two other Utah cases, *Moyer vs. Langton, 37 U. 9, 106 P. 508*, and *Rydalch vs. Anderson, 37 U. 99, 107 P. 25*, stated the principle applicable in the following language: (P. 234)

> "In those cases the doctrine is recognized, where the owner of adjoining lands occupy their respective premises up to a certain line which they recognize and acquiesce in as their boundary line for a period of time, they and their grantees will not be permitted to deny that the boundary line thus recognized is the true line of division between their properties."

In the case of *Rydalch vs. Anderson, 37 U. 99, 107 P. 25*, this court discussed the question of whether or not an agreement to establish a boundary line was binding upon the parties and cited several authorities where a long period of time had elapsed. The court then at Page 109 cited the following rule:

> "In a number of jurisdictions it seems to be well settled that where a boundary line is established by agreement of two adjoining owners title up to the line thus fixed may be acquired by estoppel, as well as by adverse possession. Where joining owners agree upon a boundary line and enter into possession and

> improve the land according to the line thus agreed upon, the parties will be precluded from afterwards disputing that the line thus agreed upon is a true one, even if the statute of limitations is not run."

In ruling upon the facts in the case, the Utah Supreme Court stated: (P. 111)

> "Under the facts in this case we think the parties had a perfect right to agree upon a boundary line between their claims as they did. They also had the right to readjust this boundary line when the section line was established which in view of the recitals contained in the first patent referred to, issued to William C. Rydalch, must have been at least some time prior to 1871. It must therefore be assumed that both Mr. Kimball and Mr. William C. Rydalch knew that the section line had been established and where it was, but that in view of the improvements they had made, or for some other good reason, concluded to continue the boundary line marked by the fence as the permanent boundary line between their lands. By doing so they did not contravene any public statute, nor offend against any public policy, so far as we are aware."

This court reviewed the law of the state in the case of *Tripp vs. Bagley, 74 U. 57, 276 P. 912*, and recognized that the law of boundary lines established by adverse possession or acquiescence are as binding upon the parties as boundary lines conforming to

meets and bounds descriptions in deeds. In 1951 the Court in an extensive review of all of the prior decisions, reaffirmed the principles set forth. In *Brown vs. Milliner*, 120 U. 16, 232 P. 2d 202, it stated the law of the State of Utah in the following language: (P. 24)

> "A review of the Utah cases involving boundary disputes reveals that it had long been recognized in this state that when the location of the true boundary between two adjoining tracts of land is unknown, uncertain or in dispute, owners thereof may, by parol agreement, establish a boundary line and thereby irrevocably bind themselves and their grantees."

A recent court decision restates the prior law of the state as outlined in the cited decision. It is *Ekberg et ux* vs. *Bates et ux*, 121 U. 123, 239 P. 2d 205. The court reiterated the prior holdings that owners of adjoining tracts of land whose true boundary lines are unknown, in dispute or uncertain, may by parol agreement establish boundary lines which are binding on themselves and their successors in interest.

The court has in three very recent cases had occasion to reconsider the boundary line law of the State of Utah as it is affected by parol agreements and acquiescence. Those cases are *Harding* vs. *Allen*, 10 U. 2d 370, 353 P. 2d 911; *Nunley* vs. *Walker*, 13 U.

2d 105, 369 P. 2d 117; and *King* vs. *Fronk*, 14 U. 2d 135, 378 P. 2d 893.

This court held that upon showing a visible, persisting, alleged acquiesced-in boundary over long period of time, party assailing boundary must show lack of agreement between neighbors, establishing the line on the visible marked boundary.

Respondent has been unable to find any law inconsistent with the principles which he seeks to have applied by this Court. They are the principles applied by the trial court in the decision here on appeal.

Conclusion

It is respectfully submitted that the judgment of the trial court should be affirmed and the court should award respondent his costs on appeal.

Respectfully submitted this ..... day of.....

....., 19.....

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