

1972

Keith J. Lane And Lea N. Lane : Brief of Respondents

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IN THE SUPREME COURT OF THE STATE OF UTAH

**KEITH J. LANE and
LEA N. LANE,**

Plaintiffs and Appellants,

vs.

**RAISA W. WALKER and CYRIL
F. WALKER;** and all other persons
unknown claiming any right, title,
estate or interest in or lien upon the real
property described herein adverse to the
Plaintiff's ownership, or clouding their
title thereto,

Defendants and Respondents.

Case No.
12,868

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

	Page
STATEMENT OF NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
STATEMENT OF POINTS	3
THE FACTS OF THIS CASE CLEARLY ESTABLISH THE NECESSARY ELEMENTS TO FIND THAT THE FENCE CONSTITUTES A BOUNDARY BY ACQUIESCENCE.	3
ARGUMENT	3
CONCLUSION	6

CASES CITED

BROWN v. MILLINER, 120 Utah 16, 232 P. 2d 202	4-5
EKBERG v. BATES, 239 P. 2d 205, 121 Utah 123	6
FUCCO v. WILLIAMS, 18 Utah 2d 282, 421 P. 2d 944	3
HOLMES v. JUDGE, 31 Utah 269, 87 P. 1009..	5
MOTZKUS v. CARROLL, 7 Utah 2d 237, 322 P. 2d 391	4

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BRIEF OF RESPONDENTS

STATEMENT OF NATURE OF CASE

This action was filed by appellants to obtain title to land occupied by respondents for more than 48 years, divided by a fence, and improved by respondents over the last 30 years. The respondents counter-claimed

contending that right to the property had been acquired by long occupancy and acquiescence of adjoining land owners for many years.

DISPOSITION IN LOWER COURT

Respondents prevailed, the court holding that respondents had a right to possession, but did not quiet title in their names.

RELIEF SOUGHT ON APPEAL

Respondents seek to have the decision of the lower court affirmed.

STATEMENT OF FACTS

The facts as stated by appellants are essentially correct. The parties have adjoining residence, the respondents' home having been erected some 30 years ago and prior to the home occupied by appellants. Some 25 feet identified as property "x" on plaintiffs' Exhibit 1 is disputed. The area includes driveway, clothes line, trees and shrubs. A fence was erected before 1922, (TR. page 33, line 25 and page 34, line 2) and was never questioned by adjoining owners until 1940, (TR. page 39, lines 13-15) at which time a predecessor to appellants' disputed the location of the fence and subsequent arguments ensued but no action was taken until the present action was filed in September of 1971.

STATEMENT OF POINTS

THE FACTS OF THIS CASE CLEARLY ESTABLISH THE NECESSARY ELEMENTS TO FIND THAT THE FENCE CONSTITUTES A BOUNDARY BY ACQUIESCENCE.

ARGUMENT

As stated by appellants on page 8 of his brief, this Court, in *FUOCO v. WILLIAMS*, 18 Utah 2d 282, 421 P. 2d 944, stated the four elements essential to finding a boundary by acquiescence are:

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

I will treat each of these elements as they apply to the present case.

- (1) Occupation up to a visible line marked by monuments, fences or buildings:

The evidence is undisputed that since 1922, when Mrs. Walker first remembers the fence existing in its present location, there has been a visible line and there has been continuous, uninterrupted occupancy by the

respondents or their predecessors in interest. That such line is still identifiable is established by respondents' surveyor in Exhibit 12 which identifies each post.

(2) Mutual acquiescence in the line as the boundary.

The fence in question was in place in 1922 and no one raised any objection as to its location until 1940. (TR. page 64, lines 4 and 5) After those mere verbal objections nothing was done to assert the claim by affirmative action until 1971. Thus, we have 18 years of acquiescence with no objections, and 31 years of acquiescence by failure to act after making claim to the property. Either action is sufficient to show acquiescence.

The case of **MOTZKUS v. CARROLL**, 7 Utah 2d 237, 322 P. 2d 391, held:

“Where party by evidence establishes a long period of acquiescence in a fence as marking boundary line between two tracts, he is not required to also produce evidence that location of true boundary line was ever unknown, uncertain or in dispute.”

It is further held such long acquiescence

“Gives rise to presumption that true boundary line was in dispute or uncertain, and places burden of producing evidence that there was no dispute or uncertainty but that true boundary line was known to respective owners or party claiming that such was the fact.”

Also, in **BROWN v. MILLINER**, 120 Utah 16, 232 P. 2d 202, it was stated that dispute or uncertainty

regarding true boundary line will be implied from the party's long acquiescence.

The property referred to as "y" and "x" has been conveyed by plaintiffs predecessors in interest by a separate Quit-Claim Deed, (TR. 76-77, lines 1-6) thus admitting a cloud upon the title yet failing to take any affirmative action to correct the same.

Mrs. Walker's testimony is that the property was used by her grandmother for pasturing a cow and growing berries (TR. page 33, line 12), with the inference that the fence has been in place much longer than the 49 years recalled by Mrs. Walker. I submit it becomes difficult to locate living witnesses when such periods are involved. Even after the question of location arose in approximately 1940, the appellants still took no affirmative action, but acquiesced in respondents' occupancy for another 31 years.

No testimony was offered by either party as to the original intent in erecting the fence in question. Therefore, this case would be governed by the rule set forth in **HOLMES v. JUDGE**, 31 Utah 269, 87 P. 1009, and followed in numerous other decisions as set forth in **BROWN v. MILLINER** (supra) page 207. This rule is that in the absence of evidence as to an express agreement as to the location of a boundary, if adjoining owners have occupied land to a visible boundary for a long period of time the law will imply an agreement fixing the boundary.

(3) Acquiescence for a long period of time.

In *EKBERG v. BATES*, 239 P.2d 205, 121 Utah 123, the court held that approximately 8 years was sufficient time to acquire property by acquiescence.

“The doctrine of ‘boundary by acquiescence’ looks to settling of titles under circumstances where claimants have slept on their claimed rights for a long time, presently assert those rights for one reason or another”

“This idea is based on the concept that we must live together in a spirit justifying repose or fixation of titles where there has been a disposition on the part of neighbors to leave an ancient boundary as is *without taking some affirmative action to assert rights inconsistent with evidence of a visible, long-standing boundary.*” (Italics for emphasis).

Thus, it would appear that there is no question but what a sufficient length of time expired in the instant case to have established a boundary by acquiescence.

(4) By adjoining owners of land:

This is not disputed and, therefore, no comment need be made to establish this element.

CONCLUSION

Long acquiescence in a visible boundary by the parties and their predecessors without testimony as to

what was intended when fence was erected gives rise to an implied agreement that the fence was a boundary. Secondly, after the verbal dispute by appellants in 1940, 31 years elapsed before legal action was taken. Either period of time is sufficient to establish the fence as a legal line.

Respectfully submitted,

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