1989

Van Dyke v. Chappell : Brief of Respondent

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

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WELBY J. VAN DYKE, Plaintiff and Respondent, -vs- MARION GLEN CHAPPELL and DEMA RUTH CHAPPELL, Defendants and Appellants.	Case No. 890133 Priority 14 b

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BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT OF THE
SIXTH JUDICIAL DISTRICT COURT OF WAYNE COUNTY
HONORABLE DON V. TIBBS, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

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NATURE OF PROCEEDINGS

The nature of the case, the course of proceedings and disposition of the case in the Sixth Judicial District Court are as stated in the Brief of the Appellant.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the record support the findings of the District Court that an existing fence observed, acquiesced in and repaired by the parties for a period of more than 77 years become a property boundary by acquiescence?

2. Does the status of a boundary line fence by acquiescence change because the fence also controls livestock of adjoining landowners?

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS

This appeal does not present any constitutional provision, statute, ordinance, rule or regulation the interpretation of which would be determinative of the issues of this case.

STATEMENT OF FACTS

Van Dyke is the owner of real property located in Wayne County, State of Utah, the boundary of which is the subject matter of this action. Van Dyke's property is bounded by an ancient fence on the south.[1]

Chappells are the owners of real property located south of the Plaintiff's property and bounded on the north by the common ancient fence between the respective tracts.[2]

The Chappells caused their property to be surveyed in June of 1987. Chappells' surveyor concluded the ancient fence was not on the record boundary between the properties but encroached upon Chappells' property[3] causing a dispute which resulted in this litigation.

The evidence is uncontradicted that the fence between the

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[1]Exhibits:
6 & 19 - Deeds to respective parties
8, 9, 17 - County plats and survey plats

[2]Exhibits:
6 & 19 - Deeds to respective parties
8, 9, 17 - County plats and survey plats

[3]Exhibit 17 - Surveyor's plat
Tr. 137, 138 (Testimony of Rodney Torgerson, Surveyor)

parties was constructed of permanent cedar posts and poles about the year of 1911.[4] The fence was built as a joint fencing project between Benjamin Turner, a predecessor in title to Van Dyke and by George Chappell, a predecessor in title to the Chappells.[5] The fence between the properties of Van Dyke and Chappells extends to the east and separates properties of other owners on the south of the fence from properties on the north of the fence;[6] the fence likewise extends to the west beyond the property of Chappells and divides properties owned by others (Max Chappell) on the south of the fence of Van Dyke who owns property on the north. The fence continues on a virtually due west course beyond the properties of these parties, dividing lands of other proprietors on the north and south, respectively.[7] The fence continues to run to the west as outlined for a distance of approximately three miles across

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[4]Tr.131, Glen Chappell, age 80 (father of Appellant)
Tr.131, L3: "As I can tell for sure. It was built about 1911."
Tr.18, 19: Van Dyke, age 78, observed maintained integrity of fence for 64 years.
Tr.42,43: Laverl Torgerson, age 78, observed maintained integrity of fence for 69 years.
Tr.121: Marion Glen Chappell, age 37 - fence there during his entire lifetime.
Tr.5: Rene Van Dyke, age 33 - observed maintained integrity of fence for 25 years.

[5]Tr.127, L 21.

[6]Tr.55; Tr.63,65; See Exs 14, 15-16 (aerial photos)

[7]Tr.40; Tr.55; Tr.61-62; See Exs. 14, 15-16.

the Lyman-Loa valley.[8] The line in question is the center line of the section (§9) running east and west.*

The fence in dispute was repaired and improved by replacing part of the poles with net wire in the year of 1933 or 1934.[9] Van Dyke's predecessor in interest, Benjamin Turner, furnished the materials to go into the fence and the owners of the property south of the fenceline furnished the labor for the fence repair and neither the alignment nor the location was changed.[10]

The field notes of a 1966 survey authorized by the Bureau of Land Management relied heavily upon a survey of 1935. The field notes show that none of the section corners of Section 9, Township 28 South, Range 3 East, Salt Lake Base and Meridian were in place. The surveyors relied upon the fences in place to re-establish the corners and quarter corners. One of the fences relied upon was a west extension of the fence which is the subject matter of this litigation.[11]

The parties to this action and their predecessors have acquiesced in the boundary line fence for a period of at least

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[8]Tr.39, 40; Tr. 55; Exs. 14, 15, 16.
*Exs. 7, 8, 9 and 17.

[9]Tr.22; Tr.44;Tr. 51.

[10]Tr.22; Tr.44; Tr.51.

[11]Ex. 10, Field Notes, p.336: "Point for the 1/4 sec. corner of secs. 8 and 9 as determined by old property fence cor. bears E., W. and N., and it's believed to be a perpetuation of the original cor. position."

77 years. The Chappells have recognized Van Dyke's ownership in the property immediately north of the boundary fence.[12]

In the year of 1984 Chappells secured permission from Van Dyke to build a corral upon property north of and bounded on the south by the fence.[13] Chappells removed the improvements when requested to do so and paid Van Dyke rent for the use of the land north of the fence.[14]

Van Dyke and his predecessors in title have had the continuous use and occupancy of the real property north of the old fenceline (T.19-24). Likewise, Chappells and their predecessors in title have had the continuous use of the property south of the fence (T.103 & 125-130). (This paragraph restates and agrees with the statement made by Appellants on page 5 of their Brief).

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[12]Tr.27, 28, 45, 46.
Ex. 13: Letter from Marion Chappell to Van Dyke:
"Enclosed please find your check. I am sending it to you as payment of rent on your property that I have been using for the past three years. Also as payment for damage to your property.
You sent a message that you had changed your mind again and that I could leave the corrals. . .
I will use my own property from now on. . .
The only reason I asked you for permission to build them at all was I hoped I could buy another acre from you. You said you would think about it everytime I asked you. June 8th you said NO. The corrals will be torn down as soon as I can."

[13]Ex. 13. See Note 12.

[14]Tr.27,28. Witness: Welby Van Dyke
Ex.13:

SUMMARY OF ARGUMENT

The Trial Court correctly ruled that an ancient fenceline in existence for 77 years was acquiesced in by the adjoining proprietors and became the boundary as a matter of law.

ARGUMENT

POINT I

THE EXISTING FENCE HAS BEEN OBSERVED, ACQUIESCED IN, REPAIRED AND MAINTAINED BY THE PARTIES FOR A PERIOD OF 77 YEARS PRIOR TO THE EXISTING BOUNDARY DISPUTE.

In this case, the Trial Court heard the evidence offered, made Findings of Fact and Conclusions of Law (R.55-62; copies are attached to Appellants' Brief) finding and concluding that the fenceline is the boundary between the parties rather than the new survey line. The decision of the Court was based on the doctrine of boundary by acquiescence.

In Staker vs. Ainsworth, 125 Utah Adv.Rep. 25, (Opinion filed January 8, 1990) Justice Durham outlined the doctrine:

> Historically, the doctrine of boundary by acquiescence included four factors: "(1) occupation up to a visible line marked by monuments, fences, or buildings, (2) mutual acquiescence in the line as a boundary, (3) for a long period of time (4) by adjoining landowners." Goodman vs. Wilkinson, 629 P2d 447, 448 (Utah 1981); 12 Am.Jur.2d Boundaries, §85 (1964 & Supp. 1989). In Halladay vs. Cluff, 685 P2d 500 (Utah 1984), this Court added a fifth element to this list of factors: "objective uncertainty" as defined in that case.

To the extent that Halladay vs. Cluff, and its progeny

added the fifth requirement of "objective uncertainty" that requirement was overruled by Staker.

The facts in this case are to be reviewed in the light most favorable to the Findings of Fact made by the District Court. Valley Bank & Trust Co. vs. First Security, 538 P2d 298. This Court has held the standard of review in connection with a Finding of Fact made by the Trial Judge requires the Finding to be upheld even though the Supreme Court may disagree with him. (Id.)

To demonstrate the Findings are supported by the evidence, the Respondent's Statement of Facts has been documented to the transcript, exhibits and record. We briefly review the facts here in the light of the four factors required to be proved by Van Dyke.

1. Occupation up to a visible line marked by monuments, fences or boundaries.

The fence was built prior to 1911 and permanent poles and posts installed by Benjamin Turner, predecessor in title to Van Dyke and by George Chappell, predecessor in title to Chappells. The fence was repaired and improved by replacing part of the poles with net wire in the year of 1933 or 1934.

Van Dyke's predecessor in interest, Benjamin Turner, furnished the materials to go into the fence and the owners of the property on the south (predecessors to Chappells) furnished the labor for the fence repair and neither the alignment nor the location was changed.

2. Mutual acquiescence in the line as a boundary.

Van Dyke and his predecessors raised livestock on the property on the north. The livestock included cattle, sheep, turkeys, chickens and goats. They fed sheep in the disputed area and used the disputed area for grazing, corrals and for the maintaining of livestock.

Chappells used the property on the south of the fenceline for the raising of livestock for farming and for other purposes.

We agree with Appellant's statement on page 5 of their brief:

> Van Dyke and his predecessors in title have had the continuous use and occupancy of the real property north of the old fenceline (T.19-24). Likewise, Chappells and their predecessors in title have had the continuous use of the property south of the fence (T.103 & 124-130).

3. For a long period of time.

Although the term "long period of time" to establish boundary by acquiescence is not set specifically by Utah decisions, it is provided in the case of Hobson vs. Panguitch Lake, 530 P2d 792 (Utah 1975) that only under unusual circumstances would a common law prescriptive period of less than 20 years be sufficient to establish a boundary by acquiescence.

The third factor is met by the evidence in this case showing the fence to have been in existence for substantially more than 20 years. The fence was erected about the year of 1911 and was repaired and extended in the year of 1933 or 1934. Therefore, more than 77 years have elapsed since the original

construction of the fence and more than 53 years have elapsed since the repair and extension. The time period is computed to the year of 1988 which is the year this action to quiet title was filed. Marian Glen Chappell, Appellant, testified at trial concerning the ancient fence:

Tr. 121: By Mr. Olsen:

Q Marion, how long have you been acquainted with the particular property where your home is now located?

A Oh, probably ever since I was big enough to walk.

Q How old are you now?

A 37.

Q During your entire lifetime has the fence been there?

A Yes. It has.

4. By adjoining landowners.

Van Dyke and Chappells are adjoining landowners as shown by the deeds of the parties, Exs. 6 & 19 and the plats which are Exhibits 8, 9 and 17. The fact is also acknowledged by all witnesses testifying.

POINT II

THE STATUS OF A BOUNDARY LINE FENCE IS NOT CHANGED BY THE FACT THE FENCE ALSO CONTROLS LIVESTOCK OF ADJOINING LANDOWNERS.

Appellants suggest that since both parties and their predecessors have had livestock from time to time which had to be controlled that the fence was built to control livestock and was never intended as a boundary fence.

This is not the evidence. The evidence is that the fence was built about 1911 and repaired and improved in 1933 or 1934.

The exact agreement between the original builders cannot be proved because they are deceased. It is suggested that Van Dyke has the burden of proving boundary by agreement or his cause of action fails. This is an incorrect view of Utah law. The doctrine of boundary by acquiescence and burden of proof of the parties is outlined by the Court in Motzkus vs. Carroll, 7 U2d 237, 322 P2d 391, pg. 396 (Utah 1958). Justice Wade, writing for the Court, stated:

> [It] is clear that where a party by evidence establishes a long period of acquiescence in a fence as marking the boundary line between two tracts, he is not required to also produce evidence that the location of the true boundary line was unknown, uncertain or in dispute. The development of a long period of acquiescence in a fence as marking the boundary line between the two tracts by the respective owners gives rise to a presumption that the true boundary line was in dispute or uncertain, which places, at least, the burden of producing evidence that there was no dispute or uncertainty but that the true boundary line was known to the respective owners on the party claiming that such was the fact. Where, as here, there is (no) evidence on that question other than the proof of acquiescence in the fence as marking the boundary line for the required long period of time the trial court must find that the boundary line by acquiescence has been established. (Emphasis added)

POINT III

A SHOWING OF OBJECTIVE UNCERTAINTY REGARDING THE TRUE BOUNDARY LINE IS NOT REQUIRED BY UTAH LAW.

Although extensive proof was directed to this point below, the requirement of "objective uncertainty" added by Halladay vs. Cluff, (supra) has been overruled by Staker vs. Ainsworth, (supra). Therefore, this point is not pursued.

CONCLUSION

Van Dyke has met his burden of proving the ancient fenceline between the parties was a boundary by acquiescence. He has shown (1) occupation by the parties and their predecessors up to a marked boundary fence; (2) mutual acquiescence in the fenceline as a boundary; (3) for a long period of time which is in excess of 77 years; and (4) that the acquiescence was by adjoining landowners and their predecessors.

The Trial Court correctly so ruled and the fenceline is the boundary line between the parties as a matter of law.

Van Dyke, therefore, respectfully requests that the Trial Court be affirmed.

DATED this 9th day of March, 1990.

Respectfully submitted,

OLSEN, McIFF & CHAMBERLAIN

By _____
Tex R. Olsen

CERTIFICATE OF SERVICE

SERVED the foregoing Brief of Respondent upon Appellants by hand delivering to their attorney, Mr. Marcus Taylor, Labrum, Taylor & Blackwell, Attorneys at Law, P. O. Box 728, 108 North Main, Richfield, Utah (84701) four (4) full, true and correct copies thereof on this 9th day of March, 1990.