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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 1983

Clerk, Supreme Court, Utah

IN THE [illegible] COURT

[illegible] OF UTAH

[illegible] Appellants,

v.   Case No. 19381

[illegible]

[illegible] -Respondents.

[illegible]'S BRIEF

[illegible] Fifth Judicial District Court

[illegible] County,

[illegible] Burns, District Judge, Presiding

* *

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Utah Supreme Court [illegible]:

Anderson v. Johnson, 12[illegible] Utah [illegible], [illegible] 1073 (195[illegible]) . . . .

Bench v. Pace, [illegible]38 P.2d [illegible] (Utah [illegible]) . . . . [illegible]

Brown v. Milliner, [illegible] Utah [illegible], [illegible] P.2d 232 (1951) . . . . [illegible]

Carnesecca v. Carnesecca, 572 P.2d 708 (Utah 1977). . . . .

Ekberg v. Bates, 2[illegible] P.2d 2[illegible] (Utah 195[illegible]) . . . [illegible]

Grieve v. Howard, 54 Utah 2[illegible], [illegible] P. 4[illegible] (1919) . . . . [illegible]

Hobson v. Panguitch [illegible] Corp., [illegible] P.2d 792 (Utah 197[illegible]). . . . . [illegible]

Jensen v. [illegible] Corp. of the Church of Jesus Christ of Latter-day Saints, 565 P.[illegible] (Utah 197[illegible]). . . . .

Kesler v. Rogers, [illegible] P.2d [illegible] (Utah [illegible]) . .

Lane v. Walker, 29 Utah 2d [illegible], [illegible] P.2d 1109 (197[illegible]). . . . . [illegible]

Madsen v. [illegible], 6[illegible] P.2d [illegible] (Utah 198[illegible]) . . . [illegible]

Maxfield v. Sainsbury, [illegible] Utah [illegible], [illegible] P.2d 122 (19[illegible]) . . . . [illegible]

Miller v. Livingston, [illegible] Utah [illegible], [illegible] P. 338 (1906) . . . . [illegible]

Morrison v. Walker Bank and Trust Company, 11 Utah 2d 416, 360 P.2d [illegible] (196[illegible]) . . .

Neeley v. Kelsch, 600 P.2d [illegible] (Utah [illegible]) . . . [illegible]

Statutes:

Utah Code Annotated, [illegible], [illegible] . . . . ,

Utah Code Annotated, [illegible], [illegible]
as amended . . . .

Other Sources:

McCormick, *Evidence* [illegible] . . . .

II Wigmore, *Evidence* (3d [illegible]) . . . .

[illegible] NATURE OF THE CASE

[illegible] determine the location of the [illegible] property owned by Plaintiffs and [illegible] Defendants.

[illegible] LOWER COURT

[illegible] was tried to the Court sitting without a [illegible]

[illegible] of the parties, prior to trial, any water [illegible] exist were not in dispute in this [illegible] the Court made no finding in reference to the [illegible] water rights of the parties, if any. (R. 67).

[illegible] stipulation of the parties, all claims between [illegible] and defendant, [illegible] Finance Company were [illegible] prior to trial. (R. 36).

Pre-Trial Order [illegible] dismissed the [illegible] of Defendants, [illegible] and Dell Stewart Family [illegible] against Plaintiffs. (R. 36).

[illegible] stipulation of the parties, the crossclaims of [illegible], [illegible] and Dell Stewart Family Trust against [illegible], were settled by agreement of the [illegible] prior to trial. (R 36).

[illegible] agreement of the parties prior to trial, both [illegible] their respective damage claims. (Tr. 4). The [illegible] trial was a determination of the boundary [illegible] the adjoining land owners.

The Court entered judgment from which this [illegible] taken declaring the [illegible]undary [illegible] between [illegible] defendants' properties t[illegible] the survey line [illegible] upon a 1949 [illegible]eed between William L. Adams [illegible] Mitchell.

RELIEF SOUGHT 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 [illegible] located in Iron County, State of Utah. The property [illegible] is the subject matter of this litigation [illegible] strip of property in which both plaintiffs and defendants claim ownership.

The properties of the parties in interest were originally part of a 120 acre tract of mountain [illegible] land, more particularly described as follows:

> The West 1/2 of lot 4, a[illegible] of lot [illegible], of S[illegible]
> and West 1/2 of lot [illegible], all of [illegible],
> Township 36 South, [illegible] West, Salt Lake [illegible]
> Meridian. (R36).

William L. Adams, defendants' predecessor in interest, [illegible] an undivided 44 63 interest; [illegible]. Harold Mitchell, [illegible] predecessor in interest, owned an undivided [illegible] and the Lyman family, which is not involved in [illegible] litigation, owned an undivided [illegible] interest. [illegible] 6).

The owners of the tract subsequently decided to [illegible] the property. A log fence was constructed by the [illegible] Adams to divide the Lyman property on the east [illegible] tract from the remainder owned by Mitchell [illegible]. That is the fence which now separates the [illegible] property (hereinafter referred to as "the [illegible]") from property to the east. That fence was [illegible] prior to 1943. (Tr. 6, 41).

In 194[illegible], the owners determined to partition the [illegible] 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 the westerly 19 acres of the property which remained after [illegible] 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 [illegible]) was constructed by Mr. Mitchell. (Tr. 54-55, 61-62).

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

belong to Mr. Mitchell. (Tr 54-55, 61-6[illegible]). 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 lot fence. (Tr. [illegible]).

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 fence was accurate enough for him to determine the boundary. (Tr. [illegible]). 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 [illegible], 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 lot fence. Mr. Mitchell replied that he did not mind so long as the description in the deed did not then or ever require moving the wire fence. Adams then agreed that it would not. (Tr. [illegible]-61). The deed was never changed because neither party thought it significant.

[illegible] with. (Tr. [illegible]-66).

[illegible] allowed plaintiffs to proffer evidence [illegible] 5, [illegible] of Civil Procedure, the trial court [illegible] the testimony of J. Harold Mitchell, based upon its [illegible] of the Utah [illegible] Statute (Utah Code [illegible] 78-[illegible], 1953, as amended). (Tr. 46-53).

The wire fence was constructed at a location which [illegible] from the existing log fence on the east [illegible] of the Adams-Mitchell parcel. (Tr. 16, 31, 54-55). The wire fence has [illegible] in existence at the same location since [illegible] time. (Tr 28). The wire on the fence was laid down [illegible] though still attached to metal and cedar posts) each fall [illegible] it from winter snows and was wired up again each [illegible] during the entire period from construction of the [illegible] in 194[illegible] through 1970 or 1971. (Tr. 30, 56-57, 71). [illegible] the entire period, Mr. Mitchell and his son used and [illegible] the Dolrusky parcel up to the wire fence for grazing in conjunction with their ranching operation. (Tr. [illegible]6, 70).

The Adams tract was also used for grazing purposes and was occupied for that purpose by the various owners and [illegible] up to the wire fence. (Tr. 88-89). Title to [illegible] Adams tract was deeded by William [illegible]. Adams to three of [illegible] in November, 1949. (Ex. P-6, P-7, P-8) (Tr. 52-[illegible]). An undivided interest in the property was acquired by [illegible] Adams in 196[illegible]. 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 [illegible] Mr. [illegible] in 1969 and subsequently constructed a summer residence thereon. 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. [illegible]).

A survey made by the developers of the Ireland Meadows Estates Subdivision in late [illegible] revealed that the fence line between the Adams and [illegible] parcels (the wire fence which was constructed in [illegible]) is not in the same location as the surveyed line between the properties. (Tr. 91-92). 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-[illegible]). 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 [illegible] of the subdivision located east of the fence (where the water tank and culinary system were located) and that they

[illegible] true boundary. (Tr. 32) (Ex.
[illegible] by the subdivision
[illegible] had [illegible] protested the location of the
[illegible] the [illegible] line between the two
[illegible]

The property in dispute is a wedge-shaped area, bounded on the west by the fence and on the east by the survey line. [illegible] boundary of the properties, the fence and survey line are approximately [illegible] feet apart. (Tr. 21). The [illegible] toward the north, cross on the northerly [illegible] of the properties and are approximately 3 feet apart [illegible] opposite direction on the north end. Plaintiffs' [illegible] and [illegible] sanitary system are located in the disputed area, (Ex. P-2, P-4).

Plaintiffs commenced the present action to determine [illegible] the boundary line between property owned by plaintiffs and that owned by defendants, and for an order [illegible] 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 [illegible] agreement between William [illegible] Adams and J. Harold [illegible], or alternatively, upon application of the judicial doctrine of "boundary by acquiescence." Defendants claim [illegible] boundary line is located along the surveyed line [illegible] from the metes and bounds description of the [illegible]. The parties also claimed damages against one

another for trespass and for [illegible].

After the trial of the issues to the court, without a jury, the court held that the boundary between the properties of the plaintiffs and the defendants was the surveyed line based upon the [illegible] 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. [illegible]).

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. [illegible]).

POINT I

J. HAROLD MITCHELL'S TESTIMONY CONCERNING HIS AGREEMENT WITH WILLIAM L. ADAMS THAT THE WIRE FENCE WOULD SERVE AS THE BOUNDARY BETWEEN THEIR PROPERTIES IS NOT BARRED BY THE SO-CALLED DEADMAN'S STATUTE AND WAS ERRONEOUSLY EXCLUDED BY THE TRIAL COURT.

Plaintiffs contend that the wire fence, constructed by J. Harold Mitchell in [illegible], is the boundary line between the property of plaintiffs and that of defendants by an express parol agreement which was made by Mr. Mitchell and William L. Adams, both at the time [illegible] and at the time the [illegible] were [illegible]

[illegible] 1949. Although it allowed plaintiffs' [illegible] the testimony of Mr. Mitchell concerning the [illegible] the boundary line, the trial court ruled [illegible] evidence must be excluded under the provisions of [illegible]eadman's Statute (Utah Code Annotated Section 78-24-[illegible], 1953) (Tr. 53). However, this statute is clearly [illegible] able to protect defendants in this case for two [illegible]asons: (1) The statute, by its very terms, does not apply [illegible] defendants; and (2) a long line of cases of this Court [illegible] held the statute inapplicable to cases such as the case [illegible] 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 from, through or under whom such party or interested person derived his interest or title 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 heirs, legatee or devisee, as to any statement by, 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 claiming or opposing, suing or defending in such action, suit or proceeding. (Utah Code Annotated, S78- 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 19[illegible]. (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 those categories

[illegible] entitled to employ the statute to exclude [illegible] Mr. Mitchell concerning his dealings with [illegible] clear that none of the Defendants is the [illegible] incompetent person. It is equally [illegible] of them are an executor, administrator, [illegible] devisee of William L. Adams. That leaves [illegible]. Defendants are entitled to exclude the [illegible] if they defend the litigation as a guardian, [illegible] grantee, directly or remotely, of an heir, [illegible] devisee of William L. Adams.

[illegible] uncontroverted evidence presented at trial was that [illegible] was not the owner of the tract which is the [illegible] this action at the time of his death. That was [illegible] the certified copies of deeds introducted by [illegible] showing that William L. Adams deeded the tract to [illegible] his sons in 1949 (Ex. P-6, P-7, P-8), by the file [illegible] of the estate of William L. Adams showing [illegible] did not own the property at his death (Tr. 53), and [illegible] testimony of D. Watson Adams that the property had [illegible] away by William L. Adams during his lifetime. [illegible]. Thus defendants cannot be defending this action [illegible] an heir, legatee or devisee of William L. [illegible] property never passed to an heir, legatee or [illegible] Adams because he did not own it at his [illegible] are, rather, successors of grantees of [illegible] and defend the litigation in that capacity.

Defendants assert that the [illegible] statute [illegible] apply even though their predecessor in interest, [illegible] Adams, did not have any interest in the subject property at the time of his death. They argue that the fact that [illegible] Adams deeded the property away prior to his death [illegible] preclude them from being "successors in interest" under the statute. (Tr. 52-54). Rather, they assert that all the statute requires is that they be successors of "[illegible] heirs" of the deceased, even though the particular parcel of property in question did not pass by will or intestate proceedings. (Id. 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 the testimony is excludable only if "the adverse party in such action . . . sues or defends as . . . successor . . . of such heirs, legatee or devisee." (Emphasis added). [illegible] illogical to interpret this provision to mean that, although defendants are not defending as successors of an heir, legatee, or devisee, the provision of the statute [illegible] should be applied because defendants might be successors of heirs, legatees, or devisees in respect to some property other than the subject matter of the lawsuit. This Court [illegible] raised and rejected [illegible] occasions.

In Grieve v. Howard, [illegible],

[illegible] sought to set aside a deed to [illegible] executed prior to her [illegible] the Deadman's Statute [illegible] statements made by the decedent, [illegible] at the time of the execution [illegible] Court held that the testimony could not be [illegible] the statute, even though the defendant was [illegible] heir of his deceased mother, since he "was [illegible] defending as guardian, executor, [illegible], heir, [illegible]." 180 P. at 429. In [illegible] the defendant's [illegible], the Court said:

> As [illegible] understand the situation, defendant was [illegible] an heir of the deceased, but [illegible] grantee under the deed executed by her. [illegible] was not such as to entitle him [illegible] object to the testimony on the grounds that it was [illegible] by the statute. If [illegible] testimony was [illegible], the court erred [illegible] it and the plaintiff was [illegible] thereby. Id.

[illegible] is, even though the defendant was a "bodily [illegible]" of the decedent, he was not defending in that capacity [illegible] the property in question in the litigation. As [illegible], he could not claim the protection of the Deadman's [illegible].

[illegible] Court affirmed [illegible] construction of the [illegible] statute in [illegible] Highlands, Inc. v. Harper, [illegible], when it refused to extend the [illegible] of the deceased person himself

(rather than only assignees 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 acknowledged the execution of the contract, but sought to introduce prior statements of the deceased which allegedly amounted to abandonment of the contract. The plaintiff argued that the statements should be excluded under the Deadman's Statute, even though they conceded they did not come within the literal reading of the statute. In rejecting 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 continues 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 thus 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. Conceding that such an argument may have validity in some statutory situations, it is not of concern 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

[illegible] and applied strictly [illegible] 2d at 185.

[illegible] v. Johnson, 121 Utah 173, 239 [illegible] parties, who claimed [illegible] of being grantees rather than heirs, [illegible] of the Deadman's Statute and [illegible] conversations with the [illegible]. In that case, two sons of the deceased [illegible] against their sister to quiet title [illegible] to the sons as joint tenants [illegible]. The defendant sought to [illegible] plaintiffs regarding their [illegible] with their father concerning the property. [illegible] the evidence on the ground that the [illegible] was an heir of her father and thus the testimony [illegible] Deadman's Statute. This Court [illegible]:

> [illegible] the provision of the Deadman's Statute, the [illegible] took the view that Marie T. [illegible], one of the respondents, was defending as an heir. If Marie were defending as an heir, she [illegible] for the benefit of the [illegible]. However, this she clearly [illegible]. She [illegible] the property as a [illegible] benefit of the estate. [illegible]

[illegible] in this case is the same as the [illegible]. By its own terms, Section 78-24- [illegible] testimony of C. Harold Mitchell

concerning agreements made with [illegible] L. Niles. [illegible] not do so because defendants are defendants, not as successors of heirs, legatees or devisees of [illegible], but as successors of his grantees. The statute is to be strictly applied and should not be construed so as to exclude the testimony. Plaintiffs are entitled to have that 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 INTERPRETING THIS PROVISION AS APPLICABLE ONLY TO ACTIONS BY OR AGAINST THE ESTATE OF THE DECEASED.

The purpose of the Deadman's Statute is to protect the estate from false or fraudulent claims by creditors and is, therefore, limited in its application to suits brought by or against the estate (or its representative where the estate is a party). It is not the purpose of this statute, as defendants have asserted (Tr. [illegible]), 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. Sainsbury, 110 Utah 280, 172 P.2d 122 (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 415, 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 708 (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 was expressed by the Court in Timpanogos Highlands, Inc. v. Harper, Supra, where the Court stated:

This [illegible] has previously stated, [illegible] one of [illegible] evidence, it [illegible] applied strictly [illegible].

And in [illegible] v. Walker Bank and Trust Company, [illegible] Utah [illegible] 416, [illegible] P.2d [illegible], [illegible] ([illegible]):

> This statute limits the [illegible] testimony which might be [illegible] in determining the ultimate truth [illegible], therefore, 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 made 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 persons from assaults "and relates to proceedings wherein the decision sought by the party so testifying would tend to reduce 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 event to be reduced or impaired. Milner v. Livingstone, [illegible] Utah [illegible], [illegible].

See also, Staats v. Staats, [illegible] Utah 470, 226 P. [illegible] ([illegible]), wherein the Court noted that "the statute has no application where the controversy arises between [illegible] the heirs and merely involves questions [illegible] respective rights as such, and where there is no assault upon the

. . ." [illegible] (emphasis added). The Utah

[illegible] very narrow

[illegible] otherwise proper testimony. It should be

[illegible] and this Court has

[illegible] done so.

The wisdom and propriety of such a narrow application of the Deadman's Statute is demonstrated by the observation that its use and purpose is in ill favor with practically all commentators and the long line of Utah cases cited [illegible]. McCormick, in his treatise (Evidence 2nd Ed. Section [illegible]), states:

> "Most 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.

([illegible] II Wigmore on Evidence Section 578 at 322-823)

[illegible]:

> 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 principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words.

The rationale for such a trend by this Court and the [illegible] is that the rule is cumbersome and more often

leads to the exclusion of the truth than in preventing false testimony. As this Court stated in *McKinley v. Salisbury*, *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 78-24-2(3), nor its statutory purpose as 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 ACQUIESCENCE

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

in connection with a proper claim of boundary by acquiescence is not subject to either the Statute of Frauds or the Parol Evidence Rule.

1. The Statute of Frauds

Although the Statute of Frauds, Utah Code Annotated, Section 25-5-1, 1953, as 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 99, 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 [illegible] the [illegible] courts which have considered [illegible]. [illegible], 104 Idaho 44, 65[illegible] P.2d [illegible]; [illegible] v. [illegible], [illegible] Kan. [illegible], 6[illegible] P.2d [illegible] (19[illegible]); Ingmeir[illegible] v. [illegible], [illegible] 672 (Tenn. App. 1980); Laur[illegible] v. McT[illegible], [illegible] P.2d 56[illegible] (19[illegible]).

Although the Court has [illegible] that a landowner may not claim a boundary "solely on the basis of an [illegible] agreement," Hobson v. Panguitch Lake Corp., 530 P.2d 792, 794 (Utah 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 could have determined the "true line" by an accurate survey does not [illegible] 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 by acquiescence may be established. Nunley v. Walker, 1[illegible] Utah 2d 1[illegible], [illegible] P.2d 117, 1[illegible] (1962) (emphasis added).

In Ekberg v. Bates, [illegible] P.2d [illegible] (Utah [illegible]), [illegible] acquiescence dispute very similar [illegible],

[illegible] that the boundary between their [illegible] was a fence which was erected pursuant to an [illegible]. The plaintiffs argued that at the time the fence [illegible] the parties could have determined the true line [illegible], the element of uncertainty necessary was not [illegible]. In rejecting that contention, the Court stated:

> It is true that the line called for by the deeds 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 P.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 be conclusively demonstrated that the parties were uncertain of the location of the true boundary at the time of their agreement, such uncertainty will be presumed from a long period 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 parol 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 and

[illegible] were originally held in tenancy in common by J.
[illegible] Mitchell, plaintiffs' predecessor in interest, and
[illegible], defendants' predecessor in interest. In
[illegible], these parties determined to partition their
properties. ([illegible]. 36)(Tr. 45). The deeds which memorialized
that 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. [illegible] does not go to the title of the property, but
rather 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
Frauds does not bar the testimony of the parties' oral

> the owners thereof may, by parol agreement, establish the boundary line and thereby irrevocably bind themselves and their grantees. (emphasis supplied)

See also, Ekberg v. Bates, 239 P.2d 205 (Utah 1951); [illegible] v. Millner, 120 Utah 16, 232 P.2d 202 (1951); Rydalch v. Anderson, 37 Utah 99, 107 P. 25 (1910); Tripp v. Bagley, [illegible] Utah 57, 276 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. Kelsch, 600 P.2d 979 (Utah 1979); [illegible] v. Pace, 548 P.2d 180 (Utah 1975); Kesler 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 called for would be inconsistent with the nature of the claim asserted. Such is clearly the case in boundary by acquiescence cases. By its very nature, the theory of those cases asserts that it was not the intention of the parties [illegible] by the deed, but rather [illegible] agreement. [illegible]

[illegible] (ostensibly to protect [illegible] written [illegible]) would be tantamount [illegible] doctrine of boundary by acquiescence.

[illegible], even if the well-established boundary by [illegible] exception were not recognized, it is not [illegible] that the parol evidence rule, even in its [illegible] application, would yield the result propounded [illegible] the defendants. This Court set out the perameters of the [illegible] evidence rule in Utah in Security Leasing Co. v. [illegible], Inc., 2? 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.

[illegible] Youngren v. John W. Lloyd Construction Co., 22 Utah 2d 207, 450 P.2d 985 (1969); Rainford v. Rytting, 22 Utah 2d [illegible], 451 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 deeds were finally exchanged indicate that they did not fully adopt 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 made 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 [illegible]

[illegible] i[illegible] subsequent agreement (i.e. an oral [illegible] of a written document) and, therefore, is not [illegible] the parol evidence rule. The deed which [illegible] in 1949 was to memorialize the decision to [illegible] the property which was made in 1948. Mr. Mitchell [illegible] that "he was slow getting the deed to me. We had [illegible] an agreement." (Tr. 55). Mr. Adams and Mr. Mitchell then agreed that Mitchell could just measure 19 rods from the [illegible] 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 [illegible] 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 Deadman's statute do not apply to the defendants, who [illegible] as successors of grantors and not successors [illegible]. Furthermore, the evidence of the oral agreement [illegible] objectionable under either the statute of frauds or [illegible] evidence rule. Plaintiffs urge this Honorable [illegible] reverse the judgment below and remand this case for

a new trial.

Respectfully submitted

Harold D. Mitchell

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[illegible]