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# Boundary Disputes in Washington

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broker makes the sale, pending negotiations by the broker, the commission may still be recovered if the broker is the "procuring cause" of the sale, the issue of "procuring cause" being for the jury [75] Where a sale is made to the broker's customer, there is an excellent chance that the broker will be held to have been the procuring cause unless he has abandoned negotiations before the sale.[76]

[75] Godefroy v. Hupp, 93 Wash. 371, 160 Pac. 1056 (1916), Keith v. Peart, 115 Wash. 552, 197 Pac. 928 (1921).
[76] Bethel v. Preston, 157 Wash. 652, 290 Pac. 224 (1930).

## BOUNDARY DISPUTES IN WASHINGTON

JAMES R. ELLIS

Quarrels over the physical edges of land ownership still appear on court calendars with disturbing frequency, displaying their peculiar bitterness beyond all value involved. A major factor swelling this litigation has been confusion over the various legal doctrines available in these disputes. Boundary line problems are often capable of treatment on several similar grounds and occasionally present contradictory equities, but they need not be a legal quagmire. This comment will attempt to analyze certain of the formulae currently applied to boundary disputes in Washington with particular reference to the doctrines of Acquiescence and Recognition, Oral Agreement, and Estoppel *in Pais*.[1] It is the writer's opinion that recent definitive decisions by our court have placed these rules on a new plane of clarity.

### ORAL BOUNDARY AGREEMENTS

It has been long settled in the law that under certain circumstances boundary lines may be permanently and irrevocably established by a parol agreement between adjoining owners.[2] Such agreements have been favored as minimizing vexatious litigation by encouraging neighboring land owners to settle their problems between themselves.[3] It is in designating the circumstances requisite to the validity of these agreements that courts have differed. Our court has built an increasingly definite pattern of its own, from which a number of rules can now be determined with reasonable accuracy

[1] The doctrine of Adverse Possession is omitted as requiring separate treatment.
[2] The conclusion of the author of an exhaustive annotation on the subject in 69 A. L. R. 1433.
[3] Loustalot v. McKeel, 157 Cal. 634, 108 Pac. 707 (1910), quoted with approval in Rose v. Fletcher, 83 Wash. 623, 626, 145 Pac. 989 (1915).

In the first place, there must be an agreement. The two adjoining land owners must manifest some deliberate intention to accept a certain line on the ground as their common boundary The doctrine of oral agreement excludes any idea of a unilateral location.[4] It is conventionally stated that the agreement may be either express or implied from conduct of the parties, but the Washington court has been reluctant to imply agreements under conditions which would not raise an estoppel. At best it may be said that the conduct of the parties will be evidence of an agreement which can be rebutted by proof of no agreement or of a contrary agreement.[5] The manifested intention of the adjoining owners must clearly be to accept a given line on the ground as the permanent boundary between their tracts. The agreed line can not be treated as a mere barrier between the lands,[6] nor as a line of convenient demarcation subject to discovery of the true line,[7] nor can it be located under the mistaken belief that it is the true line when there is no intention of recognizing any line other than the true one.[8] In all cases where an agreed line is alleged, the burden of proof is on the party seeking to assert the oral agreement.[9]

Assuming that the parties have deliberately agreed to accept a given line as their common boundary and have staked or otherwise marked it, their agreement will still fail unless certain conditions are present. It is generally stated that such an agreement will not be binding unless it has been made either to resolve an uncertainty in the location of the line or to settle a dispute between the parties. Frequently the central question in litigation over agreed lines is whether a dispute or uncertainty is presented by the facts.[10]

Where the descriptions in the deeds of two adjoining properties overlap, or where it is otherwise impossible to locate a definite common line therefrom, under the reasoning of most courts there is sufficient uncertainty to support a valid oral agreement fixing that line, regardless of the presence or absence of a dispute. By the same token where

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[4] Hruby v. Lonseth, 63 Wash. 589, 116 Pac. 26 (1911)
[5] 6 THOMPSON, REAL PROPERTY 510 (Perm. Ed. 1940).
[6] Thomas v. Harlan, 27 Wn.(2d) 512, 178 P.(2d) 965 (1947).
[7] Phinney v. Campbell, 16 Wash. 203, 47 Pac. 502 (1896).
[8] Huddart v. McGuirk, 186 Cal. 386, 199 Pac. 494 (1921), *but see* divergent views in cases discussed in 69 A. L. R. 1485 *et seq.*
[9] Jackman v. Germain, 96 Wash. 415, 420, 165 Pac. 78 (1917) and *see* cases in 69 A. L. R. 1489.
[10] See wide variety of fact patterns in the cases discussed in 69 A. L. R. 1443 *et seq.*

a bona fide dispute clearly appears, the majority of courts will not further insist upon a showing of uncertainty in the deeds. If the descriptions are uncertain, an oral location is treated not as a conveyance of land but simply as an ascertainment of the extent of ownership. There need be no hostile attitude or quarrel to constitute a dispute, simply a real difference of opinion between the parties as to the location of their ground line, which they intend to settle by agreement.[11]

With the principles discussed above few judges will quarrel; it is over a more difficult problem posed for our court by the case of *Rose v. Fletcher*[12] that authorities have differed. This early decision upheld an agreed line although the description in the deeds was definite and no dispute existed at the time of the agreement. The parties simply did not know the location on the ground of the line called for in their deeds and decided to hire a surveyor and accept his findings. The court stated that the surveyor's erroneous line was controlling and that the case fell within the "doctrine of agreed boundaries."[13] A minority of other courts have agreed that ascertainability is not inconsistent with an oral agreement if the parties do not in fact know the location,[14] but most jurisdictions treat a line which could be determined by a correct survey as a definite line,[15] unalterable by parol in the absence of dispute. As an abstract proposition it might seem that the uncertainty of the parties rather than of the instruments of title should be the real consideration. Indefiniteness in the deeds can be treated as a reflection of uncertainty in the minds of the parties. This concept of uncertainty is no more subjective in nature than that of a dispute. It is submitted that a simple disagreement between the parties as to the location of their line on the ground is not logically different from a mutual ignorance of that location where a deliberate agreement permanently to fix the line is involved. However, this analysis may be somewhat unreal in the face of an artificial legal barrier as firmly established as the statute of frauds. Most courts have considered that if a line is accurately described in the deed, an agreement to accept another line would amount to a parol conveyance of land and be void under the statute. This argument was not squarely met in *Rose v. Fletcher* but the holding, as yet not overruled, was plainly against it.[16]

[11] Brock v. Muse, 232 Ky. 293, 22 S. W.(2d) 1034 (1929).
[12] 83 Wash. 623, 145 Pac. 989 (1915).
[13] *Ibid.*, at p. 626.
[14] Muchenberger v. City of Santa Monica, 206 Cal. 635, 275 Pac. 803 (1929).
[15] Hartung v. Witte, 59 Wis. 285, 18 N. W 175 (1884).
[16] Rose v. Fletcher, 83 Wash. 623, 145 Pac. 989 (1915).

In the recent case of *Windsor v. Bourcier*[17] the court held that a definite boundary whose location is fixed and *known to the parties* can not be changed by a parol agreement. By negative implication this decision gives some support to the *Fletcher* case where the parties did not know the location of the line, but also indicates that an agreement under such circumstances will be examined closely It should be noted, however, that in the *Fletcher* case many improvements had been made and there had been an acquiescence of 20 years; so at least two alternate grounds might have been used to reach the same result.[18]

In many of the difficult cases improvements are made in reliance on the agreement, and there the court may avoid the problem of the statute of frauds by way of estoppel. But improvements are not necessary to execute a valid oral agreement. If a court, looking through the lens of its own precedents, will see either dispute or uncertainty in the facts, then a mere marking of trees along a definite line will be sufficient to take an oral agreement out of the statute.[19] Will our court find such uncertainty where the line is definite in the papers of title but doubtful in the minds of the parties? This becomes difficult to foretell when the weakness of the *Fletcher* case is considered in conjunction with the reluctance in decisions to depart from written descriptions.[20] If the agreement is stripped of the presence of long acquiescence, improvements, dispute, and uncertainty in the instruments, then its validity should be considered an open question in this state.

## BOUNDARY BY ESTOPPEL

In early Washington cases the doctrine of Estoppel *in Pais* was often referred to without being definitively applied. After a recitation of facts establishing a valid oral boundary line agreement or even consummated adverse possession, the court would state that the party seeking to change the line so established was "estopped" to do so. The elements of estoppel, which might or might not have been present were usually not discussed. However, in a line of recent cases the court has begun to confine the use of the term to cases where it was clearly a sound basis of decision for the facts set forth. The recent case of

[17] 21 Wn.(2d) 313, 150 P.(2d) 717 (1944).

[18] Estoppel *in Pais* or Acquiescence and Recognition.

[19] Tietjen v. Dobson, 170 Ga. 123, 152 S. E. 222 (1930), 69 A. L. R. 1408 and *see* numerous cases cited in the annotation.

[20] *See* Tyree v. Gosa, 11 Wn.(2d) 572, 119 P.(2d) 926 (1941), Windsor v. Bourcier, 21 Wn.(2d) 313, 150 P.(2d) 717 (1944), Thomas v. Harlan, 27 Wn.(2d) 512. 178 P.(2d) 965 (1947).

*Thomas v. Harlan*[21] announced the conventional elements of the doctrine as: "(1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such an admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act."[22]

A sound approach to the Washington law on estoppel can be made by coupling this clear statement of the doctrine with the rule of construction announced in *Tyree v. Gosa*,[23] that no boundary established in a deed will be disturbed by way of estoppel unless the evidence is "clear and cogent."[24]

The elements must all be present. If adjoining owner *A* knows his neighbor *B* is making a survey of the common line and sees the setting of some stakes but does not make *improvements* with reference to the new line, the court will not establish the staked line by estoppel.[25] If owner *A* locates his buildings, choosing to make his own boundary measurements, no line will be established by estoppel, since *A* did not *rely* on any representations by *B*.[26]

Where the conduct of the party estopped consists of doing nothing, a more difficult problem is posed. In the case of *Eubanks v. Buckly*[27] estoppel was found although *B* merely watched adjoining owner *A* rebuild a fence on a line used by their predecessors and acquiesced in the fence line for eight years. Neither an agreement between the predecessors nor a prior adverse possession was involved. When the party estopped has acted in bad faith and watched the construction of improvements knowing they were being mistakenly placed on his land, good conscience would support the estoppel. On the other hand, where both parties were innocently mistaken, as in the *Eubanks* case, the answer our court gave must seek support either in (1) an economic policy which favors the improver of land; (2) a balancing of the value of the improvements against the value of the land, or (3) the finding of an implied agreement. In any event, if both parties have acted in good faith, it should be clear that substantial damage will result to the improver by enforcement of the true line before the courts attempt to change it by estoppel.

[21] 27 Wn.(2d) 512, 178 P.(2d) 965 (1947) and cases cited therein.
[22] *Ibid.*, at p. 518.
[23] 11 Wn.(2d) 572, 119 P.(2d) 926 (1941).
[24] *Ibid.*, at p. 578.
[25] Hruby v. Lonseth, 63 Wash. 589, 116 Pac. 26 (1911).
[26] Thomas v. Harlan, 27 Wn.(2d) 512, 178 P.(2d) 965 (1947).
[27] 16 Wn.(2d) 24, 132 P.(2d) 353 (1942).

*Line bought and sold to* If *A* buys land relying on statements of adjoining owner *B* as to the location of the boundary and then develops the land, most courts will prevent *B* from thereafter asserting a different location.[28] The fact that *A* bought the land at least partly on the faith of these declarations is strong evidence of change of position on his part. However, where the only representations made to *A* come from his vendor and this vendor does not contemporaneously own the adjoining land, a different result is called for. If a line so designated is found to be wrong, the vendee, *A*, may have an action for misrepresentation against the vendor or may rescind but as against an abutting owner not involved in the sale no boundary should be created by estoppel. This reasoning finds clear authority in the case of *Tyree v. Gosa*.[29] There Gosa built his house relying on a corner located by his vendor, although the adjoining owner, Tyree, had frequently expressed his opinion that the corner was wrong. The court refused to raise an estoppel saying, "No representations of Tyree induced the Meindls and Gosas to locate their buildings where they did. They fixed the locations of their buildings upon the representations of their vendor."[30] The strength of this holding has not been weakened by later decisions[31] and should be compelling on the court if the problem is properly before it again.

A different problem is presented where the line is pointed out or staked by a vendor-grantor who owns the land on *both* sides thereof. In such cases the rule is ironclad that this grantor and his successors are estopped to deny that the line so fixed is correct. In the early days of the Washington court it was stated that "the location of a line by a common grantor is binding upon the grantees."[32] This rule has been uniformly followed through a series of strong decisions.[33] It was recently affirmed in the case of *Strom v. Arcorace*[34] where the court quoted with approval the following:

A practical location made by the common grantor of the division line between the tracts granted is binding on the grantees who take with

[28] 8 AM. JUR. 806.

[29] 11 Wn.(2d) 572, 119 P.(2d) 926 (1941).

[30] *Ibid.*, at p. 579.

[31] *Compare* Light v. McHugh, 128 Wash. Dec. 210, 183 P.(2d) 353 (1947), where apparently inconsistent language can be reconciled by separating the claims of the two plaintiffs and applying the estoppel language to the vendor only. The result of the *McHugh* case is in no way contra to the *Tyree* case.

[32] Turner v. Creech, 58 Wash. 439, 108 Pac. 1084 (1910).

[33] Roe v. Walsh, 76 Wash. 148, 135 Pac. 1031 (1913), Windsor v. Bourcier, 21 Wn.(2d) 313, 150 P.(2d) 717 (1944), Atwell v. Olson, 130 Wash. Dec. 165, 190 P.(2d) 783 (1948).

[34] Strom v. Arcorace, 27 Wn.(2d) 478, 178 P.(2d) 959 (1947).

reference to that boundary The line established in that manner is presumably the line mentioned in the deeds and no lapse of time is necessary to establish such location, which does not rest on acquiescence in an erroneous boundary, but on the fact that the true location was made and the conveyance in reference to it.[35]

This doctrine is the strongest of the many rules applied to boundary disputes by the Washington court and is adhered to by the great weight of American authority [36]

## ACQUIESCENCE AND RECOGNITION

There is language in many of our cases to support the acquisition of land ownership by acquiescence.[37] It is almost always stated that in absence of a valid agreement between the parties, or an estoppel raised between them, that the acquiescence by two adjoining owners must last for the period of the statute of limitations and be coupled with possession up to that line.[38] Some courts have held that all elements of adverse possession must be shown in these cases, thus making the doctrine merely a restatement of that method of land title acquisition. Other authority holds that mere acquiescence and recognition of the line as the boundary are enough. Our court requires recognition by the parties of the line as a boundary, occupancy by the adjoining owners up to this line, and acquiescence for a period of ten years.[39] Mere acquiescence in the existence of a fence will not establish the fence line unless the parties have actually recognized it as the boundary [40] Under such circumstances the difference between the doctrine of acquiescence and an implied boundary agreement would seem to rest primarily in the absence of any necessity for dispute or uncertainty and in the period of time required to become binding. The difference between acquiescence and adverse possession lies chiefly in proving the element of adverseness or hostility and there, it is suggested, the difference is more of terminology than of fact.

In every boundary line dispute, peculiar and compelling equities present themselves. No decision is completely divorced from the process of balancing these equities, and a party armed with an appealing argument of hardship will have a stout string in his bow However, the

[35] 11 C. J. S. 651.
[36] *Ibid.*, and cases cited therein.
[37] Farrow v. Plancich, 134 Wash. 690, 236 Pac. 288 (1925).
[38] Thomas v. Harlan, 27 Wn.(2d) 512, 176 P.(2d) 965 (1947).
[39] *Ibid.*
[40] *Ibid.*

existence of disproportionate values in land and the improvements thereon will not by itself alter land ownership. To award land to the improver even though compensation be given the owner, without meeting the criteria for acquisition of legal ownership, would effect a private condemnation. In *Tyree v. Gosa*[41] it was said. "No court has the power to compel a person to convey and surrender his property for any other person's private use (except for ways of necessity) in exchange for any sum, no matter how great."[42] This statement, broader than generally recognized equity rules, indicates the reluctance of the Washington court to let considerations of economic hardship alter legally fixed boundaries unless they appear in a situation where an otherwise substantial legal argument for alteration has been already made out.

A survey of modern Washington boundary cases shows that the doctrines of Estoppel, Oral Agreement, and Acquiescence are very much alive in the current of judicial thought. These doctrines can create or dissolve boundary lines under a wide divergence of practical situations, but all too often are inadequately presented to the court. The practitioner can with profit separately and thoroughly consider each in the solution of any boundary problem.

[41] 11 Wn.(2d) 572, 119 P.(2d) 926 (1941).
[42] *Ibid.*, at p. 581.

## HOW SECURE IS YOUR TAX FORECLOSURE TITLE?

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The statute of the state of Washington relating to the conclusiveness of tax judgments reads:

> And any judgment for the deed to real property sold for delinquent taxes shall estop all parties from raising any objections thereto and the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax has been paid. or the real property was not liable to the tax.[1]

In dealing with this statute in the past, the Supreme Court of Washington has said, "The essential thing is the actual payment of the taxes,"[2] and "Thus it appears that the conclusive effect of the judgment

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[1] REM. REV. STAT. § 11288 [P P C. § 979-313].
[2] Puget Sound National Bank v. Biswanger, 59 Wash. 134, 139, 109 Pac. 327, 329 (1910)