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Boundary Agreements-Enforcement When in Existence for a Period Less than Required to Pass Title by Adverse Possession

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RECENT CASE NOTES

BOUNDARY AGREEMENTS—ENFORCEMENT WHEN IN EXISTENCE FOR A PERIOD LESS THAN REQUIRED TO PASS TITLE BY ADVERSE POSSESSION—One Sherrer in 1902 purchased lot 24 adjacent to lot 25 which was owned by one Johnson. Sherrer contemplated building and, after speaking to Johnson of his plans, had a division line surveyed in 1903. The owners agreed shortly after the survey that the line should be the division between the lots. Sherrer built a two-story brick structure in reliance on the agreement and Johnson not only watched the process of construction but he told Sherrer and the workmen to cut away a portion of the eaves which extended from Johnson's frame building over the agreed line. The appellant, who is successor of Johnson, brought action against appellee, who is successor Sherrer, in ejectment and to quiet title to a strip of property found by a recent survey to originally belong to the appellant. *Held*, affirmed. Whenever adjoining owners agree as to the boundary between them and in reliance thereon expenditures are made, each party, in the absence of fraud, will be estopped to deny the agreed boundary as the true line. *Babacz v. Kirk*, Appellate Court of Indiana, 1930, 171 N. E. 492.

The law of boundary agreement varies so greatly that it is considered, by the authorities, almost impossible to generalize from the cases in the various jurisdictions. Tiffany, *Real Property*, 996. The law of other jurisdictions will be found discussed in 8 *Tex. L. Rev.*, 610; 14 *Calif. L. Rev.*, 138-141, 23 *Mich. L. Rev.*, 547.

A parole boundary agreement, according to Indiana cases, must arise from an *express agreement between adjoining owners*. *Ball v. Cox*, 7 Ind. 456; *Rosenmeier v. Mahrenholz*, 179 Ind. 467, 101 N. E. 721. It must be based on a valuable or mutual consideration. *Wingle v. Simpson*, 93 Ind. 201; *Fuelling v. Fuesse*, 43 Ind. App. 441, 87 N. E. 700. The agreement must concern the location of the boundary *between* their properties, the *exact location* of which is *unknown* to *either* party. *Adams v. Betz*, 167 Ind. 161, 78 N. E. 649. Indiana has been very strict in these requirements and, if one of the elements are not present, the courts will not give the agreement legal effect by enforcement.

The problem necessarily involves a consideration of the statute of limitations, the statute of frauds, and estoppel arising from acts of the parties in acquiescence or reliance upon the agreement sufficient to make it inequitable to place the boundary in its original or correct position.

Discussing the problems separately, the statute of limitations is first for consideration. Title will pass by adverse possession regardless of the parole agreement or compliance with the statute of frauds. There is no doubt on this point; but the giving of legal effect to the boundary agreement that has not existed for a sufficient period to pass title by adverse possession has caused the courts some trouble. The results are sometimes very inequitable whenever the parties make large expenditures in reliance upon the agreed boundary unless the courts can find a legal reason to support the agreement

and make it binding when its non-enforcement would be inequitable. The early case of *Myers v. Johnson*, 15 Ind. 266, in which the parties agreed upon a boundary and made improvements in reliance upon the agreement so as to make it inequitable to change the agreed boundary, is the first case in Indiana giving full legal effect to the established line, even though it had not existed for the full statutory period. This was a bold step and some later cases were not willing to venture away from adverse possession as a basis for their decision, although they do mention the element of reliance and acquiescence in the agreement as an additional reason for the decision. The tendency to combine adverse possession and acquiescence or estoppel in support of the agreement is shown by the following language used in numerous decisions: "The location of a division line between two land proprietors, acquiesced in and acted upon, and the premises improved up to the line by each for twenty years becomes binding as the true line." *Ball v. Cox*, 7 Ind. 453; *Brown v. Anderson*, 90 Ind. 93; *Dyer v. Eldridge*, 136 Ind. 654, 36 N. E. 522; *Burr v. Smith*, 152 Ind. 469; *Helton v. Fastnow*, 33 Ind. App. 288, 71 N. E. 230. But more recent cases in which the element of adverse possession was not present go back to *Myers v. Johnson*, *supra*, and give full legal effect to agreements that have been relied upon to the detriment of either party. *Adams v. Betz*, 167 Ind. 161, 78 N. E. 649; *Furst v. Satterfield*, 44 Ind. App. 613, 89 N. E. 906; *Baker v. Johnson*, 79 Ind. 413, 138 N. E. 780; *Seaver v. Vonderahe*, 74 Ind. App. 613, 127 N. E. 206. The extent to which a party must rely upon an agreement to amount to an estoppel is a question of fact. Mere possession would, no doubt, not be a sufficiently determinable act to constitute an estoppel, but it is decided that the building of fences along the agreed line in reliance upon the agreement will be an act sufficient to make it inequitable to place the boundary in its correct position, thus giving full legal recognition to the new boundary upon which the parties have agreed. *Wingler v. Simpson*, 93 Ind. 201; *Welborn v. Kimberly*, 42 Ind. App. 98, 89 N. E. 517; *Furst v. Vonderahe*, 74 Ind. App. 613, 127 N. E. 208; *Stalcup v. Ingle*, 76 Ind. App. 697; *Adams v. Betz*, 167 Ind. 161, 78 N. E. 649. Any greater erection of improvements, like the erection of a building in the instant case, would give the courts a stronger reason to support the agreement.

The question of the statute of frauds is clearly involved in boundary agreements. *Fuelling v. Fuesse*, 43 Ind. App. 441, 87 N. E. 700. But a consideration of the statute of frauds is merely incidental and does not change the result which the courts reach in applying the rules of estoppel and acquiescence mentioned above. The boundary agreement is within the statute of frauds in Indiana, *Fuelling v. Fuesse*, *supra*, but it is taken out of the statute by some act sufficient to make it inequitable to place the boundary in its original and correct position. *Tate v. Foshee*, 117 Ind. 332, 20 N. E. 241; *Fuelling v. Fuesse*, *supra*. This same act sufficient to constitute an estoppel under the statute of frauds was also incidentally the same basis for supporting the boundary agreement on the doctrine of acquiescence and estoppel discussed heretofore in connection with the support of the agreement upon that basis alone.

The agreement, in the instant case, arose from an express mutual agreement between adjoining land owners concerning the boundary between them, the true location being unknown to either. All the prerequisites to

enforcement in Indiana are present in this parole agreement. The building was erected along the agreed line in reliance upon the agreement and if the boundary line were to be placed in its original position, a part of the brick building would have to be cut away. Clearly the non-enforcement of the agreement would be inequitable, and the court rightly supported the agreement although it had not existed for the statutory period of limitations.

J. B. E.