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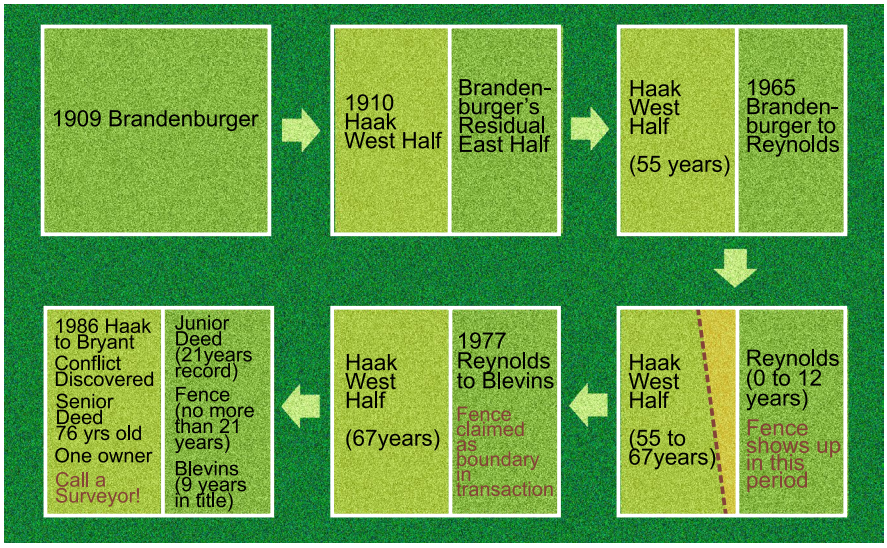
decided guidance: case examinations

Bryant v. Blevins

Part 3—The Dissenting Opinion

Okay, we are going right to the barbershop this month as I don my flaming barrister's wig to respectfully armchair the honorable Justice Mosk's dissenting opinion. This is like playing checkers against myself because I agree with Justice Mosk's on certain points in his dissent but I ended up in a different place after the dust settled. However, before I go all *lucha libre* I really need to offer up the humble pie and spend a moment on The Honorable Justice Mosk. Let's pop over to the barber pole on the next page and get a glimpse of his magnitude.

Justice Mosk starts off by applying some law. *"The majority concede that the agreed-boundary doctrine applies whether or not there is an available legal document-such as a deed or map-that purports to describe the location of the "true" boundary. (Maj. opn., ante, pp. 53-54.) However, they then in effect create two different standards of proof: if a legal description is available, the party asserting the agreed boundary must present direct evidence "that the prior owners were uncertain as to the location of the true boundary [and] that they agreed to fix their common boundary at the location of a fence." If no legal description is available, the rule that has been recognized and applied in California throughout most of this century-regardless of whether a legal description is available-still applies, namely, that direct evidence of uncertainty and agreement is not necessary because "The court may infer that there was an agreement between the coterminous owners ensuing from uncertainty or a dispute, from the long-standing acceptance of a fence as a boundary between their lands." I see no reason for this bifurcated standard of proof; I would continue to apply the well-settled inference of uncertainty and agreement whether or not a legal description is available."*



I ask when in the United States is a legal description not available? A land conveyance must be written and contain a legal description among other things to make it functional, right? I didn't say a "good" description, I'm just saying "a" description and I'm sure we've all seen a real "Duesy" or two in our time. So I'm a bit fuzzy on Justice Mosk's assertion that the agreed boundary doctrine can be applied with or without a description. I think the doctrine naturally requires an unclear description as the basis of the agreement in the first place. Otherwise it seems like a question of adverse possession or unclaimed land. The doctrine requires uncertainty as to the line but keep in mind nothing is transferred or conveyed, the parties are simply clarifying how their chains of title have behaved on the ground.

Bryant called out Blevin's "fence line uncertainty" argument because he (they) truly could make sense out of the legal description. Enough sense anyway to call in an expert surveyor. So here's the cud chewin', grass growin' thought of the month: The standard of care in determining uncertainty of legal descriptions might just lie in the hands of every minimally competent surveyor. The seasoned expert Monte Seibel showed that the ability to accurately retrace a legal description on the ground dissuaded the majority of the California Supreme Court from inferring that an alternate line was agreed on. That's some big medicine!

Okay, I'm loading my slingshot now and aiming for the eyeball. The deal breaker here is Blevin's acknowledgement that the original survey and Seibel's retracement survey were good. I think the admission that the descriptions "ain't broken" diminishes the Court's opportunity to infer uncertainty in the line and consequently the necessity for an agreement to an alternate placement. Furthermore nothing was presented that affirmed that Haak had agreed to anything other than permitting the fence in place. That's a tough pill for me to swallow with the understanding that an owner is obliged to contest adverse use. So Haak didn't object, but I concede that he also never agreed to the fence as being the

boundary. What does that have to do with the price of tea in China? Well, we are talking about the original grantee and witness to a senior grant that ripened over five and a half decades before the fence builder took title. I think this further diminishes the Court's opportunity to infer that Haak was unclear about the location of the line. Conversely I'm inclined to presume that Haak knew the true boundary. We could just as easily infer that Haak was so secure in his (their) knowledge of the true line that there was no mistaking a distant and skewed horse fence as the halfway mark. Hey, ol' Foose is on to something here, right? Well, to be clear and fair, that's a stretch on my part, especially when Justice Mosk actually has a precedent for his inference. However, The Court of Appeals in Armitage v. Decker observed that *"...although the elements of uncertainty as to the true boundary and agreement to fix a boundary may be inferred from acceptance of a fence as a boundary for many years, the plaintiff was not entitled to prevail, because "proof of acquiescence in the existence of a fence without evidence of an agreement to take the fence as a boundary is not sufficient to establish an agreed boundary"."*

Justice Mosk implies that every case of simple acquiescence is the same as the agreed boundary doctrine. I think there's a difference. When folks buy and sell lots they pick landmarks over time that certainly mark the corners. "The post next to the pin", "the rock pile", "the end of the wall by that survey pipe", "the shrub row", and so forth. People over generations of land conveyances come to rely on these ripened marks without question. This is the flavor of acquiescence and the crux of our old friend Chief justice Cooley's treatise. However, looking out from the barbershop window it almost appears that the agreed boundary doctrine is different in that it respects the adjoiners' willingness to throw their arms in the air and say "we don't know and don't care but this here works". I'll toss in the analogy of "Drive-thru" acquiescence and see if that sticks. It's quick, it's easy, and it fills the need but it's not the same as planting a garden, harvesting the crop, cutting the veggies, tossing the salad, then serving dinner. See the difference? So I suspect that pure acquiescence happens slow and naturally over time whereas agreed boundaries can be abruptly promulgated out of uncertainty. Acquiescence, accretion, and glaciers are slow moving but boundary agreements, avulsion, and "break-up" ice are relatively fast moving creatures. Okay, two analogies is overkill and you get the point so I'll throw in our "Fiddy cent" word of the month "promulgated" at no extra charge.

From my perch it looks like the first opportunity for mutual uncertainty, or agreement, or acquiescence, did not happen until Bryant took title. Bryant contested it immediately upon discovery and very soon after acquiring title. As said before, Haak apparently never agreed to the fence boundary and who knows, the Haak Family could have been absentee owners of vacant land and may have never known the fence existed when they sold to Bryant. That's presumptuous but not unrealistic.

We are certain that only Richardson was most likely uncertain when he built the fence and Blevins relied on Richardson's warranty that the fence was boundary. Apparently there's no evidence that Haak was uncertain and when the question did surface through Bryant it was quickly cleared up by Seibel. This leads me to believe that the majority embraced law to preserve the stability of the true boundaries. They concluded through evidence or lack thereof that the only thing that ripened was Blevin's confusion. I originally agreed with Justice Mosk until it dawned on me that Blevin's argument was one-sided and Bryant's chain of title was static for three-quarters of a century. I can't help but to think that a more robust chain of conveyances could have reinforced the Court's authority to infer as Justice Mosk pointed out.

I'm glad that dissent is part of the Court's function. Arguing opposing principles puts the "just" in the justice. I don't know if Justice Mosk drew the short straw or accepted the task as a benevolent challenge. Either way he tested the law heroically. Looking back at Blevin's counter claim I now see, or think I see how flawed it was and I admit that I really had to digest this one to get there. I'm childishly intrigued with a notion that the truth prevailed against strong odds and resistance in this case. However, I just can't figure why adverse possession was not the primary challenge? I guess I'll just stick to bob-dangling and bad analogies. I'm interested in hearing your thoughts. Feel free to drop a line to me at *rls43185@gmail.com* or the editor.

This month's homework can be found at *http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=4096&context=californialawreview*. The "Establishment of Boundary Lines by Practical Location" explains the common law foundation of the agreed boundary doctrine. It's a lawyerin' book and not a rope stretchin' manual so seek medical attention if your head swells or your eyes burn. We'll parade through it next month on our continual journey of professional development.

Note: A pdf copy of this case is available at *http://www.amerisurv.com/docs/BryantVersusBlevins.docx* ■

The Barber Pole—Honoring Justice Mosk

The Los Angeles County Courthouse is named, you guessed it, The Stanley Mosk Courthouse and The Stanley Mosk Library & Courts Building is located on the Capitol Mall in Sacramento, California, which by the way is the home of the California Court of Appeal for the Third District. There's even a Wikipedia page that details the Honorable Justice Mosk's accomplishments: https://en.m.wikipedia.org/wiki/Stanley_Mosk

Whether we agree or disagree with him, this is a man of principle. He said *"... to yield to my predilections would be to act willfully in the sense of enforcing individual views instead of speaking humbly as the voice of law by which society presumably consents to be ruled. ... As a judge, I am bound to the law as I find it to be and not as I might fervently wish it to be."* We sure could use about 535 Justice Mosks in Congress and I humbly contain my challenges to barbershop babble in the shadow of the wise and honorable Justice.

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