

1952

Hudson B. Taylor, Martha O. Taylor v. Wesley D. Porter : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

HUDSON B. TAYLOR,
MARTHA O. TAYLOR,
Respondents,

vs.

WESLEY D. PORTER,
Appellant.

CASE
NO. 7690

BRIEF OF APPELLANT

Appeal from Fourth Judicial District Court of the State
of Utah, Hon. R. L. Tuckett, Judge.

FILED

MAR 6 1952

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~~Fourth Judicial District Court of Utah~~
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In the Supreme Court of the State of Utah

HUDSON B.TAYLOR,
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vs.

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CASE
NO. 7690

BRIEF OF APPELLANT

STATEMENT OF FACTS

In this case, George W. Sidwell owned an eight acre piece of real estate in Orem City, Utah County, Utah. This property was all in one piece without any intervening fences and with just a fence surrounding the entire tract. Sidwell put five of the acres up for sale.

On April 29, 1946, the appellant, Wesley Porter, was taken to the property of Sidwell by Bill Baker, a real estate agent, and was shown the property. The property has an old fence as the west boundary, which has been there twenty years or more. Wesley Porter then and there signed

an "earnest money receipt" and paid One Hundred Dollars (100.00) on the purchase price of the "west two acres, more or less (west seven rows of trees) of an eight (8) acre tract at the northwest corner of Fourth North and Eighth East in Orem" (Defendant's Exhibit 2). Bill Baker testified that he measured off one hundred twenty-six feet (126') from the old fence on the west and put in a stake and as said in his testimony, "He (Wesley Porter) bought one hundred twenty-six (126) foot frontage, which took in seven rows of trees on the west side of the five acres under discussion. He gave me a deposit that day on that of One Hundred Dollars (\$100.00)" Tr. 52, l. 14).

On April 20, 1946, Bill Baker contacted Hudson Taylor, respondent, and informed him that the west two acres of ground had been sold and if he wanted it, he could purchase three acres next to it. Hudson Taylor and Bill Baker went out to the property and examined the premises and Mr. Taylor decided to take the three acres and they then executed an earnest money receipt which recited, "Received from Hudson B. Taylor and Martha O. Taylor the sum of Eight Hundred Dollars (\$800.00) to secure and apply on the purchase of the following described property: East three acres (3) of the West five acres (5) of an Eight acre (8) tract at the Northwest corner of Fourth North and Eighth East in Orem, Utah". (Tr. p. 34). Bill Baker testified that "on the west side of the property, there is an old fence and I used that fence to give us an approximate point for the front corners of these properties, and set a stake at that time" (Tr. p. 52). Hudson B. Taylor recognized the fact that the old fence on the west was used by both parties in establishing the land they purchased when he said, "You have got your irrigation ditch

right on the line, it is right between the two rows of trees, that is the line, that is what was always measured 126 feet from the old fence line (Tr. p. 29, l. 8 to 10).

Subsequent to the signing of the earnest money receipt by Hudson B. Taylor, a contract was executed between Taylor and Sidwell providing for monthly payments upon the purchase price, which contract is, at the present time, still uncompleted. The foregoing contract was filed for record on May 15, 1946, in the office of the Utah County Recorder. Wesley D. Porter went into occupancy of his purchased property immediately after the signing of the earnest money receipt and later paid the entire purchase price for the property and received a deed and had it recorded on October 7, 1946, by County Recorder, which deed purported to give him a tract of land beginning on the west in the old fence line and going east 126 feet, thence north to a point 126 feet from the old fence on the north.

Until the spring of 1949, the appellant and respondents occupied what they assumed to be their respective properties without having erected a fence or other marker between them to establish the property line. Prior to this time, the appellant for his own purposes, dug an irrigation ditch from the north side of his property to the south side of the property in between two rows of trees. There was not any fence constructed between the property of the respondent, Hudson B. Taylor, and the common grantor of the parties herein, George W. Sidwell, up to the time of the commencement of this action. The testimony of George W. Sidwell revealed that he stood ready and was able at any time to adjust the east property line of the land granted to Hudson B. Taylor, respondent, in order that he might get the entire acreage called for by his contract.

In the spring of 1949, when the appellant and respondents attempted to establish the boundary line between their two properties, they fell into dispute, and the matter was brought to the courts in this case; the respondent contending that the boundary line was in the center of the irrigation ditch dug by appellant. The appellant contends that the boundary line between the property of the parties is a line parallel to the old fence line on the west with its locus 126 feet east (at the point where appellant erected a new fence).

APPELLANT'S POINTS

POINT ONE:

The court erred in determining that the boundary line between appellant's and respondents' property was along a line between two rows of trees and evidenced by an irrigation ditch.

A. The evidence in this case does not support the finding that "the plaintiffs and respondents have recognized the boundary line dividing their respective properties as being a point immediately in the center between two rows of peach trees." (Amended Finding of Fact No. 8, dated December 27, 1951).

B. The evidence does not support the corrected Finding No. 7 dated December 27, 1951, and more particular: "That said boundary line divides the property of the plaintiffs and defendant and was made known to the defendant prior to the time the defendant purchased the property".

C. The evidence does not support the corrected Findings of Fact numbered 12, 13, 14, 15, 16, 17, 18, 19, 20, 22,

and the last sentence of Finding number 25, of the Corrected Findings of Fact dated December 27, 1951.

POINT TWO:

The Court erred in its Conclusion that respondents have a prior claim and that appellant's conveyance is subordinate thereto.

A. Where there is a clash of boundaries in two conveyances from the same grantor, the title of the grantee in the first conveyance executed is, to the extent of the conflict, superior. Appellant received the first conveyance from the common grantor.

B. Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey real estate or whereby any real estate may be affected shall be valid and binding as to all other persons who have had actual notice. Respondent had actual notice of appellant's prior purchase when he purchased.

ARGUMENT

POINT ONE:

THE COURT ERRED IN DETERMINING THAT THE BOUNDARY LINE BETWEEN APPELLANT'S AND RESPONDENTS' PROPERTY WAS ALONG A LINE BETWEEN TWO ROWS OF TREES AND EVIDENCED BY AN IRRIGATION DITCH.

The record of this case reveals that the parties concerned in this matter purchased their respective properties from a common grantor, and that there was not any fence, ditch, or other monument to show the boundary between their respective properties at the time of purchase. Thus

if a boundary was established at all by the acts of the parties it must be found in the period of time between their purchase of their property in 1946 and the filing of this action.

There are two generally recognized methods of fixing or determining boundary lines. One is by "practical location" by the parties; and the other is by "acquiescence" by the parties in a line, or monument as the boundary for a certain length of time .

A. THE EVIDENCE IN THIS CASE DOES NOT SUPPORT THE FINDING THAT "THE PLAINTIFFS AND DEFENDANT HAVE RECOGNIZED THE BOUNDARY LINE DIVIDING THEIR RESPECTIVE PROPERTIES AS BEING A POINT IMMEDIATELY IN THE CENTER BETWEEN TWO ROWS OF PEACH TREES" (Amended Findings of Fact No. 8, dated Dec. 27, 1951).

As mentioned above, a boundary may be established by "practical location." As concerns the establishment of a boundary by practical location, the general law is as set out in 11 Corpus Juris Secundum, p. 650 as follows:

"Practical location is but an actual designation by the parties on the ground of the monuments and bounds called for by their deeds. To constitute a practical location of a line, the mutual act and acquiescence of the parties is required."

The foregoing rule is recognized in Utah. See:

Brown v. Millner, _____Utah_____, 232 P2d 202.

The record of this case fails to show any agreement of any kind between appellant and respondent in respect to recognizing the irrigation ditch between two rows of

peach trees as being the boundary between the properties. There is no dispute but that appellant, Wesley Porter, dug the irrigation ditch for his own purposes (Tr. p. 67, line 17 to line 27). In respect to the irrigation ditch respondent, Hudson Taylor, said (Tr. p. 47, line 15 to 26) that appellant dug the irrigation ditch for his own purposes.

The second method of fixing a boundary is through acquiescence by the parties in an open, visible line marked by monuments, fences, or buildings and recognized as the boundary for a long term of years.

Brown v. Milliner, _____U_____, 232 P2d 202.

Ekberg v. Bates Case No. 7509 Advance Sheets,
Dec. 26, 1951.

There was not any open, visible boundary line acquiesced in by the parties for many years. The respondent, Hudson Taylor, said that he did not know how far the irrigation ditch, dug by appellant, was from the old fence on the west of the appellant's land (Tr. p. 47, l. 29). This action was filed on December 6, 1949, and thus the maximum time during which there could have been any acquiescence between the parties in any boundary was approximately three and one-half years, a time all too short in which to establish a boundary by acquiescence.

The best that can be said for the respondents' evidence is that their boundary is 23.3 feet west of the new fence built by appellant (Tr. p. 17, l. 11), and the new fence is about 3 feet east of the irrigation ditch on the south and 11.2 feet on the north (Tr. p. 71, l. 8 to 10). Under this state of the facts the lower Court's Finding No. 8 cannot stand, since it has no support in the evidence.

B. THE EVIDENCE DOES NOT SUPPORT THE CORRECTED FINDING NO. 7, DATED DEC. 27, 1951, AND MORE PARTICULARLY: "THAT SAID BOUNDARY LINE DIVIDES THE PROPERTY OF THE PLAINTIFFS AND DEFENDANT AND WAS MADE KNOWN TO THE DEFENDANT PRIOR TO THE TIME THE DEFENDANT PURCHASED THE PROPERTY"

As mentioned in the foregoing sub-point, the record seems to be devoid of any evidence from which it can be said that respondent, Hudson Taylor, informed appellant of the boundary line prior to appellant's purchase. In fact, the clear evidence is that appellant purchased his property on April 29, 1946, and that respondent purchased his on April 30, 1946, and thus it is impossible to find as set out in corrected Finding Number 7.

C. THE EVIDENCE DOES NOT SUPPORT THE CORRECTED FINDINGS OF FACT NUMBERED 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, AND THE LAST SENTENCE OF FINDING NUMBER 25, OF THE CORRECTED FINDINGS OF FACT DATED DECEMBER 27, 1951.

The record appears to be utterly devoid of any substantial evidence to support the numbered Findings set out above. The respondent's own testimony, perhaps unconsciously, reveals that he understood from the beginning that the appellant's boundary was 126 feet east of the old fence on the west of the property. In respondent's direct testimony in recounting the building of the new fence by appellant and of a conversation between the parties at that time he said, "You have got your irrigation ditch right on the line, it is right in between the two rows of trees, that

is the line, that is what was always measured 126 feet from that old fence line" (Tr. p. 29, l. 8 to 10). The undisputed evidence submitted by both appellant and respondents show that the fence erected by appellant was 126 feet, or a little less, from the old fence on the west. The testimony of Bill Baker, the real estate agent who sold both pieces to the parties hereto, shows that the parties, the appellant first and respondent next, inspected the property and noted the natural land marks and the old fence on the west before they purchased. Bill Baker testified that he measured 126 feet eastward from the southwest corner of the land at the old fence and put in a stake; that he then informed respondent the next day that three acres of land were available for sale; Baker and respondent went out to the land and Baker pointed out the stake marking the frontage measurement of appellant's property purchased the day before (Tr. p. 53, l. 1 to 22).

George W. Sidwell testified that the old fence on the west of the property has been there as long as he owned it, 18 or 20 years, and that he never considered that he owned land west of the fence (Tr. p. 59, l. 10, 11, 26 to 30; Trs. p. 60, l. 1 to 3). Thus under our law (*Ekberg v. Bates*, Advance Sheet Case No. 7509, December 26, 1951) the fence was a boundary fence and the quitclaim deed executed by George W. Sidwell, et ux, and Wesley D. Porter, et ux, to William S. Park on September 24, 1946, did not convey any interest held by appellant. Certainly there was never any intention on the part of George W. Sidwell to sell and on the part of appellant to buy property west of the old fence.

Neither appellant nor respondents considered that they were buying anything but the west 2 acres, and the east 3

acres, of the west 5 acres, respectively, from George W. Sidwell.

POINT TWO:

THE COURT ERRED IN ITS CONCLUSION THAT RESPONDENTS HAVE A PRIOR CLAIM AND THAT APPELLANT'S CONVEYANCE IS SUBORDINATE THERETO.

A. WHERE THERE IS A CLASH OF BOUNDARIES IN TWO CONVEYANCES FROM THE SAME GRANTOR, THE TITLE OF THE GRANTEE IN THE CONVEYANCE FIRST EXECUTED IS, TO THE EXTENT OF THE CONFLICT, SUPERIOR (11 C. J. S. p. 632). APPELLANT RECEIVED THE FIRST CONVEYANCE FROM THE COMMON GRANTOR.

It is necessary to seek out the definition of the word "conveyance" before we can determine the question of priority between the instruments involved in this action.

Sec. 78-1-1, U.C.A. 1943, reads as follows:

"The term 'conveyance' as used in this title shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is created, aliened, mortgaged, encumbered or assigned"

In the recent case of *Stucki v. Ellis*, _____ U_____, 201 P2d 486 (1949), the court had before it a "deposit receipt" similar in form and purpose to the "Earnest Money Receipts" employed by the real estate dealer in this case (Defendant's Exhibits 1 and 2). In the *Stucki* case the court construed Sec. 78-1-1, U.C.A. 1943, and held that the

Receipt in that case was a "conveyance." It also held:

"Under our broad statutory definition of conveyance, an interest in real estate may be conveyed without the use of a deed."

Under the facts of this case the "Earnest Money Receipt" received by appellant, dated April 29, 1946, and signed by George W. Sidwell was a conveyance. Inasmuch as appellant's conveyance was executed first then it is superior to the conveyance of respondent executed later. Certainly under the law, the appellant was fully committed to the purchase of the west 2 acres of the Sidwell property on April 29, 1946, as he could be. No subsequent recording of the respondents' contract could serve to warn appellant of respondents' interest; and certainly the common grantor could not the very next day sell any part of the property to another person.

B. EVERY CONVEYANCE OF REAL ESTATE, AND EVERY INSTRUMENT OF WRITING SETTING FORTH AN AGREEMENT TO CONVEY REAL ESTATE, OR WHEREBY ANY REAL ESTATE MAY BE AFFECTED SHALL BE VALID AND BINDING AS TO ALL OTHER PERSONS WHO HAVE ACTUAL NOTICE. RESPONDENTS HAD ACTUAL NOTICE OF APPELLANT'S PRIOR PURCHASE WHEN THEY PURCHASED.

It is to be recognized that in our State by the force of Sec. 78-1-6, U.C.A. 1943, the purpose and effect of recording conveyances is to give notice, either actual or constructive, to those subsequently dealing with the property of the interest of the parties to the conveyance. It is also recognized by statute and by a long line of Utah decisions that

a conveyance is "valid and binding as to all other persons who have actual notice."

In construing the Utah Statute which is now Sec. 78-1-6, U.C.A. 1943, it was said in *Toland v. Corey*, 6 U. 392, 24 P. 190, that:

"The demands of this section are answered if a party dealing with the land has information of a fact or facts that would put a prudent man upon inquiry, and which would, if pursued, lead to actual knowledge of the state of the title; and this is actual notice."

In a comparatively recent case, *McGarry v. Thompson*, _____U_____, 201 P2d 288 (1948), the Court held:

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."

The evidence is undisputed that the real estate agent, Bill Baker, took respondent to see the Sidwell property when there were five acres to sell. But respondent did not want five acres. On April 29, 1946, the appellant purchased the west two acres of the property and Bill Baker measured off 126 feet on the front. As to the events subsequent to the sale of the two acres to appellant on April 29, 1946, Bill Baker testified as follows: "And then I went back to Mr. Taylor the following day and told him that we had contracted to sell this two acres, or approximately two acres, the 126 feet, if he wanted to take the rest of it, it was available at a certain price So on that day he gave me a deposit, as I recall it, to bind the three acres

or 212 feet of frontage" (Tr. p. 52, l. 18 to 23). And Bill Baker further testified as follows:

Q. "Then I am to understand, Mr. Baker, from your recounting of this, that of these transactions that you made, this sale to Mr. Porter, that you executed that earnest money receipt marked Defendant's Exhibit 2 and received one hundred dollars down payment from Mr. Porter prior to the day in which you again contacted Mr. Taylor and told him there was now three acres, more or less for sale?"

A. "Yes, that's right."

Q. "And that on the day when you contacted Mr. Taylor for the second time that you went out to see the property, that you pointed out the peg which you had put in to mark the property for your convenience?"

A. "Yes."

Q. "And told him that it had been purchased by Mr. Porter?"

A. "That's right, yes, the day he bought it."

In light of the foregoing testimony and the other testimony in the transcript it would see clear that respondent, Hudson Taylor, had actual notice of appellant's prior purchase of the two acres to the west of respondents' three acres. Respondent testified that they had always considered the east property line of Porter's property to be 126 feet from the old fence on the west (Tr. p. 29, l. 8 to 10).

Certainly at the time respondent, Hudson Taylor, bought his land appellant, Wesley Porter, was already bound on a contract to purchase the west two acres of ground. Any subsequent recordation of respondents' contract could not possibly act as notice to appellant. Appellant being a prior purchaser of land cannot be bound by the statute con-

cerning recordation, and respondents cannot invoke the protection afforded to subsequent innocent purchasers for value because they had actual notice of appellant's prior interest. Thus to the extent that respondents' contract conflicts with appellant's deed, it must be found to be subordinate thereto.

CONCLUSION

The facts of this case reveal a purchase of ground by two parties, after visual inspection of the property. Appellant clearly made his purchase prior to respondents' purchase and respondent most certainly had actual notice of the prior purchase. Further, it came to the attention of the common grantor that the description in appellant's deed was incorrect so it was corrected to show the actual intention of the parties (to recognize the old fence on the west as being the boundary between Sidwell and Parks). The common grantor, George W. Sidwell, testified that the east line of the respondents' property had never been fixed and that respondent could have his full frontage of 212 feet. The evidence shows the technical description in respondents' contract places the west boundary of respondents' property in such a position as to cut appellant's house in two, a position that all the parties in this action recognize as being foreign to the original purchase of the respective parties. The obvious conclusion must be that the description in respondents' contract is wrong. Respondent testified that he didn't know where the metes and bounds of his description fell upon the ground, but doggedly asserted that the boundary was between two rows of peach trees, while the respondents' surveyor said that the line was 23.3 feet further west.

We must also recognize that the common grantor executed a conveyance to the appellant first and thus, under the law is to be given priority over the respondents' conveyance, which was subsequently made.

In view of the law and the evidence in this case, the decision of the trial court should be reversed.

Respectfully submitted,

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