

1953

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

FILED

FEB 16 1953

HUDSON B. TAYLOR,
MARTHA O. TAYLOR,

Respondents,

— vs. —

WESLEY D. PORTER,

Appellant.

Supreme Court, Utah

Case
No. 7690

Petition for Rehearing by Appellant
and Brief in Support

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Respondents,

— vs. —

WESLEY D. PORTER,

Appellant.

} Case
No. 7690

Petition for Rehearing by Appellant and Brief in Support

PETITION

The Appellant respectfully petitions the Court for a rehearing in this case for the following reasons:

1. The Court misunderstood the facts of this case in that the new ditch dug by Porter does not at any place measure 126 feet from the old fence on the West of the property and was a ditch of convenience for Porter.

2. The Court misunderstood the facts of this case in that the tree rows on the property in question are not parallel with the old fence which all the parties

regard as the West boundary line of the common grantor's property.

3. The Court erred in applying the law to this case in that apparently the court announces a new principal in the law of boundaries which is contrary to the general law and overrules many decided cases in Utah.

ARGUMENT

Point I.

1. THE COURT MISUNDERSTOOD THE FACTS OF THIS CASE IN THAT THE NEW DITCH DUG BY PORTER DOES NOT AT ANY PLACE MEASURE 126 FEET FROM THE OLD FENCE ON THE WEST OF THE PROPERTY AND WAS A DITCH OF CONVENIENCE FOR PORTER.

All of the parties understood at the time of purchase that the line between their properties was 126 feet from an old fence on the West of the entire tract of land. The court has said, "that upon this basis defendant dug an irrigation ditch along the prescribed line."

The irrigation ditch referred to does not lie 126 feet from the old fence at any point. The undisputed evidence shows that the new fence erected by defendant is 126 feet East of the old fence at all points. Also, the undisputed evidence is that the irrigation ditch of defendant is, at the back of the property, only 114 feet 10

inches (trs. p. 71, line 2), and at the front is only 123 feet (trs. p. 71, line 7), East of the old fence. Or in other words the irrigation ditch is 11 feet 2 inches West of the new fence at the back, and 3 feet West of the new fence at the front.

It is the new fence erected by defendant which is 126 feet East of the old fence and not the irrigation ditch. It is this new fence which plaintiffs are seeking to have removed.

It is also clear that the plaintiff, Taylor, did not participate in the digging of defendant's ditch (trs. p. 47, line 15 to 29); and that plaintiff understood that defendant had purchased two acres off the West end of the Sidwell property (tr. 49, line 5).

Therefore it would appear that this court has inadvertently considered the ditch and the 126 feet line to coincide. To carry out the intent of the grantor and understanding of the parties the boundary line must be found to be a line 126 feet East of the old fence (where the new fence now is).

Point II.

2. THE COURT MISUNDERSTOOD THE FACTS OF THIS CASE IN THAT THE TREE ROWS ON THE PROPERTY IN QUESTION ARE NOT PARALLEL WITH THE OLD FENCE WHICH ALL THE PARTIES REGARD AS THE WEST BOUNDARY LINE OF THE COMMON GRANTOR'S PROPERTY.

The Court stated in its opinion that "The parties stipulated that a certain line surveyed and laid out by them would constitute the correct boundary if the Court should find that such boundary belonged 126 feet from the old wire fence and between the seventh and eighth rows of peach trees."

The actual stipulation was that the description was correct, if the boundary was determined to be a line between two peach tree rows (see Stipulation).

The point of this is that a distance 126 feet from the old wire fence does not fall between the two rows of peach trees. When the real estate dealer measured 126 feet from the old fence at the front and put in a peg it was between the 7th and 8th row of trees. However, he did not measure at the back of the property. When 126 feet is measured from the old fence at the back of the property, the point falls between the 8th and 9th row of trees. In other words, the tree rows are not parallel to the old fence. The old fence runs about due North and South, whereas the tree rows run North-westerly.

Under these facts then the court has inadvertantly tied together two mutually exclusive facts, namely, a distance 126 feet from the old wire fence and the two tree rows.

It does appear that everyone involved in this action mistakenly thought that the 126 foot line fell in between the 7th and 8th row of trees (as it does on the front of

the property). However, everyone believed and intended the line to be a full 126 feet from the old fence.

It is also considered that there is adequate evidence to find that the old wire fence on the West is a boundary by long acquiescence. It was there when the common grantor bought the property in 1931 and was considered the West boundary of the property (tr. p. 59, line 28, and p. 60, line 3).

Therefore it is a mistake to treat the tree rows as coinciding with the intended boundary of 126 feet from the old fence as this Court has apparently done in its opinion herein.

Point III.

3. THE COURT ERRED IN APPLYING THE LAW TO THIS CASE IN THAT APPARENTLY THE COURT ANNOUNCES A NEW PRINCIPAL IN THE LAW OF BOUNDARIES WHICH IS CONTRARY TO THE GENERAL LAW AND OVERRULES MANY DECIDED CASES IN UTAH.

The Court apparently says that because of a mutual mistake of fact that the boundary is to be located at a point not intended by the grantor of defendant. This is contrary to the general law and the express holding of previous decisions by this court:

In *Holmes v. Judge*, 31 U. 269, 87 P. 1009, it was said:

“We do not wish to be understood as holding that the parties may not claim to the true boundary where an assumed or agreed boundary is located through mistake or inadvertance, or where it is clear that the line as located was not intended as a boundary, and where a boundary so located has not been acquiesced in for a long term of years by the parties in interest.”

This case is supported by numerous other decisions of this Court one of the last being *Brown v. Millner*, U., 232 P. 2d 202 (1951).

It is submitted that in the absence of express agreement, estoppel or acquiescence in a mistaken boundary for over seven years, there is now no recognized way of establishing a boundary other than the true boundary. It would appear that this court is introducing a new theory in our law of boundaries.

Here we have two successive purchasers from the same grantor; the grantor and each purchaser understood the West boundary of the grantor's property to be the old wire fence; it is clear that the grantor intended the defendant, Porter, to have 126 feet off the West end of his property, and that plaintiffs were to have the next 212 feet and he was to keep the balance. The defendant's earnest money receipt and later deed makes this intent clear. Plaintiffs' earnest money receipt says that they were to get the “East three acres of the West five acres of an eight acre tract . . .” (tr. P. 34).

Since defendant purchased his land first and everyone knew that he was to get the West two acres (126 feet from the old wire fence) it would appear that the true boundary is 126 feet from the old wire fence.

CONCLUSION

When the real estate dealer measured off 126 feet on the front of the property it came between the 7th and 8th row of peach trees. He apparently thought that the tree rows were parallel with the old fence but they are not. However, when plaintiffs purchased their three acre tract later they were shown the peg at 126 feet on the front of the property. The plaintiffs did not see defendant's earnest money receipt but understood there were two acres in the Porter tract (Tr. p. 49, line 5). Under these facts it would seem proper under our law to establish the boundary lines as understood by the parties and intended by the common grantor. This boundary is marked by the new fence erected by defendant and the lower court has ordered the removal of the fence and the establishment of a boundary at a point which has no justification in the facts, and employs a theory new to our law of boundaries.

The grantor intended that defendant have the West 126 feet of his property and the plaintiffs will receive their 212 feet of property (as intended by the grantor) by keeping defendant's fence where it is. Otherwise, defendant will lose a strip of land approximately 11 feet wide along the length of his property without any gain

to the plaintiffs, and without any adequate remedy to recover this loss. Therefore, a rehearing should be granted and the decision of the lower court reversed.

Respectfully submitted,

PETER M. LOWE,

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