

1953

Hudson B. Taylor, Martha O. Taylor v. Wesley D. Porter : Respondents' Answer to Petition for Rehearing by Appellant and Brief in Support

Utah Supreme Court

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**In the Supreme Court of the
State of Utah**

FILED

APR 16 1953

Clerk, Supreme Court, Uta

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

vs.

WESLEY D. PORTER,
Appellant.

**CASE
NO. 7690**

**Respondents' Answer to Petition for Rehearing
by Appellant and Brief in Support**

HUGH VERN WENTZ,
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INDEX

	Page
ANSWER TO PETITION FOR REHEARING.....	1
STATEMENT OF POINTS.....	1-2
ARGUMENT	2
Point I.	
The Court did not base its decision on an understanding that the new ditch measured 126 feet from the old fence on the west of the new property, but based its decision on the intent and understanding of the parties evidenced by their acts and knowledge.....	2-4
Point II.	
The Court did not base its decision on the tree rows being parallel with the old fence on the west boundary line of the common grantor's property...	4-5
Point III.	
The Court did not err in applying the law to this case	5-6
CONCLUSION	7

In the Supreme Court of the State of Utah

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Appellant.

**CASE
NO. 7690**

Respondents' Answer to Petition for Rehearing by Appellant and Brief in Support

STATEMENT OF POINTS

The respondents respectfully submit to the Court the following answer to the petition for a rehearing in this case for the following reasons:

1 The Court did not base its decision on an understanding that the new ditch measured 126 feet from the old fence on the west of the property, but based its decision on the intent and understanding of the parties evidenced by their acts and knowledge.

2. The Court did not base its decision on the tree rows being parallel with the old fence on the west boundary line of the common grantor's property

3 The Court did not err in applying the law to this case.

ARGUMENT

POINT I

THE COURT DID NOT BASE ITS DECISION ON AN UNDERSTANDING THAT THE NEW DITCH MEASURED 126 FEET FROM THE OLD FENCE ON THE WEST OF THE PROPERTY, BUT BASED ITS DECISION ON THE INTENT AND UNDERSTANDING OF THE PARTIES EVIDENCED BY THEIR ACTS AND KNOWLEDGE.

The Court referred to the 126 feet in connection with a stake driven to indicate the approximate boundary between the two lots, and all parties so understood at time of purchase. The evidence in the record bears this out.

Bill Baker, witness for the appellant, stated, on direct examination, relative to the line: "Now, on the west side of the property there is an old fence which was presumed by me at least to be the line between that property and the property on the west, 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, which might have been a foot or a fraction of a foot off from the true corner at any time it was surveyed, but it wouldn't probably be very far off." (Tr. p. 52, l. 24-30).

Bill Baker, witness for the appellant, testified on direct examination as follows: "... And I showed him it came right almost dead center between the 7th and 8th

row of trees. That is, counting from the west side of the tract it came almost exactly in the center between those two rows of peach trees." (Tr. p. 53, l. 15-18).

Bill Baker, witness for the appellant, further testified on cross examination that the line between the parties ran north and south between two tree rows. (Tr. p. 57, l. 14-30; Tr. p. 58, l. 1-2).

The appellant on cross examination testified that he never made any measurements on the ground until 1949 (Tr. p 81, l 13-16). The appellant never raised any question as to the 8th row of trees, which lies on the east side of the new irrigation ditch, until the following 1949. (Tr. p. 82, l. 11-19).

The description contained in the first deed of the appellant and the description contained in the deed of the respondents do not conflict with one another whatsoever. The survey made by Mr. Beckman, civil engineer, using the respective descriptions, shows the west boundary of the appellant's land 23.3' west of the old fence line, which is located on the west side of the entire tract of land, and the west boundary of the respondents' land to be 23.3' west of the line between the 7th and 8th row of trees (Tr. p. 11, l. 28-30; Tr. p. 13, l. 6-23). The decision of the lower court cut down the respondents' property by approximately 19 feet by moving the respondents' west line some 19 feet over onto the respondents' property. Said line being a point between the two rows of trees known as the 7th and 8th row of trees.

Counsel for appellant and counsel for respondents entered into a written stipulation in open court, that the description set out on page 6 of respondents' Motion to Correct Amended Findings of Fact and Conclusions of Law

and Amended Judgment was a correct description if it was the Court's intention that the west line of respondents' property be a point between the two rows of peach trees. (Rec. 64; Rec. 66).

Actually the appellant in his answer, paragraph 8, alleged: "Admits the appellant's land is on the west of respondents' land; that appellant did construct an irrigation ditch for his own purposes at or about the location as set out in paragraph 8" (Rec. 15, l. 32; Rec. 16, l. 1-2). Paragraph 8 of respondents' complaint sets out that the appellant constructed an irrigation ditch midway between the said two peach rows. (Rec. 4).

The earnest money receipt entitled "Defendants' Exhibit No. 2 reads: ". . . to secure and apply on the purchase of the following described property; West 2 acres, more or less - (West 7 rows of trees) of an 8 acre tract at the N. W. corner of 4th N., 8th E. in Orem."

The written stipulation agrees that the description set forth is a correct description if the intent of the parties is that the line is one between the two rows of trees. We submit that from all evidence that the boundary line between the parties is one that is located between two rows of trees.

POINT II

THE COURT DID NOT BASE ITS DECISION ON THE TREE ROWS BEING PARALLEL WITH THE OLD FENCE ON THE WEST BOUNDARY LINE OF THE COMMON GRANTOR'S PROPERTY.

A reading of the entire 2nd and 3rd paragraphs of the Court's opinion, rather than just one isolated sentence, clearly shows that the Court found the intent of the parties was that the line was between the two rows of trees:

The stipulation agreed that the description used correctly described a line between the two rows of trees.

The evidence in the record supports this conclusion. See "Defendant's Exhibit No. 2." The earnest money receipt which appellant himself relies on. It reads " . . . to secure and apply on the purchase of the following described property; west 2 acres more or less - (West 7 rows of trees) of an 8 acre tract at the N. W. corner of 4th N., 8th E., in Orem. Then too, the ditch constructed ran down between the two rows of trees. (Rec. 4; Rec 16, l. 32; Rec. 16, l. 1-2).

Under this construction the appellant got all he bargained for, namely, the 7 rows of trees; while the respondents lose approximately 19 feet of land. There is no evidence whatsoever that the appellant ever bargained for the 8 tree rows, but that is what he would get if the line is taken as being 126 feet east parallel with the old fence on the extreme west.

POINT III

THE COURT DID NOT ERR IN APPLYING THE LAW TO THIS CASE.

From the theory of law set forth by the appellant, we note that in this case there is no evidence that the line as located was not intended as a boundary. The earnest money receipt entitled "Defendant's Exhibit No. 2" reads: . . . to secure and apply on the purchase of the following described property; West 2 acres, more or less - (West 7 rows of trees) of an 8 acre tract at the N. W. corner of 4th N., 8th E., in Orem". It is to be noted that the receipt itself speaks of 2 acres more or less, and that it definitely speaks of the west 7 rows of trees. The receipt does not set forth

a description of so many chains or so many feet but speaks simply of the west 7 rows of trees.

At a later date after both parties were in possession, the appellant procured a deed with a detailed description, but there is nothing in the first deed of the appellant and the description contained in the deed of the respondents which conflict with one another. The survey made by Mr. Beckman, civil engineer, using the respective descriptions, shows the west boundary of the appellant's land 23.3' west of the old fence line, which is located on the west side of the entire tract of land, and the west boundary of the respondents' land to be 23.3' west of the line between the 7th and 8th rows of trees (Tr. p. 11, l. 28-30; Tr. p. 13, l. 6-23).

The decision of the lower court cuts down respondents' property by approximately 19 feet by moving respondents' west line by something like 19 feet over to the respondents' property. Said line being a point between the two rows of trees known as 7th and 8th row of trees.

Actually the description of the deeds, earnest money receipt and contract that the respective parties had did not conflict from the time they went into possession about April 30, 1946 until October 7, 1946, when the appellant recorded a second deed bearing date of September 30, 1946. (Tr. 80, l. 1-9).

If the appellant's argument is to be strictly adhered to then the respondents' west line should be moved farther west by some 19 feet. But the Court, from all the evidence found that the line between the 2 rows of trees was intended as the boundary. We submit that it cannot be said that it is clear that the line as located was not intended as a boundary.

CONCLUSION

Respondents submit that on the basis of the evidence the Court did not err in fulfilling the intention and understanding of the parties by saying a line should be established between a 7th and 8th row of trees and by fixing the location thereof in accordance with the stipulation. Therefore Petition for Rehearing should be denied.

Respectfully submitted,
HUGH VERN WENTZ,
Attorney for Respondents