1981

# Victor Brown, Et al. v. Leon Peterson and Peterson Development Co : Brief of Appellants In Opposition To Respondents Petition For Rehearing

Utah Supreme Court


STEVEN H. STEWaRT; Attorney for Respondents;M. RICHARD WALKER; Attorney for Appellants;

IN THE SUPREME COURT

OF THE STATE OF UTAH

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VICTOR BROWN, et al,

Plaintiffs and Appellants,

vs.

LEON PETERSON and PETERSON DEVELOPMENT CO.,

Defendants and Respondents.

No. 16785

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# BRIEF OF APPELLANTS IN OPPOSITION TO RESPONDENTS PETITION FOR REHEARING

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APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE DAVID K. WINDER, Judge

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M. RICHARD WALKER
WALKER & HINTZE, INC.
Suite 202
4685 Highland Drive
Salt Lake City, Utah 84117
Attorneys for Appellants

STEVEN H. STEWART
220 South Second East, No. 450
Salt Lake City, Utah 84111
Attorney for Respondents

I N T H E S U P R E M E C O U R T

OF THE STATE OF UTAH

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## CITATION OF AUTHORITIES



## AUTHORITIES


UTAH LAW REVIEW, Volume No. 1, Spring 1975 pg. 224. 6

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## STATEMENT OF THE NATURE OF THE CASE

This is an action involving a dispute of the ownership of a strip of land approximately 70 feet by 969 feet located between the Plaintiff's (Appellant's) property on the west, and the Defendant's (Respondent's) property on the east. The Appellants claim that their predecessors in title acquired ownership of the disputed strip of land through "boundary by acquiescence", establishing an "old fence" line which had defined the boundary between the properties for more than forty-five (45) years as the boundary line; and that said predecessors then conveyed ownership to the Plaintiffs/-Appellants through deeds, which have transferred ownership of the disputed strip of land to the Plaintiffs/Appellants.

The Defendants/Respondents claim that their title is based upon surveys and deeds from their predecessors.

## DISPOSITION IN THE LOWER COURT AND THE SUPREME COURT

The case was tried to the Court. The trial court entered judgment quieting title to the disputed strip of land

to the Defendants/Respondents, concluding that the Plaintiffs could not have relied upon the "old fence" as their boundary line because they were charged with actual or constructive notice of the recorded boundary line of MEADOW COVE NO. 2 SUBDIVISION, when they purchased their lots.

This Court, in a unanimous opinion, filed December 18, 1980, reversed the decision of the trial court, quieting title therein to the Plaintiffs/Appellants.

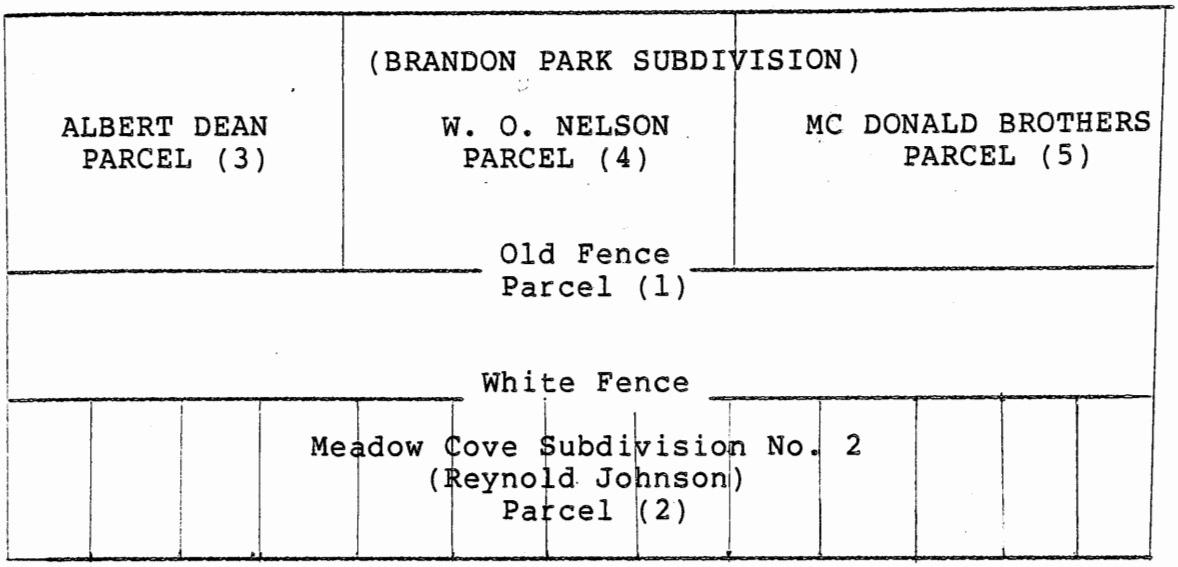
## RELIEF SOUGHT

The Appellants seek the denial of Respondents PETITION FOR REHEARING, thus affirming this Courts decision published on December 18, 1980, and quieting title in the Plaintiffs/Appellants.

## STATEMENT OF FACTS

This action involves a dispute to the ownership of a strip of land 70 feet by 969 feet, as shown on the plat hereafter as PARCEL (1).

PLAT OF PROPERTY




The appellants are owners of the lots in Meadow Cove No. 2 Subdivision, Parcel (2) on the plat. Meadow Cove Subdivision was developed by PORTER BROS. in 1973. When PORTER BROS. acquired the property they thought their property went east to the "old fence", [Record p. 188, 189] however when they hired Bush & Gudgell to survey for their subdivision, upon the surveyors advice [Record p. 12] they accepted the east boundary of the subdivision to be seventy (70) feet west of the "old fence" [Record p. 188,189] even though the subdivision plat does not agree with the deeded description from Reynold Johnson, their predecessor in title [Record p. 295].

Until Porter Brothers developed Meadow Cove Subdivision in 1973, all the property shown on the plat as parcels (1),

(2), (3), (4) and (5) were open fields divided only by the "old fence" [Record p. 214, 215].

The "old fence" was built prior to 1925 when Albert Dean, moved onto Parcel (3) [Record p. 205] and when he purchased Parcel (3) in 1935, he was informed that the "old fence" was the west boundary of his property [Record p. 206].

From that time until 1973, for a period of at least 48 years, the undisputed evidence shows that the owners on both sides of the "old fence" acquiesced in the "old fence" as the boundary line between the properties [Record p. 314, 315, 320, 212, 213, 222].

The Appellant's predecessor in title, Reynold Johnson purchased the property referred to as Parcel (1) and (2) in 1943 [Exhibit D-5]. He was told that he was acquiring everything east to the "old fence" [Record p. 212]. During the entire time he owned the property, he occupied, used, and farmed the property east to the "old fence", [Record p. 213] until he sold in 1971, when he deeded to South [Exhibit P-14] telling the Buyer they were buying to the "old fence" on the east [Record p. 217]. Johnson never had the property surveyed [Record p. 222] but relied solely on the location of the fences to define the boundary.

The Respondents introduced absolutely no evidence to controvert the establishment of boundary by acquiescence.

In proof of Respondents claim that their title was based upon surveys, and deeds to the land, it was shown by both the Appellant's and Respondent's engineers, that numerous discrepancies existed with the deeds [Record p. 293-295], [Record p. 402]. Both surveyors agreed that the deeds on both sides of the "old fence" failed to close, and had errors in the description [Record p. 293, 380, 402].

On the east side of the "old fence" the Respondent's deeds overlap into Meadow Cove Subdivision by 26 feet [Record p. 381, 382]. The deed on Parcel (4) came with two descriptions [Record 385, 386], and by using the main description (a second description was in parenthesis) there was a 68 foot gap, which would closely agree with the "old fence" as the boundary.

With regard to Parcel (5) the Mc Donald Tract the Respondent's Counsel admitted they had a problem there [Record p. 391] and their own surveyor testified that the deed description under which the Respondents obtained Parcel (5) only goes to the "old fence", [Record 391, 395] and not to the "white fence" where Respondents seek to establish the boundary.

The said Reynold Johnson having acquired title to the disputed strip of land, through boundary by acquiescence, he then deeded to the Plaintiffs/Appellants, [Exhibit P. 15].

## ARGUMENT

## POINT I

## THE RESPONDENTS PETITION FOR REHEARING RAISES NOTHING NEW, IMPORTANT, NOR SHOWS ANY ERROR BY THE APPELLATE COURT.

In Respondents Petition for Rehearing and BRIEF in Support of Petition for rehearing, the Respondents have again repeated the same issues and quoted the same cases that were before the Court on appeal. The Respondents failed in trial to introduce any evidence to dispute the boundary by acquiescence, and relied solely on the argument that because the parties to this action were not the parties between whom the boundary by acquiescense occurred, therefore a Court of Equity should ignore the doctrine and decide who would have the greater equity to be served.

This reasoning is contrary to the rulings of this Court. The doctrine of boundary by acquiescence has long been recognized to SETTLE boundary disputes, see Utah Law Review, Volume No. 1, Spring 1975 at page 224. This Court has made clear that a boundary established by acquiescence is binding not only on the acquiescing owners, but also on their grantees, see Johnson vs. Sessions, 25 Ut 2d 133, 477 P 2d 788, (1970).

In the case of Provonsha v. Johnson, 6 U 2d 26, 305 P

2d 486 (1956) this Court dealt with a boundary fence in place for some 35 years and concluded at page 29:

> "If by the time a boundary by acquiescence had been established, as we think it had, under principles heretofore announced by this Court, succeeding grantees could not marshall their disagreements or misunderstandings to destroy that established boundary."

The Respondents reargue the same facts the appellate Court rejected and site the cases of Florence v. Hiline Equipment Company and Hobson v. Panguitch Lake Corporation as their sole authority for the decision they seek. Both cases are clearly distinguishable from the present case.

In Florence v. Hiline Equipment Company, 581, P 2d 998 (1978) this Court concluded:

> "The trial court determined that the doctrine of boundary by acquiescense does not apply to the facts of this case...although the fence has been in existence for a number years, there is nothing in the record to support the claim that these parties have acquiesced in treating the fence as their mutual boundary."

Citing the Hobson v. Panguitch Lake Corporation case, this Court in Florence concluded:

> "We cannot see the circumstances as justifying a conclusion that the parties acquiesced in regarding this fence as a boundary for the sufficiently long period of time...Likewise, on the facts now before us, we must conclude as did the trial court that the parties have not by their actions relied upon the fence as being the true and actual boundary."

The very factual requirements missing in those two cases, was shown without dispute, to exist in the instant case, namely the true boundary line was unknown and the parties on both sides of the "old fence" for more than 40 years, acquiesced and relied on the "old fence" as the boundary line.

Accordingly this Court concluded in its December 18, 1980 decision at page 2:

> "It is clear from the undisputed evidence that plaintiffs and their predecessors in title and interest had occupied, possessed and used the land included in the disputed strip for more than 40 years as the owners thereof; that the land had been bounded by a visible fence during all that time, which fence had been accepted by the adjoining landowners as the boundary line between their respective tracts of land.

The evidence introduced at trial, by the Plaintiffs/Appellants, shows this case, without controverting evidence, to be the classic case of boundary by acquiescence.

The Respondent has in its petition reargued its appeal with nothing new added, no new evidence shown and no error shown, except that Respondents want a different decision.

This Court has held that a rehearing should not be granted, where nothing new and important, was offerred for consideration.

Ducheneau v. House 4 Ut 483, 11 P 618 (1886 ), further

when the Supreme Court has considered and decided all the material questions involved in a case, a rehearing should not be applies for, unless the Court misconstrued some material fact or facts, or overlooked some statute or some decision which might affect the result, or based the decision on a wrong principal of law. See Cummings v. Nielson 42 Ut 157, 129 P. 619 ( 1913).

To justify a rehearing a strong case had to be made to show the Court failed to consider some material point, or erred in its conclusion or matter was discovered which was unknown at the original hearing.

See In re MacKnight 4 Ut 237, 9 P 299 ( 1886).
Brown v. Pickard 4 Utah 292, 9 P 573, 11 P 512 ( 1886).

No such showing has been made by the Respondent. Were the Respondent's argument of equity allowed to reject boundary by acquiescence in the instant case, the settling of boundary disputes through this doctrine would become a nullity in this state.

## POINT II

## THE APPELLATE COURT PROPERLY REVIEWED THE LAW AND THE FACTS AND DETERMINED THAT THE UNDISPUTED EVIDENCE ESTABLISHED BOUNDARY BY ACQUIESCENSE VESTING TITLE IN THE PLAINTIFFS/APPELLANTS.

This Court has made clear in numerous decisions that in equity cases, it is the duty and the prerogative of the

Supreme Court to review the law and the facts and if necessary to make its own findings and substitute its judgment for that of the trial court.

See Mitchell v. Mitchell, 527 P 2d 1359 (1974); Kier v. Condrack, 478 P 2d 327, 25 Ut 2d 129 (1970); Richins v. Struhs, 412 P 2d 314, 17 Ut 2d 356 (1966); Salt Lake County v. Kartchner, 522 P 2d 136 (1976).

Pursuant to that burden this Court reviewed the law and the facts and concluded at page 2:

> "It is clear from the undisputed evidence that Plaintiffs and their predecessors in title and interest and occupied, possessed and used the land included in the disputed strip for more than 40 years as the owners thereof; that the land had been bounded by a visible fence during all that time, which fance had been accepted by the adjoining landowners as the boundary line between their respective tracts of land.
>
> It is also clear from the evidence that none of the Defendants, nor their predecessors in title and interest, had occupied, possessed, used or claimed any of the land included in the disputed strip for more than 40 years prior to the filing of the legal action in this matter.
>
> Reynold Johnson had bought the land west of the old fence in 1943. From that date until 1971, he occupies and farmed the land up to the old fence. He irrigated his crops from the ditch that ran along the old fence line immediately west of such fence. He had acquired title to the disputed strip of land by operation of law under the doctrine of boundary by acquiescence. The Defendants' predecessors in title and in-

terest held good title to their lands west to the old fence, and only the bare record title to any land west of the old fence that was embraced within the descriptions in their title documents. Their legal title to any part of the disputed strip of land had been extinguished when Johnson's occupancy and possession had ripened into a legal title."

The Respondents finally attempt to find basis for complaint because of the judges who heard and decided the case. This Court has set forth the standard for Rehearing clearly. In Shippers Best Express, Inc. vs. Newson, 579 P 2d 1316 (1978) this Court rejected a petition for rehearing and concluded that:

"To set it aside required a vote of a majority of those who heard the matter, otherwise the judgment which was pronounced by a majority of the Court stands." (at page 1319)

As stated by Justice Crockett in his concurring opinion in the Skippers Best Express v. Newsom case at Pg 1318:

"It is totally foreign to my conception of fairness and justice for a party to submit his controversy to a Court for adjudication, then wait to see whether he wins or loses, and when he loses to then attack the composition of the court. That this may not properly be done." See People, etc. Tidwell et al, 5 Ut 88, 12 P 638; In re Thompson 72 Utah 17, 269 P 103, 128.

## CONCLUSIONS

The decision of this court reaffirms the long standing doctrine of boundary by acquiescence settling property disputes in the State of Utah. The Plaintiffs/Appellants have shown by undisputed evidence the establishment of all elements of boundary by acquiescence for a period in excess of 40 years, settling the boundary line as the "old fence". The Respondents have failed to show any evidence to controvert the application of the doctrine in this case. Further, the Defendants/Respondents have failed to sustain their own burden of showing their acquisition of the property through valid deeds, and have failed to show a single case in point which would refute the application of boundary by acquiescense in this classic case.

The Plaintiffs/Appellants therefore respectfully urge the Court to deny the Defendants/Respondents Petition for Rehearing and affirm the unanimous decision of this Court.

Respectfully submitted this 9th day of February, 1981.

WALKER, HINTZE & WASHBURN, INC.

By M. Richard Walker

M. RICHARD WALKER
Attorney for the Plaintiffs
and Appellants
Suite 202, 4685 Highland Drive
Salt Lake City, Utah 84117
Telephone: 278-4747

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the Brief of Appellants in OPPOSITION to Respondents Petition of Rehearing, by mailing to STEVEN H. STEWART, Attorney for Respondents, at 220 South 200 East, Suite 450, Salt Lake City, Utah 84111, this 9th day of February, 1981, postage prepaid.