

1960

Johnson Real Estate Co. et al v. LeRoy F. Nielson et al ; Brief of Appellants

Utah Supreme Court

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

**JOHNSON REAL ESTATE COMPANY,
formerly JOHNSON-PEAY REAL ESTATE
COMPANY, a Utah Corporation, and MIL-
TON G. JOHNSON and MILDRED F. JOHN-
SON, his wife,**

Plaintiffs and Respondents,

vs.

**LeROY F. NIELSON and ORA ELIZABETH
NIELSON, husband and wife, and PEO-
PLES STATE BANK OF AMERICAN
FORK, a corporation,**

Defendants and Appellants.

FILED

APR 14 1960

Clerk, Supreme Court, Utah

**CASE
NO. 9158**

APPELLANTS' BRIEF

HUGH VERN WENTZ

**Attorney for Defendants
and Appellants**

NEW CENTURY PRINTING CO., PAPER, UTAH

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POINT I

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PLES STATE BANK OF AMERICAN
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Defendants and Appellants.

**CASE
NO. 9158**

BRIEF OF APPELLANTS

STATEMENT OF FACTS

Respondents filed suit against the Appellants LeRoy F. Nielson and Ora Elizabeth Nielson, husband and wife, alleging that the Respondents were owners of certain de-

scribed real estate situated, lying, and being in Utah County, Utah, described as follows:

Beginning at a point in a fence line on the South side of a street which point is East along the Section Line 2.57 feet and South 37.34 feet from the North Quarter Corner of Section 13, Township 5 South, Range 1 East, Salt Lake Base and Meridian; thence North $89^{\circ} 19'$ East along said street line 66.4 feet to the West side of a street; thence South $0^{\circ} 24'$ West 615.65 feet along said street line; thence North $89^{\circ} 36'$ West 100.0 feet; thence South $0^{\circ} 24'$ West 81.20 feet to a fence line; thence South $89^{\circ} 40'$ West along said fence line 233.00 feet to a fence line; thence North $0^{\circ} 53'$ West along said fence line 307.25 feet to the remnant of an old fence line heretofore referred to in doods of record as "the old field fence;" thence North $87^{\circ} 57'$ East along said old field fence line 281.14 feet to a fence line; thence North $0^{\circ} 43'$ West 379.45 feet along said fence line to the point of beginning. EXCEPTING THEREFROM that land conveyed to Darrell G. Hansen and Leo H. Wootton by deed recorded as Entry No. 2481, February 16, 1959, in the Office of the Recorder of Utah County, Utah.

And in this connection alleged that they and their predecessors in interest had been in possession of said property for more than twenty-five years under exclusive use and occupancy, and that the property had been enclosed by a fence and that they and their predecessors in interest had paid all taxes levied against said property. The Respondents prayed for and requested an order quieting title to the real estate (R. 3-4).

Appellants filed an answer and counter-claim in which they denied the allegations of the Respondents and alleged that they, the Respondents, were the owners of full fee

simple title in and to property described as follows:

Beginning at the Northeast corner of the Northwest Quarter of Section 13, Township 5 South, Range 1 East, Salt Lake Meridian, thence running South to the old field fence 7.25 chains, more or less, thence West along said old fence 13.35 chains; thence North $27\frac{1}{2}^{\circ}$ West along old bed of creek 8.20 chains, more or less, to the Quarter Section Line; thence along said line East 17.00 chains to the place of beginning.

Appellants claimed that they and their predecessors n interest had been in possession of the property for more than fifty years under full and exclusive use and occupancy. That the property was enclosed by a fence and that the Respondents and their predecessors in interest had paid all taxes levied against said property. The Respondents prayed for judgment quieting title to the said real estate (R. 7-10).

After trial of the case, the lower court granted judgment to the Respondents as prayed for in Respondents' complaint (R. 19-21) (R. 27-28).

The Appellants receive their title by a warranty deed dated May 31, 1940, recorded in Utah County Recorder's Office in book 35, page 590, on date of May 9, 1940 (Defendants' Exhibit No. 4, page 17).

The Respondents received their title and it doesn't conflict, by a warranty deed dated September 5, 1957, recorded in Utah County Recorder's Office, in book 757, page 167, on date of September 10, 1957 (Defendants' Exhibit No. 4, page 42).

Up until February 16, 1959, in so far as the deeds of record, there was not a conflict in the title line between Appellants and Respondents. On date of February 16, 1959, a

deed was made and executed by the Respondents in favor of Darrell G. Hansen and Leo H. Wootton which conflicted with the record title of the Appellants. This deed was dated February 16, 1959, and was recorded February 16, 1959, in the office of the Utah County Recorder in book 803, page 458 (Defendants' Exhibit No. 4, page 43). Then on date of March 4, 1959, the Respondents received a deed which conflicted with the title record of the Appellants. This deed was executed March 4, 1959, and was recorded March 4, 1959, in the office of the Utah County Recorder in book 806, page 64 (Defendants' Exhibit No. 4, page 44). This deed represents the fundamental conflict between the Appellants and Respondents. The effect of the deed was to place the claimed north boundary line of the Respondents approximately eighty-eight feet farther north than any deed of record that the Respondents had. The north line of the property described in said deed extended north of the south boundary line of the Appellants and extended a distance of approximately sixty feet north of the recorded south boundary line of the Appellants. The Respondents claimed that they were entitled to this property by virtue of possession for a period in excess of twenty-five years and by the payment of taxes. The Appellants claimed full fee simple title to the property and that they had been in exclusive possession and had paid taxes. Respondents contended that there had been an old fence line along the north side of the property which corresponded with the north line of the deed which they received March 4, 1959 (Defendants' Exhibit No. 4, page 44).

Appellants contended that the fence line referred to by the Respondents had never actually been a boundary fence

but that it was a fence that had separated orchard land from pasture land of the common owner and that said fence had not been in place for a period in excess of 19 years. Appellants further contended that there had been a boundary line fence between the parties and that said boundary line fence had been located along a line which corresponded with the south boundary line as set forth in Appellants' deed of May 9, 1940 (Defendants' Exhibit No. 4, page 17).

APPELLANTS' POINTS

I

THAT THE TRIAL COURT ERRED IN THAT THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE QUIETING TITLE.

ARGUMENT

I

THAT THE TRIAL COURT ERRED IN THAT THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE QUIETING TITLE.

The Appellants submit that a review of the evidence in this case and the law applicable thereto shows that judgment should have been granted in favor of the Appellants and against the Respondents. First, let us take the testimony of the Respondents' own witnesses. The first witness for the Respondents was one Ornel Emmons, the same person who made and executed a warranty deed to the Respondents on date of September 5, 1957, which deed was

recorded in the office of the Utah County Recorder on September 10, 1957, Book 757, page 167 (Defendants' Exhibit No. 4, page 42) and also is the same person who made and executed a warranty deed two years later in favor of the Respondents, said deed dated March 4, 1959, recorded in the office of the Utah County Recorder on date of March 4, 1959, Book 806, page 64, which deed is the first deed to conflict of record with the Appellants' title (Defendants' Exhibit No. 4, page 44).

Mr. Ornel Emmons testified he bought the property April 1, 1946 (Tr. D-7, Line 1). Respondents' attorney asked Mr. Emmons to describe the condition of the fence at the time he purchased it and he answered that it had two or three barbs strung through what posts were left, and that it was up on some posts and laying on the ground on some others (Tr. D-10, Line 15-20).

Ornel Emmons further testified that all the posts were not in, and that there was just a post now and then, and that the wire was up on some and down on some, and that he imagined there were at least six posts (Tr. D-11, Line 1-8).

The witness further referred to a fire that he had set a couple of years before he had sold the land, which had some effect on the fence (Tr. C-12, Lines 1-21).

Mr. Emmons certainly had an interest in the case. He had given the Respondents a warranty deed as late as March 4, 1959, which for the first time conflicted with the record title of the Appellants.

The witness, Ornel Emmons, on cross examination by the Appellants in speaking of the number of posts in the fence, stated four to six posts, (Tr. 13, Line 17), and he further testified to observing two posts that were a rod south

of the posts he had mentioned (Tr. C-13, Line 17-27).

The witness, Ornel Emmons, also testified that the wires were laying on the ground in places and that it wasn't the type of fence that would hold anything from going back and forth across the fence (Tr. C-15, Line 7-21).

He further testified that it wouldn't hold stock and that it wouldn't even keep a tractor out (Tr. C-15, Line 22-26).

Mr. Ornel Emmons, the witness for the Respondents, further testified that in the ten years that he was in possession of the land that he made no use of any of the land between the orchard clear down to the south boundary line of this own title, except for the use of some coops along the south side of his own property (Tr. C-17, Line 5-30). (Tr. C-18, Line 1-8).

In answer to the Appellants as to the ten years that he supposedly was in possession and ownership of the property in question and as to whether he had used it or not, he stated "No, I didn't use it." (Tr. C-18, Line 4-8).

The witness further mentioned that there was a discussion about putting up a fence but that the most that he and the Appellants discussed on it was as to who was to furnish material and who was to put the fence in place, and that there was nothing said as to the exact location of the fence (Tr. C-18, Lines 9-24).

The witness further testified on re-cross examination, "No, I didn't use any of it, only the coops." (Tr. RED-REC-19, Line 24). The coops were down on the lower part of the witness's land that didn't conflict with the Appellants' title.

This fact is further borne out by the testimony of Wilbur Harding, another witness for the Respondents, when he testified "I didn't do very much with any of the property

north of the chicken coops, as far as any extensive work." The question was asked Mr. Harding on cross examination, "North of the chicken coops, you didn't do much with the land at all?" Mr. Harding answered, "That is right, except for the west portion where we had the berries." (Tr. C-131, Line 11-19). It is to be noted that this witness, that is, Wilbur Harding, shows by his own testimony that he was in possession of the Emmons land in February of 1942 (Tr. D-126, Line 28). He further testified that he was on the land (meaning the Emmons land) for about four years (Tr. C-129, Line 3). The use of the land by Mr. Harding, it will be noted, was little different than the use of the land by Mr. Emmons. These are the Respondents' own witnesses.

A review of the testimony of the witness, Ornel Emmons, who was certainly a witness interested in the behalf of the Respondents for whom he testified, shows that the most that the fence amounted to was four or six posts over the entire length and that the fence was up in some places and was down in others, and that as far as keeping anything from traveling back and forth, it wholly failed to do so. His testimony clearly stated that he didn't do anything with the land, even that located south of the now disputed area; for a period of ten years he did nothing with the land. This is the testimony of the immediate predecessor of the Respondents. Add the non-user of Wilbur Harding to the non-user of Ornel Emmons and we have fourteen years of non-user by the immediate predecessors of the Respondents.

The Respondents filed a suit on April 29, 1959, and only received their conflicting title on March 4, 1959, and the man that he received it from for the ten years prior to that time didn't even do anything with the land. There could

have been no payment of taxes on the land by witness, Ornel Emmons, the immediate predecessor of the Respondents, because his own deeds of record did not conflict with that of the Appellants, or cover the land in dispute.

The first time the Respondents had anything on the record which did require a payment of taxes was upon the recording of the deed of March 4, 1959; thus the witness Ornel Emmons, who had the title for ten years had paid no taxes on the land in dispute during that period, and he had made no use of the land, and he has testified of a fence consisting of four to six posts, and a fence that was up and down in places, and a fence that in no way interfered with traveling back and forth. We submit that, based on the testimony of Mr. Ornel Emmons, who at least being the so-called possessor of the land for a period of ten years, should be a most binding witness on the Respondents.

The Respondents' engineer, Parley M. Neeley, testified for the Respondents to the effect that a year and a half prior, he observed two or three posts and he thought there were two or three stumps, and that the fence wire was laying on the ground for the most part, and that it was from this observation that he determined that it was an old fence, (Tr. C-34, Line 25-30) (Tr. C-35, Line 1-11), not that it was the fence.

Clarence Roundy testified for the Respondents but could not state with any definiteness as to the condition of the fence. He presumed that there were wires down but he could not fix as to how many posts there were and he felt that two posts would make a fence. That was his memory as to the condition of the fence in the year 1939 (Tr. C-45, Line 9-30). The witness further admitted that he had sold

property which abuts on the east of the property in dispute to the Respondents (Tr. C-46, Line 9-15).

Darrell Hansen, witness for the Respondents, testified, "The only fence that I observed, or place that there could have been any fence was the fence line in question." (Tr. D-48, Line 10-11).

In answer to the question by the Respondents' attorney as to what the fence line looked like, he stated, "Well, it had been burned out but there was still evidence there that it was a fence. (Tr. D-48, Line 13). And when asked what the evidence consisted of, he answered, "Post stubs and wire, barbed wire." (Tr. D-48, Line 19-22). There was nothing in the witness's testimony that fixed the location of the fence; the nearest that the witness fixed the location of the fence was to say it was the fence line in question (Tr. D-48, Line 10-11). He made no attempt to locate the fence.

The witness Darrell Hansen certainly has an interest consistent with the interest of the Respondents in this case, inasmuch as he is the grantee on a certain deed from the Respondents. This deed is the first deed that conflicts with the title description the the Appellants. This is the deed dated February 16, 1959, and recorded in the office of the Utah County Recorder on February 16, 1959, book 803, page 458 (Defendants' Exhibit No. 4, page 43).

If the Respondents prevail in this action, then too would witness Darrell G. Hansen prevail because a part of his title represented by the deed of February 16, 1959, is a part of the land in dispute. In other words, the witness Darrell Hansen for the Respondents, if he is to have a good title, is dependent on the fence line being established as claimed by the Respondents.

The next witness for the Respondents was Mr. Glen Farrer, who had taken some pictures of some posts and wire laying on the ground, and his testimony was directed relative to the fence line running north and south along the east side of the properties (Tr. C-57, Line 28-30). He too assumed as to the location of the fence line (Tr. D-58, Line 11-13).

The other witness for the Respondents as to the fence line was Nora Roundy, and she admitted on cross examination that she didn't know much about any of the fence lines (Tr. C-61, Line 1-11).

The evidence reviewed thus far in this brief is the evidence on which the Respondents sought to acquire title to land which was outside of any deeded description; that is, outside of the record title that Respondents had prior to a deed received immediately preceding the law suit. The Respondents are seeking to move their north boundary line north of their deeded line, a distance of approximately eighty-eight feet. Their own witnesses and evidence shows at the most, remnants of an old fence completely deteriorated and consisting of stubs of four to six posts. Their evidence does not do any more than show that there was some sort of an old fence; they do not show any occupancy up to the fence; their own evidence shows that the immediate prior grantor to the Respondents did not do anything with the land at all for a period of ten years. It is difficult for us to see any claim of right and user that did establish this so-called fence as the boundary line fence. It is the duty, as we see it, of the Respondents to do more than simply show remnants of an old fence.

The witnesses for the Appellants are quite clear and

definite as to the boundary line between the two properties. Mr. LeRoy Nielson, one of the Appellants, testified as to his purchase of the property, and an abstract marked Defendants' Exhibit No. 4, was introduced in evidence. There was no objection to the introduction of the abstract (Tr. D-62, Line 1-5).

Mr. Nielson testifies as to his first view of the premises and as to the remnants of an old fence line on the south side of his south title line. He located the south fence line as being exactly west of a headgate in the irrigation ditch called the Mott Ditch (Tr. D-67, Line 15-18). (Tr. RED-90, Line 20-30) (Tr. D-91, Line 1-8). He further testified that at the time the fence had no wire on it and that there were four posts standing (Tr. D-67, Line 22-30). He further testified that the posts remained in place until the fall of 1958, (Tr. D-68, Line 8-10), and that they disappeared after a housing project was commenced (Tr. D-68, Line 11-25).

The Appellant, LeRoy Nielson, testified as to his south fence of this south title line being in exact line with a fence line running east and west directly across the street. He further testified as to his east fence line which commenced at the north end of his property (Tr. D-71, Line 1-30) (Tr. RED-90, Line 20-30) (Tr. D-91, Line 1-8). The strip of ground referred to by the Appellants is a long narrow strip of ground between the Appellants' east fence line and the road. The south boundary line of the long narrow strip is in exact line with the south boundary line of the Appellants' property, as testified to by the Appellant, and is located 7.25 chains south from the beginning point which is the same course by way of distance south, that the Appellants' deed called for, and is exactly west of the fence line

running east and west, that is located across the street from the Appellants' property. The evidence showed that these were physical monuments now in place and corroborates the testimony of the Respondents as to the location of the old fence line that the Appellants observed when they first purchased the property. This fence line being a fence running east and west and located approximately sixty feet south of what the Respondents claimed the boundary line would be. We note also that there was not any conflict between this boundary line testified to by the Appellants and the north deed line of the Respondents, until the year 1959, when the Respondents took a second description from Ornel Emmons. Up until the deed of Ornel Emmons in 1959 the Respondents' predecessors in interest never did have a deed which conflicted with the Appellants' deed line and the old fence line on his extreme south side.

We respectfully call to the Court's attention that the south boundary line of the long narrow strip on the east lined up exactly with the boundary line claimed by the Appellants as his south boundary line, and was also in exact line with the old fence line running east and west that lies immediately across the road from Appellants' property (Tr. D-71, Line 1-30) (Tr. D-72, Line 1-30) (Tr. RED-90, Line 20-30) (Tr. D-91, Line 1-8).

The Appellants further testified as to some remnants of an old fence being located up inside of his property, but an examination of that testimony will show that the remnants did not constitute a fence (Tr. D-73, Line 1-30) (Tr. D-74, Line 1-30). The Appellants further testified as to his use of the area. Appellant, LeRoy Nielson, testified as to the separation of his orchard from the pasture by a

gate, and as to the use he made of the pasture for his horses, the pasture being the disputed area (Tr. D-74, Line 18-25). The Appellants further testified as to his payment of taxes on the property (Tr. D-76, Line 26-30) (Tr. D-77, Line 14). We respectfully call the Court's attention to the fact that until March of 1959, there was not any deed of record that would have required the Respondents to pay any taxes on the land in dispute, and there was, in fact, a period of time from 1940 up to the present date, deeds on record that would require the Appellants to pay taxes on the land in dispute (Tr. D-76, Line 26-30) (Tr. D-77, Line 6-14).

The Appellants testified as to his use of the entire area of land and his traveling back and forth over the area (Tr. D-78, Line 16-21). The Appellants further testified that there was no question ever raised as to the boundary line until the Respondents came to the Appellants with a quit-claim deed which Respondents wanted Appellants to sign (Tr. D-78, Lines 22-30). We note again that Respondents had no interest of any nature in the lands until 1959.

Carr Greer, licensed civil engineer, testified as a witness for the Appellants and testified as to the making of a survey record (Tr. D-92, Line 21-30) (Tr. D-93, Line 1-30), (Tr. D-94, Line 1-30) (Tr. D-95, Line 1-30) (Tr. D-96, Line 1-30) (Tr. D-97, Line 1-30) (Tr. D-98, Line 1-30) (Tr. D-100, Line 1-10).

The results of the survey of Carr Greer were duly set forth in a plat prepared by Carr Greer, that the plat marked Defendants' Exhibit No. 5 was offered in evidence and received (Tr. C-101, Line 1-9).

The survey plat, Defendants' Exhibit 5, sets forth the

location of an old fence line that crossed the street and sets forth the distance called for by the Appellants' deed and also sets forth the north limit of the original Respondents' deed, which represents a line located twenty-eight feet south of the south line of the Appellants' deed. The plat also sets forth the location of the deed line as called for by the deed of March 4, 1959, that the Respondents received. This deed and the north line set forth in said deed is the first conflict in the record title. The plat also sets forth the long narrow strip of ground running north and south along the east side of the Nielson property, and the south boundary line of said long narrow strip represented by the southwest corner of the west fence line of said long narrow strip which is a point directly in line with an old fence line across the street to the east. The plat also shows the extension of the new deed of the Respondents extending east to the road and the using up of a part of the south end of the long narrow strip. The south end of this long narrow strip belonged to the Respondents and it represents the piece of ground conveyed by the Respondents to the witness Darrell Hansen. We submit that the survey corroborates the testimony of the Appellant LeRoy Nielson.

The other witnesses testifying in behalf of the Appellants were all persons that were well acquainted with the land in question. In fact, they had been closely associated with the land. They were old residents of the area immediately adjacent to the property in question. Their observations covered a great number of years. They had no interest of any kind or nature in the outcome of the action

The first of these witnesses was Daniel H. Jorgensen. He had lived in the area approximately sixty years (Tr. D-

106, Line 23-30). He testified as to his long acquaintance to the property in question and to his farming in that area (Tr. D-107, Line 1-30). Tr. D-108, Line 1-30). He testified that there was an old fence line that ran west from the floodgate in the ditch. He testified about the fence line being in line with the continuation of a fence running east and west across the street (Tr. D-109, Line 1-30). Mr. Jorgensen also testified as to the long narrow strip located on the east side of the property in question but between the properties and the road (Tr. D-110, Line 1-30) (Tr. D-111, Line 1-30) (Tr. D-112, Line 1-2) (Tr. D-112, Line 8-30).

The testimony of Mary Kirkwood in behalf of the Appellants set forth her long acquaintance with the property which covered a period of forty years (Tr. D-118, Line 3-10). Her testimony showed her acquaintance with the different owners of the property and the different uses of the property over some forty years of time (Tr. D-118, Line 11-30) (Tr. D-119, Line 1-30). Mary Kirkwood further testified relative to the south boundary of the Appellants' property as being at a point running east and west from the floodgate (Tr. D-119, Line 27-30). Her personal knowledge of the floodgate and the boundary line is attested to by her testimony as to the type and make of the floodgate and the many occasions she had to pass by the boundary line (Tr. D-130, Line 1-30). Her testimony showed the pasturing use of the land made by the Appellants and predecessors in interest (Tr. D-120, Line 16-30) (Tr. D-121, Line 1-7). Mary Kirkwood's testimony as to the pasturing of the horses of George Miller, who was one of the predecessors in interest of the Appellants, is significant to show the occupancy of the Appellants and his predecessors in interest,

and it corroborates the testimony in the case as to the location of the old field fence; that is, the south boundary line of the Appellants, as shown by their deed.

The testimony of Mary Kirkwood shows the use of division fences to separate the pasture from the orchard, and its relationship to the south boundary line fence of the Appellants (Tr. RED-123, Line 19-30) (Tr. REC- 124, Line 1-8).

Randall Shipley testified in behalf of the Appellants. His testimony showed that he was an old resident of the area and that he was well acquainted with the Nielson land and the Emmons land, his father before him having owned it (Tr. D-133, Line 16-20) (Tr. C-138, Line 7). Mr. Shipley was of the age of sixty-five years, and he himself had farmed the land for a period of fifteen years (Tr. D-134, Line 26) . Randall Shipley testified as to the fence lines on the property and located as running directly west from the bottom of the long narrow piece of property that had been owned by Roundy (Tr. D-135, Line 24-27) (Tr. C-139, Line 7-16) (Tr. D-136, Line 1-24). This is in line with the testimony of Mr. Dan Jorgensen and Mary Kirkwood (Tr. D-109, Line 1-30) (Tr. D-110, Line 1-30) (Tr. D-111, Line 1-30) (Tr. D-112, Line 8-30) (Tr. D. 119, Line 27-30. He also testified as to two fences on the property: namely, a fence running east an west which did correspond with the south boundary line with the description on the Appellants' deed, (Tr. RED-141, Line 16-24) (Tr. D-142, Line 1-5), and another fence line further up in the property of Nielson which did correspond with the fence separating the orchard from the pasture (Tr. D-136, Line 25-30) (Tr. C-139, Line 4-16). This testimony corroborates the testimony

as given by Mary Kirkwood as to the division fences and the pasturing of horses; particularly the pasturing of the Miller horse referred to above in this brief, (Tr. D-120, Line 22-23), and it also lines up with the testimony of Mr. Nielson as to the use that he made of the area for his horses.

Attorney for the Respondents, in cross examining Shipley, asked the witness as follows: "Going back now to—I want to know if you are able to say with certainty that there were two parallel fences running east and west across the Keller property?" (Tr. C-139, Line 30) (Tr. C-140, Line 1-2). Mr. Shipley answered: "The way I remember it there were two fences." (Tr. C-40, Line 3). Further questions by the attorney or the Respondents brought out the following: Q. "I don't want to know the way you remember it; I want to know if you are able to say with absolute certainty under oath that there were two fences running side by side, some distance apart, in an east-west direction across the Keller property? A—That is the way I remember it. Q—And you would say that under oath? A—Yes." (Tr. C-140, Line 4-11).

The testimony of Daniel Jorgensen, Mary Kirkwood, Randall Shipley, and Samuel Park, is testimony from witnesses that had long been acquainted with the property. They were old residents of the area and were closely associated with the property. They had no interest of any kind whatsoever in the outcome of the law suit. Their testimony was very clear to the effect that the south boundary line of the Nielson property ran west from the headgate. This south boundary line corresponded with the call of the deed, namely: 7.25 chains south from the beginning point of the Nielson description, an also lined up with the fence

line across the street, referred to as the "old field fence" that continued on west across the headgate before the roadway was put in. The testimony of these witnesses is corroborated by the survey of Mr. Carr Greer. The Respondents did not introduce any survey that fixed the location of the fence line that they have contended for. The Respondents have not any evidence in the record which locates land which they are now claiming.

The Respondents who are Plaintiffs in this case apparently have, by the allegations in their complaint, proceeded on two theories: (R. 3-4) 1. Adverse possession, and, 2. Boundary line by acquiescence.

First, as to the theory of adverse possession, they alleged possession for more than twenty-five years, and that it was full and exclusive use and occupancy, enclosed by a fence, and that they paid all taxes levied against said property. The Utah Code Annotated, 1953, entitled 78-12-7, provides as follows:

"In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law; and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title or seven years before the commencement of the action."

Under this section, the Appellant, who is the owner of the record title since 1940, is entitled to the presumption that all others are deemed to have occupied subordinate to their title. The burden of proof is on the claimants, the

Respondents here, to establish their claim. (Ives vs. Grange, 42 Utah 608, 134 Pacific 619) It is their duty to establish that they have complied with all the necessary elements. (Spring Creek Irrigation Co. vs. Zollinger, 58 Utah 90, 197 Pacific 737). Their own evidence failed to establish exclusive use and occupancy. The predecessor to their title, to-wit: Ornel Emmons, admitted that he had done nothing with the property in question for a period of ten years and predecessors before him, by their own evidence, did nothing with the property for four years. The most that they established by their evidence as to the property being enclosed by a fence was that there was the remnants and parts of an old fence. There is not any evidence in the record at all as to a fence enclosing the property over the entire width of the property. The testimony spoke of stubs or parts of four to six posts with the wire up in some places and down in others. Relative to the question of payment of taxes, the evidence was undisputed to the effect that the record title has always been in the Appellants and his predecessors in interest, and the first time that there was title on the record at all that would call for payment of taxes by the Respondent was March 4, 1959; and yet the Respondents allege in their complaint that they and their predecessors have paid all taxes on the property, but until they had some showing on the record deed, they would not even have received any notice calling for them to pay any taxes on the property.

Second, as to the theory of boundary by acquiescence, it is the duty of the Respondents to establish the boundary line and it is their duty to establish acquiescence in such a boundary line. The Respondents here are seeking to move

their title line farther north by twenty-eight feet, which would then take their title line up to the south title line of the Appellant, and then in addition to that, the Respondents seek to move their title line still farther north a distance of approximately sixty feet beyond the title line of the Appellants, making a total distance of eighty-eight feet that they seek to move their title line farther north. The theory of the law in Utah as to boundary line by acquiescence is treated by an article in the Utah Law Review, Volume 3, No. 4, page 504-516. We submit that a review of the evidence which we have endeavored to do in the forepart of this brief was that there was not an occupation by the Appellants and their predecessors up to a visible line marked definitely by a fence, but rather that the land was not even occupied by the Appellants. We submit that the evidence does not show anything by way of acquiescence by either of the parties in any such a line as claimed by the Respondents. The most that the Respondents even attempted to do in their evidence was to show remnants of an old fence. They did not establish any acquiescence in such a fence. The closest the evidence got to such an acquiescence was where the parties talked about constructing a fence and as to who would furnish the material and who would place it, but nothing was said as to where. There was clear evidence in behalf of the Appellants that the remnants of a fence was an old division fence dividing Appellants' orchard from their pasture land. The length of time of any type of acquiescence is rebutted by Appellants own witnesses as to the fact of doing nothing with the property for a period of fourteen years. There is an entire absence of any agreement by the parties as to any question of attempting to settle a bound-

ary line dispute. The evidence produced by the Appellants, we feel clearly established the boundary line fence as being located on line with the south boundary line of the title description of the Appellants. The Appellants' evidence from impartial and unbiased witnesses having a long acquaintance and thorough knowledge of the property, in our opinion, refuted any evidence of the Respondents as to boundary by acquiescence. We feel that the duty of the Respondents is to establish more than a mere statement that there was remnants of an old fence. We believe that the most favorable construction of the evidence in behalf of the Respondents would be to say that they showed that there was remnants of an old fence; it would not show that it was a boundary line fence and that it had been acquiesced by the parties.

CONCLUSION

We respectfully submit that based on the evidence introduced at the trial and the application of the law thereto, that the evidence was insufficient to justify the findings of fact and conclusions of law and decree quieting title.

Respectfully submitted,

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