

1960

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

Utah Supreme Court

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Aldrich, Bullock & Nelson; Attorneys for Respondents;

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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

MAY 5 - 1960

Clerk, Supreme Court, Utah

**CASE
NO. 9158**

RESPONDENTS' BRIEF

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NEW CENTURY PRINTING CO., PROVO, UTAH

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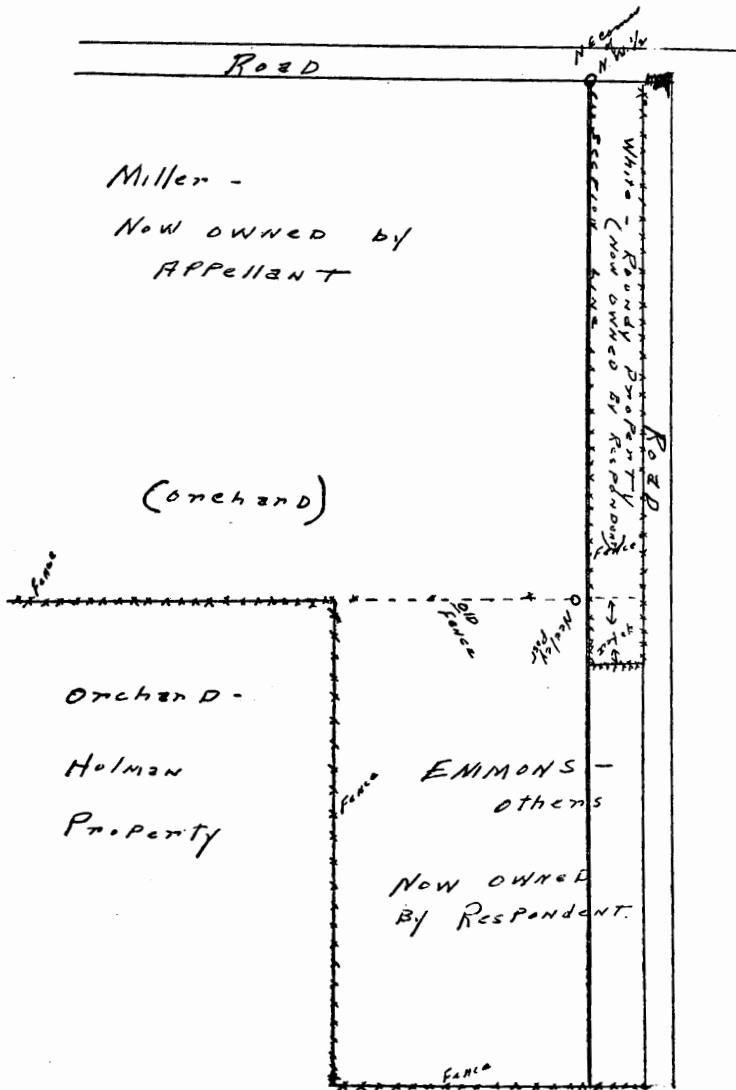
**CASE
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RESPONDENTS' BRIEF

STATEMENT OF THE CASE

It should be noted that the parties to the proceeding before the Court stipulated on pre-trial, that the sole and only issue in this case was the identity and location of the "Old field fence."

In order to assist the Court to better understand the record, the Respondents have set out herein a drawing, substantially similar to the drawing that was placed on the blackboard during the trial of the case in the lower Court. The drawing is not made to scale .



STATEMENT OF FACTS

Prior to October 16, 1944, the Appellant employed Mr. LaVern D. Green to survey his property (Tr. 167). The plat made by the surveyor showing the Appellant's property was delivered by the surveyor to the Appellant and the surveyor's findings were discussed by the surveyor and the Appellant (Tr. 169). Mr. Green's survey indicate a red line on the south side of the Appellant's property, which coincides with the Respondent's location of the old field fence, and which Mr. Green designated as a fence line (Tr. 169). The red line is a fence line as the surveyor found it in 1944 when he made his survey (Dedendant's Exhibit 6 and Tr. 171). The red line on Exhibit 6 on the south side of Appellant's property would not have been so marked if it had been anything else but a fence line (Tr. 174).

Appellant and Mr. Roundy, who owned a strip bordering Appellant's land on the east side, had the land surveyed sometime between 1940 and 1958, and that survey went the full length of Appellant's property on the east and along the full length of the fence line between Respondent and Appellant (Tr. 44). The witness, Mr. Roundy, observed the fence in 1939, and in subsequent years, and at one time he did some spring tooting of that property and came right up to the fence line on south side of the Nielson property (Tr. 44). He observed how long the east-west fence was; he went clear through it; and went the full length of the property (Tr. 44). The witness testified that there was a fence through there and that it was, in 1939, an old fence (Tr. 45, 46).

Appellant hired Parley M. Neeley to do some surveying for him in the month of May, 1958 (Tr. 20). The purpose of the survey was to work up a preliminary subdivi-

sion of Appellant's property (Tr. 21). At that time, Appellant took Mr. Neeley out into the field and showed him where the property lines were around his property, and at that time, Mr. Neeley observed the fence that constituted what Appellant showed him to be his South boundary line between Appellant's property and the property now owned by the Respondent. There was very definitely a fence in place, it was evidently an old fence and it was in a bad state of repair. There are a few bushes along the fence, some of them have been cleared away, and there are two or three posts standing and several lying down, and stumps still in the ground projecting out two or three inches above the ground. There were barbed wire entanglements all the way through there (Tr. 21, 22). The surveyor, noting that the distance in Appellant's deed of "7.25 chains more or less," would extend beyond the fence, crossed over the existing fence and looked for but found no evidence whatever of any other fence (Tr. 22).

At a later time when the same surveyor was surveying for the Respondent in this action, the Appellant was present at the fence line at a time when his south line and the Respondent's north line were fixed by the surveyor and when a nail was placed in the center of a post which stood on the said fence line. The Appellant did not protest when the line was so fixed (Tr. 25, 26).

The witness, Ornell Emmons, bought the property now owned by Respondent in 1946, and occupied the premises for more than ten years (Tr. 7). At the time he bought the property, the fence along his north line had two or three wires up through it, but the wire was up on some posts and down on some when he moved there. At the time he purchased the property, that fence was pointed out to him

as being his north boundary (Tr. 7). During the time that the witness, Mr. Emmons, lived on the property, he plowed the ground at least one back clear up to that fence (Tr. 7, 8). There were no other fences bisecting his property in an east-west direction (Tr. 8). During the time that he was there, he never saw any evidence whatsoever of any other fence bisecting his property in an east-west direction (Tr. 8). In about 1947, the witness, Mr. Ornell Emmons, had a conversation with the Appellant concerning the fence (Tr. 8). Appellant wanted Mr. Emmons to assist him in putting in a new fence and the conversation was to the effect that the Appellant would furnish the materials and Mr. Emmons put in the fence, but Mr. Emmons wanted to furnish the materials and have the Appellant put in the fence. Nothing was done about replacing the fence (Tr. 9).

Just prior to the time that the witness, Mr. Emmons, purchased the property, the prior owner had plowed the property clear up to the fence as near as the bushes would allow. During the time that Mr. Emmons lived on the property, the Appellant had no use of any of the property within the fence lines other than by invitation and with the consent of Mr. Emmons (Tr. 11). That use involved the whole width of the property on the west side, that is, the west side of the property occupied and owned by Mr. Emmons (Tr. 11).

In about 1956, Mr. Emmons attempted to burn some of the large bushes in the fence line, and to do so he hauled in a bunch of paste board boxes and things to set fire to the bushes near the line. As a result of the fire, portions of some of the posts holding up the fence were burned (Tr. 12).

At the time of the discussion between Mr. Emmons and Appellant concerning the replacement of the fence, it was understood, that the new posts should be put right back in the old post holes (Tr. 18).

The witness, Wilbur Harding, purchased the property claimed by Respondent in 1942, and resided on the property. The boundary line between the property which he purchased and occupied and the property of the Appellant was a continuation of the north boundary of the Holman property, and it was a fence. It was an older fence, but it was all there. Harding kept stock in it at the time that he lived there (Tr. 128). During the time that the witness, Harding, resided on the property, he did make use of the land. They had a garden on the west end of the property and they had berries, particularly blueberries and raspberries. This was in 1942, and the berry plants went right up to the ditch line. At that time, the fence line consisted of cedar posts and barbed wire. The North boundary fence was rather poor, but there were posts and barbed wire there and they kept stock running in it and the fence kept the stock in (Tr. 130). At the time Mr. Harding moved on the property in 1942 and thereafter, he did not ever observe any evidence of any other fence (Tr. 132).

The witness, Randall Shippley, had been away from the Holman property for 25 or 30 years. He left the vicinity and quit farming the Holman property that he had previously farmed in about 1932 or 1933 (Tr. 138). In 1932 or 1933 at a time when Mr. Shippley was farming the Holman property, he was aware of the fact that there was a fence line joining on the northeast corner of the Holman property and running east from there (Tr. 140). The wit-

ness, Mr. Randall Shippley, did not ever consider that the Appellant or any of the Appellant's predecessors in interest owned any part of the property embraced on the inside of the fence lines of the Holman property (Tr. 140, 141). The witness, Shippley, and his father rebuilt the fence on the north border of the property referred to as the Holman property and that fence line was considered the boundary line between the two properties at that time, and said fence is still standing (Tr. 142, 143). The witness, Mr. Shippley, described the situation on the ground as being just about as Wilbur Harding described it (Tr. -'0). There were never two fences that ran clear across the Respondent's property anywhere in the vicinity of the north boundary thereof (Tr. 151).

Prior to the time that the Court made its decision in the instant matter, the Court went out and viewed the premises. While traversing the premises, the Court observed several posts still in the ground running from the post that Mr. Neeley put the nail in, and running from there to the northeast corner of the Holman property. The remnants of a fence were clearly visible (Tr. 181).

STATEMENT OF POINTS

POINT I

THE FINDINGS OF FACT, CONCLUSIONS OF
TO LAW AND DECREE QUIETING TITLE ENTERED
BY THE TRIAL COURT WERE AMPLY SUPPORTED
BY COMPETENT EVIDENCE AND WERE FULLY JUS-
TIFIED.

POINT II

APPELLANT HAD NO RECORD TITLE WHATSOEVER TO AND WAS NOT THE FEE SIMPLE OWNER OF ANY PROPERTY LYING SOUTH OF "THE OLD FIELD FENCE."

POINT III

THE CONDITION OF A FENCE ESTABLISHED IN A DEED AS A BOUNDARY LINE OR MARKER IS IMMATERIAL AS LONG AS THE SAID BOUNDARY OR MARKER CAN STILL BE IDENTIFIED.

ARGUMENT**POINT I**

THE FINDINGS OF FACT, CONCLUSIONS OF TO LAW AND DECREE QUIETING TITLE ENTERED BY THE TRIAL COURT WERE AMPLY SUPPORTED BY COMPETENT EVIDENCE AND WERE FULLY JUSTIFIED.

Respondent's statement of facts, supported by transcript citation, clearly shows that Appellant's south boundary and Respondent's north boundary was a fence line. The evidence further shows that said fence line was a continuation of the north boundary fence of the Holman Property which abutts the major portion of the Appellant's property on the south side thereof. The evidence further shows that in 1942 the fence was sufficient to hold livestock on the property claimed by the Respondents, and that it did hold livestock for a number of years. The evidence is clear that even in 1942, the fence was "an old fence" from its appearance. Moreover, in 1944, when Appellant had Mr.

LaVerne D. Green survey his property, the surveyor located the fence at exactly the same place that the Respondents contend that the fence is and has been.

After the trial judge visited the premises, he observed: "I believe in this matter that the preponderance of the evidence shows that the "old fence line" is the one that we traversed there at noon time where there are several posts still in the ground running from the post that Mr. Neeley put the nail in to the corner of the Holman property. That would be to the northeast corner of the Holman property." (Tr. 181).

No place in the record can we find evidence of any other fence in the vicinity which would serve as the boundary marker referred to in the deeds.

Respondent's predecessors did use, occupy and possess this land right up to the fence in question. The witness, Mr. Clarence Roundy, testified that he spring toothed the land right up to the fence for the predecessor of Mr. Emmons (Tr. 44). Former owner, Wilbur Hardy, testified that in 1943 when he bought the property, the fence was in place and that he ran livestock on his property (Tr. 128). The fence held his livestock (Tr. 130). He also testified that he gardened and had blueberries and raspberries that ran right up to the ditch beside the fence line (Tr. 130).

Appellant argues that since there is a fence running east and west on the property situated across the road east from the property in question, that the line between the Appellant and Respondent must have been in line with that fence across the street. The land across the street is in a different section and has never been in common ownership with any of the land with which we are dealing in this law suit.

Appellant has occupied his property for a number of years, while the occupants and owners of the ground now owned by the Respondents have changed a number of times. However, no place in the record did the Appellant or any of his witnesses contend that prior to the bringing of this law suit, the Appellant had ever claimed that his property went beyond the fence line in question. When Appellant bought his property, there was no doubt in his mind but that his southern boundary was an old fence line. At that time, it was a very old fence (Tr. 86). It is interesting to note that the Appellant himself agreed that any use he had made of the property across the fence was with Mr. Emmons's permission (Tr. 82, 83). When Appellant and Mr. Emmons were discussing rebuilding of the fence, the discussion was that it would go right back to the old post holes (Tr. 18).

When there is competent evidence to support the findings of the trial court, and where the trial court has had an opportunity to hear the witnesses and study their demeanor, and where the trial court has had an opportunity to visit the premises and to see the situation as it lays on the ground, the appellate court would not be justified in reversing the decision of the trier of the fact.

POINT II

APPELLANT HAD NO RECORD TITLE WHATSOEVER TO AND WAS NOT THE FEE SIMPLE OWNER OF ANY PROPERTY LYING SOUTH OF "THE OLD FIELD FENCE."

Appellant argues as if he were the fee owner of the land reaching from point of beginning to a point 7.25 chains

south of point of beginning. That might be so had the Appellant been deeded land of that dimension. However, a very casual glance at the instrument with which Appellant received title shows that the fence was the boundary. That portion of the description reads as follows: "Thence running south to the **old field fence** 7.25 chains, more or less. The monument or boundary, in this case the fence line, is paramount. *GIAUQUE v. SALT LAKE CITY, et al*, 42 Utah 89, 129 Pac. 429, 432. The distance even without "more or less," is purely incidental. The boundary marker or monument fixes the ownership of the Appellants wherever that boundary monument or marker can be identified. *DUTRA v. PENTIRA*, 135 Cal. 320, 67 Pac. 281; *WHEATLEY v. SAN PEDRO RAILROAD COMPANY*, (Cal.) 147 Pac. 136, 138. Any fixed or natural monument which is definite and certain will control over a statement as to quantity and over the courses and distance used in a plat or in a metes and bounds description. *PATTON ON TITLES*, Paragraph 99, Page 333. Among the natural and fixed objects which are so substantial and definite as to have been considered controlling are: "railroad * * * * fence," *PATTON ON TITLES*, Paragraph 99, Pages 334 and 335.

It is interesting in this case to note that the Appellant does not claim any portion of the Holman orchard. Yet, Appellant's description in the second course reads as follows: "Thence west along said old fence 13.35 chains." If the "old field fence" referred to in Appellant's deed lies south of the fence as identified in Respondent's surveyed description, then, and in that event, following the Appel-

lant's description, a portion of the Holman orchard would of necessity belong to the Appellant. Appellant's witness, Mr. Shippley, did not believe at the time that he and his father rebuilt the fence along the north boundary of the Holman property that the Appellant had any right whatsoever over that fence line (Tr. 140, 141).

POINT III

THE CONDITION OF A FENCE ESTABLISHED IN A DEED AS A BOUNDARY LINE OR MARKER IS IMMATERIAL AS LONG AS THE SAID BOUNDARY OR MARKER CAN STILL BE IDENTIFIED.

Appellant seems to contend that since the condition of the fence has greatly deteriorated, even although he recognizes that there was a fence where the Respondents say the fence was situated, and that the condition of the fence renders it useless or untrustworthy as a marker or boundary line. Much of the testimony mentioned on brief by Appellant relates to the condition of the fence.

As a matter of fact, the condition of the fence would have no bearing whatever on the situation if the fence could be recognized and identified as the marker or boundary referred to in the deed or if it had long been regarded as the division line between the two properties. *MOTZKUS v. CARROLL*, 7 Utah 2nd 237, 322 P. 2nd 391.

CONCLUSION

The Findings, Conclusions and Decree entered by the

lower court were supported by competent evidence and should be affirmed.

Respectfully submitted,

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