

1940

Mary A. Harman v. Albert Yeager and May C.
Yeager, Frieda Murphy, Hilda Riches, Reka
Cummings, Olive G. Fox, Elsie, Nordberrg, Horace
L. Harline and Lorine Harline, Leroy G. Harline
and Albert Harline, Leigh A. Harline and Katherine
Harline, Oscar J. Harline and Lorena Harline,
Osrow L. Tilby and Selma Tilby : Abstract and
Brief of Appellants

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Utah Supreme Court

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Stewart, Stewart & Parkinson & Edwin B. Cannon; Attorneys for Defendant and Appellant;
Stewart, Stewart & Parkinson; Edwin B. Cannon; Attorneys for Defendant and Appellant;
Judd, Ray, Quinney & Nebeker; Attorney for Plaintiff and Respondent; Attorneys for American
Equitable Assurance Company;

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IN THE
SUPREME COURT
 OF THE
STATE OF UTAH

MARY A. HARMAN, *Plaintiff,*

vs.

ALBERT YEAGER and MAY C.
 YEAGER, his wife, FRIEDA
 MURPHY, HILDA RICHES,
 REKA CUMMINGS, OLIVE G.
 FOX, ELSIE NORDBERG,
 HORACE L. HARLINE and
 LORINE HARLINE, his wife,
 LERO' G. HARLINE (Also
 spel' "LEORY" G. HAR-
 LINE) and ALBERT HAR-
 LINE, his wife, LEIGH A. HAR-
 LINE and KATHERINE HAR-
 LINE, his Wife, OSCAR J.
 HARLINE and LORENA HAR-
 LINE, his Wife, OSROW L.
 TILBY and SELMA TILBY, his
 Wife,
Defendants.

No. 6244

Abstract and Brief of Appellants

Appeal from the District Court of Salt Lake County,
 Utah, Hon. Allen G. Thurman, Judge

FILED HENRI HENRIOD
 Attorney for Appellants.

CENTURY PRINTING CO.

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In the District Court of the Third Judicial District In and For Salt Lake County, State of Utah

MARY A. HARMAN, *Plaintiff,*

vs.

ALBERT YEAGER and MAY C.
YEAGER, his wife, FRIEDA
MURPHY, HILDA RICHES,
REKA CUMMINGS, OLIVE G.
FOX, ELSIE NORDBERG,
HORACE L. HARLINE and
LORINE HARLINE, his wife,
LEROY G. HARLINE (Also
spelled "LEORY" G. HAR-
LINE) and ALBERT HAR-
LINE, his wife, LEIGH A. HAR-
LINE and KATHERINE HAR-
LINE, his Wife, OSCAR J.
HARLINE and LORENA HAR-
LINE, his Wife, OSROW L.
TILBY and SELMA TILBY, his
Wife,

Defendants.

COMPLAINT

62659

ABSTRACT AND BRIEF OF APPELLANTS

Plaintiff complains of the defendants and for a cause of action alleges:

1. The persons named in the caption as "his wife" are severally the wife of the defendant whose name immediately precedes the name of such wife.

2. The name of the persons spelled "Harline" in the caption is also spelled "Harlene" and the two are pronounced alike.

3. The name of defendant Leroy G. Harline is also sometimes spelled "Leory" G. Harline.

4. That plaintiff is the owner and lawfully possessed of the following described real property situated in Salt Lake County, State of Utah, reference being made to the recorded plat therein mentioned of record in the Recorder's office of said county, viz:

Beginning at a point 148.55 feet south of the Northwest corner of Lat 8, in Block 22, Plat "A", Big Field Survey, and running thence North 76.775 feet; thence East 46 rods; thence South 79.775 feet; thence westerly 46 rods, more or less to the place of beginning.

5. That the said defendant and each of them claim some right, title or interest in or to the said described premises or some part thereof, adversely to this plaintiff and without right.

WHEREFORE, plaintiff demands judgment against the said defendants and each of them, that they be required to answer and plead what, if any, right, title or interest they have, claim or assert in or to the said described premises or any part thereof; that plaintiff's title and right of possession of said premises may be quieted and defendants and each of them be enjoined from claiming the same or any part thereof; for general relief and for the costs of this action.

PAUL G. ELLIS, J. PATTON NEELEY,
Attorneys for Plaintiff.

(Duly Verified.)

IN THE DISTRICT COURT OF SALT LAKE
COUNTY, STATE OF UTAH

MARY A. HARMAN,	} <i>Plaintiff,</i>	} <i>Demurrer</i>
vs.		
ALBERT YEAGER and others,		
<i>Defendants.</i>		

To the plaintiff and her attorneys, Ellis and Neeley:

Comes now the defendants, Albert Yeager and May C. Yeager, and demurrers to the complaint of the plaintiff and for ground of demur alleges that the complaint does not state facts sufficient to constitute a cause of action against these defendants.

Dated at Salt Lake City, Utah this 24th day of April, 1939.

L. E. Cluff, Attorney for Defendants
Albert Yeager and May C. Yeager.

I, L. E. Cluff, Attorney for defendants, Albert Yeager and May C. Yeager, certifies that in my opinion the general demurrer above is well taken; filed in good faith and not for the purpose of delay.

Salt Lake City, Utah. April 24th, 1939.

L. E. Cluff, Attorney.

Received a copy of this 24th day of April 1939.

J. P. Neeley. P. G. Ellis.

Attorneys for Plaintiff.

IN THE DISTRICT COURT OF SALT LAKE
COUNTY, STATE OF UTAH

MARY A. HARMAN,	} <i>Plaintiff,</i>	} A n s w e r 62659
vs.		
ALBERT YEAGER and others,		
<i>Defendants.</i>		

In answer to the complaint of the plaintiff, these defendants, Albert Yeager and May C. Yeager, admit, deny and alleges:

1. Not having any knowledge or information sufficient to form a belief these defendants deny the allegations in paragraphs one, two and three, except as to the allegations that these defendants herein are husband and wife which defendants admit.

2. In answer to paragraph four these defendants allege that on and immediately prior to the 18th day of November, 1932, these defendants were legal owners and in possession of

The North $\frac{1}{2}$ of the North $\frac{1}{2}$ of Lot 8, Block 22, Ten Acre Plat "A", Big Field Survey containing two and one-half acres of land;

that on or about said day these defendants executed and delivered to plaintiff a deed conveying part of the property described above, said property being so conveyed being described as follows, to wit:

Beginning at a point 8.7 rods (143.55 feet)
South of the Northwest corner of Lot 8, Block

22, Ten Acre Plat "A" Big Field Survey and running thence North 4.32 (amended to 4.35 by permission of Court) rods; thence East 46 rods; thence South 4.35 rods; thence West 46 rods to the place of beginning being the South $\frac{1}{2}$ of the North $\frac{1}{4}$ of said Lot 8, containing $1\frac{1}{4}$ acres, more or less together with $1\frac{1}{4}$ share of stock in Big Cottonwood Lower Canal Co.,

That dividing the property so conveyed from the property retained a fence had been constructed by the defendants and was standing at the time of the conveyance above mentioned and that said plaintiff has been in possession of the property conveyed south of the said fence and no part of the plaintiff (defendants?) land has been in the possession of said plaintiff.

3. That so far as any conflict exists between property described above and within the fence line as hereinabove described these defendants deny the allegations of said plaintiff's complaint and the whole thereof and alleges that plaintiff is not entitled to any part or portion of the said North $\frac{1}{2}$ of the North $\frac{1}{2}$ of the North $\frac{1}{2}$ of Lot 8, Block 22, Ten Acre Plat A, Big Field Survey, Salt Lake City, Utah.

WHEREFORE these defendants pray that the plaintiff take nothing by her action so far as the property described of defendants and only that property conveyed to plaintiff and that these defendants have their costs herein expended.

L. E. Cluff, Attorney for Defendants
Albert Yeager and May C. Yeager.

(Duly Verified.)

IN THE DISTRICT COURT OF THE THIRD J
DICIAL DISTRICT, IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH

MARY A. HARMAN,

vs.

ALBERT YEAGER,

Plaintiff,

Defendants.

Minute Entry.
Entered Order
Case Number
62659 Dated
September 6,
1939

ALLEN G.
THURMAN,
JUDGE

This case comes now on for trial, Paul G. Ell and J. Patton Neeley, attorneys appearing in behalf of the plaintiff, L. E. Cluff, attorney appearing in behalf of the defendants Albert and May C. Yeager. The case is argued to the Court by respective counsel. Comes now counsel for plaintiff and moves the court for a judgment on the pleadings in favor of the plaintiff and against the defendants Albert Yeager and May C. Yeager, and for judgment on the answer and stipulation of facts subscribed to by the plaintiff and remaining defendants, except Albert and May C. Yeager setting the boundary line between their properties as said motion is by the Court granted.

IN THE DISTRICT COURT OF SALT LAKE
COUNTY, STATE OF UTAH

<hr style="width: 20%; margin: 0 auto;"/> <p>MARY A. HARMAN,</p>	<p>vs.</p>	<p><i>Plaintiff,</i></p>	<p>}</p>	<p>Motion to Va- cate Decree and for Permission to Amend Answer</p>
<p>ALBERT YEAGER and MAY C. YEAGER, his Wife, and others,</p>		<p><i>Defendants.</i></p>	<p>}</p>	

To the Plaintiff and her attorneys, P. G. Ellis and J. Patton Neeley, Esqs:

Please take notice that the defendants, Albert Yeager and May G. Yeager, intends to move the court to vacate the decree entered in the above entitled action and to permit the defendant to amend answer. Said motion to be based on the following grounds, to wit:

1. No time was allowed defendants to file objections to Trial Minutes as prepared by attorneys for Plaintiff in accordance with requirements of Rule XIII of Rules of Practice in the District Court of the Third Judicial District.

2. No time allowed Defendants to Amend Answer after Motion for Judgment on the pleadings.

3. The decree is contrary to law.

4. That it was contrary to law to allow Plaintiff to have Judgment on the Pleadings since denial in Answer is sufficient to raise an issue.

5. The Judgment is contrary to law and the court erred in entering Judgment on the Pleadings since in making the motion by plaintiff, the court have treated the denial as sufficient and the case should have gone to trial and plaintiff required to offer evidence in support of complaint.

Dated at Salt Lake City, Utah this 22nd day of September, 1939.

L. E. Cluff, Attorney for Defendants.

Received a copy of the above this 25th day of September, 1939.

Ellis & Neeley, Attorneys for Plaintiff.

IN THE DISTRICT COURT OF SALT LAKE
COUNTY, STATE OF UTAH

MARY A. HARMAN,

Plaintiff,

vs.

ALBERT YEAGER and MAY G.

YEAGER, his Wife, and others,

Defendants.

MOTION FOR
NEW TRIAL

To the Plaintiff and her Attorneys, P. G. Ellis and J. Patton Neeley, Esqs:

Take notice, that defendants, Albert Yeager and May G. Yeager, intend to move the court to vacate and set aside the decision rendered in the above cause,

and to grant a new trial of said cause, upon the following grounds, to wit:

1. Irregularity in the proceedings of the court.
2. Irregularity in the Order of the Court.
3. Abuse of discretion by which defendants were prevented from having a fair trial.
4. Accident and surprise, which ordinary prudence could not have guarded against.
5. Insufficiency of the evidence to justify the decision.
6. That the decision of the court is against law.
7. Error in law occurring at the trial.

Said motion will be made upon affidavits hereafter to be filed and served upon you or a statement of the cause to be hereafter prepared or upon the minutes of the court in said cause.

Dated at Salt Lake City, Utah this 22nd Day of September, 1939.

L. E. Cluff, Attorney for Defendants
Albert Yeager and May C. Yeager.

Received a copy of the above this 25th day of September, 1939.

Ellis & Neeley, Attorneys for Plaintiff.

IN THE DISTRICT COURT OF SALT LAKE
COUNTY, STATE OF UTAH

MARY A. HARMAN,	} <i>Plaintiff,</i>	D E C R E E 62659
vs.		
ALBERT YEAGER and MAY C.		
YEAGER, his Wife, et al.,		
	<i>Defendants.</i>	

The Court having heretofore ordered the entry of a decree in favor of the plaintiff above named against the defendant Yeager in conformity to the Court's order sustaining a motion of plaintiff for judgment in her favor against the defendants Albert Yeager (whose full name is Albert L. Yeager) and May C. Yeager, his Wife; and also upon plaintiff's motion for a judgment or decree in her favor against the remaining defendants named in the caption hereto, which the Court did likewise sustain, settling boundaries, and quieting plaintiff's title, and enjoining claims or acts of the defendants contrary thereto; NOW THEREFORE:

1. It is ordered, adjudged and decreed by the Court that the plaintiff has good title in fee simple to the following described real property situate in Salt Lake City, Salt Lake County, Utah, reference being made to the recorded maps and plats therein mentioned

of record in the office of the County Recorder for Salt Lake County, Utah, for further precision in detail, to wit:

“Beginning at a point which is 148.55 feet south of the northwest corner of lot 8, in block 22, Ten-acre plat A, Big Field Survey, and running thence north 76.775 feet to a point which is 4.35 rods or 71.775 feet south of said northwest corner of said Lot 8; thence east or easterly 46 rods; thence south 79.775 feet to a point which is 151.55 feet south of the northeast corner of said lot 8, in block 22, 10-acre Plat A Big Field Survey, thence west or westerly 46 rods to the place of beginning.”

Together with all improvements thereon, and all hereditaments and appurtenances thereunto belonging, and also together with $1\frac{1}{4}$ share of stock in the Big Cottonwood Lower Canal Company, and all water and water rights represented by said $1\frac{1}{4}$ share of stock.

And that plaintiff is in possession and has full rights of possession in and to all the above described premises.

2. That the defendants and each one of them, to wit: Albert Yeager (whose full name is Albert L. Yeager) and May C. Yeager, his wife have not, nor have either or any or more of them any right, title or interest, lawful claim or right to the possession of the premises described in paragraph 1 of this decree, or any part thereof, or to the improvements thereon, or the water or water rights pertaining to said $1\frac{1}{4}$ share of stock in the Big Cottonwood Lower Canal Company, or to said $1\frac{1}{4}$ share of stock, or the certifi-

cate therefor; or to the hereditaments and appurtenances unto said real property appertaining; and they and each and every one of the said named defendants are hereby enjoined and restrained from ever hereafter making or asserting any claim of right, title or interest in, or right to the possession of, or to interfere in any way with plaintiff's title and right of possession of the said premises and every part thereof that is described above and in the foregoing parts of this decree, and to the title and right of possession of plaintiff's heirs, assigns, grantees, privies and personal representatives.

3. It is further ordered, adjudged and decreed by the court that whereas the above named defendants other than the said Albert L. Yeager and May C. Yeager, have not defended this action, but have disclaimed any interest adversely to the plaintiff as described in her complaint herein, the plaintiff is not entitled to costs as against those defendants, and no decree is awarded plaintiff against them.

4. It is further ordered, adjudged and decreed that plaintiff Mary A. Harman have and recover judgment against the defendants Albert L. Yeager and May C. Yeager her costs herein incurred and taxed at \$.....

5. It is further ordered and decreed that plaintiff's title to the premises described in paragraph 2 hereof, and each and every part and parcel thereof,

is hereby quieted in her as against all and every adverse claim of the said defendants, and each of them.

Allen G. Thurman, Judge.

Dated Oct. 18, 1939.

Received a copy this Sept. 6th A. D. 1939.

L. E. Cluff, Attorney for defendants
Yeager.

IN THE DISTRICT COURT OF SALT LAKE
COUNTY, STATE OF UTAH

MARY A. HARMAN,

Plaintiff,

vs.

ALBERT YEAGER and MAY G.

YEAGER, his Wife, et al.,

Defendants.

NOTICE OF
MOTION

To the Plaintiff and to her counsel, P. G. Ellis and
J. Patton Neeley:

You and each of you will please take notice that on
Saturday the 18 day of November, 1939, at the hour
of 10 o'clock A. M. of said date or as soon thereafter
a scounsel may be heard, the defendants Albert Yeager
and May G. Yeager, will move the above entitled
court to reconsider the motion to vacate decree and
permission to amend answer heretofore filed, upon the
grounds therein stated and also upon the grounds of:

1) Irregularity in the proceedings of the court and the orders of the court by which plaintiff's were given judgment and defendants were prevented from having a fair trial; 2) Accident or surprise, which ordinary prudence could not have guarded against; 3) Newly discovered evidence, material for the party making this application, which could not with reasonable diligence, be discovered and produced at the trial; 4) Insufficiency of the evidence to justify the verdict or decision, said decision being against law, and 5) Error in law occurring at the trial, which was excepted to, and said motion will be based further upon the files and records of the above cause, and upon the affidavits, testimony and evidence to be adduced on behalf of defendants at said hearing.

F. HENRI HENRIOD

Attorney for Defendants Albert & May Yeager.

Received copy of the foregoing notice this 2nd day of
November, 1939.

NEELEY & ELLIS

Attorney for Plaintiff.

IN THE DISTRICT COURT OF SALT LAKE
COUNTY, STATE OF UTAH

MARY A. HARMAN,

Plaintiff,

vs.

ALBERT YEAGER and MAY C.
YEAGER, his Wife, et al.,
Defendants.

AMENDED
ANSWER

Filed in connection with motion to reconsider defendant's motion to vacate decree and for permission to amend answer.

(Note: Defendants tendered in connection with their motion to reconsider motions to vacate judgment, new trial and for permission to amend, and in connection with their motions to set aside and vacate judgment, and in connection with their motion for new trial (Tr. 82), an amended answer which in substance contained the following (Tr. 47 to 53 inclusive):

1. Admit allegations of paragraphs 1, 2 and 3 of complaint.

2. Deny generally and specifically every other allegation of the complaint not otherwise specifically admitted or denied.

For an affirmative defense and praying for affirmative relief, defendants allege:

1. Residence of the parties.
2. That in 1929 defendants were owners and possessed of the property in question, together with other

property, which they had obtained by deed from Carl Harline.

3. That thereafter and on November 19th, 1932, defendants deeded to plaintiff the following:

Beginning at a point 8.7 rods South of the Northwest corner of Lot 8, Block 22, Ten Acre Plat "A", Big Field Survey, and running thence North 4.35 rods; thence East 46 rods; thence South 4.35 rods; thence West 46 rods to the place of beginning, being the South $1/2$ of the North $1/2$ of said Lot 8. Together with $1\frac{1}{4}$ share of stock in Big Cottonwood Lower Canal Company.

4. That for 75 years a fence stood continuously on or near the north boundary of Lot 8, and same is still standing; that defendants originally obtained their property based on the assumption that said fence was on the boundary line of Lot 8; that when defendants conveyed to plaintiff it was the intention to measure the property by starting at said fence line as the true boundary of Lot 8; that when defendants conveyed to plaintiff there was another fence separating the lot intended to be conveyed to plaintiff and that intended to be retained by defendants; that said fence separating the two lots had been in place for several years prior to the conveyance and is still in place; that at the time of said conveyance plaintiff accepted the property on the south side of this dividing fence and intended to receive only the property south thereof, and for many years occu-

pied only said property without complaint of any nature; that said dividing fence was erected in 1929 and was placed where it is by measuring from the fence on the north of defendants' property, which had been in place for 75 years; that neither the plaintiff nor defendants intended to receive or convey any other property than that south of the dividing fence.

5. That the conveyance from defendants to plaintiff was based on the assumption by both plaintiff and defendants that the partition fence mentioned was to be and was the true boundary line between the properties after said conveyance, and that if said partition fence were not the true boundary line it was treated as such by plaintiff and defendants, and if it were not the true boundary line, there was a mutual mistake; that said partition fence was measured from the 75 year old fence on or near the north boundary of Lot 8; that measuring from any other line did not and would not constitute the conveyance agreed upon by plaintiff and defendants; that any variance other than established by the fence lines was a mutual mistake and would affect the substantial rights of the parties; that defendants have no adequate or speedy remedy at law, and will suffer irreparable damage unless equity establishes the boundary set by the fence lines; that the mistake, if any there be, did not arise from any act or omission of defendants, but was based on the assump-

tion and intention of plaintiff and defendants alike that the fences were the boundaries.

6. That the description set forth in plaintiff's complaint describes property greatly in excess of that mentioned in the conveyance from defendants to plaintiff and there is a variance both as to size and shape of the property.

7. That for at least 15 years there have been a fence and ditch on the south of the property occupied by plaintiff, and that plaintiff and defendants at all times treated this fence and ditch as the south boundary of plaintiff's property; that they were established by measuring from the fence supposed to be the north boundary line of Lot 8, and had measurement been taken from any other point said fence and ditch would not have been established at their present situs; that plaintiff claims her property to said fence and ditch on the south, which were measured from the fence supposed to be on the north line of Lot 8, and at the same time claims that the partition fence between her property and defendants' is not the true boundary, though measured from the same point, and thereby plaintiff is seeking equity and not doing equity.

8. That for more than 10 years next last past the defendants have occupied the premises north of the partition fence and have cultivated said property, planting flowers and crops thereon, building structures there-

on, and protecting the same, and have held said property up to said partition fence adversely to the plaintiff and all the world for said ten years, and have occupied same under claim of title based on fence lines and natural monuments, improving same, paying taxes thereon for more than said 10 years, as did their predecessors in title, and that defendants' possession during said time has been open, notorious, uninterrupted and peaceable under claim of right, save and except as qualified by the above entitled cause.

9. That the partition fence between plaintiff's and defendants' properties was at the time of conveyance the agreed boundary line separating the properties, and that said fence was then in place and is now in place.

10. That for many years after plaintiff received and accepted said property divided by said partition fence, said plaintiff treated said partition fence as the true boundary line and made ^{no} objection or claim for any property north of said partition fence and represented for many years to defendants and others that said fence was the true boundary line, and defendants believed said representations and acted thereon and plaintiff knew defendants would act thereon and permitted defendants to plant shrubs on said property and build structures thereof and cultivate crops thereon, to the expense of defendants, and that defendants acted

in good faith, and plaintiff is estopped from asserting any claim to property north of said partition fence.

11. That these defendants are the owners and occupants of all of the property contained between said partition fence and the fence on or near the north boundary of Lot 8, Block 22, Flat A, Big Field Survey, Salt Lake County, State of Utah; that the plaintiff asserts to have some claim or interest in a part thereof, but that plaintiff's claim is without any right whatsoever.

WHEREFORE, defendants pray that plaintiff take nothing by virtue of her complaint, and that a judgment be entered in favor of defendants quieting their title to the property up to the partition fence herein mentioned, and that a decree be entered reforming the deed mentioned herein in paragraph 3, to conform to the intentions of the parties and reforming the description in said deed, which is in the possession of plaintiff, to conform with the intentions of the parties with respect to natural monuments and fence lines, and that a decree be entered establishing the boundary line in accordance with the allegations herein contained, and for any further and additional relief, which in the discretion of this court seems just, reasonable and equitable, including costs.

F. Henri Henriod, Attorney for Albert Yeager and
May C. Yeager, Defendants.
(Duly Verified).

IN THE DISTRICT COURT OF SALT LAKE
COUNTY, STATE OF UTAH

MARY A. HARMAN,

Plaintiff,

vs.

ALBERT YEAGER and MAY C.
YEAGER, his Wife, et al.,
Defendants.

AFFIDAVIT
62659

(Note: Affidavit tendered by defendant, Albert Yeager in connection with motions to vacate judgment, new trial and for permission to amend, and in connection with motions to set aside and vacate judgment, and for new trial (Tr. 82), in substance as follows (Tr. 54-61 inclusive):

STATE OF UTAH
COUNTY OF SALT LAKE } SS

1. That he is one of the defendants herein; that he incorporates herein the reasons assigned in motion to vacate decree and for permission to amend answer.

2. That affiant has not had access to any accredited survey; that what surveys have been made are conflicting, and it is impossible to determine the boundary line of Lot 8 from said surveys; that affiant has at all times assumed that the north boundary of Lot 8 was marked by a fence which has been in position for 75 years; that said fence was not heretofore mentioned in the pleadings because affiant assumed plaintiff's claim was based on measurement from said 75 year old

fence, and it was impossible to determine that plaintiff made any other claim for property, and affiant could not determine with due diligence that plaintiff intended to base her claim on any other theory than measurement from said fence, and that therefore affiant's failure to plead the exact position of said fence line was excusable neglect, and affiant wishes to amend said pleadings to conform to the facts; that affiant believes and states that plaintiff, at the time of accepting deed to said property, thought that said description was based on measurement from said fence line.

3. That at the time the Court heard said motions and granted motion for judgment on the pleadings for plaintiff, there was an excusable misunderstanding concerning the starting point for measurement of said properties, the defendants assuming that said point was said boundary fence, and the plaintiff asserting something different, without either party mentioning said fence, and that any stipulation of boundary was based on misunderstanding; that because of said misunderstanding there was a mutual mistake of fact making it appear that the parties were agreed on the line when in fact they were not; that it was impossible for defendants at said time to determine that said misunderstanding existed; that no sworn testimony of any nature was ever taken at the trial; that the motion for

judgment on the pleadings was granted solely on statements of counsel, and the property rights of the parties affected by default and without taking of evidence, which is contrary to the statutes of Utah; that affiant is desirous of presenting an amended answer setting forth the facts and praying for reformation of the deed.

4. That there is a fatal variance in plaintiff's complaint and the decree with respect to the description of the property, the complaint stating that the property claimed by plaintiff runs

" . . . North 76,775 feet (among other things)"
(Tr. 56)

and the decree states that it runs:

" . . . North 76.775 feet (among other things)"
(Tr. 56)

the said description in the complaint varying greatly as to size and shape with that set forth in the decree.

5. That when the Court inquired of plaintiff's counsel if plaintiff claimed anything north of the line described in the deed and the answer was "No", affiant herein assumed that the answer was based on a description whose starting point was the 75 year old fence; and that affiant likewise assumed the answer of counsel for defendants, being "No" was based on the same fact; that had there been an understanding with respect to basis for measurement counsel for defen-

dants' answer would have been "Yes"; that it is inequitable to grant judgment on the pleadings upon such misunderstanding, and without first having heard sworn testimony and evidence; that had such evidence been required, affiant believes and asserts that such misunderstanding would have been made obvious and that amendment of the pleadings would have been allowed and a trial had on the merits, and defendants' prayer amended to include a request for reformation, if a true survey should show that the north boundary of Lot 8 was not the 75 year old fence.

6. That affiant believes that the Court, on hearing the statement of counsel, thought the parties were in agreement as to the boundary, but that such was not the case; that no evidence or testimony was introduced to show the boundary intended, and that if such evidence had been introduced the court would not have given judgment on the pleadings and would have permitted an amendment of defendants' answer, and had evidence been introduced showing plaintiff had occupied and accepted her property based on said fence line and said partition fence, amendment would have been allowed; that the Court's ruling was based on mutual mistake and misunderstanding, on complete lack of sworn testimony and evidence, and constituted inadvertence and excusable neglect.

7. That affiant believes and states defendants have

an affirmative defense based on prescription and adverse possession, which affiant would have asserted but for said misunderstanding with respect to measuring points; that defendants have occupied the property on the north of the partition fence at all times since and before 1932, have paid taxes thereon and improved the same, and such facts would have appeared had testimony been taken.

8. That the court's giving judgment on the pleadings constituted accident or surprise because of the misunderstanding, as was the assumption by plaintiff and counsel for plaintiff that there was a different measuring point than said fence; that affiant did not know at said hearing that there was a difference of opinion as to starting points and did not discover same until after said hearing.

9. That affiant has newly discovered evidence, in this: That other nearby property owners whose property is described by starting from said fence, have stated that they considered their property as being measured from said fence and that this is shown by the disclaimer filed by some of the defendants in this cause, the disclaimants' property having been measured by said fence line and disclaimants assuming that the fences were the true boundaries; that plaintiff, in obtaining such disclaimer is using the fence lines as a

basis for measurement, and in making claim from affiant is attempting to use another basis for measurement, and in so doing is seeking equity but not doing equity.

10. That there was insufficiency of evidence to support judgment on the pleadings, there having been no evidence introduced on behalf of either plaintiff or defendant.

11. That there was error in law in granting motion for judgment on the pleadings and refusing to grant defendants' motion for a new trial.

12. That affiant has newly discovered evidence, in this: That plaintiff's complaint calls for more property than does her deed; that said complaint is based on a private, unofficial survey, which defendants could not anticipate and of which defendants did not know until after said hearing; that affiant believes said survey to be inaccurate.

13. That affiant has newly discovered evidence in this: That affiant has discovered that other nearby property owners customarily received one share of water stock to one acre of ground; that affiant's deed to plaintiff called for $1\frac{1}{4}$ shares and $1\frac{1}{4}$ acres of ground; that plaintiff's complaint calls for more than $1\frac{1}{4}$ acres of ground.

Albert Yeager

Subscribed and sworn to before me this 17th day of November, 1939.

F. Henri Henriod, Notary Public residing at
Salt Lake City, Utah.

Received copy of the foregoing affidavit this 18th day
of Nov., 1939.

J. Patton Neeley & P. G. Ellis
Attorneys for Plaintiff.

ASSIGNMENTS OF ERROR

Come now Albert Yeager and May C. Yeager, defendants in the above entitled cause, and except to and assign as error the Court's 1) overruling defendants' demurrer, May 1st, 1939, 2) judgment on pleadings, September 6th, 1939, 3) trial minutes signed by Judge based on hearing September 6th, 1939, 4) written decree quieting title in plainteiff, dated and filed October 18th, 1939, 5) denial of defendants' motions to set aside decree and permit amendment of answer, October 14th, 1939, and denial of motion for new trial, October 14, 1939, 6) denial of motion to re-consider motion for new trial, motion for new trial and motion to vacate judgment, February 6th, 1940, and 7) denial of defendants' motion to amend answer, September 6th, 1939, and to all other orders and rulings of the Court in said cause, made and entered adversely to and ob-

jected to by Albert Yeager and May C. Yeager, defendants.

F. Henri Henriod, Attorney for Defendants, Albert Yeager and May C. Yeager, his Wife.

The within and foregoing Bill of Exceptions, together with the changes and corrections referred to in the objection, heretofore presented to the Court, is hereby settled, approved and allowed, this 21st day of March, 1940, as and for the bill of exception in the within cause.

Allen G. Thurman.

(Seal)

Pursuant to argument on motions to re-consider motion for new trial, to vacate judgment and permission to amend pleadings, on November 18th, 1939, F. Henri Henriod, counsel for defendants, moved the Court also: 1) To set aside the judgment, 2) for a new trial (Tr. 82), and Mr. Neeley, counsel for plaintiff stated "I won't object to those motions; they may go into the record." (Tr. 82). The Court set Wednesday, December 6th, 1939, to hear evidence in support of affidavit in support of motions (Tr. 84). On December 6th, hearing was had, counsel for plaintiff objecting to introduction of any testimony in support of the affidavit, and was overruled. (Tr. 84).

Oscar J. Harline was sworn and examined and testified (Tr. 85, et seq.) that he was agent for property south of plaintiff's; that there was a fence between his and plaintiff's property for 17 years, and that it has been there, he thought since a little after 1892 (Tr. 86); that there has been a ditch there about the same length of time (Tr. 87); that he considered this fence and ditch as the dividing line or north line of his property (Tr. 87 and 90); that his father owned the entire tract, and sold the north half about 1922; that he lived in the district at that time; that he knows there is a fence between the Harman (plaintiff) and Yeager (defendants') property, and that it has been there five years or probably more; that he knows of a fence on the north of the defendants' property that continues the whole length of the block and that this fence has been there fifty years or more (Tr. 92); that he was one of the defendants in this action and signed a paper (disclaimer) to Mrs. Harman establishing the old fence line; that at no time did he consider that he had an interest north of the fence and ditch line (Tr. 93); that he is acquainted with other properties in the vicinity and knows that one share of water goes with one acre of ground (Tr. 93); that he is selling the north half of the south half of Lot 8 to a Mr. Tilby, and that in doing so he was using the fence and ditch line as the boundary of the property and that Mr. Tilby

was dealing on the same basis; that in all of the transactions with which he is acquainted the fence lines have been considered as the true boundaries (Tr. 94).

Mrs. Jessie B. Ence was sworn and examined and testified that she was owner of property in the vicinity on the west of 11th East (Tr. 94); that the south line of her property was even with the north line of the Yeager property; that there has always been a fence on this line since she lived there, which has been for 20 years (Tr. 95); that she has always considered this fence line the correct line (Tr. 96); that she is no relation to Yeagers, but is a neighbor; that there is a ditch along her south line; that she received water shares when she bought the property and bought five acres and received five shares (Tr. 96); that one share of water goes with one acre of ground.

Thereupon Mr. Henriod stated that he would like to ask Mrs. Harman (the plaintiff) a question or two, to which counsel for Mrs. Harman objected. Thereafter the abstract of title was introduced by counsel for defendants, and abstract of title was introduced by counsel for plaintiff.

ARGUMENT

Introduction: This case concerns itself with a complaint setting forth allegations designed to quiet title to certain property described therein. A demurrer there-

to was overruled, and the defendants filed an answer in substance stating that certain property was described in a deed executed and delivered by defendants to plaintiff on or about November 18th, 1932; that *“dividing the property so conveyed from the property retained, a fence had been constructed by the defendants and was standing at the time of the conveyance above mentioned and that said plaintiff has been in possession of the property conveyed south of the said fence and no part of the plaintiff (defendants’?) land has been in the possession of said plaintiff”* and that *“so far as any conflict exists between property described above and within the fence line as hereinabove described, these defendants deny the allegations of said plaintiff’s complaint and the whole thereof and alleges that plaintiff is not entitled to any part or portion of said North ½ of the North ½ of the North ½ of Lot 8, Block 22, Ten Acre Plat A (Tr. 8 and 9). Upon the date of the trial of said cause, counsel for both sides made statements, but no evidence or testimony of any nature was taken. During the discussion between Court and counsel, and before any motion for judgment on the pleadings was made by counsel for plaintiff, counsel for defendant asked permission to amend his answer (Tr. 77) and such permission was objected to by counsel for plaintiff (Tr. 77). Counsel*

for defendants then requested 24 hours in which to amend, and counsel for plaintiff again objected (Tr. 78), and the Court stated that it would entertain a motion for judgment on the pleadings, and the motion being made, was granted by the Court without giving counsel for defendants the requested permission to amend his answer. The plaintiff had at no time demurred to defendants' answer, and there had been no opportunity to pass on the sufficiency of the pleadings up to that point.

Subsequently, defendants made a motion to vacate the decree and for permission to amend the answer (Tr. 21), and made a motion for a new trial (Tr. 22), which were all denied by the Court (Tr. 25). A written decree was thereafter entered quieting title in plaintiff (Tr. 27, 28 and 29), to property differently described than was described in the complaint (Tr. 1), the complaint being different than the decree in that the description states that starting from a certain point the property runs "North 76,775 feet . . .", the decree stating "North 76.775 feet . . .", and differing also in that the description in the complaint does not have the words "Ten-acre plat A", whereas the decree does, and differing also in that the description in the complaint does not have the words "to a point which is 4.35 rods or 71.775 feet south of said northwest corner

of said lot 8'' whereas the decree does, and differing also in that the description in the complaint does not contain the words "to a point which is 151.55 feet south of the northeast corner of said lot 8, in block 22, 10-acre Plat A, Big Field Survey," whereas the decree does, and differing also in that the description in the complaint, or any part of the complaint contains the words "Together with all improvements thereon, and all hereditaments and appurtenances thereunto belonging, and also together with 1¼ share of stock in the Big Cottonwood Lower Canal Company, and all water and water rights represented by said 1¼ share of stock," whereas the decree does contain such quoted words and phrases.

This decree was entered on October 18th, 1939, and thereafter and on November 2nd, 1939, defendants served and filed Notice of Motion wherein they proposed to move the Court on November 18th, 1939, to reconsider the motion to vacate decree and permission to amend answer (Tr. 34), and they set forth all the statutory grounds previously set forth in their former motions (Tr. 21 and 22), *adding in said Notice of Motion, however, an additional statutory ground, i.e., newly discovered evidence, material for the applicant, which could not with reasonable diligence, be discovered and produced at the trial.*

In support of the motions for which said notice was served and filed, defendants tendered a verified amended answer (Tr. 47 to 53 incl.), and one of the appellants, Mr. Yeager, tendered his affidavit in support of the motions (Tr. 54 to 61 incl.), setting forth reasons for having a trial on the merits. The matter was continued to take testimony in further support of the motions, and it was stipulated that the affidavit of Mr. Yeager (Tr. 54) stated facts to which he would testify if sworn (Tr. 83), and two witnesses were sworn in support of defendants' motion, Mr. Oscar J. Harline and Mrs. Jessie B. Ence (Tr. 85 to 97 incl.). Counsel for defendants, at the hearing on said motions, also made motions in open court to 1) reconsider the motions theretofore filed, and separately and independently and not by way of re-consideration, to 2) set aside and vacate the judgment, and to 3) grant a new trial, (Tr. 82), which motions were not objected to by counsel for respondent. (Tr. 82.)

Thereafter, the various motions were denied by the court, and appellants appeal from all the rulings of the court and from the judgment on the pleadings given by the court in favor of respondent, and in attacking said rulings, respectfully represent as follows:

I. THE DISTRICT COURT ERRED IN GRANTING

MOTION FOR JUDGMENT ON THE PLEADINGS IN FAVOR OF PLAINTIFF AND RESPONDENT.

A. It is submitted that the appellants and defendants in their amended answer (Tr. 8) sufficiently denied the allegations of the complaint, to raise an issue requiring the taking of evidence and testimony. In answering paragraph 4 of the complaint, which was the paragraph claiming ownership and possession of the described property, the defendants stated:

“That dividing the property so conveyed from the property retained a fence had been constructed by the defendants and was standing at the time of the conveyance above mentioned and that said plaintiff has been in possession of the property conveyed south of said fence and no part of the plaintiff (defendants?) land has been in the possession of said plaintiff.”

Also:

“So far as any conflict exists between property described above and within the fence line as hereinabove described these defendants deny the allegations of said plaintiff’s complaint and the whole thereof and allege that plaintiff is not entitled to any part or portion of the said North $\frac{1}{2}$ of the North $\frac{1}{2}$ of the North $\frac{1}{2}$ of Lot 8, Block 22, Ten Acre Plat A, Big Field Survey, Salt Lake City, Utah.”

It is submitted that these allegations, though somewhat inartistic are certainly not admissions that plaintiff was the owner and entitled to the possession of

the property she described and certainly constitute denials of any claim by plaintiff for land north of the fence line mentioned, and are diametrically opposed to an admission justifying judgment on the pleadings. Cases are legion holding that such an answer constitutes a denial which raises an issue that must be tried to the court or jury, but inasmuch as our own Supreme Court has spoken it would seem inapropos to cite authorities from other jurisdictions. In the case of

Hancock vs. Luke, 148 Pac. 452; 46

Utah 26, 1915,

a case where an appeal was taken from judgment on the pleadings, the plaintiff, an attorney, sued to rescind a contract to purchase stock, wherein, among other things, defendant had purportedly agreed to employ the plaintiff, the plaintiff praying that the contract be rescinded for fraud and misrepresentation. To the complaint an answer was filed containing lengthy allegations, some of which admitted the contract and the allegations of the complaint, and some of which were inconsistent therewith, the answer further denying each and every other allegation in said complaint contained. No demurrer had been interposed to the answer. Judgment on the pleadings was given on motion of defendant. Plaintiff asked leave to amend and such leave was denied. The court, among other things said:

“Under our statute, ‘a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties.’ Com. Laws 1907, Sec. 2986. Where it is clear, therefore that a denial of particular allegations of the complaint was intended, the mere form of such denial is not always conclusive.”

The court also said:

“The motion for judgment on the pleadings was, in legal effect, a general demurrer to the answer, and such demurrer searches the entire record, including the sufficiency of the complaint.”

The court commented on the fact that our statutes do not have a provision for a motion for judgment on the pleadings, but that our courts have inherent power, independent of statute, to grant such a motion. But, said the court:

“Motions for judgments on the pleadings are, however, not favored by the courts, and upon such a motion the pleadings will be construed with great liberality in favor of the party whose pleadings are assailed,”

citing a number of cases, included in which was *Giles vs. Recamier*, 15 N. Y. St. Rep. 354, a part of the opinion of which the court quoted approvingly:

“It is a dangerous practice to allow either party to interpose an oral demurrer at the trial, to the pleading of his adversary. If a pleading be substantially defective, the honest course is to demur to it, and thus give court and counsel a fair opportunity to examine and consider the question of law that is involved. If there be any

reasonable doubt as to the sufficiency of the pleading, the court should deny a motion that is sprung at the trial, for judgment on the pleadings."

In our principal case we have the same situation, except that we have a stronger case for the application of the above principles, in view of the fact that in our principal case, appellants made application for permission to amend their answer *prior* to motion for judgment on the pleadings, (Tr. 77), whereas in the Hancock case, the motion for permission to amend came *after* the motion for judgment on the pleadings, and it was because of the fact that the motion came *after* the judgment that Justice McCarty dissented. In this connection, calling attention to Tr. 77 and 78, Mr. Cluff, counsel for defendants, said: "I am asking to amend, Your Honor," which was objected to. Again Mr. Cluff said: "I ask the privilege of 24 hours in which to prepare an amendment," which was objected to and the Court immediately, without further consideration, said it would entertain a motion for judgment on the pleadings, which motion was promptly granted. Justice Frick, in the majority opinion in the Hancock case, continued as follows:

"If in this case, plaintiff had interposed a general demurrer to the answer, and the court had sustained it, the defendants would have been

permitted to amend their answer as a matter of course, under the practice, if not as a matter of right. . . . In our judgment there is not a respectable attorney practicing in this jurisdiction who would question the right of his adversary to at least attempt to amend a pleading after a general demurrer had been sustained by the court. Is there any reason for a different rule in case of a motion for judgment on the pleadings? We confess our inability to discover any substantial difference between a general demurrer and a motion for judgment on the pleadings, insofar as the right to amend is concerned."

We commend also the other statements made in the case by Mr. Justice Frick and Mr. Justice Straup, establishing the above principles in the State of Utah, but space does not permit further quotation.

Another Utah case adhering to the doctrine above is that of

Tooele Meat Co. v. Fite Candy Co., 168 Pac. 427, 57 Utah 1, 1917,

wherein plaintiff sought to set aside a judgment obtained in another case, claiming the complaint in the other action was based on fraud and misrepresentation. The defendant answered generally and in some instances specifically. The plaintiff did not put in any evidence but the defendant did. The plaintiff, on appeal, claims that judgment should have been given on the pleadings, and the court said:

"Under our statutes (Com. Laws 1907, Sec. 2986), the allegations and averments in plead-

ings must be liberally construed. That section reads:

‘In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties.’

If, therefore, we apply the provisions of that section to defendant’s answer in this case it cannot be doubted that the answer does present an issue of fact and hence is sufficient to withstand a motion for judgment on the pleadings. The court therefore did not err in refusing to enter judgment for the plaintiff.”

Com. Laws 1907, Sec. 2986 is identical to Title 104-13-1, R. S. U. 1933. The pleadings in the above case are substantially similar to those of our principal case, and we submit that the decision in the Tooele case should apply to our case. Another case re-iterating the Utah principle is that of

Johnson v. Mountain St. Tel. & Tel. Co.,
159 Pac. 526; 48 Utah 339,

and many others from other jurisdictions which we feel need not be cited in view of the law of our own state. The above cited cases should conclusively determine our principal case and the error committed by the District Judge in granting judgment on the pleadings.

II. THE DISTRICT COURT ERRED IN DENYING APPELLANTS’ MOTION TO RECONSIDER FORMER MOTIONS, AND IN DENYING AP-

PELLANTS' INDEPENDENT MOTION FOR
A NEW TRIAL AND TO VACATE JUDGMENT.

As has been stated hereinabove, appellants moved the court to re-consider former motions for new trial, vacate judgment and permission to amend, (Tr. 34) and also moved the court independently and separately for a new trial and to vacate the judgment (Tr. 82), and in support of these various motions presented *new and additional statutory grounds*, i.e., that of newly discovered evidence, and in further support of said motions tendered a verified answer (Tr. 47 to 53), an affidavit of one of the appellants (Tr. 54 to 61), and sworn testimony of two witnesses (Tr. 85 to 97), and introduced the abstract of title (Tr. 97).

The case of *Luke vs. Coleman*, 38 Utah 383, was strongly urged by counsel for respondent as authority for the proposition that the court could not entertain said motions to re-consider and said motion for new trial and to vacate judgment. It is true, *Luke vs. Coleman* states that a motion to re-hear a motion for a new trial is foreign to our *statutes* on procedure, but the court in that case restricted its decision to motions to re-hear the very same thing on the very same grounds. Where additional grounds or new evidence is presented, *Luke vs. Coleman* is not applicable, the court acknowledging its inapplicability in such case when it said:

“ . . . According to some of these decisions, a second application for a new trial may be made within the term in which the judgment was rendered, when it is based on grounds not included in the first application, and satisfactory reasons given for the omission. The plaintiff, however, did not proceed on the theory of a second application based on new grounds, but on the theory of a rehearing and a resubmission of the grounds already passed upon and adjudged on the first application. . . .”

In our principal case there is no question but that new grounds were presented in support of a second application, and an answer, affidavit, testimony and evidence tendered in support thereof. In the original motions in our principal case no affidavit or answer was tendered. *Luke vs. Coleman* is not applicable in our principal case for the further reason that a more recent Utah case, that of

Lund vs. Third District Court, 62 Pac.

(2) 278, 90 Utah 433, 1935,

reduces *Luke vs. Coleman* to its own facts and none other. In the *Lund* case, a motion for a new trial had been denied during the term. After term time it was discovered that one of the jurors had been incompetent, and upon application for a new trial, based on accident and surprise, a new trial was granted, and the ruling upheld by our Supreme Court, on the principle that if there be additional grounds presented in support of the motion and such grounds are meritorious, a new

trial may be granted regardless of the fact that a motion for a new trial had previously been denied. In our principal case sufficient additional grounds have been presented which were not mentioned in the previous motion, to bring it within the purview of the Lund case. The appellants in bringing in witnesses in support of their motions also satisfied the rule in Utah that something in addition to the affidavits must be offered. It might be stated also, for what it may be worth, that in the Luke case the motion to re-hear was made long after term time, while in our principal case the motion to re-hear was made well within term time.

We feel that quite apart from the Utah authorities the court abused its discretion in not relieving appellants from the judgment entered. The Court, upon presentation of the motions and evidence tendered in support thereof, could have invoked the power given it under Title 104-14-4, *Revised Statutes of Utah*, 1933, providing for relief from a judgment, especially since the whole record indicates a willingness and desire on the part of the appellants to try the case on its merits and not merely on the pleadings. The tender of answer, of the affidavit, of costs, the various motions, and the bringing of witnesses into court would seem to disclose a desire to try the case, and certainly does not

evinced a desire to have the case go by default by way of judgment on the pleadings. Surely the spirit of Title 104-57-12, Revised Statutes of Utah, 1933, if not the letter thereof, was also abused by the District Judge in this case, when such statute states that the court in real property cases

“ . . . must not enter any judgment by default against unknown defendants, *but must in all cases* require evidence of plaintiff's title and possession and hear such evidence as may be offered respecting the claims and title of any of the defendants, and must thereafter enter judgment in accordance with the evidence and the law. . . . ”

Surely, the appellants would have been better off in our principal case, in view of this statute, if they had not answered at all, for in that case the plaintiff would have been put to her proof by sworn testimony and evidence. A fortiori, where a defendant does answer, there is more reason to take evidence than where a default judgment is taken, and less reason to give judgment on the pleadings as was done in our principal case without one word of testimony or evidence, but only upon confused statements of counsel.

The appellants have done about everything they could have done under the circumstances to attempt to bring this case to trial, and we submit that the Court abused its discretion in not allowing appellants their day in court. The books are full of authority sus-

taining the power of a court during term to grant permission to try a cause on its merits, where there may have been a technicality that temporarily impeded the progress thereof.

Vol. 3, *Bancroft's Practice*, Chapter

VII, pages 2432 et seq.,

15 *Ruling Case Law*, page 688 et seq.

On page 2433 of Bancroft it is stated:

“Within proper limits and under proper circumstances every court of record has authority to vacate its own judgments. While it has been regulated to a large extent by legislation, this power is inherent and in some cases independent of statute. . . .”

And even though a court may follow the statutory technique (p. 2459):

“Where a motion is based upon a ground which the court is held to have inherent power to vacate a judgment, as in case of fraud or the inadvertence of the court, and not upon a statutory ground, the power of the court is not governed by the statutory limitation as to time. . . .”

and on page 2477:

“On the other hand the circumstances may be such as to make it an abuse of discretion to deny an application to open a default or set aside a judgment. If the moving party makes a clear and unquestionable showing that he has a good defense or cause of action on the merits, of the benefit of which he has been deprived without fault on his part, the court has little discretion in the matter and should it deny re-

lief, its action may be set aside and proper relief ordered by the appellate court. . . .”

and on page 2478:

“An appellate court is inclined to listen more readily to an appeal from an order denying relief than one granting relief, because of the policy of applying remedial statutes liberally to permit a trial on the merits. . . .”

. . . . It is the undoubted general rule that this power should be exercised liberally in furtherance of justice and in view of the policy of the law and the statutes governing relief, to have cases disposed of on their merits rather than upon technicalities and fortuitous circumstances. . . . If reasonable minds might differ as to the propriety of setting aside a judgment upon a proper and timely application and showing, the doubt should be resolved in favor of the applicant.”

and see also page 2489 which states as a general principle the doctrine of *Lund vs. Third District Court*, and see also the Ruling Case Law citations, principally at page 688, 689, and 708.

It is therefore submitted that in the light of the Lund case, the statutes of Utah, and the general authorities cited, the Court abused its discretion in giving judgment on the pleadings and in refusing to grant a new trial and permit amendment of the answer, and in refusing to grant a new trial and vacate judgment when new, additional and obviously meritorious grounds were presented,—and in this respect may it be pointed out that the answer, affidavit and evidence tendered by ap-

pellants were not resisted by counter-affidavit or counter-evidence or reply of any nature on the part of respondent.

III. THE DECREE ENTERED BY THE COURT IS FATALLY AT VARIANCE WITH THE CON- TENT AND PRAYER OF THE COMPLAINT.

The discrepancies pointed out in the "Introduction" herein above, it is submitted, make it obvious that the Court went far afield in its judgment in granting more relief and inserting more description than called for in the complaint. It is also obvious that the property described in the complaint, although the "North 76,775 feet" probably was intended for "North 76.775," the comma being a probable error, is vastly different in size and shape than that described in the decree. True, the use of the comma in the description instead of a period may have been an error, but there was no effort to amend the description, and the same has never been amended, and we submit that if the respondent is willing to rely on a technicality based on inartistic wording of an answer when the meaning was obviously to deny the complaint, then surely the appellants should be entitled to rely on the misplacement of a comma in order to have their day in court. It is further submitted that a calculation of the area as described in the decree of the court makes for a

discrepancy with the area described in the deed to respondent. Surely the court erred in giving the respondent more land in its decree than was called for in the deed, when the court itself gave judgment on the pleadings ostensibly based on the descriptions in the deeds.

With respect to the merit of appellants' theory with respect to reformation as shown in their tendered amended answer, it is unnecessary to cite authorities here in support of the principles with respect to natural monuments, mutual mistake, estoppel, fence-line law and the like, but it is submitted that appellants, in their tendered amended answer, affidavit, evidence and proof, have certainly set forth matters which, if they had been presented in the first instance would have called for a trial on the merits. Hence, since there is no question with respect to the merit of appellants' proposed defense and prayer for relief, counsel feels that the questions of abuse of discretion, granting of new trials, sufficiency of pleadings with respect to judgments on the pleading and the like should be the only questions presented to this court as has been attempted hereinabove.

In conclusion, we submit that a careful reading of the transcript from beginning to end and examination of the pleadings, the discourses of counsel and the other

matters contained in this case, will make obvious the desire of the appellants to have their day in court, and the denial of that right through no fault of their own. We feel that this matter, which vitally affects the substantial property rights of the parties, should be sent back to the lower court with instructions to allow appellants to file an amended answer and have this case tried on sworn testimony, evidence and fact, and not upon the bickerings of counsel and court on matters which the record obviously discloses led to confusion and misunderstanding.

Respectfully submitted,

F. HENRI HENRIOD,

Attorney for Appellants.