

1940

Mary A. Harman v. Albert Yeager and May C. Yeager : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

MARY A. HARMAN,

Respondent,

vs.

ALBERT YEAGER and MAY C.
YEAGER,

Appellants.

No. 6244

RESPONDENT'S BRIEF

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

MARY A. HARMAN,

vs.

ALBERT YEAGER and MAY C.
YEAGER,

Respondent,

Appellants.

No. 6244

RESPONDENT'S BRIEF

STATEMENT OF CASE

The appellants, on November 18, 1932, conveyed to respondent the following described parcel of land in Salt Lake County, Utah: Beginning at a point 8.7 rods (143.55 ft.) South of the Northwest corner of Lot 8, Block 22, 10 acres Plat "A", Big Field Survey, and running thence North 4.35 rods (71.775 ft.); thence East 46 rods; thence South 4.35 rods; thence West 46 rods to 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. By the same deed, the appellants pretended to convey to respondent $1\frac{1}{4}$ acres of stock of the Big Cottonwood Lower Canal Co. Lot 8, above mentioned, was divided into four parts, each 46 rods East to West and 4.35 rods North to South; and before the conveyance to the respondent, the appellant owned the North quarter, and at the time of the commencement of this action, the defendants, other than the Yeagers, owned the quarter lot South of what was originally the Yeager's quarter lot. There is no evidence as to the origin of respondent's title to the land in the quarter lot south of her land except by negotiation with and the stipulations of the owners of that quarter; but by her complaint in this action she claimed, and by the judgment herein was awarded, the strip of ground approximately 46 rods East to West, five feet deep at its West end and eight feet deep at its East end, and which was contiguous to the South half of the North quarter of said Lot 8.

The respondent particularly desired to ascertain the North boundary line of her property; and in her complaint described the South half of the North quarter of Lot 8 together with the strip above mentioned as one parcel. So far as the trial was concerned, and on this appeal we shall treat the case as one against the Yeager's to quiet title to the South half of the North quarter of Lot 8, the parcel first above described as conveyed by them to the respondent; and, in this regard, the complaint and appellant's answer described or included the same land as conveyed by appellants to respondent.

The complaint is in the usual form of actions to quiet title. In the appellants' answer after describing the land conveyed by them to respondent, they allege: "That dividing the property so conveyed (i. e., the South half of the North quarter of Lot 8) from the property retained, a fence had been constructed by the defendants, (appellants) and was standing at the time of conveyance above mentioned and the said plaintiff had been in possession of the property conveyed south of the said fence and no part of defendant's land had been in possession of said plaintiff"; and, further, "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 complaint and whole thereof, and allege the plaintiff is not entitled to any part or portion of said north half or north half of north half of Lot 8, Block 22, 10 acre Plat 'A,' Big Field Survey, Salt Lake City, Utah." The answer contains the prayer, that "the plaintiff take nothing by her action so far as the property described of defendants and that these defendants have their costs herein expended."

The substance of the foregoing allegation is, we presume, that there was a fence on the division line between the north half and south half of the north quarter of said Lot 8; and that respondent was not entitled to any part of the appellants' north half of that quarter. As the respondent was not claiming any part of the latter property, the allegations of the answer elucidated by the prayer, contains a concession by appellants that respondent's title to the south half of the north quarter of Lot 8 might

be quieted. Indeed, it would not be too strong a statement to say, that the appellants joined in the prayer of respondent's complaint that her title to the latter property be quieted.

The defendants named in the complaint, other than the appellants disclaimed; and the action came on for trial on the complaint and appellant's answer. While plaintiff's counsel was making a statement of the case to the court, a discussion arose between the court and the attorneys, in which the Judge, addressing counsel for appellants, said: "The plaintiff wants the land described in the deed, no more, no less, and you say they are entitled to the land described in the deed, no more and no less" (Tr., 74); and, also, "I do not think you have a controversy here" (Tr., 76). The appellant's counsel thereupon asked leave to amend his answer, so as to claim "three feet on one side and five feet on the other, north of the fence described in the answer, and 24 hours in which to prepare the amendment." (Tr., 77.) The court had previously stated to plaintiff's counsel, "I will give you judgment on your pleadings to that effect—that you have the land described in the deed." (Tr., 76.) Plaintiff's counsel objected to the appellants' proposed amendment of their answer and the court thereupon said, "I will entertain a motion for judgment on the pleadings quieting title"; to which counsel for plaintiff replied, "We make that motion, Your Honor." The court granted the motion, saying, "The motion is for judgment of the pleadings in favor of the plaintiff and against the defendants, Albert Yeager and May C. Yeager." (Tr.,

78.) The court then addressed the attorney for the defendants, saying: "Now, that does not bar you, Mr. Cluff. You get your answer drawn and if you want to ask leave to open the case or file your answer or not, as the case may be, you can draw your answer that will give you a cause of action." To which Mr. Cluff replied, "I will see what I can do anyway." (Tr., 78.) The plaintiff then asked for judgment on the answer and stipulation of fact and subscribed by the plaintiff and remaining defendants, settling the boundary line between the other properties; which motion the court granted. (Tr., 78.)

On September 25, 1939, within the time allowed by the court therefor, the appellants served and filed their notice of intention to move for a new trial on all the statutory grounds, excepting to those relating to misconduct of the jury, etc., excessive damages and newly discovered evidence (Tr., 21); and also served and filed what is denominated "Motion to Vacate Decree and for Permission to Amend Answer," but which really is only a notice of intention to make a motion for that purpose and specifying the grounds on which it would be made, which were: (1) That no time was allowed defendants to file objection to trial minutes as prepared by attorneys for plaintiff as required in Rule 13 of Rules of Practice of the District Court of the Third Judicial District; (2) that no time was allowed defendants to amend their answer after motion for judgment of the pleadings; (3) that the decree is contrary to law; (4) that the denial in the answer is sufficient to raise an issue, and (5) that the judgment is contrary to law and the court erred

in judgment on the pleadings, since in making the motion by plaintiff the court (should) have treated the denial as sufficient and the case should have gone to trial and plaintiff required to offer evidence in support of complaint. (Tr., 22.)

Both of the foregoing motions were, on October 14, 1939, with the consent of appellants, by their attorney, denied. (Tr., 25, 104.)

On November 2, 1939, the appellants, by their present attorney, Mr. Henroid, served a notice of motion that on November 18, 1939, they would move the court to reconsider the motion to vacate decree and permission to amend answer theretofore filed, upon the grounds therein stated and also upon the grounds of: (Specifying all the statutory grounds for motion for new trial, excepting those related to misconduct of the jury, etc., and excessive damages. (Tr., 34.) Afterwards, on December 6, 1939, the appellants tendered an answer, in which they alleged, in substance, that at the time of their conveyance to plaintiff, a fence stood *on or near* the north boundary of Lot 8, and that there was another fence separating the lot intended to be conveyed to plaintiff and that intended to be retained by defendants; that when defendants conveyed to plaintiff, it was the intention to measure the property by starting at the fence line on or near the north boundary of Lot 8 and that the plaintiff accepted the property on the south side of second fence, above mentioned, which separated the lot intended to be conveyed to plaintiff and that intended to be retained by defendants; that the assumption of both

plaintiff and defendant that the partition fence was to be the true boundary line between the properties, and that if said partition fence was not the true boundary, it was treated as such by plaintiff and defendants, "and if it were not the true boundary line there was a mutual mistake"; that measured from any other line (that is, the fence on or near the north boundary of Lot 8) did not and would not constitute the conveyance agreed upon by plaintiff and defendants; the plaintiff and defendants at all times treated the fence and ditch as the south boundary of plaintiff's property; that for more than 10 years the defendants have occupied and cultivated the premises north of the partition fence, adverse to the defendant and all the world under claim of title based on fence line and natural monuments, paying taxes thereon for said 10 years and the 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 case*"; that the partition fence between plaintiff and defendants' properties was at the time of conveyance the *agreed* boundary line separated the properties, and that said fence was then in place and is now in place; that for many years the plaintiff treated said partition fence as the true boundary line and made no claim to any property north of said partition fence and represented to defendants and others that said fence was the true boundary line; that defendants believed said representations and planted shrubs, cultivated crops, and built structures thereon and plaintiff is estopped from asserting any claim to the property north

of said partition fence. The defendants also included the following counterclaim in their answer:

That these defendants are the owners and occupants of all the property between said partition fence and the fence on or near the north boundary of Lot 8, Block 22, Plat "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 the plaintiff's claim is without any right whatsoever.

The defendants prayed that a judgment be entered in their favor "quieting their title to the property up to the partition fence herein mentioned, and that a decree be entered reforming the deed herein mentioned in paragraph 3, to conform to the intentions of the parties and reforming the description in said deed," etc. (Tr., 47.)

The appellant, Albert Yeager, made an Affidavit in support of so-called motion to vacate the decree, in which he attempts to state grounds for the motion, as follows: "There was an excusable misunderstanding concerning the starting point for the measurement of said properties"; "and that any stipulation of *boundary was based on misunderstanding*"; "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"; "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

the Court's giving judgment on the pleadings constituted accident and surprise because of the misunderstanding"; "that affiant has newly discovered evidence" (of three particulars); "that there was insufficiency of evidence to support judgment on the pleadings, there having been no evidence introduced on behalf of either plaintiff or defendants"; and "that there was error in law in granting motion for judgment on the pleadings and refusing to grant defendants' motion for a new trial."

ARGUMENT

The appellants have filed an assignment of errors in which they except to and assign as error (1) the Court's overruling defendants' demurrer, (2) judgment on pleadings, (3) trial minutes signed by judge based on hearing September 16, 1939, (4) written decree quieting title in plaintiff, (5) denial of defendants' motions to set aside decree and permit amendment of answer, and denial of motion for new trial, motion for new trial and motion to vacate judgment, February 6, 1940, and (7) denial of defendants' motion to amend answer, September 6, 1939, *and to all other orders and rulings of the court in said cause, made and entered adverse to and objected to by Albert Yeager and May C. Yeager, defendants.* (Abs., 29.) If it is the rule that in the assignment of errors, the errors complained of should be clearly designated, the assignments numbered 2, 3, and 4, and most, if not all of 5 and 7, are insufficient for the reason that they are too general and indefinite; and as assignments num-

bered 1 and 3 are not argued in appellants' brief, none of these assignments of error is entitled to the consideration of the court. *Blue Creek L. and L. S. Co. v. Anderson*, 35 Utah 61, 99 P. 444; *Crook v. Harman*, 29 Utah 304, 81 P. 95; *Thomas v. Perry Irr. Co.*, 63 Utah 490, 227 P. 225; *Appeal on Falkenberg*, 73 Utah 50, 272 P. 225. In the first case above cited, and in the *Falkenberg* case, it was held that in assigning as error the overruling of a motion for a new trial, the grounds thereof as to which it is claimed the court erred should be specified; and in the other cases it was held that assignment of error merely attaching the judgment cannot be considered. See, also, *Copeland v. Ferris*, 118 Iowa 554, 92 N. W. 699; *Barry v. Barry*, 9 Kan. App. 884, 59 P. 685; *Ferrell v. City of Opelika*, 144 Ala. 135, 39 South, 289.

Originally, about September 25, 1939, the appellants filed a motion to vacate the decree and for a new trial. The former, owing to the grounds on which it is based, is a nondescript thing; but we must presume that it was made under Rev. Sts. 1933, 104-14-4, authorizing the court to relieve a party from a judgment, order, or other proceeding taken against and through his mistake, inadvertence, surprise, or excusable neglect. In *King v. Superior Court*, 12 Cal. App. (2d) 501, 56 P. (2d) 268, it was held that the "ordinary ways in which judgment may be set aside by court are by motion for new trial, by motion made in due time under statutes, by motion at any time when judgment is void on its face, and by suit in equity, where judgment is regular in form but void for extrinsic fraud or other proper cause." It has often puzzled courts

as to how to classify a particular motion, as in *Thomas v. Morris*, 8 Utah 284, 31 P. 446; but, ordinarily, the question is, whether it is a motion for a new trial, and in this case we cannot call the motion to vacate the decree a motion for a new trial, for the reason that a formal motion for a new trial was filed at the same time. True, Section 104-14-4 contemplated, as was said in the *Thomas Case*, a case where relief is applied for on grounds (mistake, inadvertence, etc.,) differing materially from those mentioned in section 104-40-2, and that the defendants' motion does not state such grounds, still we must classify it as coming under the former section; although in the absence of the motions for a new trial, the motion to vacate the decree might have been treated as such. *Newlander v. Rothschild*, 67 Ill. App. 288. If the motion to vacate comes under section 104-14-4, then it is without grounds as it does not allege mistake, inadvertence, surprise, or excusable neglect, for on a proper motion, the ground alleged is the one question involved; and, further, a meritorious defense must be shown by the answer tendered. *Quealy v. Willardson*, 35 Utah 414, 100 P. 930.

The original motions of the defendants were, with the consent of their attorney, denied October 14, 1939, and on November 2, thereafter, their new attorney, Mr. Henroid, gave notice that on November 16, he would move the court to reconsider the motion to vacate decree and for permission to amend answer theretofore filed, upon the ground therein stated, and also upon the grounds of irregularity in the proceedings of the court, accident and surprise, newly discovered evidence, insufficiency of the

evidence to justify the decision, and error of law occurring at the trial (Abs., 15) ; but defendants' attorney now claims, and the record may show, that on November 18, 1939, he orally moved the court to reconsider motion for new trial to vacate judgment and permission to amend and also to set aside the judgment and for a new trial. (Abs., 30.) At page 35 of his abstract and brief, however, he says: "This decree was entered on October 18, 1939, and thereafter and on November 2nd, 1939, defendants served and filed Notice of Motion, wherein they proposed to move the court, on November 18, 1939, to reconsider the motion to vacate decree and permission to amend (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 have been discovered and produced at the trial*"; and, further, at page 36 of the abstract and brief: "*In support of the motions for which said notice was served and filed*, defendants tendered a verified answer and one of the appellants, Mr. Yeager, tendered his affidavit in support of the motions, setting forth reasons for having a trial on the merits." It is possible that counsel for defendants had discovered that the notice of "intention to move for a new trial stands for the formal motion, and the questions may be ruled on, although no motion is filed." East v. Moore, 7 Utah 414, 27 P. 4; Lund v. Third Judicial District Court, 90 Utah 433, 62 P. (2d) 278, 282.

At the hearing of the latter motions, the appellants' attorney was confident of his right to ask reconsideration of the previous motions to vacate the decree and for a new trial, and that he could file a second motion for a new trial, with the right to support all of such motions by oral and other evidence. The term "reconsider" chosen by appellants for their motions manifestly includes both the rehearing and renewal of motions. (42 C. J., 520, Sec. 181.) There are distinctions between a rehearing and the renewal of a motion, one of which is, as stated in 42 C. J., 514, Sec. 161, that a rehearing "is not an independent proceeding; but is always to be heard on the same notice and the same papers upon which the original motion was heard." Judge Straup recognized this distinction in *Luke v. Coleman*, 38 Utah 383, 113 P. 1023, when he said: "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." As to the renewal of a motion, it has been said: "The necessity for obtaining leave to renew a motion depends on the reasons for which the renewal is sought, usually whether the renewal motion is based on the same or on a new state of facts. . . . Want of leave to renew a motion in a case where leave is necessary is a sufficient ground for denying this renewal motion and it has been held to be reversible error to grant such a motion but if the order is granted it is not void, because the rule requiring leave to renew is merely one of practice and may be disregarded by the

court.” 42 C. J. 518, Sec. 176. And in the same text, page 719, Sec. 177, it is said: “Notwithstanding the decision of a motion may not operate strictly as *res judicata*, it will ordinarily be considered as conclusive to the extent of barring this renewal of the same or a similar motion once denied on the merits based on the same or similar facts, either before the same or before a different judge unless leave of court is obtained to present the same matter again, the renewal of such a motion being not of right but merely a matter of grace which as repeatedly said, should be ‘rarely’ or ‘sparingly’ granted.” Also, “such a second motion should not be allowed where it would result in permitting a party to bring forward his objections by installments, without any excuse for not presenting all his objections upon the former motion” (Sec. 183); for, in such a case the decision or order is *res judicata*. Van Fleet’s former adjudication, 102, Sec. 19; Rogers v. McCord-Collins Merc. Co., 19 Okla. 115, 91 P. 864; Winstone v. Winstone, 40 Wash. 272, 82 P. 268; Bernard v. Idaho Bank, Etc. Co., 21 Idaho 598, 123 P. 481; Ann. Cas. 1913E. 120; Harper v. Hildreth, 99 Cal. 265, 33 P. 1103; King v. Pony Gold Min. Co., 24 Mont. 470, 62 P. 783.

In appellants’ brief, pages 43-48, their attorney lamely argues that the party aggrieved by the court’s decision on a motion may thereafter make motions for rehearing or file new motions of the same character, provided he presents additional grounds or new evidence, citing Luke v. Coleman, 38 Utah 383, 113 P. 1023, and Lund v. Third Judicial District Court, 90 Utah 433, 62 P. (2d)

278. It is hard to see how these cases can be distorted to fit that contention. In the Lund case, all previous Utah cases, including *Luke v. Coleman*, were reviewed and the court held, (1) that “but one motion upon the statutory grounds for a new trial may be made in pursuance of the statute providing for motion for new trial,” and (2) that “a motion for new trial may not after the time for filing a motion for new trial has expired (section 104-40-4) be amended by adding thereto a new or additional ground not specified in the original motion but included in the grounds specified in section 104-40-2”; and the court stated, that in *Luke v. Coleman* “the court held that a rehearing of a motion for a new trial was a proceeding unknown to our practice and that the trial court had no power to reopen the question of granting or denying a motion for a new trial after disposing of it.” The proceeding in question in the Lund case was not a new or amended motion for a new trial, but a motion to set aside a judgment under Section 104-14-4, which provides, that “When, for any reason, satisfactory to the court or judge thereof, the party aggrieved has failed to apply for a new trial or other relief sought during the term at which such judgment, order or proceeding complained of was taken, the court, or judge thereof in vacation, may grant the relief upon application made within a reasonable time, not exceeding six months after the making or occurrence of the judgment, order or other proceeding sought to be relieved from”; and the court, with that provision in mind, said:

The party applying for relief under that section must do more than merely move the court to act and

file the necessary affidavits required to be filed in support of the motion for a new trial, as provided for by section 104-40-4, *Supra*. The applicant must produce proper evidence upon which the court can base findings, that through no fault of his he was prevented from filing a notice of motion for a new trial within the time fixed by the statute and produce satisfactory evidence why he did not apply for an extension of time at some time within the statutory limitation.

We contend, however, that the court's action in granting judgment on the pleadings in the present case cannot be assigned as ground for a new trial, as it is not an error of law occurring during the progress of the trial. It was so held in *Powder River Cattle Co. v. Custer County Com'rs*, 9 Mont. 145, 22 P. 383, and in *Ayotte v. Nadeau*, 32 Mont. 498, 81 P. 145. The court's granting a motion for judgment prevents a trial, and a motion for a new trial is only proper where there has been a trial. *Thomas v. Morris*, 8 Utah 284, 31 P. 446. The statute, section 104-40-1, provides that "a new trial" is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, judicial officer or referee." In *Stockton Iron Works v. Walter*, 18 Cal. App. 373, 123 U. 240, it was held that "trial" as used in Cal. Code Civ. Prac. Sec. 656, declaring that a new trial is a re-examination of an issue of fact by the same court after a trial and decision by jury or court, refers to an investigation of the issues of fact raised by the pleadings." And see, *People v. Bank*, 152 Cal. 261, 92 P. 481. *Buckhouse v. Parsons*, 60 Mont. 156, 198 P. 444. A statement in *James v. Robertson*, 39 Utah 414, 117 P. 1068,

wherein Judge Frick said that "a party had the unqualified right to move for a new trial in every case," might be misleading; but the cases cited by this judge show that he meant after a trial. In *Cella v. Chicago and W. I. R. Co.*, 217 Ill. 326, 75 N. E. 373, it was held that errors regarding motions upon pleadings, or other matters arising before the trial is entered upon, are not ground for motion for a new trial, adding that such motion only reaches errors occurring during the course of the trial. In *Abbey Land & Improvement Co. v. San Mateo County*, 167 Cal. 434, 139 P. 1068, 52 L. R. (N. S.) 408, Ann. Cas. 1915C, 804, it was held that a motion for new trial cannot be entertained where the cause was submitted on the pleadings. In *Beach v. Spokane Ranch & Water Co.*, 21 Mont. 7, 52 P. 560, it was held that a motion which does not ask for a decision on an issue of fact arising on the pleadings is not the subject of a new trial. A motion for a new trial is not a proper proceeding to review the action of the court in giving judgment, where no issue of fact was tried (*Younger v. Moore*, 8 Cal. App. 237, 96 P. 1093) and, for this reason, the trial court's rulings on demurrers to and motions respecting pleadings are not proper grounds for new trial. *Gray v. James*, 100 Ind. App. 257, 194 N. E. 203; *Bone v. Hayes*, 154 Cal. 759, 99 P. 172; *Perkins v. McDowell*, 3 Wyo. 328, 23 P. 71. The last four paragraphs of Mr. Yeager's affidavit (Abs., 28) show the absurdity of attempting to apply the grounds of motion for a new trial to a case which was decided on a motion for judgment on the pleadings for lack of issue.

The answer did not deny the allegations, even argumentatively, as by alleging title in the appellants; the answer admitted the conveyance by appellants to respondent of the South $\frac{1}{2}$ of the North $\frac{1}{4}$ of Lot 8, describing it by metes and bounds, and alleged that dividing that parcel from the North half of the lot was a fence, meaning, of course, that the fence extended west to east through the middle of said north $\frac{1}{4}$, and alleged that so far as any conflict exists between the property conveyed to respondent and within the fence line, the appellants denied the allegations of the complaint. If the fence was in the middle of said north quarter, right on the north boundary line of the land sold to respondent, it is hard to see how "any conflict exists between property described above and within the fence line as hereinabove described." Whatever that may mean. According to the answer, there was no disputed area. The proposed amended answer contained many statements as to the intentions and assumptions of the parties regarding the true north boundary line of the parcel of land conveyed by appellants to respondent, and they audaciously allege that the respondent "represented" to appellants her vendors, that the fence was "on or near" the median line, east to west of the north quarter of Lot 8; and although a reformation of the appellants' deed to respondent is asked, there is no allegation as to what the agreement between them was. While the amended answer indicates that appellants do not yet know that there is an area between the fence mentioned and the north boundary line given in their deed to respondent,

they claim title to it by adverse possession, and as that this title be quieted, although appellants conveyed to respondent November 18, 1932. In this case, the answer does not show title by adverse possession; nor does it show estoppel. Neither does the amended answer show that the North boundary line of plaintiff's land was disputed or unknown. It may be that the appellants, or one of them, stated that the fence on or near the north boundary line of respondent's parcel was the true dividing line between their lands; although appellants do not make such contention, but such a statement, although respondents appeared to accept it, would not bind either of the parties. DeLong v. Baldwin, 111 Mich. 466, 69 N. W. 831; Clapp v. Churchill, 164 Cal. 741, 130 P. 1061; Hall v. Davis, 122 Ga. 252, 50 S. E. 106; Crawford v. Roloson, 256 Mass. 331, 152 N. E. 319; Cornell v. Jackson, 9 Met. (Mass.) 150; Trussel v. Lewis, 13 Neb. 415, 14 N. W. 155, 42 Am. Rep. 767; Cummings v. Williams (Tex. Civ. App.) 260 S. W. 845; Purtle v. Bell, 225 Ill. 523, 80 N. E. 350; Sonnemann v. Mertz, 221 Ill. 362, 77 N. E. 550; McAfferty v. Conover, 70 Ohio St. 99, 70 Am. Dec. 57; McKinney v. Doane, 155 Mo. 287, 59 S. W. 304; Hatfield v. Workman, 35 W. Va. 586, 14 S. E. 153; Miner v. New York, 5 Jones & S. (N. Y.) 171; Bemis v. Bradley, 126 Me. 462, 139 A. 593, 69 A. L. R. 1399. The above cases are reviewed in 69 A. L. R. at pages 1449, 1452, 1455, 1478, 1487, 1488, 1489, of the annotation. At page 1481 of that annotation quoting from Davison v. Richards (Tex. Civ. App.) 38 S. W. 374, it is said: "The mere statement that the line is at a particular place does

not, of itself, constitute an agreement that it shall be there, or bind the parties when the error of the statement is discovered''; and at page 1487 of the annotation, quoting 4 R. C. L. 131, it is said: "It has been held that an agreement fixing a boundary line under the belief that it is the true boundary line when in fact it is not, is not binding, and may be set aside by either party when the mistake is discovered, unless there is some estoppel which prevents it, as where the right of innocent third persons has intervened. See, also, *Tripp v. Bagley*, 74 Utah 57, 276 P. 912, 69 A. L. R. 1417. A purchaser is entitled to the land up to the lines called for in his deed, no more, no less, unless as in *Binford v. Eccles*, 41 Utah 457, 126 P. 333, and *Hill v. Schumacher*, 45 Cal. App. 362, 187 P. 437, there is a surplus of land.

The question of pleading, in a case of this character, seems to be well settled in Utah. *Warren v. Mazzuchi*, 45 Utah 612, 148 P. 360; *Blackham v. Olsen*, 51 Utah 124, 169 P. 156; *Bartholomew v. Richett*, 51 Utah 312, 170 P. 65; *Nelson v. Da Rouch*, 87 Utah 468, 50 P. (2d) 273. In the latter case, the court held: "Locating of building or fence or other structure that may later take on nature of monument in absence of, or without knowledge of, adjoining owner, or upon supposition that such location is true boundary line when in fact it is not, and when no express agreement or long acquiescence is shown does not establish boundary line different from true one''; and evidence as to long acquiescence in practical boundary line consisting of trees and fences was held

insufficient to overturn true boundary line as established by muniments of title.

On the occasion when the motion for judgment on the pleadings was granted, appellants' attorney asked leave to file an amendment to the complaint so as to claim "three feet on one side and five feet on the other," which obviously, is the equivalent of the strip apparently claimed by respondent in the parcel south of the land purchased from appellants. Although this may have been a specious claim, the court refused to accede to that bare request but clearly stated that if the appellants asked to reopen the case and tendered a proper answer, the motion would be granted. The appellants, by a peculiar motion, asked to reopen the case, but did not tender an amended answer; and subsequently consented that the motion might be denied. Under these circumstances, the appellants cannot complain that they were not given an opportunity to amend by making an issue of some kind. We believe courts should be liberal in allowing amendments to a complaint in the face of a motion for judgment on the pleadings. Perhaps the respondent, under her general allegation of title, would not have been permitted to prove the establishment of the south boundary line of her land by acquiescence or agreement if it trenched upon the land of her neighbors to the south. However, if the latter thoughtlessly disclaimed any interest in this strip and consented that a decree might be entered in favor of the respondent, we do not see why the appellants should profit by the mistake and concession, which has since spoiled a sale of the

parcel of land to the south. The last statement is outside the record, as is the following: That respondent never claimed any right there except that conveyed to her by appellants, and so advised her counsel; but at their insistence, the strip in question remained a part of the subject matter of the complaint and was included in the judgment. So far as respondent is concerned, it will be restored to the rightful owners.

We believe the record does not disclose any of the errors assigned and that judgment should be affirmed.

Respectfully submitted,

PARLEY P. JENSON,
Attorney for Respondent.