

1950

# Mike Dragos and Milka Dragos v. Teddy G. Russell and Manilla Russell : Brief of Appellants

Utah Supreme Court

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Perry H. Burnham; William S. Livingston; Attorneys for Defendants and Appellants;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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MIKE DRAGOS, and MILKA  
DRAGOS, his wife,

*Plaintiffs and Respondents,*

— vs. —

TEDDY G. RUSSELL, and MAN-  
ILLA RUSSELL, his wife,

*Defendants and Appellants.*

Case No.  
7568

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## Brief of Appellants

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**FILED** PERRY H. BURNHAM,  
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DEC 11 1950

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and Appellants.*

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Clerk, Supreme Court, Utah

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ILLA RUSSELL, his wife,

*Defendants and Appellants.*

Case No.  
7568

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## Brief of Appellants

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### STATEMENT OF FACTS

This is an action in equity in the District Court for Salt Lake County between adjoining property owners to quiet title to contested property between them, to decree that certain buildings and sewer line construction by defendants are an unlawful encumbrance and obstruction on plaintiffs' property, to compel defendants and appellants to remove the alleged building and construction encroachments from the land claimed by plaintiffs and respondents, and for damages for the alleged trespass. Defendants filed a counterclaim for an alleged

trespass by plaintiffs and respondents during the period of defendants' alleged trespass over the contested boundary line and upon the contested property between the parties. The district court struck out the counterclaim and awarded judgment and decree to the plaintiffs.

Teddy Russell and his wife, Manilla Russell, who are defendants and appellants herein, purchased and took possession of the State Tourist Court at 3114 South State Street in Salt Lake County, Utah, during the spring or summer of 1943. Their property was some 65.6 feet more or less in frontage and extended all the way through the block in an east-west direction from State Street to Main Street. Mike Dragos and his wife, plaintiffs and respondents herein, were owners of and in possession of an adjoining piece of land directly to the north of the Russell property for the full distance westward from State Street of some 495 feet. It is the common boundary between the Russell and Dragos properties along this 495 foot strip which is in dispute.

When the Russells moved onto their property in 1943, a fence was situated between the Russell and Dragos properties for the full distance of the said 495 feet, marking the line between the properties. (Tr. 60). This fence began at the sidewalk on State Street and proceeded westward some 87 feet or more as a wire and post fence. The next 37 feet westward were of wire or wood, and the balance of the fence westward was of posts, barbed wire and wooden boards. (Tr. 61, 62). The rear of the Dragos property westward from State Street

was located, or approximately marked, by the west end post of the fence. (Tr. 163, Def. Exh. 12).

It is uncontroverted that the same fence was located and fixed between the two properties as early as 1911 and 1912 as the boundary line between the properties, and was so considered by all owners and occupiers of the two properties until the latter part of 1948 or early in 1949. (Tr. 63, 82, 139, 140, 147-154, 173, 174). Indeed, there being no fence or boundary indicator or monument for 165 feet west from State Street, and the exact boundary being unlocated and in doubt, at least the east 165 feet of the fence was extended eastward in 1911 from the older western section by the owners of both properties, by mutual agreement to locate and fix the boundary line between the properties, there being no otherwise fixed or known boundary, (Tr. 169) and the actual line being uncertain. (Tr. 130, 135, 139, 148, 149). The uncertainty of the line in 1911 and 1912 is conclusively shown by the fact that the fence, believed to be established on the boundary line, was at no place located on the true survey line, (Def. Exh. 17), (Tr. 51, 52, 62, 98), but varied or meandered slightly north of due west. (Tr. 63), (Def. Exh. 17). The adjoining owners, by agreement, thereby confirmed and established the entire old fence line with its eastward extension as the boundary between the properties which were later to be owned by appellants and respondents respectively. (Tr. 134, 135, 137, 138, 139, 148, 149). A joint water well was put down on the agreed line as established by the parties, or very near thereto. (Tr. 134, 135, 161, 162). Both the

fence and the well were constructed by the joint efforts and upon joint determination of location, by the adjoining landowners at the time, and trees were planted all along the fence line. These facts are also uncontroverted. (Tr. 6, 25, 69, 134-139, 161).

Substantial portions of the old fence, as established in 1911 and 1912, remained in place at the time of the trial of the cause, (Tr. 6, 7, 8, 33, 85, 96, 107-111, 120, 131, 136, 145, 146, 151, 152, 154-164, 172, 181, 188—lines 15-27, Tr. 193-194, 197), except for the cinder block section of some ten feet placed south of the old fence line and eastward from the east end of the tourist court cabins by Mike Dragos in 1948 or 1949. (Tr. 32, 86). Otherwise, its entire original location was marked by the remaining portions, a remaining tree of those planted about 1912, old power poles, a well, and other fence posts. (Tr. 30—lines 27-30; Tr. 31, 32, 34, Def. Exh. 6, Tr. 37, 64, 65, Def. Exh. 1-16; Tr. 69, 70, 85-96, 107-111, 118, 135, 136, 139, 140, 145, 146, 147, 151, 152, 154, 155, 157, 158, 162, 163, 166, 169, 193, 194, 197). From time to time boards have been added to the fence and removed from it, and a part of the fence was destroyed by fire in 1944 or 1945, but was immediately rebuilt at the same place. (Tr. 71-74). Regardless of all other markers or monuments, the distance north from the line of cabins to the old fence line is definitely marked beyond all doubt by the remaining tree which both plaintiffs and defendants admit is still in place and was located along the fence line exactly at the south edge thereof. (Tr. 6, 25, 71, 89, 90, 109, 147, 156, 157; Def.



Exh. 14, 15). The details of location of the old fence in 1911 and 1912 and its continuous location in the same place for more than thirty years and until just before the trial, are proved by the references given above to the testimony of the actual residents and owners of both adjoining pieces of property through every year from 1911 to 1949. Many of these witnesses are completely independent persons with no interest in this action.

From 1911 and 1912 until late in 1944 or 1945, it is uncontroverted that all property owners on both sides of the fence used the properties right up to the fence line on either side of the old fence for their various proprietary purposes. (Tr. 44, 135, 139, 146, 147, 148, 150, 151, 156, 159; Def. Exh. 16; Tr. 174). There is no evidence at all that from 1912 until 1944 or 1945 any boundary other than the old fence was known or considered as far as anyone who testified knew or could tell. Following 1945, and until the fall of 1948, the evidence is in some conflict on the matter of anyone having knowledge or any cause to suspect the boundary line might be other than the old fence line. However, the plaintiff Mike Dragos testified during the trial that he too considers the old fence to constitute his boundary line, (Tr. 18, 29, 30) and the conflict is solely found in the uncorroborated testimony of the two plaintiffs.

In 1928, Edward B. McCabe and Mary McCabe, who then owned the State Tourist Court property, constructed a line of tourist cabins along and against the

old fence. (Tr. 171). There is no record or evidence of any objection or protest to this by anyone, (Tr. 174), and the McCabes considered that they effected all of their construction on their own property. (Tr. 174, 175). These cabins were of wood and were built upon concrete foundations laid to within some six to nine inches of the old fence line as to the north-south sections and about three feet south of the fence as to the east-west sections. (Tr. 67, 155, 165, 171, 172). A few extra such foundations were poured by the McCabes on the west end of their line of original cabins to permit future construction. (Tr. 175). In the process of their original construction, the McCabes extended the back or north end of the garage portions of their cabins, located between dwelling units, all the way northward to the old fence itself, and constituted the fence the rear wall of the garages. (Tr. 108; Def. Exh. 14; Tr. 159, 160, 165, 197). This was done by nailing boards to the old fence posts (Tr. 173, 176) to make such portions of the fence the rear wall or panel of the garages. The remainder of the old fence back of the cabins and between the garage sections was also boarded up by the McCabes, leaving some three feet of space between the backs of the cabins and the old fence to permit space for cleaning behind the cabins and to make room for shade trees, (Tr. 154, 172), and to avoid the nuisance of a cow and chickens then on the adjoining property to the north. (Tr. 148, 154, 156.) The McCabes never moved the fence in any particular, (Tr. 172, 182), nor did the Russells change its position to the north, or at all. (Tr. 73, 74, 75, 120, 154, 155, 194).

The Russells thereafter pulled most of the originally planted trees situated along the south edge of the old fence, but left one tree in place, (Tr. 69, 70, 71; Def. Exh. 7, 15), and separately and by units, renovated the cabins, completing some in cinder block and concrete (Tr. 66), but limiting this construction to the location of McCabe's concrete foundations laid in 1928 south of the old fence line. (Tr. 67, 68, 108, 109; Def. Exh. 14; Tr. 126, 128). The Russells installed some of the wooden cabins on the old concrete foundations at the west end of McCabes' completed cabins. (Tr. 66, 67, 89-91, 95; Def. Exh. 8, 11, 15). Various units were completed from time to time until August of 1948, when the last unit to be renovated was completed. The five on the east end were completed by May of 1946. (Tr. 68, 69). As the various units were completed, the Russells installed a permanent tile and metal sewer line along the north edge of the line of cabins. (Def. Exh. 10, Tr. 93-95, Tr. 68). All construction was at least six to eight inches south of the old fence line, which the Russells, in good faith, continued to consider the boundary line between the parties. (Tr. 15, 47, 82, 83, 114, 124, 125, 126, 127). It is uncontroverted that extensive and costly construction work involving expense to the Russells of many thousands of dollars was completed by way of renovation of these cabins and installation of a sewer of a permanent nature, (Tr. 66, 110, Defs. Exh. 1-15) all with full knowledge of the respondents herein, (Tr. 14-15) and the only important conflict in the evidence arises upon the point as to whether or not the respondents made any protest to appellants or had any idea the boundary

line might be other than the fence line, during the entire period of construction by the Russells. (Tr. 63). However, the evidence would seem overwhelming that the respondents always considered the old fence the actual boundary line between themselves and the Russells. (Tr. 18, 29) and did not object to the location of the fence and the construction by the defendants. (Tr. 29, Lines 8-25; Tr. 190-191). The respondent, Mike Dragos, testified that when Russell removed part of the boards and some posts during renovation construction of the cabins, he re-installed the fence at the special request of Dragos, to which Dragos never did object (Tr. 190-191) until 1949 after the survey was made and trouble developed between the parties. (Tr. 191). The respondents considered that even the sewer line along the north side of the renovated cabins was south of the established boundary line, and Mike Dragos so admits. (Tr. 34, 35, 36, Def. Exh. 3).

While the Dragos testimony is that they considered the Russells to be clearly encroaching upon their property for the entire period of time since renovation of these costly and permanent buildings began, that is, for several years, (Tr. 14, 15) and so informed the Russells and demanded that they move back, yet they actually did absolutely nothing during this several year period to protect their property against the alleged known encroachment, and it is a fact, admitted by the plaintiff Mike Dragos, that in August and September of 1948, as the sewer line became completed, Mike Dragos bargained for and arranged with Teddy Russell that if Russell

would permit him to connect his septic tank to Russell's sewer, Dragos would pay Russell the sum of \$25.00 cash for the right to connect and would pay Russell's man to make the connection. This was accomplished in good friendship and the money paid to Russell by Mike Dragos in the Russell home over a glass of beer (Tr. 35, 36, 79, 80) about Christmas time, three months after the connection was made. During none of these negotiations did respondents object or demand defendants to move any of their construction. There is no conflict on this vital point, nor is it otherwise explained. It is also the uncontroverted evidence that following the initial connection, Mike Dragos in 1949 again approached Teddy Russell to ask permission to connect the Dragos Tavern lavatories to the Russell sewer line, and Dragos agreed to pay a further \$25.00 for the right to connect, but due solely to difficulties of proper drainage Dragos did not ultimately make the connection. (Tr. 80, 81). The parties were still, at the time of this second agreement, apparently good friends, (Tr. 75) and Russell regularly patronized the Dragos Tavern. (Tr. 81). This tavern, built by Dragos in 1948 by the same contractor who had worked on the Russells' cabins along the fence in the beginning of the renovation, was so constructed that its walls somewhat paralleled the old fence line and in so doing, wandered considerably to the north of the later determined east-west survey line. The uncontroverted testimony is that the tavern was purposely so built to stay in line with the old fence. (Def. Exh. 2, 3; Tr. 35, 111-112).

Appellants' evidence is all to the effect that the first objection made by the respondents to Russells concerning any claim that Russells were encroaching upon the Dragos property came in April of 1949. (Tr. 75, 76, 77, 78, 79, 80, 81, 82). Russell had experienced his first difficulty with Mike Dragos earlier in the spring of 1949 when he complained to Dragos that customers of the Dragos tavern enterprise were continually blocking up one of Russell's driveways into his property. The fact of this difficulty is uncontroverted. (Tr. 76, 81). About this same time the respondents decided to sell their property, and for the first time had it surveyed. (Tr. 52, 53). The Dragos survey, made according to the Dragos deed, occurred in April of 1949 (Tr. 16), and disclosed that while the fence was located very near to the survey line between the properties at the State Street end of the fence, a very gradual and slight difference developed as the fence proceeded westerly—such that the west end of the fence lay about 2.7 feet north of the survey line. The survey also showed that the cabins renovated of cinder block, while wholly and completely south of the old fence line, meandered slightly north as they proceeded westward approximately parallel with the old fence, from a position just south of the survey line at the east end of the cinder block cabins to about 2.1 feet north of the survey line at the west end of the cinder block cabins. (Def. Exh. 17). The width of the sewer line was 6 inches, immediately north of the cabins. The balance of the cabins westward all appear to be not only south of the fence but also south of the survey line, except for old garage sections going to the fence. (Def.

Exh. 17). Following the Dragos survey and the filing of this complaint, Russell caused a survey to be made of his north line, which the parties agreed, is virtually identical with the Dragos survey, and a chart and certificate of survey showing details of the old fence line and the cabins to the southward, all drawn to scale, have been received in evidence as one of the exhibits for the appellants. (Def. Exh. 17).

In 1948 after all renovation and construction was complete, Russell had some question about his south line and had it surveyed. (Tr. 110-111). He was not at that time in any way concerned about his north line and there is no evidence that he was aware at that time of any discrepancy with his north line. (Tr. 123, 125-126, 165).

All the evidence, except for the unsubstantiated testimony of the respondents, shows that none of Russell's renovation and sewer construction proceeded north of the old McCabe foundations or within inches of the old fence line. The Russells proceeded entirely in good faith (Tr. 15, 47, 48, 124, 127) and at great cost to themselves. The Dragos stood by and did absolutely nothing during the entire period of construction, a period of about five years and according to some of the evidence, seven years, except to approve and recognize the full propriety of even the sewer location, the northernmost part of the work done by the Russells. The weight of the evidence shows that it was not until trouble developed over the respondents' tavern operation and respondents

contemplated selling their land that either respondents or appellants or any of their predecessors in title back to 1912 had any idea that a survey line might be located differently from the fence line, which since 1912 at least, had been the established and respected boundary line between the properties (Tr. 18).

Actual measurement of the width of the Dragos property at its west end and northward from the west end of the old fence to the west end of the fence on the north side of the Dragos land is not only the full 66 feet claimed by the respondents but  $67\frac{1}{2}$  feet. (Tr. 83, 84, 85. Def. Exh. 12). The respondents thus not only now claim their north fence as their boundary line but claim an additional 2.7 feet south of the old fence at its west end and thereby giving them not 66 but 70.2 feet in width of property at their west end. (Tr. 23, 24, 54). The respondents state that all they claim is 66 feet of land at the east end and also the west end of their property. (Tr. 23, 24, 25, 54). They further claim only 66 feet south from their north fence line which they claim is correctly positioned. (Tr. 37, 40). Mike Dragos and Milka Dragos then testified that their only claim against the Russells was on account of construction work north of the old fence line (Tr. 27, 30, 51, 52), and Milka Dragos claims one cannot now even tell where the old fence was located. (Tr. 49, 52). The respondent, Mike Dragos, also claims he owns the well drilled jointly on or near the old fence line in 1911. (Tr. 32, Def. Exh. 3, 6). Notwithstanding the testimony of respondents that the old fence did not reach northward to the power



poles, and permitted them to pass between the fence and the poles, the uncontradicted testimony is that respondents in building their own fence, stopped short of one of the power poles to permit passage north of the pole through a gate; (Tr. 191, 192-3) and further one of the occupants of the Russell property in 1911 testified the old fence was "right next to the pole" and "was up against it" and had not been changed when she moved away in 1928. (Tr. 92-3, 131, 136, 140). It is apparent that plaintiffs are not at all clear as to what they should claim and just how they are injured.

During the first few months of 1949, the plaintiffs and respondents removed and changed a portion of the old fence running eastward from the tourist cabins to a point and line south of the former location of the fence and then piled on the land thus gained, quantities of brick, blocks and other material, thereby encroaching and trespassing upon land of appellants. Appellants' counterclaim for this cause of action was stricken by the Court upon motion of respondents.

Following entry of the judgment herein, defendants filed their motion for a new trial which the court by its subsequent order denied in toto. The motion was based upon:

- (1) newly discovered evidence which though material was not capable of discovery through any exercise of reasonable diligence during the trial of the cause and to the effect that the power poles along the fence line

and in place at the time of the trial were in fact originally placed along the old fence line more than 30 years prior to the filing of the complaint, and further that the original poles had been replaced in the same place occupied by the original poles ten to fifteen years before the filing of the complaint; and

- (2) that the judgment and the decree were against the evidence and the law.

### STATEMENT OF POINTS

1. The complaint fails to state a claim upon which relief can be granted.

2. The Court erred in granting plaintiffs' motion to strike both counterclaims No. 1 and No. 2 from defendants' answer and counterclaim.

3. The evidence is insufficient to support the findings of the Court and the findings are contrary to the evidence as follows:

a. As specified in paragraph No. 1 of the findings that "During all times herein mentioned and prior to commencement of this action plaintiffs have been . . . in possession of the following described real property . . ."

b. As specified in paragraph No. 3 of the findings that "On or about the month of October, 1943, the defendants began the construction of a motel and began to erect on the north part of their lot a number of cabins."

- c. As specified in paragraph No. 4 of the findings that "said cabins and sewer pipe line were constructed over into plaintiffs' land notwithstanding the protests of plaintiffs and against their consent; that prior to the commencement of this action plaintiffs have made demands upon the defendants to remove said buildings and sewer line from their premises but although defendants have made many promises to do so, they have refused and neglected to take down and remove the same or any part thereof."
- d. As specified in paragraph No. 5 thereof: "That the said described land of the plaintiffs is of great value . . . and plaintiffs are prevented from using and occupying the whole of their land for such purpose by reason of the intrusion of the buildings and sewer line erected by the defendants and that plaintiffs' land is greatly diminished and the same is made unsalable and the plaintiffs are greatly damaged."
- e. As specified in paragraph No. 7 thereof: "that said fence was located on the legal boundary line separating said two parcels of land belonging to the plaintiffs and the defendants."
- f. The findings and particularly paragraph No. 7 thereof fail to settle the issue of fact as to whether or not the fence line between the parties as existing for more than thirty years by way of the legal boundary was located on the survey line between the parties according to the deed descriptions of the parties or to the northward thereof and whether or not defendants ever encroached over and northward of said fence line.
- g. Paragraph No. 8 of the findings and each and every finding therein.

4. That the findings and conclusions are inconsistent or ambiguous and are insufficient to sustain the judgment and decree herein.

5. That the Court erred in not finding upon the issue and thereafter concluding as a matter of law that as to all construction of defendants north of the deed survey line between the parties, or at least as to all separate construction done or completed prior to 6 May, 1946, one or more of the statutes of limitation were a bar to action thereupon by the plaintiffs.

6. The Court should have granted appellants' motion for a new trial.

7. The findings, conclusions and decree are insufficient, in error and against the law in finding, concluding and decreeing that under the evidence and the law the plaintiffs and respondents are entitled to the possession of all the land described in paragraph No. 1 of the complaint and that a mandatory injunction should issue requiring the defendants and appellants to remove all construction in any way located on such described land rather than to determine and then require defendants to pay to plaintiffs the value of any land encroached upon.

## ARGUMENT

### I.

#### DOES THE COMPLAINT FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED?

Part of the Complaint in plain terms and language avers that plaintiffs have been at all times mentioned in said complaint and “prior to commencement of this action” and now are the owners and in possession of all the land claimed by plaintiffs. Based on Par. 1 of their complaint, plaintiffs have no grievance or cause for action against defendants. The paragraph is essential to the complaint because it describes all of the property claimed by plaintiffs in the complaint and sets forth the necessary allegations of ownership and possession to comply with Sections 104-2-5 and 6 U.C.A. 1943.

The allegations in paragraphs 3, 4 and 5 of the complaint are in conflict and do not cure the defect. Further, it is not clear from paragraphs 3, 4 and 5 of the complaint whether the same lot referred to in Par. 1 of the complaint or some other lot of the plaintiffs is being encroached upon by defendants.

## II.

DID THE COURT ERR IN GRANTING PLAINTIFFS' MOTION TO STRIKE BOTH COUNTERCLAIMS NO. 1 AND NO. 2 FROM DEFENDANTS' ANSWER AND COUNTERCLAIM?

Counterclaim No. 1 (page 4 of defendants' answer and counterclaim) is a cause of action for a counter trespass occurring during the same period plaintiffs complain of defendants' trespass and encroachment and arising over the same contested boundary line situation and depends for its determination on the same essential issue as to whether the legal boundary line between the parties is to be located on the old fence line or whether on the survey line delineating the deed description of the properties of the parties. This counterclaim arises out of the identical boundary line dispute and the issues to be determined are almost identical. It would seem clear that the counterclaim is definitely within the purview of Sec. 104-9-2(1) UCA, 1943 and Rules 13(a) and 13(b) of the Utah Rules of Civil Procedure requiring that the counterclaim arise out of the transaction set forth in the complaint or be connected with the subject of the action and particularly is within Rule 13(b) providing for permissive counterclaims not arising out of the transaction or subject matter of the action stated in the complaint. It is true that the rules of civil procedure were not effective until January of 1950 and that the order striking counterclaim No. 1 was made in July of 1949. However, in view of the intent of the rules that

the widest latitude exist to permit filing of a counterclaim, and this entire action having been treated as an equity action and the appellate court having the power to review the entire record, (Tripp v. Bagley, 74 Utah 57, 276 P. 912, 69 A.L.R. 1417), it would appear that the court should permit defendants' counterclaim No. 1 to be tried in this action upon the occasion of any remittitur for the taking of new or additional evidence.

### III.

#### IS THE EVIDENCE INSUFFICIENT TO SUPPORT THE FINDINGS OF THE COURT AND ARE THE FINDINGS CONTRARY TO THE EVIDENCE:

a. As specified in Par. 1 of the findings that "During all times herein mentioned and prior to commencement of this action plaintiffs have been in possession of the following described real property . . ."? Plaintiffs' complaint in paragraphs No. 3, 4 and 5 alleges that in fact defendants took wrongful possession of plaintiffs' property by building over onto plaintiffs' property and staying there, thereby preventing use and occupation not only of the area of encroachment but of the whole of the plaintiffs' land. If the plaintiffs during all times mentioned in the complaint were in fact in possession of all of their land, then plaintiffs have nothing to complain of. The plaintiffs complain (paragraphs 3, 4 and 5 of the complaint) that plaintiffs were in fact not in possession of all of their land as claimed in Par. 1 of the complaint since the first day any construction of the defendants was made over the line delineating the

property therein described. (Plaintiffs' Exh. A, Tr. 17, 51). The evidence shows that plaintiffs and their predecessors since 1912 were never in possession of any land south of the old fence line between the parties and that the fence line was located for virtually all of its distance somewhat to the north of the south line of the description in plaintiffs' deed (Pls. Exh. 1, Tr. 44, 63, 82, 135, 139, 140, 146, 147, 148, 150, 151, 154, 156, 159, 173, 174, Defs. Exhibits 16 and 17). It is admitted, however, that plaintiffs were in possession of the great majority of the property called for by their deed. (Tr. 24, 25, Def. Exh. 6, Tr. 33).

b. As specified in paragraph No. 3 of the findings that "On or about the month of October, 1943, the defendants began the construction of a motel and began to erect on the north part of their lot a number of cabins"? The evidence is conclusive on the part of both plaintiffs and defendants and from other witnesses that cabins existed on property of the defendants and along the disputed boundary line since 1928 and that defendants began renovation or remodeling in 1943. There is no evidence whatsoever that in 1943 defendants "began the construction of a motel" and "began to erect . . . a number of cabins." The evidence is, of course, that the motel and cabins had clearly been in existence for fifteen years when defendants began renovation in 1943 and for more than twenty years when plaintiffs filed their complaint in 1949. (Tr. 12, 44-45, 63, 66-67, 68, 171, 180).



c. As specified in Par. 4 of the findings that "said cabins and sewer pipe line were constructed over into plaintiffs' land notwithstanding the protests of plaintiffs and against their consent; that prior to the commencement of this action, plaintiffs have made demands upon the defendants to remove said buildings and sewer line from their premises, but although defendants have made many promises to do so, they have refused and neglected to take down and remove the same or any part thereof"? The record contains no reference whatsoever to any promises of the defendants to remove and take down any construction at all or any construction alleged by plaintiffs to be an encroachment upon their property, nor does the record contain any facts indicating an admission, express or implied, that defendants or either of them knew they were building over onto plaintiffs' land or even north of the old fence to any extent at all. Instead and aside from the uncorroborated and contradictory testimony of Mike Dragos and his wife (Tr. 14—lines 18-21, Tr. 190—lines 24-30 and 191—lines 1-7, Tr. 35-36, Tr. 49—lines 1-12, Tr. 52—lines 25-30 and Tr. 53—lines 1-7, Tr. 53) the evidence is consistently clear that all construction by defendants was done under claim of right, without protest on the part of the plaintiffs, was with plaintiffs tacit, if not express consent, acquiescence and approval, was open and notorious, was recognized by the plaintiffs themselves as rightfully done by the defendants and when completed, was the property of the defendants to the extent of the northernmost part of any construction done by the defendants, the sewer line. It further is the uncontradicted fact

that the respective properties were used right up to the old fence line on both sides by the respective owners and occupants while considering the fence the property line for 32 years before defendants began any construction and for 38 years before plaintiffs filed their complaint. It would further appear conclusive that no renovation or construction was effected by the defendants north of the old fence line.

*d.* As specified in Par. 5 thereof “That the said described land of the plaintiffs is of great value . . . and plaintiffs are prevented from using and occupying the whole of their land for such purpose by reason of the intrusion of the buildings and sewer line erected by the defendants and that plaintiffs’ land is greatly diminished and the same is made unsalable and the plaintiffs are greatly damaged . . .”? The record is entirely devoid of any evidence that plaintiffs’ land is of great value, is situated in any business district, is suitable for business purposes and plaintiffs are prevented from using and occupying the whole of their land or more than an unnoticeable and minute part of it due to any construction by defendants, that plaintiffs’ land is greatly diminished or to any extent more than such almost imperceptible and unused portion along the south boundary of their lot, that the same was made unsalable or that plaintiffs were greatly damaged or at all (Def. Exhibits 1-17).

*e.* As specified in Par. 7 thereof “. . . that said fence was located on the legal boundary line separating

said two parcels of land belonging to the plaintiffs and the defendants''? It is impossible to know from such finding whether the ''legal boundary'' mentioned is the line called for by the deed of the plaintiffs or the line of the old fence very slightly north of the deed line, and which the defendants contend, under the facts, became the legal boundary for the purposes of this action. If the finding is meant to locate the old fence right along the deed line, then the evidence in this case is almost conclusive that the old fence going westward, meandered to the north and was located for most of its distance slightly north of the deed line and did not at any point coincide with the deed line. (Def. Exhibits 17 and 18, Tr. 98-104, Def. Exhibits 1, 2, 5, 7, 8, 9, 11, 13, 14 and 15, Tr. 85, 86, 87-89 incl., Tr. 25—lines 13-25, Tr. 69—lines 8-30 and Tr. 70—line 1, Tr. 71-75 incl., Tr. 62-65 incl., Tr. 67-68, Tr. 106—lines 8-9, Tr. 117, 90-91, 89-90, 91-92, 92-93, 93-95, 95-96, 107-108).

f. The findings nowhere and particularly in Par. 7 thereof determine and settle the issue of fact as to whether or not the fence line between the parties as existing for more than thirty years as the legal boundary was located on the survey line between the parties according to the deed descriptions of the parties or to the northward thereof and whether or not defendants ever encroached over and northward of said fence line. Defendants' affirmative defenses 6(b) and 6(d) (Par. 2 of the answer and counterclaim) allege the fence line was the boundary line between the parties and in defense 6(e) (Par. 2 of the answer and counterclaim) that

the entire construction of defendants was south of the fence line. These allegations raised the issue of fact of the location of the fence line as compared to any different boundary line called for by the deeds of the parties and required a finding and also a conclusion of law as to whether the fence was located apart from the deed line and if so was it the legal boundary between the parties for the purpose of this action. If the fence was north of the deed line and was the legal boundary, then the issue of whether defendants effected any construction north of the fence remained. It is elementary that a finding must be made on each material issue of fact raised by the pleadings and a conclusion of law determined on each material issue of law raised by the pleadings and the facts as found. (2 Bancroft's Code Practice and Remedies 2157—par. 1677, page 2158—Par. 1679, page 2159—par. 1680, page 2170—par. 1690, page 2172—par. 1692, page 2175—par. 1695 et seq.)

*g.* As specified in Par. 8 of the findings that “The court finds the issues in favor of the plaintiffs and against the defendants and further finds that the affirmative issues raised in defendants’ answer are not supported by the evidence and the court finds on said defenses in favor of the plaintiffs and against the defendants”?

(1) As to defense 6(a) (page 2 of the answer and counterclaim) the evidence is uncontradicted that defendants simply renovated or remodeled cabins upon the identical foundations of earlier cabins laid down in

1928, did not construct northward of such foundations and all construction, including the sewer on the north was in all cases south of the old fence line. (Tr. 67, 68, 108, 109, 15, 47, 82, 83, 124, 126, 127, Def. Exhibits 1-17).

(2) As to the defense 6(b) (page 2 of the answer and counterclaim), the court's finding No. 7 is directly in accord with the matters alleged therein and the evidence is overwhelming and clear in support thereof, throughout the transcript.

(3) As to the defense 6(c) (page 2 of the answer and counterclaim) the plaintiffs admit the truth thereof and the testimony for the defendants is consistently in support thereof (Tr. 44, 63, 82, 135, 139, 140, 146, 147, 148, 150, 151, 154, 156, 159, Def. Exhibits 16 and 17, Tr. 174). The occupant of the Russell property in 1911 testified that in 1911 the respective owners of the adjoining properties in question settled the doubtful boundary line situation between them by establishing a new fence as an extension of the older fence line and constituting the fence as the actual boundary line between the parties. No other boundary line ever appears to have been definitely known, (Tr. 139-140), until 1949. (Tr. 16, 52, 53, Def. Exh. 17).

#### IV.

ARE THE FINDINGS AND CONCLUSIONS INCONSISTENT OR AMBIGUOUS AND INSUFFICIENT TO SUSTAIN THE JUDGMENT AND DECREE?

a. Par. 1 of the findings stating that plaintiffs at all times were in possession of all land described in their deed is directly controverted by paragraphs 3, 4, 5 and 6 of the findings which in substance state that defendants were encroaching upon and were actually in possession of part of such land to the extent of their construction north of the south boundary of the plaintiffs' described land. The uncontradicted evidence is that the plaintiffs had more land even between their north fence and the old fence line between the parties to this action than plaintiffs' deed called for (Tr. 83, 84, 85, Defs. Exhibit 12) and plaintiffs claimed every bit of such ground as being the ground called for by their deed (Tr. 23, 24, 54). It is thus clear that if finding No. 1 stands, in view of the evidence as to the extent of land possessed and claimed by plaintiffs north of the old fence between the parties, findings No. 3, 4, 5 and 6 must fall as well as the decree.

#### V.

DID THE COURT ERR IN NOT FINDING UPON THE ISSUE AND THEREAFTER CONCLUDING AS A MATTER OF LAW THAT AS TO ALL CONSTRUCTION OF DEFENDANTS NORTH

OF THE DEED SURVEY LINE BETWEEN THE PARTIES, OR AT LEAST AS TO ALL SEPARATE CONSTRUCTION DONE OR COMPLETED PRIOR TO 6 MAY, 1946, ONE OR MORE OF THE STATUTES OF LIMITATION WERE A BAR TO ACTION THEREUPON BY THE PLAINTIFFS?

The evidence is uncontradicted that the property on the south side of the old fence was used for cabin purposes right up to the old fence since 1928 (Tr. 67, 155, 165, 171-174, 66, 110). The defendants, according to the overwhelming evidence did not effect any construction north of the old fence line (Tr. 67, 68, 108, 109, 126, 128, 66, 89-91, 95, 15, 47, 82, 83, 124, 127, Defs. Exhibits 1-17) and the old fence line remained at the date of the trial substantially where it had always been (Tr. 6-8, 33, 85, 96, 107-111, 120, 131, 136, 145, 146, 151, 152, 154-164, 172, 181, 188—lines 15-27, 193-194, 197). The evidence is again virtually unanimous that the fence was considered the boundary between the parties and so respected by the adjoining owners and their predecessors in title since about 1911 or 1912 and it was recognized that the respective owners were entitled to the land on each side of the fence right up to the fence (Tr. 44, 63, 82, 135, 139, 140, 146-154, 156, 159, 173, 174, Defs. Exhibits 1-17). Indeed, there can be no doubt but that the owners on each side of the fence were in open, notorious and exclusive possession of the land under full claim of right all the way to the old fence line. It follows that defendants and their continuous chain of predecessors in title since 1911 were in possession of

all of the land south of the old fence line. Plaintiffs or their predecessors were not and could not have been in possession of any land south of the old fence and were therefore not seised of or in possession of any of the land south of the old fence line since at least 1912. Plaintiffs are therefore barred in this action for the recovery of their property or the possession thereof by the direct provisions of Sections 104-2-5 and 6, U.C.A. 1943 as follows:

Sec. 104-2-5: No action for the recovery of real property or for the possession thereof shall be maintained, unless it appears that the plaintiff, his ancestor, grantor or predecessor was seised or possessed of the property in question within seven years before commencement of the action . . .

Sec. 104-2-6: No cause of action, or defense or counterclaim to an action, founded upon the title to real property or to rents or profits out of the same, shall be effectual, unless it appears that the person prosecuting the action, or interposing the defense or counterclaim, or under whose title the action is prosecuted, or defense or counterclaim is made, or the ancestor, predecessor or grantor of such person was seised or possessed of the property in question within seven years before the committing of the act in respect to which such action is prosecuted or defense or counterclaim made . . .

These sections were added to as regards tax titles by the 1943 session laws but were not changed as to any of the provisions cited.

Bozievich v. Slechta, et al., 109 Utah 373, 166 P. 2d 239.



Larsen v. Onesite, 21 Utah 38, 59 P. 234.

See also Morrow, et al. v. Coast Land Co., 29 Cal. App. 2d 92, 84 P. 2d 301.

Since this action is, in addition to being one based on title to land and for the recovery of possession of the same, also one for trespass upon and injury to real property, it seems clear that Sec. 104-2-24 U.C.A. 1943 would further bar relief to the plaintiffs for any construction on the part of defendants completed prior to 6 May, 1946. The section requires commencement of an action within three years upon "(1) An action for waste, or trespass upon or injury to real property; . . ."

The evidence shows that the easternmost six cabins of the line of cabins alleged to be encroaching on plaintiffs' land, were finished as a separate series of renovation of cabins by the summer of 1946 (Tr. 68-69), and the east five of these were of cinder block and finished first (Tr. 66). It would thus appear that a considerable portion, if not all of the construction and renovation of at least the five eastern cabins were completed by 6 May 1946, three years prior to filing of this action, including foundations, floors, walls and sewer connection. This construction was obviously open and notorious and plaintiffs admit they were aware of it from the beginning (Tr. 13, 14, 15, 47). It is submitted that as to the construction completed prior to 6 May, 1946, plaintiffs are limited at the most to the value of any land which it might be determined defendants encroached upon with their renovation. (See Salt Lake Investment Co. v. Railroad, 46 Utah 203, 148 P. 439).

## VI. and VII.

DID THE COURT ERR IN REFUSING TO GRANT APPELLANTS' MOTION FOR A NEW TRIAL and

ARE THE FINDINGS, CONCLUSIONS AND DECREE INSUFFICIENT, IN ERROR AND AGAINST THE LAW IN FINDING, CONCLUDING AND DECREERING THAT UNDER THE EVIDENCE AND THE LAW THE PLAINTIFFS AND RESPONDENTS ARE ENTITLED TO THE POSSESSION OF ALL THE LAND DESCRIBED IN PARAGRAPH NO. 1 OF THE COMPLAINT AND THAT A MANDATORY INJUNCTION SHOULD ISSUE REQUIRING DEFENDANTS AND APPELLANTS TO REMOVE ALL CONSTRUCTION IN ANY WAY LOCATED ON SUCH DESCRIBED LAND?

Defendants' motion for a new trial rested first on newly discovered evidence tending to prove that the old fence between the parties was located well to the northward of any construction by defendants and that the location of the old fence for more than thirty years prior to the filing of the complaint could not be in doubt under the new evidence. Specifically, the new evidence would show that power poles, located and referred to by testimony and the exhibits in the case (Tr. 63, 65, 72, 191-193, 92-93, 107, 108, 131, 136, 140, 194, Defs. Exhibits 7, 10, 9, 4, 17), were in existence and located in the same place as shown in the exhibits for more than

thirty years prior to filing of the complaint and were simply replaced by the present poles within ten to fifteen years just prior to the complaint. This evidence would further directly refute the testimony of the plaintiff, Mike Dragos, that the poles were installed as late as 1936 (Tr. 189). Such evidence is material on the issue of the actual location of the old fence and as to whether defendants could possibly have effected any of their construction northward of the old fence line. It should be recalled that the court found that the old fence existed for more than thirty years prior to the complaint upon the boundary line between the parties (Par. 7 of the Findings of Fact).

The second ground of the motion for a new trial was that the judgment and decree was against the evidence and the law. Appellants' point VII may be here argued as part of the same general problem. Defendants submit that the entire transcript, taken in connection with the exhibits in the case show by consistent evidence from defendants and many independent witnesses, and by conflicting testimony from the plaintiffs the conclusive and overwhelming preponderance of the evidence that the defendants renovated cabins beginning in 1943; finished at least five of them in May of 1946; effected the construction entirely upon space occupied by cabins since 1928 and upon foundations thereof and did not construct anything north of the old fence line which existed in place and along a line marked by an old cedar post at its west end (Tr. 188—lines 15-27, 152, 193-197 incl., Defendants' Exhibits 5, 12 and 17), a

remaining tree planted about 1912 or earlier (Tr. 69-70, 90, 135, 147, 156-157, 169), the power poles (Tr. 30, 61, 64, 65, 72, 73, 74, 92, 94, 136, 140, 158, 193, 194, 197), the well (Tr. 61, 87, 134, 135, 146, 161, 173), and the concrete foundations originally poured by the McCabes (67, 90, 95, 155, 172, Defs. Exhibit 8) extending to within about six inches of the old fence (note that these are all relatively permanent monuments); that the said fence was acquiesced in as to position and location and was considered and respected as the boundary line between the respective parties for more than thirty years next preceding filing of the complaint; that construction was very costly to defendants, was of a relatively permanent nature and was completed without objection by plaintiffs and with their approval and recognition of its propriety and validity until the fall of 1948 or the spring of 1949; the work was done under full claim of right and was open, notorious and known to plaintiffs from the beginning; the encroachment over the deed survey line is very small indeed, is of minute comparative damage to plaintiffs and plaintiffs do not appear to have any new or different use for the land alleged encroached upon than they had for it prior to 1949 when they acquiesced in the position of the old fence line and prior to 1943 when admittedly there was universal acquiescence in the position of the old fence and defendants had not begun any construction. The exhibits show no interference by the construction of defendants with any activity or structures of the plaintiffs. The encroachment, if any, has resulted in plaintiffs and their predecessors in title being out of possession of the small

portion of land encroached upon since 1911 and clearly since 1928 when the same use of the land encroached upon was instituted in favor of defendants' predecessor in title as was to continue thereafter through 1943 to 1949 under the defendants.

If it be admitted for the purpose of this argument that defendants have effected costly and expensive construction of a permanent nature upon land of the plaintiffs, to a slight extent, and plaintiffs are not for any other reason without a right or remedy, then it would appear that in this situation the court should not require defendants to remove the construction. Rather, in view of the peculiar facts, plaintiffs are in equity to be denied a mandatory injunction and rightly limited to a recovery of the value of the land encroached upon. The rule is well stated in 1 Am. Jur. 516 et seq., par. 19 as follows:

“While the right to a mandatory injunction under proper circumstances is firmly established, the injunction may be refused because of the absence of proper circumstances, or especially because of inequitable incidents . . . The same exception (denial of the injunction and awarding damages to cover the value of the portion of land occupied by the encroachment) is made in favor of a bona fide trespasser where his damage, if compelled to remove the encroachment would be greatly disproportionate to the injury of which the plaintiff complains by reason of the encroachment, for the general rule is that the extraordinary remedy of injunction is allowable only when strong reasons therefore are shown.”

This doctrine is certainly not new. In 1888, in the case of *Hunter v. Carroll*, 64 N.H. 572, 15 Atl. 17, 14 A.L.R.

836, the court refused to order the removal of a building which encroached at one point 7.45 feet, and another building which encroached 4.95 feet, upon land of the complainant, where the complainant might apparently be fully compensated and the land itself recovered in proceedings at law; but, if not, it was held that equity would not aid in the attempt since the injury to the complainant was very small and could be compensated and the defendant would be subjected to great inconvenience and expense in removing the buildings which were erected innocently and with no intent to trespass upon the complainant's land.

To the same effect are *Delorme v. Cusson* (1897) 28 Can. S.C. 66 and *Goldbacher v. Eggers* (1902) 38 Misc. 36, 76 N.Y. Supp. 881, affirmed 1903, 82 App. Div. 637, 84 N.Y. Supp. 1127 and affirmed in 1904 179 N.Y. 551, 71 N.E. 1131. Other and later cases to the same effect are collected in 14 A.L.R. at page 835 et seq., 31 A.L.R. 1302 and 96 A.L.R. 1291 et seq.

Of course, each case must rest on its own circumstances. (*Glinn v. Silver* (1916) 64 Pa. Super. Ct. 383, 96 A.L.R. 1291), and in this case it would appear that all the equities are with the defendants and appellants. They accomplished all building under claim of right (Tr. 15, 47, 48, 82, 83, 114, 124, 125, 126, 127) and at the most were guilty of mutual error with plaintiffs and plaintiffs' predecessors in title and occupancy as to the location of the true boundary. Their construction is extremely expensive and difficult to remove and the damage, if

any, to plaintiffs is extremely small, and although the plaintiffs lived within a few feet of all construction complained of from 1943 through 1948, they took no steps to stop construction, or if in doubt as to the line, even make a survey. The final and convincing act of the plaintiffs and respondents came in 1948 after all construction had been completed and Mike Dragos bargained for and paid defendants for the right to connect their cesspool to defendants' sewer line, the part of defendants' construction of greatest alleged encroachment, under circumstances indicating plaintiffs were entirely pleased with the arrangement and the construction situation. Thus while the evidence is in direct conflict, to the extent of the uncorroborated testimony of the two plaintiffs, as to whether any objection at all was ever made by plaintiffs to any of the construction for any reason, the great, conclusive weight of the evidence would appear to require the finding that no protest was in fact made until the fall of 1948 or the spring of 1949.

In support of the position of defendants and appellants with respect to the old fence line having become the legal boundary between themselves and plaintiffs and respondents, the attention of the Court is directed to the leading case of *Davis vs. Lynham*, 67 Utah 283, 247 Pac. 294. In that case the facts were remarkably similar to the facts in this case. The Court quotes the findings of the Lower Court in its opinion as the facts in the case as follows:

“that said boundary line as herein last above described has been acquiesced and agreed in and to by the plaintiff and these defendants and their predecessors in interest for more than 20 years next prior to the last date hereinabove named; that said line has been marked, fixed, defined, and determined by the building upon said line and a maintenance thereon of a substantial boundary line fence which fence as a boundary line has been acquiesced in and agreed to by the plaintiff and defendants and their predecessors in interest for the time hereinabove set out, after evidence by the fact that the defendants or their predecessors in interest have permitted old trees to stand along the boundary line as hereinabove described, to which old trees there have been attached the wires completing the fence; which trees today stand along and mark said boundary line; that defendants or their predecessors in interest, at least 15 years next prior to the date of the trial of this cause of action, built and constructed a buggy house and lean-to along said fence line, making the northerly side of said buggy house and lean-to part of said fence line . . . that plaintiff and his predecessors in interest have continuously and uninterruptedly, for a period of more than 20 years next prior to the date last above referred to, occupied and used their said land up to said fence and boundary line without molestation or objection on the part of the defendants, or either of them or their predecessors in interest; . . . that said boundary line, as established and fixed by said fence as herein set out for more than 20 years next prior to the 1st day of May, 1922, has never been disturbed or molested by the defendants or either of them or their predecessors in interest, but has at all times been acknowledged, acquiesced in, and mutually agreed to and recognized by plaintiff these defendants, and their



predecessors in interest as the true fixed and determined boundary line between their respective lands."

The Court held that the old fence line under such circumstances amounted to an agreed boundary line which the Court was not justified in disturbing.

In connection with the matter of a prior uncertainty or dispute as to the location of the true boundary line in connection with establishing a fence as an agreed boundary line, the Court's attention is directed to the case of *Hannah vs. Pogue*, Cal. App. 138 P. 2d 790, where an old fence line marking the boundary between adjoining property owners had existed in a certain location for more than 20 years prior to the action arising out of a dispute as to the true line, and it appearing that there was no direct evidence of any dispute or uncertainty, the Court holds in the decision at Page 797 of 138 P. 2d:

"Appellant urges that there is no proof that there was ever any uncertainty of agreement as to the location of the true boundary line. Although there is no direct evidence to that effect, yet the facts found to exist justify the inference that the previous owners had agreed upon the location of the boundary line. An agreement fixing a boundary line need not be established by direct evidence, but may be inferred by conduct, and especially by long acquiescence. The agreement must be express or implied from the acts of the parties and acquiesced in for the period fixed by the statute of limitations. A presumption that an agreement formerly was made as to the location of a boundary line may arise from the

fact that one or both of the adjoining owners have definitely defined such line by erecting a fence or other monument on it and both have treated the same as fixing the boundary between them for such length of time that neither ought to be denied the correctness of its location. *Board of Trustees v. Miller*, 54 Cal. App. 102, 201 P. 952."

The holding of *Hannah vs. Pogue* (supra) was followed in the later leading case of *Board of Trustees of Leland Stanford, Jr., University v. Miller et al.*, 54 Cal. App. 102, 201 Pac. 952 (Hearing denied by Supreme Court), where upon a boundary line contest the lower court held that an old fence line had been established by mutual agreement some 660 feet away from the survey line dividing the properties. The question on appeal was "whether there is evidence to support the finding that the predecessors in title of the parties established such boundary line by mutual agreement. There is no direct evidence of such an agreement, and the question must, therefore, be determined from the conduct of the respective owners of the lands, viewed in the light of the surrounding circumstances." The evidence showed payment of taxes according to the record title but respect and acquiescence in the fence as the boundary together with use of the land in the proprietary sense by the adjoining parties right up to the fence on each side for more than forty years. In affirming the lower court the court said at page 953 of 201 Pac.:

"There is no direct evidence to that effect (uncertainty as to the location of the true boundary

line), but, as stated the facts found to exist justify the inference that the adjoining owners had agreed upon the location of the boundary. This inference is of a valid agreement, and necessarily implies that there was an uncertainty as to the true line. 'The doctrine of an agreed boundary line and its binding effects upon the coterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line . . . This does not mean that the inference of an agreement arising from acquiescence does not support the added inference that the inferred agreement was based on a questioned boundary. The primary inference is of a valid pre-existing agreement, and to be valid that agreement must have been based on a doubtful boundary line.' *Clapp v. Churchill*, 164 Cal. 745, 130 Pac. 1062."

The matter of determining a boundary by an old fence line where the old fence may be located apart from the survey line between adjoining owners is settled in the leading Utah case of *Tripp vs. Bagley*, 74 Utah 57, 276 Pac. 912, 69 A.L.R. 1418, et seq. In that case an old fence was located some distance from the survey line between adjoining owners, and at the time the fence was located, both parties knew the fence did not coincide with the true survey line. There were no permanent improvements of any kind involved, and the Court held that under those circumstances the old fence line could not be considered the boundary line between the parties. The specific issue in the case is set out at P. 917 of 276 Pac. as follows:

"It thus becomes of controlling importance to determine whether two adjacent landowners may

establish a boundary line between their lands by oral agreement or by acquiescence for a long period of time, when there is no uncertainty as to the location of the true boundary line, and where it is known by them at all times that the boundary line sought to be established is not the true boundary line. . . . Neither are we dealing with a case where any permanent improvements have been placed upon the land in reliance upon an established boundary line."

The important thing about the opinion is that the court reiterates and states the supporting rule in many cases in Utah in connection with establishment of a boundary by an old fence line, as follows:

"Counsel for defendants cite and rely upon the rule announced by this court in the following cases: *Holmes v. Judge*, 31 Utah, 269, 87 P. 1009; *Moyer v. Langton*, 37 Utah, 9, 106 P. 509; *Rydalch v. Anderson*, 37 Utah, 99, 107 P. 25; *Young v. Hyland*, 37 Utah 229, 108 P. 1124; *Farr v. Thomas*, 41 Utah 1, 122 P. 906; *Binford v. Eccles*, 41 Utah 457, 126 P. 333; *Christensen v. Beultner*, 42 Utah, 392, 131 P. 666; *Tanner v. Stratton*, 44 Utah 253, 139 P. 940; *Warren v. Mazzuchi*, 45 Utah 612, 148 P. 360; *Van Cott v. Casper*, 53 Utah 161, 176 P. 849. In these cases the rule is announced and reiterated that, where the owners of adjoining lands occupy their respective premises up to a certain line which they mutually recognize as the boundary line for a long period of time, they and their grantees may not deny that the boundary line thus recognized is the true one. The general rule thus repeatedly enunciated has become the settled law in this jurisdiction. However, the question for determination in this case is whether the facts here bring it within the general rule or constitute an exception thereto."

## CONCLUSION

Under the conclusive facts as indicated above by the evidence and in accordance with the law cited, it is respectfully submitted that the district court erred, its decree must be reversed and the defendants and appellants are entitled to a decree and judgment in one or more respects together with findings and conclusions in accordance therewith as is indicated below.

1. That plaintiffs are barred by Section 104-2-5, 104-2-6 and/or 104-2-24, *Utah Code Annotated*, 1943, from

a. Instituting or maintaining this action at all, or

b. Bringing or maintaining the action as to any construction by the defendants with particular reference to five cabins first constructed, renovated, or completed by defendants on or before May 6, 1946.

2. Defendants have with their predecessors in title acquired a perpetual easement to the use of the land of the plaintiffs which might be found to be encroached upon.

a. To continue to use the same to the same extent as such use was continually made beginning in 1912 and continuing thereafter until 1943 and probably the fall of 1948.

b. To use the same for general proprietary purposes as used since 1911.

3. That the legal boundary line between the parties has been and is now the old fence line location since the establishment of the same as the boundary between the parties in 1911 or 1912, and plaintiffs are not entitled to an injunction requiring defendants to move construction from or pay damages for any land built upon by defendants southward of the old fence line between the parties, and plaintiffs are now estopped to claim the land south of the old fence line.

4. That defendants should in equity be required in the event of a finding of any encroachment upon the plaintiffs' land to pay to plaintiffs the market value of such land encroached upon, and plaintiffs should be denied an injunction requiring defendants to remove any of the permanent sewer line and cabin renovation or construction effected by them.

5. That a new trial should be granted defendants and appellants.

Respectfully submitted,

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Received copies of the foregoing brief this 11th day of December, 1950.

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