

1952

Maria B. Lepasiotes v. Sophronia Woodland Dinsdale, Chester F. Dinsdale and Darrell Dinsdale : Brief of Respondent

Utah Supreme Court

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2 of 2

#7655

In The
SUPREME COURT
of the State of Utah

MARIA B. LEPASIOTES,

Plaintiff and Respondent

-VS-

SOPHRONIA WOODLAND DINSDALE,
CHESTER F. DINSDALE and
DARRELL DINSDALE,

Defendants and Appellants

RESPONDENT'S BRIEF

FILED
FEB 4 1992

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Clerk, Supreme Court, Utah

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RESPONDENT'S CORRECTIONS

Index:	Page
Reflor v. Lansing Drop Forge Company - Line 19 Change Sp. Ct. citation to 62 Sp. Ct. 794	59
Page 21 - Line 17 - Insert NW 5 after NE 5	21
Page 30 - Line 10 - Insert after \$450.00, the words, "Frank Fowles (Tr. 50 to 68), who placed them at \$450.00."	30
Page 31 - Line 12 - Change Tr. to Br.	31
Page 31 - Line 14 - Change Tr. to Br.	31
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Page 38 - Line 2 - Change word "nother" to read "another."	38

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STATEMENT OF FACTS

The brief filed herein by the Appellants presents counsel for Respondent with the question as to whether it should not be sufficient to direct attention to the weakness of the case presented or to add much more, perhaps unnecessarily, to disclose the strength of the opposing case.

It will be observed that appellants do not comply with the rule requiring citation of the pages in the record supporting their statements as to what the testimony established. Appellants would require the Court to scan the many pages of testimony on its own initiative. At the risk of overtrying this matter, we will give as briefly as possible a Statement of Facts.

with citations which may aid the Court.

Nature of Cause and Facts established:

This action commenced as one in trespass by plaintiff for damages done to her property by defendants, consisting of tearing down and moving her fence some feet westward on her property, destroying lateral support for her land so that it fell away, and in particular, destroying in part the bank of her irrigation ditch, adjacent to the boundary line between the parties; and placing a chemical substance in holes in her trees for the purpose of killing the trees.

Defendants met this with a denial in part, and a counterclaim that some 60 feet of land, west of the boundary line which had been invaded, belonged to the defendants, Chester

F. Dinsdale and Sophronia Woodland Dinsdale.

Plaintiff, by her reply, denied ownership by defendant of any land west of the fence by the defendants, and set up a further claim that the boundary of her lands which she claimed to have been invaded, was established by a boundary fence line, with respect to which her lands had been improved, and pleaded estoppel against attack on that line.

Aside from the question of damages, the matters of title raised involved both the question of the actual location of the lands held under their respective deeds by the parties, and also the effect, if there was an overlap, of the fence and other line markers and monuments thereon.

In setting out the facts, we shall refer both to what the court found, and cite

the evidence in support thereof, without attempting to sift it as to its effect upon the two phases of title so presented, but segregating the evidence as to use and occupation to the fence, as to the conflict of titles, and as to damages.

EVIDENCE ON OCCUPATION AND USE

The Court found that, for some 55 years prior to the time of the trial, plaintiff and her predecessors in interest had occupied certain lands situate in the Southwest Quarter of Section 19, Township 6 North, Range 1 West, and the adjacent Quarter Section across the township line in Range 2 West, up to the division line marked by a fence located as follows:

Beginning at a corner post located on the North line of 17th Street;

said post being South 20° 17' West 1523.2 feet; South 84° 8' East 100.75 feet and North 20° 58' East 30 feet from the Northwest corner of the Southwest Quarter of Section 19, Township 6 North, Range 1 West, Salt Lake Meridian, U. S. Survey, and running North 20° 49' East 673.4 feet to a corner post.

Sophonria Woodland Dinsdale owned property to the east of the plaintiff's land, her title coming by conveyance made by her husband, Chester F. Dinsdale, recorded November 12, 1931, and dated August 17th of that year. Plaintiff acquired her land by purchase from a Mr. Lake. Her deed was dated December 8th, 1924, and recorded the following day. Both titles went back, the same descriptions being used in the deeds, to common ownership in one Thomas M. Douglass, who conveyed out the Dinsdale title August 23rd, 1893, and the Lepasiotes title

September 25th, 1895. (Plaintiff's Ex. "A"; Defendants' Ex. 3 and 4). The description in the deeds in the chain of title of Mrs. Lepasiotes, (commonly called Lepas and so usually named in the record and so thereafter called herein,) was as follows:

Part of the Southwest Quarter of Section 19, Township 6 North, Range 1 West, and Part of the Southeast Quarter of Section 24, Township 6 North, Range 2 West, Salt Lake Meridian, United States Survey: Beginning 14.03 chains South of the Northwest corner of said Southwest Quarter Section and running thence West 4.06 chains; thence South 9.98 chains to a road; thence East 4.82 chains; thence North 9.98 chains; thence West .76 of a chain to the place of beginning.

The description in the chain of title of Sophronia Woodland Dinsdale was for land in said Southwest Quarter of

Section 19, described as follows:

Beginning 1067.8 feet North
and 66 feet South $84^{\circ} 08'$
East from the Southwest corner
of said Quarter Section, and
running thence South $84^{\circ} 08'$
East 330 feet along the center
of street; thence North $1^{\circ} 54'$
East 693 feet; thence West
328.2 feet to a point North
 $1^{\circ} 54'$ East of the place of
beginning; thence South $1^{\circ} 54'$
West 658.8 feet to the place
of beginning.

The Court found, (Tr. 012 to
017,) and the evidence disclosed, that
a boundary had existed between the two
tracts of land for some 55 years,
marked by a fence, running the greater
part of the line at all times, and all
of it most of the time, by a row of
trees just West of the fence running
back about 124 feet from the south
frontage on 17th Street, by an irriga-

tion ditch running from the south line north just inside the trees for about 160 feet, thence turning westward, and by a driveway just west of the ditch, taking up the space between ditch and house, and extending back some 378 feet to a barn and corral.

It found and the evidence disclosed that plaintiff and her predecessors for more than fifty years had occupied the lands west of, and up to that fence line, for residential, agricultural and other purposes; having constructed a house and barn thereon some fifty years prior to the trial, erected subsequently other structures, irrigating their lands from the ditch, using barn and corral for usual purposes, and

had cultivated and harvested crops from the lands west of the fence not occupied by buildings and other works, except that north of the barn, which had been used for pasturage. Evidence supporting these findings, in condensed form, was as follows:

Citations: (a) Testimony of Louise Elmer, (Tr. 159-163) who moved onto the Chester Dinsdale property in 1895, visited it as an L.D.S. teacher many times down to about 6 years prior to the trial, when she became incapacitated and who knew of no change in the location of fence, trees, ditch, driveway, and buildings in that period. She recalled the building of the house by N. C. Erickson, whose wife then was

part owner of the plaintiff's property,
in 1895.

(b) Testimony of Frank Hodson,
born and reared on the property next
north of the plaintiff's land, now owning
that land, a brother-in-law of one Dolph
Parry, who owned the Dinsdale tract from
the spring of 1906 to the spring of 1908,
remembered the property for at least 50
years, had worked with T. E. Bates, who
owned it from May of 1907 to April of
1914, and who said that when he first
knew the place there was a fence either
nailed to the trees or just east of it
(Tr. 115) never too much of a fence
over the slough in the rear of the barn,
in the early days; knew the barn was
there in Bates' day (Tr. 117) and that

Erickson built the house, that neither the Dinsdale people or Ingrebretsen, (owner Dinsdale property 1908-1910) used the driveway (Tr. 122-3); he and Dolph Parry had hauled hay over the driveway to Bates' barn, but that it was not Dolph Parry's right-of-way (Tr. 127) and that he and a brother had had permission from Bates to haul peas out over it (Tr. 128-9).

Testimony of plaintiff and her husband, William Lepasiotes or Lepas. Plaintiff purchased the place in December, 1924, since which time, except as hereafter discussed, the location of fence, trees, ditch, driveway, corral and buildings was the same down to May or June of 1949, (Tr. 14 to 20; 131 to

135) some stumps of posts, which were there in 1924, being still in place. (Tr. 155—for location see Dinsdale Ex. 2). Not much of a fence in 1924 at the slough, just a few posts and wires, pretty much broken down, (Tr. 131-2-3). Lepas and Chester Dinsdale agreed that Lepas keep up the fence from his barn to the trees, Dinsdale from the rear to the barn, and from the north end of the trees to the road, and that they had so done. (Tr. 85-107). They and no one else had used the barn or farmed any part of the property west of the fence during the period from 1925 to May, 1949. (Tr. 141; 146; 304-5-6; 309). They even grazed the driveway with their sheep. (Tr. 304). They had used the ditch west

of the fence ever since they moved there. (Tr. 43-4; 310). They bought the place "as was", it "was right there like I buy it, and still is." (Tr. 145).

As to the time the barn had been there, Alice Keller, sister of Chester Dinsdale, testified (Tr. 214) that it had been built to replace an older barn built by Erickson, which had stood in the same location and blew down in 1908. (Tr. 213-4) the same Erickson who built the house. Gertrude Shafer Hutchins, daughter of the Shafers, who owned the place from 1914 down to a few months prior to the Lepas' purchase, testified that the trees, driveway, ditch, and buildings were as they stood when she lived there with her parents (Tr. 288 to

291); that her father had farmed the place, used the barn for his cows, the irrigation ditch east of the house for his irrigation water; that if any of the persons then on the Dinsdale place used the barn, they "rented it from the folks." (Tr. 296.)

One change had been made in the fence line. It is not disputed that Chester Dinsdale, about six years prior to the time of the trial, moved the south corner post a little west, affixing the wires from that point to the center of the nearest tree on the north, and fastening the wire to some of the other southern trees. The old fence was about gone, and the old post out of line. (Ex. 2). Lepas had complained of this, as

the change pushed the Lepas intake a little west. The court found that the post as so fixed was on the line; the wire off the line some short distance and gave leave to restore the wire to the true line when the fence was repaired or rebuilt. As plaintiff does not complain of the result, this deserves no further attention.

It also appears (Tr. 20 to 25, 85, 116-7, 133) that about 1929 or 1930, such fence as there was in the "slough" area, including the north corner post, was destroyed by Chester Dinsdale while burning weeds in the slough. A dispute arising as to where the fence should be placed on relocation, some three or four feet of difference being involved, Mr.

Dinsdale's father, Mrs. Lepas' father, and two neighbors, including Frank Hodson, were called in to set the corner post and fix the line. They acted; the defendant Dinsdale, who then owned all the property along the fence line, set the post where so determined, and built the rest of the destroyed part of the north fence. From that time down, he, while owner, and his wife, through him thereafter, kept up the fence on that line.

CONFLICT OF TITLES

Testimony adduced in chief by plaintiff included her abstract of title (Ex. A-Tr. 158), evidence as to the purchase and occupation of the land by plain-

tiff, of the acts of trespass committed by the defendants, and of the damages therefrom resulting, as well as evidence showing the situation of the various growing and erected improvements from the fence west. Nothing indicated any conflict of titles, or adverse claims, was presented, except as it came out through cross-examination, some testimony not relevant to the defendants' claims as to replacement of the fence destroyed in 1929 or 1930, and as to Chester Dinsdale moving the south corner post west a short way, and running the wires from that to the nearest tree some six years prior to the time of trial.

After defendants had put on three witnesses as to some minor points, they

called Jack H. Craven, a qualified surveyor, who had prepared Exhibit 2. The court, if it examines the record, should bear in mind that the original exhibit was misplaced during the trial, so that references to various notations made on it in pages 178 to 209 of the record are meaningless. The present exhibit was brought in later, and the references to the markings thereon appear in testimony of Mr. Craven subsequent to page 220 of the record.

It will be recalled that plaintiff's deed called for a beginning point due south of the northwest corner of the Southwest Quarter of Section 19. Exhibit "2" was prepared, Mr. Craven testified, upon the theory that the calls in the

Lepas and Dinsdale deeds were not intended to run due north or south as the case might be, but had a bearing like the township line which, at this point, he fixed as running north $2^{\circ} 17'$ east from the Southwest corner of that quarter, (Tr. 181; 187; 195; 199). As so prepared the Lepas tract is marked by the letters P-A, P-D, P-F and P-G, and as so surveyed, the Sophronia Dinsdale property would have a west line beginning some 37 feet west of the north corner post of the fence claimed as a boundary line, running thence on the bearing called for by the Dinsdale west line of South $1^{\circ} 54'$ west, to a point some 37 feet West of the fence line, where it reached 17th Street on the south side of the Lepas land, and which

brought east of the Dinsdale line all the trees, the irrigation ditch, the driveway, the house, barn, and all other buildings on the Lepas land, (Tr. 193-4-5-6; 206; 229.) However, Mr. Craven further said, if he had not assumed that the calls in the Lepas deed were supposed to run south on a parallel with the section line as he located it, and he had platted the property, using the calls due south and north given in that deed, the Northeast corner of the Lepas property would have been 37 feet further east, and almost exactly at the north corner post of the fence. (Tr. 195-6).

He indicated its location as platted by the markings NE5, ^{NW5}SW5 and SE5 on that exhibit. (Tr. 231-2).

The Southeast corner of the Lepas description (SE5) he testified would lie 26 feet further east from the Section line drawn on the 2° 17' bearing, than did the corner marked NE5, (Tr. 195-6). However, the fence did not run due south, but angled westerly as did the west line of the Dinsdale description. (Tr. 198). There would be a gap between the east Lepas line and the west Dinsdale line, because the Lepas line ran only .78 of a chain east of the section line, while the beginning point of the Dinsdale line was one chain east of that line. (Tr. 202). The court will observe that, in practical effect, said "gap" would become wider as the lines were run north, because the Dinsdale west line had an angle of North

10 54' East, a variance Mr. Craven had already noted.

Mr. Craven further testified:

That he had made examination of the field notes of the original survey of the section line, and they showed the Southwest Quarter corner lying due South of the Northwest Quarter corner. (Tr. 244).

That none of the original section corners could be located on the ground, nor could the Northwest corner of the Southwest Quarter of the section. He had checked against other titles, and the fence corners of such lands, which were tied to the Northwest corner, and to the railroad surveys, the Northwest corner lying in the railroad right-of-way, to

locate it. He used as the Southwest corner a place located by a former county surveyor, and found the two locations to lie on the $2^{\circ} 17'$ bearing as to each other. (Tr. 180-1). In making his drawing (Exhibit 2), he had actually made survey only of the fence line, and had merely drawn the other lines from the descriptions. (Tr. 231-2).

That present day surveys rarely agreed with the original surveys in "the sections here" and almost all property lines would be found off, if the "surveys were made properly." (Tr. 240).

That he had followed the $2^{\circ} 17'$ variation in the preparation of Exhibit 2, because they seemed to him to more nearly conform to the intent of the

the parties in making the descriptions originally but that, had he known that the titles came down from a common source and that they fitted as closely as they did, by following the calls in the deeds exactly, he would have considered that as the intent of the grantors and drawn his plat accordingly. (Tr. 206-7). In explaining what he meant by intent, he called attention to the fact that the 2° 17' variation from a due south course would make quite a bit of difference in the parts of the Lepas property which would lie in the different sections—but in so doing, he did not show that he had in mind the fact, as shown by the abstract exhibits, that Douglass, the common grantor, owned the land on both sides of the Town—

ship line,

The actual dimensions of the Lepas property, within its fences, (Tr. 311) and the dimensions called for by the Lepas chain of title follow:

	Deed	Actual
North line	318.12	308
South line	318.12	292
East line	648.68	673.8
West line	648.68	655

It will be observed that the width of the tract at the north is 10 feet less than the deed calls for, while on the south, the bearing westwardly of the fence line reduces the width by some 16 feet additional. The west line is 6.32 feet longer than the calls of the deed, the east line quite a bit longer—readily explainable by the fact that 17th street, as shown on Exhibit "2" runs on a bear-

ing of South $5^{\circ} 52'$ East along the front of this property.

The court's findings on the matters here involved reflect the situation, as disclosed by Mr. Craven's testimony, and the abstracts. (Tr. 014-5), as to the showing of the field notes of the original survey, the disappearance of the corner monuments, the relocations made by Mr. Craven, of the Northwest Quarter corner, "with common certainty", and his use of that and the Southwest Quarter as relocated by the former county surveyor; use by Mr. Craven of the South $2^{\circ} 17'$ West bearing in preparing his plat; location of the north fence corner exactly where it should be, using due south measurements from the Northwest Quarter corner; the fact that

the fence from that point ran southerly, substantially parallel with the west line of the Dinsdale deed. He found that the owners of the two tracts had made a practical location of the division line, gave the course of the fence line as shown by Exhibit "2", noting some slight deviations, which he held came in rebuilding and not to be intentional; and fixed the line at a point equidistant from the "survey line" shown on Exhibit "2" as paralleling a line drawn between the corner posts as now located. He found that plaintiff made no claim to land lying easterly of the fence. The court also finds (Exhibit 2 as authority) some minor deviations from the original line, north of the trees, (1 to 3.5

variations up to 6.6 inches along the line east of the trees; and that the line prior to 1944, when Chester Dinsdale reset the corner post, had been off about a foot, that being the point where the Lepas irrigation ditch came in from the street; a deviation for convenience. In the decree, the court provides (Tr. 018) for subsequent rebuilding or relocation of the fence being made upon the boundary line where such deviation now existed.

DAMAGES

The court found defendants to have committed the acts complained of by plaintiff as to moving of the fence, depriving her land of lateral support, and causing her ditch bank to break down so as to

lessen its capacity to carry water, and boring holes in her trees, causing some to die, and assessed her damages at \$275.00. The finding is supported by the testimony of Lepas (Tr. 37 to 48; 97 to 100), Hugh E. Dobbs, (Tr. 108 to 112), plaintiff (Tr. 136 to 138, 148, 151, 153; 244-5), and as to the damages by that of Lepas, who placed them at upwards of \$450.00, *Frank Fowles (Tr. 50 to 68) who placed them at \$450.00*, and Frederick Freerer, (Tr. 68 to 78) who placed them at \$425.00. The latter two witnesses qualified as experts,

MISSTATEMENTS BY APPELLANTS

Assuming that when appellants speak of "Tract No. 1" they thereby refer to the land lying East of the line which runs west of the Lepas house, and fixed

by making the Lepas east line run parallel to a section line assumed to run south 2° 17' west from the Northwest Quarter corner, it is obvious from the foregoing that there is no basis of fact for any of the following assertions in that brief:

That plaintiff admits ownership by Mrs. Dinsdale of Tract No. 1. (Ex. 2).

That either defendants, or their predecessors, enjoyed quiet and peaceable possession of "Tract No. 1" except for the brick house (Br. 2-3) and the subsequent assertion of the same fact, but limited to the period prior to 1931. (Br. 3-4). Also, similar assertions near the bottom of Page 4 and at the top of Page 6, that the evidence, and particularly that of William Lepasiotes, makes it appear that

when the titles were acquired by Chester Dinsdale and Mrs. Lepasiotes, the boundary fence was on the line "called for" by the deeds of the parties--assuming again that the quoted words again allude to the imaginary line west of the house. (Tr. 4).

The detail given on Pages 4 and 5 as to the construction of what is there called a "peace fence", both as to date and that it arose out of something said by Judge (later Justice) Pratt in a civil suit between Chester Dinsdale and Lepas.

The record is "absent" of the fact that the trees in which Darrell Dinsdale bored holes and poured salt were damaged--several were killed.

The facts indicated that plaintiff

was able to use her irrigation ditch in 1949 and 1950 without difficulty or inconvenience.

Our Statement of Facts, and the citations there given, show a complete want of accuracy in such statements.

Finally: As to the statements made respecting the attempt to cause Judge Hendricks to disqualify himself from further proceeding with the trial of this case: It is truthfully stated by Appellants that such an affidavit was made, disqualification denied. But appellants omit the fact that this was done after trial of the cause commenced. It is unfortunate that the whole record was not furnished by the reporter, but only the proceedings from October 17th on. However the following does appear:

A minute entry (Tr. 027) showing that this case being then set for trial, came on for hearing; that the court and at least some of the parties, with counsel, inspected the site, that inspection was made of a survey and maps, as well as of the premises, that the facts were argued and submitted, and some stipulation made established the line along the trees as shown by the survey maps, and that findings and a decree were to be drawn accordingly.

It further appears (Tr. 5) that when counsel submitted the affidavit of prejudice, the court directed counsel's attention to the fact that the trial had been commenced on a previous time so that the affidavit came too late; that the

court asked (Tr. 7) for the written stipulation which was to have been prepared, one embodying the oral stipulation made on the ground apparently, and was advised by counsel that it had not been entered into because one of the defendants, not present when the stipulation was made, refused to be bound by the action of her counsel, and that (Tr. 11 to 14) Mrs. Dinsdale was sworn, testified that she was in court "at the beginning of the trial", in the courtroom, did not go down to the premises, although present when the court adjourned to go down there, and had not authorized her husband, nor her counsel, to act in making the stipulation, upon which showing the court permitted the trial to proceed.

STATEMENT OF POINTS

- Point No. 1: The Dinsdale deed does not call for any land west of the fence line established by the court,
- Point No. 2: The court properly held that fence line to be an established boundary,
- Point No. 3: The court properly awarded plaintiff a money judgment against the defendants,
- Point No. 4: No prejudicial error arose from the action of Judge Hendricks with respect to the "affidavit of prejudice."
- Point No. 5: Appellant's points Nos. II, III and VI are waived by want of proper argument, and are without merit.

ARGUMENT

- Point No. 1: "The Dinsdale deed does not call for any land west of the fence line established by the Court."

The facts developed in this cause by

the defendants, through the witness, Jack H. Craven, included the following undisputed statements:

That the official field notes of the original survey of that line show the Southwest corner of the Southwest Quarter of Section 19, Township 6 North, Range 1 West, to lie due south of the Northwest corner of that Quarter section. That surveying the lands described in the deeds, by lines running exactly as called for therein, would result in no overlap of the two areas, but rather a gap between them, and would leave the boundary fence described in the decree entirely upon the plaintiff's land,

It is true that, after both monuments were lost, relocation of the same

by Mr. Craven, as to the Northwest corner, and ²/₁ another former county surveyor, as to the Southwest Quarter corner, resulted in fixing that line at an angle west of south, so that, if the line so fixed—"as well as could be done under the conditions", as Mr. Craven says, (Tr. 198)--is considered, and the lines of the two deeds drawn parallel thereto, as would be permissible where the deeds were drawn with reference to a line so established, a conflict results.

The record is silent of any inference that Douglass, in deeding his land, took into consideration any such bearing away from the cardinal points. The record is silent as to any surveys intermediate of the original survey, and the time when

Douglass deeded; or any survey between that time and the time the respective parties to this action acquired their land. A complete absence of any public record or private survey showing any variation of the section line from its course between two cardinal points, at a time when deeds are made, would seem to amount to substantially complete proof that the makers of the deeds in these abstracts actually meant south when they said that.

Since it is the defendants who seek to claim land that plaintiff occupies, it would seem to be essential that she establish that her deed calls for some of that land. A survey, with reference to which none of the deeds

could have been made, can hardly amount to such proof. For while this Court has held in *H.O.L.C. v. Dudley*, (105 Utah 208, 141 P. 2nd 160), that a survey monument, relocated by proper authority, is presumed to be placed where the surveyor originally located it, that presumption prevails only until properly challenged. In that case, the Court said:

"No field notes from the surveyor or general's office on actual surveys between monuments were offered to show where the boundaries were actually located, if in a different location. The location of a monument controls, and if it is obliterated, the court is concerned in ascertaining where it was originally located, if in a different location."

Appellants' proof here itself disclosed that one or the other of the re-located monuments must have differed from

the original survey monuments, since otherwise, they would have been due north and south of each other, as disclosed from examination by her witness of the field notes of United States Survey. At the very best, she left uncertain the question of the true location of the United States Survey, upon which the deeds in both chains of title base their descriptions.

As her evidence contained proof contradicting her claim that she owned land other than that which she occupied, it fell short of establishing her right.

Utah cases contain other matter as to surveys, mixed authority upon this Point, and on Point No. 2, which we will briefly note here:

Street monuments, placed by public authority where original monuments were not found, held not to control over a fence line and improvements made with relation thereto long prior to such relocation.

Holmes v. Judge - 31 Utah 269,
87 P. 1009

Where surveyors testified that old monuments of the original survey of Lake View Addition had disappeared, that they located them "as best we could" from the old plat, that "you locate them from one direction and make a certain location, and you locate them from another direction and make another location and you have to reconcile them as best you can", they came close to stating the situation

here presented. Judgment of the court establishing lines on the basis of a new survey, rather than on old fence lines, was reversed.

Young vs. Hyland - 37 Utah 229,
106 P. 1124

We submit that defendants failed to establish any claim to lands occupied by plaintiff.

Point No. 2: "The Court properly held that fence line to be an established boundary."

So far as the fence line lies west of the lines called for by the deeds, as we have urged under the previous heading, plaintiff may not complain, having expressly disclaimed any other boundary line, as the court found. Nor have the defendants any cause to complain of that finding.

Were it in dispute, were plaintiff

claiming, as defendants claim, land on the other side, the evidence in the case presents almost every element of fact that moves courts to refuse to permit parties to claim beyond such a fence. We have shown by the testimony:

The original monuments have been completely obliterated and the surveyor upon whose evidence the case depends admitted the probability of error in relocating them.

There have been some 55 years of acquiescence in a line marked by many visible monuments, a fence over all of it for many years, (Bates didn't bother with much of one at the slough), such fence lying in front of a line of trees, just east of, in order, an irrigation ditch, a

driveway and a house; the driveway running parallel to the fence to a barn shown as being there in Erickson's day, with a corral in front of it, and use and occupation up to that boundary line by all adjoining owners.

Acquiescence in the fence line shown by the replacement, in 1929 or 1930, upon the former line as established by the "committee of viewers."

The fact that all of the improvements now on the property, except some small construction by plaintiff, were built, obviously with reference to that line, as much as 55 years prior to the completion of the trial.

Such effect as may be given to the inspection of the property by the court.

The Craven testimony which disclosed that, in drafting his plat, this expert took into consideration factors which he considered as disclosing the intent of the makers of the deeds, and, had he known of the additional factor that the titles came out of a common owner, he would have reached a different result in platting its lines—certainly adequate evidence that the location of the line was, at best, so far as defendants' testimony went, an uncertain factor.

This Court, for about as many years as that boundary line had existed, has handed down decisions which establish that lines, used as boundaries between the lands of adjoining owners, under such circumstances of long acquiescence, improve-

ment with relation to them, use and occupation up to the line, become boundaries which may not be disturbed. Any cases which this court has decided against such lines as boundaries have been marked by want of some essential factor, or presence of some other factor negating the effect of the line as a boundary. Our position is squarely based on such cases as those cited under Point No. 1, and

Brown vs. Mulliner - 232 P. 2nd 831,
No Utah Citation
Dragos vs. Russell - 237 P. 2nd 831,
No Utah Citation

Point No. 3: "The Court properly awarded plaintiff a money judgment against defendants."

Our statement of facts disclosed citations of evidence showing, and a finding by the court that the defendants so excavated the property along the boundary

as to loosen the posts leaving them completely detached from the soil or exposed; that such excavations ran back 410 feet from the street; that the excavations removed lateral support from plaintiff's land, the land along the excavation crumbling and falling into the excavation; the adjacent bank of plaintiff's irrigation ditch had broken down in such a manner as to reduce its carrying capacity--to a third of the former capacity, the testimony shows (Tr. 43); a series of acts in which each of the three defendants participated at one time or another and which the court found to have been done with malice and for the purpose of injuring plaintiff.

Factually, such finding was backed up by the court's view of the property,

when he must have observed the facilities Mrs. Dinsdale had for seeing work being done along the boundary line from her house; the testimony that on May 22nd, 1949, (Tr. 39 to 41) Darrell Dinsdale, a son working on his mother's place (Tr. 286) and, if employed by anyone, then employed by her, bored holes in several trees and put salt in them to kill them; that on June 2nd, (Tr. 41) Mrs. Dinsdale and Darrell worked together putting the fence in place in its new location, Darrell shoving it back, and Mrs. Dinsdale shovelling dirt into the postholes; that between June 2nd and 22nd, (Tr. 42) "they" kept moving the fence, cutting away the dirt, throwing it back on their property, had a bulldozer there and went as close to the trees as "she"

could, while "he"—whether Chester or Darrell not specified,—was digging with a shovel, cutting the tree roots, and slicing into the sides of the trees with his shovel.

This was not an attempt to move the fence line to the location the defendants claimed for it in their pleadings. It was a malicious attempt to annoy plaintiff and injure her property. There can be no doubt that all three defendants knew what went on, and joined in more than one of the actions. Such a course of conduct surely renders all of them liable for the consequences.

As to the Amount: No witness who testified as to the damage done, and the experts saw it personally, one of them

knowing the property prior to the commission of the acts complained of, fixed the damage at less than \$425.00, and there was no evidence offered to dispute the figures used by them in reaching that result.

Point No. 4: "No prejudicial error arose from the action of Judge Hendricks with respect to the affidavit of prejudice."

Trial of this action commenced, as we have seen, May 31st, 1950. Had Mrs. Dinsdale been present when the inspection of the premises, with examination of the Craven map, was had, the action would have ended that day since she, as well as the other defendants would have been bound by the stipulation then made. She thereafter refused to be so bound, and

the trial had to proceed. The matters had been argued, and the court evidently indicated some opinion upon the basis of the view, the plat, map or survey and whatever had been stipulated, because he directed findings to be made.

That seemed to be the end of the trial. But Mrs. Dinsdale refused to be bound by the stipulation of her counsel, he withdrew, new counsel was employed, a new setting obtained so that the cause might be finished in some manner. At that stage, when the court was prepared to go forward with whatever might be requisite to complete the trial, the affidavit of prejudice was interposed.

It contained no ground of disqualification established by constitution or

statute. The affidavit stated first that some 18 years before, while County Attorney, Judge Hendricks had "handled the prosecution against the defendant, Chester Dinsdale, on a battery charge, which controversy and said criminal charge arose out of a dispute over the same property herein questioned."

Constitutional grounds for disqualification of a Utah judge, as given in Article VIII, Section 13, prohibit a judge from sitting in a cause in which he may have been of counsel. Section 20-6-1, Utah Code Ann., 1943, provides that no judge may sit in a cause when he has been attorney or counsel for either party in the action or proceeding."

Both constitution and statute permit such disqualification to be waived by the parties, and going to trial is an implied consent.

5 A.L.R. 1604, (Note c.)

Nothing in this affidavit raised ground for such constitutional disqualification. Representation of either party to a cause, while a practitioner, does not disqualify a judge unless the cause before him is that in which he had so acted. He is not disqualified by having represented third parties in actions even though their claims were identical with those arising out of the pending suit; nor because the facts in a former case were similar, and the law involved the same as in that before him. "The matter in controversy must

be essentially the same as that in connection with which he was employed."

(30 A. Jur. 789) A county attorney does not represent a litigant, but the public, and the criminal trial of a charge of battery is not the same as a private controversy as to who owns certain land, even though the battery arose out of a quarrel over that land.

The affidavit further said: "That during the pendency of this action and prior to the time when the action had been tried on its merits, the judge had viewed the premises and stated in word and effect that the boundary line as claimed by the defendants will be the boundary line established."

Again the affidavit said too little.

Language such as that quoted requires giving its context before its weight towards showing bias or prejudice can be determined. A judge is not disqualified to sit in the trial of a criminal case because he may have expressed an opinion as to the guilt or innocence of an accused, nor to try an election contest because, on election day, he advised a challenged voter that he was entitled to vote. (30 Am. Jur. 786) A statement such as that ascribed to Judge Handricks, made privately, not as a part of his official duties, might not imply bias, it might be mere offhand opinion from what he saw on the visit.

The context which appellants omit, perhaps advisedly, is supplied elsewhere

by the record. This cause proceeded in May to the point where the judge directed findings to be made. He must have expressed his opinion as to the judgment to be entered. We submit that to so indicate at that stage and upon the record then made, did not establish with legal sufficiency his inability, by reason of bias or prejudice, to complete the case when the stipulation on which he acted was set aside, and the matter was to be determined upon additional evidence. Judges may and frequently do retry causes after a reversal of a former judgment, they frequently indicate in hearing preliminary matters what their opinion is on a pleaded state of facts; they hear motions for new trials, in causes they tried, motions to vacate

judgment which they have entered, and their former decisions do not constitute grounds for alleging bias or prejudice against them. (30 Am. Jur. 789-790).

The above approach illustrates our suggestions as to the logical decision of this matter. It is the law that, as to affidavits of prejudice:

"It is the duty of the party to make his objections before the trial is commenced if he is aware of the facts at that time, otherwise he will be deemed to have waived it, where it may be waived." (30 Am. Jur. 792).

The objections from the prosecution of the battery case was known long prior to May 31st. If the other objection did not arise out of the former proceedings at this trial, the affidavit is silent as to any reason, any excuse, why it was not presented

more seasonably. Had such an affidavit been presented at the commencement of this trial, another judge, upon it being referred to him, should have pronounced it legally insufficient because one ground alleged was not matter for disqualification, and the other ground was not sufficiently alleged so as to show the judge to have been biased or prejudiced.

Failure timely to present grounds for disqualification under the Federal Statute upon which, our Rules note, this particular rule is based, waives that right.

Eisler vs. U.S.	170 F.2nd, 273
Reflor vs. Lansing	
Drop Forge Co.	124 F.2nd, 440; cert den, 62 Sp. Ct, 794.

Tenn. Pub. Co. vs. Carpenter	100 F.2nd, 728; Cert., den., 59 Sp. Ct., 775
Scott vs. Beams	122 F.2nd, 77; cert. den., 62 Sp. Ct., 794- 5-9

Scott v. Beams is quite close to this case on the facts. Trial to determine heirship of one Jackson Barnett, wealthy Creek Indian, had been proceeding, the applicants for change of judge had put in evidence some 60 days prior, a question arose as to validity of a contract, between certain groups of contestants for a common front in the litigation, which applicants claimed to be contemptuous and against public policy; the affidavit said that in a private conversation between the judge and an assistant district attorney representing the United States, the

latter had told the judge that the attorney general thought the contract valid, and the judge had replied he did not think it contemptuous and probably not against public policy; other matter in the affidavit is indicated below. The Tenth Circuit Court said:

"The statement, that the Assistant United States District Attorney conferred with the judge in the absence of other attorneys in the case was not a fact showing bias or prejudice. And the statement that the contract was probably not against public policy was manifestly a mere extemporaneous or offhand expression of opinion without any purpose or intent to prejudice any issue in the case and was not a fact showing bias or prejudice. Otherwise, the affidavit abounded with general allegations of hostility of the court, abuse of witnesses and threats to have them incarcerated, and encouragement of their attorneys for litigants in their abuse of such witnesses; but these were conclusions and not statements of fact. For instance,

one litigant might regard a statement or several statements of the presiding judge as constituting hostility, abuse of witnesses and threats of incarceration, while another litigant might regard such a statement or statements otherwise. Except the statement of the court in respect to the contract not being contemptuous and as to it probably not being against public policy, the affidavit did not set out any statement of the court in form or substance. It requires no elucidation to make plain that the affidavit fell far short of stating facts and prejudice of the court and therefore it failed to comply with the requirements of the statute."

After noting that the United States statute requires such an affidavit to be filed at least ten days prior to the beginning of the term of court, or that good cause be shown for failure, the Court further said:

"If in the nature of things

the affidavit cannot be filed at least ten days before the beginning of the term of court it must be filed with reasonable promptitude after the disqualifying facts are known and it must show a proper excuse for delay. But the initial affidavit of disqualification was not filed until sixty days thereafter, that is to say about two months after the bias and prejudice of the court became apparent. That was too late."

Finally, the Court said:

"Still, we are not to be understood as approving all of the statements, comments and criticisms coming from the Court, or the excess of interference with the attorneys in their examination of the witnesses. But there is no showing whatever that the complaining parties failed to introduce all of the evidence which was available to them. And we think the court reached the right conclusion in the end. Another long and expensive trial, without the incidents of which complaint is made, would in all probability conclude with like findings of

fact and judgment. The ends of justice would therefore not be furthered with reasonable dispatch by ordering a retrial."

From another viewpoint: Assume no trial had been commenced, assume the affidavit to have been legally sufficient, yet error is not prejudicial unless it affects the decision in the cause, unless prejudice results,

Upon the main issue, we think our point that no evidence here establishes any rights on the part of Mrs. Dinsdale to any land west of the boundary fence should be sustained. Her own proof boomeranged into proof against her.

On the other issue of damages: Defendants did not deny that the acts alleged were done; Mrs. Dinsdale did not

deny participation in the things which her menfolk did under her eyes, menfolk living on her land, and subject to her direction as its owner. The sole question the court had to determine was what damage had been done, and an allowance of 60% of the lowest estimate made by a witness can scarcely be called prejudicial.

A final word: We would admit that the Statement of Facts we herein make, and our argument on this point are in excess of what might be required of us, were it not for one thing. It seems obvious that appellants have no hope of prevailing upon any other ground than that arising from the affidavit of prejudice. Our client, should we not prevail upon this, may possibly have to shoulder the burden

of a huge transcript,--a transcript of which the appellants, after bringing it here, have made no use save to proffer it to this court as a happy hunting ground in which the court, if so disposed, may beat up error which appellants have shunned the task of point out.

Point No. 5: "Appellants' Points Nos. II, III and VI are waived by want of proper argument and without merit."

As to appellants' point No. II, the only thing appearing by way of argument made is that invitation, to which we above referred, for this court to hunt out in the record something to support appellants' point. In their Point No. VI, the Court again is invited to search the transcript for the purpose of finding some ruling on

evidence by the lower court which was erroneous. Upon their Point No. III, Appellants go further only to the extent of citing to this court the pages where their motion for dismissal may be found.

The Rules (75 (p) 2), do not require in the Statement of Points detailed statements of the ruling of which appellants complain. But nothing in the Rules relaxes the necessary requirement that the writer of a brief be specific as to the errors in the record which he argues under that point.

Respondent, not having knowledge of what conduct of the trial court is claimed to be erroneous, nor as to what rulings in the admission of testimony

and evidence are complained of, cannot argue further.

As to Point No. III, we have directed this Court's attention to the situation as to the evidence when plaintiff rested and this motion was made, in the first paragraph under the sub-head, "Conflict of Titles" in our Statement of Facts.

Plaintiff came into court to sue trespassers. Her right to do so necessarily required proof of either possession of title. Possession with claim of title made her case in that respect.

63 C.J. 902 - 909 - 979 - 1009
Kunkel vs. Utah Lumber
Company 29 Utah 13
81 P. 897

Evidence introduced prior to plain-

tiff resting, as there detailed, adequately established such a possession, and that it was under claim of title.

Judgment in favor of plaintiff should be sustained.

Respectfully submitted

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