

2001

Wilford N. Hansen v. John J. Stewart : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

James D. Jenkins; James C. Jenkins and Associates; Attorney for Defendants/Respondents.

Bill Hansen; Christensen and Hansen; Attorney for Plaintiffs/Appellants.

Recommended Citation

Reply Brief, *Hansen v. Stewart*, No. 19383.00 (Utah Supreme Court, 2001).

https://digitalcommons.law.byu.edu/byu_sc2/1667

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

UTAH
DOCUMENT

K F U

45.9

S9

DOCKET NO 19383

IN THE SUPREME COURT OF THE STATE OF UTAH

WILFORD N. HANSEN and VADA J.
HANSEN, husband and wife,
Plaintiffs/Appellants,

Supreme Court No. 19393

vs.

JOHN J. STEWART and ALICE E.K.
STEWART, husband and wife,
Defendants/Respondents

REPLY BRIEF OF APPELLANTS, WILFORD N. HANSEN and VADA J. HANSEN

Appeal from the Judgment and Decision of the
FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH
the Honorable Omer J. Call, presiding

BILL HANSEN
CHRISTENSEN & HANSEN
201 East 100 North
P.O. Box 67
Payson, Utah 84651-0067
Telephone: (801) 465-9288

Attorney for Plaintiffs/Appellants

JAMES C. JENKINS
JAMES C. JENKINS & ASSOCIATES
67 East 100 North
Logan, Utah 84321
Telephone: (801) 752-4107

Attorney for Defendants/Respondents

FILED

APR 25 1984

IN THE SUPREME COURT OF THE STATE OF UTAH

WILFORD N. HANSEN and VADA J.
HANSEN, husband and wife,
Plaintiffs/Appellants,

Supreme Court No. 19393

vs.

JOHN J. STEWART and ALICE E.K.
STEWART, husband and wife,
Defendants/Respondents

REPLY BRIEF OF APPELLANTS, WILFORD N. HANSEN and VADA J. HANSEN

Appeal from the Judgment and Decision of the
FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH
the Honorable Omer J. Call, presiding

BILL HANSEN
CHRISTENSEN & HANSEN
201 East 100 North
P.O. Box 67
Payson, Utah 84651-0067
Telephone: (801) 465-9288

Attorney for Plaintiffs/Appellants

JAMES C. JENKINS
JAMES C. JENKINS & ASSOCIATES
67 East 100 North
Logan, Utah 84321
Telephone: (801) 752-4107

Attorney for Defendants/Respondents

TABLE OF CONTENTS

NATURE OF THE CASE.....	p 3
DISPOSITION IN LOWER COURT.....	p 4
RELIEF SOUGHT ON APPEAL.....	p 4
SUMMARY OF FACTS.....	p 4
ARGUMENTS.....	p 5
ARGUMENT 1 WHAT EVIDENCE IS NECESSARY AND HOW IT IS TO BE USED TO ESTABLISH AN OBLITERATED OR LOST CORNER ARE MATTERS OF LAW	p 12
ARGUMENT 2 THE STANDARD FOR BURDEN OF PROOF TO ESTABLISH AN OBLITERATED CORNER IS "BEYOND A REASONABLE DOUBT".....	p 17
ARGUMENT 3 THIS MATTER OF LAW SHOULD NOT HAVE BEEN SUBMITTED TO A JURY.....	p 20
ARGUMENT 4 SUPREME COURT MAY REVERSE THE JUDGMENT AND DECISION OF THE LOWER COURT.....	p 21
ARGUMENT 5 THE VERDICT IS AGAINST LAW AND RESULTS IN A SUBSTANTIAL MISCARRIAGE OF JUSTICE.....	p 23
COMMENTS IN REPLY TO RESPONDENTS' BRIEF.....	p 24
POINT 1 RE: INTENT OF THE DEED WRITERS.....	p 24
POINT 2 RE: APPELLANTS' NOTICE OF BOUNDARY DISPUTE.....	p 24
POINT 3 RE: ORIGIN OF PRESENT DISPUTE.....	p 25
POINT 4 RE: RESPONDENTS' CLAIM TO PROPERTY NOT DISPUTED.....	p 25
POINT 5 RE: RIGHT TO A JURY TRIAL.....	p 25
POINT 6 RE: ALLEGED QUESTIONS OF FACT.....	p 26
POINT 7 RE: WHO IS MOVING THE CORNER.....	p 26
POINT 8 RE: NO EVIDENCE TO SUPPORT JURY VERDICT AND EXISTENCE OF PREJUDICIAL ERROR.....	p 27
POINT 9 RE: RESPONDENTS' LIST OF "EVIDENCE".....	p 28
POINT 10 RE: RESPONDENTS' USE OF APPELLANTS' EVIDENCE.....	p 28
POINT 11 RE: BOTT'S MEASUREMENTS AS "EVIDENCE".....	p 29

POINT 12 RE: EDEN AKERS SUBDIVISION (EXHIBIT 24).....	p 29
POINT 13 RE: RESPONDENTS' USE OF SOUTH LINE OF 800 SOUTH STREET, CENTER LINE OF 700 SOUTH STREET, AND 'EVIDENCE OF 66-FOOT PLATTED ROAD AT 800 SOUTH STREET	p 30
POINT 14 RE: RESPONDENTS CLAIM THAT LOT 12 IS 1320 FEET LONG	p 30
POINT 15 RE: USE OF MARTINEAU PLAT (EXHIBIT 1).....	p 32
POINT 16 RE: EFFECT OF VERDICT, JUDGMENT AND DECISION ON OTHER LANDOWNERS.....	p 33
POINT 17 RE: APPELLANTS' FAILURE TO TIMELY OBJECT TO JURY INSTRUCTIONS.....	p 34
POINT 18 RE: RESPONDENTS' CONCLUSIONS.....	p 34
CONCLUSIONS.....	p 37
AUTHORITIES CITED	p 38
MAILING CERTIFICATE.....	p 40

IN THE SUPREME COURT OF THE STATE OF UTAH

WILFORD N. HANSEN and VADA J.
HANSEN, husband and wife,
Plaintiffs/Appellants,

REPLY BRIEF OF APPELLANTS
Supreme Court No. 19393

vs.

JOHN J. STEWART and ALICE E.K.
STEWART, husband and wife,
Defendants/Respondents

NATURE OF THE CASE

This action is to determine the rights of the parties to a strip of property bounded on the north by and east-west line 620 feet south of the north fence line of Respondents' pasture and bounded on the south by an existing fence, claimed by Respondents to be their southern boundary (see map attached to Appellants Brief). The action was originally termed a quiet title action. However, Appellants concede that the action might more properly be termed one in ejectment.

Respondents stipulated prior to trial that they have no claim to the disputed property through boundary by agreement or acquiescence, adverse possession, or prescriptive easement and have acquired no title thereto except under their deed from Albern Allen, a common grantor of Appellants' and Respondents' properties.

The single issue for trial was the original location of the Northeast Corner of Lot 12, Block 34, Providence Survey of Farms.

Respondents claimed shortly before trial that their surveyor, Randy Bott, by recent survey, had determined that the Northeast corner of Lot 12, Block 34 Providence Survey of Farms relied upon by Appellants and

others was 33 feet north of its original location and that Appellants were as a matter of law (see Exhibit 8) required to move their corner to a point 33 feet south which Respondents believed would entitle them to possession of the disputed ground.

DISPOSITION IN LOWER COURT

Respondents were granted a jury trial over Appellants' objections. The jury found in favor of Respondents. Appellants moved for judgment notwithstanding the verdict and for a new trial. Appellants' Motion was denied. Appellants now appeal both the Judgment of the District Court and the denial of their Motion.

RELIEF SOUGHT ON APPEAL

Appellants respectfully request that the Judgment entered in favor of Respondents be vacated, and that judgment be entered in favor of Appellants or that a new trial be granted.

SUMMARY OF FACTS

1. The facts relevant to a determination of the location of the Northeast Corner of Lot 12, Block 34 Providence Survey of Farms are not in dispute (see Appellants' Brief, Summary of Evidence, p. 2-7 and compare with Defendants' Brief, Statement of Facts, p. 2-3).

2. Respondents' measurements to known points on the ground do not differ significantly from those presented by Appellants.

3. The location points for the Southeast corner of Lot 12, Block 34 and the Northeast corner of Lot 17, Block 8 (see map attached to Appellants' Brief) are agreed upon and the distance between them is agreed to be 2733 feet.

4. The distances and descriptions set forth in the various deeds are not disputed.

5. The existence and location of various fences are accepted.

6. The existence and location of the present lines of possession are not disputed (except for a single Hansen/Stewart boundary).

7. The purpose of the various plats submitted was agreed upon.

8. All surveyors agree that there is no original monument at the location of the Northeast Corner of Lot 12, Block 34, Providence Survey of Farms.

9. All parties agree that, in spite of the representation of a 4-rod rod on some of the unofficial plats of the area, only a 33-foot gravel lane has ever been established on the ground.

10. All surveyors agree that all of the deeds in the area will require reformation in the event Respondents prevail (T.V.II, pp.38-39, p. 139).

11. All parties agree that the Northeast corner of Lot 12, Block 34, Providence Survey of Farms as relied upon by the deed writers and as actually possessed is at the location claimed by Appellants.

ARGUMENTS

Appellants submit the following arguments in reply to the points raised in Respondents' Brief.

The location of the Northeast Corner of Lot 12, Block 34, Providence Farm Survey was the single issue to be determined at trial.

If the above phrase means "the location of the Northeast Corner of Lot 12, Block 34, Providence Farm Survey as intended by the common grantor of the parties and as used as the beginning point in Appellants'

deeds" then the matter is easily resolved in favor of Appellants. Respondents do not dispute, and in fact their evidence supports the contention that the corner as possessed and relied on is and has always been at the location Appellants claim (T.V.II,p.128-129). Respondents merely claim that the corner was relied upon by mistake since it was first established.

If the above phrase means "the location of the Northeast Corner of Lot 12, Block 34, Providence Farm Survey as intended by the original surveyor" which being once established is a point on the earth which cannot be moved as a matter of law, the trial court should have determined whether the corner was

- (a) an existent corner
- (b) an obliterated corner
- (c) a lost corner.

Dorsey v. Ryan, Ill.App. 442 N.E.2d 689 (1982) citing the Bureau of Land Management's manual of Instructions for the Survey of the Public Lands of the United States:

(W)e think that the authorities differentiate between three types of corners, two of which may be relied upon to ascertain a lost corner. In the manual previously referred to, three different types of corners are noted and defined.

An existent corner is one whose position can be identified by verifying the evidence of the monument or its accessories, by reference to the description in the field notes, or located by an acceptable supplemental survey record, some physical evidence, or testimony.

San Juan County v. Ayer, 604 P.2d 1304 (Wash.App., 1980) citing the Manual of Instructions for the Survey of the Public Lands of the United States-1973, Sections 5-9 at p.130 (1973 Manual):

An obliterated corner is one at whose point there are no remaining traces of the monument or its accessories, but whose location has been perpetuated, or the point for which may be recovered beyond reasonable doubt by the acts and testimony of the interested landowners, competent surveyors, or other qualified local authorities, or witnesses, or by some acceptable record evidence.

A lost corner is a point of a survey whose position cannot be determined, beyond reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony that bears upon the original position, and whose location can be restored only be reference to one or more interdependent (i.e., nearby, adjacent) corners. Manual Section 5-20 at 133.

A proportionate measurement is one that gives equal relative weight to all parts of the line. The excess or deficiency between two existent corners is so distributed that the amount given to each interval bears the same proportion to the whole difference as the record length of the interval bears to the whole record distance. Manual Section 5-24 at 133.

(see also Dorsey v. Ryan, Ill.App. 442 N.E.2d 689 (1982) supra.)

All parties agree that there is no survey monument at the corner. The corner is therefore by definition either an obliterated corner or a lost corner (Manual of Surveying Instructions - 1973, p. 129 ff).

If the corner is obliterated then its location must have been perpetuated by "best evidence" beyond a reasonable doubt. Henrie v. Hyer, 70 P.2d 154, 156 (Utah 1937) quoting from the General Land Office pamphlet 1909 on Restoration of Lost or Obliterated Corners, etc. p.5:

An obliterated corner is one where no visible evidence remains of the work of the original surveyor in establishing it. Its location may, however, have been preserved beyond all question by acts of land owners, and by the memory of those who knew and recollect the true situs of the original monument. In such case it is not a lost corner.

Dorsey v. Ryan, (supra.)

The direction in (Irvin v. Rotramel, 68 Ill. 11, (1873)) to establish lost corners by reference to known government corners requires, at a minimum, reference to an obliterated corner which is one whose location may be recovered beyond a reasonable doubt by the testimony of landowners, witnesses, or acceptable record evidence.

Henrie v. Hyer, (supra.)

It is conceded, as it must be, that the original corners as established by the government surveyors, if they can be found, or the places where they were originally established, if that can be definitely determined, are conclusive on all persons owning or claiming to hold with reference to such survey and the monuments placed by the original surveyor without regard to whether they were correctly located or not. Surveyors, in making resurveys or in searching for or relocating or re-establishing lost or obliterated corners, may consider extrinsic and material evidence, as well as the field notes, if there is doubt or uncertainty in the field notes, for the purpose of determining the exact location of lost lines or corners of the original survey. Monuments control over courses and distances. Washington Rock Co. v. Young, 29 Utah, 108, 80 P. 382, 110 Am.St.Rep. 666.

Staff v. Bilder, 415 P.2d 650 (Wash 1966) citing Stewart v. Hoffman, 64 Wash.2d 37, 390 P.2d 553 (1964) and 11 C.J.S. Boundaries Section 49c (1938):

Courts should ascertain and carry out the intention of the original platters. In case of discrepancy, however, between lines actually marked or surveyed on the ground and lines called for by plats, maps or field notes, the lines marked by survey on the ground prevail save for intervening equities arising by contract, conveyance, estoppel, prescription, or the application of well-defined legal and equitable concepts.

(see also Clark, Surveying and Boundaries Section 258 (3rd ed. 1959)).

Washington Nickel Mining & Alloys, Inc. v. Martin, 534 P.2d 59 (Wash. App. 1975) citing Inmon v. Pearson, 47 Wash. 402, 92 P. 279:

But it does not follow that, if there be evidence of a corner which has been destroyed or obliterated by the lapse of time, a court will direct the establishment of a corner under the rule stated, or any other rule, for the law establishes an obliterated corner where the surveyor actually located it, and not where it ought to be located by a correct survey.

In the event a survey using the "obliterated corner" as the point of beginning fails to resolve the dispute between the parties, then the parties may seek a determination of the location of the disputed boundary line in a future action.

If the corner is not located beyond a reasonable doubt, it is a lost corner and must be reestablished by proportionate measurement (Manual of Surveying Instructions-1973, p. 133, *supra.*) Henrie v. Hyer, *supra.*

A lost corner is one whose position cannot be determined beyond reasonable doubt, either from original marks or reliable external evidence.

Resort should be had, first, to the monuments placed at the various corners when the original government survey of the land was made, provided they are still in existence and can be identified, or can be relocated by the aid of any attainable data. But if this cannot be done and a survey becomes necessary, this must be made from the east, and not from the west, boundary line of the township (Mason v. Braught, 33 S.D. 559, 146 N.W. 687, 688.)

The Utah Supreme Court in Cornia v. Putnam, 489 P.2d 1001 (Utah 1971). stated:

In the relocation or re-establishment of government corners, there is a distinction drawn between an obliterated corner and a lost corner; in the former, the investigation is directed toward the determination of its original location; while in the latter, the corner is relocated by a new survey...

A lost corner is one which cannot be replaced by reference to any existing data or sources of information, although it is not necessary that evidence of its physical location may be seen or that one who has seen the marked corner be produced. A corner will not be regarded as lost where it may be located by field notes referring to discoverable natural objects (Chandler v. Hibberd, 165 Cal.App.2d 39, 332 P.2d 133, 141 (1958)).

In Reid v. Dunn, 201 Cal.App.2d 612, 20 Cal.Rptr. 273, 275 (1962) the Court observed that if there be some acceptable evidence of the original location, that position will be employed in preference to the rule that would be applied to a lost corner. The Court stated:

"(I)f monuments are obliterated and undiscoverable, corners should be re-established wherever possible in accordance with natural objects described in the field notes of the original survey. And the proportional method must not be resorted to unless the line cannot be retraced and its corners relocated by reference to natural objects of the field notes and all other prescribed methods fail."

(see also Washington Nickel Mining & Alloys, Inc. v. Marin, supra citing Martin v. Neeley, 55 Wash.2d 219, 222-23, 347 P.2d 529, 530 (1959).)

Dorsey v. Ryan, supra.

All lost section and quarter-section corners on the township boundary lines will be restored by single proportionate measurement between the nearest identified corners on opposite sides of the missing corner, north and south on a meridional line or east and west on a latitudinal line.

United States v. Citko, 517 F.Supp. 233 (1981)

For a corner to be lost it "must be so completely lost that (it) cannot be replaced by reference to any existing data or other sources of information." (cites omitted.) The decision that a corner is lost should not be made until every means has been exercised that might aid in identifying its true original position. (cite omitted). Even though the physical evidence of a corner may have entirely disappeared, a corner cannot be regarded as lost if its position can be recovered through the testimony

of one or more witnesses who have a dependable knowledge of the original location.

Appellants presented evidence at trial to establish beyond a reasonable doubt that the Northeast Corner of Lot 12, Block 34 Providence Farm Survey is located at the point frequently referred to as the "Larsen Fence Corner". This they accomplished by the unrefuted evidence regarding old fences erected along the lines of possession of various lot owners, record titles, measurements between known points, unofficial plats, an aerial photo, and the testimony of experts in survey law, according to the procedures set forth in the Manual of Surveying Instructions - 1973, supra.

Respondents did not refute Appellants' evidence, but merely added some measurements derived from the scaled dimensions of the Martineau Plat. Respondents then disputed the legal significance and legal interpretation of the evidence. Respondents claim that their evidence is legally sufficient to establish the corner as they claim in spite of not following the procedures set forth in the Manual of Surveying Instructions - 1973. Appellants claim that Respondents present no evidence which either legally or sufficiently supports their position, even if viewed in the light most favorable to their case. Respondents' interpretation of their own evidence fails to establish anything except some non-probative distances on the ground which do not conclusively establish their claim or refute Appellants' claim beyond a reasonable doubt.

When the facts of this case are interpreted according to survey law, reasonable minds cannot differ as to the outcome of this case. There is no factual dispute to be determined by a jury.

Even if the Appellants' evidence, as viewed in the light most favorable to Respondents' case, were ruled not to establish the corner beyond a reasonable doubt and the corner were thus ruled to be lost rather than obliterated, Appellants should still prevail because their surveyor has already gone through the procedures for restoring a lost corner as set forth in the Manual of Surveying Instructions - 1973 p. 133, ie. through single proportionate measurement. Respondents have not even attempted such a restoration.

Appellants now discuss general Arguments and will later reply to Respondents' Brief point by point.

Argument 1. What evidence is necessary and how it is to be used to establish the position of a disputed corner beyond a reasonable doubt is a matter of law, established over many years, after much practical experience, and documented in numerous cases (see Henrie v. Hyer, supra, Cornia v. Putnam, supra, San Juan v. Ayer, supra, Dorsey v. Ryan, supra, United States v. Citko, supra, Palmer v. Fitzpatrick, infra, Hook v. Horner, infra, etc.) The cases refer to the Manual of Surveying Instructions, based in part on 43 U.S.C. Sections 751, 752, and 753, and published by the U.S. Department of the Interior, and use it as a primary source of lawful survey procedure. Chapter V entitled "Restoration of Lost or Obliterated Corners" and the pamphlets based thereon are especially applicable to the present case. Utah, Washington, Idaho, Illinois and Montana all, as a matter of law, require surveyors to follow the procedures outlined in the Manual.

Barbizon of Utah, Inc. v. General Oil Company, 471 P.2d 148 (Utah 1970) citing Vaught v. McClymond 144 P.2d 612 (Mont 1945) and 43 U.S.C.A. Sections 751, 752, and 753:

When lands are granted according to an official plat of a survey, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out on the fact of the deed or grant itself...

Congress has provided a system for the survey of public lands, and the boundaries and limits of the several sections and subdivisions thereof, including quarter sections, must be ascertained in conformity with the principles laid down in the federal statutes...

To find the common corner or quarter sections or the legal center of a section of land, straight lines must be run from the quarter section corners on the boundary of the section to the opposite quarter corners, the point of intersection constituting the legal center, and the boundary line between two quarters cannot be legally established by measuring along one side of the section 160 rods,...

But the government surveys are, as a matter of law, the best evidence; and, if the boundaries of land are clearly established thereby, other evidence is superfluous and may be excluded; the best evidence is the corners actually fixed upon the ground by the government surveyor, in default of which the field notes and plats come next, unless satisfactory evidence is produced that the corner was actually located upon the ground at a point different from that stated in the field notes...

Any section corner or quarter corner that is identified as having been established by an official survey of the United States government must stand as being correctly located, however plain it may appear that the location is wrong; because the government surveys cannot be changed in an action at law between individuals."

Vaught v. McClymond 144 P.2d 612 (Mont 1945) citing 43 U.S.C.A. Sections 751, 752 and various cases)

In ascertaining the lines of land or in re-establishing the lines of a survey, the footsteps of the original surveyor, so far as discoverable on the ground, should be followed and it is immaterial if the lines actually run by the original surveyor are incorrect. Ayers v. Watson, 137 U.S. 584, 11 S.Ct. 201, 34 L.Ed. 803; Galt v. Willingham, 11 F.2d 757.

In surveying a tract of land according to a former plat or survey, the surveyor's only duty is to relocate, upon the best evidence obtainable, the courses and lines at the same place where originally located by the first surveyor on the ground. In making the resurvey, he has the right to use the field notes of the original survey. The object of a resurvey is to furnish proof of the location of the lost lines or monuments, not to dispute the correctness of or to control the original survey. The original survey in all cases must, whenever possible, be retraced, since it cannot be disregarded or needlessly altered after property rights have been acquired in reliance upon it. On a resurvey to establish lost boundaries, if the original corners can be found, the places where they were originally established are conclusive without regard to whether they were in fact correctly located. 8 Am.Jur. Boundaries, Section 102, p. 819.

The Idaho Supreme Court in adopting the rule that the Manual of Instructions for the Survey of the Public Lands of the United States-1973 is law (Hook v. Horner, 517 P.2d 554 (Idaho 1973) and Palmer v. Fitzpatrick, 557 P.2d 203 (Idaho 1976) further stated that any survey not based thereon is not substantive evidence. Hook v. Horner, 517 P.2d 554, 558 (Idaho 1973) held:

(W)e agree with respondents' contention that without the field notes of the Ashley survey, or other evidence indicating that the survey was conducted in accordance with the United States Manual of Surveying Instructions...it cannot be admitted as substantive evidence...

Even if the Ashley survey had been admitted for illustrative purposes, it would not have provided a legal basis upon which Booth could base his survey, since it would not have been substantive evidence..."

In the present case, Respondents' experts do not base their testimony or methods on the Manual of Surveying Instructions. Respondents' Brief has completely ignored the importance of the law in this matter, and has not specifically cited any fact in dispute, preferring to establish the corner on the basis of alleged stipulations, waivers, and the determination of law by a jury.

In Cornia v. Putnam, 489 P.2d 1001 (Utah 1971), the Utah Supreme Court ruled as illegal a surveying technique used by Mr. Irwin Moser who, interestingly was Respondents' surveyor's instructor (see T.V.II,p.103.1.16-18). Moser's theory was stated as follows:

(I)f you have one or more in-place original monuments located anywhere in the township and you have the angles and distances from the original field notes, the exact location of a disputed line can be determined, even though it is necessary to cross over lost or obliterated corners."

In the instant case, Bott (Moser's student), used a similar technique to arrive at what Respondents claim is the Northeast corner of Lot 12, Block 34. Bott began at the undisputed Southeast corner of Lot 12, Block 34 and, using the scaled distances he assumed and derived from the Martineau plat, measured up to what he considered the Northeast corner of Lot 12. Such is not the procedure for reestablishing an obliterated corner or relocating a lost corner as set forth in the Manual. Bott admitted he was only "somewhat familiar" with the history of platting of properties in Cache County (T.V.II,p.140,1.14-17) and based his knowledge of the law on Black's Law Dictionary, (T.V.II

p.106,1.7-13). It is interesting to note that Bott erred by 33 feet in this case just as his instructor, Moser, erred by 33 feet in Cornia v. Putnam.

The reason for Bott's survey being against survey law and not merely a "difference of opinion" as Respondents claim in their Brief at page 17 is easily seen by applying Bott's method of scaling and measurement from a different beginning point. By law, the recovered corner should be locatable from any direction (beyond a reasonable doubt). As the basis for re-establishing a disputed corner, there is no justification for measuring in a single line from one known corner, any more than for measuring in a single line either east-west or north south from any of the other known corners. Thus, there is no basis for Bott's preferring his measurement from the Southeast Corner of Lot 12 over a measurement using his method from the Northeast Corner of Block 8. However, when Bott's method of scaling and measuring is used beginning at the Northeast Corner of Lot 17, Block 8, neither the Southeast Corner of Lot 1, Block 8 nor the Northeast Corner of Lot 12, Block 34 can be recovered. The Southeast Corner of Lot 1, Block 8 is just as much in doubt as the Northeast Corner of Lot 12, Block 34, using Bott's scale-and-measure method. Therefore, even though the Southeast corner of Lot 1, Block 8 is just across the gravel lane from the Northeast Corner of Lot 12, Block 34, the former cannot be used to establish the latter. Neither point is useful in support of Bott's contentions that there was ever a 66-foot road established at the gravel lane. Likewise 700 South Street, used as a point of reference by Bott, is a recent addition to Block 8 and was not even anticipated by the Martineau Survey

or any plats based thereon. It is therefore not evidence in support of the original survey and cannot be used to locate the Northeast Corner of Lot 12. Appellants' surveyor used the Northeast corner of Lot 17, Block 8 (an undisputed, known corner) as a reference point together with the Southeast Corner of Lot 12, Block 34 (also known and undisputed) to determine the location of the Northeast Corner of Lot 12, Block 34.

The plats introduced by both Appellants and Respondents at trial were admitted only for the purpose of showing relative sizes and shapes of properties in the area, not to determine actual dimensions as they exist on the ground, not to determine that a 66-foot road was ever established by an original survey, not to determine the location of the disputed corner. They are not official maps or plats of the original survey within the meaning of Section 57-5-3, Utah Code Annotated (1953 as amended) (T.V.II,p.64,1.18-p.65,1.1, also T.V.III,p.43,1.7-10) nor are they probative evidence according to the Manual in light of the evidence that exists on the ground, including lines of possession, and record titles. In short, they are just drawings.

Thus the Bott survey is not probative to determine the location of an obliterated corner.

His method is not equivalent to using proportional measurement to determine a lost corner either, and therefore has no substantive value in determining the disputed corner (see Cornia v. Putnam, supra. citing Reid v. Dunn, 201 Cal.App.2d 612, 20 Cal.Rptr. 273, 277-278 (1962)).

Argument 2. The Northeast Corner of Lot 12, Block 34 is either an obliterated or a lost corner. Any party desiring to establish it at a particular point has the burden of proving the location beyond a

reasonable doubt. In the event that no one can establish the corner beyond a reasonable doubt, it must be relocated by proportionate measurement according to the Manual of Instructions for the Survey of the Public Lands of the United States-1973, supra. It is not acceptable, for example, to use the single scale-and-measure method used in the Bott survey. The Washington Supreme Court discusses the development of Beyond A Reasonable Doubt as the standard of proof in the case of a disputed corner in San Juan County v. Ayer, 604 P.2d 1304 (Wash.App., 1980) citing the Manual of Instructions for the Survey of the Public Lands of the United States-1973, Sections 5-9 at p.130 (1973 Manual):

Both parties rely upon the Manual and are in agreement that Washington courts and surveyors are required to follow the instructions of the Manual. King v. Carmichael, 45 Wash. 127, 87 P. 1120 (1906).

The (Washington) court first considered the dichotomy between a lost, as opposed to an obliterated, corner in King v. Carmichael, 45 Wash. 127, 87 P. 1120 (1906) at 1121, and upheld the trial court's determination that the corner was lost without suggesting what the burden of proof must be; the court indicated that the case "presented a question of fact only" and that "we are not inclined to disturb the findings of the trial court." The lost corner vis-a-vis obliterated corner issue appeared again in Immon v. Pearson, 47 Wash. 402, 92 P. 279 (1907), and then again in Hale v. Ball, 70 Wash. 435, 441, 126 P. 942, 944 (1912), where the (Washington) court summarized the applicable rules:

"We conceive that there is a distinction between a lost corner and a corner the markings of which have been obliterated. If no monument or marking of a quarter corner can be found or the testimony of its location be overcome by better evidence, a court will decree the establishment of a corner under the rule prevailing in the land department of the United States; that is, at a point equidistant from the section corners. But it does not follow that, if there be evidence of a corner which has been

destroyed or obliterated by the lapse of time, a court will direct the establishment of a corner under the rule stated, or any other rule, for the law establishes an obliterated corner where the surveyor actually located it, and not where it ought to be located by a correct survey."

The standard of proof then evolved in Washington from "a preponderance of the evidence," to "clear, cogent and convincing evidence," and then to the "beyond a reasonable doubt" standard clearly set forth in the language of the Manual.

The rationale for requiring proof "beyond a reasonable doubt" has been well stated in Greer v. Squire, 9 Wash.359, 364, 37 P. 545 (1894). There are strong policy considerations favoring the retention of a corner once marked on the ground by the government surveyor even though that is a point which other surveyors might upon resurveys agree is in error. The directive of the Manual reflects experiences accumulated over the years by those who surveyed the continental United States and anticipated the problems of ascertaining obliterated corners. Their considered judgment that the establishment of an "obliterated corner" should require the highest degree of proof reflects an acknowledgement that error was bound to be made by surveyors subject to human frailties. Thus the GLO prefers the reestablishment of a lost corner by the proportionate method rather than reliance upon evidence of its original location that is open to doubt. To lend certainty to an area that might otherwise lead to "great confusion and litigation," the Manual requires proof beyond a reasonable doubt of the original location of the point.

We hold that a party seeking to recover the location of an obliterated surveying point must sustain the burden of proving the location of that point beyond a reasonable doubt.

The policy basis set forth above is compatible with that set forth in Cragin v. Powell, 128 U.S. 691, 9 S.Ct. 203, 32 L.Ed. 566 (1888) cited in Greer v. Squire, 9 Wash.359, 364, 37 P. 545 (1894) as follows:

The power to make and correct surveys of the public land belongs to the political department of the government; "and the reason of this rule," says the court, quoting...Haydel v. Dufresne, 17 How.23, (30, 15 L.Ed. 115 (1854)) "is that great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done, and divisions more equitably made, than the department of public lands could do."

Thus (the Washington) court early declared that "the true corner is where the United States Surveyor established it, notwithstanding its location may not be such as is designated in the plat or field notes.

The Washington court in San Juan v. Ayer, supra. citing State v. Green, 91 Wash.2d 431, 588 P.2d 1370 (1979), reconsideration granted, 92 Wash.2d 1103 (1979) discussed the standard of appellate review and concluded by holding that:

Despite the seemingly higher standard adopted by the court in "Sego" for appellate review of clear, cogent and convincing evidence, the standard for review of beyond a reasonable doubt evidence remains the "substantial evidence test."

The Utah Supreme Court has since 1937 (see Henrie v. Hyer, 70 P.2d 154, 156 (Utah 1937)) recognized that proof beyond a reasonable doubt is required to establish an obliterated corner.

It was prejudicial error in this case not to require the Respondents to prove the location of the obliterated corner beyond a reasonable doubt.

Argument 3. It was also prejudicial error to submit this case to a jury. There are no material questions of fact which need to be resolved to determine the location of the disputed corner (in spite of the general allegations of Respondents' counsel in their Brief). Appellants and Respondents essentially agree on the facts. Bott's measurements to

known points are not in dispute. In fact, all survey measurements presented were in agreement to within a few feet. Other pertinent facts such as the nature and location of old fences, etc., are not in dispute (see Summary of Facts above). What is in dispute are the legal implications of the facts and Bott's application of the facts to unknown points. The application of the facts to determine a point is a matter of carefully developed law (see Manual of Surveying Instructions, supra.) Thus Appellants contest the Respondents' application of law to the facts of this case, not the facts themselves. (See also Sections 78-21-1 and 3 Utah Code Annotated (1953 as amended), Holland v. Wilson, 327 P.2d 250, 252 (Utah 1958), and Appellants' Brief pp. 21-22.)

Argument 4. The Supreme Court may reverse the verdict in this matter or grant a new trial on the basis of the verdict not being supported by substantial evidence and because substantial, prejudicial errors were committed at trial, including:

- a. Submitting this matter of law to a jury.
- b. Failure to require Respondents to prove their case beyond a reasonable doubt.
- c. Failing to properly instruct the jury (see Appellants' Brief, pp.23-26)
- d. Failing to grant judgment notwithstanding the verdict or in the alternative a new trial.

State v. Day, 572 P.2d 703, 705 (Utah 1977),

This Court will notice the failure to give an instruction even though it was not requested when the failure to give it would plainly result in a miscarriage of justice.

State v. Evans, No. 18482 Utah State Bulletin, August 15, 1983,

We recognize that, had the instructions which were given been erroneous to such an extent that they prevented a fair determination of the issues or resulted in a miscarriage of justice, we are at liberty to notice the error irrespective of counsel's failure to preserve it." Citations omitted.

Anderson v. Toone, No. 17924 Utah State Bulletin, October 15, 1983

citing Nelson v. Trujillo, 657 P.2d 730 (Utah 1982),

The trial court has wide discretion to grant or deny a motion for a new trial and we do not reverse a denial unless the 'evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust.' (citations omitted).

Beehive Medical Electronics, Inc. v. Square D. Company, No. 17546 Utah

State Bulletin, September 15, 1983 citing Williams v. Lloyd, 16 Utah 2d 427, 403 P.2d 166, 167 (1965),

This Court has occasionally exercised its discretion in the absence of proper objections and reviewed instructions given or not given. But we have said that this should be done 'only under unusual circumstances where the interests of justice urgently so demand.'

Ute-Cal Land Development Corp. v. Sather, 605 P.2d 1240 (Utah 1980)

citing Nelson v. Watts, 563 P.2d 798, 799 (Utah 1977),

In viewing this evidence, this Court will upset the jury verdict only upon a showing by the appealing party that the evidence so clearly preponderates in his favor reasonable people could not differ on the outcome of the case. Also, in determining if there was sufficient evidence to support the jury's verdict this Court will consider those facts which most strongly support the verdict and where there is any conflict in the evidence this Court will consider as true that evidence which supports the verdict.

State v. Pierce, 655 p.2d 677 (Utah 1982),

This can be done (entertain an issue for the first time on appeal) in rare cases under Rule 4 of the Utah Rules of Evidence, or under such exceptions as this Court considers of momentous concern in protecting constitutional rights previously waived. (citations omitted.)

State v. Lesley, No. 18038 Utah State Bulletin, October 1, 1983, citing

Rule 4 of the Utah Rules of Evidence,

This Court has discretion to review the allegedly erroneous admission of evidence when the grounds of objection are not clearly or correctly stated.

Argument 5. To permit the judgment and decision of the District Court to stand in light of substantial, prejudicial error, denies Appellants equal protection of the law, guaranteed pursuant to Article I, Section 2 of the Constitution of Utah, and Amendment XIV, Section 1, of the Constitution of the United States. It also violates Appellants' right to due process provided in Article I, Section 7 of the Constitution of Utah and Amendment XIV, Section 1 of the Constitution of the United States.

Furthermore, the decision impacts on others, not parties to this action so as to deny them equal protection of the law, guaranteed pursuant to Article I, Section 2 of the Constitution of Utah, and Amendment XIV, Section 1, of the Constitution of the United States and violates their right to due process provided in Article I, Section 7 of the Constitution of Utah and Amendment XIV, Section 1 of the Constitution of the United States.

To deprive Appellants of the right to rely on a survey corners set by law beyond a reasonable doubt, is to selectively apply the law in violation of Appellants' right to equal protection. To establish an

obliterated or lost corner except as provided by law violates Appellants' right to due process.

To permit a judgment or decision to impact on the property rights of others not parties to the dispute to unsettle their property descriptions, denies them equal protection and due process as well.

Appellants now reply to the Respondents' Brief point by point.

Point 1. (see Respondents' Brief (RB) p. 1, Nature of the Case)

Whether Respondents or Appellants have title to the disputed property depends on the location of the beginning points in their deeds as intended by the deed writers, not merely as originally surveyed.

Contrary to Respondents' assertion that "the parties waived all other claims," Appellants never stipulated to refrain from reforming their deeds, to give Respondents more land than their pleadings called for, or to give up any other rights of possession in the event an "original" Northeast Corner of Lot 12 were located at some point other than the one presently relied upon.

Point 2. (see RB p.2 paragraph 1, Statement of Facts)

With regard to Respondents' assertion that Appellants began claiming land north of a fence existing in 1969 shortly after Appellants acquired their land; there was no fence on roughly the west half of the property (T.V.I, p.35,1.11-13, T.V.II, p.76, 1.2-9 see Appellants' Brief p. 28, note 7). Respondents extended the partial angular fence to the west boundary line in about 1977. It has been taken down, re-angled and disputed ever since.

In any event, such fact, even if true, is not supportive of the Respondents' claim for the location of the Northeast Corner of Lot 12, Block 34 as originally surveyed.

Point 3. (see RB p. 2 paragraph 2, Statement of Facts)

Respondents' statement, "It was discovered that the original northeast corner of Lot 12, Block 34...was 33 feet south of where Plaintiffs claim." is false. No evidence was presented at trial in support of such a statement nor would such evidence been probative to locate the disputed corner. Respondents' statement should alert the Court that Respondents, not Appellants, devised the idea to move the corner, which even they believed, until shortly before trial, was at the location claimed by Appellants.

Point 4. (see RB p. 2 last sentence, Statement of Facts)

Regarding Respondents' claim that they are now entitled to land south of the existing fence (land never before in dispute); Respondents acquire no title to any property by virtue of this action nor are they entitled to a remedy which they have not pled and for which Appellants have had no notice. (see Washington Nickel Mining & Alloys, Inc. v. Martin, supra.)

Point 5. (see RB p. 3 paragraph 2, Statement of Facts)

Holland v. Wilson, 327 P.2d 250, 252 (Utah 1958) set forth the standard that a jury trial was appropriate only to decide questions of fact. Even if the District Court did not understand prior to trial that there were no factual issues in this matter requiring jury resolution, the Court should still have granted Appellants' Motion for Judgment Notwithstanding the Verdict or for a New Trial. To permit a jury to

decide the law is to require of them the expertise of a judge and is itself contrary to law. In short, even though the jury did its best to determine "a preponderance of the evidence", its verdict could not have been anything but arbitrary.

Appellants respectfully submit that the verdict in this matter, if allowed to stand, establishes "stipulation", "jury determination of law", and the standard of "preponderance of the illusory evidence" as legal methods for relocating obliterated or lost corners.

Point 6. (see RB pp.3-5, Right to Jury Trial)

Respondents' assertion that they are entitled to a jury trial is only valid to the extent that there are factual questions to be decided. Appellants objected to a trial by jury because the issues to be resolved were legal, and because there were no essential facts in dispute.

In spite of Respondents' claims that the location of the disputed corner was a question of fact, the definition and location of the Northeast Corner of Lot 12, Block 34 can be matters both of law and fact. But the facts material to the location of the corner are not in dispute (see Argument 1 above). There is no substantial, probative, or lawful evidence which supports the Respondents' position and it was prejudicial error to refer the matter to a jury for determination.

Point 7. (see RB p.5, Right to Jury Trial)

Respondents' statement, "At trial Plaintiffs contended that the original Northeast Corner had moved and changed from where it had been placed," is false. Appellants made no such statement. Rather, Appellants maintained that the Northeast Corner of Lot 12, Block 34 is

and always has been at what is presently called the "Larsen Fence Corner."

Respondents contend that the original northeast corner..."was located where the plats, surveys, deeds and other records indicated it would be, i.e. 1320 feet directly north of the southeast corner of Lot 12, Block 34..." The deeds, plats, lawful surveys and other records indicate plainly on their face that

a. the northeast corner of Lot 12, Block 34 is approximately 1350 feet north of the southeast corner of Lot 12, Block 34.

b. the southeast corner of Lot 1, Block 8 is approximately 1350 south of the northeast corner of Lot 17, Block 8

c. there is a 33-foot road separating them.

d. Respondents' assumptions regarding a "standard" 1320 foot Block, the existence of a 66-foot road, and the location of the south line and southeast corner of Block 8 are completely unfounded.

(Respondents actually derive their measurements from the scale of a plat, as previously discussed, in spite of all other deeds and other records, and not from deeds, official plats or official surveys as they claim.)

Point 8. (see RB p.5ff, ARGUMENTS II and III)

In spite of Respondents' general assertions, there is no substantial evidence to support the jury's verdict or the District Court's decision, and there has been substantial and prejudicial error committed at trial. (See Arguments above).

Point 9. (see RB p.8, paragraph 1, Evidence in Support of Jury Verdict)

Respondents' list of "evidence" in support of the jury's verdict contains nothing material or substantial that supports their claim for locating the disputed corner in a manner prescribed by law as set forth in the Manual of Surveying Instructions - 1973. (see Arguments above).

Point 10. (see RB p.8, last paragraph, Evidence in Support of Jury Verdict)

Appellants' do not object to Respondents' right to use evidence submitted by Appellants at trial. Appellants do object however to the unlawful interpretation of the evidence beyond the purposes for which it was admitted, specifically in regard to the Martineau Plat, Exhibit #1. It is not proper and lawful survey practice to conclude from a scaled measurement of an unofficial plat the exact measurements of a Lot, especially in light of more conclusive evidence. The Martineau Plat is a valuable and useful document. But there was no evidence that it was established on the ground or approved as an official plat. No field notes of a corresponding survey were found, and it gave no calls for the dimensions of Lot 12. It was drawn to scale, thus showing approximate anticipated dimensions and relationships between various properties.

Respondents' confuse the admissibility of evidence with its probative value as established by law, e.g. that evidence of long-standing lines of possession on the ground which conform with record titles take precedence over tax plats and measurements in determining the foot-steps of the original surveyor. (see Diehl v.

Zanger, 39 Mich 601 (1878) and also Brown, Evidence and Procedures for Boundary Location, cited in Appellants' Brief at pp.17-19).

Though Respondents claim the priority and relative weight of evidence is the sole province of the jury, the cases cited refer to fact questions and not issues of law.

11 C.J.S. Boundaries, Section 118, p. 728.

The relative weight to be given evidence of disputed boundaries such as natural monuments, artificial marks, courses and distances, and the like, is ordinarily a question of law.

Point 11. (see RB pp.8-9, Evidence in Support of Jury Verdict)

With regard to Respondents' claimed measurements, Appellants do not dispute the ability of Bott to measure distances in the field. Appellants do, however, dispute the purported legal conclusions of his survey.

Respondents have the burden of establishing the disputed corner beyond a reasonable doubt in spite of what Appellants prove. Respondents' claims cannot be established by default.

Point 12. (see RB pp. 9-13, Evidence in Support of Jury Verdict)

The Eden Akers subdivision (Exhibit 24) referred to as Respondents' evidence is relatively recent (1961), is not in Lot 12, and its dimensions are irrelevant to a determination of the disputed corner.

None of the other plats submitted by Respondents purport to be surveys or official survey plats and are merely to show general relationships between the properties.

Point 13. (see RB p.10, line 9ff, Evidence in Support of Jury Verdict)

Respondents claim to know the location of the north side of 800 South Street. However, the position of the north side of 800 South Street is unknown, given the 66-foot right-of-way asserted by the Bott survey. The road is actually only 33 feet wide. Thus Respondents cannot use the position of the north side of 800 South Street to determine the south side of the road. If the original surveyor actually intended and established a 33-foot wide road, as presently exists, and not the 66-foot road Respondents claim, all other points relied upon in Lot 12 match with measurements called for in the deeds, not the Bott survey.

Point 14. (see RB p.11, Evidence in Support of Jury Verdict)

In trying to prove that Lot 12 is 1320 feet long, Respondents rely on non-legal and non-probative evidence (illusory evidence) which even if accepted in the light most favorable to Respondents' case is inconclusive. Respondents ignore conclusive proof that it is longer. Some of the evidence ignored is briefly outlined here.

(a) The aerial photograph (Exhibit 3) and measurements in the field (including Respondents' own measurements if interpreted properly) show excess land in the ground covered by the Martineau Plat (see map in Appellants' Brief). This is not by any means an unusual situation (see Appellants' Brief p.15 and *Cornia v. Putnam, 489 P.2d 1001 (Utah 1971)).

(b) The Kreisie to Kreisie deed of 1943 (see Exhibit 12) transferred the north part of Lot 12 as a parcel exactly 660 feet (10

chains) long, and the entire south part as a parcel to include the remaining distance, (referred to as 10.2 chains more or less). Thus the "north part" is not equal to the "south part" and the excess present always remained in the "south part" of Lot 12. Thus also, the length of Lot 12 is longer than the 2 x 660 feet or 1320 feet claimed by Respondents and Respondents' method is proven conclusively to be in error and non-probative. The M.D. Hammond to Mattie Hansen deed (Exhibit 39?) agrees with Appellants' evidence and the Kreisie deeds above-mentioned.

(c) Hickman's testimony regarding the "standard historical distance of lots", is irrelevant, misleading and unfounded because the size of lots in the actual area of interest is clear from uncontested survey measurements and the aerial photo presented in the trial. The length of Block 8 and Lot 12 are each considerably greater than 2 x 1320 feet implied by Mr. Bott (see appellants brief map, pp.27, 28.) Thus there is excess land over that suggested by scaling from the Martineau Survey. Inclusions of this excess land obviously makes the length of Lot 12 greater than "a standard 1320 feet". Measurements involving 700 South street are irrelevant because this street is not called for in the Martineau Plat. If the present 33-foot gravel lane at 800 South lane were to be widened to 66 feet, best evidence indicates that the extra 33 feet might better come from the north side of the present lane rather than from the south side. Thus the southeast corner of Lot 1, Block 8 would be located 33 feet north of where Bott assumes it to be. Recall, however, that there is evidence that a 66-foot roadway was never actually laid out in the filed. The roadway ends altogether to the west

and to the east, and a setback of ten feet on each side of the present 33 foot lane was called for a few years back in anticipation of subdivisions. The 33 foot lane is equitably located, and is consistent with deed calls in Lot 12.

(d) Respondents argue that the deed from M.D. Hammond to Mattie Hansen in 1877 indicates that Lot 12, Block 34 was 1320 feet long. Actually, their assumption that the "north part of Lot 12" was the same length as the south part of Lot 12 is in error as indicated by Plaintiffs' exhibit number 12. in the deed of Kreasie to Kreasie , the "North part of Lot 12" is described as being "40 rods" (10 chains) long. The "South part of Lot 12" however, is described as extending from its south boundary "10.2 chains South from the Northeast corner of said lot". Thus this exhibit illustrates two points, viz. (1) Lot 12, Block 34 was considerably longer than 1320 feet in the 1943 era and earlier, and (2) the excess land was in the "South part". This "South part" was eventually deeded to Hansen. Thus the Respondents' argument has no basis in fact. The deeds, even in the light most favorable to the Respondents' case are clear on their face, despite Respondents' assertions to the contrary.

Point 15. (see RB p.12 last paragraph, Evidence in Support of Jury Verdict)

Appellants do not object to the admission of the Martineau Plat as evidence, nor to its proper use, that is, to show relationships between properties not actual dimensions from its scale. The Martineau Plat was never offered by Plaintiffs as an Official Map or Official Plat of an actual survey. Indeed the Mattie Hansen Deed dated January 12, 1877

used the designation "Lot 12" three years prior to the Martineau Plat of 1880. The oft-referred-to Martineau Plat is just as Respondents surveyors admit, merely a drawing which purports to be based on the Martineau Survey. It neither indicates when said survey was performed or that Martineau actually made the drawing.

The Respondents' claim that other plats in evidence are "ancient documents" is wholly without merit. None of the plats submitted by Respondents as evidence qualify as ancient documents for purposes of this case. Some are not relevant. Some are not verified. Some are tax plats. Age is not the sole determinant of an ancient document nor does age alone endow an prior irrelevant document with relevance or materiality. Such documents must still be interpreted on their face, in light of all other evidence. Respondents' documentary evidence supports Appellants' position when viewed within the framework of the other undisputed facts.

Point 16. (see RB bottom half of p. 13, Verdict Effects Only Parties to Trial)

Despite Respondents' assertions, the results of this trial, if allowed to stand, do affect the accepted position of the Northeast Corner of Lot 12, Block 34 for landowners in Lot 12 not parties to this action. The Court has established an obliterated or lost corner at a location not previously relied on. The location therefore impacts on the validity of all deeds which use this point of reference.

Furthermore, if those deeds are subject to reformation, as the Respondents claim, then the Appellants' and Respondents' deeds are also subject to that same reformation and Appellants are still entitled to

the disputed property. Appellants did not stipulate away their right to deed reformation in such a case. Thus the lower court decision does not resolve the boundary dispute.

Point 17. (see RB pp. 14-15, Appellant's Failure to Object)

Appellants objected to the granting of a jury trial, to the jury instructions used and moved for judgment notwithstanding the verdict. As to the jury instructions, there is no question that there was no court reporter in the in-chambers discussions and that counsel for Appellants failed to enter the objections to the jury instructions in the record during the jury deliberations. Appellants attempted to remedy the problem by amending the record. The jury instructions set forth in Appellants' Brief are verbatim from the proposed instructions and the given instructions copies of which were at the time of trial given to all parties and the originals of which Appellants' believe have been transmitted to the Supreme Court for review.

The District Court might well have rendered the matter of the jury instructions moot by reviewing the evidence and granting judgment notwithstanding the verdict pursuant to Appellants' Motion.

Even if Appellants had made no effort to amend the record there has still been substantial prejudicial error committed which more than permits this Court to intervene (see Arguments above.)

Point 18. (see RB p.16, Conclusions)

Appellants' conclusions differ in essential ways from those of the Respondents.

a. Appellants have clearly shown substantial and prejudicial error in the proceedings, that the verdict is not supported by substantial evidence, and that the verdict is against law (see Arguments above).

b. The Respondents' statement "the essence of the Plaintiffs' appeal is a challenge of the facts not the law." is absolutely wrong. The appellants do not challenge the facts, only the way the Respondents attempt to use them. The proper use of the facts is clearly stated in survey law as given in the Manual of Instructions for the Survey of the Public Lands of the United States - 1973. Measurements of distances, and the location of known, real objects like fences and lines of possession, are essentially known and agreed to by all parties and surveyors. These are the facts. How these facts are to be used to determine the intent of the original surveyor (follow the steps of the original surveyor) in the restoration of the Northeast Corner of Lot 12, Block 34 is a matter of law, carefully spelled out, whether the corner be obliterated or lost. It is not a subject for jury determination.

c. The Appellants have no objection to the Defendants' use of evidence the Appellants introduced. Appellants welcome clarifications from either side.

d. Respondents' evidence, including the Bott Survey, clearly indicates that all parties acknowledge the intent of the deed writers to begin the property descriptions at the point claimed by Appellants as the Northeast Corner of Lot 12, Block 34 and oft referred to as the Larsen Fence Corner.

e. The jury should be commended for their efforts to weigh the evidence. It is unfortunate that they were asked to decide questions of law.

CONCLUSIONS

Appellants have demonstrated that the judgment of the District Court is clearly against law and is not supported by substantial evidence. Appellants have also indicated that substantial, prejudicial errors were committed at trial.

The evidence now before the Court is sufficient beyond a reasonable doubt to establish the Northeast Corner of Lot 12, Block 34, Providence Survey of Farms at the location claimed by Appellants at the point oft referred to at trial as the Larsen Fence Corner.

Whether the location is for the purpose of determining the intent of the deed writers--common grantors of the parties--or to determine the "footsteps" and intent of the original surveyor, the point is the same.

Only Appellants' surveys comply with the legal requirements set forth in the Manual of Instructions for the Survey of the Public Lands of the United States - 1973 for the re-establishment of obliterated corners. Furthermore, if, after reviewing the evidence, this Court feels that neither party has established the disputed corner beyond a reasonable doubt, Appellants' surveys have already met the requirements for the lawful restoration of a lost corner. Both methods indicate the true location of the Northeast Corner of Lot 12, Block 34, Providence Farm Survey to be as Appellants claim.

Appellants respectfully request that the Judgment of the District Court be reversed and that Judgment be entered in their favor, or in the alternative, that a New Trial be granted.

DATED this 25th day of April, 1984.

CHRISTENSEN & HANSEN


BILL HANSEN

Attorney for Plaintiffs/Appellants

AUTHORITIES CITED

- Anderson v. Toone, No. 17924 Utah State Bulletin, October 15, 1983p 22
- Barbizon of Utah, Inc. v. General Oil Company, 471 P.2d 148 (Utah 1970)p 13
- Beehive Medical Electronics, Inc. v. Square D. Company, No. 17546 Utah State Bulletin, September 15, 1983p 22
- Cornia v. Putnam, 489 P.2d 1001 (Utah 1971)pp 9, 12, 15-17, 30
- Cragin v. Powell, 128 U.S. 691, 9 S.Ct. 203, 32 L.Ed. 566 (1888)p 19
- Diehl v. Zanger, 39 Mich 601 (1878)pp 28-29
- Dorsey v. Ryan, Ill.App. 442 N.E.2d 689 (1982)pp 6-8, 10, 12
- Greer v. Squire, 9 Wash.359, 364, 37 P. 545 (1894)p 19
- Henrie v. Hyer, 70 P.2d 154, 156 (Utah 1937)pp 7-9, 12, 20, 25
- Holland v. Wilson, 327 P.2d 250, 252 (Utah 1958)p 21
- Hook v. Horner, 517 P.2d 554 (Idaho 1973)pp 12, 14
- Palmer v. Fitzpatrick, 557 P.2d 203 (Idaho 1976)pp 12, 14
- San Juan County v. Ayer, 604 P.2d 1304 (Wash.App., 1980)pp 6, 12, 17, 18, 20
- Staff v. Bilder, 415 P.2d 650 (Wash 1966)p 8
- State v. Day, 572 P.2d 703, 705 (Utah 1977)p 21
- State v. Evans, No. 18482 Utah State Bulletin, August 15, 1983p 22
- State v. Lesley, No. 18038 Utah State Bulletin, October 1, 1983p 23
- State v. Pierce, 655 p.2d 677 (Utah 1982)p 23
- United States v. Citko, 517 F.Supp. 233 (1981)pp 10-12
- Ute-Cal Land Development Corp. v. Sather, 605 P.2d 1240 (Utah 1980)p 22
- Vaught v. McClymond 144 P.2d 612 (Mont 1945)p 12
- Washington Nickel Mining & Alloys, Inc. v. Martin, 534 P.2d 59 (Wash. App. 1975)pp 9-10, 25

<u>Manual of Instructions for the Survey of the Public Lands of the United States</u> secs. 5-5, 5-9, 5-20, at 130, 133 (1973) issued by the United States Department of the Interior, Bureau of Land Management	pp 6-9, 11-12, 14-15, 18-19, 21, 28, 35
"Restoration of Lost or Obliterated Corners and Subdivision of Section...a Guide for Surveyors," issued by the United States Department of the Interior, Bureau of Land Management, and which is taken from the <u>Manual of Instructions for the Survey of the Public Lands of the United States</u>	pp 6-7
Amendment XIV, Section 1, Constitution of the United States	p 23
43 United States Code Annotated Sections 751, 752, 753	p 12
Article I, Section 2, Constitution of Utah	p 23
Article I, Section 7, Constitution of Utah	p 23
Rule 4 of the Utah Rules of Evidence	p 23
Section 57- 5-3 Utah Code Annotated (1953 as amended)	p 17
Section 78-21-1 Utah Code Annotated (1953 as amended)	p 21
Section 78-21-3 Utah Code Annotated (1953 as amended)	p 21

STATE OF UTAH)
 ss.
COUNTY OF UTAH)

Bashawn Barnett , being first duly sworn, says:
That she is employed in the office of CHRISTENSEN & HANSEN, Attorneys
for the Plaintiffs/Appellants herein; that she served the attached

APPELLANTS' REPLY BRIEF

(Mailed two copies)

upon the Defendants/ by placing a true and correct copy thereof in
 Respondents
an envelope addressed to: James C. Jenkins, JAMES C. JENKINS & ASSOCIATES
67 East 100 North, Logan, UT 84321

and depositing the same, sealed, with first-class postage prepaid
thereof, in the United States mail at Payson, Utah on the 26th day
of April , 1984.

Bashawn Barnett

Secretary

SUBSCRIBED AND SWORN TO BEFORE ME this 25th day of April , 1984.

[Signature]
NOTARY PUBLIC

Residing at Payson, Utah
My Commission expires November 20, 1984