

2001

Wilford N. Hansen v. John J. Stewart : Petition for Rehearing

Utah Supreme Court

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Bill Hansen; Attorney for Plaintiffs/Appellants.

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BRIEF

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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. 19383

vs.

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

PETITION FOR REHEARING 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

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AUG 12 1988

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Pursuant to Rule 35 of the Rules of the Utah Supreme Court, Wilford and Vada Hansen, the Plaintiffs/Appellants respectfully petition the Utah Supreme Court for rehearing of the above-entitled matter.

SUMMARY OF ARGUMENTS

Petitioners set forth, with particularity, the following points of facts and law which Petitioners claim the Court has overlooked or misapprehended.

1. While the location of a disputed boundary may often be a question of both fact and law, in this case, there are only questions of law. None of the facts are in dispute. The majority's description of appropriate roles of judge and jury presupposes a determination that there are factual issues to be resolved by a jury and that some evidence has been presented in support thereof. In the instant case, there are no disputes of relevant factual issues. The only issue involves the application of law to the undisputed facts.

2. The facts do not support the verdict, factually or legally. The facts presented support only one conclusion: judgment in favor of Plaintiffs. If the facts presented in this matter are clearly understood and are distinguished from the opinions and conclusions proffered by the witnesses at trial, the Court will understand that there is not even a scintilla of relevant factual evidence which supports Defendants' position. What is in dispute in this case is the law.

3. Plaintiffs' appeal does not ask the Court to ignore its standards of review. Plaintiffs have now complied with the Court's standards of review. Since the jurors had no factual issues to weigh, the appellate court's determination will not be a substitution for the decision of the jury. Because the facts do not support the verdict, it cannot stand.

4. Even if Plaintiffs' proposed jury instructions and their specific objections made in chambers have not been preserved in the record, the Court may still, in its discretion and in the interest of justice, review errors in instructions which have not been properly preserved. Special circumstances warranting such a review occur in this case because the jury instructions are legally insufficient and result in prejudice to the plaintiff.

a. The jury was asked to resolve an alleged factual dispute when there was none.

b. The jury was instructed to weigh evidence which, by law, had already been weighed.

c. The jury was instructed to determine the credibility of witnesses when credibility was not a relevant issue of fact. Since there were no factual

disputes, this instruction resulted in their weighing the credibility of the witnesses' arguments, opinions, and conclusions.

d. The burden of proof should have rested with defendants.

e. Plaintiffs and surrounding landowners are now burdened by a void judgment. The judgment is void because, despite disclaimers of the trial judge, it assumes jurisdiction over landowners who are not parties to this action, and will require that they reform their deeds.

5. Plaintiffs resubmit with this petition a marshalling of all the evidence. None of it is in dispute and none of it supports the verdict as a matter of law. The Supreme Court is entitled to overturn the jury verdict and enter judgment in favor of the Plaintiffs as a matter of law i.e., to grant judgment notwithstanding the jury verdict, or to order a new trial when there is manifest error or when the verdict is not supported by substantial evidence, is against law, or is void.

ARGUMENTS

POINT I. THIS TRIAL PRESENTED ONLY QUESTIONS OF LAW.

The majority opinion issued on July 28, 1988 states (See par. 6):

The determination of the actual location of a disputed boundary is often a compound issue which presents question both of law and of fact. . . . In any particular case, then, where conflicting evidence of various types is presented, some evidentiary conflicts may be resolved as matters of law, while others may be decided as matters of fact. The appropriate roles of judge and jury are preserved when the judge instructs as the relative weight to be given each type of evidence and the jury then determines the facts to which those relative weights are to be assigned. See 12 Am. Jur. 2d Boundaries Section 116 (1964).

Although it may have been proper to empanel a jury at the beginning of this trial in case there were to be disputes of fact presented, there were no conflicts that needed

to be resolved as matters of fact. The facts in this case consisted of undisputed testimony regarding the visible location of boundary lines and fences, the undisputed and unambiguous descriptions in the deeds of landowners in Lot 12, field measurements which can be shown to be in agreement to within a few inches, various unofficial maps and plats which were offered to show undisputed relative positions of various properties, and the scaled dimensions derived therefrom.¹ (See marshalled evidence in appendix.)

75 Am. Jr. 2d Trial Section 328 states:

Before submitting a case to the jury, the judge must determine whether the party who has the burden of proof has produced any substantial evidence upon which the jury can properly render a verdict in favor of that party. Having found that such evidence has been introduced, the court cannot invade the function of the jury to determine the facts, but must, when such evidence is conflicting, or admits of different inferences, leave the case to the determination of the jury.

In the instant case, the issue of the corner location was raised as part of defendants' counterclaims. The defendants, therefore, have the burden of proof. The trial judge should properly have determined 1) whether there was any substantial evidence upon which the jury could properly render a verdict in defendants' favor, and 2) whether such evidence was in dispute. It should be remembered that "evidence" refers exclusively to the facts and not to the opinions and conclusions presented at trial. Such opinions, conclusions etc. may become confused with evidence in a juror's mind,

¹ By way of note on this point, it was difficult at trial to see that the measurements were not in dispute because Defendants' surveyor conducted his measurements irregularly, ie. to points within the Block not recommended by good surveying technique, so that his measurements must at times be added together to show that his measurements agree with Plaintiffs' surveyors' measurements.

but are not in themselves probative as factual issues. Whether there are factual questions may not be readily apparent at the beginning of trial, and may not be readily apparent even at the close of the trial, as in this case. The fact that counsel or trial judge may neglect to follow these determinations need not imply that factual issues exist and support defendants' claims. If neither counsel nor the judge recognized that there were no factual issues at trial, it constitutes manifest error to assume or to determine erroneously that some must have existed. The principal trial question itself which was submitted to the jury cannot itself be a factual issue if the underlying facts are not at issue. There were no issues of fact. This being the case, this Court may review the facts and so determine.

In the present case there are several reasons why the trial judge and the opposing counsel (See Defendants' Brief at p.4) have passed over this argument without reciting any fact which they claim was at issue.

- a. The evidence was technical.
- b. The surveyors' measurements were taken from different points and need to be understood mathematically to recognize that they agree with each other to within inches.
- c. The testimony of the witnesses was fraught with statements of opinion about what the law on this question might reasonably be, and with unfounded conclusions so that even though the underlying facts were in agreement, the testimony appeared to be divergent and contradictory.

In spite of the trial court's reluctance to review the facts after trial and in spite of Defendants' counsel's implications to the contrary in Defendants' Brief, the truth of the matter is that there is no issue of fact.

The majority assumes that conflicting testimony necessarily implies conflicting facts. Testimony consists of relevant and irrelevant facts, founded and unfounded conclusions or opinions. The relevant facts in this case are not in dispute. Rather, the witnesses' conclusions and opinions were in dispute.

POINT II. THERE IS NO EVIDENCE TO SUPPORT THE VERDICT. THE FACTS PRESENTED SUPPORT ONLY ONE CONCLUSION - PLAINTIFFS' POSITION.

Whether or not there were issues of fact presented at trial, the relevant facts support only one conclusion, the position claimed by Plaintiffs. In the present case, if the testimony is reviewed carefully to separate the relevant facts from the claimed conclusions, (a task that is sometimes difficult during the trial itself) it can be clearly seen that there is not one scintilla of evidence to support Defendants' position. All of the facts are in harmony and are supportive of only one position: locating the northeast corner of Lot 12 at a coincident point with the northeast corner of Block 34 - Plaintiffs' location. All of the boundaries, deeds, maps, plats and measurements are in agreement. Not even the boundary between Plaintiffs and Defendants is factually at issue. Both parties stipulated that the only issue was the actual location of the northeast corner of Lot 12, Block 34. Plaintiffs marshalled all of the factual evidence (see appendix) and have searched the record for a factual issue or for a fact which can be viewed in a light supportive of Defendants' position and have found none. Only testimony such as the following is seen (see Trans Vol III p. 99-100)

DIRECT EXAMINATION BY MR. JENKINS:

Q Mr. Hickman, I think your experience in surveying and abstracting stands probably 40 years, correct?

A Yes.

Q In your experience and based upon your training do you have an opinion as to what the impact would be, and I want a comparison, of using the Bott survey to establish the northeast corner of Lot 12 as opposed to the Spires' survey?

A I would like to go into a little background. I'm concerned personally about the impact of this whole trial because in my opinion it strikes right at the heart of the American recording system which was established by William Bradford who was the first governor of the Plymouth Colony who set up a recording system so that documents could be put of record to establish for the public as a whole notice of interest so that they could go there and determine the status of ownership of property.

If we at will change recorded maps and this type of thing, it seems to me that there is going to be a great deal of impact, and now I'm getting to your question.

What is to prevent us from changing any survey, any subdivision that is recorded today through use, I'm not stating that ownership or possession cannot change, because I don't deny that and it can be. What I'm saying is that the recorded information should be there as a reference.

Now, it's a simple matter to change descriptions on individual deeds. We do it everyday and the cost is minimal.

The thing that I don't like to see is a change of this nature because it does not only affect this particular piece, but just in Logan and Hyrum and so forth alone there are many, many blocks where this same thing has happened and this could set a precedent for creating impact on those as well as this one.

Q What does the Bott survey do?

A Well, in my opinion all the Bott survey does is show the location of the record and the possessory interest.

Q What does the Spires' survey do?

A It attempts to change that record location.

Q Will the Bott survey adversely affect the ownership of property within Lot 12? Are those people down the line going to be hurt?

A Obviously it will, the two parcels involved here, but no, I can't see that it will the others.

CROSS-EXAMINATION BY MR. FILLMORE:

Q The fact is other parties will be affected unless they agree to a reformation of deeds, right?

A Right.

The court committed reversible error when it allowed the court appointed surveyor and another surveyor who had surveyed the land in question to state their opinions as to the true boundary line between plaintiff and each of the defendants. . . .

Combs v. Woodie 53 NC App 789, 281 SE2d 705 (1981)

In the present case, it is clear that Defendants' object is to reject the beginning point in spite of its clear harmony with all of the other relevant facts. Defendants' statement (Transcript Vol 3 at p.33) that if their position is allowed to

stand, all of the deeds in the area will have to be reformed, is a clear statement of their error. It amounts to saying, "The facts as they now stand are in favor of Plaintiffs survey point, and if Defendants' position is accepted, all of the facts will have to be reformed to support it."

As stated in 12 Am. Jur. 2d Boundaries Section 55 (1974):

In locating and running the boundary lines of lots or tracts of land of private owners, reference is to be had to the calls in the grant and to the field notes carried into the grant or the map or plan with reference to which the conveyance was made; and if there is no ambiguity the land must be located and the lines run according to the description of the conveyance. None of the calls should be rejected or disregarded if they can be harmonized and applied in any reasonable manner...the real purpose of a boundary inquiry is to follow the steps of the surveyor on the ground, and all calls will be construed with this in mind.

In short, there is not one scintilla of evidence, and not any fact in dispute, which supports the location of the disputed corner at the location contended for by Defendants. It never has existed there, and would require the reformation of all of the facts to put it where Defendants contend.

POINT III. PLAINTIFFS' APPEAL DOES NOT ASK THE COURT TO IGNORE ITS STANDARD OF REVIEW.

Plaintiffs' appeal accepts the standards of review established by the court for examining jury instructions, for overturning a jury verdict, for granting a new trial or a judgment notwithstanding the verdict as shown in the sections below. Plaintiffs have now complied with each of those standards.

POINT IV. SPECIAL CIRCUMSTANCES WARRANT THE COURT'S REVIEW
OF THE JURY INSTRUCTIONS.

The majority in this matter, citing Rule 51 U.R.C.P., E.A. STROUT WESTERN REALTY AGENCY, INC. v. W.C.FOY & SONS, INC., 665 P.2d 1320, 1322 (Utah 1983) and CAMBELT INT'L CORP. v. DALTON, 745 P.2d 1239, 1241 (Utah 1987), have stated

Rule 51 does allow this Court "in its discretion and in the interests of justice" to review errors in instructions which have not been properly preserved. However, "it is incumbent upon the aggrieved party to present a persuasive reason" for exercising that discretion, and this requires "showing special circumstances warranting such a review."

The Strout case then suggests (p.1323) that special circumstances include those instances where the court's instructions presented to the jury are legally insufficient or result in prejudice to the party seeking relief. As set forth in STATE v. KAZDA 545 P.2d 190 (Utah 1976) there must also be a showing that there is a "substantial likelihood that an injustice has resulted."

The majority in this matter states that Hansens have made no such showing. However, Hansens clearly show that the jury instructions given are legally insufficient, result in prejudice to them, and that injustice has occurred as follows:

A. The jury was asked to resolve an alleged factual dispute when there was none. POWERS v. GENE'S BLDG MATERIALS, INC., 567 P.2d 174 (Utah 1977) held:

Parties are entitled to have their theories of the case presented to the jury in the form of instructions only if they are supported by the evidence.

B. The jury was instructed to weigh evidence which, by law, had already been weighed. 12 Am. Jur. 2d Boundaries Section 61 states:

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...the rule is based on the premise that the stability of boundary lines is more important than minor inaccuracies or mistakes...A resurvey not shown to have been based upon the original survey is inconclusive in determining boundaries and will ordinarily yield to a resurvey based upon known monuments and boundaries of the original survey.

12 Am. Jur. 2d Boundaries Sections 64 through 66 state:

All parts of the description in a conveyance should be allowed to stand if possible, and none of the calls should be rejected if they can be applied in any reasonable manner; it is only in the case of an obvious mistake or where there is such a contradiction or inconsistency as to render the conveyance unintelligible that some of the calls are to be rejected.

The general rule that in the construction of boundaries the intention of the parties is the controlling consideration is applied in determining the relative importance of conflicting elements of description. The various rules adapted by the court for construing and interpreting conflicts between calls of description all have for their primary purpose the ascertainment of the intention of the parties. Another basic consideration is that those particulars of the description which are uncertain and more liable to error and mistake must be governed by those which are more certain.

Where the calls for the location of boundaries to land are inconsistent, other things being equal, resort is to be had first to natural objects or landmarks, next to artificial monuments, then to adjacent boundaries (which are considered a sort of monument), and thereafter to courses and distances...

In determining boundaries of a tract of land, it is not permissible to disregard any of the calls if they can be applied and harmonized in any reasonable manner, but if there is an actual contradiction between calls in the description of land, so that they are irreconcilable, the court may reject or disregard the one which is false or mistaken. Calls which cannot be complied with because they are vague or repugnant may be rejected or controlled by other material calls which are consistent and certain. An inconsistent call should be discarded if thereby all the rest of the calls are reconciled and the description perfected.

12 Am. Jur. 2d Boundaries Section 71 p. 608 states:

Ancient fences used by a surveyor in his attempt to reproduce an old survey are strong evidence of the location of the original lines and, if they have been standing for many years, should be taken as indicating such lines as against the evidence of a survey which ignores such fences and is based upon an assumed starting point. It is said that a long-established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments of the original survey have disappeared. Accordingly, a fence erected on a surveyed line shortly after the land has been surveyed may serve as a monument to control courses and distances or a subsequent survey after the stakes set out at the time of the original survey have disappeared.

The weight of the relevant facts presented in this survey case is determined by law. Therefore it is not within the discretion of a jury to weigh it.

C. The jury was instructed to determine the credibility of witnesses when credibility was not a relevant issue of fact. Since there were no factual disputes, this instruction resulted in their weighing the credibility of the witnesses' arguments, opinions, and conclusions.

Witness credibility was not at issue because the present location of all of the boundary lines and fences was agreed upon, the deeds were clear and unambiguous and were for the trial court to interpret, and the measurements agreed with each other.

The trial courts' instruction to the jury that they were the determiners of the credibility of the witnesses was misleading and could only have resulted in a jury decision based upon the witnesses' conclusions and opinions.

D. The burden of proof should have rested with defendants. The disputed corner was the issue raised by defendants as an issue in support of their counter-claim.

E. Plaintiffs and surrounding landowners are now burdened by a void judgment. The judgment is void because, despite disclaimers of the trial judge, it assumes jurisdiction over landowners who are not parties to this action, and will require that they reform their deeds. The dissenting opinion correctly points out that

if the defendants' contention is adopted as to the location of the obliterated monument, all property owners along Sixth East Street must shift south 33 feet. Since this would put boundary lines through existing houses, both parties agree that this is not practical and that instead the description of each property owner would have to be reformed to conform to the defendants' contention as to the location of the corner.

This reformation affects the numerous property owners in Block 34, only two of which are parties to this action. The rendering of a judgment which affects these property owners without obtaining jurisdiction over them renders the judgment void.

Where the final decree in an action between adjoining landowners to establish the true boundary between their lots incorporated a new survey which established that the entire section contained excess acreage, that the parcels belonging to the parties should be apportioned on a pro rated basis, and that a road through the center of the subdivision was 75 feet off of its actual true center line, the effect of the enlargement of the section would be to redraw the boundaries of each and every lot in the subdivision as well as those of all parcels outside the subdivision but within the section. All owners of affected lots and the city, as holder of an interest in the public roadway, would be indispensable parties and the rendering of a final judgment without jurisdiction over such parties would render the judgment void and such jurisdiction failure would not be cured by an express declaration in the decree that the court had no intent to adjudicate the rights of those not parties to the action.

Johnston v. White-Spunner 342 So2d 754 (Ala 1977)

POINT V. THE SUPREME COURT IS ENTITLED TO OVERTURN THE JURY VERDICT AND ENTER JUDGMENT IN FAVOR OF THE PLAINTIFFS AS A MATTER OF LAW, TO GRANT JUDGMENT NOTWITHSTANDING THE VERDICT OR TO ORDER A NEW TRIAL.

The Court may overturn, grant judgment, or order a new trial where there is manifest error or when the verdict is not supported by substantial evidence, is against law, and is void. The majority in this matter holds that:

Therefore, an insufficiency-of-the-evidence based challenge to a denial of either motion (j.n.o.v. or a new trial) is governed by one standard of review: we reverse only if, viewing the evidence in the light most favorable to the party who prevailed, we conclude that the evidence is insufficient to support the verdict.

The majority then summarily states, as did the trial judge and opposing counsel without reference to a single specific fact in dispute, that:

During the three-day trial, each side supported its position with deeds, maps, plats, and the testimony of several expert surveyors who had independently retraced the original surveys of the disputed parcels. The Hansens did not object to the admission of any of the material evidence. There were conflicts in the evidence...On the record before us, we cannot conclude that the evidence was so slight and insubstantial that it cannot support the verdict for the Stewarts.

The sufficiency of the evidence and whether there was any material issue have been previously discussed. (See POINT I.)

But a new trial may also be granted even if the evidence was sufficient to support the verdict, when the judge believes the verdict was against the clear weight of the evidence; or when procedural errors were committed (such as erroneous admission or exclusion of evidence, misconduct of a party or counsel, etc.) which in the trial judge's estimation may have seriously contaminated the proceeding. (JAMES & HAZARD, Civil Procedure, Sections 7.20, .22(3d ed. 1985))

12 Am. Jur. 2d Boundaries Section 116 states:

New trials may be granted in cases involving questions of the location of boundary lines where the questions are legal in their character; and in proper cases new trial will be granted on grounds dependent upon the weight of the evidence.

Furthermore, it is clear that the verdict itself results in manifest error. If, as Respondents contend, the very facts themselves (the deeds) would have to be reformed if the verdict were to stand, it is clear that the verdict is wrong. Indeed, if all deeds are reformed to refer to the new point defendants have located, the disputed boundary should still be resolved in Plaintiffs' favor as the single boundary in question is not ambiguous in the deeds. And since the intent of such reformation is to not alter the lines of possession which have agreed with the deeds, the boundary Plaintiffs defend would remain as they contend. Judgment in favor of defendants would result in chaos and would not even resolve the disputed boundary. Judgment in favor of plaintiffs easily resolves all issues of law, alters no facts, and injures no one.

CONCLUSIONS

WHEREFORE, Plaintiffs/Appellants/Petitioners respectfully request that the Court determine 1) that there have been no questions of fact presented in this matter, 2) that there is no evidence either factual or legal to support the verdict, 3) Plaintiffs have now complied with the Court's standard of review, 4) the jury instruction's were legally insufficient and resulted in prejudice to plaintiffs, and 5) that plaintiffs should be granted a judgment n.o.v. or a new trial.

RESPECTFULLY SUBMITTED this 11th day of August, 1988


BILL HANSEN -
ATTORNEY FOR PETITIONERS

CERTIFICATION OF GOOD FAITH

STATE OF UTAH)
 ss.
COUNTY OF UTAH)

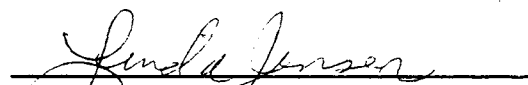
BILL HANSEN, being first duly sworn, upon his oath certifies as follows:

1. I am counsel for Plaintiffs in the above-entitled matter.
2. The Petition for Rehearing attached hereto is presented in good faith and not for any delay.

DATED this 11th day of August, 1988.


BILL HANSEN

Subscribed and sworn to before me this 11th day of August, 1988.


NOTARY PUBLIC

Residing at: *Payson*
My commission expires: *6-26-90*

CERTIFICATE OF MAILING

STATE OF UTAH)
 ss.
COUNTY OF UTAH)

Evelyn Herbert, being first duly sworn, says:

That she is employed in the office of WILFORD N. HANSEN JR., attorney for the
Plaintiffs/Appellants herein; that she served the attached _____
Petition for Rehearing

_____ upon

the Defendants/Respondents by placing a true and correct copy thereof in an
envelope addressed to: James C. Jenkins

Jenkins & Purbank

67 East 100 North

Logan, Utah 84321

_____ and

deposited the same, sealed, with first-class postage prepaid thereof, in the United
States mail at Payson, Utah on the 11th day of August, 1988.

Evelyn Herbert

SUBSCRIBED AND SWORN to before me this 11th day of August
1988.

[Signature]
NOTARY PUBLIC

Residing at Payson, Utah.
My commission expires November 20, 1988.

MARSHALLING OF EVIDENCE

1. The figure is a drawing to scale (1 inch = 165 ft.) of important features near the disputed boundary located in Lot 12 Block 34. When various features have a number near them, place in a circle, e.g. 6, the number refers to a note given below. The abbreviation "cf." is used to indicate a cross-reference and "Ex." followed by a number indicates a specific exhibit. "Trans. I, II or III" is the abbreviation for trial transcript, volume I, II or III, as they are respectively referenced herein.

2. Southeast corner of Lot 12 Block 34. The location on the ground of the Southeast Corner of Lot 12 was agreed to by all parties.

3. The Northeast Corner of Lot 17 Block 8 was the next point north on the ground that could easily be identified with a point on the Martineau plat. It was the south boundary of a paved street. Its use was not objected to by anyone.

4. The distance from the Northeast corner of Lot 17 south to the north boundary of a graveled lane called 800 South street is about 1350 feet by measurement (cf. Trans. Vol. III p. 81 lines 1-4). The distance from the Southeast Corner of Lot 12 to the south boundary of the same lane is also about 1350 feet. The Martineau Plat calls for these distances to be equal, by showing them to be the same length on the plat drawing. Thus the placement of the present 33 ft. wide 800 South street distributes the excess land equitably on both sides. This fact is evident on the large aerial photograph (cf. Ex. 5).

5. The location of this point with respect to both the Northeast Corner of Lot 12 and the Southeast Corner of Lot 12 is called for in two different deeds (cf. Ex. 15, 17). These deeds therefore specify the length of Lot 12. The length specified is 400 ft. + 950.5 ft. = 1350.5 ft, in close agreement with Plaintiff's Northeast Corner of Lot 12 location (cf. Trans. I p. 82 lines 8-12).

6. The location of this point by measurement is 934 feet south of the Plaintiff's Northeast Corner of Lot 12 (cf. Trans. Vol. III pp. 94, 95). Four deeds call for this same distance (cf. Exs. 10 or 11, 13, 17, 22). This is a driveway of 1 rod width, easily identified on the ground.

7. The land at issue in this trial is shown by the cross-hatched area. It is north of the fence whose position at the time of trial is roughly indicated by the line with little tick marks.

The fence location might require a little explanation to avoid confusion. In 1969 when Hansen acquired his property from Miller there was no boundary fence on roughly the west half of the disputed property, as testified by Hansen (cf. Trans. Vol. I p. 35 lines 11-13). Stewart testified that there was a fence, in poor condition (cf. Trans. Vol. II p. 76 lines 2-9). Stewart caused the angular fence present on the east side to be extended in a straight line to the west boundary line in about 1977. Spiers surveyed the area in December 1978 while the straight fence was up (cf. Ex. 7). Hansen had the fence taken down, and after that Stewart had it put up again, but as indicated in the drawing with its

west end going to the North. Litigation was started and has taken several years. Meanwhile, the fence has remained as indicated on the figure.

8. The rectangular strip of land (40 ft. by 330 ft.) was deeded by Allen to Miller before Allen deeded the parcel north of this strip to Stewart. The Allen to Miller conveyance was by two deeds, one in 1957 and one in 1960 (cf. Exs. 14, 18). Here the location of the strip is derived from Plaintiff's Northeast Corner of Lot 12 location.

9. Location of the "Northeast Corner of Lot 12 Block 34 Plat A Providence Farm Survey" as contended by Plaintiffs.

10. Location of the "Northeast Corner of Lot 12 Block 34 Plat A Providence Farm Survey" as contended by Defendants.

11. The position of this 10 ft. strip of land on the ground is obvious. Its description in deed (cf. Exs. 10 or 11) calls for the "Northeast Corner of Lot 12 Block 34" as its own Northeast Corner.

12. The points marked by X are the sites of steel surveyor's pegs testified to by Hansen (cf. Trans. Vol III p. 3 lines 6-18). Their location is perfectly consistent with Plaintiff's Northeast Corner.

13. The deed calls for all the remaining parcels of land in Lot 12 are also consistent with measurements in the field if the Northeast Corner of Lot 12 is located as the Plaintiff's contend (cf. Trans. Vol. III pp. 66-67 and the exhibited deeds).

14. The transparent overlay to the figure shows the positions of the boundaries in Lot 12 as called for in the deeds using the Defendant's Northeast Corner of Lot 12. The resulting entanglement is obvious. Lots outside Lot 12 are also involved. If the area labeled 8 is shifted south as on the overlay it will be in Hansen's pond.

15. Note that there is no sign of the big platted 800 South street east of 600 East street, on the ground, even though it is prominent on the Martineau plat (cf. Ex. 5). The area that the street would occupy is already occupied by a large church.

16. cf. Trans. Vol. III pp. 94, 95.

17. cf. Trans. Vol. III p. 81 line 3.

18. Stewart pasture (cf. Ex. 9).

19. Hansen property (cf. Exs. 10, 11).

20. Thayne properties (recently purchased by Larsen, cf. Exs. 16, 23).

21. Gunnel property (cf. Ex. 17).

22. Former Gunnel property (cf. Ex. 22).

23. Plaintiffs purchased the disputed property (cf. map 7, 8) which adjoins Defendants' property on the south from Maurine Miller (cf. Ex. 10 or 11), who acquired the property from her husband Charles' estate. Charles Miller acquired the property from Albern Allen by two separate Warranty Deeds in 1957 and 1960 (cf. Ex. 14, 18). Charles Miller acquired additional property (cf. map 19), adjoining the two parcels, on the south and east from Vernon Kreasie and Amy Kreasie in 1956 and 1958 (cf. Ex. 13, 15, 19). Vernon Kreasie acquired the property from John William Kreasie in 1943 (cf. Ex. 12).

24. Defendants purchased their pasture (cf. map 18) from Albern Allen in 1967 (cf. Exs. 9, 21).

25. Charles Miller deeded lots to Henry Thain (cf. Exs. 16, 20, map 20) and J.B. Gunnel (cf. Ex. 17, map 21).

26. J.B. Gunnel deeded land in Lot 12 to Plaintiffs in 1970 (cf. Ex. 22, map 22).

27. Robert Larsen acquired the two Thain lots (cf. map 20) in 1983 (cf. Ex. 23). The 10-foot strip belonging to Plaintiffs and located north of the Thain lots is now being used by Larsen and its northeast corner is fenced. The northeast corner of that fence was referred to at trial as the Larsen fence corner and is at the northeast corner of Lot 12, Block 34 as Plaintiffs claim (cf. Trans. Vol. I p. 41 lines 2-10, also map northeast corner of Lot 12).

28. Two of the deeds are double-tied to both the northeast corner of Lot 12, Block 34 and the southeast corner of Lot 12, Block 34, to-wit: Kreasie to Miller, Miller to Gunnel (cf. Exs. 15, 17). These deeds specify the length of Lot 12 as 1350.5 feet, in close agreement with the location of the northeast corner of Lot 12, Block 34 as Plaintiffs claim (cf. Trans. Vol. II p. 53 lines 4-10 error on lien 10 should read 1350.5 feet and Trans. Vol. III p. 94 lines 13-16). This measurement is confirmed by Spiers, Naylor and Bott (cf. Trans. Vol. I p. 82 lines 8-22, Trans. Vol. II p. 53 lines 4-10 and Trans. Vol. II p. 122 lines 20-25).

29. At the time Plaintiffs purchased their property, they discovered that the fence along what Defendants claimed to be their southern boundary did not run in an east/west direction as described in Plaintiffs' and Defendants' deeds (cf. Exs. 10, 11, 9, map 7), and was at the time only partially completed. It was later completed in a line to the southwest (cf. Trans. Vol. I p. 35 lines 11-13 and Trans. Vol. II p. 80. line 12, p. 81 line 7) at an angle and encroached from 16 feet at its eastern-most point to 25 feet at its western-most point into Plaintiffs' property. Defendants recently move the wets half of the fence in a northwesterly direction to the point claimed by Plaintiffs to be the northwest corner of the western-most Allen-to-Miller parcel (cf. Ex. 14 or 18, map 8 northwest corner of parcel).

30. Plaintiff Wilford Hansen and the then-Cache County Surveyor, Erwin Moser, surveyed the property and located the actual boundaries described in the deeds

and the northeast corner of Lot 12, Block 34 Providence Survey of Farms at the point now claimed by Plaintiffs, the Larsen fence corner (cf. Trans. Vol. I p. 19 line 12 and p. 20 line 16).

31. Plaintiff Wilford Hansen contacted Defendant John Stewart, who refused to adjust the encroaching fence line and claimed that the fence was the actual boundary (cf. Trans. Vol. II p. 82, lines 9-13). Plaintiffs filed this action to quiet title to their property.

32. Plaintiffs has the property resurveyed by Ken Spiers, a registered land surveyor employed by Forsgren and Perkins (cf. Ex. 7) and by Clyde Naylor, Utah County Surveyor and President of the Utah Chapter of the National Society of Professional Engineers (cf. Trans. Vol. II p. 5 lines 11-23 and Trans. Vol. II p. 6 lines 2-11). Both surveys show the northeast corner of Lot 12 Block 34 to be at the point claimed by Plaintiffs, the Larsen fence corner (cf. Trans. Vol. I p. 41 line 17, p. 42 line 3 and Trans. Vol. II p. 8 lines 13-24). Both surveys show that the lines of possession in Block 34 conform with the record titles, that is deed descriptions, (including Defendants' except for their southern boundary) in Block 34 only if the northeast corner of Lot 12 Block 34 is at the Larsen fence corner as Plaintiffs claim (cf. Trans. Vol. III p. 66 lines 10-15, line 23, p. 67 line 1).

33. Defendants employed Randy Bott, a seminary teacher and part-time surveyor, to resurvey the property (cf. Trans. Vol. II p. 103 line 10 p. 106 line 5 and Trans. Vol. II p. 107 lines 12-18). Bott determined that there were two corners: one he called the "northeast corner of Block 34 as possessed", and a second he called the "northeast corner of Lot 12 as measured" (cf. Trans. Vol. I p. 47 line 23, p. 48 line 3). At trial, Bott testified that he found the first corner (located at the Larsen fence corner as Plaintiffs claimed) by noting the lines of possession established on the ground, using record title descriptions, measurements and other evidence (cf. Trans. Vol. II p. 147 lines 2-7, p. 125 lines 8-11). The second corner, 33 feet south of the first, he found by measuring the length of the east line of Lot 12 indicated on the Martineau Plat, multiplying the number of inches by the scale (number of inches x feet per inch = 1320 feet) (cf. Trans. Vol. II p. 120 lines 20-21, p. 121 lines 4-6). Then, beginning at the south line of Lot 12, assuming the actual north/south distance of Lot 12 to be 1320 feet, Bott located the "north line of Lot 12 as platted", by measuring 1320 feet along the east boundary of Lot 12 (cf. Ex. 8, Trans. Vol. II p. 122 line 24, p. 123 line 2, p. 125 lines 5-6, p. 126 line 21). He proclaimed the northernmost point of said line to be the northeast corner of Lot 12 as platted (cf. Trans. Vol. II p. 126 lines 21, 24-25).

34. Naylor's uncontroverted testimony was that the measured distance from the only two identifiable monuments that exist in the area along the west side of 600 East street (the monuments at the southeast corner of Lot 12 and at the south boundary of 600 South street) was 2, 733 feet, rather than the distance of 2, 706 feet suggested by the scale of the Martineau Plat (cf. Ex. 1, Trans. Vol. III p. 80 line 17, p. 81 line 4). This shows that the Martineau Plat is not a survey and that the scaled dimensions of the Martineau Plat do not exist anywhere on the ground (cf. Trans. Vol. III p. 80 lines 11-17).

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35. Hickman testified that the Martineau Plat was drawn primarily for tax assessment purposes (cf. Trans. Vol. III p. 31, line 23, p. 32 line 3). Bott, Naylor and Hickman testified that the Martineau Plat was created as an office survey or paper survey as were subsequent plats (cf. Trans. Vol. II p. 135 lines 19-24, Trans. Vol. III p. 32 lines 4-12, Trans. Vol. III p. 55 lines 6-12).

36. Bott, Naylor and Hickman testified that if the northeast corner of Lot 12 is located as Defendants claim, Plaintiffs', Defendants', Larsens' and other deeds tied to the northeast corner (north line) of Lot 12 (and by implication the deeds in the other lots of Block 34 in line with the north boundary of Lot 12) will of necessity need to be reformed and/or the long-standing lines of possession relocated (cf. Trans. Vol. II p. 130 lines 1-6, Trans. Vol. II p. 36 line 3, p. 37 line 20, Trans. Vol. III p. 67 line 17, p. 68 line 25, Trans. Vol. III p. 75 line 23, p. 76 line 22, Trans. Vol. III p. 33 lines 4-20).

37. It is undisputed that there is merely a partial gravel lane, approximately 33 feet wide, beginning at 600 East street and extending westerly along the north boundary of Lots 12, 11, 10 and 9 at the location indicated as 800 South street on the Martineau Plat. There is not evidence that a 66-foot road has ever existed at that location (cf. Trans. Vol. II p. 44 lines 6-12, p. 10 lines 20-24).

38. No evidence was presented that there has ever been any dispute over lines of possession or record titles in the area except along the disputed south boundary of Defendants pasture. Defendants now propose to disrupt the lines of possession and record titles (deed descriptions) of the entire area to establish the south boundary of their pasture as they claim, an unconscionable result (cf. Trans. Vol. II p. 38 lines 14-20).

U

600 EAST

600 SOUTH

—road continues—

3

17

LOT 15

LOT 16

LOT 17

BLOCK 8

LOT 1

1380'

