

1952

# Moses Blanchard v. Donald E. Smith : Brief of Respondents

Utah Supreme Court

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George C. Heinrich; Attorney for Defendants and Respondents;

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# In the Supreme Court of the State of Utah

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MOSES BLANCHARD,  
*Plaintiff and Appellant*

-vs-

DONALD E. SMITH, et al,  
*Defendants and  
Respondents.*

RESPONDENTS'  
BRIEF  
No. 7869

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**Appeal from the District Court of Cache County, Utah**

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**Honorable Lewis Jones, District Judge**

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Filed Georg C. Heinrich,

Attorney for Defendants and Respondents.

SEP 10 1952

U.S. Sup. Court, Utah

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# In the Supreme Court of the State of Utah

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MOSES BLANCHARD,  
*Plaintiff and Appellant*

-VS-

DONALD E. SMITH, et al,  
*Defendants and  
Respondents.*

RESPONDENTS'  
BRIEF  
No. 7869

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## STATEMENT OF FACTS

Respondents believe appellant's statement of facts is incomplete, erroneous and misleading in part, and therefore do not adequately "picture" to this court the basis for the lower court's decision and so considers that the following corrective as well as additional facts will be helpful, particularly because appellant attempts to stress bits of isolated and unimportant testimony which the lower court refused to follow as being controlling. In this regard it is also pointed out that the trial court saw and heard the witnesses and observed their demeanor and conduct on the witness stand, and was therefore in a favorable position to weigh the testimony. Under these circumstances, the judgment of the trial court should not be

lightly disregarded. The trial court found all of the issues in favor of the defendants.

The defendants are husband and wife and each of them of the age of 58 years. The defendant, Fern P. Smith, is an only child of Frank Purser, deceased, and she bought the property from her father's estate April 12, 1941, and ever since then defendants' son and his wife have resided thereon. Frank Purser purchased the property under contract from George Tiller in 1916 and he resided upon the property from that time to the time of his death. Ever since 1916, Frank Purser in his lifetime, and since his death, these defendants, have always had and claimed the property between their north and south fence lines (tr. 4) without interruption or claim on the part of anybody and had no suggestion from any source that the property within the fence lines was claimed by anyone until the year 1948 when the plaintiff claimed to be the owner of 19 feet north of defendants' south fence line.

Both plaintiff and defendants' property is derained from a common source: via Halvor O. Tiller's estate. Tiller acquired the property January 8, 1879. (Def Ex. 1 page 4). He died Feb. 28, 1901, leaving surviving him three daughters, Anna, Helen, and Edith, then of the ages of 20, 17, and 15 years, respectively, and a son, George, then of the age of 13 years. Decree of distribution was entered July 5, 1902, and the real property was distributed by metes and bounds to three

of the children, Edith getting the south 4 rods, (now owned by plaintiff), George the middle piece( now owned by defendants), and Helen the north part, not directly involved in this action. (Defs. Ex. 1 page 5). Although plaintiff so states on page 2 of his brief, nevertheless none of the property so distributed by decree of distribution was surveyed during probate (tr. B 6-8). It is plain that the survey was made at the time of the sale of Edith's tract of land to plaintiff about three years later. (tr. 60, 66). Edith conveyed to plaintiff August 1, 1904 (Pls. ex. A, page 6). This then made plaintiff and George Tiller, who was then about 14 or 15 years of age adjoining landowners. It is plain that the court was justified in finding from the testimony of Edith Tiller, George Tiller and Anna T. Peery that the estate property when distributed was all in one enclosure, bounded on the south by a fence line (tr. 3-4), on the east by a solid picket fence, on the north by Logan River, "or maybe a wire fence," on the west by Brigham Young College Campus, which is separated from the Tiller property by a slough as well as a fence.

At the time, or shortly after plaintiff purchased his property, he wanted to know the boundry lines. No one knew them. (tr. 4, 5, 60, 45-46). Anna Tiller attempted to fix the lines by measuring herself, but at the suggestion of attorney W. W. Maughan a surveyor was called and he, the surveyor, fixed the boundary lines. (tr. 60-61, 4, 5). Plaintiff claims at page 2-3 of

his brief that Logan City owned 1 rod of land "which the lower court refused to notice, meet or recognize" (finding No. 6 — tr. 13), "and that this fooled them all," but there is nothing in the record to show that the surveyor was directed in his survey. From all that appears in the record he simply performed his survey professionally. In fact the court found Logan City never owned the 1 rod strip. Plaintiff and his predecessor, the Tillers, have always been in possession of the property. Plaintiff never used or claimed any of the property north of the fence while Anna Peery lived there which was until 1908 (tr. 62), or while George Tiller lived there until 1916 (tr. 2, 5, 6), or while Mrs. Grace W. Tiller, wife of George Tiller, lived there from 1909 to 1916 (tr.73), or while Frank Purser and these defendants lived there (tr. B 24-30) (tr. 22, 23, 75, 76). In fact while defendants have owned the property plaintiff tore down and rebuilt part of the original fence in the same place (tr. 75, 76) and yet plaintiff states (page 2 of brief tr. 76) that he knew for a long time that the fence was not on the boundary line. But then plaintiff states too he never entertained any thought that the fence was not on true line until 1948, about 45 years after he built the original fence and this was after rebuilding it in part; that he first questioned the fence when the curb and gutter was put in by Logan City in 1948 (tr.41,



48). After the fence was built plaintiff built his house, garage, chicken coup, etc., all with reference to the fence line (tr. 40-42). Also planted trees (tr. B 45) (tr. B 7-8). G. Blanchard states inconsistently that although he had no idea they owned anything north of the fence line yet they claimed and used it as right-of-way (tr. 37). And then plaintiff claimed his use was only because agreeable to his neighbors (tr. 36, 37, 79). All of defendants' witnesses denied any use at all.

Ever since erection of fence by plaintiff he has been in possession of the property south of the fence line and has paid taxes thereon upon receipt of a tax notice wherein the property was described in form as conveyed to him, and the defendants and their predecessors in interest have always done likewise. Each have always paid for the sidewalk and sewer improvements according to the frontage (tr. B 18) of the respective tracts they were in possession of and plaintiff has always been in possession of 4 rods. When the curb and gutter was put in Logan City adopted a different method of assessing the cost thereof—from the record instead of according to the actual frontage covered—(tr. B 73-80) and this was the first time plaintiff even thought that the property described in the deed and that which he was actually in possession of might not be identical. (tr. 32). He learned this from a notice which appeared in the newspaper. (pls. ex. C) \$16.50 then remained unpaid to Logan City. Plain-

tiff paid the \$16.50 to Logan City and upon learning of it defendants offered to repay him. (tr. B 21), and so Logan City quitclaimed 1 rod strip to plaintiff. (Pls. ex. P). Because of this expenditure of \$16.50 for the quitclaim deed, he, plaintiff, wanted to move the fence line north 19 feet (16½ feet by reason of the rod covered in the quitclaim deed, and also 2½ feet which he said he was short between the fence lines upon which he had lived for 45 years or more), and in the alternative complains that the lower court failed to compensate him for taxes, etc., mentioned at the top of page 6 of his brief. Appellant claims that because Logan City conveyed to him there was a mutual mistake of fact. If this is so then everytime a boundary line established by the parties is in error, there is a mutual mistake of fact. The issue as to the 19 ft. was made by defendants counterclaim. No objection was made during the trial. See rule 15 (244 P. 2, 360). Appellant also claims the court erred in finding: "Through a mixup in connection with the assessment of property, the said 1 rod above referred to has never been assessed for taxes." If Logan City never paid any taxes thereon, nor did these defendants and their predecessors who owned the excess in the block, then why is the court not correct? Furthermore, how did this harm appellant? He does not show. He, appellant, only paid taxes on the property he was in possession of.

We will answer appellant's argument and statements

in the order advanced in his brief and also show the lower court's decision in the matter is eminently equitable and fair and correct and should be affirmed.

## ARGUMENT

POINT NO. 1: THE LOWER COURT FULLY MET APPELLANT'S CONTENTION THAT THERE WAS A MISTAKE OF FACT AND UPON SUBSTANTIAL EVIDENCE DECIDED THE ISSUES AGAINST HIM.

Beginning at page 8 in an attempt to show a mistake of fact he quotes bits of testimony from the record. It is garbled. On page 9 Geo. Tiller is quoted as saying: "I never heard before that the surveyor gave me over 5 rods and Blanchard less than three." I have searched the record and I can find no such statement. At page 10 counsel puts the following question to Geo. Tiller, "According to your testimony he gave Mose less than 3 rods and he gave you about 5 and a fraction," to which the witness answered: "Why?" Question: "Because that fence is down there 19 feet on his ground." Answer: "I never heard that before." This is far from being the statement claimed for by counsel. Both questions asked for by counsel assumed facts unfair to the witness, but the court was not mislead because of the form of the question. The last question even intimates plaintiff owned the land he claims to have acquired from Logan City by the quitclaim deed in 1904 when the property was surveyed. The next statement counsel

quotes is also equally garbled: "I didn't intend to deed away any of Blanchard's property." (tr. 14). The court's attention is directed to tr. 14. The statement was not made by the witness as given in the brief. Line 13—"And you didn't intend to deed part of Mose Blanchard's property." Answer: "No sir, I didn't." Again the question even assumes Blanchard had property there in 1904. No where in the record is there any such claim. The substance of the remaining testimony quoted by appellant to the effect that Geo. Tiller figured Mose Blanchard got 4 rods south of the fence, that the deeds would call for the right property, is no doubt correct. The witness so thought. Both Blanchard and Geo. Tiller believed the fence was put where it should be. They both believed the surveyor was right and from that time on regarded it as the boundary line of their property.

The balance of the testimony quoted on page 9 and at the top of page 10 is tricky. "That one rod fooled us all, I am satisfied about that." "When did you find out about that." These answers are based upon the correctness of counsel's question that Logan City owned the one rod and that the surveyor was fooled. It is against finding No. 6 of the court that Logan City never was the owner of the 1 rod. The giving of a quitclaim deed does not imply the conveyance of any particular interest in property. The grantee acquires only the interest of the grantor, be that interest what

it may. *Nix vs. Tooele Co.*, 118 Pac. 2d 376 (Utah). And the court's finding is well supported by the evidence. See full testimony of witnesses Crockett and Marler, transcripts A and B. Neither abstract introduced in evidence shows Logan City to be the owner of the 1 rod of property. The abstractor who testified at the trial (tr. 88, 89, 90, 91, 94, 95) says Logan City never had title so far as his search reveals. Just how long since the south fence was built is not certain, but Anna T. Peery, who was 71 years when she testified in court upon the trial (tr. 59) stated the fence was up when she was a child because "us kids used to sit on the fence and watch the circus go through that lane to get to the B. Y. Campus when we were young" (tr. 64). That during all these years no action has been brought by anyone to move the fence or to claim that plaintiff or his predecessors in interest were not the true and lawful owners of the property to the south fence. Only the plaintiff wants to move his north fence because Logan City gave him a quitclaim deed after he himself built the fence about 45 years ago. He is also envious because he thinks George Tiller and subsequently these defendants as his successors in interest got more land out of the Tiller Estate than he did. There no doubt was a surplus in the block (tr. B 8, 9, 11). The north line of the Tiller estate property was not certain (tr. 13, 14). The river had been moved (tr. 67). A new road had been built to the B. Y. Campus.

IN THE SUPREME COURT OF THE STATE OF UTAH.

JOSEPH BLANCHARD,

Civil No. 7869.

Plaintiff and Appellant.

vs.

RONALD E. SMITH, et al.,

Defendants & Respondents.

RECENTLY UNCOVERED CASES ON

THE PART OF RESPONDENTS.

Comes now respondents and desires to cite the following recently uncovered cases given in support of Point No. 1 to be inserted at page 10 of Respondents' Brief. Respondents contend both of these very recent cases following Brown vs. Millner, supra, abundantly support the lower court's decision on the facts found, most of which are undisputed, and that these decisions also thoroughly refute appellant's contentions. These cases are obviously in point where, as in the case at bar, all the parties admittedly for more than 45 years regarded the fence as the boundary line between their properties.

Dragos vs. Russell (Utah) 237 Pac. 2nd 831.

Eckberg vs. Bates (Utah) 239 Pac. 2nd 205.

Dated this 9th day of October, 1952.

George C. Heinrich  
Attorney for Respondents.



the fence lines were even established by tenants of the owners thus negating entirely any agreement on the part of the owners; they did, however, recognize the fence lines as the boundry line by acquiescence and would not therefore later be permitted to deny that it was the boundry line. Appellant quotes, but fails to show just how his facts fit into *Holmes vs. Judge*.

In *Tripp vs. Bagley*, *supra*, the facts are different. There both parties knew when the fence was being built the fence was not on the true boundry line. There were no permanent improvements placed in reliance upon an established fence boundry line. Certainly appellant would not undertake to say in the case at bar both parties knew where the true line was. If so, why then even ask where the line was? Why take the word of a surveyor? Why build buildings with reference to the line and observe it as the boundry line for about 45 years? Appellant cannot by any analogy bring these facts within those of the *Tripp* case.

*Rydalch vs. Anderson*, *supra*, is a case where the original owners built a boundary line fence before the property was surveyed by the government so that at the time neither could possibly know where the true line was. Later a survey was made so that the section lines and corners were then well established and easily ascertainable. But the owners still continued to regard the fence as a boundry line. Said the court at page 29, right-hand column:

“That the boundry was open, and visibly marked on the ground by a fence which appellant’s seemed anxious to maintain and make permanent long after he had obtained title from the United States to the land in dispute, and long after the land had been surveyed, so that he at least had the means of knowledge, if he did not actually know where the government lines were located, is also beyond cavil.” And again, “The whole world, including respondent, therefore had a right to assume that the ownership of the land in fact was what those in interest held it out to be. Appellant, as the mere successor of his father, is estopped, if his father would have been.” The court then concludes that the father would be estopped.

Respondent believes this case also is in his favor. In fact, in the case at bar, one element here is more flagrant: Plaintiff even testified that he knew for a long time that the fence was wrong, that it was 2½ feet short of giving him 4 rods, and still the record is silent about him ever complaining to either George Tiller, Frank Purser, or the defendants, and yet he now wants to move the fence although it has been up for about 45 years, during all of which time he regarded it as the boundry line. That the fence line was visible and well established, see picture exhibits and tr. B. The lower court in its finding no. 3 (tr. 12) in addition to stating that the means of ascertaining the true line has always been available, could have gone further and found that the plaintiff actually knew (according to his own tesimony) that the fence was



not on the true line, and did nothing throughout the years but held out that it was on the true line by acknowledging the fence and so is now for that reason estopped. Rydalch P. Anderson, *supra*.

Counsel for appellant at page 11 of brief states that the law here involved is annotated in 69 ALR1430-1533, following, *Tripp vs. Bagley*, *supra*, and that altho there are some cases to the contrary, the big majority there cited under the subhead "Effect of Mistake" hold in harmony with *Brown vs. Milliner*. It is submitted that this statement is not borne out either by the facts or as to the law. As above shown, the facts in the case of *Tripp vs. Bagley* and those in the case at bar are as different as is night from day. The *Trip* case is discussed in *Brown vs. Milliner*, *supra*, and at page 208, left-hand column, in that case the court says:

"But the *Tripp* case does not require a party relying upon a boundary which has been acquiesced in for a long period of time to produce evidence that the location of the true boundary was ever unknown, uncertain or in dispute. That the true boundary was uncertain or in dispute and that the parties agreed upon the recognized boundary will be implied from the parties' long acquiescence."

In this case the defendant could know nothing about how the fence line was established (they are now 58 years of age) were it not for the fact that George Tiller and his sister, Mrs. Peery are still alive and so when

plaintiff wanted to move the fence line they investigated.

Appellant then at page 11 cites *Brown vs. Milliner*, supra, to the effect that this case holds "that when a party has acted under a mistake of fact, especially a mutual mistake of fact, such party is not estopped, but may claim to the true line upon discovery of the mistake just as plaintiff tried to do when he discovered his mistake." It is submitted that the holding in that case justifies no such statement when attempt is made to fit these facts into that statement. In that case the lower court was reversed because the record did not sustain the lower court's finding that "the old channel of Weber River was mutually recognized and acquiesced in as the boundry between the property now owned by the palintiff and the defendant." (Page 208, lower left-hand column) No stretch of the imagination could contend such statement fit the facts in the case at bar. Here the plaintiff recognized the fence the court found he built during all the time George Tiller and his successors in interest, Frank Purser and these defendants, have resided upon the property, until 1948 when first complaint was made. Defendants' contend that *Brown vs. Milliner* is also a case in their favor and rely upon it.

Counsel then at the top of page 12 of brief refers to and quotes from some cases cited bginning on page 1486 of 69 ALR, many of which are old southern ones. A reference to these cases show that the factual basis

for the quotes are so different from the facts in the case at bar that the quotes cannot possibly have any meaning so far as this case is concerned. Nor do they represent the majority view. It is belived that the cases cited on pages 1485 and 1486 of 69 ALR under the title "Effect of Mistake" are more in keeping with the decisions and trends of the holding of our own court. Many of the cases cited are western ones, and the facts given are for the most part applicable. A case very similar in facts to the case at bar is *Davies vs. Lynham* 247 Pac. 294 (Utah) cited in *Brown vs. Milliner* at page 207. See also Am. Jur. Boundaries, Effect of Mistake of Fact, Sec. 77, citing 69 ALR 1485 to the effect that landowners may when in doubt as to boundary line orally agree where it shall be etc., and also to the effect when innocent third parties have intervened they may be estopped, as also they may be upon discovery of the true line if they do not immediately disavow the oral line agreed upon, citing 69 ALR 1486.

Point No. 3: THE PARTIES DID NOT KNOW FENCE WAS NOT ON THE TRUE LINE.

At the top of page 13 counsel next states: "Parties knew fence was not on true line." This statement just simply is not borne out by the facts. Certainly at the time the survey was made neither party knew where the dividing line was and that is the time that counts and there is nothing in the record to show that defendants or any of their predecessors at any time were

aware that the fence was not on the true boundary line as called for by their respective deeds. But plaintiff upon the trial stated that he knew for a long time the fence was not on the line. If he did, why then did he not complain? Just when did he learn this, if he knew it? As late as 1943, he rebuilt part of the fence, and this was done after the defendants became the owner of the property. Why did he do this? That such facts do not bring this case within the holding of *Tripp vs. Bagley* is too obvious for discussion. If plaintiff knew the boundary line was in error then he concealed such fact from all of the parties who have resided on the premises and he should not now be rewarded for such conduct. I cannot find any justification for counsel's statement on page 14 that the *Tripp* case says: "If *one* of the adjoining landowners has knowledge, or understands, that the fence in question is not on the true line, the rule permitting a boundary line to be fixed by parol agreement or acquiescence does not apply." I believe the case stands for no such rule. Even if it did, then it is submitted that it must refer to knowledge of error at the time the fence is located, not knowledge later acquired, because even then no matter when acquired, certainly it becomes the duty of the party to make the error known promptly unless he desired to waive or ratify the error. He cannot idly sit by. And even if he does make it know many cases still hold that if the fence has been up for many years

and agreed upon as the dividing line it cannot then be moved, particularly if innocent third parties have relied upon the fence line.

Point No. 4: THERE WAS DISPUTE AND UNCERTAINLY ACTUALLY AND LEGALLY:

At page 14 counsel next discusses “No Dispute and No Uncertainty” and then states that the court “found that there had never been any dispute concerning the boundary line between them.” This statement is misleading and it is submitted not accurate. The court found in finding No. 2 (tr. 9) that all of the parties were in doubt as to the location of the boundary line so that the line separating plaintiff’s property and George Tiller’s property was unknown and uncertain. A surveyor was then called and he made a survey and upon this line (thus accepting the findings of the surveyor) the fence was mutually agreed to be and upon which the plaintiff erected the fence. In finding No. 3 (tr. 11) the court found that after the erection of the fence each used the lands adverse to the other and that neither defendants nor their predecessors in interest “ever knew that there was any thought of dispute as to the property line until at the time herein-before mentioned.” This refers, of course, to after the erection of the fence and not before. That the plaintiff and defendants and their grantors testified that there was no *dispute* concerning the boundary line simply shows that they all regarded the fence as the boundary

line. It does not refer to before the fence was built.

Appellant then quotes from *Talbot vs. Smith*, 107 Pac. 480 (Ore) to defeat the description in a deed the plaintiff urged that a fence line or stake set up by someone has been acquiesced in and should control. And in *Jefferies vs. Sheehan* 242 Mich. 167, 218 N. W. 703, where the language quoted shows there never was a dispute. These statements upon their face show that the facts are entirely different from those at bar and can have no application. In passing it should be observed also that in *Talbot vs. Smith*, supra, syllabus No. 4, it is stated that even where the fence is by mistake supposed to be on the boundary line that after ten years of adverse occupancy by another under claim of title it could not be moved. Defendants and their predecessors in interest have been in possession for about 45 years. Counsel then states that defendant's cannot succeed in their counterclaim for they have failed to pay taxes. In answer to this it might be asked, how then can plaintiff succeed when they have been out of possession of the 19 foot strip for about 45 years. The answer of course is that this is a boundary line case which defendants set up in their counterclaim.

The recognized rule is in keeping with the finding of the lower court that the line sought to be established be doubtful, uncertain or in dispute. See 8 Am. Jur. Boundaries, Sec. 74, page 799, the cases cited following note 11 including 69 ALR 1443, et seq, wherein is



cited *Tripp vs. Bagley*, supra. The subject, "Necessity and sufficiency of dispute or uncertainty" is further annotated in 113 ALR page 425, et seq, to which reference is made. Appellant seems to labor under the impression that in order for there to be a "dispute" it is necessary for there to be a fight or a quarrel. Such is not the case. The annotation just referred to cites an excellent number of illustrations. They hold for example: "No dispute in the sense of a quarrel or ill feeling between the parties is necessary." *Moniz vs. Peterman* 31 Pac. 2d 353 (Calif.). If the location of the line between contiguous landowners has not been definitely established, or is otherwise doubtful and uncertain, and they orally agree to be bound by a line then established by the agreement, the agreed line will be adhered to by the court. *Sammann vs. Dietrich* (Tex.) 39 SW (2d) 647. It is not necessary that the true line be absolutely unascertainable, nor that it could have been determined by a survey. *Sobol vs. Gulinson* (Colo.) 28 Pac. 2d, 810. In fact, in *Coleman vs. Smith*, 55 Tex. 254 referred to in 69 ALR page 1485 attention is drawn to the fact that even different surveys may differ. In *Caputo vs. Mariatti* (1934) Pa. Super. Ct. 314, 173 A. 770, the owner of a plot of ground subdivided it into lots, placing stakes in the ground, that thereafter purchasers of two contiguous lots erected a division fence following the stakes, and the court held the

stakes controlled. The above are simply a few of the many cases cited in the annotations referred to which shows the kind of dispute and uncertainty necessary, legally.

Appellant then contends uncertainty or indefiniteness was not proved by making reference to 11 C.J.S. 538-9 and also *Hartun vs. Witte* (1884) 59 Wis. 285, 18 N.W. 174. Such a contention is thoroughly unsound. It is in conflict with all boundaries established orally and does not fall within the subject under consideration. That question is treated in the same work counsel refers to 11 C.J.S. Boundaries, Sec 67, page 638 and sections following. Appellant next states the burden of proof is upon respondents and cites 8 Am. Juris. page 810 and 69 ALR 1489. Respondents agree with this and contend they fully discharged this burden upon the trial.

Point No. 5: THE LOWER COURT WAS CORRECT IN FINDING THAT THERE WAS AN AGREEMENT.

Inasmuch as this has been previously treated by a reference to the survey made, that plaintiff lived with the fence for 45 years without objection, re-built part of it as late as 1943, it is so obvious that he agreed to the fence as the boundary line that this will not be pursued further. In *Holmes vs. Judge*, supra, it was held that there need be no agreement if the parties



recognized the fence sufficiently long. See also 8 Am. Jur. Boundaries, Sec. 75, page 799. 69 ALR 1466. Acquiescence. See 69 ALR 1491 (citing many Utah cases) further annotated in 113 ALR 432. When acquiescence has been for sufficiently long time it is immaterial that established line does not agree with conveyances.

Counsel next states that the court found: “plaintiff’s property was distributed in accordance with the survey directed by the late W. W. Maughan.” I am unable to find any such finding by the court. Finding No. 2 and 3 (tr. 9-10) is directly contra. There is positively nothing in the evidence to show any survey was made at any time during probate of the Tiller estate. Distribution was simply made by metes and bounds, but no survey was had. To so distribute is a common practice with which every lawyer is familiar. Next counsel says: “Why would plaintiff want a survey 2½ years later?” I can find no such evidence to this effect. But if so, then why does he let the matter go on for an additional 42½ years and then attempt to change a boundary he permitted to remain and later purchased by innocent third parties? If he did this, then he should now certainly be estopped. See 8 Am. Jur. page 800, Sec. 77, Effect of Mistake of Fact, where the rights of innocent third parties have intervened. Also 69 ALR 1485- 86, 1520.

Appellant at page 17 and 18 makes further reference to testimony and attempts to “make fun” of some of

it. Reference to contra testimony has previously been given and so no further comment will here be made. However, it must be brought to the court's attention that Anna Peery, now of Ogden, and Mr. and Mrs. George Tiller, now of Brigham City, all testified that while they lived next door to plaintiff that they were always neighborly and friendly. They were unacquainted with defendants, (tr. B 10). Yet when called upon to testify their unbiased testimony favored the defendants. There was no reason to disbelieve either or any of them and the lower court who saw them apparently had no hesitation in believing them. The statements counsel criticize for being made by Mrs. Peery at the bottom of page 17 are: "I know he built it because I saw him. I didn't build it. My father didn't build it. I say Mose did it or his boys did." It is perfectly understandable how any witness while on the stand could so testify and yet not be any ground for questioning her credibility. The attempt to discredit because Mrs. Peery inadvertently used the words "or his boys did it" is ridiculous.

At page 4 appellant mentions that the court failed to bring in as third parties the Federal Land Bank because of an unsatisfied mortgage and the State of Utah because of the existence of a Public Welfare Lien, both given by plaintiff, in violation of Civil Rules 13(g). The record does not show that counsel for appellant even suggested bringing them in to the court. **If counsel**

regarded their presence necessary for a complete determination under the rule, then he should have made the suggestion to the court rather than now complain. Nor does he show how failure to bring in either or both of them failed to give complete relief in the action, and it is difficult to see just why they should be made parties. If either party viewed the property at all before making the mortgage they certainly made it with reference to fence lines as being the property line and if so, upon a foreclosure the mortgage can always be corrected to properly describe the property intended. At any rate, all counsel does is mentions the matter. He does not argue or cite any authority so he must be deemed to have waived the matter.

**Point No. 6: COURT DID NOT ERR IN PERMITTING DESIGNATION TO BE TARDILY FILED NOR SHOULD RULE 75(b) BE AMMENDED.**

Finally at page 19 appellant complains that contrary to the spirit and purpose of Rule 75 (e) the court arbitrarily required him to furnish respondents' with the entire transcript; On June 21, 1952 counsel for appellant served on counsel for respondent, Designation of Record, etc., (tr. 35) in which appears among other things the simple statement: "Transcript of the evidence served herewith." Later when counsel obtained the transcript for purpose of preparation of appeal it was observed that the notes transcribed were only those requested by counsel for appellant, that in no

instance was the full testimony of any witness reported and that approximately one-third of the testimony was eliminated in the opinion of the reporter, (tr. 148) (It finally turned out that 82 pages were omitted and 96 transcribed). In other words, counsel for appellant had ordered transcribed for the use of respondents such testimony as he chose. At the time of service of the designation there was nothing to indicate that the whole of the proceedings had not been transcribed. If only part was transcribed, it should have expressly so stated or counsel should have been so advised. At any rate, it mislead counsel for respondents. He therefore filed Demand for Additional Evidence, etc., (tr. 39 to 43) and counsel complains at the court's order requiring entire transcript of evidence. The record further shows that this cause was tried Sept. 21, 1951, and that several continuances was had.

Appellant complains that no designation was made as to what additional testimony was required to be transcribed. Such a request it is submitted is unreasonable and not contemplated by any rule. No lawyer could be expected to recall what bits or even large portions of important testimony was eliminated, or the materiality thereof. He could not therefore be able to designate what omitted part should be added without having the court reporter read the notes to him and such a requirement should not be imposed upon any respondent. Respondents use of transcript on appeal should

never be limited to what appellant's counsel thinks he should have. In this instance, for example, all of the testimony explanatory of the picture exhibits have been omitted, besides much corroboration testimony. Then too abstracts gotten out in piecemeal are not satisfactory. That is apparent from the transcripts furnished herewith because it is very difficult to read the second transcript marked "B" even though the reporter made references in the best way he knew how.

Rule 75(b) Transcript, provides in part as follows: "If the designation does not include all of the evidence, the appellant shall file a copy of such part thereof as the respondent may need to enable him to designate the part he desires to have added, and if the appellants fail to do so the court on motion may require him to furnish the additional part needed." This is just what the court did on affidavit, etc., of counsel for respondents. And, it is believed, Rule 75(e), "Record to be Abbreviated" does not refer to the question here presented. It refers to omitting formal parts of exhibits, more than one copy of any document, omitting irrelevant and formal portions of documents, or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another. None of these things happened, so there was no violation of this rule. If the rule were applied as contended for by appellant, then if respondent shall recover upon appeal he would be taxed

with costs for additional transcript and without which he might not have prevailed had he not ordered more than appellant arbitrarily had transcribed. It is contended that appellant's contention is entirely untenable and that the rule should not be amended. Nor did the court violate any rule in requiring appellant to furnish transcript covering all evidence.

IN CONCLUSION it is submitted that the decision of the lower court is fair and equitable between the parties and finds support both in the facts and the law, and that it would be inequitable at this late date to grant appellant's appeal for recovery of 19 feet (or any part thereof) of ground, the difference between the lines established by the boundary line fence by plaintiff and defendant's predecessors in interest about 45 years ago and the description contained in deed, or to require these defendants to pay any taxes, etc. thereon, particularly when appellant himself has paid no taxes, etc., other than those which covered the property he has always enjoyed and been in possession of, even if it did not actually on the ground happen to cover the description contained in the deed. The decision of the lower court is entitled to be affirmed in all particulars, together with respondents' costs in connection with this appeal.

Respectfully submitted,  
George C. Heinrich,  
Attorney for Defendants and Respondents.