

1988

George G. Mahas v. Lavar Rindlesbacher : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT.

BRIEF

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

880350

GEORGE G. MAHAS and
LUCILLE H. MAHAS,

Plaintiffs-Respondents,

vs.

Case No. 88-0350

LAVAR RINDLISBACHER,

#146.

Defendant-Appellant.

APPELLANT'S BRIEF

Appeal from the Judgment of the
Second Judicial District Court of Weber County
Honorable David E. Roth, Judge

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IN THE
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TABLE OF CONTENTS

Table of Authorities	ii
Statement of Jurisdiction	ii
Issues Presented for Review	ii
Statutes and Rules to be Interpreted	ii
Statement of the Case	1
Nature of the Case	1
Disposition in the Lower Court	1
Statement of Facts	1
Summary of Argument	4
Argument	5
Conclusion	16

TABLE OF AUTHORITIES

Cases

Page

<u>Achter v. Maw</u> , 27 Utah 2nd 149, 493 P2d 989 (1972)	5,6,9
<u>Johnson Real Estate Company v. Nielson</u> , 10 Utah 2nd 380, 353 P2d 918 (1960).....	5,6
<u>Scott v. Hansen</u> , 18 Utah 2d 303, 422 P2d 525 (1966)....	5,6,9

Other Authorities

12 AmJur 2nd, <u>Boundaries</u> , Sections 64, 65, 66 and 67...	6
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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this court by §78-2-2(i), U.C.A. This appeal is from final judgment of the District Court of the Second Judicial District of Weber County, State of Utah. The judgment and order to be reviewed on this appeal are the Judgment entered May 18, 1988, and the Order Denying Defendant's Motion for a New Trial entered August 22, 1988. The Notice of Appeal was filed September 19, 1988.

ISSUES PRESENTED FOR REVIEW

SHOULD A CALL TO A MONUMENT IN A LEGAL DESCRIPTION TAKE PRECEDENCE OVER A DISTANCE CALL.

STATUTES AND RULES TO BE INTERPRETED

None.

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

GEORGE G. MAHAS and
LUCILLE H. MAHAS,

Plaintiffs-Respondents,

vs.

Case No. 88-0350

LAVAR RINDLISBACHER,

Defendant-Appellant.

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Nature of the Case

This is a suit brought by George G. Mahas and Lucille H. Mahas against LaVar Rindlisbacher to determine the correct boundary line separating their respective properties which are situated in Slaterville, Weber County, State of Utah

Disposition in the Lower Court

The matter was heard in trial before the court and the court ruled in favor of Mahases. Rindlisbacher filed a motion for a new trial. The court denied that motion.

Statement of Facts

LaVar Rindlisbacher and Elaine Rindlisbacher, his wife, acquired a parcel of real property situated in Slaterville, Weber County, Utah, from Priscilla M. Owens, aka Pricilla M.

Owens, by warranty deed dated July 10, 1975, and recorded July 15, 1975, as entry number 641926, in book 1092, at page 255 (Exhibit 9). The legal description contained in the warranty deed describes the property by metes and bounds and calls to a known monument (canal). The legal description is as follows:

A Part of the Northeast Quarter of Section 10, Township 6 North, Range 2 West, Salt Lake Meridian, U.S. Survey: Beginning 9.06 chains West and South 27° West 22.43 chains from the Northeast corner of Section 10 (at a point in the Northerly line of the County Road) thence North 27° East 12.00 chains, more or less, to a canal; thence Southeasterly along canal to a point North 15° East 10.18 chains from the County Road; thence South 15° West 10.18 chains to the County Road; thence Northwesterly along the County Road, 600 feet, more or less, to the place of beginning. Excepting therefrom that portion Deeded to Marvin L. Barney & wife Edith E. Barney in Book 1037, Page 2 and Book 1022, Page 70 of Records.

George G. Mahas and Lucille H. Mahas, his wife, acquired a parcel of real property situated in Slaterville, Weber County, Utah, from Joan Norman, formerly known as Joan Mahas, by warranty deed dated July 8, 1985, and recorded July 8, 1985, as entry number 941574, in book 1474, at page 2513 (contains the property in dispute as well as additional property). The relevant legal description appeared as follows:

A part of the Northeast Quarter of Section 10, Township 6 North, Range 2 West, Salt Lake Meridian, U.S. Survey: Beginning at a point 8 chains West of the Northeast corner of said Section 10; running thence West 1.06 chains; thence South 27° West to Warren Canal; thence Southeasterly along said canal to a point North 15° East 10.18 chains from County Road; thence North 15° East 975 feet; thence North

74° West 198 feet to the point of beginning.

This warranty deed was re-recorded on January 21, 1987, immediately prior to the commencement of this action, as entry number 996627, in book 1507, at page 2758 (Exhibit 7), and the relevant legal description therein was altered to read as follows:

A part of the Northeast Quarter of Section 10, Township 6 North, Range 2 West, Salt Lake Meridian, U.S. Survey: Beginning at a point 8 chains West of the Northeast corner of said Section 10; running thence West 1.06 chains; thence South 27° West to Canal; thence Southeasterly along said canal to a point North 15° East 10.18 chains from County Road; thence North 15° East 975 feet; thence North 74° West 198 feet to the point of beginning.

The grantor in this warranty deed, Joan Norman, formerly known as Joan Mahas, acquired a larger tract of real property from which the subject real property was derived, from Earn P. Fryer and Ella B. Fryer, by warranty deed dated March 19, 1970, and recorded April 7, 1970, as entry number 533600, in book 938, at page 604 (Exhibit 6). The relevant tract was therein described as follows:

A part of the Northeast quarter of Section 10, Township 6 North, Range 2 West, Salt Lake Meridian, U.S. Survey, Beginning at a point 8 chains West of the Northeast Corner of said Section 10; thence West 1.06 chains thence South 27° West to Warren Canal; thence Southeasterly along said canal to a point North 15° East 10.18 chains from county road; thence North 15° East 975 feet; thence North 74° West 198 feet to point of beginning.

Earn P. Fryer and Ella B. Fryer acquired their interest in the property from Victor J. Wheeler and Mae Wheeler by warranty deed dated May 19, 1942, and recorded May 19, 1942,

in book 160, at page 126 (Exhibit 5). The legal description of this tract of real property is described as follows:

A part of the Northeast quarter of Section 10, Township 6 North, Range 2 West, Salt Lake Meridian, U.S. Survey: Being all that part of the following described tract of land which lies North of the canal: Beginning at a point 20 chains South and 10.25 chains West from the Northeast corner of the Northeast quarter of said Section 10, running thence West 9 chains; thence North 27° East 22.45 chains; thence East 1.06 chains; thence South 74° East 3.85 chains; thence South 7° 45' West 15.84 chains; thence North 58° West 3 chains; thence South 15° West 5 chains to the place of beginning.

Subsequent to the initiation of this lawsuit, Earn P. Fryer and Ella B. Fryer, gave a quit claim deed to George C. Mahas and Lucille H. Mahas, this deed being dated May 7, 1987, and recorded May 7, 1987, as entry number 1010147, in book 1516, at page 1121 (Exhibit 8). The legal description was altered to read as follows:

A part of the Northeast quarter of Section 10, Township 6 North, Range 2 West, Salt Lake Meridian, U.S. Survey, Beginning at a point 8 chains West of the Northeast corner of said Section 10; thence West 1.06 chains; thence South 27° West to an old canal line; thence Southeasterly along said canal to a point North 15° East 10.18 chains from county road; thence North 15° East 975 feet; thence North 74° West 198 feet to a point of beginning.

Mahases commenced suit against Rindlisbacher under a complaint dated February 25, 1987, seeking to establish the boundary line between the respective properties and for damages for Rindlisbacher's unauthorized use of Mahas' property.

SUMMARY OF ARGUMENT

The law of boundaries in Utah is settled. It is the

purpose of the law to effect the intent of the parties at the time of the conveyance. Rules of construction have been adopted for the purpose of assisting in ascertaining and giving effect to such intent. The primary rule is that fixed monuments or markers of a permanent nature which can be definitely identified and located take precedence over calls of courses and distance, or plats.

Evidence demonstrates that the relevant deeds contain calls to a monument which can be none other than the Warren Canal. The court erred in speculating that there might have been another canal, and in relying on the county plat which erroneously sets forth a speculative representation of a canal based upon deed distance calls. The court further erred in allowing plaintiff-respondents to claim property which was beyond the calls of their title and that of their predecessors in title.

That the judgment of the lower court should be reversed.

ARGUMENT

The status of the law of boundaries is well established in Utah.

The most critical consideration in determining boundaries is to effect the intent of the parties {see 12 AmJur 2d, Boundaries, Section 64; Achter vs. Maw, 27 Utah 2d 149, 493 P2d 989, 993 (1972); Scott vs. Hansen, 18 Utah 2d 303, 422 P2d 525, 527 (1966)); and Johnson Real Estate Company v. Nielson, 10 Utah 2d 380, 353 P2d 918 (1960). In

construing intent the most reliable rule is to accept a call to a monument as superior to a distance call.

The rules of construction for determining the intent of the parties are in relevant part set forth as follows:

1. If all parts of the description can reasonably be interpreted to be consistent, the description should be so interpreted (12 AmJur 2d, Boundaries, Section 64).

2. If all parts of the description are not consistent, then the order of precedence as between the different calls is as follows:

(a) Natural monuments, (b) artificial monuments, (c) adjacent boundaries and finally (d) courses and distances. {See 12 AmJur 2d, Boundaries, Section 65; Johnson Real Estate Company vs. Nielson 10 Utah 2d 380, 353 P2d 918, 920 (Utah 1960); Scott vs. Hansen, 18 Utah 2d 303, 422 P2d 525, 257 (Utah 1966); Achter vs. Maw, 27 Utah 2d 149, 493 P2d 989, 993 (Utah 1972).

3. Any call can be disregarded if it leads to an absurdity (12 AmJur 2d Boundaries, Sections 66 and 67).

4. An inconsistent call should be discarded if thereby all the rest of the calls are reconciled and the description perfected (12 AmJur 2d Boundaries, Section 66).

5. As few calls or descriptions as possible should be disregarded (12 AmJur 2d, Boundaries, Section 66).

Application of the first rule of construction for determining intent requires examination of the deed(s) to

determine whether all parts of the description(s) can be reasonably interpreted to be consistent. Both the Mahas' and Rindlisbacher's descriptions contain a call to the canal followed by the following common course: ... "thence Southeasterly along said canal to a point North 15° East 10.18 chains from county road...". This requires both descriptions to follow the line of the canal to the same point.

Without reference to the monument (physically existing canal), neither legal description can trace the line of the canal. To attempt to place this course anywhere but on the line of the physically existing canal creates an absurdity, because there is no legitimate way to bring about closure of the description. "Southeasterly" standing alone is too vague. On the other hand, reference to the physically existing Warren Canal as the existing monument allows the property boundary to be precisely defined and allows closure of Rindlisbacher's description. The Mahas' description is self contradictory in that it doubles back on itself on part of one call, but nevertheless closes. Thus, application of this rule of construction allows all parts of both descriptions to be interpreted with consistency and therefore the Warren Canal should be interpreted to be the boundary.

Mahases claim that the real intent was to make the boundary line an "old canal," not the Warren Canal, and that the monument call to "the old canal" is therefore correct.

Mahases have laboriously "corrected" their original deeds to substitute "canal" for "Warren Canal" in their deed descriptions. It is apparent from the original deeds that Earn P. Fryer and Ella B. Fryer perceived their boundary to be the Warren Canal, and they conveyed title to that monument. Likewise, Joan Norman perceived her boundary to be the Warren Canal and she conveyed title to that monument. Recognizing that a deed call to the Warren Canal was fatal to their position, Mahases acquired corrective deeds to change the stated intent of Fryers and Norman, and thus obfuscate the location of the canal monument. They have attempted to create the illusion there was another canal. There is no evidence to support the existence of a second canal parallel to the Warren Canal. The absence of a second canal is evidenced by the following:

a) Exhibit 23 which demonstrates the existence of the Warren Canal as early as 1908, with no reference to a parallel canal.

b) The affidavit in the court file from Wesley T. Spencer, a 50 year resident of the area who states that there has been but one canal within the area, the Warren Canal, and that Rindlisbacher and his predecessors have farmed the property to the Warren Canal.

c) Unopposed proffer of testimony at trial that there were witnesses who would testify that there was only one canal, the Warren Canal, in the area within the last

forty (40) years (p.99).

d) None of the deed calls recites more than one canal. A call to "a canal" or "the canal" implies that there was only one canal in the area. In order for the Mahases description to reach the line which they claim as the boundary requires their description to cross the Warren Canal. Reason would argue that if the Warren Canal was in existence as early as 1908, and a grantor intended to convey property on both sides of the Warren Canal, that the deed description would specifically state that the call crosses the Warren Canal to another canal, instead of simply reciting "to canal."

Furthermore, to constitute a monument a landmark must have certain qualities, such as "visibility, permanence, stability and a definite location ..." See Achter vs. Maw, Supra at Page 993. Therefore, the "old canal," which exists only as a line on the plat map, is still insufficient to describe the property, leaving plaintiffs with an invalid description. In Scott vs. Hansen, Supra at Page 527 there appears the following language:

"...it becomes important to determine if possible the intent of the parties at the time of conveyance. There are rules of construction which have been adopted for the purpose of assisting in ascertaining and giving effect to such intent. One of these is that fixed monuments or markers of a permanent nature which can be definitely identified and located take precedence over calls of courses or distances, or plats, or amounts of acreage. (Emphasis added.)

It is submitted that this entire dispute has arisen by

virtue of the manner in which the Weber County Recorder has designated the Rindlisbacher's and Mahas' legal descriptions on the county plats. (See Exhibit 2). Mahases continue to speculate on the possible existence of an old canal to justify the validity of their interpretation of their legal description because of what is shown on the county plats, notwithstanding there is no evidence to support this speculation. (See Amended Findings 5 and 6 of the trial court.) The plats maintained by the County Recorder are a means of identifying property ownership. The plats are a two-dimensional representation of ownership and boundaries which rely upon the accuracy of surveyors and draftsman, without reference to apparent imperfections (such as the earth's curvature resulting in Sections that are sometimes larger and sometimes smaller than the ideal norm). Plats are further handicapped in accurately describing properties because they do not reveal natural or artificial monuments. Herein lies the problem with monuments in legal descriptions; the law affords priority to monuments in land descriptions, while the draftsman who creates the county plats has no way of accurately depicting those monuments on his plats, indeed, the monuments do not normally appear on the plats. Therefore, when he plats a legal description containing courses, distances and monuments, he is able to plat only those portions which he is able to plat with certainty, namely distances. When presented with descriptions such as

those of the Mahases and Rindlisbacher, he can plat a course with a distance, and then can only speculate as to whether the description at that point intersects a monument (canal) which does not appear on his plat. Based on his lack of certainty, he draws in an imaginary line to represent the monument (canal). Others then place reliance upon the draftsman's speculation and create other descriptions in reliance thereon, resulting in speculation becoming the basis in fact for other incorrect legal descriptions. Note that all of the testimony in the trial court dealt with a county plat which on its face acknowledges that the location of the warren canal shown on that plat is an approximation based upon an aerial survey. It is not platted therein by a land survey. Further note that the deed descriptions of Mahas' predecessors in title were for property north of the canal. Notwithstanding the Rindlisbacher deed precedes the Mahas' deed, and the call of the Mahas' deed is "south 27° West to Warren Canal" or ("an old canal", as re-recorded), the county recorder platted the Mahas' description across the Warren Canal to the imaginary line on the plat designated as "canal". It is submitted that this was a result of platting the Rindlisbacher deed to a distance (12 chains) instead of to the monument, and then platting Mahas' description to this point to close and to prevent gaps.

If, for the sake of argument, Rindlisbacher concedes that all parts of his description cannot reasonably be

interpreted to be consistent, then an interpretation should be sought under the second rule of construction for determining intent. If all parts of the description are not consistent, then the order of precedence between the calls would be first to natural monuments (in this case the canal), and lastly to courses and distances, which are the basis for Mahas' attempt to discredit Rindlisbacher's description. As argued elsewhere herein, there is copious evidence that the Warren Canal is the only canal ever existing in the area and is the monument to which attention must be turned if a correct application of the law is to be made in this matter.

The third rule of construction for determining intent allows a call to be disregarded if it leads to an absurdity. Rindlisbacher's call to the canal is consistent with Mahas' call to the canal. To follow Rindlisbacher's description from the canal southeasterly around the perimeter of his description is logical and consistent, and results in closure. It is also consistent with the ownership of Rindlisbacher's predecessors in title. Likewise, Mahas' call to the canal is consistent with Rindlisbacher's call to the canal. To follow Mahas' description southeasterly along the canal is consistent with Rindlisbacher's description and is also consistent with the ownership of Mahas' predecessors in title. The only absurdity in either description occurs when Mahas' call retraces itself northward along the canal, instead of making a call eastward before proceeding

northward. This absurdity was created by Mahas' predecessor in title, not by Rindlisbacher. It is erroneous to attempt to harmonize Mahas' description by making the unwarranted assumption that another canal may have existed in a location justifying that harmony when there is no evidence to support it.

If Rindlisbacher's call to the canal is considered inconsistent and thereby discarded, as argued by Mahases in application of the fourth rule of construction, Mahases are left with their own inconsistent call as stated above, as well as the fact that their root of title places their description north of the canal.

Plaintiffs' Exhibit 1 demonstrates that the chain of title, by which Mahases derive title, vested ownership to lands lying North of the canal.

Plaintiffs' Exhibit 5 is a warranty deed dated May 19, 1942, wherein Victor J. Wheeler and Mae Wheeler convey to Earn P. Fryer and Ella B. Fryer, the following:

A part of the Northeast quarter of Section 10, Township 6 North, Range 2 West, Salt Lake Meridian, U.S. Survey: being all that part of the following described tract of land which lies North of the canal: Beginning at a point 20 chains South 10.25 chains West from the Northeast corner of the Northeast quarter of said Section 10, running thence West 9 chains; thence North 27° East 22.45 chains; thence East 1.06 chains; thence South 74° East 3.85 chains; thence South 7°45' West 15.84 chains; thence North 58° West 3 chains; thence South 15° West 5 chains to the place of beginning. (Emphasis added)

(Note: This description contains plaintiffs' description, together with additional property).

Plaintiffs' Exhibit 6 is a warranty deed dated March 19, 1970, wherein Earn P. Fryer and Ella B. Fryer convey to Jimmy G. Mahas and Joan Mahas, the following:

A part of the Northeast quarter of Section 10, Township 6 North, Range 2 West, Salt Lake Meridian, U.S. Survey, beginning at a point 8 chains West of the Northeast corner of said Section 10; thence West 1.06 chains thence South 27° West to Warren Canal; thence Southeasterly along said canal to a point North 15° East 10.18 chains from County Road; thence North 15° East 975 feet; thence North 74° West 198 feet to point of beginning. (emphasis added.)

Plaintiffs' Exhibit 8 is a quit claim deed dated May 7, 1987 (recorded by Mahas' counsel subsequent to the filing of this lawsuit) wherein Earn P. Fryer and Ella B. Fryer convey to George G. Mahas and Lucille H. Mahas, the following:

A part of the Northeast quarter of Section 10, Township 6 North, Range 2 West, Salt Lake Meridian, U.S. Survey, beginning at a point 8 chains West of the Northeast corner of said Section 10; thence West 1.06 chains; thence South 27° West to an old canal line; thence Southeasterly along said canal to a point North 15° East 10.18 chains from County Road; thence North 15° East 975 feet; thence North 74° West 198 feet to point of beginning. (emphasis added.)

In the body of the above deed appears the following language: "This deed is given to correct a deed heretofore given by us dated the 19th day of March, 1970 and recorded April 7, 1970 in the office of the Weber County Recorder as number 533600, which said deed mistakenly referred to the "Warren Canal" as one of the boundaries." (It is to be noted that this quit claim deed names the Mahases as Grantees, yet purports to correct the earlier deed wherein Jimmy G. Mahas

and Joan Mahas were named as Grantees).

Plaintiffs' Exhibit 7 is a warranty deed wherein Joan Norman, formerly known as Joan Mahas, conveys to George G. Mahas and Lucille H. Mahas the legal description by which they now claim title. The warranty deed bears two recording stamps. It was first recorded July 8, 1985, at which time the relevant legal description read as follows:

A part of the Northeast quarter of Section 10, Township 6 North, Range 2 West, Salt Lake Meridian, U.S. Survey: Beginning at a point 8 chains West of the Northeast corner of said Section 10; running thence West 1.06 chains; thence South 27° West to Warren Canal thence Southeasterly along said canal to a point 15° East 10.18 chains from County Road; thence North 15° East 975 feet; thence North 74° West 198 feet to the point of beginning. (Emphasis added).

This warranty deed was subsequently re-recorded January 21, 1987, at which time the relevant legal description was modified to read as follows:

A part of the Northeast quarter of Section 10, Township 6 North, Range 2 West, Salt Lake Meridian, U.S. Survey: Beginning at a point 8 chains West of the Northeast corner of said Section 10; running thence West 1.06 chains; thence South 27° West to Canal; thence Southeasterly along said Canal to a point 15° 10.18 chains from County Road; thence North 15° East 975 feet; thence North 74° West 198 feet to the point of beginning. (Emphasis added).

It is clear from an examination of plaintiffs' Exhibit 1 (including the Warranty Deed from Russell C. Wheeler and Maude E. Wheeler to Victor J. Wheeler) and plaintiffs' Exhibit 6 that Mahas' predecessor in title acquired only that property North of the canal. It is suggested that had there been more than one canal in the area the parties would have

so specified. In reality there was but one canal, the Warren Canal. Therefore, regardless of the status of defendant Rindlisbacher's legal description, Mahas' predecessors cannot convey to Mahases an interest in property South of the canal. To do so, Mahas' predecessor in interest would be conveying something they did not have.

CONCLUSION

The most critical consideration in determining boundaries is to effect the intent of the parties. The rules of construction for determining the intent of the parties provides a logical sequence within which a description can be analyzed.

First, if all parts of the description can be reasonably interpreted to be consistent, the description should be so interpreted. It has been demonstrated that there is no inconsistency.

Second, if portions of the descriptions are inconsistent, then the order of precedence between the calls is first to monuments and last to courses and distances. For clarification of Mahas' and Rindlisbacher's descriptions, this necessitates resort to the physically existing monument (canal).

Third, a call may be disregarded if it leads to an absurdity. The only call leading to an absurdity is a call in the Mahas' description which doubles back upon itself.

Fourth, an inconsistent call should be disregarded if

thereby all the rest of the calls are reconciled and the description perfected. To disregard the physically existing monument for courses and distances and an artificial monument created on a plat is clearly contrary to law. Furthermore, it does not allow for the perfection of all of the descriptions in that it expands plaintiffs ownership across a physical monument inconsistent with the ability of plaintiffs' predecessors in title to convey.

The judgment entered by the lower court is inconsistent with a correct application of the law, and that judgment should be reversed.

Respectfully submitted,

BACKMAN, CLARK & MARSH

By Gary A. Sargent
Gary A. Sargent
Attorneys for Appellant

CERTIFICATE OF MAILING

THIS IS TO CERTIFY that four (4) true and correct copies of the foregoing Appellant's Brief were mailed on the 13TH day of December, 1988, to the following:

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1218 First Security Bank Building
Ogden, UT 84401
Attorney for Plaintiff-Respondent

Gary A. Sargent

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IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

GEORGE G. MAHAS AND)
LUCILLE H. MAHAS)

Plaintiff) J U D G M E N T

vs)
LAVAR RINDLISBACHER)

Defendant)

Civil No.98505

The above entitled matter having come on regularly for hearing on the 23rd day of February, 1988, and plaintiff appearing and being represented by their attorney, I. GORDON HUGGINS, and the defendant appearing and represented by his counsel, MARTIN V. GRAVIS. Plaintiff and his witnesses having been duly sworn and testifying and the defendant having called his witness and testified and based upon the testimony and exhibits submitted by the parties, and the Court having entered its Findings of Fact and Conclusions of law, now enters its Order:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That plaintiff is the owner of certain real property located in Slaterville, Weber County, Utah and more particularly described as follows, to wit:

A part of the Northeast Quarter of Section 10 T6N,
R2W, SLM, U.S. Survey: Beginning at a point 8
chains West of the Northeast corner of said Section
10; running thence West 1.06 chains; thence South
27° West to Canal; thence Southeasterly along said

canal to a point North 15° East 10.18 chains from County Road; thence North 15° East 975 feet; thence North 74° West 198 feet to the point of beginning, free and clear of any claim of defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Warren Canal is not the canal referred to in Plaintiff and Defendant's property descriptions and that the property lines are those designated by courses and distances without reference to any monument now in existence relating to the South line of Plaintiff's property and the North line of Defendants property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's complaint against defendant for damages be dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff shall be awarded his court costs incurred in this matter.

DATED This 17 day of May, 1988

151 David E. Roth
DAVID E. ROTH
DISTRICT COURT JUDGE

I. GORDON HUGGINS,1569
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IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

GEORGE G. MAHAS AND) AMENDED
LUCILLE H. MAHAS)
FINDINGS OF FACT AND
Plaintiff) CONCLUSIONS OF LAW
vs)
LAVAR RINDLISBACHER) Civil No.98505
Defendant)

The above entitled matter having come on regularly for hearing on the 23rd day of February, 1988, and plaintiff appearing and being represented by their attorney, I. GORDON HUGGINS, and the defendant appearing and represented by his counsel, MARTIN V. GRAVIS. Plaintiff and his witnesses having been duly sworn and testifying and the defendant having called his witness who testified and based upon the testimony and exhibits submitted by the parties, Now therefore, the Court hereby makes its:

FINDINGS OF FACT

1. That the plaintiff is the owner of certain real property located in Slaterville, Weber County, Utah and more particularly described as follows, to wit:

A part of the Northeast Quarter of Section 10 T6N, R2W, SLM, U.S. Survey: Beginning at a point 8 chains West of the Northeast corner of said Section 10; running thence West 1.06 chains; thence South 27° West to Canal; thence Southeasterly along said

canal to a point North 15° East 10.18 chains from County Road; thence North 15° East 975 feet; thence North 74° West 198 feet to the point of beginning.

2. That the defendant is the owner of certain real property adjacent to Plaintiff's property, more particularly described as follows, to wit:

A Part of the Northeast Quarter of Section 10, T6N, R2W, SLM. U.S. Survey: Beginning 9.06 chains West and South 27° West 22.43 chains from the Northeast corner of Section 10 (at a point in the Northerly line of the County road); thence North 27° East 12.00 chains, more or less, to a canal; Thence Southeasterly along canal to a point North 15° East 10.18 chains from the County road; thence South 15° West 10.18 chains to the County Road; Thence Northwesterly along the County Road, 600 feet, more or less, to the place of beginning.

Excepting therefrom that portion deeded to Marvin L. Barney and Wife, Edith E. Barney in Book 1037, page 2 and Book 1022 page 70 of Records

3. That conveyances from Plaintiff's and Defendant's predecessors in title describe said properties by courses and distances which, when surveyed and platted, close and harmonize.

4. That if the Warren Canal is the Canal that is referred to in most of the Deeds, then the descriptions of Plaintiff's and Defendant's parcels doesn't make any sense.

5. From the evidence admitted, it appears that the Warren Canal has not moved significantly since 1908.

6. That there is no strong evidence, in recent history, that there is another canal in the area in existence, but there is, in fact, a reference to a canal that is described in the metes and bounds description in

that location, some evidence of a possibility that at one time there was a canal in that area.

7. That if this was the case where the canal was some 50 feet or less off the metes and bounds description, it would be assumed that that the canal was the boundary. But, where it is some 400 feet off, to find that the Warren Canal is the boundary would lead us to an absurd result.

8. That there are clear descriptions of all parcels in that area where Plaintiff's and defendant's properties are located and they all seem to suggest that the natural boundary is where Plaintiff is arguing it is. It is so found that that is the boundary.

9. That if the metes and bounds description of Plaintiff's property is charted with the acreage computed therefrom, the acreage is approximately 4 1/2 acres. If the Warren Canal were the boundary, with the acreage computed, there would be less than 2 acres. This would result in an absurdity. Therefore, Plaintiff prevails on his claim as to where the boundary is.

10. That there is insufficient evidence to determine damages claimed by plaintiff for defendant's use of the property or otherwise.

From the foregoing Findings of Fact, the Court enters its:

CONCLUSIONS OF LAW

1. Plaintiff is entitled to a Judgment against defendant determining that the true property line between

the properties of the parties be located by the Courses and distances calls only of their respective conveyances.

2. That the Warren Canal is not the monument referred to in the conveyances of Plaintiff and Defendant,

3. That defendant is entitled to an Order dismissing Plaintiff's Complaint against defendant for damages to plaintiff's property.

4. That Plaintiff is entitled to his costs of Court.

DATED This 18 day of May, 1988.

151 David E Roth
DAVID E. ROTH
DISTRICT COURT JUDGE

APPROVED AS TO FORM

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IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

GEORGE G. MAHAS AND)
LUCILLE H. MAHAS) ORDER ON DEFENDANT'S MOTION

Plaintiff) FOR A NEW TRIAL and

LAVAR RINDLISBACHER) PLAINTIFF'S MOTION FOR

ATTORNEY FEES

) Civil No.98505

Defendant)

The above entitled matter having come on regularly for hearing on the 15th day of August, 1988, plaintiff represented by their counsel, I. GORDON HUGGINS and defendant represented by his counsel, GARY A. SARGENT. Arguments were made to the Court and based upon the arguments of counsel and notations made at the time of the trial, the Court makes the following findings:

1. A great reliance was placed upon the testimony of the three expert witnesses testifying at the time of trial, all of whom testified that the properties of both plaintiff and defendant would not close if the Warren Canal were used as a reference point to determine the boundary of the parties properties. In their opinion the Warran Canal was not the canal referred to in the Deeds to Plaintiffs' and Defendants' properties, and the court so finds..

2. That the difference of 400 feet in the distance between the Warren Canal and the metes and bounds description is to great a difference to ignore. The Warren Canal cannot be used as the call in determining the boundary lines of plaintiffs' and defendants' properties.

3. That the decision heretofore made in the above entitled matter was correct and is reaffirmed.

4. That plaintiffs Motion for Attorney fees is not appropriate in this matter, and that defendant's Motion for a New Trial should be denied.

WHEREFORE, the court makes the following order:

1. That defendant's Motion for New Trial is denied.

2. That plaintiff's Motion for Attorney Fees is denied.

3. That the decision heretofore made in the above entitled matter is hereby reaffirmed in its entirety.

DATED this 22 day of August, 1988.

(S)
DAVID E. ROTH
DISTRICT COURT JUDGE

APPROVED AS TO FORM

Gary A Sargent
GARY A. SARGENT