

1966

Jack O. Coffin and Leone A. Coffin, His Wife v.  
Charles E. Degraffenried, and Irmadell Degraff, His  
Wife, and C. Edward Degraffenried, Also Known as  
Charles E. Degraffenried and As Charles E.  
Degraffenried; Jr., and Pamela Degraffenried, His  
Wife : Brief of Defendants and Appellants

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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JACK O. COFFIN AND LEONE

A. COFFIN, his wife

*Plaintiffs and Respondents,*

VS

CHARLES E. DEGRAFFENRIED,  
and IRMADELL DEGRAFFENRIED,

his wife, and C. EDWARD DEGRAFFENRIED, also known as CHARLES

E. DEGRAFFENRIED and as

CHARLES E. DEGRAFFENRIED,

JR., and PAMELA DEGRAFFENRIED, his wife

*Defendants and Appellants.*

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BRIEF OF DEFENDANTS AND APPELLANTS

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APPEAL FROM JUDGMENT OF DISTRICT COURT  
OF SALT LAKE COUNTY, HON. A. H. [illegible]  
DISTRICT JUDGE

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**FILED**

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Clerk, Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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JACK O. COFFIN AND LEONE  
A. COFFIN, his wife  
*Plaintiffs and Respondents,*

vs

CHARLES E. DEGRAFFENRIED,  
and IRMADELL DEGRAFFENRIED,  
his wife, and C. EDWARD DEGRAF-  
FENRIED, also known as CHARLES  
E. DEGRAFFENRIED and as  
CHARLES E. DEGRAFFENRIED,  
JR., and PAMELA DEGRAFFEN-  
RIED, his wife  
*Defendants and Appellants.*

Case No.  
10528

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## BRIEF OF DEFENDANTS AND APPELLANTS

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### STATEMENT OF THE NATURE OF CASE

This case involves a boundary dispute. Plaintiffs ask that title be quieted in them based upon a survey from a re-located monument. Defendants ask that the title to the property in dispute be quieted in them based upon the physical facts, and upon a survey tied into the physical facts and natural monuments on the property and the old fence lines.

## DISPOSITION IN THE LOWER COURT

The court found in favor of plaintiffs and against the defendants quieting title in plaintiffs and awarding damages against defendants. Although the court made findings that in accordance with the survey from the natural monuments, that the defendant, Charles E. DeGraffenried, Jr. was the owner of the property in dispute, but it held that the plaintiffs were entitled by reason of statutes of limitation to have the title to the property quieted in them.

## RELIEF SOUGHT ON APPEAL

Defendants ask for a reversal of the Judgment entered by the Lower Court and asks the Supreme Court to direct the Trial Court to quiet title to the property in the defendant, Charles E. DeGraffenried, Jr.

## PREFACE

The property involved in this suit is located in South Jordan and is a rectangular diamond shaped piece of property with a long strip of land one rod wide (Mill Tail) running to the Jordan River and has been used as a flour mill and known as the White Fawn Flour Mill. See map attached to end of Brief.

This is a boundary dispute and involves about 2 acres south of the White Fawn Mill Race and a strip of property north and contiguous to the Mill Race. There was no controversy between plaintiff's predecessors in interest and the defendant's predecessors in interest. The

taxes were paid by the respective parties upon their respective properties as described in their deeds as filed in the County Recorders Office until a survey was made from a different description and a different point of beginning. A dispute arose as a result of the survey. A fence was built by defendants, DeGraffenried's where they contended the true boundary is and the uncontradicted evidence showed and the court found that where the fence was built by the DeGraffenrieds was the true boundary.

The court quieted the title to the 2 acres and also to the property which is north of the Mill Tail and Mill Race covered by the survey. The undisputed evidence is that at no time was any possession ever had of any property north of the Mill Tail by plaintiffs and the undisputed evidence is that the White Fawn Mill used and owned the 2 acres south of the Mill Tail. The defendants and their predecessors in interest have paid the taxes on the property described in their Deed and the description has been the same since it was conveyed in 1881 up to the present time. Defendants Abstract D.14 and plaintiff's Abstract D. 15. Plaintiff's and their predecessors in interest have paid the taxes on their property as originally conveyed by one predecessor in interest to another. A deed was made to plaintiffs, Coffin, May 13, 1952, which Deed was never recorded and had the same point of beginning and description as all of his predecessors in interest. A second Deed was executed and recorded on November 5, 1956, which had a different point of beginning and description and which was based on a

survey from a relocated monument by surveyor Gardner. When Coffin acquired the property there was no fence between plaintiffs and defendants and there was no fence built until one was built by DeGraffenried in April of 1963, and DeGraffenried's took possession of the disputed property.

The survey made by surveyor Gardner was based upon a relocated monument and different description. The survey of surveyor Gardner puts part of the Coffin property north of the Mill Tail and puts the DeGraffenried property north and onto and beyond the new county road and into the field of their neighbor, Mr. Harmon.

The survey made by the surveyor Knowlton from the natural monuments on the property which natural monuments are referred to in the deed of defendants puts the DeGraffenried property just south of the old county road ties into and runs down each side of the Mill Tail to the Jordan River, ties into the south side of the county road, ties into the Beckstead Ditch and ties into pipes which were placed on the property by the White Fawn Mill.

After the close of the evidence the Court was of the opinion that the survey made from the natural monument by surveyor Knowlton, was correct and so stated and also so found in the Findings, but concluded that Coffin had been in possession of all the property as surveyed and had paid the taxes on it and therefore held it by adverse possession.



Surveyor Gardner testified that he estimated where the point of beginning was and surveyed from the relocated monument and from this survey, the second deed for Mr. Coffin was made.

There was no overlapping of the property and no dispute until the survey was made and the second Deed made from this survey, and the taxes were paid by the plaintiffs and defendants upon their respective properties in accordance with the old descriptions from 1881.

The description on the DeGraffenried Deed ties into the natural monuments and the Deed of Coffin ties into the south line of the DeGraffenried property. If the payment of taxes was based on Coffin's second deed based on the relocated monument and on the different description, that deed has only been in existence for less than 7 years when the DeGraffenrieds interrupted their possession by building the fence and taking exclusive possession.

The Salt Lake County Assessor could not have made a conflicting assessment until the second deed was recorded. That after the second deed was put on record by the Coffins, the DeGraffenrieds were still paying the taxes on the property in accordance with the original description and the description used by the county assessor, Ex. D.25 and offered Exhibits D.1 and D.2, and is the same description which Defendants and their predecessors in interest had been paying taxes on since 1881. Defendants Abstract Ex. D. 14. Until the second Coffin

Deed there was no overlapping of any description from which a double assessment or an erroneous assessment could have been made.

## STATEMENT OF FACTS

All of Plaintiff's property and all of the defendants' property was originally owned by James Oliver. The defendants' property was purchased in three parcels, one from James Oliver Ex. D.14 abstract page 8 and second parcel from his wife, Naomi V. Oliver Beckstead. Abstract Ex. D.14 entry 16 and the third parcel from the Oliver's successors in interest, Jesse Vincent Ex. D.14 abstract Entry 25. Attached to this Brief is a photostat of the map which is attached to Exhibit D.14 abstract showing defendants' three pieces of property.

The property acquired from James Oliver and the property acquired from his wife, the description begins at the SE corner of the NE $\frac{1}{4}$  of section 14 same as (the east  $\frac{1}{4}$  corner of Section 14). The third piece of property acquired commences at the SW corner of the SE $\frac{1}{4}$  of the NE $\frac{1}{4}$  and ties into the center of Sec. 14, and ties into a point in an adobe wall which is on the section line, and then into the west bank of a large ditch (Beckstead Ditch), and ties into a cottonwood tree on the east bank of the Beckstead Ditch and along the center of county road. See map and exhibit D22 and D23 in pocket at end of Brief.

The first piece of property was an oblong shaped piece of property with the Mill Tail attached to it running to the Jordan River 1 rd wide. The second piece of

property was an oblong shaped piece of property but on the west end going in an oblique direction to a point on the south line. The third piece of property is the one on the West and is referred to as the Diamond shaped property. All three of the properties fit together to form the rectangular diamond shaped property with a tail.

The description in the deed of DeGraffenried, Exhibit p. 19 ties into the physical facts and natural monuments as follows: the Mill Tail the west bank of the Jordan River; crosses the Mill Tail; 25 links 1 rod the south side of the county road and mill tail crosses the old county road goes west along the line of fence and a row of trees; then along the west bank of a large ditch (Beckstead Ditch); thence south along the center of the old county road to adobe wall which point is on the center line of the section thence to the west bank of the large ditch (Beckstead Ditch) then crossing the ditch to a brush and hedge fence.

The description in the deed of McCullough to DeGraffenried ties into the natural monuments above set out and it is the same description used in all conveyances shown in the abstract.

The description of the Coffin property does not change in any of the conveyances in their abstract Exhibit P. 15 and it ties into the diamond shaped property of the DeGraffenried's and is the same description as used by the county assessor.

The original piece of property was in the name of James Oliver. He conveyed the first two acres to the

White Fawn Mill. James Oliver conveyed the balance of the grounds surrounding the Mill to his wife, Naomi Oliver, Abstract D. 14 entry 9 and 10 and Abstract P. 15 page 31. This deed shows the original owner of the ground, James Oliver, conveyed to his wife, Naomi Oliver, the property and tied into natural monuments, the south side of Mill Race and the west bank of the Jordan River, and southerly along the west bank of the Jordan River. This deed shows that there was never any property conveyed by plaintiff predecessors in interest to plaintiff grantors north of the Mill Race.

The description of the Coffin property started at the center of Sec. 14. Both of the engineers testified they did not know where the center of the section is. (R148) and (R206, 207)

Surveyor Gardner, who made the description said that he assumed the point of beginning. (R 185) and (R208)

The description in the Coffin Deed comes down the center of the road and is the same description that ties into the property of DeGraffenried.

By assuming the point of beginning and without tying into any physical fact, Surveyor Gardner came up with the description that was put into the deed of September 29, 1956. This is the first and only description where there is a conflict between the two properties since 1881.

In the pocket at the end of this brief is Ex. 22, the Basic Map of the DeGraffenried property surveyed from the Natural monuments and the overlay map of the DeGraffenried property on a piece of transparent paper Ex. 23, and if placed on the re-located monument it puts the DeGraffenried property across the new road and into the Harmon property. If it fits into the physical fact, then the point of beginning is 76.83 feet south and 15.97 feet west of the re-located monument. Ex. 22 and (R206)

The plaintiff testified that he had never used any of the property north of the Mill Race (R131). That he thought the property between the Mill Race and the Harmon fence belonged to the county. (R. 120) There was no exact boundaries established when he bought the property. (R 138) There was no fence on the north between his property and the DeGraffenried property. The black iron pipes were on the property when he bought it. (R 138) Talked with DeGraffenried between 1961 and 1963. (R 123) Each contended that they owned the ground. There is only a few inches between the Mill Race and the gravel portion of the old county road. That he didn't examine the title but relied upon the title company. (R 191) That he paid the taxes on his property, but had misplaced some of the tax receipts.

Charles E. DeGraffenried, Sr. testified that there had been a controversy with Jack Coffin about the boundaries and he had helped his son build the fence and his son has possession of the property.

Eddie DeGraffenried, Jr. testified that he had paid the taxes on the property as described in Ex. D25.

The following are quotations from surveyor, Gardner's testimony to show that the old monuments and the new monuments are not in the same place, and that he assumed the point of beginning, and that the Deed was made from his survey. He did not survey from the deed.

THE COURT: But isn't it a known fact that the old quarter corners and corners of the sections out there are not where they now appear to be according to the County markers?

A. They have been reset.

THE COURT: And they are not in the same place where they used to be and all the land out there is off by the new markers. Isn't that true?

A. Well, if they reset them, they would not.

A. They just set them where — some of them in the old original deeds, the Government has not closed some of the corners by three hundred feet one way and four hundred another. I have run into that and in this particular case if I may —

THE COURT: Yes.

A. — to shorten the thing, in this particular case, the original description of this whole property was tied to the center of the section. Now, normally the Government surveyor when he set it out in 1857 or 1856, which ever, they didn't mark the center of the section; and in order to re-establish anything tied to the center of that section, a surveyor now, if he were going to do it without the assistance of the county surveyor he would have to run

precision lines on all four corners, split them according to the surveyor's rule, and it would cost thousands of dollars to do that, which these small land deals cannot afford; but the county surveyor has the right to move in and set a section. Only he and the Government surveyor have the right except if another engineer be deputized to do it. (R 147 and R 148)

So that's the situation that exists here. You cannot find the center of the section. I had spent days on other jobs out there trying to find them. This section corner, this east quarter corner was gone. They set — the original surveyors set the corner, the quarter corner around the sections but not the center of the section. That is why this case is extremely difficult to tie down.

THE COURT: You don't know another description of anybody else who knows where the center of the section is?

A. No. (R 146-148)

The quarter corner was the one that was reset and the center of the section was the one to which all the surveyors deeds were tied. \* \* \*

A. At one time the property in its original — when the deed in its original issuance I might say, all this property was tied to the center of the section. (R 161)

\* \* \*

A. No. My survey was made before.

Q. Made before, that's right. Your survey was made before the deed?

A. This was written from my survey.

Q. That was written from your survey?

A. Right.

Q. So you didn't have this description when you made the survey?

A. No. I wrote that description.

THE COURT: Did you have a document that you surveyed, that you used to survey, or did you survey to get the figures that are used in this deed?

A. I surveyed to get the figures that are used — that was used. (R 180-181)

A survey was made by Engineer Hooper Knowlton, Jr. for the DeGraffenrieds taking into account the physical facts and showing where the quarter corner should have been if it had been properly relocated from the physical facts.

Q. — as a result of that survey have you made any instruments reflecting the results of that survey and your work? (R 202)

A. Yes. This plat.

Q. I show you what has been marked D-22 and ask you what that is and who prepared it.



A. This is a plat of the DeGraffenried property as we would survey it, showing the location of the section — the east quarter corner of Section 14 as it has now been re-established by the county surveyor, and also a location where we think it should have been re-established in order to fit the existing conditions on the ground.

Q. What did you have to make the survey from?

A. It seems to me we had a copy of the deed and also we had copies of the abstract. We had the abstract of the DeGraffenried property.

Q. Is P-19 (DeGraffenried Deed) the documents which you used to make the survey?

A. Yes.

Q. Now, just describe exactly what you did and how you arrived at the figures that you put on the map.

A. When we were contacted to do this survey, we had a copy of Brad Gardner's survey, which showed that the property was going north of the new county road, and it had been indicated to us that there were some problems and possible errors in the survey, and would we find out is Brad Gardner right or isn't he. This was part of the problem that we were given.

So the first time that we went out there, we tied in all of the physical features. We tied them to the existing section corner. We tied in the millrace and the tailrace and the old road and the new road, the Beckstead Ditch, all of the fences, the — where the Beckstead Ditch crossed

the old road, the culvert there, and the buildings, most everything, all physical features that were in the area we tied in.

Then we did that and plotted on one plat. Then we took the description, and on another piece of paper which was transparent we plotted the actual description of the DeGraffenried property. Then we took this transparency and overlaid it on top of the map showing all the physical features, and from that we arrived at where the section corner would have to have been relocated to have properly surveyed the DeGraffenried property.

Q. Now, will you just illustrate and show us what you did there?

Go ahead.

A. When we did this, and we took the overlay and worked it onto these physical — the map with the physical features, it was interesting to us to know that when we got this narrow one-rodstrip of ground that ran east to the river, that when we got that centered over the existing location of the tailrace, we hit the old survey points, these old metal stakes that have been shown in these pictures, we hit those, one of them right on. One we missed by about eight or nine inches. Others were on our survey lines. And we also hit things like the east — the north side of the old county road. We hit the west side of the Beckstead Ditch which was called for in the deed. We went right along one of the culverts, right on the west side of the culvert, and it said along the west side of the ditch.

We feel that this survey we have got accurately shows the location of the DeGraffenried property as it is supposed to have been, as it was intended to have been conveyed. (R 203-204) \* \* \* \*

A. That transparency is just the description as it was taken off the deed and plotted. (R 205) \* \* \* \*

\* \* \* \* \* if we slip this up (the overlay map) and put it where it was surveyed by the Gardner firm, we are not even — there isn't one of these things that will tie to a physical feature because the tailrace then comes on the north side of the road, in fact, north side of the old road and down the middle of the county road, and this line which is supposed to be along the north side of the old road is eighty feet north of it.

We can't make this hit into the Beckstead Ditch, and when we come down through here to the east side or to the west — to this point, this corner, we are a long way from the Beckstead Ditch, so we figured — and also we are missing all these points which had been pointed out as property corners; but when we slip it down about 76.83 feet and over about 13 feet, then we hit this corner that's in and this corner. This corner is on our survey, and there is an iron stake that's up here that is also very close to one of the corners.

And so from the description that has been coming down historically, tying to the millrace and the road and the Beckstead Ditch, we feel that this is where this property is really intended.

Now we all know that these section corners, when they get relocated, they are oftentimes a long way away from where they originally were. (R 206-207)

\*\*\*\*\* its description is tied to the center of the section; and, as Mr. Gardner said, nobody knows where the center of the section is, so he just assumed it is going to be a half mile exactly from this existing corner that had been set. (R 208)

\*\*\*\*\* the Coffin property started from the center of the section, starts over here and comes down the road, and down this road it has the same calls, the same courses and distances all along here as this DeGraffenried property; \*\*\*\*\*

THE COURT: Now, are you telling me that if you go from the present location of the quarter — east quarter section corner that this DeGraffenried property gets north of the highway?

A. Yes, gets north of the highway.

THE COURT: All right.

Q. That is north of the new highway?

A. Yes, even north of the new highway.

THE COURT: Yes.

Q. It goes over into the Harmons' place?

A. It is about 76 feet too far north. ( R209)

Q. Have you compared the deed of the — the deed that came from the Rogers, which is the one that conveyed Coffin, for these indentations?

A. Yes. It follows right along. It has exactly the same bearings and the same distances as shown on our plat here, which is the same as the DeGraffenried deed; \*\*\*\*\*

Q. I mean as far as the metes and bounds and the degrees, they are the same?

A. You bet, yes, they are.

Q. And is the same metes and bounds where it says comes up the center of the old county road, both deeds, DeGraffenried description and the Rogers description.

A. Yes, they do. (R 211)

\*\*\*\*\*

A. The north side of the tailrace is the south line of the county road. (R 211)

THE COURT: Under the survey based on the present marker?

A. No, based on a survey if we move it south about 76 feet and east about 13, but if you —

THE COURT: Before the county put in a — assume the old marker was where you think it ought to be, would the tailrace and the county road then be contiguous?

A. Yes. (R 212-213)

When the overlay map is adjusted it hits the physical facts.

A. Well, when we adjusted this overlay so that we hit the tailrace and hit these other physical features, then

the south-east corner of this survey hits on one of these iron pipes. Then the northeast corner of the property misses the pipe only about eight inches north and south and five inches east and west, and then the other two pipes that are on the northwest and the southwest corners, we are very close to corners that are shown on our plat. (R 213-214)

Joseph L. Johnson testified that he had lived in South Jordan close to the Old Mill property for 51 years. His grandfather owned the property that was known as the Rogers and Coffin property and that his father worked at the White Fawn Mill and he had been familiar with the White Fawn Mill and its property as long as he could remember. That the White Fawn Mill owned a piece of property across the Mill Race that was used and owned by the Mill and was the same size as that claimed by the defendant, DeGraffenried. There was a fence in about the same place where DeGraffenried put his fence, and there was a ditch and a hedge of currant bushes by the fence. There is now a ditch where the old ditch used to be. The White Fawn Mill used the property south of the Mill Race for a horse pasture. There has been no change in the Mill Tail and Mill Race as long as he can remember other than part of the Mill Race was at one time made of wood and now it is made of cement. (R 224 and 225) The old county road is in the same place as it has always been. That he remembers the ditch and the row of trees north of the old road because he dug worms there as a boy to go fishing. The ditch and row of trees were between what is now the new road and the old road.

LeRoy Helf testified that he owned the Coffin property from 1943 to 1948. He did not farm the 2 acres south of the Mill Race. It was farmed by one of his neighbors, Lewis Burbidge. He farmed to the water ditch mentioned by witness, Leonard Johnson, which is close to the DeGraffenried fence. He did not attempt to convey the piece of property that the DeGraffenried's claim. (R 234) He conveyed the property to Mr. Rogers who conveyed to Coffin. He never considered that he owned any of the property north of the Mill Tail. (R 234) He did not claim to own the property south of the Mill Tail that was farmed by Lewis Burbidge. (R. 235) He did not claim to own the property claimed by the DeGraffenried's. (R 235) He knew about the iron posts being there. (R 235-236) He considered the iron posts his line. The iron posts were close to where the fence is now located.

Henry Parduhn testified that he drove a team of horses for the White Fawn Hill. (R 239-240) The horses were put in the pasture south of the Mill Tail, which is the property the subject of this lawsuit. He started working for the White Fawn Mill in 1907. (R 240) He worked for the White Fawn Mill for 24 years. He used the land in dispute as a pasture during that period of time. The old county road was right in front of the White Fawn Mill. In order to make the new road they bought the Albert Oliver property. (R 241) They had to move the Oliver fence to build the new road. Now Harmon property. (R 241) Picture of the Old Mill is D-24.

Herman Youngberg testified that he bought the property from Mr. Johnson in 1920. (R 244) Had the prop-

erty for 15 years. He owned all of the property to Rogers including the portion of the Rogers property sold to Coffin. Two acres of land abutted out into his property. Never used the property. There was a fence around it. His south boundary was the water ditch and the currant bushes. The DeGraffenried's fence is approximately the same as where the old fence was. He left the farm in 1925. (R 245) The old county road was next to the Mill Race.

George Harmon testified that he owns the property north of the Old Mill. Two and one-half acres was conveyed to make the new road. He told M. Coffin, when discussing the survey, that he could not possibly move the line over because the White Fawn property would take in the road. The Mill would own nothing but the county road. (R 249) That the piece of property between the old county road and the new county road was taken from his property. Found the pipes with Oscar Johnson and DeGraffenried. The stakes were where the DeGraffenried fence is now. The stakes have stood up in the field throughout the years.

The Court at the conclusion of the evidence stated (R 255) page 145

“THE COURT: Yes. Alright. Well, I would think that the first thing we ought to talk about is where there is prescriptive rights here. I suppose that with these 2 descriptions we have of tax notices here that we can't say, can we that — just what land one was paying and what the other was paying on. It may be that Mr. Coffin's got to go south to get his extra land if he hasn't lost it



by prescriptive rights. I believe this man, Hooper Knowlton, — I thought he had this thing figured about right. I don't believe that I ought to push this mill property to the North of that road, and I suppose you have the right to open and close this argument."

and the court in its finding (R 101) states:

"4. Early in 1956 the Salt Lake County Surveyor re-located the E $\frac{1}{4}$  corner of said Section 14. A survey was made in 1956 of plaintiff's land and, based upon the use of said relocated section quarter marker, plaintiffs title was certified to conclude the entire 2-acre tract at issue. However, a later survey in 1956 has applied to the physical location of the county road with the mill race, the Beckstead Ditch, and the Jordan River, reflected that the defendants' legal description would encompass said property if the quarter corner marker were located at a point approximately 79 feet to the South of where the same was re-located by the Salt Lake County Surveyor. The court believes that the true and correct location of the quarter corner should have been as claimed by the defendants, and not as re-located by the Salt Lake County Surveyor.

The Pre-Trial Order raises only one issue and that is where is the true boundaries of plaintiffs property determined from natural monuments or re-located corners. (R. 78-79)

There was nothing in the Pre-Trial Order which would indicate there was going to be any question about adverse possession or Statute of Limitation.

Defendants made a Motion (R 88) requesting the court to enter judgment in their favor and offered evidence, the record from the County Treasurer's Office offered Exhibits D. 1, D. 2, D. 3, D. 4.

The plaintiff made a Motion for a new trial and as part of the Motion for new trial, and the supporting affidavit made the records from the County Treasurer's Office a part thereof offered evidence D. 1, D. 2, D. 3 and D. 4.

## ARGUMENT

### POINT I

#### BOUNDARY DISPUTE LIMITATIONS IS CONTROLLED BY PRESCRIPTION 20 YEARS OR LONG ACQUIESCENCE.

This is a boundary dispute and any title that plaintiff could acquire would be by prescription and the statutes of limitation would be 20 years or for a period of time long enough that the parties had acquiescence in the boundary.

The Pre-Trial Order sets out:

1. "What is the ultimate issue of facts and law. What is the true boundaries of plaintiffs property. Which in this case will be determinative of the true boundary —
  - (a) A survey based on the physical or natural monuments, objects and marks.
  - (b) A survey based on and tied to relocated monuments which represents Government lines and corners."

There is nothing said in the Pre-Trial Order about adverse possession, or the Statute of Limitations. (R 78-79)

There is no conveyance made by a party in the chain of title nor is there any claim based on a tax deed. It is merely a question where is the boundary between the property.

The plaintiff is attempting to acquire property without a conveyance. There is nothing in the record which shows a conveyance of the disputed property to plaintiff. The entire claim is based upon an erroneous survey. It is analogous to putting a fence in the wrong place. Which survey was unknown to anyone in the defendants chain of title until a controversy arose between plaintiff and defendant as to where the fence should be put.

In the case of *King v Fronk*, 14 U 2d 135, 378 P. 2d 893 on page 896, the court speaking through Justice Henroid states:

“To assert that a 7-year persistent fence, nothing more, could ripen into title, is to overlook the following: 1) that it would establish title in the fence maker, 2) without his having complied with the sanctions of the adverse possession statute, which does not give title but only a defense against others who claim it.

In logic and reason, therefore, or by way of analogy, we would be disinclined to ascribe to the doctrine of “boundary by acquiescence” a period similar to the adverse possession statute. It would seem to be ridiculous since the legislature could fix overnight, the period for limitations of action

at 2, 5, 7, 19 years. "Boundary by acquiescence," in the nature of things invokes the office of equity. This is not too unrelated to the concept that ancient documents prove themselves because of their antiquity, unless successfully rebutted. It also was kinship to the concept of setting titles by prescription after 20 years' assertion of title coupled with occupancy. All this on the basic and sound legal philosophy that at some time or another a claimant may not disturb an ancient and continuous employment of property without affirmative objection albeit the record owner claims previously to have been the owner thereof."

In instance case there would have had to been a passage of a number of years and the knowledge or the acquisition in the deed made from Gardner's erroneous survey before the title to the property could have been presumed to have passed to the plaintiff.

In the case of *Morris v. Blunt*, 49 U. 243, 161 P. 1127 it discusses prescriptive rights, and we quote as follows from page 1131 first column paragraph 7:

"The right to a public road or private way by prescription arises from the uninterrupted adverse enjoyment of it under a claim of right known to the owner for the requisite length of time. Anciently the right to the easement arose by prescription from the use of the land for so long a time that there was no existing evidence as to when such use commenced. Its origin must have been at a time 'whereof the memory of man runneth not to the contrary'. Later the rule was changed by limiting the time of uninterrupted possession to 20 years. *Harkness v. Woodmansee*, 7 Utah, 229, 26 Pac. 292."

*Brown vs Milliner*, 232 P. 2d 202, 120 U. 16, it says on page 207 Pac. bottom of 1st column:

“While the interests of society require that the title to real estate shall not be transferred from the owner for slight cause, or otherwise than by law.”

“We do not wish to be understood as holding that the parties may not claim to the true boundary, where an assumed or agreed boundary is located through mistake or inadvertence, or where it is clear that the line is located was not intended as a boundary, and where a boundary so located has not been acquiesced in for a long term of years by the parties in interest. 31 Utah 269, 87 P. 1014.”

In the above entitled case the evidence was that both parties had paid the taxes upon their respective pieces of property under an assessment which merely designated the quarter section within which the land was embraced.

## POINT II

NO NOTICE OR WARNING THAT TAXES WERE BEING PAID OR ATTEMPTED TO BE PAID BY ADVERSE CLAIMANT. LEGAL DESCRIPTION HAD ALWAYS BEEN THE SAME AND TAXES PAID THEREON BY OWNER.

The evidence is undisputed and the court so stated and the findings are that DeGraffenrieds are the record owners of the property. The description in the DeGraffenried deed has been the same since the first deed in 1881. All tax assessment that has been assessed has al-

ways been assessed upon the same description, and at no time did Coffin pay taxes on the property described in the DeGraffenried deed and the description in their tax notice. The taxes as described in the deed and tax notices was paid by DeGraffenrieds and their predecessors in interest.

There is nothing which would give warning to the DeGraffenrieds or predecessors in interest that the taxes on their property were being paid or that Coffin was attempting to pay taxes on their property.

In the case of *Bowen v. Olson*, 268 P.2d 983 2 U. 2d 12 the Court in the opinion written by Justice Crocket on page 985 of the Pacific, last paragraph, first column states:

“Another and perhaps the most important consideration is that one of the purposes of the statute requiring payment of taxes in order to establish adverse possession is that by paying taxes on the land a public record is made which gives notice to the owner that his land is being claimed adversely. This purpose cannot be fulfilled if the possessor can wait any number of years, even up to the necessary seven, and then pay the taxes in one lump sum by redeeming. Under such circumstances the owner would get no current notice of adverse claims against his property, and may not until it is too late to do anything about it.”

2. C.J.S. Sec. 173 Page 748.

“Since one of the purposes of the statutory requirements of payment of taxes is to afford notice to the owner of the legal title that someone else is paying taxes on his land and thus claiming ownership, the payment of taxes for the entire statutory

period, must be on the particular tract of land which is claimed by adverse possession; and payment on other land, although believed and intended by claimant to be on the land in controversy, is fatal to his claim in that it is not a compliance with the statute."

In the case of *Christensen vs Munster*, 1 U 2d 334 266 P. 2d 756 on page 557 first column second paragraph the Court speaking through Justice Henroid states:

"We believe that to hold otherwise would be to flee from logic, attach an unrealistic significance to a county official's assessment (possibly erroneous) of land to an adverse possessor instead of to the record owner or other claimant having a statutory right to have land assessed to him, would relax the high type of vigilance of him who seeks to acquire someone else's land by means other than by conveyance. Such a holding also would extend undue sympathy to the adverse user and would fly in the teeth of the statute which makes such user a beneficiary only by strict adherence to well-defined procedural requirements. Were we to hold that a record owner could not protect his title by payment of taxes during one year, there would be no logical reason why he should be protected more by paying them all 7 years. We do not believe that, at least in this state, our holding makes the destruction of old titles and the creation of new ones depend 'upon the strongest man or the fleetest horse,' as one court puts it. If, perchance, the adverse possessor pays the taxes before the record owner, the latter nevertheless, may interrupt the continuity mentioned by commencing a title action or by ouster, the onus of which would seem to be no greater than prevails in suits pertaining to land generally."

That title 59-5-18 U.C.A. 1953 states as follows:

“Assessment in name of claimant as well as owner.  
— Lands once described on the assessment book need not be described a second time, but any person claiming the same and desiring to be assessed therefor may have his name inserted with that of assessed.”

The taxes were paid on the defendants property by them as assessed by the county assessor, and as far as the defendants knew the taxes were paid on their property by them and no one else. No other name on their assessment notice. (D.25 and abstract D.14) The county assessor must have intended to assess the property to defendant and his predecessors as historically described. Certainly the county assessor did not intend for DeGraffenrieds to pay the taxes on the old and new county road which they would be doing if assessed according to the erroneous Gardner survey.

### POINT III

FROM DATE AND RECORDING OF CONFLICTING DEED POSSESSION WAS TAKEN BY DEFENDANT IN LESS THAN SEVEN YEARS.

The defendants, in their Brief, have set out the evidence in detail so that it is clearly established that there is no evidence in the record that there was any controversy or any disagreement as to the boundary prior to survey of David Gardner, and the Deed which was made therefrom because there was no description to form the basis of any controversy or for the payment of any taxes.



That prior to that time there could be no payment of taxes only by the parties on their respective pieces of property.

That no taxes could be assessed and none could be levied on the Deed recorded on November 5, 1956 Ex. D.2 until November of 1957. That the Defendants DeGraffenrieds put up the fence in April of 1963, which was less than 7 years of paying taxes.

Our statute, Section 78-12-12 provides that all taxes which have been levied and assessed upon such land according to law must be paid for seven years which statute is as follows:

“Possession must be continuous, and taxes paid. — In no case shall adverse possession be considered established under the provisions of any section of this Code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law.”

The only valid assessment according to law was the assessment made on the description in the Defendant DeGraffenried Deed which was not changed throughout the years, and there could be no assessment whatsoever made on any overlap and Coffin did not and could not pay taxes on the overlap until the new deed was recorded. The old deed was never recorded Ex D 1. Even then it would be an illegal assessment as to owner.

The following cases hold that there was not a proper payment of the taxes under various circumstances.

*Rio Grande Western Ry. Co. v. Salt Lake Inc. Co.*,  
35 U. 528, 101 P. 586:

“7. Payment of taxes, necessity—Railroad could not acquire title by adverse possession to part of lot not owned by it and not part of its right-of-way, but which was assessed merely as part of lot distinct from assessment of its right-of-way, where railroad did not pay taxes thereon as required by this section. \* \* \*”

*Fares v. Urban*, 46 U. 609, 151 P. 57:

“Under this section, title by adverse possession cannot be established unless the adverse claim is supported by the payment of all taxes assessed against the particular property for the statutory period.”

*Huntsman v. Huntsman*, 56 U. 609, 192 P. 368:

“Exclusive, continuous, uninterrupted possession of property under claim of right and adverse to all world for more than seven years held of no avail in establishing title unless claimants paid all taxes levied and assessed against property during period of seven years.”

*Tripp v. Bagley*, 74 U. 57, 66, 276 P. 912, 69 A.L.R. 1417.

“Under this section title to land cannot be established by adverse possession unless claimants or predecessors in title have paid taxes thereon in accordance with its requirements.”

*Aggelos v. Zella Min. Co.*, 99 U. 417, 107 P. 2d 170, 132 A.L.R. 213:

“Acquisition of tax deed by person holding property adversely held not to constitute payment of taxes under this section.”

## POINT IV.

### ALL TAXES LEGALLY ASSESSED PAID BY RECORD OWNER.

The DeGraffenrieds and predecessors in interest have paid all the taxes which have been levied against their property. From the time of the original conveyances there has been the same description and all the taxes have been paid by defendants and their predecessors in interest. There has been no conflict in the descriptions and no neighbor could have been paying the taxes on the other neighbor's property.

According to surveyor Gardner the original survey was made in 1856 or 1857 (R. 147).

The original description of the Old Mill property starting from the original monument the quarter corner and tied into all the natural monuments on the property of the White Fawn Mill. The DeGraffenrieds and their predecessors in interest have always paid the taxes upon this property. (abstract Ex. D. 14 and Ex. D. 25) There has been nobody else who had paid the taxes under this description. Therefore, Coffins have not at any time paid the taxes upon the DeGraffenried property. There has been only one lawful assessment upon the ground, and that is the assessment which was made upon the whole of the DeGraffenried's property which was paid by them and their predecessors in interest.

Any payment of taxes on the overlap would be unlawful and would not be a payment of taxes as contem-

plated by our statutes. The county assessor certainly did not intend to assess property to DeGraffenried that was out in and covered the old and new county road.

The original survey of the Coffin property started in the center of the section, came down the road and tied into physical monuments, so when the original survey was made from the center of the section and into the natural monuments of both of the Coffins property and the DeGraffenried property.

Defendant's predecessors in interest actually paid the taxes on their land and Plaintiff predecessors in interest actually paid the taxes on his land, and Coffin, in fact, never paid any taxes on the DeGraffenried property. So there could not be any adverse possession because the taxes were not paid.

And in the case of *Christensen v. Munster*, 266 P. 2d 756, 1 U.2d 335, on page 757, first column of the Pacific.

“We prefer to adopt the view espoused by the authorities cited by plaintiff, and we conclude, therefore and hold that payment by the record owner or his agent of the taxes for one or more years during the 7-year period, prior to any payment thereof having been made by the adverse possessor, not only extinguishes his tax liability, but extinguishes the tax itself and effectively interrupts the continuity of events necessary to perfect title by adverse possession.”

In no event could the taxes have been paid for more than six years from recording the erroneous description in the conflict deed and the taking of possession by DeGraffenried.

We submit no taxes were paid at any time by plaintiff on defendant's property according to the correct survey.

## POINT V.

### DESCRIPTION IN THE DECREE TO QUIET TITLE IS NOT IN ACCORDANCE WITH THE EVIDENCE AND PHYSICAL FACTS.

The trial court found that the plaintiff Coffin because of the Statute of Limitations was the owner of the property according to the erroneous survey made by David Gardner, Ex. P. 19 and from that description has quieted title in plaintiff. The survey Ex. P. 19 shows that the description crosses the Mill Tail, crosses the old county road almost to the new county road. The plaintiff's own testimony is that he never had possession or claimed any property north of the Mill Tail.

We submit to quiet title to this description is clearly erroneous and the court erred in not making a new description, which would describe only the property south of the Mill Race and Tail. This description does not fit into the physical facts and testimony. This clearly illustrates that the property should have been quieted in defendants according to the survey based on the physical facts and the uncontradicted evidence.

## CONCLUSION

The evidence is clear and the Court found that defendants description is correct and that the monument was not properly relocated as pertains to their property. Defendants are real owners of the property.

This was a boundary dispute and the Statute of Limitations should be 20 years or a long period of acquiescence.

The 7 years Statute of Limitations would not be effective for the plaintiff because there was no recorded deed filed for 7 years on which taxes could be paid prior to the DeGraffenrieds putting up the fence and taking possession of the property.

There could be no adverse possession under 7 years Statute of Limitations because no taxes were legally paid. All taxes legally assessed at any time on the property of defendants was paid by them.

Taxes were paid on the property from the time of the original deed by owners. No notice to the owner that anyone was trying to pay taxes and thereby acquire an interest in their property.

The Court erred in quieting title to property under the erroneous description of property which had never been in the plaintiff's possession.

Certainly the law should not be that a person can make an erroneuos survey and description and pay taxes on property under that description with the true owner paying taxes under his original description and without

notice and claimant thereby acquire title to the property without a tax deed or any conveyance from anybody in the chain of title.

Defendants submit that the case should be reversed and that title should be quieted in accordance with the description of surveyor Knowlton in the defendant, Charles E. DeGraffenried, Jr.

Respectively submitted,

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PLAT OF  
A PORTION OF SECTIONS  
13 and 14  
T. 3 S. R. 1 W.  
S. L. M.

