

1962

San Juan County v. Grand County : Brief of Respondent and Cross Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

No. 9563

JAN - 8 1962

SAN JUAN COUNTY, a Body Corporate and Politic of the State of Utah,

Plaintiff-Respondent

and

Cross Appellant

vs.

GRAND COUNTY, a Body Corporate and Politic of the State of Utah,

Defendant-Appellant

APPELLANT'S BRIEF

Appeal from the Judgment of the
Fourth District Court for Utah County

Hon. R. L. Tuckett, Judge

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STATEMENT OF THE KIND OF CASE

This case is a boundary line dispute case brought by San Juan County, Utah, as Plaintiff, seeking an injunction against the Defendant Grand County's continued exercise of jurisdiction over an area "approximately 2/3 of a mile wide" between the Colorado border and the Green River. The Plaintiff also seeks a judgment for the tax money admittedly collected in said disputed area by Grand County. Grand County, on the other hand, counterclaimed and in its Counterclaim contends that old surveys conducted by the parties and others and acquiesced in over a long period of time creates the true and correct common boundary between the two counties.

DISPOSITION IN LOWER COURT

The trial court held that it did not have jurisdiction to hear and determine the issues presented to it, either on the Plaintiff's Complaint or on the Defendant's Counterclaim and dismissed the Plaintiff's Complaint and the Defendant's Counterclaim and awarded costs to the Defendant; the Defendant appeals and the Plaintiff cross-appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of that portion of the judgment of the lower court that holds that the court did not have jurisdiction to hear and determine the issues presented to it by the Defendant's Counterclaim, and from that portion of the judgment and decree dismissing Defendant's Counterclaim and seeks a decree establishing that as a matter of law the common boundary between the

two counties is the line found by the trial court to have been surveyed by mutual consent and by the joint effort of the two counties pursuant to Utah Law. It is also the position of the Defendant that the line found by the Court to have been surveyed and marked on the ground by the two counties corresponds to the south line of Township 26 South and as a matter of law said line so established and acquiesced in for a long period of time creates a boundary by prescription and estoppel and should be declared to be the common boundary line between the two counties. It is the further contention of the Defendant that the Parallel 38°30' North Latitude as fixed by the State Legislature and as historically marked on the ancient maps and plats and acquiesced in by both Grand and San Juan Counties is the common boundary line between the two counties as a matter of law; that once so established and fixed neither the State Engineer nor the Legislature itself can declare said boundary line to be otherwise.

STATEMENT OF FACTS

On December 18, 1958, for the first time, a judicial determination of the common boundary between Grand and San Juan Counties was brought by San Juan County in an effort on the part of San Juan County to obtain an order of the court for an accounting and money judgment against the Defendant for taxes admittedly collected by the Defendant in the disputed area and to restrain the Defendant from continuing to exercise jurisdiction over the so-called "disputed area," which the Plaintiff alleges to be a line on Parallel 38°30' North Latitude and which it states in its Complaint is "approximately 2/3 of a mile north of

the south boundary line of Township 26 South," (Paragraph 15 of Plaintiff's Complaint) as determined by a reconnaissance performed by the Coast and Geodetic Survey branch of the Federal Government at the request of the State Engineer. The Defendant Grand County admits that it has exercised jurisdiction and control over said disputed area and that it had collected the taxes in the so-called "disputed area" and would continue to do so unless restrained by order of the Court. (See paragraph 10 of Plaintiff's Complaint and paragraph 10 of Defendant's Amended Answer and Counterclaim). Defendant Grand County contends that the two counties had, by mutual consent and joint effort, surveyed the common boundary and that thereafter both counties acquiesced in said line as the boundary line for a long period of time, thus establishing the common boundary between said counties, which line it so happens is coincident with the south line of Township 26 South as it has come to be marked on the earth's surface, and further contends that all of the early surveys placed the common boundary and Parallel 38°30' North Latitude on a line coincident with the south line of Township 26 South.

On the 18th day of November, A.D., 1960, a pre-trial order of the Court framed the issues as follows:

"1. What was the boundary between the plaintiff and the defendant of 1896, at the time the State of Utah was admitted to the Union.

2. What is the common boundary line between the parties as of the present time.

3. Where is the boundary line to be established on the surface of the earth.

4. What amount of taxes, if any, collected by Grand County is the plaintiff entitled to; and whether or not the Statute of Limitations applies to this issue.

5. Whether or not the parties have acquiesced in the boundary now established upon the surface of the earth."

The issues thus joined the case were presented to the trial court, the question of taxes payable from Grand County to San Juan County being deferred by the Court until after the location of the common boundary had been disposed of.

The evidence presented disclosed that all of the old maps show the south line of Township 26 South to be the common boundary between the two counties while the more recent ones show the common boundary to be somewhat north of the south line of Township 26 South.

The old Bureau of Land Management township plats which are on file in the State Land Office show Parallel 38°30' North Latitude to be either just south of or as being the same line as the south line of Township 26 South.

In the year 1912 the two counties, by mutual agreement, conducted a joint survey to ascertain and mark the common boundary between the two counties.

In the year 1958, Grand and San Juan Counties engaged the services of the State Engineer to determine as best he could the location of Parallel 38°30' North Latitude. The State Engineer never conducted any survey or placed any monuments upon 38°30' North Latitude or at any other place pursuant to said employment but did request the

Coast and Geodetic Department of the Federal Government to conduct a reconnaissance which was done. No further steps were taken and the project was abandoned.

At the conclusion of the evidence the court took the case under advisement and on the 12th day of September, 1961, the trial court made and entered its Findings of Fact and Conclusions of Law, which facts found read in words and figures as follows, to-wit:

FINDINGS OF FACT

"1. That the Plaintiff San Juan County is now, and ever since February 17, 1880, has been, a body corporate and politic of either the Territory of Utah or of the State of Utah.

2. That the Defendant Grand County is now and since March 13, 1890, has been a body corporate and politic of either the Territory of Utah or the State of Utah.

3. That the common boundary line between Grand and San Juan Counties as defined by the Territorial Legislature of the Territory of Utah, and later by the Legislature of the State of Utah, has never varied and has always been described as Parallel 38°30' North Latitude.

4. That the State Legislature provided a means for the determination of the location of boundary lines upon the ground in the event of a dispute between counties and this method has remained substantially the same through the years and is presently identified as Section 17-1-33, Utah Code Annotated, 1953.

5. That sometime in 1958, the two counties en-

gaged the State Engineer to survey and mark the common boundary line between the two counties. The State Engineer never conducted any survey or placed any monuments on Parallel 38°30' North Latitude, or any other place pursuant to said employment but requested the Coast and Geodetic Department of the Federal Government to do a reconnaissance survey, which was conducted by said Coast and Geodetic Department of the Federal Government. No further steps were taken and the project was abandoned.

6. There is evidence in the record that in the year 1912, the County surveyors of the Plaintiff and Defendant Counties surveyed the common boundary line between the two counties and there is evidence of monuments and other markings being made, but the exact location thereof cannot now be determined.

7. That the procedure set forth by the Legislature for determining County boundaries in case of dispute has not been complied with by the parties.

The Court concluded from the foregoing facts that it did not have jurisdiction in this case.

ARGUMENT

POINT NO. 1

The District Court had jurisdiction to hear and determine the issues presented to it by the Defendant's Counterclaim and in the light of the evidence presented the Defendant Grand County is entitled to a judgment as a matter of law establishing the line found by the Court to have been surveyed, marked and monumented by the mutual consent and agreement of the two counties to be

the true common boundary line between the two counties.

The Court has jurisdiction to determine this matter. In 20 C. J. S. Counties, Section 21, page 772, it is stated: "Suit in Equity. In the absence of such a statute a court of equity has jurisdiction to determine the true location of a disputed boundary between counties, and, if necessary, cause the line to be marked by permanent monuments."

Article VIII, Section 7 of the Utah Constitution states: "The District Court shall have original jurisdiction in all matters civil and criminal not excepted by this Constitution, and not prohibited by law; appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of same. The District Courts or any judge thereof, shall have the power to issue writs of Habeas Corpus, mandamus, injunctions, give warrants, certiorari prohibitions and other writs necessary to carry into effect the orders, judgments and decrees, and to give them general control over inferior Courts and tribunals within their respective jurisdictions."

The Statutes disclose, and the Court found, that "the Legislature provided a means for determining the location of boundary lines upon the ground in the event of dispute or uncertainty between counties and this method has remained substantially the same, through the years and is presently identified as Section 17-1-33, Utah Code Annotated, 1953," and which reads as follows:

"17-1-33. Disputed boundaries — Determination — Whenever any dispute or uncertainty shall arise as to any county boundary the same may be determined by

the county surveyors of the counties interested, and in case they fail to agree or otherwise fail to establish the boundary, the board of county commissioners of either or both counties interested shall engage the services of the state engineer who, with the aforesaid county surveyors, or either of them, if but one appears for that purpose, all having received due and proper notice, shall proceed forthwith to permanently determine such boundary line by making the necessary surveys and erecting suitable monuments to designate the boundaries, which shall be deemed permanent until superseded by legislative enactment. Nothing in this section shall be construed to give the surveyors or state engineer any further authority than to erect suitable monuments to designate boundaries as they are now established by law.

History: R. S. 1898 Sec. 487; L. 1907 Ch 82, Sec. 1; C. L. 1907 Sec. 487; C. L. 1917 Sec. 1322; R, S, 1933 and C. 1943, 19-1-33."

The Defendant Grand County's first point on this appeal is that when a county line has been run and marked on the ground in accordance with law by the agents designated by the Legislature for that purpose that it is conclusive and can only be changed by legislative enactment and that where the trial court found the facts to exist the court has jurisdiction and must issue an order accordingly.

The Findings of the trial court, above quoted with respect to the joint survey of the two counties and the markings and monumenting of the line, are fully supported by the evidence submitted to the trial court.

The minutes of the meetings of the Plaintiff San Juan County were introduced in evidence by the Defendant

Grand County and the uncontradicted testimony of C. R. Christensen, former official of San Juan County, confirmed the fact that a joint survey by the counties to this action was conducted by the two counties, whose agents marked and monumented the common boundary line between said counties from the Colorado border to the Green River. (Defendant's Exhibits 129 through 139.)

C. R. Christensen, a former Assessor of San Juan County, testified on February 14, 1961, (Transcript of Trial Proceedings, Volume II, page 453 through 485) parts of which will be set forth for the benefit of the Court as follows:

"Q. Mr. Christensen do you know whether or not the boundary line between Grand County and San Juan County has ever been surveyed? (Lines 22-23-24, page 455.)

A. Yes, Sir. (Line 25, page 455.)

Q. When to the best of your recollection? (Lines 4-5, page 456.)

A. The fall and summer of 1912 is the best of my recollection. That is the survey I was on anyway. (Lines 6-7-8, page 456.)

Q. Did you participate in it? (Lines 9-10, page 456.)

A. Yes, sir. (Line 11, page 456.)

Q. Well, will you tell us who you remember to be there? (Lines 19-20, page 458.)

A. There was Harry Preston, Gene Rogerson, Andrew Middlemist, myself and Branson. I believe his name

was Tom Branson. He was one of the Commissioners from Grand County. The Chairman, I understood. (Lines 22-23-24, page 458.)

Q. Now who was Harry Preston? (Lines 25-26, page 458.)

A. He was a young surveyor that came to this country and married a Monticello girl. . . . (Lines 27 through 30, page 458; lines 1-2-3, page 459.)

Q. Where was Harry Preston living at that time? (Lines 4-5, page 459.)

A. This was his home. (Line 6, page 459.)

Q. You mean Moab when you say this? (Lines 7-8, page 459.)

A. Yes, sir, she was living with her mother, and when he was at home he was with her. (Lines 9-10, page 459.)

Q. Tell us what you know about Middlemist. (Lines 22-23, page 459.)

A. He lived at Monticello, east of there, and homesteaded there. (Lines 24-25, page 459.)

Q. What was his profession? (Lines 26-27, page 459.)

A. He had worked with a surveyor by the name of E. C. Laure. In fact, quite a surveyor, that is not a surveyor but a lineman. That is what they called him. (Lines 28-29-30, page 459.)

Q What did you do and what did you see done?
(Lines 24-25, page 461.)

A Well, I helped tend camp around there and done some chaining and the boys, Preston and Middlemist, were trying to determine the starting point on that State line to run the line west to determine the line between the two counties. (Lines 26 through 30, page 461.)

Beginning on page 462 through line 18, page 467) C.
R. Christensen testified as follows:

“Q. Did they establish a starting point?

A. Yes, sir.

Q. When they established the starting point how did they mark it?

A. Well, I couldn't tell you definitely. I saw them mark it and saw them start, but I couldn't tell you just—they piled up some rock. Oh, we were there a day or two. I couldn't tell you what happened.

Q. They did pile up some rock?

A. Yes, sir.

Q. Then after you started what did, what was done up there?

A. They started running a line directly west.

Q. Well to your best recollection can you tell us what they did in running this line?

A. Well, sometimes they could chain, but they did

more in lining and putting up monuments so they could trace it.

Q. Did they set up instruments?

A. Yes, sir.

Q. And then with these instruments they surveyed a line, is that correct?

A. Well, I don't know whether they did anything else. They looked through a transit. I looked through it several times, and a number of the other boys.

Q. Now, did you put marks on this line?

A. Yes, sir.

Q. What, can you describe some of the marks that were placed on it?

A. Yes, sir. Some of them. They were when there were rock handy, they piled up a pretty good pile of rock and Rogerson had the job of marking those rocks with a hammer and coal chisel. That was his job mainly. But he didn't stay right on the job because—

Q. Well, describe one of these monuments, if you can. One of the rock monuments. How large it was and so forth.

A. Well, it depended a little on how plentiful the rock were. Sometimes larger. But they aimed to put them about four feet high where the rock was handy, and the base, it was bigger around on the bottom than the top. It sloped up.

Q. Did you mark them in places where there weren't rock? How did you mark them in those places?

A. Well, there was trees some of the way. Very thick trees. And they had trouble getting through those trees, and they would off-set, he called it. They would measure a distance, if that was the east and west line, or north and south line, east and west line, they would measure off a chain or so many links south trying to find those marks.....

Q. Now am I correct, then, in other words, where the trees were real thick and they couldn't get through they made some off-sets?

A. Yes, sir.

Q. Now, do you know whether or not they made any marks on trees?

A. Yes, sir.

Q. How did they do that?

A. They would bark them. I had a little axe of my own. I would, what we called scalping down the side. And this Rogerson, well, Andy, mostly, had a hammer that he would knock a mark in to them. Give the initials.

Q. Now you said you started on the east line. That would be on the boundary between Colorado and Utah?

A. Yes, sir.

Q. And you proceeded west, is that correct?

A. Yes, sir.

Q. Now how far west did you go, Mr. Christensen?

A. To the Green River.

Q. To the Green River?

A. Yes, sir. I and two others in the party started out. Some didn't go through. They changed some of the crew at the Saw Mill. Branson was. Another man, he had a partner there. Can't speak his name right now, but I know it if I hear it.

Q. Did you yourself go all the way to the Green River?

A. Yes, sir.

Q. As—now, during this survey were there people there from both counties?

A. Yes, sir.

MR. BURTON: We made an objection there.

Q. Who was there from Grand County?

A. Well, there was different men at different times, but Branson was all the way until we got in this valley, or this valley south of us here, and for some—well, he helped back of the rocks here too. So they had quite a time getting lined up that, over that cliff, what they called back of the rocks And he was with us.

* * * *

Q. Did you go through that area, the Poverty Flats?

A. Yes, sir.

Q. And then over back of the rocks. Is that what you said?

A. Yes, sir. West, yes, sir.

Q. Do you know who else was from Grand County?

A. Yes,—

* * * *

A. Yes. There was, well, now, just where they came on. Joe Hammond was with from over back of the rocks. He had sheep in that neighborhood, and he wanted to know where the line was.

Q. And Harry Preston, is he one?

A. Harry Preston and Middlemist.

Q. Was Middlemist from Grand or San Juan County?

A. He was from San Juan mostly. That is where he homesteaded. He was an unmarried man.

Q. Now who was from San Juan County other than yourself?

A. Rogerson and Middlemist.

Q. Were you acquainted with Mr. Hyde?

A. What Hyde? There's several of them.

Q. Do you know whether or not a Hyde was a commissioner at that time in 1910?

A. Yes, sir.

Q. What were his initials?

A. F. H., Frank H. Hyde.

Q. Were you acquainted with him?

A. Quite well.

Q. Now during that time did you ever have a conversation with Mr. Hyde concerning a boundary line?

A. Prior to that time I had. Not while we were running the line I didn't.

Q. Mr. Christensen, do you know what the purpose of this survey was?

A. Yes, sir.

Q. What was the purpose of the survey?

A. My understanding was to determine the line between the two counties, there was dissatisfaction between the commissioners and the patrons in that county, and some in this. It was my understanding that was the reason for the survey."

The uncontradicted and only evidence on the subject of the existence of the disputed or uncertain boundary between Grand and San Juan Counties and the joint effort of the two counties to resolve same is presented above and is in complete and absolute harmony with the trial court's Finding No. 6 that there was such a survey and monumenting pursuant to the statute referred to in the Court's Finding No. 4.

The uncontradicted testimony of Richard O. Cozzens, Civil Engineer and Land Surveyor, coupled with the testimony of old-time residents and viewed in the light of the old maps and plats demonstrates that Parallel 38°30' North Latitude as determined by all the surveyors at the time of the joint effort of the two counties was on a line coincident with the south line of Township 26 South.

Richard O. Cozzens, Civil Engineer and Land Surveyor, uncontradicted testimony shows that on February 1, 1961, he drove to a point on the south line of Township 26 South, where were two signs, one facing south reading "Entering Grand County" (See Defendant's Exhibit 109) and the other facing north reading "Entering San Juan County" (See Defendant's Exhibit 159) Transcript of Trial Proceedings, Vol. II, lines 14 through 19 and 25 through 28, page 402, and lines 9 through 23, page 426.)

That in running a line east and west from said points he found a pile of stones which showed extreme effects of the elements and looked aged. (Lines 7-8, pag 425.) He took pictures of them, which are identified as Defendant's Exhibits 47 and 48; some distance therefrom he found other stones in a straight line indicating the boundary line. (Defendant's Exhibit 145.)

On February 6, 1961, Witness Cozzens found a blazed pine tree about 30 feet south of a straight line from the monuments identified as Exhibits 47, 38 and 145. The blazes showed extreme signs of weathering and age. (See Transcript lines 6 through 16, page 421, and Defendant's Exhibit 162.)

Witness Cozzens' uncontradicted testimony shows that the old monuments established by the joint survey of the two counties are located on a line which for all practical purposes corresponds with the south line of Township 26 South, Salt Lake Base and Meridian.

Witness R. L. Holyoak's uncontradicted testimony identified the Exhibits referred to above by Witness Cozzens and stated that he has been in the area for about fifty-four years (Transcript of Trial Proceedings, Vol. II, page 340, lines 7 and 8) and that he could not remember a time when these marks were not there.

The joint survey conducted by the two counties placed the common boundary on a line which has come to be known as the south line of Township 26 South, which fact is not strange since the surveyors were using the same methods and the same kind of instruments that were used by the early government surveyors who placed Parallel 38°30' North Latitude on a line coinciding with the south line of Township 26 South, Salt Lake Base and Meridian. It is conspicuous that the only fixed location on the earth's surface referred to in the Plaintiff's Complaint is a reference to the south line of Township 26 South.

Another aid in fixing the location of a common boundary between the two counties which the trial court apparently neglected to consider when stating that the joint survey marked and monumented in 1912, "could not now be determined" was the fact that after said joint survey was completed San Juan County acquiesced in its fixed location and has never sought any legislative or judicial

determination of its common boundary with Grand County until this suit was commenced by it on December 18, 1958.

In 20 C. J. S. (Counties) Section 21, Page 772, it is stated: "Where the boundary line between two counties is uncertain in view of legislative acts and other matters of which the Court takes judicial knowledge, extrinsic evidence is admissible in determining the boundary. The evidence admissible includes maps of the territory involved, published by authority of law, as well as oral and written evidence of the assumption and continuous exercise of jurisdiction over the territory by one county. The testimony of parties running county lines, of those present and assisting therein, and of those present and seeing the line as it was run is competent and entitled to the greatest weight."

IN PUGET SOUND NAT. BANK OF SEATTLE v. FISHER, Supreme Court of Washington, 1909, 100 P. 724, the Court stated the rule to be as follows: "It would seem that no higher and better evidence could be offered than that of assumption and continuous exercise of jurisdiction over the territory by one county for many years, extending back beyond the memory of living witnesses and which jurisdiction was acquiesced in by the citizens of both counties to a comparatively recent time."

In VIRGINIA v. TENNESSEE, 148 U. S. 503, Mr. Justice Field in a case involving a disputed boundary which had been by compact previously marked on what was thought to be parallel 36°30' North Latitude and whose markings had been rendered difficult of certainty by obliteration stated: "The compact in this case having received the consent of Congress, though not in express terms, yet

impliedly, and subsequently, which is equally effective, became obligatory and binding upon all the citizens of both Virginia and Tennessee. Nor is it any objection that there may have been errors in the line which the states by their compact sanctioned. After such compacts have been adhered to for years neither party can be absolved from them upon showing errors, mistakes or misapprehension of their terms, or in the line established; this is a complete and perfect answer to the complainants' position in this case."

In *INDIANA v. KENTUCKY*, 136 U. S. Reports, Mr. Justice Field on page 515 states: "It is an admission entitled to great weight in explaining the cause of the states general acquiescence, from the time it was admitted into the Union up to the passage of that act, in the claim and jurisdiction of Kentucky . . . whilst on the part of Indiana there was want of affirmative action in the assertion of her present claim, and a general acquiescence in the claim of Kentucky; there was affirmative action on the part of Kentucky in her assertion of her rights."

In the present case there is no question that there was affirmative action on the part of Grand County in her assertion of her rights as evidenced by the very nature of this case and there was a recognition of the line surveyed and marked and monumented by the joint efforts of the two counties at least until very recent years as evidenced by the testimony of C. R. Christensen, the former Assessor of San Juan County, whose testimony on this point is set forth in detail on pages 34-35-36 of this Brief. Since Grand County was exercising jurisdiction and control over the so-called disputed area and levied, assessed and collected

taxes thereon without interruption by San Juan County, it had no occasion to seek a judicial determination of its common boundary with San Juan County. San Juan County on the other hand conspicuously never sought any legislative or judicial determination of its common boundary until this suit was instituted on the 18th day of December, 1958, when it made affirmative allegations in its Complaint that the Defendant assumes jurisdiction over the disputed area and its inhabitants and levies and collects taxes against them and that Defendant would continue to do so unless restrained by Court Order from doing so. (Paragraph 10 of Plaintiff's Complaint) Defendant admitted all of Plaintiff's assertions. (Paragraph 10 of Defendant's Amended Answer.)

All of the old plats of the Bureau of Land Management which are on file in the Utah State Land Office and which are a part of the evidence show the south line of Township 26 South to be coincident with and the same line as Parallel 38°30' North Latitude or show 38°30' North Latitude to be slightly south of the south line of Township 26 South, and all of the old maps show the south line of Township 26 South to be the common boundary between the two counties. (See Defendant's Exhibits 23 through 31.)

George M. Bacon, former Utah State Engineer, on September 5, 1925, in an exchange of correspondence with F. B. Hammond, County Attorney of San Juan County, stated that the South Township line of Township 26 South "is meant to coincide with the line of Latitude 38°30' minutes No." (Defendant's Exhibit 67), and that he found "the SE corner of Township 26 South, Range 23 East are given

as located exactly at Latitude No. $38^{\circ}30'$."

Witness Hubert C. Lambert, Deputy Utah State Engineer, testified for the Plaintiff San Juan County that the plats and maps of the earlier days show Latitude $38^{\circ}30'$ as close to or coincidental with the south line of Township 26 South (Transcript lines 19 through 28, page 161.)

It is submitted that there is overwhelming proof that the line found by the trial, marked and monumented by the joint efforts of the two counties, and acquiesced in is not indefinite and can now be determined and that it is for all practical purposes the same line as the south line of Township 26 South, Salt Lake Base and Meridian, and that it was the obligation of the trial court to order that the old survey conducted by the parties pursuant to law be re-marked and re-monumented if the old marks and monuments have become obscure.

Justice Field in discussing a similar question in the case of VIRGINIA v. TENNESSEE, Supreme Court of the of the United States, (supra) stated: "The commissioners appointed under the act of Virginia of 1856, and under the act of Tennessee 1858, found all of the old marks upon the trees in the forest through which the line established ran in the form of a diamond; and whenever they were indistinct, or, in the judgment of the commissioners, too far removed from each other, new marks were made upon the trees, or if no trees were found at particular places to be marked, monuments in stone were planted. Besides this, the State of Virginia does not ask that the line of 1803 shall be re-run or re-marked, but proposes that a new boundary line be run on the line of $36^{\circ}30'$. Tennessee does not ask

that the line of 1803 be re-run or re-marked. Nevertheless, under the prayer of Virginia for general relief, there can be no objection to the restoration of any marks which may be found to be obliterated and become indistinct upon the line as herein defined.

“Our judgment, therefore, is that the boundary line established by the State of Virginia and Tennessee by the Compact of 1803 is the true boundary between them, and that on a proper application, based upon a showing that any marks for identification of that line have been obliterated or have become indistinct, an order may be made, at any time during the present term, for the restoration of such marks without any change of the lines.”

The same result was reached in the case of *NEW MEXICO v. COLORADO*, 364 U. S. 296. In this case the statutes fixed the common boundary line between the two states on the 37th parallel of north latitude between its intersection with the 103rd and 109th meridians of longitude west from Greenwich. In pointing up the issues the Court said, “The only dispute is as to the alleged location of this line. Different surveys have been made. New Mexico alleges in its bill that the true line is that which was surveyed and marked by Howard B. Carpenter in 1903, and prays that this be decreed to be the boundary. Colorado, in answer and cross bill, alleges that the true line is that which was surveyed and marked by Elud N. Darling in 1868, and extended by John J. Major and Levi S. Preston in 1874 and 1900; and prays that this line be decreed to be the boundary, and that, in so far as necessary it be restored and re-marked.

"When Carpenter made his survey in 1903 'He was not directed to retrace the lines previously established, but was directed to make an independent survey, and was specifically instructed to "obliterate" all evidences of corners and monuments that had been set by Darling."

The Court held: "We have no occasion, however, to determine the question, or to settle the precise location of the parallel line as an original matter, since, upon the uncontradicted facts, it is entirely clear that the line of the parallel as surveyed and marked by Darling westerly from the Macomb monument, and by Major and Preston from the Macomb monument to the Preston monument, must now be taken as the established boundary * * * *. From 1868, when Darling ran and marked the line of the 37th parallel, to 1919, when this suit was brought, a period of more than half a century, this line was recognized and acquiesced in, successively, as the boundary between the two Territories, between the State of Colorado and the Territory of New Mexico and between the two states. * * * * The effect of this recognition of the Darling line by the United States was not impaired by the temporary recognition of the Carpenter line of the General Land Office, from 1904 to 1908. * * * * And independently of these matters New Mexico is bound by its own recognition and adoption of the Darling line, from 1912 to the beginning of this suit, after its admission to statehood."

"This boundary line should now be resurveyed and remarked by the commissioner or commissioners appointed by the Court; such action to be subject to its approval. Missouri v. Iowa, supra p. 679; Indiana v. Kentucky 136

U. S. 479, 519; Oklahoma v. Texas 260 U. S. 606, 640."

IN HUNT COUNTY v RAINS COUNTY, 7 SW 2d 648, the Texas Court in determining a similar case to the one in dispute said: "And it is the firmly settled rule that a court has no power to direct another survey to be made and thereby establish another county boundary line different from the one established at some former period, when a county line has been once run, marked upon the ground and established 'in accordance with law.' Jones v. Powers, 65 Tex 207; Pecos County v. Brewster County, (Tex Cir. App.) 250 SW 310; Lampasos County v. Corryell County, 27 Tex. Cir. App. 195, 65 SW 67."

If there is any question with respect to the exact location of the marks and monuments which the county surveyors by their joint efforts placed upon the earth's surface said line should be re-established and re-marked in keeping with the authorities above cited.

Under the provisions of 17-1-33 Utah Code Annotated, 1958, disputed or uncertain boundaries can be settled and where the statute has been followed, as in this case, the boundaries so determined shall "be deemed permanent until superseded by legislative enactment." In construing statutes of this kind the Defendant cites the Court the following authorities as supporting its position in this case.

16 Corpu Juris Secundum, (Constitutional Law), Sec. 138, Section 15, page 614, states:

"The power to fix the boundaries of political subdivisions cannot be delegated but details as to the de-

termination of the location of boundaries may be left to administrative agencies."

The California courts have supported the general statement set forth above beginning with the case of *PEOPLE ex rel BORRELL v. BOGGS*, 56 Cal. 648. "We think it was competent for the Legislature to direct its officer to go upon the ground, run his lines along that ridge, and in doing so he was acting merely in a ministerial capacity; and we think that it was competent for the Legislature to declare that the lines so run that is the location of the boundary line upon the ground should be thereby defined and fixed."

The Supreme Court of California in a land mark case entitled "*TRINITY COUNTY v. MENDOCINO COUNTY*, 90 P. 685," cited at great length here because of its extreme similarity to the case at bar, assumed jurisdiction and determined the common boundary between Trinity County and Mendocino County.

"It is conceded that if, after the survey was made, the Legislature had enacted a law providing that the line so marked should be the boundary line between the counties it would thereupon constitute such boundary, no matter how much it deviated from the true line or position of the fortieth parallel, and that, even if such subsequent act was passed in ignorance of the mistake or error in the survey, it would make no difference in this respect. But it is contended that it is not competent for the Legislature to declare, in advance of the work, that the line which might be surveyed and marked by the surveyor should be the true line. We can see no essential difference between the two

propositions, so far as the mere matter of legislative power is concerned. The rule in regard to such legislation is thus stated by the authorities: "The Legislature cannot delegate the power to make laws, but it can delegate the power to determine some fact or state of things upon which the law makes or intends to make, its own action depend. Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 722; State v. Thompson, 160 Mo. 333, 60 S. W. 1077, 54 L. R. A. 950, 83 Am. St. Rep. 468; Boyd v. Bryant, 35 Ark. 69, 37 Am. Rep. 6; Pueblo Co. v. Smith, 22 Colo., 534, 46 Pac. 360, 362, 33 L. R. A. 465; in re Flaherty, 105 Cal. 558 38 Pac. 981, 27 L. R. A. 529; 8 Cyc. 830; 6 Am. & Eng. Ency. 1029, 1032. " * * * Here, the Legislature having declared that the county boundary should be the fortieth parallel, it further provided that its location should be established by a surveyor and marked accordingly, and that the line so fixed and marked should be the true boundary. The surveyor was directed to ascertain the position of that parallel on the ground in accordance with the rules of his science and by means of the instruments of his profession. The exact position was presumably unknown. Perhaps it may be said that it cannot, by human means, be ascertained with absolute certainty. It was therefore competent for the Legislature to settle all controversy over the question by providing for a survey and declaring in advance that the line as surveyed should be the true boundary line. It cannot be conceded that the Legislature cannot delegate the power to determine contrary to the fact. The power to decide necessarily includes the power to decide erroneously; but the fact, once decided, whether true or false, is nevertheless effective for its purpose.

"The act provided that the surveyor, when employed, should 'accurately run' the line of the fortieth parallel. It is contended that the effect of this language is that if he ran it inaccurately his survey would be void; that the words quoted were a limitation upon his power, such that he could make no legal survey unless it was sufficiently clear by Section 1 above quoted. That section manifestly was made in view of the contingency that the survey might not be absolutely correct, and its purpose and effect was that, whether correct or not, the line surveyed and marked should thereupon be the true line. The construction contended for would leave the county lines always subject to change and uncertainty; if the line of that parallel and not any particular surveyed line thereof is to be the true county line, it would be subject to relocation and change whenever new discoveries, more accurate instruments or more careful surveys should demonstrate that the previously surveyed line was incorrectly located on the ground. If the true line of the parallel, and no other, was to be the lawful line, the surveying and marking of any line would accomplish nothing. It would, indeed, indicate the place where the particular surveyor ascertained and believed the position of the true line to be, and to prove which might show it to be false, and there would be no remedy, except by legislative act. The matter of establishing a county boundary is for the Legislature. If it has declared that the true line of the parallel is the line, the courts cannot declare any other line to be the boundary, in the absence of legislative authority to so declare. The Court can declare and construe the law on the subject, but it cannot declare and establish the fact that the parallel is situated elsewhere than in its true location; and, if that location is to be the sole criterion, the

Court's decree must be as much subject to such inquiry and dispute as the survey of any surveyor. It is not to be supposed that the Legislature intended to reduce the proposed survey and location to such a mere idle ceremony.

“It is said that under the theory of the law the surveyor might arbitrarily locate the line 10, 15 or even 50 miles from the true line. There is no charge that the surveyor fraudulently located the line. What the effect would be if he did act fraudulently we need not decide. But, so far as mere inaccuracy is concerned, it seems clear that it would not affect the question. In any event, the location of the county lines is a political question, to be settled by the legislative power of the state, and subject to change from time to time as the legislative power may direct. If the line as fixed in accordance with its directions is inaccurately located by the person whom it has directed to make the survey and place the marks, the correction of the error lies with the Legislature, and not with the courts, unless it has provided that the courts shall determine the true location, which it has not done. The finding of the Court is that the common boundary line between Mendocino and Trinity counties was, and ever since the Fauntleroy survey, has been, adequately marked by monuments, lines and surveys lawfully made. Such being the fact, there was no necessity or authority for a resurvey by the surveyor general, under Section 3969 of the Political Code, unless it appeared that the monuments of the Fauntleroy survey had been displaced or destroyed, so that this line was no longer adequately marked. In that event the surveyor general could be called upon to resurvey and mark the line under the provisions of the Political Code above cited; but if he

should be called upon to make such survey, it would be the Fauntleroy line which he must survey and mark, and not the actual position of the fortieth parallel of north latitude.

"It is entirely immaterial whether there was, or was not, a dispute concerning the location of the line when the act of March 30, 1872, was passed and the survey made thereunder."

The arguments presented in the well reasoned land mark case above set forth are applicable in this case.

The Legislature on March 13, 1890, declared that the common boundary between Grand and San Juan Counties was parallel 38°30' North Latitude and provided a means which disputed boundaries could be settled. The exact position of 38°30' North Latitude is still unmarked on the earth's surface. The Legislature provided a means to settle any disputed or uncertain boundary, and Grand and San Juan Counties, having taken advantage of this law, fixed and established the boundary which, according to the provisions of the statute under which they acted, "shall be deemed permanent until superseded by legislative enactment."

It is not questioned by the Defendant that with the technological advancements that have been made since the turn of the century that Parallel 38°30' North Latitude can be more accurately marked on the earth's surface today than it could have been marked then; nor is it questioned that as man's knowledge of the earth's surface increases and technology advances further that at some later date engineers and scientists will be able to more accurately mark Parallel 38°30' North Latitude on the

earth's surface than they can today. But are these two counties to be subjected to renewed and continued litigation each time new discoveries, more accurate instruments, or more technical surveys can be made? To answer this interrogatory in the affirmative would be to deny the Legislature of its right to fix county boundaries and to reduce the joint survey made, established and acquiesced in since 1912 to a mere ceremony.

In the case of *BARTON v. SANPETE COUNTY*, 162 P. 611 (Utah), Dec. 29, 1916, the Court, at page 612, states: "In 1907 in order to devise some method or means by which disputed boundary lines, including the one in question here, could definitely be fixed and settled, the Legislature enacted a statute (Comp. Laws 1907 Sec. 487), which reads as follows: "(The statute in question is set out in full and is substantially the one cited to the Court in this case.) The Utah Court said:

"1. The law, we think, is well settled that the Legislature has the sole power to define and determine the boundary lines between counties and to provide the means or methods by which such boundaries, when in dispute, may be established and marked upon the ground. The law is tersely stated in 11 Cyc. 346, in the following words:

" 'It rests with the Legislature of the state, not only to define the boundaries of counties, but also to provide the means whereby the true localities of such boundaries on the ground may be finally determined; and the settling of the boundary lines of a county by an unauthorized survey may be ratified by a curative act of the Legislature.' "

In the case of *JONES v. POWERS*, 65 Tex. page 207,

cited with approval by the Utah Supreme Court in *BAR-TON v. SANPETE COUNTY*, the Court said:

"It rests with the Legislature to define the boundaries of counties and to provide the means whereby their true localities on the ground may be determined, and when these methods have been pursued and the line or lines so established should be considered the true ones, whether mathematically so or not. It is of more importance that the lines be certain and well defined than that they be absolutely correct. If a different rule were adopted untold injury and confusion might result.

"The boundary lines of counties are matters of public concern; and when they have been run and their position ascertained, by public authority, the actual line, though it should vary from the descriptive boundary designated in the statute, must be conclusively binding upon all private individuals and county officers, until a different position is given to it by the public authorities. It is also familiar principal in relation to boundary lines, and one which seems applicable to public as well as private boundaries, that description course shall yield to a line actually run."

It is submitted here that the Courts of this State in the proper exercise of the jurisdiction granted to them by the Constitution of the State and the common law should, under the circumstances and evidence in this case, declare the line surveyed, marked, and acquiesced in, to be the true common boundary between the two counties.

POINT II

San Juan County is bound by the acts of its county commissioners in surveying, establishing, monumenting,

and thereafter recognizing a line as the common boundary line between the two counties and is estopped by the doctrine of long possession, prescription, laches and acquiescence from now asserting a different boundary line and the trial court erred in not making a finding on this question.

At the pretrial hearing of this case, the trial court properly framed as one of the issues to be determined in this case "whether or not the parties have acquiesced in the boundary now established upon the surface of the surface of the earth."

The trial court completely neglected to make any finding with respect to whether or not the parties had acquiesced in a line marked on the earth's surface.

It is submitted that there was such acquiescence and that the evidence on this point is clear, uncontradicted, and overwhelming that both parties have acquiesced in the line so surveyed and the south line of Township 26 South as the common boundary line between the two counties over a long period of time.

Mr. Christensen, who participated in the joint survey of the two counties, stated that after completing the survey San Juan County used the line so surveyed in assessing the property in San Juan County.

(The following is copied from the Transcript of Trial Proceedings, Volume II, beginning with line 8, page 483, and ending on line 13, page 485.)

Q. Mr. Christensen, as the Assessor of San Juan County, did you abide by the line that was run on that survey?

MR. BURTON: We objected to it. No testimony that he was the assessor.

MR. RUGGERI: Mr. Snow said "Oh, yes." Mr. Burton said, "Up to this time" and then I got into the act and said "Yes, there was. He said he was the assessor." Mr. Burton said, "He said he had been at various times." The witness said, "At that time." Mr. Burton said, "I submit on the record. There is no qualification. I make my objection for that reason." Mr. Ruggeri: "Were you the assessor at that time?"

A. Yes, sir.

Q. All right. Now as the assessor did you abide by the line that you had run in assessing the taxes in San Juan County?

MR. BURTON: I objected to that a calling for a conclusion of the witness.

THE COURT: Well, he may answer.

Q. I will ask you again, Mr. Christensen. As the assessor of San Juan County, did you abide by this line that you had run between the two counties in assessing the property of San Juan County?

* * * *

(Argument to Court.)

MR. RUGGERI: And then this question was asked: "Did you assess up to this line that you established?"

MR. BURTON: I objected to that as leading and suggestive.

THE COURT: He may answer that question.

A. Well, it was generally, pretty generally understood. We knew the boys along the line there and about the only difficulty I ever had was a bunch of steers left here one spring and they wrote they, that they hadn't been assessed. And I followed that bunch of steers to Bed Rock, Colorado, to get the taxes on them.

Q. Well, now, the real property, did you have any trouble in assessing the real property after that?

MR. BURTIN: Then, objected to that as calling for a conclusion of the witness.

THE COURT: He may answer.

A. Well, I couldn't answer it. I never had any difficulty.

Q. Now you said—is that the line that you used?

MR. BURTON: I objected to that. It's incompetent, irrelevant and immaterial.

MR. RUGGERI: The witness requested the question, and this question was asked:

“Now, the line, this boundary line that you made and put up, is that the line you used in assessing property?”

A Yes, sir.

Miss Marian Bayles, the present Treasurer of San Juan County, on cross-examination testified that San Juan County was not and to her knowledge had not collected real property taxes in any of the disputed area when the following question was put to her:

Q. So that San Juan, as far as you know, at least, hasn't collected any real property taxes for property located in this co-called disputed area, is that right, as far as you know?

A. Not to my knowledge. (Transcript lines 28, 29, 30, page 301, and lines 1 and 2, page 302.)

It is significant that San Juan did not bring this action until December, 1958, some forty-six (46) years after the joint survey was made, and then the action was brought for the purpose of restraining the Defendant Grand County, its officers and agents from exercising jurisdiction over the so-called "disputed area" and for an accounting to recover taxes admittedly collected by Grand County in its exercise of jurisdiction over said so-called disputed area.

The Plaintiff introduced evidence that San Juan County paid Grand County for maintaining roads located in the so-called disputed area for the years beginning with 1955, (see testimony of Ada Palmer, San Juan Clerk, beginning page 305), and collected taxes from the Utah Power and Light Company and the Pacific Northwest Pipeline Company for the years 1956, 1957, 1958 and 1959 in an apparent attempt to show lack of acquiescence. These feeble and belated attempts on the part of San Juan County to contradict the facts affirmatively pleaded by it, and admitted by the defendant, do not change the fact that for a long, long period of years both the plaintiff and defendant treated the south line of Township 26 South, and the joint survey conducted by the parties in 1912 as the common boundary line between them and that said line was acquiesced as the common boundary and should now be

declared by the Court to be the common boundary as a matter of law.

As late as September 12, 1953, the County of San Juan, by and through its County Commissioners, deeded certain land in San Juan County for the Grand County Airport, recognizing the south line of Township 26 South to be the common boundary line between the two counties and that in the years 1956 and 1958, Grand County was asserting affirmative jurisdiction and control over all of said so-called disputed area. (See Abstract of Title to the Grand County Airport, marked Defendant's Exhibit 32.)

McQuillen in *Municipal Corporations*, 3rd Edition, Volume 2, Section 7.09 states the rule of law applicable as follows:

"Long acquiescence in the location of municipal boundaries by the local corporation and the inhabitants thereof where all municipal action and improvements have been done under the assumption that such are the boundaries, notwithstanding they were not originally so located and hence, indefinite and uncertain." * * * *
When the boundaries of a municipal corporation become ancient and are unmarked by artificial monuments, they may be proved by general reputation, in the absence of higher evidence."

C. J. S. 20, (Counties) Sec. 22, page 773. "Long usage, acquiescence in, and recognition of a particular boundary as the true county boundary line may have the effect of establishing it as such"

The Utah Supreme Court in the case of *SUMMIT COUNTY v. RICH COUNTY* 224 P. 653, cited earlier, seems to recognize the doctrine of acquiescence when it states on

page 655: "It is made to appear that the officials of both Rich County and Summit County for many years acquiesced in the fact that the dispute area was a part of Summit County."

WASHINGTON ROCK CO. v. YOUNG, 29 Utah 108.

"The law is well settled that an original survey of lands, upon the faith of which property rights have been based and acquired, controls over surveys subsequently made which injuriously affects such rights."

IN RHODE ISLAND v. MASSACHUSETTS, 4 How 591, decided in 1846, it was alleged by Rhode Island that there was a mistake in the location of the boundary line between said states; the Bill was dismissed; the Court said: "More than two centuries have passed since Massachusetts claimed and took possession of the territory up to the line established by Woodward and Saffrey. This possession has ever since been steadily maintained, under an assertion of right. It would be difficult to disturb a claim thus sanctioned by time, however unfounded it might have been in its origin. * * * * Surely this, connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreement of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fail with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and property than in a case of disputed boundary."

In *INDIANA v. KENTUCKY*, 136 U. S. 479, the territory in dispute was an island in the Ohio River, over which Kentucky had long exercised dominion and sovereignty. In its opinion this Court said:

“This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.”

VIRGINIA v. TENNESSEE, 148 U. S. 503, the Supreme Court in a case where the contention that the common boundary line does not follow the parallel of 36° and 30' north but varies from it by running too far north, the Court said:

“A boundary line between states or provinces as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties, for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant, and the line so established takes effect, not as an alienation of territory but as a true and ancient boundary. *Lord Hardwicks in Penn. v. Lord Baltimore*, 1 Vesey Sen. 444, 448; *Boyd v.*

Graves, 4 Wheat 513, Rhode Island v. Mass. 12 Pet. 65, 734; United States v. Stone, 2 Wall, 525, 537; Kellogg v. Smith, 7 Cush., 375, 382; Chenery v. Waltham, 8 Cush., 327; Hunt on Boundaries 3rd Edition 306."

HUNT COUNTY v. RAINS COUNTY, 116 Tex. 277, 7 S. W. page 655.

"In sound policy a county line that has been located and acquiesced in for many years, as here, should not be changed unless expressly required by law to be done, even though such line was not the correct one in the first instance for interminable confusion would result from the change of conditions of such long standing. Road and school bond issues would be affected, as well as individual privileges and status in respect to this line."

It was said in the case of CITY OF RACINE v. EMERSON, 85 Wis., 80-86: "The public and private owners have acquiesced in the lines established by the first and original survey and plat, and by practical location and undisturbed possession for a great many years, and there does not seem to have been any necessity to disturb them at this late day. The judgment of the Circuit Court is reversed, and the cause remanded with direction to enter judgment in favor of the defendant."

MARYLAND v. WEST VIRGINIA, 217 U. S. 1, is directly in point. It was contended by Maryland and apparently not disputed by West Virginia, that the survey of the new meridian contended for by Maryland was much more accurate than the old established and recognized line. West Virginia contended that the long recognized line was the boundary notwithstanding its jog, irregularities, imperfec-

tions and different location and regardless of the fact that it was not intended as a fixation of an inter-state boundary line when it was surveyed. The Court sustained the claims of West Virginia and caused the long recognized boundary to be resurveyed and remonumented by commissioners.

“In this case we think a right, in its nature prescriptive, has arisen, practically undisturbed for many years, not to be overthrown without doing violence to principles of established right and justice equally binding upon states and individuals. *Rhode Island v. Massachusetts*, 12 Pet. 657.

“Upon the whole case, the conclusions at which we have arrived, we believe, best meet the facts disclosed in this record, are warranted by the applicable principles of law and equity, and will least disturb rights and title long regarded as settled and fixed by the people most to be affected.”

Both counties having treated the line established by the joint survey of the two counties as their common boundary, the Court should have entered a finding of fact in this regard and concluded, as a matter of law, that the line so long acquiesced in, is the common boundary between the two counties.

POINT III.

The Court should have determined as a matter of law that 38°30' North Latitude, as historically marked and monumented, is the common boundary line between the two counties and was what the Legislature creating the counties intended as the true common boundary between the counties.

Article XI, Section 1 of the Constitution of Utah, insofar as applicable, reads as follows:

“Section 1. (Existing counties, precincts and school districts recognized).

“The several counties of the Territory of Utah, existing at the time of the adoption of this Constitution are hereby recognized as legal subdivisions of this State, and the precincts, and school districts, now existing in said counties, as legal subdivisions thereof, and they shall so continue until changed by law in pursuance of this Article.

“Section 2. (Removal of County seats.)

“Section 3. (Changing County Lines.)

“No territory shall be stricken from any county unless a majority of the voters living in such territory, as well as the county to which it is to be annexed, shall vote therefor, and then only under such conditions as may be prescribed by general law.”

In the second Utah case of *SUMMIT COUNTY v. RICH COUNTY*, 224 P. 653, the Utah Court in interpreting the provisions of the state constitution quoted above, states as follows: “The following legal propositions, in the opinion of the writer, are fairly deducible from the opinions of the court in these cases: (a) that the Legislature by reason of the provisions of Section 3, Art. 11, of the Constitution quoted, is without authority by legislative act or otherwise to establish or locate new or any boundary line between counties where a boundary line exists, unless the description of the boundary line is so indefinite, uncertain or ambiguous that the line cannot be definitely determined from the description of it given, or for any other reason

the line cannot be located on the ground. (b) that the Legislature must, in attempting to establish the correct boundary line, so far as possible, establish and determine the boundary line so as to carry into effect and make certain the boundary line as it was intended to be established and fixed prior to the enactment of the correcting legislative act. (c) that any act of the Legislature that attempts to establish a different or new boundary line without regard to the line so originally intended to be established is void as being within the inhibition of the Constitution."

"* * * * In so establishing the line, the Legislature clearly failed to carry into effect the intent of the Territorial Legislature in its effort to establish the boundary line between Summit County and Rich County. If the legal conclusions hereinbefore stated are rightly deducible from the opinions of this Court on the former appeal of this case and in the Barton case, *supra*, respecting the power and duty of the Legislature with reference to the establishment of boundary lines between counties, then it must necessarily follow that the act of the Legislature of 1917, in determining and fixing the boundary line as the same affects the area in dispute and herein questioned is in contravention of the provisions of our State Constitution and is therefore null and void.

"(4) We are not unmindful of the rule of law and courts will not declare an act of the Legislature unconstitutional if by any consistent reasoning it can be held to be otherwise. If, however, appearing from this record that the Legislature, in establishing the boundary line between Summit County and Rich County by the act of 1917, disregarded the plain intent of the Territorial Legislature in

fixing the boundary line between such counties, thereby detaching from Summit County the disputed area which clearly was within that county under the description of the formerly established boundary, we can see no escape from the conclusion that the lower court was right in declaring and holding the Act of the 1917 Legislature unconstitutional and therefore void."

The old plats on file with the State Land Office and the Bureau of Land Management show that there were surveys conducted and that the surveyors of the day placed Parallel 38°30' North Latitude and the south line of Township 26 South as the same line. See Defendant's Exhibit 23 which plat was referred to by State Engineer Bacon in 1925, when he stated in a letter addressed to the County Attorney of San Juan County, as follows:

"On looking into the situation in the Surveyor General's Office I find that the south township line of Township 26 South is meant to coincide with a line at latitude of 38° degrees 30 minutes No. Owing to field errors there may be a slight variation but I do not consider it at all material when weighed against the fact of having this line definitely and plainly marked on the ground as would be the case of a township line. There is also the big advantage of having all legal descriptions of land reach right to the county line as would be the case when this line coincided with a legal subdivision line. I find that the SE corner of Township 26 South, Range 22 East, and also the SE corner of Township 26 South, Range 23 East are given as located exactly at latitude No. 38°30'."

Mr. Lambert testified as follows:

"Q. From your observations from those particular

maps and plats, do you think that the—do you concur with the opinion of Mr. Bacon in that letter that it indicates that the south line of Township 26 South is the common boundary line between the two counties? (Lines 25 through 29, page 160.)

A. As far as Mr. Bacon is concerned, I think he can have his opinion. From what I have seen of the Township plat and the designation on the Township plats and some of the old ones in the early days, the latitude of 38°30' is designated on those plats as fairly close to the south boundary of Township 26. (Lines 19 through 24, page 161.)

Q. And some of them it's actually coincidental?

A. That's right. It actually crosses at some places and no Township line could be concurrent to a parallel." (Lines 25 through 27, page 161.)

The evidence shows that all of the old maps place the common boundary of Emery County, from which Grand County was originally formed, and San Juan County, and later Grand and San Juan Counties, to be on the south line of Township 26 South, Salt Lake Base and Meridian. (See Defendant's Exhibits 27, 28, 29, 30 and 31.)

Mr. Hubert Lambert, testifying on cross-examination, stated as follows:

"Q. Plaintiff's Exhibit 25 and ask you if you can identify that document.

A. Well, it's a General Land Office map of the Territory of Utah, published in 1884. (Lines 19 through 22, page 166, Transcript of Trial Proceedings, Volume I.)

THE COURT: What was the question,

MR. RUGGERI: I simply asked, Your Honor, from observing this map and the legend identifying county boundaries thereon whether or not that map, dated 1884, shows the officialness of it on its face, shows that the common boundary line between Grand and San Juan Counties is coincidental with and the same line as the south line of 26 South.

THE COURT: He may answer that.

A. The map indicates that the south boundary of Township 26 South is the same as the boundary between Emery County and San Juan, not Grand. (Lines 22 through 30, page 168, and lines 1 and 2, page 169.)

Q. I show you what has been marked for identification as Defendant's Exhibit No. 31 and ask you if you can identify that?

A. This is a map of the Territory of Utah issued—1889 by the Department of the Interior, the General Land Office.

Q. And does it have a legend for the county boundaries on it? (Lines 17 through 25, page 160.)

A. There is no designation in the legend, for county lines. However, the county lines are marked by heavy black lines as indicated by the names of the counties and the boundaries thereof.

Q. Is the heavy black line in the same place as the south line of Township 26 South as shown on this map?

A. In the instance of two—of two townships the line is coincidental between Emery and San Juan. The rest of

the county line does not show designation in this particular map. Just in this particular map. Just two townships on the east side. (Lines 13 through 26, page 170.)

Q. (By Mr. Ruggeri) I show you what has been marked as Exhibit 27 and ask you if you can identify that?

A. This is a map of the State of Utah issued in 1902 by the General Land Office under the direction of Harry Keen the Chief of the Drafting Division.

Q. Does this particular map have a legend for boundaries for counties on it?

A. This map has a legend for boundaries of counties in heavy dark lines.

Q. Does that boundary coincide with, or is it, according to this map, coincidental as shown on this map with the south line of Township 26 South? (Lines 15 through 27, page 174.)

A. Well, as near as can be determined from the map, the line is between figures 26 and 27 with no other line and designated as the boundary of 26 and 27, and, therefore, I think you would have to assume from the map that the heavy line is the county line on the south line of 26. * * * *
(ines 8 through 17, page 175.)

Similar examination went on with respect to Defendant's Exhibits 28, 29, and 30. (See transcript pages 175 through 182.)

The Legislature creating Grand County in 1890, using the maps and plats available to it at that time, intended the common boundary line between the two counties to be

established at the location shown on said maps and plats and could not have intended that the common boundary line between Grand and San Juan Counties to be fixed by a Coast and Geodetic Reconnaissance conducted in 1958 with the aid of precision instruments and an elaborate network of triangulation stations, neither of which were available in 1890.

In applying the rule laid down in the SUMMIT COUNTY v. RICH COUNTY case it is evident that the Legislators creating Grand County were looking at maps that showed that the common boundary line between the two counties were coincidental with and the same line as Township 26 South, Salt Lake Base and Meridian, and that the court should have declared said line as the common boundary line between the two counties as a matter of law.

CONCLUSION

The evidence shows:

1. That the county surveyors of the two counties surveyed a line and marked and monumented it in the year 1912 in an attempt to give a practical interpretation and meaning to Parallel 38°30' North Latitude.

2. That the joint survey conducted by the counties in 1912 is substantially the same as the south line of Township 26 South, Salt Lake Base and Meridian.

3. That all of the old maps which antedate the creation of Grand County show the south line of Township 26 South to be the common boundary line between the two counties.

4. That many of the old plats show the south line of

Township 26 South to be coincident with and the same line as Parallel 38°30' North Latitude.

5. That the State Engineer on September 5, 1925, advised the San Juan County officials that the "South Township line of Township 26 South is meant to coincide with a line at latitude 38°30' No."

6. That Mr. Lambert, the present Utah Deputy State Engineer, concurs in 1959, with the conclusion of Mr. Bacon.

7. That the two counties acquiesced in said line so marked and monumented until very recent times.

8. That no legislative or judicial determination of the common boundary line between the two counties was sought by San Juan County until it filed this action on December 18, 1958.

9. That when San Juan County brought this action it did not bring its action to relocate and remark the boundary line previously marked, monumented and acquiesced in, but it brought the action to move the common boundary an indefinite and undetermined distance approximately 2/3 of a mile north of the south line of Township 26 South, Salt Lake Base and Meridian.

10. That the only reference to any fixed or definitely ascertainable place on the earth's surface mentioned in Plaintiff's Complaint is the south line of Township 26 South, Salt Lake Base and Meridian.

The Defendant is entitled to a judicial determination that its common boundary with the Plaintiff County has been established by the counties pursuant to law, and acquiesced in over a long period of time, and is as historically designated.