1971

K. F. Achter and Ruth A. Achter, His Wife v. Keith W. Maw and Evelyn G. Maw, His Wife : Brief of Appellants

IN THE SUPREME CO
OF THE STATE O

K. F. ACHTER and RUTH A.
ACHTER, his wife,
Plaintiffs and

vs.

KEITH W. MAW and
MAW, his wife,
Defendants

BRIEF OF A

APPEAL FROM SEC
OF DAV
HONORABLE THORL

BLAINE V. GLASMANN
YOUNG, THATCHER & GLASMANN
First Security Bank Building
Ogden Utah 84401
Attorneys for Defendants and Respondents

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

K. F. ACHTER and RUTH A. ACHTER, his wife,
Plaintiffs and Appellants,

vs.

KEITH W. MAW and EVELYN G. MAW, his wife,
Defendants and Respondents.

Case No. 12317

BRIEF OF APPELLANTS

NATURE OF THE CASE

This is an action to establish a boundary line by interpretation of documents, by oral agreement of the parties and by estoppel.

DISPOSITION OF CASE IN LOWER COURT

The Honorable Thornley K. Swan in Davis County held that oral agreement of the parties established the position of the defendants and that the plaintiffs failed

in their proof of grounds for estoppel or agreement or interpretation of documents.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellants seek review of the evidence on the estoppel issue and of the documents in evidence and interpretation of the documents, and an order either that there be a new trial or that the Court erred in not giving judgment for the plaintiffs.

STATEMENT OF FACTS

Western National Investment Company owned a tract of some forty-three acres in Davis County on both sides of the North Fork of Holmes Creek, and placed title in LeR Burton, a real estate agent to whom it owed money, who had the property placed in the name of LeR, a corporation which was owned by LeR Burton (Ex. 1, 4 and 7). The defendants Maw and the Willard Mortons approached LeR Burton to acquire a portion of the land (Tr. 247). The original Earnest Money Receipt as written up by them was for ten acres, which was changed to a somewhat larger tract (Ex. 2 and 3), and then conveyed June 1, 1965 (Ex. 4). The terrain is wooded, hilly and in parts precipitous, with a stream flowing down the center and a 20-foot waterfall some 600 feet from the East boundary.

Messrs. Morton, Maw and Burton laid out a tract at the South end of the larger tract and prepared Exhibit 2 as representing their agreement. (Tr. 13-16, 253-

255, 380)

(NOTE: The Abstract of Testimony uses references to the pages of the transcript of testimony and abstracts the testimony in consecutive order. References herein will, therefore, be to the pages of the transcript which can be found either in the transcript or by reference to the Abstract in the consecutive order of the transcript pages.)

Mr. Burton testified that the first point West of the East boundary on the North side of the tract was established as being substantially South of a ledge overlooking the waterfall basin (Tr. 18 and 20), and Messrs. Morton and Maw testified that this point was 25 or 30 or 40 feet Southwest of the waterfall overlook (Tr. 265, 286, 287, 300, 382, 383, 392), and that the deed (Ex. 4) was intended to go to the edge of the ledge overlooking the waterfall (Tr. 278, 315 and 395).

Following the giving of the deed, Messrs. Maw and Morton had Rodney Dahl make a survey of the land conveyed to Maw. They all testified that they assisted him in making the survey and led him to the point at the edge of the ledge (Tr. 221, 323 and 453).

Following the making of this survey and the placing of a pipe and a tack at the point near the waterfall, which was called P1 by the Court and appears as P1 on Exhibit A, Mr. Burton pulled out the stake and the tack (Tr. 34, 87 and 397) and informed Messrs. Maw and Morton that they were claiming too much ground (Tr. 34, 326, 400), and when Mr. Maw put some paint in the

stakehole (Tr. 398), Mr. Burton hammered out the rock to obliterate the mark (Tr. 399, 372).

Mr. and Mrs. Morton had an interest in the tract which was conveyed by a deed made in January, 1967, and recorded in December, 1968 (Ex. 21).

The plaintiffs had seen the property in 1965 and 1966 and seriously negotiated for the remainder of the entire tract in 1967 (Tr. 165, 166). Mr. Burton informed the Achters of the dispute as to the proximity of the defendants' boundary to the waterfall area (Tr. 42, 46, 111, 170, 197) and they were willing to buy only if that point, and other disputes concerning location of a roadway and location of a fence along the creek, would be resolved (Tr. 47, 118, 155, 178 and Ex. 8). The plaintiffs' offer on August 2, 1967, was to purchase the aproximately 32 acres "subject to the buyer making personal inspection of the survey staked as referred herein and approving in writing the boundary as shown by said survey on or before August 20, 1967. If said boundary is not approved, the return of the earnest money shall void this offer without harm to anyone concerned." (Ex. 8)

Mr. Burton and Mr. Achter testified that following a further survey by Mr. Dahl (Ex. 5), Messrs. Burton and Achter walked the ground, discussed the boundary, particularly at the point opposite the waterfall, discussed the use of the wrong roadway and the existence of the defendants' fence on the North side of the creek, and then had conversation with the defendant Keith Maw to resolve the disputed points (Tr. 59-66, 176-177, 203).

Mr. Burton and Mr. Achter testified that in this conversation the newly placed stake was discussed with Mr. Maw, who said he knew where it was, and Mr. Maw was told that Mr. Achter wanted to buy the property North of the defendants if the dispute could be resolved and invited Mr. Maw to go look at the stake to make certain, and Mr. Maw declined, said he knew where the stake was and that that was the boundary (Tr. 65-66, 177). Mr. Maw testified that Burton talked about the boundary in July, 1967 (Tr. 400-401) and August 22 or 23, 1967, Burton and Achter came together and discussed the boundary (Tr. 402-406) and in May, 1968 Achter came alone (Tr. 411). Mrs. Maw testified that Burton and Achter came together in July, 1967 and didn't mention the boundary (Tr. 344-345); Mr. Burton came alone August 12, 1967 and didn't mention the boundary (Tr. 346) and Burton and Achter came together later in August and didn't mention a boundary line problem (Tr. 347-348), and in May, 1968 Achter came alone and discussed the boundary (Tr. 354-355).

Mr. Burton assisted Mr. Dahl in the survey which is Exhibit 5 and in the location of what the Court called "point PB," which is the point opposite the waterfall, as shown on Exhibits 5, 6 and A (Tr. 56, 217).

The changes in the descriptions in Exhibit 2, 3 and 4 as to the critical point are shown on Exhibit 22. Rodney Dahl, the surveyor, testified that these changes were inconsequential (Tr. 234) and that in his opinion the proper construction was to let the "monument" control (Tr. 224), and that "being on top of the South rim of

the North Fork of Holmes Creek" does not suggest anything different from the "edge" (Tr. 231).

Alton F. Lund, an attorney experienced in title matters (Tr. 457), testified that the reference in Exhibit 4 was not to a monument (Tr. 460) and that the distance call should control (Tr. 462) and that if it were interpreted as referring to a monument, it would be more logical to go to the high point 226 feet from the South boundary rather than to the edge of the ledge 378 feet from the South boundary on the call of 300 feet, more or less (Tr. 470-471). Mr. Lund testified that viewing the premises would be helpful (Tr. 471) and was shown a picture of the disputed point (Ex. 25), which confirmed his opinions (Tr. 492).

At the conclusion of the trial the court viewed the premises (Tr. 511).

The Court's Memorandum Decision was as follows:

> "1. That the plaintiffs failed to meet their burden of proof and contention that .PB was the point agreed upon by defendants and their grantor LeR Burton, and that defendants and Burton did agree upon a point referred to as P 1.
> "2. That plaintiffs failed to sustain their burden of proof that defendants agreed to the survey of August 12, 1967 and that defendants in fact always contended that the boundary was established at .P 1 in accordance with the prior Rodney L. Dahl survey." (R. 15)

The Findings of Fact, Conclusions of Law and Judgment were made and entered September 17, 1970, and a Motion for New Trial or to Amend the Judgment was

filed September 25, 1970 (R. 26-28), argued October 13, 1970 (R. 29), and denied October 30, 1970 (R. 30).

POINTS OF ARGUMENT

1. Defendants should be held estopped to claim beyond the 300-foot stake.

2. There was no agreement as to the point near the waterfall.

3. In the absence of agreement, the descriptions are ambiguous and the measurements should control.

ARGUMENT

POINT I

DEFENDANTS SHOULD BE HELD ESTOPPED TO CLAIM BEYOND THE 300-FOOT POINT.

The issue of estoppel was raised by the third cause of action of the amended complaint (R. 3), which alleges that Maw and Achter acting for their wives met at the property following the August survey and that defendants were advised that unless a boundary could be established in the waterfall area, plaintiffs would not purchase; the defendant said he was acquainted with the survey just made and that it was agreeable; and in reliance on the statement and conversation, the plaintiffs purchased the property, relying on the point established by that conversation, and that defendants should be estopped to deny the boundary point as approximately

78 feet South of the point overlooking the waterfall.

In its Memorandum Decision (R.14) the Court did not refer specifically to the issue of estoppel and simply found the issues in favor of the defendants. In Finding of Fact No. 8, the Court found that plaintiffs failed to sustain the allegations of the second and third causes of action and "that the defendants are not estopped to deny the establishment of the disputed point as being the point identified as P 1, to-wit, as described in paragraph 7 of these Findings of Fact." (R. 20)

It is appellants' position that estoppel is an equitable plea and that the evidence is reviewable by the Court; and that if the evidence clearly preponderates against the decision, this Court can and will do equity. *Corbet* v. *Corbet,* 24 Utah 2d 378, 381, 472 P.2d 430; *Super Tire Market, Inc.* v. *Rollins,* 18 Utah 2d 122, 125, 417 P.2d 132; *Givan* v. *Lambeth,* 10 Utah 2d 287, 288-289, 351 P.2d 959.

The language used by this Court in *Chevron Oil Company* v. *Beaver County,* 22 Utah 2d 143 at 146, 449 P.2d 989, is:

> "This being an equitable proceeding, we may review the findings but should not distrub them unless they are clearly against the weight of the evidence. *Shaw v. Jepson,* 121 Utah 155, 239 P.2d 745 (1952)"

The evidence and the equities are so strong in favor of the plaintiffs on the issue of estoppel that this Court should overrule the District Court and find that the defendants should be estopped to deny the establishment of the point by the conversation arranged for that pur-

pose, and either order a new trial or direct the entry of judgment.

The existence of a dispute as to the boundary by August 2, 1967 was known to Burton (T. 41, 122, 114), Morton (T. 286, 318, Ex. 21), Maw (T. 397, 400), Achter (T. 170) and Dahl (T. 221). The Achters, on or about August 2, 1967, walked over the property and entered into the Earnest Money Agreement (Ex. 8), which reserved to the buyer "personal inspection of the survey staked as referred herein and approving in writing the boundary as shown by said survey on or before August 20, 1967." The Earnest Money Agreement went on to recite that if the boundary was not approved in that manner, the return of the earnest money would void the offer.

The required survey was made by Mr. Dahl on August 12 and the drawing became Exhibit 5. On the day of the survey, which was Saturday, August 12, Mr. Burton and Mr. Achter went over the entire area and especially the area at the waterfall, and observed the stake at point PB 78.15 feet South of the edge of the ledge overlooking the waterfall (T. 175), and they proceeded to find Mr. Maw to settle the three points of the boundary at the waterfall, the fences which were North of the creek, and use of the wrong right-of-way (Tr. 176-177). The conversation was long; it was specific as to the existence of the new stake and as to whether Maw knew of its location, specific that the Achters would not buy unless that boundary were accepted; and Mr. Maw replied that he knew where the stake was and didn't

need to go up with them to look at it, and that it was acceptable (T. 63-66, 177).

Thereupon, and in reliance on that conversation and the establishment of the point, Mr. and Mrs. Achter executed the Uniform Real Estate Contract on August 16, 1967 (Ex. 7), after Mr. Achter had noted on the original of the Earnest Money Receipt and Offer to Purchase:

> "A staked survey of subject property which is to be approved in writing by buyer. Signed K. F. Achter 8/14/67." (Ex. 27)

Mr. and Mrs. Achter closed the transaction on August 20, after Mr. Achter had accepted the survey and signed the Earnest Money Receipt on August 14, 1967 (Ex's. 7 and 27). Because of these dates and the signing of the Earnest Money Receipt on August 2, it is not possible that they could have been mistaken as to the timing or that Mr. Achter and Mr. Burton could have been mistaken as to the effect of the conversation with Mr. Maw. The conversation with the title insurance attorney plus the demands of Achter made the timing and the subject matter as impressed upon the mind of Mr. Burton as upon the mind of Mr. Achter.

Mr. and Mrs. Maw were not aware in July and August, 1967 of the timing of the events related to the Achter purchase; and in recalling the conversations later, were naturally motivated by an effort to defeat the claim of agreement and estoppel pleaded by Mr Achter.

Mrs. Maw testified that in July, 1967 Achter and

Burton came on horses and announced that Achter was interested in the property, and there was no discussion of the boundary (T. 345). Mr. Maw testified that Burton came on the property around July 20, 1967 and told him he had too much property in the waterfall area and there was a discussion about selling the place and whether Maw could purchase the area around the waterfall (T. 402).

Mrs. Maw saw Mr. Burton on the property on August 12 when Dahl was there making the survey, and there was no mention then of a boundary (T. 346). Mr. Maw did not testify to any conversation at the time of the survey by Mr. Dahl.

Mrs. Maw testified that in August Burton and Achter came to the property and stated that Achter had purchased the property, and that Mr. Maw might be interested in purcasing some more, but there was no conversation about a boundary problem (T. 347). Mr. Maw testified there was a discussion with Burton and Achter on August 22 or 23 (T. 402). He was putting in a spring then and Exhibit M was a check for a reduction valve dated August 21, 1967, and it was after that that Achter and Burton came (T. 403-404). He was watering new grass and Mr. Burton got a drink, which couldn't have been done before August 20, and this was the first time he ever met Mr. Achter, who was introduced as the new owner (T. 405).

They both testified that in May, 1968, Mr. Achter came and checked the area around the waterfall and

became upset (T. 354 and 411).

Mr. Maw recalled a meeting with Burton and Achter when the boundary was discussed and placed it at July 20 (T. 402). Achter testified that he met Maw for the first time when they discussed the boundary, but that the date was August 12 (T. 176). The August 12 meeting is confirmed by Mrs. Maw as being the day of the survey, but she does not recall Achter (T. 346), and both Achter and Burton testified that their conversation was only with Mr. Maw and not with Mrs. Maw. Mr. Maw then testified that he met Mr. Achter for the first time on August 20 (T. 405), and of course the conversation would have been meaningless had it been made after the consummation of the purchase and the Maws cannot be believed in this matter.

This Court has recognized the principles of equitable estoppel many times. For instance, *Union Tank Car Company* v. *Wheat Brothers,* 15 Utah 2d 101, 387 P.2d 1000; *Easton* v. *Wycoff,* 4 Utah 2d 386, 295 P.2d 332; *Petty* v. *Gindy Mfg. Company,* 17 Utah 2d 321, 404 P.2d 30. We haven't found a Utah case dealing with the establishment of a boundary point. The elements of estoppel are set out in 28 Am. Jur. 2d, Estoppel and Waiver, § 35, as being as to the party estopped:

1. Concealment of facts or conduct which is calculated to convey the impression that the facts are inconsistent with those which the party subsequently attempts to assert;

2. Expectation that the conduct will influence the

other party; and

3. Actual or constructive knowledge of the real facts.

The elements as to the party claiming the estoppel must be:

1. Lack of knowledge and the means of knowledge of the truth;

2. Reliance in good faith upon the conduct of the party to be estopped; and

3. Action based on the representation amounting to a change of position to his detriment.

In *Rowell* v. *Weinemann,* 119 Iowa 256, 93 N.W. 279, the defendant purchased land from the plaintiff, the plaintiff pointing out the boundaries of the land to the defendant prior to sale. The plaintiff then sought to re-establish the boundary lines in accordance with a subsequent survey, to do which the court held the plaintiff was clearly estopped.

Likewise, in *Hankins* v. *Dilley,* 206 S.W. 549 (Tex. 1918), an adjoining landowner pointed out the boundary line to a prospective purchaser, upon which the purchaser relied. When the adjoining owner later brought suit to declare the boundary erroneous, the court held him to be estopped to deny the boundary he had indicated.

Again, in *Fitch* v. *Wilsh,* 94 Neb. 32, 142 N.W. 293 (1913), two parties purchased adjoining land, one pointing out to the other the boundary between them along

which the second purchaser built a fence. Seventeen years later the one who pointed out the line brought an action for ejectment and it was held that these facts worked an estoppel against the claimant.

Colby v. *Norton,* 19 Me. 412, 50 A.L.R. 853, 854, holds that one who sees another take a deed in reliance upon statements as to how far his land extends and a valuable consideration is paid therefor, the person giving the information is concluded, and indeed:

> "If he had witnessed such a conveyance, and had been merely passive, it has been held that he would have been concluded."

Appellants recognize that there was an issue raised by the defendants. Their interests made it easy for them to place the date of the conversation at a meaningless time, fix the date by the unrelated circumstances of paying bills and doing work and suggesting by their testimony that after the plaintiffs had signed their contract of purchase, they were for the first time interested in knowing what they had purchased. Furthermore, the negotiations of Maw and Morton with LeR Burton as reflected by the documents disclose no understanding that the waterfall area was bargained for or available.

On the other hand, the Achters were interested in the 32-acre tract only if the area South of the waterfall was available as a home site. Their Earnest Money Offer (Ex. 8) specifically and plainly gave them an out if the survey and the establishment of boundary was not as required. The only logical reconciliation of the testimony

is that the Achters required the survey and inspected the property and made their decision before the deadline of August 20 set in Exhibit 8, and the date on Exhibit 27 of August 14, 1967 cannot be based on recollection, circumstance or coincidence, but coincides precisely with the testimony of Messrs. Burton and Achter given when only Exhibit 8 was before the Court and prior to the time that Mr. Burton discovered Exhibit 27 among his files.

The trial judge made no effort to deal with the issue of estoppel, but disposed of the case by finding an agreement of the parties and therefore logically did not reach the issue of estoppel. We submit that the ambiguity of the documents on every issue except the estoppel issue, the uncertainty in the reference to places not properly utilized as monuments and the conflict generally as to how the boundaries were determined, suggest that the case should have been resolved on the issue of estoppel and favorably to appellants.

POINT II

THERE WAS NO AGREEMENT AS TO THE POINT NEAR THE WATERFALL.

The first point of the Court's Memorandum Decision was:

> "That the plaintiffs failed to meet their burden of proof and contention that .PB was the point agreed upon by defendants and their grantor L. R. Burton, and that defendants and Burton did

agree upon a point referred to as P 1." (R. 14)

The second cause of action of the amended complaint alleges agreement on a boundary based upon the conversation between Messrs. Burton, Achter and Maw on or about August 15, 1967 on the property, with estoppel as an alternative to a finding of agreement. One problem with the agreement theory is the statute of frauds, which was not pleaded but could have been injected.

It is not possible that the trial court could have found that at the conversation on August 12, 1967, Messrs. Burton, Achter and Maw agreed on the point at the edge of the ledge overlooking the waterfall as the boundary point in that area. No one so testified.

The Court, therefore, must have found that somehow the welter of contradictory evidence as to where the parties stood at various times with reference to the waterfall resulted in some sort of agreement between Messrs. Burton, Maw and Morton that the point right at the edge of the ledge was the division point, thereby stranding, isolating, making inaccessible and useless the residue of property East of that point, and consisting of a triangle 700 x 700 x 200, plus the South slope of the canyon of 700 x 700 x 75 (T. 169), a total of 96,250 square feet or roughly two and a quarter acres.

In reporting his view of the property, the Court mentioned that he had observed points P1, PB, the point 30 feet West of PB and the point 42 feet West of P1. A consideration of the testimony will show that there

was no agreement whatsoever as to any point. We invite the Court to consider first the testimony as the several parties gave it, and then to compare the documents and the calculations based upon the documents with the testimony of the several persons who participated in the preparation of the documents.

No one testified that point P1 at the edge of the ledge overlooking the waterfall was the point upon which Messrs. Maw, Morton and Burton stood at the time they made preliminary measurements and had preliminary conversations with reference to the preparation of Exhibits 2 and 3.

Mr. Morton testified that the point at which they stood was 35 or 40 feet Southwesterly from poin P1 (T. 265, 277-278, 287), and point P1 was first established or claimed by anyone only when Mr. Dahl put a stake there at Morton's direction (T. 221).

Mr. Maw testified that on their first measuring trip they taped down the rocky canyon to the big rock and then down a little farther from the big rock to the point by the figure "279" on Exhibit A. He said the big rock is 150 feet from the waterfall and 50 feet West of point P1 (T.383). These measurements agree reasonably well with Exhibit P28. The point they went to in connection with the Exhibit 3 measuring was also 50 feet down from point P1 where there is a smaller rock (T. 392).

Mr. Burton definitely testified that the point measured as 300 feet from the South boundary was 30 feet

West of point PB, which is shown on Exhibit 28 (T. 26, 37, 46 and Ex. 5).

In Finding of Fact No. 7 in lines 5-7 (R. 19),

> "The Court further finds that the defendants and their grantor, LeR, a corporation, did agree upon the point referred to and identified in the trial as point P 1."

and further in said Finding of Fact at lines 16-18:

> "And that the said point picked by LeR Burton on behalf of LeR, a corporation, and the defendants is the point surveyed by their surveyor, Rodney Dahl."

The evidence is that no one claimed, recognized, or measured to the point P1 until the Rodney Dahl survey, and there is no evidence to support the Court's Finding of Fact as above quoted, upon which finding this case was decided.

The disagreemnt is plain from the two surveys made by Mr. Dahl. P6 was made at the instance of Messrs. Morton and Maw, and they led Mr. Dahl to the edge of the ledge and had him put a stake there. P5 was made at the instance of Mr. Burton who directed Mr. Dahl to put his stake at point PB, which was 78 feet South.

It is plain from a reading of Exhibit P2 that regardless of what anybody thought about the waterfall, the option in Exhibit P2 would have resulted in placing Morton and Maw far South of the waterfall and would have left them very little creek frontage. The parties were agreed that 700 feet West along the South rim of the canyon wall would have taken them well below the waterfall,

and then the call North 50 feet more or less to the center line of the creek would have afforded the creek frontage which the Maws desired. But that description is:

> "Subject to an option in favor of the seller to reduce the total acreage to exactly 10 acres by purchase of the excess that may exist with $1.00 cash * * * and in the absence of mutual agreemnt it will begin with the Northerly 200 feet of the East line of the subject property and continue West along said North line, but in no case will it extend closer than 180 feet to the South line of subject property * * *."

Messrs. Maw and Morton testified that they didn't know what the effect of the exercise of that option would be (T. 303, 421-422). It is plain that the Northerly 200 feet of the East line would cut the North boundary in half, since it was 400 feet along the quarter section line to the South rim of the canyon wall. Then 200 feet would be taken from the creek side of property extending West as far as necessary to reduce the acreage of the remainder to exactly ten. Since no else had calculated the effect of that process, Mr. Achter was asked to do so and testified (and he is an engineer) that if the West 400 feet were left at the required frontage width of 200 feet, the balance of the property would be reduced to 180.29 feet North of the South boundary (T. 498-499). An examination of Exhibit 6, which shows the distances from the South boundary to the creek and to the edge of the ledge near the waterfall, will show that the exercise of the option on Exhibit 2 would deprive the Maws of all creek frontage East of about 950 feet and some of the creek

frontage in the area of 797.34 feet East. In the area of the waterfall the exercise of the option would have left the Maws approximately 200 feet from the edge of the ledge.

The reason for the change from the description in Exhibit 2 to the description in Exhibit 3 was to increase the acreage somewhat and to give Maw and Morton the creek frontage in the area where they could water horses (T. 308, 309), all of which pertained to the boundary South of the call of "thence Southwesterly in a straight line to a point 1400 feet East of the West boundary line and in the center of the North Fork of Holmes Creek, which is 200 feet, more or less, from the South boundary." The result of this was to give Maw 1400 feet of creek frontage including both sides of the creek for approximately the West 400 feet. The course in Exhibit 2, which ran North 50 feet to the center of the creek after going 700 feet West from the East boundary, was eliminated indicating that the creek in the precipitous area was not bargained for and was not to go to Maw. That point on the creek is actually 967 feet from the East boundary and the parties believed the creek to be 200 feet from the South boundary at that point, whereas actually it was 267.4 according to Exhibit 6. With those facts in mind, there is nothing about the description in Exhibit 3 to suggest that the point South of the waterfall was intended to be any closer to the waterfall than 300 feet from the South boundary and in an area where the creek on both sides was being retained by the grantor.

POINT III

IN THE ABSENCE OF AGREEMENT, THE DESCRIPTIONS ARE AMBIGUOUS AND THE MEASUREMENTS SHOULD CONTROL.

At the threshold is the question of whether the deed is ambiguous and whether parol evidence was admissible to assist in construction of the dead and the terms used. *Thompson on Real Property,* Vol. 6 § 3027.

Appellants' position, in accordance with the first cause of action in the amended complaint, is that if a surveyor went 700 feet West and 300 feet North of the Southeast corner of the tract of land shown on Exhibit 1, he would not find anything which clearly and unmistakeably was a point "on top of the South rim of the North Fork of Holmes Creek Canyon." Instead, as shown on Exhibit 25, he would be at an area midway between the edge of a rock ledge overlooking a waterfall and the high high point of a straight line running North and South 700 feet West of the East boundary of the property. LeR Burton described this as a point from which a person would descend to the main portion of the Maw property and also to the waterfall area and the creek (T. 84) and that this is, therefore, a point on top of the South rim and the deed is unambinguous. Alton F. Lund testified that the reference in Exhibit 4 is not to a monument but to a measured point. It is unfortunate that Messrs. Burton, Morton and Maw did not at the time recognize the significance of reference to the waterfall area and measure to a distance a certain number of feet from the edge

of the rocky ledge overlooking the waterfall, which would be readily ascertained. The reference of 300 feet from the South boundary is equally definite, although not quite so readily ascertainable as of that time, but the addition of "more or less" challenges the simple procedure of measuring 700 feet West and 300 feet North.

Th evidence is that by locating the point 700 feet West and 300 feet North all clauses of the deed are used and all are consistent. If all provisions are harmonized, the interpretation is reasonable. *LeBaron v. Crimson*, 100 Ariz. 206, 412 P.2d 705, 706. That case also holds that interpretation of deeds is for the Supreme Court, independent of the trial court's findings. It approves the rule that a deed is:

> "ambiguous and subject to instruction only if it is not possible to relate the description to the land without inconsistency."

We consider the matter further, in case the court is not satisfied that parol evidence was necessary to aid construction and interpretation.

An examination of Exhibits 2, 3, 4, 10, 11 and 21 discloses that the scriveners, who were Messrs. Burton and Morton, knew how to describe a course which runs to an ascertainable monument. Thus, in Exhibit 2 the description runs "North along the quarter section line to the South rim of canyon wall which is 400 feet" and then later "North 50 feet, more or less, to the center line of

the North Fork of the Holmes Creek"; and in the right-of-way the description runs "to a point where the Northeasterly line meets the subject property and a pipeline easement." Also, in Exhibit 3 the description starts at the West end and runs East "to the quarter section line" and later, "to a point 1,400 feet East of the West boundary line and in the center of the North Fork of Holmes Creek, which is 200 feet, more or less, from the South boundary." Exhibit 4 is similar to Exhibit 3, except that the crucial call is "to a point 700 feet West of the East line of subject property and 300 feet North, more or less, from the South line of subject property" which is the same up to that point in both deeds, but then in Exhibit 3 the incidental reference is "being the South rim of the North Fork of Holmes Creek Canyon" and in Exhibit 4 is "being on *top of* the South rim of the North Fork of Holmes Creek Canyon." Exhibit 10 was prepared by Mr. Morton and although not copied from the deed (T. 313), there is no change in the reference to the point South of the waterfall. Exhibit 11 recognizes the problem by a call "Northwesterly in a straight line to a point which is 700 feet West of the East boundary and on the South boundary of grantor's land" and then makes it subject to correction by a qualified survey. In Exhibit 21 Mr. Morton clarified this call by providing "thence North 75°42'10" West 722.46 feet to a point on the South rim of the North Fork of Holmes Creek Canyon 378.15 feet North and 700 feet West of the Southeast property corner", which is an amplification of this call from Exhibit 6 prepared by the surveyor.

Thus, it is plain that ability to tie to a determinable point existed in the scriveners, which suggests that the point on which the parties stood when Exhibit 3 was contemplated was not a definitely determinable monument, but a rather general area which was simply "being on top of the South rim."

Ordinarily, reference to a monument takes precedence over courses and distances. *Scott v. Hansen,* 18 Utah 2d 303, 422 P.2d 525:

> " * * * fixed monuments or markers of a permanent nature *which can be definitely identified and located* take precedence over calls of courses and distances * * * ." (Emphasis supplied)

Incidental references to an area do not constitute a controlling tie to a monument. *Southwestern Settlement and Development Company v. Stanburg,* (Tex. 1923) 248 S.W. 108, recognizes the difference of calls to monuments which are merely incidental and those which are "locative", which case is footnoted at 11 C.J.S. ¶ 50 (f) (2) (c):

> "And an incidental call for a natural monument should be given but little, if any, probative force, and is secondary in importance to a call for course and distance, which will prevail over the former in locating a corner." P. 610

Weaver v. Howatt, 171 Cal. 302, 152 P. 925, was a complicated problem of locating a boundary where the original survey markers had been lost, the monument

placed by the surveyor had been obliterated, the distances to the marker were found not to be accurate because of the field notes of the surveyor, the monuments referred to were incidental only, and yet the survey had been made and the problem could not be treated as though there had been no survey and no location of the monument. The court had previously directed the trial court to fix the corner:

> "at a point where it will best agree with the natural objects described in the field notes as being about it, and found to exist on the ground, and which is least inconsistent with the distances mentioned in the notes and plat."

The court reconciled the conflicting means of locating a point with the following reasoning:

> "The appellants contend that the references in the field notes and map to the natural objects, by which the site of the corner is now determined, are mere 'incidental' calls, and not 'locative' calls, and hence that they should yield to distances. It is true that they are incidental calls, But incidental calls may be resorted to for the purpose of ascertaining a located corner where the locative calls have all disappeared, or cannot be identified, and there are no means, other than the incidental calls, of ascertaining the place where the locative monument for the corner was placed by the surveyor. They may or may not be allowed to prevail over the courses and distances according to the circumstances of the case; but in a case like this, where the locative monument is gone, and the place incapable of identification, where the distances noted in the survey as locative of the

> corner are manifestly erroneous, such distances should give way to the natural objects noted and found upon the ground at approximately the distances given in the notes, even if the calls for such natural objects are incidental and not 'locative'." (P. 928)

If in that case the distances had been reliable and usable, there would have been no other problem. *Garnsey v. Poston,* 52 Cal. App. 2d 828, 127 P.2d 17, also holds that monuments, when incidental and at intermediate points, yield to distances.

In the instant case the distance of 300 feet from the South boundary satisfies the requirements of Maw and Morton, who expected to get more than ten acres and around eleven (T. 307). By proceeding from this point, which is point PB, to the center of the creek 260 feet away gives all of the creek where it is usable and does not have a steep descent to Maw and Morton, and locates the point in the precise East-West plane where the witness Burton testified it should be, as shown on Exhibits 28 and A.

This disposition of the problem of locating the point would also be consistent with the development of language through Exhibist 2, 3 and 4 as contained on Exhibit 22. Exhibit 2 runs a line to the South rim of the canyon wall, which is definitely locative, and Exhibit 3 departs from that canyon wall and obviously goes South of it because it proceeds "Northwesterly in a straight line" instead of proceeding along the rugged and irregu-

lar canyon wall; and if it were intended to go into the creek, that would have been described; and if it were intended to use the same point on top of the canyon wall, there would have been no occasion to depart from the language "to the Southrim of the canyon wall, 700 feet West." Then it appears that the language from Exhibit 3, "being the South rim of the North Fork" required some clarification so that Exhibit 4 made this "being on top of the South rim," which distinguishes it from the edge of the rocky ledge, or the edge of the overlook, or the top of the South rim of the canyon wall, any one of which would have aptly described the point at the edge of the rocky ledge where there is an overlook of the waterfall basin.

It is plain that in preparing the description for Exhibit 3 Messrs. Burton and Maw were describing a smaller tract than the outside perimeter in Exhibit 2. That is of necessity true, since the East line was 200 feet instead of 400 feet and to the South rim of the canyon wall. In Exhibit 2 the next call is "West along said South rim of the canyon wall 700 feet", which would give a point still on the canyon wall, but some 150 feet west of waterfall. If the intention had been only to cut out a pie-shaped piece in the Northeast corner of the tract without getting any farther away from the waterfall, the only logical development of the description would have been to go from the 200-foot point on the East boundary Northwesterly to a point on the South rim of the canyon wall 700 feet West of the East boundary, and then go

North 50 feet to the center of the creek. Instead of doing that, the call as prepared was to go to a point for which coordinates were given, and then instead of going North to the center of the creek, the call was "Southwesterly in a straight line to a point 1,400 East of the West boundary line and in the center of the North Fork of Holmes Creek which is 200 feet, more or less from South boundary." Obviously intending that that line North to the creek and East of the 1,400-foot mark was a piece worth describing and worth retaining by the grantor. This would be a meaningless gesture if the point were from the edge of the rocky ledge Southwest to a point in the center of the creek, since that would have retained to the grantor only the slope from the top of the canyon wall or the edge of the ledge down to the center of the stream in an area which was precipitous and unusable. This reinforces the view that the 300 feet, more or less, was to a point which was approximately 300 feet from an area which satisfied the parties that it was the South boundary; and if the parties cannot agree on what that point was, the logical conclusion is to treat the "300 feet, more or less" as 300 feet, which coincides precisely with the recollection and the testimony of the grantor LeR Burton.

This construction can be made from the deed itself as an unambiguous deed and is the only logical construction based upon parol and documentary evidence meeting the requiremet of reconciling the terms of the document.

SUMMARY AND CONCLUSION

It fully appears that Morton, Maw and Burton negotiated a ten-acre tract description along the South of this 43-acre tract shown on Exhibit 1. When Burton became free to increase the acreage it was important to Maw and Morton to increase the frontage on the creek, but there was never any question about conveying everything South of the creek and the grantor retained both sides of the creek East of a point 1,400 feet East of the highway and some 360 feet West of the waterfall. It was only reasonable that with four acres or more of ground on the South side of the creek, the grantor would include in his retainage the usable area South of the waterfall to give value to that land and render usable the land to the East of it, which could be approached only by crossing the creek West of the waterfall and including the level ground South of the waterfall. The development of the language was reasonable and consisent with these objectives when non-experts were doing the drafting.

Then the defendants concluded that the description was ambiguous and that Burton had not been as skillful as he might have been, and so they had Dahl ignore the 300 feet, more or less, limitation by reading "on top of the South rim" as though it were "the edge of the rocky ledge" or "to the South rim of the canyon wall." To further this, Exhibit 21 was prepared by Morton as the Quit-Claim Deed to Maw, which goes to a point 378.15 North and 700 feet West of the Southeast corner, which deed was made January 16, 1967 but not recorded until well

after the Achter purchase and the arising of this controversy.

But when Burton decided to sell the rest of the property and Maw was confronted face to face with decision of establishing the boundary, he acquiesced in the survey stake that had been made, and the Achters were satisfied and purchased the rest of the property. The circumstances of the Achter purchase and the timing from August 2 to August 20 were such that the Achters could not have been mistaken as to the dates and sequence of those events.

In the conversation with Maw the improper boundary fences, the wrong roadway, as well as the boundary in the area of the waterfall were all discussed and acquieseed in, very reluctantly complied with and finally the lawsuit was necessary on the waterfall boundary.

The deed (Ex. 4) contains measurements of 700 feet West and 300 feet North, more or less, from the Southeast corner, being on top of the North Fork of Holmes Creek. If the top were a few feet away from that point, there would be no inconsistency and the point a few feet away should be accepted. But when it appears that the top on that line is 74 feet to the South, that is not reasonable or consistent and neither Burton nor the Achters have suggested that solution. Neither is it reasonable or consistent to go 78.15 feet North from the 300-foot mark when that is going downward and certainly not to the top; and there is no justification for going to

the edge of the ledge, or to "the top of the South rim of the canyon wall."

Although the scriveners knew how to locate a monument, it is plain that in Exhibits 3 and 4, the Southwest call from the East boundary was not to a monument, but to a point with an approximate distance. Since there is no monument at that point, the logical construction is to eliminate the "more or less" and establish the point at 700 feet West and 300 feet North of the Southeast corner of the tract.

The Court should grant the motion for new trial with directions either to find the estoppel or to give further consideration to the issue of estoppel; or failing that, the Court must find that the parties did not agree on a point at the 700-foot West line and that the descriptions in Exhibits 2, 3 and 4 must be construed by the Court and direct, in accordance with sound rules of construction, that the point be located at 700 feet West and 300 feet North of the Southeast corner.

Respectfully submitted,

RICHARDS, BIRD & KUMP
By RICHARD L. BIRD, JR.

720 Newhouse Building
Salt Lake City, Utah 84111

Attorneys for Plaintiffs and
Appellants