

1995

Walter Scott Hansen and Kristi D. Hansen v. Craig Oberg and Diane Oberg : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Douglas L. Neeley; Attorney for Plaintiff/Appellees.

Jerry L. Reynolds; Randy J. Christensen; Reynolds & Christiansen; Attorneys for DefendantsAppellants.

Recommended Citation

Brief of Appellant, *Hansen v. Oberg*, No. 950231 (Utah Court of Appeals, 1995).
https://digitalcommons.law.byu.edu/byu_ca1/6563

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH SUPREME COURT

BRIEF

FILED

AUG 21 1995

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

WALTER SCOTT HANSEN and
KRISTI D. HANSEN

Plaintiffs and Appellees,

VS.

CRAIG OBERG and DIANE OBERG,

Defendants and Appellants.

)
)
)
)
)
)
)
)
)

Case No. 950231-CA

Argument Priority No. 15

**APPEAL FROM THE JUDGMENT OF THE SIXTH JUDICIAL
DISTRICT COURT IN AND FOR SANPETE COUNTY, STATE
OF UTAH, HONORABLE DAVID L. MOWER, PRESIDING**

BRIEF OF APPELLANTS

Jerry L. Reynolds, No. 2728
Randy J. Christiansen, No. 5380
REYNOLDS & CHRISTIANSEN, P.C.
Attorneys for Defendants/Appellants
64 North 100 East Street
Post Office Box 896
Provo, Utah 84603-0896
Telephone: (801) 373-0131

Douglas L. Neeley, No. 6290
Attorney for Plaintiff/Appellees
96 South Main 5-15
Ephraim, Utah 84627
Telephone: (801) 283-5055

IN THE UTAH COURT OF APPEALS

WALTER SCOTT HANSEN and
KRISTI D. HANSEN

Plaintiffs and Appellees,

vs.

CRAIG OBERG and DIANE OBERG,

Defendants and Appellants.

)
)
)
)
)
)
)
)
)
)

Case No. 950231-CA

Argument Priority No. 15

**APPEAL FROM THE JUDGMENT OF THE SIXTH JUDICIAL
DISTRICT COURT IN AND FOR SANPETE COUNTY, STATE
OF UTAH, HONORABLE DAVID L. MOWER, PRESIDING**

BRIEF OF APPELLANTS

Jerry L. Reynolds, No. 2728
Randy J. Christiansen, No. 5380
REYNOLDS & CHRISTIANSEN, P.C.
Attorneys for Defendants/Appellants
64 North 100 East Street
Post Office Box 896
Provo, Utah 84603-0896
Telephone: (801) 373-0131

Douglas L. Neeley, No. 6290
Attorney for Plaintiff/Appellees
96 South Main 5-15
Ephraim, Utah 84627
Telephone: (801) 283-5055

LIST OF PARTIES TO PROCEEDINGS BELOW

Plaintiffs: Walter Scott Hansen and Kristi D. Hansen

Defendants: Craig Oberg and Diane Oberg

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
JURISDICTION	1.
STATEMENT OF ISSUES AND STANDARD OF REVIEW	1.
STATEMENT OF ISSUES	1.
STANDARD OF APPELLATE REVIEW	2.
CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS	3.
STATEMENT OF THE CASE	3.
NATURE OF THE CASE	3.
PROCEEDINGS AND DISPOSITION BELOW	3.
STATEMENT OF FACTS	4.
SUMMARY OF ARGUMENT	8.
ARGUMENT	10.
 <u>POINT I</u>	
DEFENDANTS' TITLE TO THE DISPUTED PROPERTY BECAME PERFECTED UNDER THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE PRIOR TO THE TIME PLAINTIFFS ACQUIRED A DEED TO PROPERTY WHICH INCLUDED THE DISPUTED PROPERTY	10.
 <u>POINT II</u>	
THE LOWER COURT ERRED IN AWARDING ATTORNEY'S FEES TO PLAINTIFF IN THE ABSENCE OF A STATUTE OR CONTRACT PROVIDING FOR THE SAME	16.

CONCLUSION 17.

ADDENDUM 19.

TABLE OF AUTHORITIES

Cases Cited

<u>Baldwin v. Burton</u> , 850 P.2d 1188 (Utah 1993)	2, 16
<u>Baum v. Defa</u> , 525 P.2d 725, 727 (Utah 1974)	13, 14
<u>Cabrera v. Cottrell</u> , 690 P.2d 622, 625 (Utah 1985)	16
<u>Carter v. Hanrath</u> , 885 P.2d 801, 806 (Utah App. 1994)	2, 14, 15
<u>Cobabe v. Crawford</u> , 780 P.2d 834, 835, 836 (Utah App. 1989)	2, 16
<u>Englert v. Zane</u> , 848 P.2d 165 (Utah App. 1993)	13
<u>Halladay v. Cluff</u> , 685 P.2d 500 (Utah 1984)	10
<u>Hatanaka v. Struhs</u> , 738 P.2d 1052 (Utah App. 1987)	17
<u>King v. Fronk</u> , 14 Utah 2d 135, 378 P.2d 893, 895-896 (1963)	12, 13
<u>Lane v. Walker</u> , 29 Utah 2d 119, 505 P.2d 1199, 1200 (1973)	14
<u>Motzkus v. Carroll</u> , 7 Utah 2d 237, 322 P.2d 391 (1958)	15

<u>Olsen v. Park Daughters Inv. Co.</u> , 29 Utah 2d 421, 425, 511 P.2d 145, 147 (1973)	15
<u>Spinks v. Chevron Oil Co.</u> , 507 F.2d 216, 226 (5th Cir. 1975)	16
<u>Staker v. Ainsworth</u> , 785 P.2d 417, 420-421 (Utah 1990)	10
<u>Trayner v. Cushing</u> , 688 P.2d 856, 858 (Utah 1984)	16

Statutes Cited

Utah Code Annotated Section 78-2a-3(2)(k)	1
Utah Code Annotated Section 78-27-56	3

Other Authorities

Black's Law Dictionary 24 (6th ed. 1990)	14
James H. Backman, <i>The Law of Practical Location of Boundaries and the Need for an Adverse Possession Remedy</i> , 1986 B.Y.U.L.Rev. 957, 965 (1986)	15

IN THE UTAH COURT OF APPEALS

WALTER SCOTT HANSEN and
KRISTI D. HANSEN

Plaintiffs and Appellees,

vs.

CRAIG OBERG and DIANE OBERG,

Defendants and Appellants.

)
)
)
)
)
)
)
)
)
)

Case No. 950231-CA

Argument Priority No. 15

**APPEAL FROM THE JUDGMENT OF THE SIXTH JUDICIAL
DISTRICT COURT IN AND FOR SANPETE COUNTY, STATE OF UTAH
HONORABLE DAVID L. MOWER, PRESIDING**

BRIEF OF APPELLANTS

JURISDICTION

This appeal is from a final judgment of the Sixth Judicial District Court in and for Sanpete County, State of Utah, the Honorable David L. Mower presiding, entered November 22, 1994. This court has jurisdiction to hear this appeal pursuant to Utah Code Annotated Section 78-2a-3(2)(k) and pursuant to the order of the Utah Supreme Court dated March 31, 1995, transferring this matter from the Supreme Court to the Court of Appeals for disposition.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

STATEMENT OF ISSUES

1. Whether or not defendants' title to the subject property became perfected under

the doctrine of boundary by acquiescence prior to plaintiffs' acquiring a deed to the subject property. (Record at 166-169, 197).

2. Whether or not the lower court erred in awarding to plaintiffs attorney's fees incurred in this action inasmuch as the same were not provided for by contract or statute. (Record at 182-187, 197).

STANDARD OF APPELLATE REVIEW

The first issue stated above is a mixed question of law and fact. The actions or inactions of plaintiffs' predecessors in interest with regard to acquiescence in the old fence as a boundary are questions of fact, the findings for which may be reversed if "clearly erroneous" so that they are "against the great weight of evidence or if the court is otherwise definitely and firmly convinced that a mistake has been made". Carter v. Hanrath, 885 P.2d 801 (Utah App. 1994). However, in this case the court did not make any findings relating to acquiescence on the part of plaintiffs' predecessors. The legal standard for acquiescence is a question of law which may be reviewed by this court for correctness, "granting no particular deference." Carter v. Hanrath, *supra*.

In reviewing the second issue stated above, the award of attorney's fees to plaintiffs, this court reviews the lower court's conclusion of law granting the award for correctness (Cobabe v. Crawford, 780 P.2d 835 (Utah App. 1989)) and, if properly granted, affirms the amount of the award unless it finds that the court abused its discretion. Baldwin v. Burton, 850 P.2d 1188 (Utah 1993).

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES,
RULES AND REGULATIONS**

Utah Code Annotated Section 78-27-56.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

STATEMENT OF THE CASE

NATURE OF THE CASE

Plaintiffs brought this action to quiet title to the property which is in dispute, to enjoin defendants from maintaining a fence as a boundary to said disputed property and for damages. (Record at 4-5). Defendants counter-claimed to quiet title to the disputed property under the doctrine of boundary by acquiescence, to enjoin plaintiffs from interfering with defendants' use of an irrigation ditch which runs through defendants' property and for damages. (Record at 15).

PROCEEDINGS AND DISPOSITION BELOW

This matter was tried to the court on August 3-4, 1994. After trial, the court took the matter under advisement and issued its findings of fact and decision on September 21, 1994. A copy of the court's findings and decision is included in the addendum hereto. Plaintiff's

counsel prepared written findings of fact and conclusions of law as well as a judgment and order which were entered by the court on November 22, 1994. Copies of the findings of fact and conclusions of law and judgment are also included in the addendum hereto. The court found that there was no acquiescence in the old fence as a boundary by plaintiffs and awarded plaintiffs attorney's fees incurred in prosecuting the action. (Record at 197-198).

STATEMENT OF FACTS

1. Plaintiffs reside in Ephraim, Utah and are adjoining neighbors to defendants. (Record at 191-192).

2. Defendants acquired their property in March 1976 from Kenneth M. Sevy and Sylvia L. Sevy by warranty deed dated April 29, 1976, and recorded February 23, 1977, in the official records of the Sanpete County Recorder. The real property conveyed by said deed is described as follows:

Beginning at a point 1.00 chain West from the Southwest corner of Block 30, Plat "A" Ephraim City Survey, and running thence North 1.00 chain; thence West 1.58 chains; thence North 17 degrees 15 minutes West 7.40 chains; thence North 64 degrees 30 minutes West 2.10 chains; thence South 69 degrees West 1.15 chains; thence South 30 degrees East 1.90 chains; thence North 78 degrees 30 minutes East 0.92 of a chain; thence South 14 degrees East 2.58 chains; thence South 60 degrees East 0.90 of a chain; thence South 3.80 chains; thence East 3.50 chains to the point of beginning.

Said property is also identified in the records of the Sanpete County Recorder as parcel 105, Plat "A", Ephraim City Survey. (Record at 191, Exhibit "2").

3. Plaintiffs' acquired their property by warranty deed from Jack Lou Peterson and

Kris W. Peterson dated August 8, 1990, recorded August 8, 1990, in the official records of the Sanpete County Recorder. The real property described in the deed received by plaintiffs is set forth below:

Beginning at a point 1.00 chain West and 1.00 chain North from the Southwest corner of Block 30, Plat "A" Ephraim City Survey, and running thence West 1.58 chains; thence North 17 degrees 15 minutes West 3.30 chains; thence East 2.62 chains, more or less; thence South 3.29 chains to the point of beginning.

The foregoing parcel is also identified in the official records of the Sanpete County Recorder as a part of Parcel 107, Plat "A" Ephraim City Survey. (Hereinafter referred to as parcel 107). (Record at 191, Exhibit "14").

4. The properties described in paragraphs 2 and 3 above share a common boundary on the south of plaintiffs' property and on the west of plaintiffs' property. Cottonwood Creek runs in a basically west to northwest direction and meanders on or near the deeded boundaries between plaintiffs' and defendants' property on the north and west of defendants' property. A diagram showing the respective locations of the deeded lines and Cottonwood Creek was introduced as Exhibit "2", a copy of which is included in the Addendum hereto. (Record at 193, Exhibit "2").

5. Exhibit "2" also shows the location of the old fence line North and East of plaintiffs' deeded lines which was constructed some time prior to 1923. (Trial Transcript at 363). When it was new, the old fence consisted of cedar posts with net wire and a strand or two of barbed wire on top. (Record at 194).

6. Defendants' predecessors in interest to parcel 105 were as follows:

<u>OWNER</u>	<u>DATES OF OWNERSHIP</u>
Maddonna Beck	1958 - 1963
F. Hespert Sevy	1963 - 1971
Rosella P. Sevy	1971 - 1973
Kenneth M. Sevy	1973 - 1976

(Record at 193).

7. Plaintiffs' predecessors in interest to parcel 107 were as follows:

<u>OWNER</u>	<u>DATES OF OWNERSHIP</u>
Madonna Beck	1954 - 1963
F. Hespert Sevy	1963 - 1970
Robert P. Sevy	1970 - 1980
Oscar V. Peterson	1980 - 1983
Jack L. Peterson	1983 - 1990

(Record at 193).

8. Parcels 105 and 107 were under common ownership from November 1958 when Madonna Beck owned both parcels until March 1970, when F. Hespert Sevy conveyed parcel 107 to his son Robert P. Sevy. (Record at 193, Trial Transcript at 185, 187).

9. Parcel 107 was not used for residential purposes by any of plaintiffs' predecessors in interest listed in paragraph 7 above. Plaintiffs were with first to use parcel 107 for residential purposes. (Record at 194).

10. When he acquired parcel 107 from his father in March 1970, Robert Sevy understood that the existing old fence north and east of Cottonwood Creek was the boundary between his parcel and his father's (105). (Trial Transcript at 291).

11. Robert Sevy sold parcel 107 to Oscar D. Peterson in 1980. (Record at 193).

Oscar Peterson did not have any discussions with defendants, the owners of parcel 105 during the time that Oscar Peterson owned parcel 107, concerning the boundaries between the parcels. (Trial Transcript at 56). Oscar Peterson did not use the property to the South and West of the old fence, other than chasing kids off the property, cutting the rope out of the tree and cutting limbs off of a tree. (Trial Transcript at 57-58).

12. Oscar Peterson sold parcel 107 to Jack L. Peterson in April 1983. (Record at 193, Trial Transcript at 80). Jack L. Peterson is the brother of Oscar Peterson. (Trial Transcript at 80). After acquiring parcel 107 in April of 1983, Jack Peterson did not use the property for any purpose. (Trial Transcript at 83). Jack Peterson did not have any discussions with defendants regarding the boundary between parcels 105 and 107 during the time that he owned parcel 107. (Trial Transcript at 87).

13. Jack Peterson sold parcel 107 to plaintiffs in August 1990. (Record at 193, Trial Transcript at 15, Exhibit "14").

14. After Hespert Sevy conveyed parcel 107 to his son Robert Sevy in March 1970, he continued to own and occupy parcel 105. (Trial Transcript at 301, 316).

15. F. Hespert Sevy died in 1970. (Trial Transcript at 311). His interest in parcel 105 became vested in his surviving spouse, Rozella Sevy, by right of survivorship. (Trial Transcript at 187, 312). Rozella Sevy conveyed parcel 105 to their son Kenneth Sevy in 1973. Rosella Sevy and Kenneth Sevy continued to occupy that portion of parcel 107 up to the old fence line for the purposes of grazing livestock and otherwise until Kenneth Sevy conveyed parcel 105 to defendants in April 1976. (Trial Transcript at 216).

16. From the time defendants acquired parcel 105 in April of 1976, they have used that portion of parcel 107 up to the old fence line for grazing horses. (Trial Transcript at 221). Defendants understood that the old fence was the boundary between his property and what is now plaintiffs' property, but which was owned by Robert Sevy in 1976 when defendants purchased parcel 105. (Trial Transcript at 222). Defendant Craig Oberg has also regularly cleaned Cottonwood Creek. (Trial Transcript at 241).

17. In March of 1992, defendant Craig Oberg constructed an irrigation pond on his property. (See Record at 195). As a result of conversations with plaintiff Walter Scott Hansen, defendant Craig Oberg had constructed a new fence. Plaintiffs were concerned about the safety of children in and about the irrigation pond. (Record at 195). The new fence was along the same line as the old fence in June of 1992. (Trial Transcript at 364). The reason defendant Craig Oberg had the new fence constructed was to keep children out of the irrigation pond. He believed he was constructing the fence on his property line. (Trial Transcript at 282).

SUMMARY OF ARGUMENT

This action was precipitated by defendants' construction of a new fence along a fence line which had existed for more than sixty (60) years. Generally, the old fence was located north of the boundary line described in the parties deeds. From the time the old fence was constructed, sometime prior to 1923, until the property on either side of the fence came into the common ownership of Madonna Beck in 1958, the owners of the property on either side of the fence occupied up to the fence and there was never a dispute or any action taken which would be inconsistent with the recognition of that fence as a boundary between the adjoining parcels.

The property on either side of the fence was in common ownership from October 1958 until March 1970 when Hespert Sevy conveyed the property on the northern side of the fence (parcel 107) to Robert Sevy. From March 1970 until plaintiffs' acquisition of title to parcel 107 in August of 1990, there was no dispute as to the fence being the boundary between the properties nor any action taken which was inconsistent with the recognition of the old fence as a boundary. Defendants and their predecessors occupied up to the old fence line from March 1970 until June of 1992, when defendants constructed the new fence along the same line as the old fence.

Defendants, whose property is south and west of the old fence, seek to quiet title to the disputed property under the doctrine of boundary by acquiescence. The lower court's finding on the issue of acquiescence only goes to acquiescence by the parties to this action. It does not address acquiescence by plaintiffs' predecessors in the old fence line. In any event, the element of acquiescence is a mixed question of law and fact, with the legal standard for acquiescence, consisting of indolence or inactivity, being a question of law reviewable by this court for correctness. Acquiescence on the part of plaintiffs' predecessors is imputed from the evidence of their indolence and inactivity with regard to the old fence. The other elements of the doctrine, occupation to a visible line marked by fences by adjoining landowners for a long period of time, having been clearly established, the lower court should have entered a decree quieting title to the subject property up to the old fence line in defendants under the doctrine of boundary by acquiescence.

The lower court also erred in awarding attorney's fees to plaintiffs. The only possible basis for an award of attorney's fees to plaintiffs in this case is pursuant to Utah Code Annotated

Section 78-27-56 which provides for an award of attorney's fees if an action or defense is without merit and not brought or asserted in good faith. Plaintiffs did not assert that section in seeking an award of attorney's fees nor did the lower court refer to that section or make findings consistent with that section in awarding attorney's fees to plaintiffs. Because the award of attorney's fees to plaintiffs was not made pursuant to statute or contract, defendants respectfully request that this court reverse that portion of the judgment and require each of the parties to bear their own attorney's fees.

ARGUMENT

POINT I

DEFENDANTS' TITLE TO THE DISPUTED PROPERTY BECAME PERFECTED UNDER THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE PRIOR TO THE TIME PLAINTIFFS ACQUIRED A DEED TO PROPERTY WHICH INCLUDED THE DISPUTED PROPERTY.

In Staker v. Ainsworth, 785 P.2d 417 (Utah 1990) the Utah Supreme Court overruled Halladay v. Cluff, 685 P.2d 500 (Utah 1984) and reestablished the following elements of boundary by acquiescence:

"(1) occupation up to a visible line marked by monuments, fences, or buildings; (2) mutual acquiescence in the line as a boundary; (3) for a long period of time; (4) by adjoining landowners." (Omitting citations).

785 P.2d at 417. In holding that there was mutual acquiescence in a fence line as a boundary for a long period of time by adjoining landowners in that case the court stated:

It appears ... to be undisputed that successive landowners until 1972 or 1985 regarded the fence as the true boundary line from the time they were first erected.... [T]his probably was as early as 1890. There is no indication in the record that any predecessor in

interest behaved in a fashion inconsistent with the belief that the fence line was the boundary. Owners occupied houses, constructed buildings, farmed and irrigated, and raised livestock only within their respective fenced areas. *** Additionally, there is no indication that any landowner notified his neighbor of a disagreement over the true boundary.

785 P.2d at 420-421.

In the present case, the lower court appears to have based its finding that there was no acquiescence by the parties in the old fence as a boundary upon the testimony of plaintiff Walter Hansen regarding conversations between himself and defendant Craig Oberg which purportedly occurred in May 1991, March 1992 and August 1992. (Record at 195-196). The substance of those conversations as found by the court is that defendant Oberg commented to plaintiff Hansen that the boundary between plaintiffs' and defendants' property was the Cottonwood Creek which runs near the old fence line. Defendant Oberg's recollection of those conversations varies from that of plaintiff Hansen's and is more to the effect that the true boundary line between the properties was unknown. (Trial Transcript at 272). Defendant Oberg testified that he believed that he owned up to the old fence. (Trial Transcript at 206). Defendant Oberg made repairs to the old fence line, cleaned the creek of debris, raised livestock which grazed up to the old fence and he and his family otherwise occupied the property up to the fence line for recreational and other activities. (Trial Transcript at 221,241,253).

Defendant Oberg's predecessors, Kenneth Sevy and Hespert Sevy, also occupied the property up to the old fence line. Consequently, defendants and their predecessors have occupied the subject property up to a visible line marked by definite fence posts and wire fencing

material for more than twenty years prior to defendant Oberg's conversations with plaintiff Hansen. The record also reflects that plaintiffs' predecessors in interest occupied only up to the old fence line and did not take any action or make any statements that were inconsistent with the old fence line constituting a boundary between the respective properties. In fact Robert Sevy, who owned parcel 107 from 1970 to 1980, asked permission of Craig Oberg to put a V on the old fence so that his horse could drink from the creek. (Trial Transcript at 305).

In King v. Fronk, 14 Utah 2d 135, 378 P.2d 893 (1963), the court addressed the issue of the sufficiency of occupation of property up to a visible line. In that case defendant Fronk acquired Lot 4 in 1948 and from 1948 to 1961 respected a line marked by an old wire fence, a barn's wall, shrubs and a concrete driveway. Since 1926, no one in the chain of title on either side of that line, dividing Lots 3 and 4, ever questioned the old fence or the line as a boundary. In 1961 Fronk anticipated constructing an apartment house and for the first time questioned the old fence as a boundary line. In holding that boundary by acquiescence had been established prior to 1961, the court stated:

[A] visible, persisting boundary having been shown over a long period of time is convincing evidence of an intended or acquiesced-in boundary.

The visible boundary of ancient vintage and persistency of placement are the important aspects of the doctrine, although they may be indecisive in some rather rare circumstances, mentioned above, which could destroy the vertebrae of the doctrine's backbone, looking to elimination of litigation involving, perhaps, unreliability of memory and cobwebbed evidenced, in the laws policy of looking toward repose of title at one time or another.

[W]hat we assert is that the doctrine of "boundary by acquiescence" looks to the settling of titles under circumstances where claimants, ex post facto, having slept on their claimed rights for a long time, presently assert those rights for one reason or another, including appreciation of values, un-neighborly relations, or because of an equity measured by the length of the Chancellor's foot, while insisting on ownership of property that an ancient boundary does not reflect or designate on the surface of the property. (Emphasis added).

378 P.2d at 895-896.

King v. Fronk, *supra*, was followed by the court in Baum v. Defa, 525 P.2d 725 (Utah 1974). In that case the fence line in question was constructed by Frank Defa when he owned property on both sides of the fence. The fence was originally intended as a barrier to control livestock. The fence itself was irregular rather than one which runs in a straight line. After acknowledging that the period of time during which a fence exists as a barrier as opposed to a boundary does not constitute part of the "long period of time" requisite to establish boundary by acquiescence, the court stated:

"On the other hand, if the property on either side of such a fence is conveyed to separate parties, so that there comes into being separate ownership of the tracks on either side, and the circumstances are such that the parties should reasonably be assumed to accept the fence as the boundary between their properties, then from that time on, the time during which the fence continues to exist, should be regarded as going towards fulfilling the time requirement for the establishment of a boundary by acquiescence.

525 P.2d 727. The court then affirmed the lower court's holding that the subject fence constituted a boundary by acquiescence. See also Englert v. Zane, 848 P.2d 165 (Utah App.

1993) (use of property for gardening, relaxation and recreation was appropriate and sufficient for the nature of the land to satisfy the occupation element). Similarly, in the present case, the circumstances are such that "the parties should reasonably be assumed to accept the fence as the boundary between their properties." Baum v. Defa, *supra*, at 727.

The evidence in this case clearly shows that defendants and their predecessors occupied up to a visible line marked by an existing fence for a period of in excess of twenty years. Whether or not such occupation, and the actions or inactions of the owners of the adjoining property, constitute "acquiescence" as that term has been defined by the Utah Supreme Court and by this court, is a question of law. This court reviews the lower court's conclusions of law for correctness without according any particular deference thereto. Carter v. Hanrath, 885 P.2d 801 (Utah App. 1994). In Carter v. Hanrath, the plaintiff used the disputed property for growing hay, pasturing animals and calving, and his predecessors used the disputed property for farming and grazing. The "visible line" in that case was cliffs. In addressing the plaintiff's argument that acquiescence requires actual knowledge of the disputed boundary the court stated:

The Utah Supreme Court has stated that "'[a]cquiescence' is more nearly synonymous with 'indolence,' or 'consent by silence,' --- or a knowledge that a fence or other monuments appears to be a boundary, --- but that no one did anything about it." Lane v. Walker, 29 Utah 2d 119, 505 P.2d 1199, 1200 (1973). This accords with the dictionary definition of acquiescence as "[p]assive compliance or satisfaction ... [c]onduct from which assent may be reasonably inferred.... Equivalent to assent inferred from silence with knowledge or from encouragement, and presupposes knowledge and assent." Black's Law Dictionary 24 (6th ed. 1990).

Therefore, landowners may acquiesce to a boundary through

idleness or laziness. In other words, a landowner whose property has been encroached upon acquiesces to the boundary when he or she "either had or *should have had* knowledge that his [or her] property was being claimed by another." (Omitting citations).

Moreover, our holding that acquiescence may be imputed from long-term indolence is consistent with the policy upon which boundary by acquiescence is based, namely

"that the peace and good order of society require that there be stability ... in the ownership and occupation of lands.... [B]oundary lines which have been long established and accepted by those who should be concerned should be left undisturbed in order to leave at rest matters which may have resulted in controversy and litigation."

James H. Backman, *The Law of Practical Location of Boundaries and the Need for an Adverse Possession Remedy*, 1986 B.Y.U.L.Rev. 957, 965 (1986) (quoting *Olsen v. Park Daughters Inv. Co.*, 29 Utah 2d 421, 425, 511 P.2d 145, 147 (1973)).

885 P.2d at 806. In the present case, the actions of plaintiffs' predecessors in interest shows a long-term indolence from which legal acquiescence may be imputed as found by the court in Carter v. Hanrath, *supra*. They took no action inconsistent with a recognition of the old fence as a boundary. Robert Sevy, who owned parcel 107 for 10 years, testified that he believed the old fence was the boundary of his property. (Trial Transcript at 292). His successors did not make use of the disputed property. Defendants' title to the subject property under the doctrine of boundary by acquiescence was perfected prior to plaintiffs acquisition of parcel 107. Motzkus v. Carroll, 7 Utah 2d 2137, 322 P.2d 391 (1958) (purchaser's knowledge of true boundary at time of purchase did not defeat boundary established by acquiescence prior thereto).

POINT II

THE LOWER COURT ERRED IN AWARDING ATTORNEY'S FEES TO PLAINTIFF IN THE ABSENCE OF A STATUTE OR CONTRACT PROVIDING FOR THE SAME.

In addition to ordering defendants to remove the fence which defendants had constructed in June of 1992, the court awarded plaintiffs attorney's fees in the amount of \$3,300.00. The court did not state its basis for the award of attorney's fees other than the fact that plaintiffs were indebted to Mr. Neeley, plaintiffs' counsel, in that amount and that that amount was a reasonable attorney's fee for the work performed by Mr. Neeley. (Record at 197). In Baldwin v. Burton, 850 P.2d 1188 (Utah 1993), the court stated that "the general rule is that an award of attorney's fees is appropriate only if authorized by statute or contract." 850 P.2d at 1198. In Cobabe v. Crawford, 780 P.2d 834 (Utah App. 1989), the court stated that the "general rule requires each party to bear his or her own attorney's fees in the absence of a statute or enforceable contractual provision to the contrary." 780 P.2d at 836. The court also noted that

"attorney's fees, when awarded as allowed by law, are awarded as a matter of legal right." *Cabrera v. Cottrell*, 690 P.2d 622, 625 (Utah 1985). "Since the right is contractual, the court does not possess the same equitable discretion to deny attorney's fees that it has when fashioning equitable remedies, or applying a statute which allows the discretionary award of such fees." *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 226 (5th Cir. 1975).

780 P.2d at 836. Consequently, a determination of whether or not plaintiffs are entitled to an award of attorney's fees in this case is a question of law which is reviewed by this court on appeal for correctness. However, "[t]he amount of fees to be awarded is 'largely within the sound discretion of the trial court'". Cobabe v. Crawford, *supra*, at 836, (quoting Trayner v.

Cushing, 688 P.2d 856, 858 (Utah 1984)).

In Hatanaka v. Struhs, 738 P.2d 1052 (Utah App. 1987), the lower court found that the defendants trespassed upon the plaintiff's property and ordered the defendants to remove a fence, dirt, and debris which they had placed on what the court determined to be the plaintiff's property and further enjoined the defendants from placing any additional fences, debris or fill on that property. The plaintiff also sought attorney's fees which were denied by the lower court. The basis for the plaintiff's claim to an award of attorney's fees was Utah Code Annotated Section 78-27-56 which the court quoted as follows:

In civil actions, where not otherwise provided by statute or agreement, the court may award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.

Because the appellate court found that the defense was meritorious, the issue of good faith was not reached. In the present case, plaintiffs did not assert entitlement to attorney's fees pursuant to Utah Code Annotated Section 78-27-56. Nor did the lower court find that defendants' defense was not meritorious. As a matter of law, attorney's fees are not awardable in a trespass action other than under Utah Code Annotated Section 78-27-56. Inasmuch as that section is not applicable to the present action, the lower court erred in awarding plaintiffs attorney's fees. Therefore, defendants respectfully request that the court reverse the lower court's judgment awarding such fees to plaintiff.

CONCLUSION

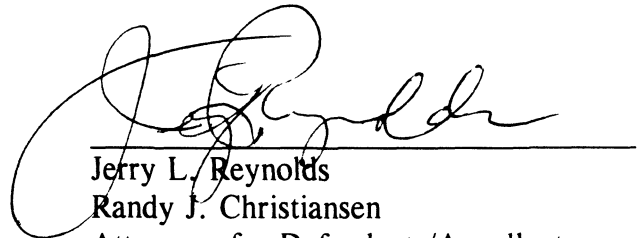
Defendants' title to the subject property through the doctrine of boundary by acquiescence

became perfected prior to the time plaintiffs acquired their deed to parcel 107 in August 1990. By virtue of defendants' title to the disputed property, defendants construction of a fence along the old fence line in June 1992 did not constitute a trespass. The lower court's judgment should be reversed so as to quiet title to the disputed property up to the old fence line in defendants.

Regardless of whether or not the judgment as to boundary by acquiescence is modified on appeal, plaintiffs are not entitled to an award of attorney's fees pursuant to statute or contract. The court's judgment awarding plaintiffs their attorney's fees should be reversed and the order modified so each of the parties bears their own attorney's fees in this action.

Dated this 18 day of August, 1995.

Respectfully submitted,

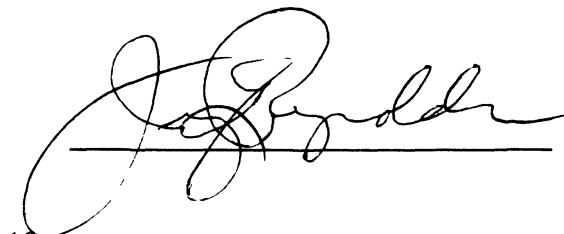


Jerry L. Reynolds
Randy J. Christiansen
Attorneys for Defendants/Appellants

MAILING CERTIFICATE

I hereby certify that I mailed two complete, true and correct copies of the foregoing Brief of Appellants by first class mail with postage prepaid thereon, this 18th day of August, 1995 to the following:

Douglas Neeley
96 South Main 5-15
Ephraim, Utah 84627



18

ADDENDUM

FILED
SANPETE COUNTY, UTAH
'94 SEP 27 AM 9 49
KRISTINE F. CHRISTIANSEN
CLERK
BY J. Moore DEPUTY

DISTRICT COURT, STATE OF UTAH
SANPETE COUNTY
160 North Main, Manti, Utah 84642
Telephone (801) 835-2131 Facsimile (801) 835-2135

WALTER SCOTT HANSEN and
KRISTI D. HANSEN,

Plaintiffs,

vs.

CRAIG OBERG and DIANE OBERG,

Defendants.

FINDINGS OF FACT AND DECISION

Case number 920600278

Assigned Judge David L. Mower

The above matter was tried to the Court at Manti on August 3 and 4, 1994. The plaintiffs were present with their lawyer, Douglas L. Neeley. The defendants were present with their lawyer, Randy J. Christiansen. Witnesses testified and evidence was received. There is sufficient evidence to support the following facts.

FINDINGS OF FACT

1. All the parties to this action are individuals who reside in Sanpete County, Utah.
2. During the period 1990 until 1992 the parties had minor children residing with them in their homes.
3. Plaintiffs own a parcel of real property in Sanpete County, Utah described as follows:

Beginning at a point 1.00 chain West and 1.00 chain North from the Southwest

corner of Block 30, Plat "A" Ephraim City Survey, and running thence
West 1.58 chains; thence
North 17° 15' West 3.30 chains; thence
East 2.62 chains, more or less; thence
South 3.29 chains to the point of beginning.

This parcel is also identified in the official records of Sanpete County as a portion of parcel 107, Plat "A" Ephraim City Survey. This parcel has the street address of 150 North 200 West, Ephraim, Utah.

4. The defendants own a parcel of real property in Sanpete County, Utah described as follows:

Beginning at a point 1.00 chain West from the Southwest corner of Block 30, Plat "A" Ephraim City Survey, and running thence
North 1.00 chain; thence
West 1.58 chains; thence
North 17° 15' West 7.40 chains; thence
North 64° 30' West 2.10 chains; thence
South 69° West 1.15 chains; thence
South 30° East 1.90 chains; thence
North 78° 30' East 0.92 of a chain; thence
South 14° East 2.58 chains; thence
South 60° East 0.90 of a chain; thence
South 3.80 chains; thence
East 3.50 chains to the point of beginning.

This parcel is also identified in the official records of Sanpete County as parcel 105, Plat "A" Ephraim City Survey.

5. The above described parcels are contiguous to each other and share a common

boundary. The first call of plaintiffs' legal description (West 1.58 chains) is common to the second call of the defendants' legal description. The second call of the plaintiffs' legal description is, in part, common to the third call of the defendants' legal description.

6. Stephen L. Ludlow is an individual who resides in Juab County, Utah. He is a registered land surveyor of the State of Utah.
7. In June of 1992 Mr. Ludlow and others under his direction prepared a survey of plaintiffs' property. Exhibit number 26 received at the trial is a map that Mr. Ludlow prepared.
8. There is a natural water course running through Ephraim City known as Cottonwood Creek.
9. Cottonwood Creek crosses the two common boundary lines between the parties' property so that a portion of it runs through the area enclosed within plaintiffs' legal description and a portion runs through the area enclosed within defendants' legal description.
10. The course of Cottonwood Creek is not the same as and does not match the calls of the parties' legal descriptions. Nevertheless, knowing the course of the creek and its relationship to the parties' property is helpful to the analysis of the facts in

this case.

11. Cottonwood Creek runs in a basically West to Northwest direction. The center of the creek, flowing West, enters the property at a point which is approximately equal to the point of beginning of plaintiffs' legal description. It then meanders in a West by Northwest direction so that at a point approximately 0.75 of a chain West of the plaintiffs' point of beginning the entire creek bed is within the property enclosed by the plaintiffs' legal description. It continues to meander but changes direction so that its course is then North by Northwest and at a point approximately 2.50 chains Northwest along plaintiffs' second call the creek channel is then completely within the property described in defendants' legal description. A graphical representation of these words is found in defendants' exhibit number 2.
12. The plaintiffs' predecessors in interest were as follows:¹

<u>OWNER</u>	1980-1983
Madonna P. Beck	Jack L. Peterson
F. Hespert Sevy	
Robert P. Sevy	
Oscar D. Peterson	
<u>DATES OF OWNERSHIP</u>	
1954-1963	
1963-1970	
1970-1980	

¹ No evidence was offered concerning pre-1954 owners.

1983-1990

13. The defendants' predecessors in interest were as follows:

Maddonna Beck	1958-1963
F. Hespert Sevy	1963-1971
Rosella P. Sevy	1971-1973
Kenneth M. Sevy	1973-1976

14. Madonna P. Beck and Maddonna Beck are the same person.
15. There was testimony from Oscar D. Peterson that he used parcel 107 for raising livestock.
16. There was testimony from other witnesses that Maddonna Beck and F. Hespert Sevy, during their separate periods of ownership, used both parcels 105 and 107, together, to graze and raise livestock.
17. At some time in the past, on a date that is unknown to the Court, a fence was constructed that ran basically parallel to Cottonwood Creek and which was located on parcel 107 and on the North side of Cottonwood Creek (where it runs East and West) and also on the East side of Cottonwood Creek (where it runs North and South).
- a. When new, the fence was cedar posts with net wire and a strand or two or barbed wire on top.
- b. In 1977 the fence was in disrepair. Robert Sevy's brother, Wayne

Sevy, built a hog pen on parcel 107 that year and kept hogs in it.

The fence would have been between the pen and the creek. Wayne watered the hogs daily by carrying water in a bucket from the creek to the pen. He had no memory of a fence.

c. In 1990 the fence was in disrepair.

18. Of all the owners listed herein, the plaintiffs were the first to use their legal description for residential purposes.
19. Madonna P. Beck and the Obergs used parcel 105 for residential purposes.
20. During the period 1990 to 1992 the parties' minor children occupied those portions of parcel 107 and 105 in the area of Cottonwood Creek and used that area for the operation of ATVs and for play activities.
21. In May of 1991 Mr. Hansen and Mr. Oberg had a conversation. Mr. Oberg said, in essence, that the boundary between parcels 105 and 107 was the same as the course of Cottonwood Creek.
22. In March of 1992 the defendants begin construction of an irrigation pond on parcel 105.
23. In March of 1992 Mr. Oberg and Mr. Hansen met at the site of the irrigation pond development site, during which a conversation ensued in which safety of children

was discussed. Mr. Oberg said, in essence, that the boundary between parcels 105 and 107 was equal to the course of Cottonwood Creek.

24. In June of 1992 the defendant caused a fence to be built.

- a. As far as this case is concerned, that fence follows this line:

beginning at a point 1.0 chains West and 1.17 chains North from

the Southwest corner of Block 30 Plat "A" Ephraim City Survey

and running thence Northwesterly to a point 0.73 of a chain North

and 0.20 of a chain West from the Southwest corner of parcel 107;

running thence Northwesterly to the Northeast corner of the

Hansen's property description.
- b. Please note that I have attempted to generate this legal description

by looking at the exhibits that were received in evidence in this

case, especially Mr. Ludlow's map. I have not attempted to

generate a legal description which matches the exact location of the

fence as built on the ground. My point has been to show that a

portion of the fence constructed by the defendants on June 12,

1992 lies entirely within the Hansens' legal description.
- c. The fence was constructed at the direction of Mr. Oberg.

However, he did not do any of the actual work. Rather, he directed his employees to do so. The job foreman was Earl Livingston.

- d. Mr. Livingston testified that he received instructions from Mr. Oberg as to the location of the fence to be constructed. He was instructed to follow the old fence line.
 - e. Mr. Livingston and his crew begin constructing the fence on 200 West in Ephraim at a point on the street about 10 to 15 feet North of Cottonwood Creek. The distance from the first post on the new fence to the first post on the old broken-down fence was about 20 feet. The new fence then followed the course of the old fence. Each of the old fence posts was cut off with a chainsaw about six inches above ground level.
25. On June 12, 1992 Mr. Scott Hansen was out of town. However, his father, Thomas Hansen, appeared at the property when defendants' agents were starting construction of the fence and asked them to stop.
26. In August of 1992 Mr. Hansen and Mr. Oberg had a conversation. Mr. Oberg said, in essence, that the boundary between parcels 105 and 107 is Cottonwood Creek and that he, Mr. Oberg, would move the fence in the future as Hansens

developed their property.

27. On November 27, 1992 Mr. Douglas L. Neeley asked Mr. Oberg, in writing, to vacate the Hansens' property, dismantle the fence and desist from any further interference.
28. The fence still stood on August 3, 1994.
29. The Hansens have employed the only means available to them to prevent the Obergs from trespassing. That means is this lawsuit.
30. The Hansens are indebted to Mr. Neeley in the sum of \$3300.00 for the work that he has done.
31. A reasonable attorney in this type of action would charge \$3300.00 for the work that has been performed.

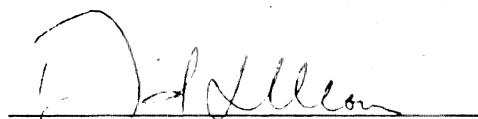
DECISION

To the extent that there may have been a fence or any other boundary between parcels 105 and 107, there was no acquiescence in it by the parties to this action. In other words, there has never been a boundary between these parcels that qualifies as a boundary by acquiescence in this action. The defendants have trespassed on the property of the plaintiffs and should be ordered to cease and desist from the trespass and to remove the fence which they constructed.

Plaintiffs should be awarded judgment against defendants and they should be ordered to pay to plaintiffs \$3,300.00. Plaintiffs should also be awarded their costs, if a proper memorandum is submitted.

Mr. Neeley is directed to prepare a Judgment and Order that conforms to this decision and to submit it for execution by following the procedure set forth in Rule 4-504, Code of Judicial Administration.

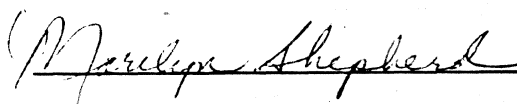
Signed on September 21, 1994.


David L. Mower, Judge

CERTIFICATE OF SERVICE

On September 21, 1994 a copy of the above FINDINGS OF FACT AND DECISION was sent to each of the following by the method indicated:

Addressee	Method (Mail, in Person, Fax)	Addressee	Method (Mail, in Person, Fax)
Mr. Douglas Neeley Attorney at Law 96 S. Main #5-15 Ephraim, UT 84627	<input checked="" type="checkbox"/>	Mr. Randy J. Christiansen Attorney at Law 64 North 100 East Street P.O. Box 896 Provo, UT 84603-0896	<input checked="" type="checkbox"/>



FILED
SANPETE COUNTY, UTAH
94 NOV 22 PM 2 10
KRISTINE F. CHRISTIANSEN
CLERK
BY S. May DEPUTY

DOUGLAS L. NEELEY 6290
Attorney for Plaintiff
96 South Main 5-15
Ephraim, UT 84627
Telephone: (801)283-5055

IN THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY
STATE OF UTAH

WALTER SCOTT HANSEN and	:	FINDINGS OF FACT AND
KRISTI D. HANSEN	:	CONCLUSIONS OF LAW
Plaintiff,	:	
vs.	:	Civil No. 920600278
CRAIG OBERG and DIANE OBERG	:	JUDGE DAVID L. MOWER
Defendant.	:	

The above-entitled matter came on for hearing on the 3rd and 4th day of August, 1994, before the Honorable Judge David L. Mower presiding. The Plaintiffs appeared in person and were represented by their attorney, Douglas L. Neeley. The Defendants were present and were represented by their attorney, Randy J. Christiansen. The matter was heard on Plaintiffs' Complaint and upon the Answer and Counterclaim of the Defendants.

The Court, having heard the sworn testimony of the witnesses, having examined the documentary proof and having received evidence and being fully advised in the premises, does now make the following:

FINDINGS OF FACT

1. All the parties to this action are individuals who reside in Sanpete County, Utah.

2. During the period 1990 until 1992 the parties had minor children residing with them in their homes.

3. Plaintiffs own a parcel of real property in Sanpete County, Utah, described as follows:

Beginning at a point 1.00 chain West and 1.00 chain North from the Southwest corner of Block 30, Plat "A" Ephraim City Survey, and running thence West 1.58 chains; thence North $17^{\circ}15'$ West 3.30 chains; thence East 2.62 chains, more or less; thence South 3.29 chains to the point of beginning.

This parcel is also identified in the official records of Sanpete County as a portion of parcel 107, Plat "A" Ephraim City Survey. This parcel has the street address of 150 North 200 West, Ephraim, Utah.

4. The Defendants own a parcel of real property in Sanpete County, Utah, described as follows:

Beginning at a point 1.00 chain West from the Southwest corner of Block 30, Plat "A" Ephraim City Survey, and running thence North 1.00 chain; thence West 1.58 chains; thence North $17^{\circ}15'$ West 7.40 chains; thence North $64^{\circ}30'$ West 2.10 chains; thence South 69° West 1.15 chains; thence South 30° East 1.90 chains; thence North $78^{\circ}30'$ East 0.92 of a chain; thence South 14° East 2.58 chains; thence South 60° East 0.90 of a chain; thence South 3.80 chains; thence East 3.50 chains to the point of beginning.

This parcel is also identified in the official records of Sanpete County as parcel 105, Plat "A" Ephraim City Survey.

5. The above described parcels are contiguous to each other and share a common boundary. The first call of Plaintiff's legal description (West 1.58 chains) is common to the second call of the Defendants' legal description. The second call of the Plaintiffs' legal description is, in part, common to the third call of the Defendants' legal description.

6. Stephen L. Ludlow is an individual who resides in Juab County, Utah. He is a registered land surveyor of the State of Utah. Mr. Ludlow was qualified as an expert witness by the Court.

7. In June of 1992, Mr. Ludlow and others under his direction prepared a survey of Plaintiffs' property. Exhibit number 26 received at the trial is a map that Mr. Ludlow prepared.

8. There is a natural water course running through Ephraim City known as Cottonwood Creek.

9. Cottonwood Creek crosses the two common boundary lines between the parties' property so that a portion of it runs through the area enclosed within Plaintiffs' legal description and a portion runs through the area enclosed within Defendants' legal description.

10. The course of Cottonwood Creek is not the same as and does not match the calls of the parties' legal descriptions. Nevertheless, knowing the course of the creek and it's relationship to the parties' property is helpful to the analysis of the facts in this case.

11. Cottonwood Creek runs in a basically West to Northwest direction. The center of the creek, flowing West, enters the property at a point which is approximately equal to the point of beginning of Plaintiffs' legal description. It then meanders in a West by Northwest direction so that at a point approximately 0.75 of a chain West of the Plaintiffs' point of beginning the entire creek bed is within the property enclosed by the Plaintiffs' legal description. It continues to meander but changes direction so that it's course is then North by Northwest, and at a point approximately 2.50 chains Northwest along Plaintiffs' second call, the creek channel is then completely within the property described in Defendants' legal description. A graphical representation of these words is found in Defendants' exhibit number 2.

12. The Plaintiffs' predecessors in interest were as follows:

<u>Owner</u>	<u>Dates of Ownership</u>
Madonna P. Beck	1954-1963
F. Hespert Sevy	1963-1970
Robert P. Sevy	1970-1980
Oscar D. Peterson	1980-1983
Jack L. Peterson	1983-1990

No evidence was offered concerning pre-1954 owners.

13. The Defendants' predecessors in interest were as follows:

<u>Owner</u>	<u>Dates of Ownership</u>
Maddonna Beck	1958-1963
F. Hespert Sevy	1963-1971
Rosella P. Sevy	1971-1973
Kenneth M. Sevy	1973-1976

14. Madonna P. Beck and Maddonna Beck are the same person.

15. There was testimony from Oscar D. Peterson that he used parcel 107 for raising livestock.

16. There was testimony from other witnesses that Maddonna Beck and F. Hespert Sevy, during their separate periods of ownership, used both parcels 105 and 107, together, to graze and raise livestock.

17. At some time in the past, on a date that is unknown to the Court, a fence was constructed that ran basically parallel to Cottonwood Creek and which was located on parcel 107 and on the North side of Cottonwood Creek (where it runs East and West) and also on the East side of Cottonwood Creek (where it runs North and South).

a. When new, the fence was cedar posts with net wire and a strand or two of barbed wire on top.

b. In 1977 the fence was in disrepair. Robert Sevy's brother, Wayne Sevy, built a hog pen on parcel 107 that year and kept hogs in it. The fence would have been between the pen and the creek. Wayne watered the hogs daily by carrying water in a bucket from the creek to the pen. He had no memory of a fence.

c. In 1990 the fence was in disrepair.

18. Of all the owners listed herein, the Plaintiffs were the first to use their legal description for residential purposes.

19. Madonna P. Beck and the Oberg's used parcel 105 for residential purposes.

20. During the period 1990 to 1992, the parties' minor children occupied those portions of parcel 107 and 105 in the area of Cottonwood Creek and used that area for the operation of ATVs and for play activities.

21. In May of 1991 Mr. Hansen and Mr. Oberg had a conversation. Mr. Oberg said, in essence, that the boundary between parcels 105 and 107 was the same as the course of Cottonwood Creek.

22. In March of 1992, the Defendants begin construction of an irrigation pond on parcel 105.

23. In March of 1992, Mr. Oberg and Mr. Hansen met at the site of the irrigation pond development site, during which a conversation ensued in which safety of children was discussed. Mr. Oberg said, in essence, that the boundary between parcels 105 and 107 was equal to the course of Cottonwood Creek.

24. In June of 1992 the Defendant caused a fence to be built.

a. As far as this case is concerned, that fence follows this line:

Beginning at a point 1.0 chains West and 1.17 chains North from the Southwest corner of Block 30 Plat "A" Ephraim City Survey and running thence Northwesterly to a point 0.73 of a chain North and 0.20 of a chain West from the Southwest corner of parcel 107; running thence Northwesterly to the Northeast corner of the Hansen's property description.

b. The fence described above, constructed by the Defendants on June 12, 1992, lies entirely within the Hansen's legal description.

c. The fence was constructed at the direction of Mr. Oberg. However, he did not do any of the actual work. Rather, he directed his employees to do so. The job foreman was Earl Livingston.

d. Mr. Livingston testified that he received instructions from Mr. Oberg as to the location of the fence to be constructed. He was instructed to follow the old fence line.

e. Mr. Livingston and his crew begin constructing the fence on 200 West in Ephraim at a point on the street about 10 to 15 feet North of Cottonwood Creek. The distance from the first post on the new fence to the first post on the old broken-down fence was about 20 feet. The new fence then followed the course of the old fence. Each of the old fence posts was cut off with a chain saw about six inches above ground level.

25. On June 12, 1992, Mr. Scott Hansen was out of town. However, his father, Thomas Hansen, appeared at the property when Defendants' agents were starting construction of the fence and asked them to stop.

26. In August of 1992 Mr. Hansen and Mr. Oberg had a conversation. Mr. Oberg said, in essence, that the boundary between parcels 105 and 107 is Cottonwood Creek and that he, Mr.

Oberg, would move the fence in the future as Hansen's developed their property.

27. On November 27, 1992, Mr. Douglas L. Neeley asked Mr. Oberg, in writing, to vacate the Hansen's property, dismantle the fence and desist from any further interference.

28. The fence still stood on August 3, 1994.

29. There has never been a boundary between parcels 105 and 107 that qualified as a boundary by acquiescence.

30. To the extent that there may have been a fence or any other boundary between parcels 105 and 107, there was no acquiescence in it by the parties to this action.

31. The Hansen's have employed the only means available to them to prevent the Oberg's from trespassing. That means is this lawsuit.

32. The Hansen's are indebted to Mr. Neeley in the sum of \$3,300.00 for the work that he has done.

33. A reasonable attorney in this type of action would charge \$3,300.00 for the work that has been performed.

CONCLUSIONS OF LAW

1. Plaintiffs are entitled to a Decree Quieting Title in and to the property more particularly described in paragraph #3 above.

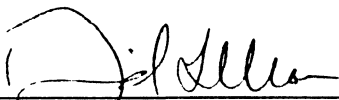
2. Defendants have trespassed upon the property of the Plaintiffs and have constructed a fence that trespasses upon the property. The Plaintiffs are entitled to an order that the

Defendants cease and desist from trespassing upon the property of the Plaintiffs and that the fence be removed.

3. The Plaintiffs are entitled to a judgment against the Defendants for the sum of \$3,300.00 plus interest at the statutory rate from September 21, 1994.

4. That the Plaintiffs are entitled to their costs.

DATED this 31 day of ^{Nov}~~October~~, 1994. 3:20 P.M.



JUDGE DAVID L. MOWER
DISTRICT COURT JUDGE

FILED
SANPETE COUNTY, UTAH
94 NOV 22 PM 2 10
KRISTINE F. CHRISTIANSEN
CLERK
BY 211/11/94 DEPUTY

DOUGLAS L. NEELEY 6290
Attorney for Plaintiffs
96 South Main 5-15
Ephraim, UT 84627
Telephone: (801)283-5055

IN THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY
STATE OF UTAH

WALTER SCOTT HANSEN and	:	JUDGMENT AND ORDER
KRISTI D. HANSEN	:	
Plaintiffs,	:	
vs.	:	Civil No. 920600278
CRAIG OBERG and DIANA OBERG	:	JUDGE DAVID L. MOWER
Defendants	:	

The above-entitled matter came on for hearing on the 3rd and 4th day of August, 1994, before the Honorable Judge David L. Mower presiding. The Plaintiffs appeared in person and were represented by their attorney, Douglas L. Neeley. The Defendants were present and represented by their attorney, Randy J. Christiansen. The matter was heard upon Plaintiffs' Complaint and upon the Answer and Counterclaim of the Defendants.

The Court, having heard the sworn testimony of the witnesses, having examined the documentary proof and received evidence and having made and entered it's Findings of Fact and Conclusions of Law and being fully advised in the premises, does now ORDER and grants JUDGMENT as follows:

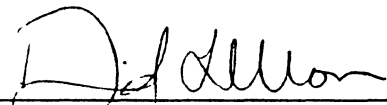
1. The Defendants are hereby ordered to cease and desist from trespassing upon Plaintiffs' property.

2. The Defendants are hereby ordered to remove the fence which they have constructed upon the Plaintiffs' property.

3. The Plaintiffs are awarded judgment against the Defendants in the sum of \$3,300.00, together with interest at the statutory rate, from September 21, 1994.

4. The Plaintiffs are awarded their costs, if a proper memorandum is filed pursuant to, Rule 54, Utah Rules of Civil Procedure, said amount being \$ 705.00. *tm 12-16-94*

DATED this 21 day of ^{NOV}~~October~~, 1994. 3:20 P.M.



JUDGE DAVID L. MOWER
DISTRICT COURT JUDGE

IN THE SIXTH DISTRICT COURT OF SANPETE COUNTY, STATE OF UTAH

WALTER SCOTT HANSEN AND
KRISTI D HANSEN
Plaintiff,
- VS -
CRAIG AND DIANA OBERG
Defendant.

CASE NO. 920600278

STATE OF UTAH)
County of Sanpete) SS.

I, the undersigned Clerk of the SIXTH DISTRICT Court of the County of Sanpete, State of Utah, do hereby certify that the foregoing is a true copy of the Judgment rendered in the above entitled action,

and recorded in Judgment Record No. 9 of said court, at page "Q", and I further certify that the foregoing papers hereto annexed constitute the Judgment Roll in said action.

WITNESS my hand and seal of said Court hereto set on this 25th day of Nov., 19 74.

KRISTINE F. CHRISTIANSEN
Sanpete County Clerk

By Jenny Moore
Deputy Clerk

PART OF PARCEL 107, PLAT A, EPHRAIM CITY SURVEY

