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Van Dyke v. Chappell : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WELBY J. VAN DYKE, Plaintiff and Respondent, vs. MARION GLEN CHAPPELL and DEAMA RUTH CHAPPELL, Defendants and Appellants.	*	Case No. 890133

BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE
SIXTH JUDICIAL DISTRICT COURT FOR WAYNE COUNTY
HONORABLE DON V. TIBBS, JUDGE

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JURISDICTION

The Court has jurisdiction to entertain this appeal pursuant to UCA §78-2-2(3)(j). This cause may be transferred to the Court of Appeals pursuant to UCA §78-2-2(4).

NATURE OF PROCEEDINGS BELOW

Plaintiff and Respondent, Welby J. Van Dyke (hereinafter referred to as "Van Dyke"), filed suit in the District Court of Wayne County against Marion Glen Chappell, and his wife, Deama Ruth Chappell, Defendants and Appellants (hereinafter referred to as "Chappells"), seeking to quiet title to a small parcel of real property based upon a theory of boundary by acquiescence, sometimes called boundary by fenceline. Chappells answered and counterclaimed, denying generally the claims of Van Dyke, and asserting title to the disputed parcel based upon their deed and record title. Following a non-jury trial, the Sixth District Court, Wayne County, Don V. Tibbs, J., entered findings and decree in favor of Van Dyke. This appeal followed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Boundary line by acquiescence is established by evidence which shows (1) occupation up to visible monuments, (2) mutual acquiescence in the line as a boundary, (3) for a

long period of time, (4) by adjoining land owners, where (5) evidence of a dispute or uncertainty as to the true boundary line exists when measured against an objective test. Halladay v. Cluff, Utah, 685 P.2d 500 (1984); Parsons v. Anderson, Utah, 690 P.2d 535 (1984). Chappells contend that the evidence was insufficient to show the elements of mutual acquiescence, and dispute or uncertainty when measured against an objective test. The specific issues to be addressed by this appeal are then the following:

a. Did the parties mutually acquiesce in the old fence as a boundary line, or did they simply treat it as a barrier for livestock control.

b. Was there any dispute regarding the true location of the boundary line at the time of the construction of the fence, or was it simply constructed for a convenient livestock control measure.

c. Did existing survey information clearly indicate the true boundary line between the properties of the parties.

d. Did the record chain of title, available survey information, or other objective indicia show or reflect any uncertainty regarding the true boundary line.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

This appeal does not present any constitutional provision, statute, ordinance, rule or regulation whose interpretation is determinative of the issues of the case.

STATEMENT OF THE CASE

This case presents a simple contest between Van Dyke who claims title to real property under a theory of boundary by acquiescence and Chappells who claim title by their deed and title of record. Issues of money damages were framed by the pleadings, but neither party offered evidence in that regard, nor was any request for an award of money damages made at the close of trial. The District Court did not issue oral findings from the bench. Rather, the Court invited counsel to submit findings and conclusions consistent with their respective positions. Counsel complied, and the Court adopted the findings submitted by counsel for Van Dyke, and entered a Decree Quieting Title in him to the disputed parcel.

STATEMENT OF FACTS

Van Dyke and Chappells are adjoining land owners in Lyman, Wayne County, Utah (T.18 & 102). The real property owned by Van Dyke is described as follows:

> Commencing at the Southeast corner of the Southwest quarter of the Northeast quarter of Section 9, Township 28 South, Range 3 East, Salt Lake Base and Meridian; thence North 56 rods; thence West 80 rods; thence South 56 rods; thence East 80 rods to point of beginning, containing 28 acres, more or less, together with all improvements thereon and appurtenant thereto. (Exhibit 6).

The record title to Van Dyke's property is vested in him, and his late wife, Katie Van Dyke, as joint tenants, by virtue of a warranty deed recorded September 29, 1973 (Exhibit 6). Mrs. Van Dyke had earlier received title to this real property by quit claim deed recorded July 17, 1967 (Exhibit 5). This parcel of real property was part of a larger parcel which was originally patented to Benjamin Turner (Exhibit 1), and by meane conveyances (Exhibits 2, 3, & 4), title passed to Van Dyke and his wife.

Chappells acquired record title to their real property by warranty deed recorded February 27, 1988 (Exhibit 19). The Chappell property was acquired from Mr. Chappell's parents (T.102). The Chappell property is described as follows:

> Commencing at the Northeast corner of the Northwest quarter of the Southeast quarter of Section 9, Township 28 South, Range 3 East, Salt Lake Base and Meridian, thence South 14.5 rods; thence West 48 rods; thence North 14.5 rods; thence East 48 rods to beginning.

The parcel of real property in dispute is a strip running the full width along the north portion of the Chappell property. A 1987 survey, completed by Rodney K. Torgersen (Exhibit 17), (T.84 & 85), defines the disputed parcel as the following:

> Beginning at the northeast corner of the northwest quarter of the southeast quarter of Section 9, Township 28 South, Range 3 East, Salt Lake Base and Meridian, running thence West 789.6 feet; thence South 14.5 feet; thence South 89°45'04" East 789.6 feet; thence North 25 feet to the point of beginning.

Exhibit 17 locates the property with a red grid having corners marked C-A-B-D. The total area of the disputed parcel is less than one-half acre.

An old fenceline marks the south boundary of the disputed parcel (Line D-B of Exhibit 17). Van Dyke claims to this fenceline. Chappells claim to the boundary line (Line C-A of Exhibit 17) north of the fence consistent with their deed and the survey.

Van Dyke and his predecessors in title have had the continuous use and occupancy of the real property north of the old fenceline (T.19-24). Likewise, Chappells and their predecessors in title have had the continuous use of the property south of the fence (T.103 & 125-130).

United States government surveys were completed with

reference to Section 9, generally, in 1876 (T.87 & 135) (Exhibit 22), 1935 (T.135) (Exhibit 23), and again in 1966 (T.135) (Exhibit 24). Torgersen had the benefit of those three government surveys, having obtained and utilized original field notes and surveys from the Bureau of Land Management (T.134 & 135). Torgersen held bachelor and master degrees in engineering from Brigham Young University and the University of Utah, respectively, and held both engineering and surveyor licenses from the State of Utah (T.84 & 133). He had pursued his profession since 1978 (T.133). His primary area of work was in Wayne County (T.134). Torgersen had completed a survey for property owned by Max Chappell (T.134) which adjoined Chappells to the west (T.109 & 110). Torgersen also did survey work with reference to a parcel in the west half of Section 9 in 1981 (T.136). Torgersen completed the survey for Chappells on June 13, 1987 (T.136), after the dispute between Chappells and Van Dyke had developed (T.118).

The Torgersen survey established the boundary lines of the Chappell property on the ground, consistent with their record title, without problem and without uncertainty (T.148). He utilized the three prior official government surveys completed in 1876, 1935 and 1966 (T.147). The 1876 survey reflected the establishment of a rock monument at the east quarter corner of Section 9 (T.143). The 1935 survey

remonumented that point with a brass cap, examined by Torgersen (T.143 & 144). The 1966 survey remonumented the corner of Sections 17, 16, 20, and 21, with a brass cap (T.92). The 1935 survey remonumented the corner of Sections 9, 10, 16, and 15 (T.93). Brass cap monuments were also placed by the 1966 survey at the corner of Sections 8, 9, 17, and 16 (T.95), and at the west quarter corner of Section 9 (T.95 & 96). Witness markers were set by the 1966 survey adjacent a paved roadway to remonument the corner of Sections 4, 5, 8, and 9 (T.96 & 97). A brass cap set in 1935 marked the corner of Sections 3, 4, 9, and 10 (T.97).

Torgersen found each of the monuments set by the prior official surveys (T.136 & 137). He found all monuments to be consistent with the ancient 1876 monument at the east quarter corner of Section 9 (T.147). Torgersen also expressed the opinion that the result of remonumenting based upon old fence-lines produced correct results (T.148). He also expressed the opinion that the fenceline westward across the valley, at the point where is left the west quarter corner of Section 9, was indeed on the very center of that section because of the existence of a brass cap at that location (T.150). Torgersen found all monuments to be well set, good, durable, and undisturbed (T.151). He stated without qualification that the center line running east and west through Section 9 was in fact

the north boundary of the Chappell property (T.151).

Torgersen examined the deeds of Van Dyke and Chappells, and noted that both deeds had a point of beginning at the 16 corner of Section 9 (half way between the center of Section 9 and the east quarter corner of Section 9) (T.141). Furthermore, Torgersen employed the same point of beginning in his survey as that of the deeds of the parties (T.142).

The testimony of Torgersen, and the survey completed by him, was not disputed by Van Dyke.

Van Dyke never had his property surveyed (T.33). He did not consult any information from the 1876, 1935 or 1966 government surveys (T.33). Van Dyke never inspected any section corner, brass cap or other survey monument, and never employed another to do so on his behalf (T.33 & 34). Van Dyke offered no evidence that any irregularity existed in his record chain of title or the record chain of title of Chappells.

Three witnesses discussed the origin of the old fence. Van Dyke was familiar with the fence since his youth (T.18). He was 78 years of age at the time of trial (T.17). The old fence was originally constructed of poles (T.19), but had later been replaced by a net wire fence, using the same alignment (T.22). Van Dyke offered no evidence regarding the original construction of the fence or its original purpose, although he stated that the net wire reconstruction was employed to control

livestock (T.19, 21, 22).

LaVerl Torgersen, called as a witness for Van Dyke (T.41), had also been familiar with the fence during his 78 years (T.42). He confirmed that the original fence was constructed of poles (T.42), and agreed that the net wire replacement was utilized to control sheep (T.44). He indicated that there had been some problem with sheep entering upon the property now owned by Chappells (T.47. 48, 49). However, LaVerl Torgersen offered no testimony concerning the construction of the original pole fence.

Glen Sherman Chappell, then 80 years old, the father of Defendant Marion Chappell, testified (T.125). He stated that the Chappell property was not used until 1932 (T.126), but that year a fence was constructed to protect a field of barley (T.127). He explained that the 1932 fence was the same as the one in dispute (T.128). He also clarified the situation with reference to the fence prior to that date. He stated that the old pole fence had been constructed about 1911 by his father and Ben Turner (T.130 & 131). He pinpointed the eastern terminus of the old pole fence at a point which was four or five rods east from the west boundary of the Chappell property (T.131). The 1932 fence was extended to control livestock (T.129). He described the alignment of the extended fence as angling "off just like the rest of the fence." (T.132)

Van Dyke discussed an irrigation pipeline which had been constructed across his property. He stated that he was approached by an irrigation group in 1972 (T.30). Permission was requested to install a sprinkler irrigation line across his property, and he granted permission by giving a written easement (T.31). He explained that the pipeline was installed on a line parallel to the old fence and four or five feet north of the fence alignment (T.31). Van Dyke also claimed that he was the only land owner in the area who was approached for an easement (T.32). LaVerl Torgersen, who testified for Van Dyke, stated that he was the "ramrod" for the sprinkler project, that Van Dyke had indeed granted an easement for both the pipeline and a storage pond (T.46), and that it was his determination that Van Dyke owned the property where the line was installed (T.47). LaVerl Torgersen stated that the pipeline was installed six feet north of the old fence (T.47). Van Dyke did not offer into evidence any written easement for the pipeline.

Chappells called Colleen Brinkerhoff, Deputy Treasurer/ Recorder for Wayne County (T.98). She had held that position for eight years, with primary duties of maintaining real property records and documents (T.99). She testified that she had searched the real property records of Section 9, Township 28 South, Range 3 East, and in particular the real property owned by Van Dyke (T.99). Her search was completed the day of

trial (T.99), and extended back to the year 1950 (T.100). She searched the tract index and the grantor/grantee index, doing so twice with reference to each index (T.100). Her search did not reveal any recorded easement for the pipeline as claimed by Van Dyke (T.100).

Paul Pace, County Director for the ASCS office, called as a witness by Van Dyke, explained that he had the responsibility to determine the nature of various crops planted in the area (T.57 & 58). He stated that aerial photographs were employed to determine crops and their acreages (T.58). Pace discussed three such aerial photographs, one taken in 1980 (T.59) (Exhibit 14), another taken in 1966 (T.66) (Exhibit 15), and a third taken in 1950 (T.68) (Exhibit 16). Pace explained that he could identify the properties of the parties, and various fencelines, from the photos (T.61-63). Pace was then questioned as to the distance, going westward, which was traversed by the general fence alignment between the two properties of the parties. The Court allowed Pace, using a ruler, to enter a straight line on the photograph, the intent being to show that the old fence between the property of Van Dyke on Chappells bore similar alignment to what appeared to be a fenceline some one or two miles to the west (T.64 & 65). Pace identified general fence alignments as depicted by Exhibits 15 (T.67) and 16 (T.68).

On cross examination, Pace acknowledged that he had not taken the photos, that the elevation of the plane when the photos were taken was not known, and that the photos were scaled down to reflect a plane elevation of 3000. That equated to a one inch distance on the photo representing 660 feet on the ground (T.81 & 81). Pace also acknowledged that he was not an engineer or surveyor, that his college degree was in economics, and that although he had done some surveying, he had never surveyed the fence at issue, nor had he ever surveyed any portion of the general fence alignment extending westward across the valley which he claimed was detectable in Exhibits 14, 15, and 16 (T.70). Mr. Pace drew an orange line on Exhibit 14, and then acknowledged, using his ruler, that the orange line appeared to be ten feet north of the east/west center line of Section 9 (T.75). Pace further admitted that he had not examined any brass cap survey markers in the area (T.76), and then admitted that Exhibit 14 did not reveal a fenceline extending westward from the subject property for an undisclosed distance (T.76 & 77). Pace also admitted that Exhibit 15 did not disclose a fenceline west of the subject property for a distance of one quarter of a mile (T.77 & 78). Similar comment was forthcoming from Pace with reference to Exhibit 16 (T.78, 79 & 80). Finally, and of most significance, Pace acknowledged that the general line reflected by Exhibits 14, 15 and 16,

which extended westward across the valley, could be either north or south of the east/west center line of Section 9 (T.80), that the orange lines he entered on the photographs, intended by counsel for Van Dyke to be in direct alignment with the old fence, could be either north or south of the east/west center line of Section 9, an undetermined distance (T.82), and that the orange line may not be a true east/west course, with at least a margin of error of ten degrees south or ten degrees north (T.83).

The dispute between the parties arose in 1987. Van Dyke stated that Chappells approached him for permission to construct a corral on the disputed parcel (T.26), permission being granted (T.27). After the corral was built, Chappells built a shed near the corral without Van Dyke's permission, and he asked that the shed be removed, Chappells complying (T.28). Marion Chappell testified that Van Dyke knew the true boundary line as of 1987 (T.107, 117 & 118), and explained that the corral was intersected through the middle by that line (T.107).

Van Dyke stated his first knowledge of a boundary line problem followed the Max Chappell survey in the early 1980's (T.24). Chappell recalls the problem being discussed in 1982 or 1983, with Max Chappell advising Van Dyke of the situation (T.117).

The disputed parcel of property had never contained

irrigated crops, although some grass appeared on the west end, with hillside and sagebrush to the east (T.36). Van Dyke never constructed a building on the disputed parcel (T.36).

SUMMARY OF ARGUMENTS

A Marshalling of the Evidence to Support Van Dyke's Position Shows That The Findings are Clearly Erroneous

Neither party offered evidence to show the purpose of the original pole fence. However, the evidence of all witnesses shows that the use of the fence, and its later repairs and extensions, each had the exclusive purpose of livestock control.

Van Dyke offered no evidence to show any dispute between the parties, or their predecessors in title. The only dispute developed in the 1980s after the Torgersen surveys reflected the true boundary line.

All deeds and other instruments of record were without irregularity. No uncertainty appeared from those instruments, and Van Dyke made no claim otherwise.

The Torgersen survey of 1987, utilizing data and monuments from three prior official government surveys, was completed with precise and accurate results. The validity and accuracy of that survey was not questioned by Van Dyke.

Three surveys completed by Torgersen, and the three prior official government surveys, were each consistent with one another.

Remonumenting of corners during either the 1935 survey, or the 1966 survey, did not cast any uncertainty as to the true boundary line between the parties.

The Fence Was Utilized For Livestock Control

The purpose for the original of the pole fence was unknown. Later repairs and extensions were completed for livestock control. All evidence showed that the fence had been used exclusively for livestock purposes.

No Ojective Uncertainty Regarding The True Boundary Line Was Demonstrated

Van Dyke made no claim that the deeds and other instruments of record created any doubt or uncertainty. The Torgersen survey was reliable and accurate. Van Dyke offered no conflicting survey evidence. No boundary line dispute between the parties, or their predecessors in title, had ever occurred. Six surveys, three private, and three official, were inherently consistent. Those six surveys were consistent with the descriptions in the respective deeds of the litigants. Some remonumenting during the 1935 and 1966 surveys did not

produce any error or inaccuracy, and did not cast doubt upon the location of the true boundary line.

ARGUMENT

POINT I

A Marshalling of the Evidence to Support Van Dyke's Position Shows That The Findings are Clearly Erroneous

The lengthy factual statement, above, is intended to meet the requirement of marshalling the evidence to support the findings of the Court below, and then demonstrate those findings to be clearly erroneous. Utah R. Civ. P. 52(a); State v. Walker, Utah, 743 P.2d 191 (1987); Cambelt Int'l Corp. v. Dalton, Utah, 745 P.2d 1239 (1987). Summarizing that evidence to support Van Dyke's position, the following is noted:

a. A pole fence was erected, probably in 1911, by Benjamin Turner, a predecessor in title to Van Dyke, and George Chappell, a predecessor in title to Chappells. No evidence was presented as to the purpose of that initial fence construction.

b. In the 1930s, the fence was rebuilt with net wire, and extended, for purposes of livestock control.

c. Throughout the history of the fence, its sole

purpose has been to control livestock.

d. Van Dyke and his predecessors had the continuous occupancy of the property north of the fence, and Chappells and their predecessors had the occupancy south of that line.

e. No dispute or argument occurred with reference to the fence or the true boundary line until surveys in the 1980s. The record is absolutely silent on that point.

f. In 1972, Van Dyke granted a pipeline easement across a portion of the property, although the pipeline was never surveyed, and no written easement appears of record. Its exact location is uncertain. Chappells were not approached for the easement.

g. ASCS aerial photos were admitted, but they prove nothing. They reveal the topography of the area, generally, but lack the precision to establish a true boundary line.

h. A private survey of a parcel adjoining the property of Chappells to the west completed in the early 1980s suggested the true boundary line to be north of the old fence. That survey prompted Chappells to construct a corral and shed on the disputed parcel, but after objection by Van Dyke those improvements were removed. Chappells followed up with a survey of their own dated June 13, 1987. That survey confirmed the

true boundary line to be north of the old fence and on the east/west center line of Section 9.

More striking than the meager evidence offered by Van Dyke, is a review of the lack of evidence to support his claim:

a. No claim was made that the deeds and instruments of record reflect uncertainty.

b. Van Dyke never surveyed his own property, nor any other property in the area.

c. Van Dyke never consulted any survey monuments or other data.

d. The only dispute in the history of the fence is Van Dyke's objection to the true boundary line as established by Chappells' survey.

e. Van Dyke made no showing that the 1987 survey was other than precise and accurate.

The burden of proof to establish boundary by acquiescence is upon the party claiming under that theory. That burden of proof includes the element of objective uncertainty Halladay v. Cluff, Utah, 685 P.2d 500, 506 (1984). Van Dyke made no showing that the 1987 survey completed by Torgersen was inaccurate in any respect. He made no showing that any prior survey was inaccurate in any respect. He could not demonstrate any inconsistency among the various surveys discussed. No evidence was presented to show that any survey

marker was inaccurately located. No conflicting survey was offered by Van Dyke, and neither Van Dyke nor any of his predecessors in title had ever made an effort to determine the true boundary line between the properties in question. Van Dyke made no attack upon his chain of title, the deed which vested him with title, nor the deed which vested title in the Chappells. All deeds and other instruments of record were without irregularity, and none presented any element of uncertainty in either title.

A boundary dispute is not proved by a mere difference of opinion and uncertainty is not proved by a mere lack of actual knowledge regarding a boundary line Madsen v. Clegg, Utah, 639 P.2d 726 (1981); Glenn v. Whitney, Utah, 109 P.2d 257 (1949).

Under circumstances where reasonable survey information is available, litigants are expected to locate their true boundary lines by those means. Halladay, supra 504.

In order to prevail, a party claiming boundary by acquiescence must show that "some objectively measurable circumstance in the record title or in the reasonably available survey information" prevented him from being reasonably certain about the true location of a boundary. Halladay, supra 505. In the case at bar, the ancient 1876 monument at the east quarter corner of Section 9 was available for a reference point

at all times. That monument was readily located in 1935, again in 1966, and at least three times during the 1980s by Torgersen. The fence at issue in this cause was historically used as a livestock barrier. No dispute ever existed between any predecessors in title to the parties. The only dispute disclosed by the evidence occurred after Torgersen correctly surveyed the Chappell property. The claim of boundary by acquiescence must fail if there is a clear record title supported by survey information Roderick v. Durfey, 746 P.2d 1186 (Crt. of App. 1987).

The fact that the fence in question has existed since near the year 1911, and the acquiescence by the parties and their predecessors in the fence as a dividing line, will not, in and of itself, permit an implication or presumption that the fence was initially constructed to resolve dispute. Such passive facts will not imply the resolution of a dispute concerning an unknown or uncertain boundary. Mere elapse of time proves nothing. Leon v. Dansie, Utah, 639 P.2d 730 (1981); Madsen, supra.

The findings adopted by the Court (R.55-62), can now be examined.

Finding No. 5 (R.56) begins with the following statement:

> From the control point believed by the original owners who built the fence to be on the true boundary...

That statement is contrary to any evidence received by the Court. The original pole fence was in existence at the time of Van Dyke's earliest memory, and was in existence at the time of the earliest memory of his other witness, LaVerl Torgersen, who testified concerning the fence. The only evidence regarding the construction of the original pole fence was offered by Chappells' witness, Glen Sherman Chappell, who testified that the fence was built in 1911 by his father (George Chappell) and Benjamin Turner, a predecessor in title to Van Dyke. No evidence indicated the purpose for the construction of the original pole fence. However, all witnesses agree that the fence has been used continuously to control livestock.

The final sentence of Finding No. 5, (R.56 & 57) states that "the fence continues on a straight and virtually due west course beyond the properties of Plaintiff and Defendants, dividing lands of other proprietors on the north and south, respectively." That finding is an error in two respects. First, the survey completed by Torgersen, which was not questioned, shows the fence with a bearing of south, 89°46'04" east. Furthermore, the aerial photographs, Exhibits 14, 15, & 16, clearly reflect that a fenceline is not visible to the immediate west of the properties in question. If indeed the aerial photographs reflect a fenceline at all, it is only

observable in the those photographs after a distance of approximately one-quarter mile west of the subject properties. Van Dyke's own witness, Paul Pace, admitted as much.

Finding No. 6, (R.57), reports the reconstruction of the fence with net wire in the 1930's. However, that finding omits the undisputed fact that the net wire replacement was completed to retain sheep then owned by Jacob White.

Finding No. 7 (R.57), is contrary to the evidence. It reports that the old fence at issue is in alignment with fences running to the west for a distance of three miles. No such fence existed for one-quarter of a mile immediately west of the subject properties, and thereafter, any existing fenceline was not specifically located. No survey had been completed of the westerly fences, and Van Dyke's own witness, Paul Pace, admitted that he could not determine the location of those westerly fences with any degree of accuracy based upon his photographs (Exhibits 14, 15 & 16). Furthermore, the 1987 survey reported a brass cap monument at the west quarter corner of Section 9, that brass cap being set on the very fenceline which Van Dyke claims is on the same course as the old fence in dispute. The Torgersen survey places the westerly fence at that point as being on the true east/west center line of Section 9, the same line as the north boundary of the Chappell property. Accordingly, that information suggests that the westerly fences

running three miles across the valley are in fact on the true boundary line, consistent with the Chappell north boundary, and inconsistent with the old fence in question.

Finding No. 9 (R.57) states that no stone monuments referenced in the government surveys were viewed by Van Dyke, the Chappells or other residents of Lyman, Utah. That statement is true, but immaterial. It omits the significant evidence by Van Dyke himself that he made no effort to have his property surveyed, and made no effort to locate any survey monuments of any nature. Indeed, Van Dyke's testimony clearly reflects that he places no reliance upon any survey data.

Finding No. 11 (R.58) is another half truth. The east quarter corner of Section 9 was set with a stone monument in 1876, remonumented with a brass cap in 1935, and noted and utilized by all surveys since that time. Furthermore, the remonumented corners, and quarter corners, completed in 1935 and 1966, were all consistent with that 1876 monument which has continuously been in place. Furthermore, Van Dyke has made no showing that the remonumenting of any point was done in error. Of greater significance, Van Dyke makes no showing that any remonumenting cast any doubt upon the true boundary line.

Finding No. 12 (R.58) contains two blatant errors. That finding begins with the statement that "stone monument references not being in place" the 1935 and 1966 surveys relied

upon fencelines. The undisputed evidence reflected that some remonumenting of corners was completed in 1935, and again in 1966, but other survey monuments were intact and utilized. Specifically, the ancient monument at the east quarter corner of Section 9, erected in 1876, remained intact at all times. The final sentence of Finding No. 12 repeats a conclusion which is contrary to the evidence. It state that an east/west fence, at the west quarter corner of Section 9, is aligned with the old fence at issue. That fenceline contained a brass cap at that location. That brass cap is precisely on the east/west center line of Section 9, and that line is the very north boundary of the Chappell property. The 1987 survey confirmed as much, again proving that the 1966 remonumenting was extremely accurate.

Finding No. 13 (R.58 & 59) states that the rock monument, set in 1876 at the east quarter corner of Section 9, would be difficult to locate. The implication is that Van Dyke, or one of his predecessors in title, could not determine the true boundary line of the properties because of the inability to locate that monument. The finding carefully omits the fact that no evidence was presented that anyone had attempted to locate that monument, and indeed, Van Dyke acknowledges that he never made such an effort. That finding is assailable also from the fact that Mr. Torgersen, the crew of the 1966 survey,

and the crew of the 1935 survey all availed themselves of that monument.

Finding No. 14 (R.59) states that the value of the lands divided by the fence were of such nominal value as to not justify a survey. That statement is contrary to the evidence. No evidence was presented as to the value of the land when compared with the value of a survey. That finding is also misleading because three government surveys existed which could be consulted, and Torgersen made at least three surveys of the land in the 1980s. The finding is further objectionable because no evidence was presented that anyone made an effort to have the property surveyed and then abandoned that effort due to economic considerations.

Finding No. 15 (R.59) reports that the parties and their predecessor acquiesced in the old fence as a boundary line. No evidence was presented to support that finding. The only evidence regarding acquiescence was that the fence was used by the respective owners for livestock control. Acquiescence in a fence as a boundary line is much different than acquiescence in a fence for livestock control.

Finding No. 16 (R.59) is simply not accurate. It reports that "the expert witness" had not surveyed a fence-line since 1980 which corresponded with a true boundary line. However, 1987 survey reported that fencelines on the south and

west of Section 9 were indeed aligned with the true boundary lines.

Finding No. 18 (R.59 & 60) states that individuals with property interests in the area have recognized the old fence as a property line. No witness from either side offered testimony to that effect. All witnesses who discussed the fence concurred that it was a livestock barrier. Finding 18 also reports that the pipeline runs across the property of Chappells. The pipeline was never surveyed, and its true location is unknown. Evidence as to its precise location was conflicting. However, the location of the pipeline is immaterial. The fact that a stranger to title believes one party or another to be the true owner is not determinative of a boundary dispute.

Finding No. 19 (R.60) states that Chappells recognized Van Dyke's ownership of the disputed parcel. That is contrary to Van Dyke's own evidence. Van Dyke offered Exhibit 13, a letter from Chappell, containing this statement:

> I honestly thought I owned the property on my deed's description.

Chappells did remove improvements upon the disputed parcel, after arguing with Van Dyke, but then immediately had the property surveyed in an effort to put the problem to rest.

Finding No. 20 (R.60) is inaccurate and misleading.

It reports that reliable survey information was not available to the parties, or their predecessors, until 1966. That assertion is contrary to the evidence which reflected a stone monument at the east quarter corner of Section 9 from 1876 until 1935, and a brass cap at that precise point from 1935 to the present time. Furthermore, the finding is a half truth because neither Van Dyke, nor his predecessors in title, made any attempt to obtain any survey information, and Van Dyke himself acknowledges that he made no effort to locate any survey monument. The element of objective uncertainty requires consciousness and knowledge.

Finding No. 21 (R.60 & 61) is blatantly inaccurate and contrary to the evidence. That finding reports "substantial uncertainty concerning the location of .... monuments for Section 9." The evidence was precisely to the contrary. It is true that corners were remonumented in 1935 and 1966, but there is no evidence of any uncertainty. Furthermore, all existing monuments, regardless of the date of placement, are consistent with the most ancient marker set in 1876 at the east quarter corner of Section 9. And again, Van Dyke did not avail himself of any claimed uncertainty in survey monuments. The balance of Finding No. 21 engages in a general statement that because of monuments being destroyed, roughly marked, not recognizable, or difficult to find, that uncertainty exists, but that uncertainty

is never demonstrated. The simple fact of the matter is that the 1966 government survey precisely reestablished certain corners, those corners were consistent with ancient monuments in place, and adequately allowed an uncontroverted survey to be completed in 1987. The final sentence of Finding 21 is lacking in any support in the evidence. That sentence reports that professional surveyors, relying upon fencelines, aligned a fence which extends west of the old fence at issue. There is absolutely no evidence to show that any surveyor made an effort at such an alignment. Furthermore, no such fence exists, as admitted by Paul Pace, Van Dyke's own witness, and the 1966 and 1987 surveys confirm the east/west fence at the west quarter corner of Section 9 to be exactly at the center of that Section.

Finding No. 22 (R.61), is likewise without support in the evidence. That finding states that historical surveys were inconsistent with one another, and that defective monumentation created doubt as to the true boundary lines of the properties at issue. The evidence clearly shows that each government survey, 1876, 1935, and 1966, is consistent with the others. The three surveys completed by Torgersen are each consistent with one another, and each is consistent with the prior government surveys. No inconsistency between any two surveys was demonstrated by Van Dyke. The Torgersen survey of 1987, utilizing and relying upon date from his own prior surveys, and

from the three historical government surveys, reflects great precision and accuracy, and total consistency. The remonumenting completed in 1966, which Van Dyke claims creates uncertainty, demonstrates the opposite. That remonumenting was good engineering and resulted in brass caps being placed at the precise locations where they ought to be. Van Dyke has not demonstrated that any survey monument, regardless of its date, is inaccurate. All of the survey data confirms that the north boundary line of the Chappell property is the east/west center line of Section 9.

The recent case of Bountiful v. Riley, 125 Utah Adv. Rep. 15 (December 20, 1989), debunks the claim of Van Dyke that somehow a remonumenting of some corners by the 1966 official resurvey created objective uncertainty in the boundary at issue. In Bountiful, monuments of an 1874 survey reestablished appropriate monuments which were found to be controlling. The case "affirmed the principle that official surveys are presumed to be accurate." P.16.

The case of Hudson v. Erickson, Wyo., 216 P.2d 379 (1950), quoted with approval in Bountiful, supra, held that an official resurvey would control over an ancient fence where monuments of an earlier survey had disappeared.

The instant case is stronger on the facts than either Bountiful or Hudson since some monuments existed from each of

the official surveys completed in 1876, 1935, and 1966.

POINT II

The Fence Was Utilized For Livestock Control

The only use made of the subject fence was for livestock control. That use is continuous since the earliest memory of the witnesses. Nothing is known about the intent of the persons who initially constructed the pole fence, but the burden is upon Van Dyke to show that initial construction was undertaken to resolve a boundary dispute. Absent that showing, he cannot prevail. The historical duration of the fence does not meet the burden of proof. Ringwood v. Bradford, Utah, 269 P.2d 1053 (1954); Glen, supra.

The Court in Glen, supra, at 1054, stated this concept in the following language:

> The theory under which a boundary line is established by long acquiescence along an existing fenceline is founded on the doctrine that the parties erect the fence to settle some doubt or uncertainty which they may have as to the location of the true boundary, and then compromised their differences by agreeing to accept the fenceline as the limiting line of their respective lands. The mere fact that a fence happens to be put up and neither party does anything about it for a long period of time will not establish it as the true boundary.

POINT III

No Objective Uncertainty Regarding The True Boundary Line Was Demonstrated

The absence of any objective uncertainty has been discussed at length above. That element is totally missing in the evidence. Van Dyke could point to nothing in the record chains of title, nor in any survey, which created doubt or uncertainty as to the true boundary line between the properties at issue. The instant case parallels the facts presented by Stratford v. Morgan, Utah, 689 P.2d 360 (1984). In Stratford, it was a simple contest between an ancient fence and a recent survey. Plaintiffs claimed to the fenceline, in the face of a contrary survey. In reversing a lower Court judgment for the plaintiffs, this Court stated, at 364:

> Plaintiffs in this case failed to provide any objective or subjective evidence of dispute or uncertainty. The trial judge found, supported by the evidence, that the parties received valid deeds containing metes and bounds descriptions of their respective parcels, that said deed descriptions were compatible insofar as they described the boundary line between the properties, that no dispute ever arose with respect to plaintiffs' fence or the true boundary line until shortly before this litigation began, and that a survey prepared at plaintiffs' request based upon the parties' respective deed descriptions established the true

location of their common boundary to be a significant distance south of plaintiffs' fence line. These facts do not show any dispute or uncertainty as measured by Halladay.

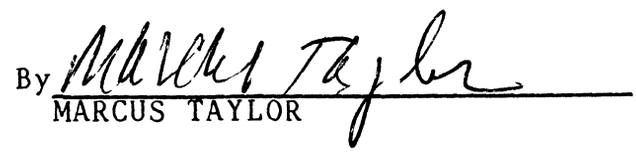
CONCLUSION

Van Dyke failed to meet his burden of proof. He did not show dispute or uncertainty concerning the true boundary line. The old fence in question was a livestock barrier control. No objective uncertainty was demonstrated from any source. The true boundary line was clearly and precisely established both by instruments in the respective chains of title, and by a series of surveys, all consistent with one another, the most recent survey having been completed in 1987. Van Dyke offered no conflicting survey, nor did he demonstrate that the 1987 survey, or any prior survey, contained any error or inaccuracy.

Chappells, therefore, respectfully request that the Court reverse the decision of the trial Court, and remand the case with directions that judgment be entered against Van Dyke on his complaint, and in favor of Chappells quieting title in them to the real property described in their deed of record.

DATED this 10th day of January, 1990.

LABRUM, TAYLOR & BLACKWELL

By 
MARCUS TAYLOR

MAILING CERTIFICATE

I herewith and hereby certify that a copy of the foregoing BRIEF OF APPELLANTS was placed in the United States mail at Richfield, Utah, with first-class postage thereon fully prepaid, this 10th day of January, 1990, addressed to Tex R. Olsen, OLSEN, McIFF & CHAMBERLAIN, P.O. Box 100, Richfield, Utah 84701.

MARCUS TAYLOR

ADDENDUM

FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE SIXTH JUDICIAL DISTRICT COURT OF WAYNE COUNTY,

STATE OF UTAH

* * * * * * * * * * * * * *

WELBY J. VAN DYKE, Plaintiff, -vs- MARION GLEN CHAPPELL and DEMA RUTH CHAPPELL, Defendants.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 1096

* * * * * * * * * * * * * * * * *

The above-entitled matter came on regularly for hearing before the Honorable Don V. Tibbs, District Judge, sitting at Loa, Wayne County, State of Utah. The matter was heard upon the Complaint of the Plaintiff seeking to quiet title to real property in Wayne County, State of Utah and upon the Answer and Counterclaim of Defendants. The Plaintiff appeared in person and with his attorney, Tex R. Olsen, of Richfield, Utah. The Defendants appeared in person and with their attorney, Marcus Taylor of Richfield, Utah. The Court having heard the sworn testimony of witnesses and having examined the exhibits introduced into evidence and having heard the arguments of counsel and being fully advised in the premises, does now make the following:

RICHFIELD, UTAH 84701

FINDINGS OF FACT

1. The Plaintiff is the owner of real property particularly described hereinafter located in Wayne County, State of Utah, the legal boundary of which is the subject of this

action. Plaintiff's property is bounded by an ancient fence o the South.

2. The Defendants are the owners of real property locate in Wayne County, State of Utah, south of the Plaintiff's propert and bounded on the north by the common ancient fence between th respective tracts of Plaintiff and Defendants.

3. Defendants caused their property to be surveyed ir June of 1987 and their surveyor concluded that the ancient fence was not on the record boundary between the properties but encroached upon Defendants' property causing a dispute which resulted in this litigation.

4. The evidence is both clear and uncontradicted that the fence between the parties was constructed of permanent cedar posts and poles prior to the year of 1911. The fence was built as a joint fencing project by Benjamin Turner, a predecessor in title of the Plaintiff and by George Chappell, a predecessor in title of the Defendants.

5. From the control point believed by the original owners who built the fence to be on the true boundary, the fence is extended to the east and separates properties on the south of the fence from properties on the north of the fence; the fence is likewise extended to the west beyond the property of the Defendants and divides properties owned by others on the south of the fence and the Plaintiff who owns property on the north. The fence continues on a straight andvirtually due west course beyond the properties of Plaintiff and Defendants, dividing lands of

other proprietors on the north and south, respectively.

6. The fence in dispute was repaired and improved b replacing part of the poles with net wire in the year of 1933 o 1934. Plaintiff's predecessor in interest, Benjamin Turner furnished the materials to go into the fence and the owners o the property south of the fenceline furnished the labor for th fence repair and neither the alignment nor the location wa: changed.

7. The east-west extension of the fence between the parties has remained in alignment with fences to the west on the quarter section lines for a distance of three miles or more.

8. The original Land Office Survey for property including Section 9, Township 28 South, Range 3 East, Salt Lake Base and Meridian (the section in which property of Plaintiff and Defendants is located) was performed on contract for the U. S. General Land Office in the year of 1876. Stones were reported to have been placed on section corners and quarter corners of Section 9.

9. Neither the Plaintiff, the Defendants nor the residents of Lyman, Utah testifying in the matter have ever seen any of the stone monuments referenced in the Land Office Survey notes.

10. The general area was resurveyed in the year of 1935, approximately 24 years after the fence was established and resurveyed again in the year of 1966. Both surveys were conducted for the Bureau of Land Management of the United States

Government.

11. The field notes of the 1966 survey relied heavil upon the previous survey of 1935. The field notes of that surve show that none of the referenced stone monuments were in place o either the section corners, or the south quarter corner, the wes quarter corner or north quarter corner of Section 9.

12. The stone monument references not being in place, th General Land surveyors in 1935 and 1966 relied upon th fencelines dividing the land for the purpose of setting ne survey monuments. Commencing at the southwest corner of Sectio 9, the corner was set at the intersection of two fences and continuing north the survey followed the fenceline to a point where it intersected an east-west fenceline, which fence corner was used to set the west quarter corner. The east-west fence used to establish the west quarter corner of Section 9 is the same fenceline which is in alignment with the boundary fence between Plaintiff and Defendant.

13. A surveyor appearing as an expert witness for Defendants found no original monument referenced by the 1876 survey team except a volcanic rock monument set at the east quarter corner of Section 9. This rock monument was in the hills a half mile east of the property of Plaintiff. The rock monument would have been difficult if not impossible for laymen to find without surveying instruments since the rock monument would blend in with the surroundings; also the hill country would distort measured distances since the angles of all hills must be taken

into account in reaching a specific distance.

14. At the time the fence was built in 1911 or shortl prior thereto, the lands divided by the fence were of nomina value and several times the value of the land in dispute in thi case would not have justified the employment of a surveyor.

15. The parties to this action and their predecessor: have acquiesced in the boundary line fence for a period of mor than 77 years; there was more than a 24-year period o acquiescence by adjoining landowners in the boundary line fence between its construction and before a second general land survey was made in the year of 1935.

16. Numerous tracts of land and their boundary fencelines have been surveyed in Wayne County, Utah by the expert witness testifying at trial. He had not surveyed a fenceline which was constructed accurately upon the deed lines since he commenced his surveying profession in the year of 1980.

17. The Plaintiff and his predecessors had continually used the property on the north of and up to the boundary fence in their livestock operation.

18. Individuals with property interests in the vicinity have recognized the boundary fence as the property line between the parties. In the year of 1972 irrigators for the Lyman Pressurized Irrigation System contacted the Plaintiff to secure an easement for a pond and pressurized pipeline upon and across Plaintiff's property. A part of the pressurized pipeline runs immediately north of the boundary fenceline and upon property now

claimed by Defendants.

19. In years prior to 1987, the Defendants themselves have recognized Plaintiff's ownership in the property immediately north of the boundary fence. In the year of 1984 Defendants secured permission from the Plaintiff to build a corral upon Plaintiff's property north of and bounded on the south by the fence and also removed most of the improvements they had placed upon the land with the consent of Plaintiff when requested to do so and paid Plaintiff rent for use of the land north of the fence.

20. Neither the Plaintiff nor the Defendants or their predecessors in interest had any knowledge that the fence was not on the true location of the boundary line until approximately the calendar year of 1984, a period of 73 years after the erection of the boundary line fence; reliable survey information was not available to the parties or any of their predecessors until after the survey conducted in the year of 1966 by the Bureau of Land Management and approved in the year of 1968, a period of more than 55 years since the construction of the boundary fence.

21. Field notes from the 1935 survey and the 1966 survey indicate substantial uncertainty concerning the location of section and quarter section monuments for Section 9. The notes show that monuments were either not established or if established were destroyed; or were erected or roughly marked in such a way that they could not be recognized or located unless they were surveyed in from far-distant reference monuments and even those

were either not physically in place or extremely difficult t find. Field notes demonstrate there was not only uncertainty s far as laymen were concerned but there was professiona uncertainty concerning established monuments from whic measurements could be made. Because of many uncertainties, professional surveyors actually relied upon fencelines t establish locations and, in particular, to establish and align a fenceline which extended west of the boundary fence at issue.

22. While surveys were in fact conducted historically they were not consistent with one another and their monumentation was such that it was both obscure and left reasonable if not great doubt as to the actual on-the-ground location of the property identified in those surveys.

From the foregoing Findings of Fact, the Court now enters the following:

CONCLUSIONS OF LAW

A. The evidence supports a finding that there was objective uncertainty about the correct or true location of boundaries and monuments and those monuments were located in such a way that surveying costs to locate them and build a fence conforming to them would been grossly disproportionate to the value of the land involved and under circumstances where it is not reasonable to expect that the owners, at the time the fence was built about or prior to 1911, would have attempted to locate the boundary on the ground by surveys. The land in question was in a rural if not a wilderness area during at least the first

twenty years after the fence was first established.

B. The fence between the properties of the Plaintiff and Defendants has become a boundary line fence by acquiescence and the Plaintiff is entitled to a Decree Quieting Title against the Defendants in the following-described real property located in Wayne County, State of Utah:

> Commencing at the Southeast Corner of the Southwest Corner of the Northeast Quarter of Section 9, Township 28 South, Range 3 East, Salt Lake Base and Meridian and running thence North 924 feet; thence West 1320 feet; thence South 938 feet, more or less, to the boundary line fence; thence East along the boundary line fence 1320 feet, more or less, to a point immediately South of the point of beginning; thence North to the point of beginning.

And as specifically bounded on the south by the boundary line fence which is the south boundary line of Plaintiff's property and the north boundary line of the Defendants' property.

C. That judgment should be entered against the Defendants of no cause of action upon the Counterclaim of Defendants.

DATED this 7th day of ~~February~~ March, 1989.

DISTRICT JUDGE