

1986

# Mack Halladay v. Madge Cluff : Brief of Respondent

Utah Supreme Court

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S. Rex Lewis; Howard, Lewis & Petersen; M. Dayle Jeffs; Jeffs & Jeffs; attorneys for appellant.

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 860079

IN THE SUPREME COURT OF THE STATE OF UTAH

MACK HALLADAY and MERLE )  
HALLADAY, )

Plaintiffs- )  
Appellants, )

vs. )

MADGE CLUFF, PERRY K. BIGELOW )  
and NORMA G. BIGELOW, )

Defendants- )  
Respondents )

860079-CA  
Case No. 20,318

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BRIEF OF RESPONDENT

---

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL  
DISTRICT COURT IN AND FOR UTAH COUNTY, STATE  
OF UTAH, HONORABLE GEORGE E. BALLIF, PRESIDING

---

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FILED

APR 8 1985

IN THE SUPREME COURT OF THE STATE OF UTAH

MACK HALLADAY and MERLE )  
HALLADAY, )

Plaintiffs- )  
Appellants, )

Case No. 20,318

vs. )

MADGE CLUFF, PERRY K. BIGELOW )  
and NORMA G. BIGELOW, )

Defendants- )  
Respondents )

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BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL  
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IN THE SUPREME COURT OF THE STATE OF UTAH

MACK HALLADAY and MERLE	)	
HALLADAY,	)	
Plaintiffs-	)	
Appellants,	)	Case No. 20,318
vs.	)	
MADGE CLUFF, PERRY K. BIGELOW	)	
and NORMA G. BIGELOW,	)	
Defendants-	)	
Respondents.	)	

PARTIES TO THE PROCEEDING

The caption of this case contains the names of the parties to this proceeding, except that Perry K. Bigelow and Norma G. Bigelow are not parties to this appeal.

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IN THE SUPREME COURT OF THE STATE OF UTAH

MACK HALLADAY and MERLE	)	
HALLADAY,	)	
Plaintiffs-	)	
Appellants,	)	Case No. 20,318
vs.	)	
MADGE CLUFF, PERRY K. BIGELOW	)	
and NORMA G. BIGELOW,	)	
Defendants-	)	
Respondents.	)	

---

BRIEF OF RESPONDENTS

---

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether or not the trial court erred in refusing to disturb its earlier judgment with respect to certain property which was quieted in plaintiffs and from which judgment defendant Cluff did not file a cross appeal.

2. Whether or not the trial court erred in including in its order on remand the following statement: "That all of the claims raised by the defendants against the plaintiffs in Civil No. 53,243 have been decided and are res judicata."

STATEMENT OF THE CASE

Plaintiffs brought this action seeking to quiet title

to certain property shown as Parcel P-M-N-O on Exhibit A attached hereto. Defendant Cluff counterclaimed attempting to quiet title to that same property by virtue of the doctrine of boundary by acquiescence and also to quiet title to Parcel W-X-Y-Z shown on Exhibit A. The trial court quieted title to Parcel P-M-N-O in defendants Cluff and Bigelow and quieted title to Parcel W-X-Y-Z in plaintiffs. Plaintiffs appealed from the court's ruling with respect to the P-M-N-O parcel and defendant Cluff did not file a cross appeal with respect to the court's ruling on the W-X-Y-Z parcel.

On appeal, the Supreme Court reversed the trial court's judgment with respect to the P-M-N-O parcel and remanded the case to the District Court for the entry of a new decree with respect to that parcel. Halladay v. Cluff, 685 P. 2d 500 (Utah, 1984). A copy of the ruling entered by the court upon remand and the order which was entered pursuant thereto are attached hereto as Exhibits B and C respectively.

On this appeal, defendant Cluff alleges the trial court erred in refusing to disturb its prior findings and judgment regarding the W-X-Y-Z parcel because of defendant Cluff's failure to file a cross appeal. Defendant Cluff also contends that paragraph #2 of Exhibit C does not reflect the court's ruling.

#### STATEMENT OF FACTS



Inasmuch as defendant Cluff's appeal is based upon issues of law presented to the trial court on remand, a statement of facts is unnecessary to the resolution of this appeal beyond what has been stated in the preceeding sections.

#### SUMMARY OF ARGUMENT

Plaintiffs' arguments with respect to the first issue presented for review may be summarized as follows:

1. Defendant Cluff failed to file a cross-appeal with respect to the trial court's judgment regarding Parcel W-X-Y-Z and therefore that portion of the court's judgment is not subject to a modification on appeal or on remand from the appeal.

2. In the course of the trial, defendant Cluff conceded that plaintiffs were entitled to Parcel W-X-Y-Z by virtue of the doctrine of boundary by acquiescence and therefore an appeal from the portion of the court's judgment dealing with that parcel would not be appropriate.

3. The opinion of the court in Halladay v. Cluff, supra, does not add a new element to the doctrine of boundary by acquiescence, but merely clarifies prior cases which recognize the element of dispute or uncertainty. Defendant Cluff could have and should have raised that element as a defense to plaintiff's claim to boundary by acquiescence with respect to Parcel W-X-Y-Z if in fact defendant Cluff had a

defense to plaintiff's claim. Defendant Cluff's failure to do so either in the lower court or on the prior appeal, precludes her from asserting that position on this appeal.

4. Defendant Cluff misconstrues the court's instructions on remand. The court reversed the trial court's ruling with respect to Parcel A-B-C-D (which includes Parcel P-M-N-O) and directed that the trial court enter a new decree in conformity with the opinion of the court. The court instructions by no means intimated that the trial court's decree should be modified with respect to Parcel W-X-Y-Z.

With respect to defendant's argument that paragraph 2 of the order attached hereto as Exhibit C should be stricken, it should be noted that that paragraph merely states what the effect of the order would be without that express language. The effect of the court's order without that language would be to preclude defendant Cluff from again asserting claims against plaintiffs with respect to either Parcel P-M-N-O or Parcel W-X-Y-Z. Therefore, there is no reason to exclude paragraph 2 from the court's order.

#### ARGUMENT

##### POINT 1

DEFENDANT CLUFF HAVING ACQUIESCED IN THE JUDGMENT RELATING TO PARCEL W-X-Y-Z AND HAVING FAILED TO FILE A CROSS-APPEAL THEREFROM, THE TRIAL COURT PROPERLY LEFT UNDISTURBED ITS JUDGMENT WITH RESPECT THERETO UPON REMAND FROM THIS COURT.

In this action plaintiffs sought to quiet title to

Parcel P-M-N-O on Exhibit A by virtue of a recorded deed, and also to quiet title to Parcel W-X-Y-Z on Exhibit A by virtue of the doctrine of boundary by acquiescence. Defendant Cluff asserted title to Parcel P-M-N-O by virtue of the doctrine of boundary by acquiescence. This court having ruled against defendant Cluff with respect to Parcel P-M-N-O, defendant Cluff is now attempting to reverse the trial court's order, from which no cross-appeal was filed, with respect to Parcel W-X-Y-Z.

Defendant Cluff's argument in this regard is that it would be ludicrous for her to file a cross-appeal from a judgment she believes she won. Yet, with respect to Parcel W-X-Y-Z it is clear that defendant Cluff lost. In fact, during the course of the trial, defendant Cluff conceded that plaintiffs were entitled to Parcel W-X-Y-Z by virtue of the doctrine of boundary by acquiescence and that issue was never submitted to the court for decision. During plaintiff's cross examination of defendant Cluff the court called a bench conference with counsel. After the conference, which was had off the record, the court stated:

THE COURT: As a result of a Bench Conference I think there is no issue on that particular area, Mr. Young.

MR. YOUNG: The area of W",X",Y", and Z" on Plaintiff's Exhibit 8?

THE COURT: Yes.

(Trial Transcript page 134. Record at 173).

Thereafter, defendant Cluff did not claim an interest in Parcel W-X-Y-Z. Consequently, defendant Cluff did not file a cross appeal with respect to the W-X-Y-Z property at the time plaintiffs' appealed from the court's decision with respect to Parcel P-M-N-O.

Accordingly, not only did defendant Cluff fail to file a cross appeal as required by Rule 74(b), Utah Rules of Civil Procedure (in effect at that time), but defendant Cluff would not have been entitled to prevail on any such cross appeal by virtue of conceding the issue in the trial court. Defendant Cluff would therefore have no grounds to appeal from an issue to which she stipulated.

In any event, defendant Cluff having failed to comply with Rule 74(b), defendant Cluff is now precluded from objecting to that portion of the court's order dealing with the W-X-Y-Z property. This court has consistently held that the failure to comply with Rule 74(b) precludes the consideration of issues from which no appeal has been taken. Bentley v. Potter, 694 P. 2d 617 (Utah 1984); Cerritos Trucking Company v. Utah Venture No. 1, 645 P. 2d 608 (Utah 1982); Terry v. Zions Cooperative Mercantile Institute, 617 P. 2d 700 (Utah 1980); and Eliason v. Watts, 615 P. 2d 427 (Utah 1980). In Terry v. Zions Cooperative Mercantile Institute, supra, Rule 74(b) was discussed in some length. In that case the court stated:

The rule which deals with the problem of cross-appeals is Rule 74(b), U.R.C.P., which states:

"For any one or more parties who have filed a notice of appeal as required by Rule 73, other parties may separately or together cross-appeal without filing a notice a appeal; provided, however, such party or parties shall file a statement of points on which he intends to rely on such cross-appeal within the time and as required by subdivision (b) of Rule 75."

As to the time limitation, Rule 75(b) states:

"If the respondent desires to cross-appeal, or if the appellant has filed a statement of the points... and the respondent desires to have the appellate court consider other or additonal matters, the respondent shall, within 10 days after the service and filing of appellant's designation... serve and file a statement of respondent's points either by way of such cross-appeal or for the purpose of having considered other or additional matters than those raised by the appellant."

From the just quoted rules it could hardly be clearer that if a respondent desires to attack the judgment and change it in his favor, he must timely file a cross-appeal which plainly states the propositions he intends to rely on as entitling him to relief. This conforms with the desired objective of giving his opponent and the court a clear and definite understanding of the issues to be treated and of thus providing a firm foundation upon which the case is to proceed. (Emphasis in original).

617 P. 2d 701.

Defendant Cluff having failed to file and perfect a cross-appeal, the district court correctly refused to disturb its findings as to Parcel W-X-Y-Z.

Defendant Cluff contends that this court's decision in Halladay v. Cluff, supra, added an element to the doctrine of boundary by acquiescence and that based on the added

element, plaintiffs are not entitled to prevail with respect to Parcel W-X-Y-Z. However, this court's opinion in Halladay v. Cluff, supra, merely clarifies the elements of boundary by acquiescence which have been stated in prior cases. The element of dispute or uncertainty had been recognized prior to the trial of this case and in fact plaintiffs argued that principle to the trial court. See Halladay v. Cluff, supra, at pp. 504-505. Defendant Cluff could have made the same argument with respect to Parcel W-X-Y-Z but failed to do so.

Defendant Cluff further contends that this court's statement in the prior appeal that "[T]he decree is reversed, and the case is remanded to the District Court for the entry of a new decree in conformity with this opinion," entitles defendant Cluff to a reversal of the trial court's judgment with respect to Parcel W-X-Y-Z. Defendant Cluff reasons that since the trial court applied the doctrine of boundary by acquiescence to both Parcel W-X-Y-Z and Parcel P-M-N-O, that if this court reversed the lower court with regard to Parcel P-M-N-O, that on remand, the trial court should have also reversed as to Parcel W-X-Y-Z. Defendant Cluff is attempting to persuade this court that either the doctrine of boundary by acquiescence applies to both parcels or it does not apply to either parcel. The underlying facts so not appear to be

significant to defendant Cluff. Obviously, this argument is nonsense. Defendant Cluff even recognized one distinguishing factual circumstance in her brief.

The trial court recognized and counsel conceded that the doctrine of boundary by acquiescence clearly applied to Parcel W-X-Y-Z and consequently that issue was not contested. However, the applicability of boundary by acquiescence with respect to Parcel P-M-N-O was contested, was litigated, and the trial court was found to be in error by this court in the earlier appeal.

Defendant Cluff is reading too much into the court's statement cited above. Defendant Cluff fails to quote other statements of the court in that opinion such as the following:

On appeal the Halladays seek to overturn that decision on the basis that boundary by acquiescence cannot be applied where there was no dispute or uncertainty concerning the location of the boundary. We agree and reverse with directions to quiet title in the Halladays, the record owners.

\* \* \*

Consequently, the doctrine of boundary by acquiescence is inapplicable as a matter of law in the circumstances of this case. The decree relying on that doctrine in quieting the claimants' title to Parcel A-B-C-D must therefore be reversed.

The decree is reversed and the case is remanded to the District Court for the entry of a new decree in conformity with this opinion.

685 P. 2d 502, 507-508.

To be in conformity with this court's opinion, the trial

court on remand could only modify that portion of the judgment dealing with Parcel A-B-C-D (which includes Parcel P-M-N-O) and had no authority to modify the judgment with respect to Parcel W-X-Y-Z. Defendant Cluff's appeal in this case is not well taken. Plaintiffs respectfully request that the court affirm the order of the lower court which is attached hereto as Exhibit C.

#### POINT II

THE TRIAL COURT'S ORDER ENTERED UPON REMAND OF THIS CASE HAS THE EFFECT OF RES JUDICATA AS TO THE ISSUES RAISED IN THIS ACTION.

Defendant Cluff's second point on appeal was that paragraph #2 of the court's order attached hereto as Exhibit C should be stricken. That statement reads as follows:

2. That all of the claims raised by the defendants as against the plaintiffs in Civil No. 53,243 have been decided and are res judicata.

That statement was placed in the order in light of defendant Cluff's argument to the trial court that title to Parcel W-X-Y-Z should be quieted in defendant Cluff. The effect of the order with respect to that parcel of property is the same with or without the cited language. The order has the effect of precluding defendant Cluff from again raising any issues with regard to the W-X-Y-Z property by virtue of the doctrine of res judicata without the order expressly so stating. Therefore, there would be no reason to eliminate that language

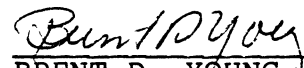


and the court's order should stand as is.

#### CONCLUSION

Defendant Cluff having conceded to the trial court's judgment with respect to Parcel W-X-Y-Z and having failed to perfect any cross-appeal with respect to that property, and the court's order entered upon remand of the case from this court having the effect of res judicata with respect to that property, plaintiffs respectfully request that the court's order entered October 18, 1984 be affirmed.

Dated this 3 day of April, 1985.


  
BRENT D. YOUNG  
Attorney for Respondents

MAILING CERTIFICATE

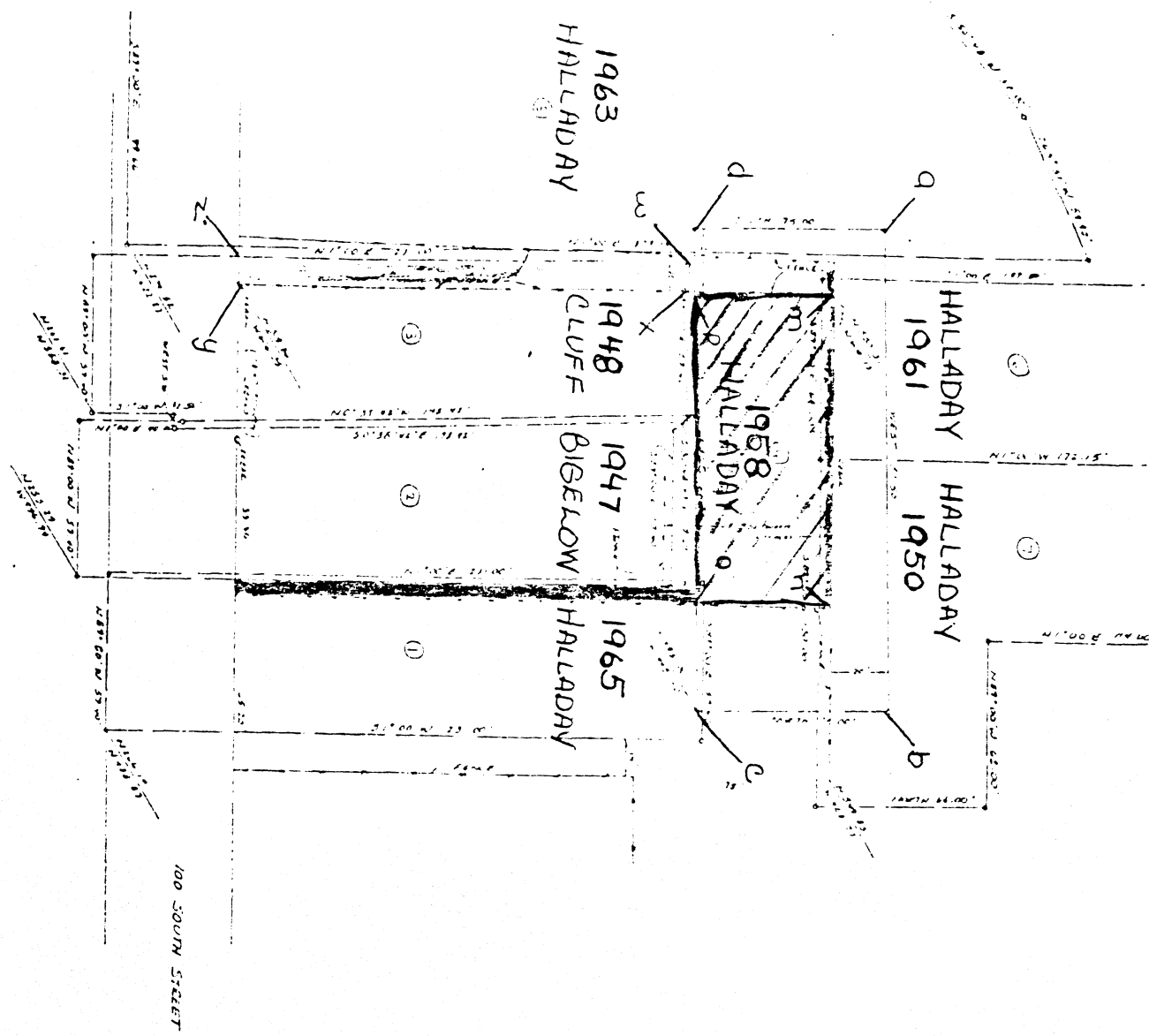
Mailed two copies of the foregoing Brief of Respondents, postage prepaid, to S. Rex Lewis, Esq., Attorney for Defendant Bigelow, and to M. Dayle Jeffs, Esq., Attorney for Defendant Cluff, addressed follows this 3 day of April, 1985.

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BRENT D. YOUNG

## A P P E N D I X



1. Mack A. Halladay - Commencing 3.55 chains West and 3.38 chains North and 3 chains North 8.1° West from the Southwest corner of Section 21 Township 2 North Range 2 East, Salt Lake Base and Meridian; thence North 51° West 0.72 chains; thence North 1° East 3.50 chains; thence South 89° East 0.72 chains; thence South 1° West 3.50 chains to the point of beginning.
2. Taylor F. Blalock - Commencing 1.43 chains West and 3.00 chains North and 1.50 chains North 8.1° West from the Southwest corner of Section 21 Township 2 North Range 2 East, Salt Lake Base and Meridian; thence North 51° West 0.72 chains; thence North 1° East 3.50 chains; thence South 89° East 0.72 chains; thence South 1° West 3.50 chains to the point of beginning.
3. Hedge Cluff - Commencing 341.76 feet East and 396.09 feet North and 116.72 feet North 8.1° West from the Southwest corner of Section 21 Township 2 North Range 2 East, Salt Lake Base and Meridian; thence North 51° West 0.72 chains; thence North 1° East 3.50 chains; thence South 89° East 0.72 chains; thence South 1° West 3.50 chains to the point of beginning.
4. Mack A. Halladay - Commencing 1.43 chains West and 3.00 chains North and 1.50 chains North 8.1° West from the Southwest corner of Section 21 Township 2 North Range 2 East, Salt Lake Base and Meridian; thence North 51° West 0.72 chains; thence North 1° East 3.50 chains; thence South 89° East 0.72 chains; thence South 1° West 3.50 chains to the point of beginning.
5. Mack A. Halladay - Commencing 1.43 chains West and 3.00 chains North and 1.50 chains North 8.1° West from the Southwest corner of Section 21 Township 2 North Range 2 East, Salt Lake Base and Meridian; thence North 51° West 0.72 chains; thence North 1° East 3.50 chains; thence South 89° East 0.72 chains; thence South 1° West 3.50 chains to the point of beginning.
6. Mack A. Halladay - Commencing 1.43 chains West and 3.00 chains North and 1.50 chains North 8.1° West from the Southwest corner of Section 21 Township 2 North Range 2 East, Salt Lake Base and Meridian; thence North 51° West 0.72 chains; thence North 1° East 3.50 chains; thence South 89° East 0.72 chains; thence South 1° West 3.50 chains to the point of beginning.
7. Mack A. Halladay - Commencing 1.43 chains West and 3.00 chains North and 1.50 chains North 8.1° West from the Southwest corner of Section 21 Township 2 North Range 2 East, Salt Lake Base and Meridian; thence North 51° West 0.72 chains; thence North 1° East 3.50 chains; thence South 89° East 0.72 chains; thence South 1° West 3.50 chains to the point of beginning.
8. Mack A. Halladay - Commencing 1.43 chains West and 3.00 chains North and 1.50 chains North 8.1° West from the Southwest corner of Section 21 Township 2 North Range 2 East, Salt Lake Base and Meridian; thence North 51° West 0.72 chains; thence North 1° East 3.50 chains; thence South 89° East 0.72 chains; thence South 1° West 3.50 chains to the point of beginning.
9. Mack A. Halladay - Commencing 1.43 chains West and 3.00 chains North and 1.50 chains North 8.1° West from the Southwest corner of Section 21 Township 2 North Range 2 East, Salt Lake Base and Meridian; thence North 51° West 0.72 chains; thence North 1° East 3.50 chains; thence South 89° East 0.72 chains; thence South 1° West 3.50 chains to the point of beginning.
10. Mack A. Halladay - Commencing 1.43 chains West and 3.00 chains North and 1.50 chains North 8.1° West from the Southwest corner of Section 21 Township 2 North Range 2 East, Salt Lake Base and Meridian; thence North 51° West 0.72 chains; thence North 1° East 3.50 chains; thence South 89° East 0.72 chains; thence South 1° West 3.50 chains to the point of beginning.

Brent Young	
Mack Halladay Property	
1020 West 20 South	
Provo	
Clyde R. Naylor	
Registered Civil Engineers and Land Surveyors	
Utah	

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

-----

MACK HALLADAY and  
MERLE HALLADAY,

Civil No. 53243

Plaintiffs,

vs.

R U L I N G

MADGE CLUFF, PERRY K.  
BIGELOW and NORMA G.  
BIGELOW,

Defendants.


-----

This matter came before the Court on the 21st day of September, 1984, wherein the Court heard oral argument from counsel as to the disposition to be made of this case on remand from the Supreme Court, and all of counsel were heard and the Court having thoroughly <sup>considered</sup> the alternatives, and the language of the Supreme Court directing that they ". . . reverse with directions to quiet title in the Halladays, the record owners."

It is noted that the defendants Halladay appealed from the Court's Ruling as to that portion of Defendants' Exhibit 12 identified as "A", "B", "C", "D" or Parcel 3, and no cross appeal was taken as to the Court's finding of boundary by acquiescence as to Tracts 1 and 2 in

Bigelow and Cluff respectively. Therefore, the only matter before the Supreme Court had to do with Parcel 3 and that the same be quieted in the record owners. The Court therefore directs counsel for Halladays to prepare a new Decree quieting title in the Halladays as to Parcel 3 along the description contained from points "A" to "B" to "C" to "D".

Dated at Provo, Utah County, Utah, this 27<sup>th</sup> day of September, 1984.

  
GEORGE E. DALLIF, JUDGE

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IN THE DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH

MACK HALLADAY and MERLE	)	
HALLADAY,	)	
Plaintiffs,	)	ORDER
vs.	)	
MADGE CLUFF, PERRY K. BIGELOW	)	Civil No. 53,243
and NORMA G. BIGELOW,	)	
Defendants.	)	

This matter came before the court on the 21st day of September, 1984, wherein the court heard oral argument from counsel as to the disposition to be made of this case on remand from the Supreme Court, and all of counsel were heard and the court having thoroughly considered the alternatives, and the language of the Supreme Court directing that they " . . . reverse with directions to quiet title in the Halladays, the record owners."

It is noted that the plaintiffs Halladay appealed from the court's ruling as to that portion of defendant's Exhibit 12 identified as "A", "E", "C", "D" or Parcel 3, and no cross appeal was taken as to the court's finding of boundary by acquiescence as to Tracts 1 and 2 in Bigelow and Cluff respectively. Therefore, the only matter before the Supreme Court had to do with Parcel 3 and that the same be quieted in the record owners. The court

therefore directs counsel for Halladays to prepare a new decree quieting title in the Halladays as to Parcel 3 along the description contained from points "A" to "B" to "C" to "D".

Based upon the foregoing IT IS HEREBY ORDERED:

1. That title to the following described property is is quieted in plaintiffs, Mack Halladay and Merle Halladay:

Commencing 488.08 feet West and 495.00 feet North from the Southeast corner of Section 2, Township 7 South, Range 2 East, Salt Lake Base and Meridian, thence West 118.10 feet, thence North 0° 03' 17" East along a fence line 55.31 feet, thence South 89° 51' 20" East along a fence line 118.20 feet thence South 0° 09' 25" West along a fence line, 55.01 feet to the point of beginning. Area .15 acres.

2. That all other claims raised by the defendants as against the plaintiffs in Civil No. 53,243 have been decided and are res judicata.

Dated: October 18, 1984.

BY THE COURT:

  
GEORGE E. BALLIF, Judge