

1987

Mack Halladay and Merle Halladay v. Madge Cluff, Perry K. Bigelow and Norma G. Bigelow : Petition for Writ of Certiorari

Utah Supreme Court

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M. Dayle Jeffs; Jeffs and Jeffs; attorneys for defendant. S. Rex Lewis; Howard, Lewis and Petersen; Attorneys for Defendants.

Brent D. Young; Jerry L. Reynolds; Ivie and Young; Attorneys for Appellants.

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DOCKET

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)

Case No. 870280

PETITION FOR WRIT OF CERTIORARI

PETITION FOR REVIEW OF THE JUDGMENT OF THE
UTAH COURT OF APPEALS

BRENT D. YOUNG
JERRY L. REYNOLDS
IVIE and YOUNG
Attorneys for Appellants
48 North University Avenue
P.O. Box 672
Provo, Utah 84603

M. DAYLE JEFFS
JEFFS & JEFFS
Attorneys for Defendant Cluff
90 North 100 East
Provo, Utah 84601

S. REX LEWIS
HOWARD, LEWIS & PETERSEN
Attorneys for Defendants Bigelow
120 East 300 North
Provo, Utah 84601
(not participating)

FILED

AUG 10 1987

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
QUESTION PRESENTED FOR REVIEW	1
OPINIONS ISSUED BY THE COURT OF APPEALS	1
JURISDICTION	2
CONTROLLING PROVISIONS OF CONSTITUTIONS, STATUTES, ORDINANCES, AND REGULATIONS	2
STATEMENT OF THE CASE	3
ARGUMENT	6
DEFENDANT CLUFF HAVING ABANDONED HER CLAIM TO PARCEL W-X-Y-Z AND HAVING FAILED TO FILE A CROSS-APPEAL FROM THE COURT'S JUDGMENT WITH RESPECT THERETO, THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S ORDER FOLLOWING REMAND WITH RESPECT TO PARCEL W-X-Y-Z.	
CONCLUSION	12
APPENDIX	

TABLE OF AUTHORITIES CITED

CASES	PAGE
<u>Bentley v. Potter</u> , 694 P. 2d 617 (Utah 1984)	11
<u>Cerritos Trucking Company v. Utah Venture No. 1</u> , 645 P. 2d 608 (Utah 1982)	11
<u>Eliason v. Watts</u> , 615 P. 2d 427 (Utah 1980)	11
<u>Halladay v. Cluff</u> , 685 P. 2d, 500 (Utah 1984) 1, 2, 3, 4, 6, 12	
<u>Halladay v. Cluff</u> , No. 860079-CA filed July 10, 1987, 61 Utah Adv. Rep. 41 (Ct. App. 1987)	1
<u>Madsen v. Clegg</u> , 639 P. 2d 726 (Utah 1981)	11
<u>Terry v. Zions Cooperative Mercantile Institute</u> , 617 P. 2d 700 (Utah 1980)	8, 9, 11
<u>Wright v. Clissold</u> , 521 P. 2d 1224	11

OTHER AUTHORITIES CITED

Utah Code Annotated § 78-2-2	2, 4
Rule 42, Rules of the Utah Supreme Court	2
Rule 43 Rules of Utah Supreme Court	12
61 Utah Adv. Rep. 41 (Ct. App. 1987)	4
Rule 74(b) Utah Rules of Civil Procedure	8, 12
Rule 75(d) Utah Rules of Civil Procedure	8

IN THE SUPREME COURT OF THE STATE OF UTAH

MACK HALLADAY and MERLE HALLADAY,)	
Plaintiffs-)	PETITION FOR WRIT
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vs.)	
MADGE CLUFF, PERRY K. BIGELOW and NORMA G. BIGELOW,)	Case No. _____
Defendants-)	
Respondents)	

QUESTION PRESENTED FOR REVIEW

Whether or not the Court of Appeals erred in construing the opinion of this court and directions for remand in Halladay v. Cluff, 685 P. 2d, 500 (Utah 1984) by allowing defendant Cluff the opportunity to argue the merits of an issue which was conceded by defendant Cluff and from which defendant Cluff did not file a cross-appeal.

OPINIONS ISSUED BY THE COURT OF APPEALS

3. The opinion of the Court of Appeals in this matter is Halladay v. Cluff, No. 860079-CA filed July 10, 1987, reported as Halladay v. Cluff, 61 Utah Adv. Rep. 41 (Ct. App. 1987). A copy of the opinion is included in the Appendix hereto.

JURISDICTION

1. The date of the entry of the decision sought to be reviewed is July 10, 1987.

2. There have been no requests for rehearing and no extension of time for filing the petition for certiorari has been granted.

3. Jurisdiction of this matter is conferred upon the court by Utah Code Annotated § 78-2-2 (3)(a) and by Rule 42, Rules of the Utah Supreme Court.

CONTROLLING PROVISIONS OF CONSTITUTIONS,
STATUTES, ORDINANCES, AND REGULATIONS

The original appeal of this case was filed on or about October 13, 1981, and the opinion of the Supreme Court was issued on May 1, 1984. Halladay v. Cluff, 685 P. 2d 500 (Utah 1984). Therefore, the rule of appellate procedure applicable to the original appeal was Rule 74(b), Utah Rules of Civil Procedure, which reads:

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

STATEMENT OF THE CASE

PROCEEDINGS BELOW

Plaintiff 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 of 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 Parcel P-M-N-O. Neither defendant Cluff nor defendant Bigelow filed 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 as to the P-M-N-O parcel and remanded the case "...with directions to quiet title in the Halladays, the record owners." Halladay v. Cluff, 685 P. 2d 500, 502 (Utah 1984). The court held that the decree relying on the doctrine of boundary by acquiescence

in quieting the claimants' title to Parcel A-B-C-D [Parcel P-M-N-O on Exhibit A] must therefore be reversed.

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

685 P. 2d at 507-508.

On remand, defendant Cluff urged that this court's statement "enter a new decree in conformity with this opinion," meant that the trial court should enter a decree quieting title to Parcel W-X-Y-Z in defendant Cluff. The lower court ruled against defendant Cluff on that matter and defendant Cluff filed an appeal with this court, Case No. 20318.

This court transferred that appeal to the Court of Appeals pursuant to Utah Code Annotated § 78-2-2(4). It was assigned Case No. 860079-CA. On July 10, 1987, the Court of Appeals entered its opinion in favor of defendant Cluff. It is reported at 61 Utah Adv. Rep. 41 (Ct. App. 1987), a copy of which is included in the Appendix hereof.

STATEMENT OF FACTS

This court has already decided the appeal of this matter on the merits in Halladay v. Cluff, 685 P. 2d 500 (1984). A copy of that case is included in the Appendix hereof. The issues presented on this appeal largely involve procedural matters and do not require a lengthy recitation of facts. This petition involves defendant Cluff's right to reverse the trial court's decree that Parcel W-X-Y-Z should be quieted in plaintiffs. With respect to that parcel,

plaintiffs put on evidence to establish the elements of the doctrine of boundary by acquiescence and plaintiff's counsel was in the middle of cross-examination of defendant Cluff with respect thereto when the court called a bench conference. The record of that exchange and the questioning just prior thereto is as follows:

Q. Now, so we are not misunderstanding each other, it is your testimony that they didn't ever drive into here?

A. Not regularly, no. Not on a regular basis.

Q. You don't recall --

The Court: Mr. Jeffs and Mr. Lewis, will you come to the Bench for just a minute.

(Discussion off the record between the Court and all counsel)

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 Plaintiffs' Exhibit 8?

The Court: Yes.

(Trial Transcript, pp. 133-134) (Record at 172-173).

Following the bench conference and the comments made by the court with respect thereto, no further evidence was presented with respect to Parcel W-X-Y-Z, nor was there further argument thereon. As shown on Exhibit A, Parcel W-X-Y-Z is a strip of ground which is included in defendant Cluff's record title, but outside of an existing fenceline that has been there for more

than fifty years. (Trial Transcript, p. 60) (Record at 99).

ARGUMENT

DEFENDANT CLUFF HAVING ABANDONED HER CLAIM TO PARCEL W-X-Y-Z AND HAVING FAILED TO FILE A CROSS-APPEAL FROM THE COURT'S JUDGMENT WITH RESPECT THERETO, THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S ORDER FOLLOWING REMAND WITH RESPECT TO PARCEL W-X-Y-Z.

As noted in the foregoing Statement of the Case, the trial court quieted title to Parcel W-X-Y-Z in plaintiffs and Parcel P-M-N-O in defendants Cluff and Bigelow. Plaintiffs appealed from the court's ruling with respect to Parcel P-M-N-O and this court reversed the lower court. Halladay v. Cluff, supra. No cross-appeal was filed by defendant Cluff with respect to the W-X-Y-Z parcel. On remand defendant Cluff argued that this court's opinion in Halladay v. Cluff, supra, should be applied to reverse the trial court's earlier decision with respect to Parcel W-X-Y-Z and quiet title to that property in defendant Cluff by virtue of the recorded deed lines. The trial court held that that issue was not before the court on remand because defendant Cluff did not file a cross appeal. Defendant Cluff appealed the court's decision and the Court of Appeals agreed with defendant Cluff. The case was remanded to the District Court to determine whether or not defendant Cluff

is entitled to the W-X-Y-Z parcel by virtue of the evidence in the record.

In reaching its decision, the Court of Appeals was persuaded by defendant Cluff's argument that either the doctrine of boundary by acquiescence or the recorded title line should be applied to both Parcel P-M-N-O and Parcel W-X-Y-Z. Without reviewing or discussing the facts relative to the application of boundary of acquiescence to either parcel, the court simply concluded that either boundary by acquiescence or the title line should be applied in each case. Such an approach however, is an extreme over simplification of the facts giving rise to boundary by acquiescence with respect to each parcel. Plaintiffs in presenting their evidence regarding the applicability of boundary by acquiescence as to Parcel W-X-Y-Z, were stopped by the court, a bench conference ensued, and it was concluded that there was no issue as to boundary by acquiescence with respect to Parcel W-X-Y-Z. Defendant Cluff, essentially, was conceding that question. Plaintiffs however, did not concede that issue with respect to Parcel P-M-N-O and, when the trial court ruled against them, appealed that question to this court and were successful on appeal.

Inasmuch as this court is not now in a position to evaluate the facts giving rise to the applicability of the doctrine of boundary by acquiescence with respect to Parcel W-X-Y-Z, it is

sufficient to note that the applicability of that doctrine to that parcel is based on its own facts, and not a common set of facts that would make that doctrine applicable or not applicable to both parcels universally. Defendant Cluff's argument that the court must uniformly apply title lines or fence lines ignores the proposition that whether or not fence lines or title lines are applied depends on the facts and circumstances of each case. The court could consistently apply a fence line to one parcel and a deed or title line to another parcel depending on the factual circumstances giving rise to the dispute in each instance.

Rule 74(b), Utah Rules of Civil Procedure, in effect at the time plaintiffs' appeal was filed, reads as follows:

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

In Terry v. Zions Cooperative Mercantile Institute, 617 P. 2d 700 (Utah 1980) the court discussed Rule 74(b) at some length. After quoting Rule 74(b), the court quoted Rule 75(d) and then added its own comments.

"If the respondent desires to cross-appeal, or if the appellant has filed a statement of points ... and the respondent desires to have the appellate court consider

other or additional 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 proving a firm foundation upon which the case is to proceed. (Emphasis in original)

617 P. 2d 701.

The Court of Appeals, although acknowledging Rule 74(b) and this court's opinion in Terry v. Zions Cooperative Mercantile Institute, supra, simply brushed the rule aside by its simplistic view of the case. The Court of Appeals viewed the case as an all or nothing proposition. Either boundary by acquiescence applied or title lines applied. The Court of Appeals ruled that since defendant Cluff had succeeded as to Parcel P-M-N-O in the trial court, that defendant Cluff had won the case and therefore needed no cross-appeal. However, an examination of the claims made by the parties reveals, as shown above, that different facts apply to Parcel W-X-Y-Z and the doctrine of boundary by acquiescence may or not have applied to that parcel. As noted earlier, plaintiffs' presentation of evidence on that issue was interrupted by the court and after conference it was conceded

that defendant Cluff did not claim that property and the evidence then turned to Parcel P-M-N-O. Although the Court of Appeals found that the concession made by defendant Cluff was ambiguous, the comments made by counsel and the court which supposedly created the ambiguity were made prior to the presentation of the evidence.

Mr. Jeffs: What I am saying, when I said the same principle lies, if the Court is going to follow title lines rather than boundary by acquiescence, then we should be entitled to the green slashed area. And we believe that if Mr. Halladay is entitled to orange slashed area to this title line, that we are entitled to move over to the title line. That there should be a consistency.

The Court: The facts will possibly change the circumstances one place or another --

Mr. Jeffs: That's possible.

The Court: Depending. But as far as the fenceline is concerned here, you don't claim to the west of it, right?

Mr. Jeffs: That's true. We think that it became there by boundary by acquiescence, the same as we claim the other piece.

But, if the Court were to adopt the rule that there was no boundary by acquiescence, and you are going to examine the title, then I think we would be entitled to that title. * * *

The Court: Lets get on with this Court's tasks that we have now. So there will be no stipulations on that.

(Trial transcript p. 16-17, Record at 55-56).

As is readily apparent from reviewing the above colloquy, there were no stipulations as to boundaries prior to the

presentation of the evidence, but after the evidence was put on, it was conceded by defendant Cluff that there was no issue on the W-X-Y-Z parcel. Defendant Cluff could have made the argument, as did plaintiffs, that the lack of a dispute or uncertainty with respect to the boundary of the W-X-Y-Z parcel precluded plaintiffs from claiming that property by boundary by acquiescence.

The Court of Appeals has departed from this court's consistent application of Rule 74(b) to deny the raising of issues which have not been properly preserved by a cross-appeal. Terry v. Zions Mercantile Institute, supra; Bentley v. Potter, 694 P. 2d 617 (Utah 1984); Cerritos Trucking Company v. Utah Venture No. 1, 645 P. 2d 608 (Utah 1982); and Eliason v. Watts, 615 P. 2d 427 (Utah 1980). Although the Court of Appeals distinguishes this case because the court felt that defendant Cluff had "won" in the lower court, the fact is that defendant Cluff not only lost with respect to Parcel W-X-Y-Z, but she voluntarily conceded that issue. Contrary to defendant Cluff's position this court did not change the rules regarding boundary by acquiescence but merely clarified that the element of dispute or uncertainty is a factor to be considered as set forth in earlier cases. Madsen v. Clegg, 639 P. 2d 726 (Utah 1981); Wright v. Clissold, 521 P. 2d 1224 (Utah 1974).

It appears that defendant Cluff and the Court of Appeals

read too much into this court's instructions to the trial court to enter a "new decree in conformity with this opinion." Halladay v. Cluff, supra at 508. The court noted in that opinion, that the only issue before the court was with respect to Parcel P-M-N-O and the court specifically reversed the trial court on that issue "with directions to quiet title in the Halladays, the record owners." Halladay v. Cluff, supra at 502.

CONCLUSION

Rule 43, Rules of the Utah Supreme Court, sets forth some guidelines for the exercise of the court's discretion in granting a petition for writ of certiorari. Subparagraphs 2 and 3 of Rule 43 read as follows:

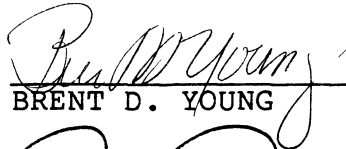
(2) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of this Court; (3) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

In this case, the decision of the Court of Appeals clearly conflicts with earlier pronouncements of this court regarding the application of Rule 74(b), Utah Rules of Civil Procedure. It provides for a remand of matters which were not preserved by a cross-appeal, which is a clear and substantial departure from the normal course of judicial proceedings. Therefore,

plaintiffs respectfully request that the court grant their petition for a writ of certiorari, to review the decision of the Court of Appeals.

Dated this 10 day of August, 1987.

Respectfully submitted,


BRENT D. YOUNG


JERRY L. REYNOLDS

MAILING CERTIFICATE

Mailed four copies of the foregoing Petition for Writ of Certiorari, postage prepaid, to S. Rex Lewis, Esq., Attorney for Defendants Bigelow, and to M. Dayle Jeffs, Esq., Attorney for Defendant Cluff, addressed follows this 10 day of August, 1987.

M. DAYLE JEFFS
JEFFS & JEFFS
90 North 100 East
Provo, Utah 84601

S. REX LEWIS
HOWARD, LEWIS & PETERSEN
Attorney at Law
120 East 300 North
Provo, Utah 84601


BRENT D. YOUNG

APPENDIX

A



⑦
HALLADAY

⑤
HALLADAY

CLUFF
③

BIGELOW
(2)

HALLADAY
①

100 SOUTH STREET

WEST 2X

NE 9° 00' N 59 40'

know it and didn't disclose it, or are you going to claim your evidence is they knew it and didn't disclose it?

MR. FRANDSEN. I don't know whether they knew it or not. I asked him if there was any other indebtedness and they said so [sic]. So I paid them the balance that was owing based upon their representations.

THE COURT: You're not going to have any evidence they knew about it, had actual knowledge as opposed to information because it was on the record?

MR. FRANDSEN: No, I don't know if they had knowledge. I can't prove that, Your Honor.

Frandsen went forward and presented his case.³ True to his word, he produced no evidence that any of the individual defendants, including Biesinger, had actual knowledge in October, 1981, that Laubs' judgment had been filed in Weber County or that the lien thereof had attached to the subject property. Constructive knowledge imparted by the filing of the judgment was charged to Frandsen by law, as well as to defendants. See Utah Code Ann. §17-21-11 (1987) and §57-1-6 (1986); *Crompton v. Jenson*, 78 Utah 55, 1 P.2d 242 (1931).

In dismissing appellant's causes of actions against all the named defendants,⁴ the lower court concluded that Frandsen "did not reasonably rely on any statements or omissions of the defendants, in that the Judgment lien of the Laubs was of public record" The judgment below is affirmed. Costs are awarded to respondents Max and Eva Laub.

Norman H. Jackson, Judge

I CONCUR:

Richard C. Davidson, Judge

I CONCUR IN RESULT ONLY.

Pamela T. Greenwood, Judge

1 Thirty percent of a one-third interest is actually 9.99%, not 10%.

2 Frandsen's second cause of action was based on alleged violation of Utah Code Ann. §48-1-17 (1981), which provides

Duty of partners to render information
Partners shall render on demand true and full information of all things affecting the partnership to any partner, or the legal representatives of any deceased partner, or partner under legal disability

However, Frandsen alleged in his Amended Amended Complaint that Biesinger sold his partnership interest on June 12, 1981 and that at the time Laubs' judgment was docketed, Biesinger did not have any interest in the partnership. Frandsen's evidence did not contradict those allegations. In

fact, Biesinger was never a partner. The partnership consisted of two corporations and Frandsen. See *Burke v. Farrell*, 656 P.2d 1015 (Utah 1982), and *Nelson v. Matsch*, 38 Utah 122, 110 P. 865 (1910), which discuss the fiduciary duty that exists between partners.

3 In some jurisdictions, these actions by Frandsen would be sufficient to constitute his waiver of default by any of the defendants, even if default had already been entered. 47 Am. Jur. 2d *Judgments* §1161 (1969).

4 In this appeal, Frandsen has not challenged the judgment below insofar as it dismissed his complaints against the defendants other than Biesinger and the Laubs.

Cite as
61 Utah Adv. Rep. 41

IN THE UTAH COURT OF APPEALS

Mack HALLADAY and Merle Halladay,
Plaintiff and Respondent,

v.

Madge CLUFF, Perry K. Bigelow, and Norma G. Bigelow,
Defendant and Appellant.

Before Judges Orme, Garff, and Jackson.

No. 860079-CA

FILED: July 10, 1987

FOURTH DISTRICT
Hon. George E. Ballif

ATTORNEYS:

Dayle M. Jeffs for Appellant.

Brent D. Young, S. Rex Lewis for
Respondents

OPINION

ORME, Judge:

Halladays commenced this action to quiet title to a parcel of property sometimes referred to as the orange parcel. They relied on their holding actual legal title. Cluff counterclaimed seeking to quiet title to the orange parcel on the basis of boundary by acquiescence and, alternatively, seeking to quiet title to another parcel of property, sometimes referred to as the green parcel, if the court determined to adjudicate the rights of the parties with reference to legal titles rather than on the basis of boundary by acquiescence. The unusual situation came about because Halladays held legal title to the orange parcel, which Cluff occupied, while Cluff held legal title to the green parcel, which Halladays occupied. If occupancy controlled, Cluff would own the orange parcel and Halladays the green. If legal title controlled, Halladays would own the orange parcel and Cluff the green. Under no consis-

tently applied theory would either party be entitled to both parcels.

Cluff was successful at trial, persuading the court to adjust the parties' competing rights on the basis of the boundary by acquiescence doctrine. Thus, she was held to have title to the larger orange parcel primarily in dispute, but Halladays got the smaller green parcel on the same basis.

Halladays appealed to the Supreme Court and were successful there. *Halladay v. Cluff*, 685 P.2d 500 (Utah 1984). The Supreme Court held that boundary by acquiescence did not apply, given the facts developed at trial, and that legal title should control. See *id.* at 507. Of course, since the judgment had been adverse to Halladays only as concerned the orange parcel, the orange parcel was the focus of the appeal.² The case was remanded for entry of "a new decree in conformity" with the Supreme Court's opinion.

On remand, Cluff argued that consistency with the Supreme Court's analysis required that her alternative claim be granted. Cluff argued that if legal title was to control, it should control the whole dispute, and she should be awarded the green parcel, to which she held title.

The trial court, however, concluded that Cluff's failure to take a cross-appeal from the determination concerning the green parcel foreclosed any re-examination of that issue. We cannot agree. Cross-appeals are properly limited to grievances a party has with the judgment as it was entered—not grievances it might acquire depending on the outcome of the appeal. See *Cunningham v. Lynch-Davidson Motors, Inc.*, 425 So.2d 131, 133 (Fla. App. 1982)(cross-appeal only required when respondent seeks to vary or modify judgment below); *Terry v. Zions Co-Op. Mercantile Inst.*, 617 P.2d 700, 701 (Utah 1980)("If a respondent desires to attack the judgment and change it in his favor, he must timely file a cross-appeal ..."). See also 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3904 (1976).

Cluff knew all along she could not have it both ways. Either boundary by acquiescence would apply, in which case she would win the larger parcel but lose the smaller, or legal titles would control, in which event she would lose the larger parcel but at least get the smaller one.³ She could not plausibly argue one theory as to one parcel and another as to the other and walk away with both contested parcels. On balance, Cluff would come out much better if the boundary by acquiescence argument carried the day. She accordingly argued for application of that theory. She prevailed at the trial level to the fullest extent possible consistent with a disciplined decision, even though she "lost" as to the green parcel. Halladays appealed, arguing that legal titles, not the doctrine, should govern. Cluff's

proper response to that appeal was to resist the Halladays' arguments and seek to have the trial court affirmed. A cross-appeal would not have been appropriate. Cluff had no dissatisfaction with the trial court's judgment, which she simply wanted to have affirmed. Moreover, a cross-appeal would have left Cluff and Halladays making inconsistent and contrary arguments depending on which parcel was being focused on.⁴

Thus, the absence of a cross-appeal did not, of itself, foreclose the trial court from reassessing the status of the green parcel in view of the Supreme Court's decision and changing its decree as to that parcel as well, so the "new decree" would be fully "in conformity" with the doctrine expressed in the Court's opinion.⁵

However, for the trial court to be able to address the green parcel on remand, i.e., to reconsider the claim in the alternative that if Cluff did not own the orange parcel she owned the green one, it would be necessary that that claim had not been compromised, dismissed, or otherwise unconditionally disposed of. If, as Halladays suggest on this appeal, Cluff unqualifiedly waived her claim to the smaller parcel, without regard to the disposition made as to the larger one or the legal doctrine underlying that disposition, Cluff would not be entitled to any relief. If, on the other hand, the claim to the green parcel was expressly preserved or had been resolved only as a necessary part of the basic determination concerning boundary by acquiescence, Cluff would clearly be entitled to an opportunity to show the trial court that the Supreme Court's reversal as to the larger parcel necessitates a "reversal" as to the other.⁶

We have reviewed the record, with considerable care, with an eye toward determining whether the claim was unqualifiedly waived. Cluff's counterclaim was crystal clear that she should be declared the owner of the orange parcel on the basis of the doctrine of boundary by acquiescence, but that if she was unsuccessful, she should be declared the owner of the green parcel because of the "identical circumstances" concerning each parcel. At trial, Cluff explained her position, through counsel, in response to the court's initial perception that she was conceding her rights to the green parcel:

What I'm saying, when I said the same principle lies, if the Court is going to follow title lines, rather than boundary by acquiescence, then we would be entitled to the green slashed area. And we believe that if Mr. Halladay is entitled to the orange slashed area to this title line, that we are entitled to move over to the title line. That there

should be a consistency

Counsel for Halladays then sought to characterize Cluff's position as conceding the green parcel. The court explained that Cluff simply wanted a consistent legal approach and concluded by observing "So there will be no stipulations on that." The parties then presented their evidence. After argument, the court issued a written decision. It recited no waiver or concession by Cluff as to the green parcel, but rather reached the merits and found that Halladays had established entitlement to it on the basis of boundary by acquiescence under the cases of *Fuoco v Williams*, 15 Utah 2d 156, 389 P 2d 143 (1964), and *Hales v Frakes*, 600 P 2d 556 (1979). Conversely, the trial court found, relying principally on the same cases, that Cluff had established entitlement to the orange parcel on the basis of boundary by acquiescence. Subsequently, the court entered Findings and Conclusions which reflect that the court reached the merits on both the green and the orange parcels and decided both situations on the basis of a consistent application of the doctrine of boundary by acquiescence. A single, short decree recited the result of the court's decision and quieted title to the green parcel in Halladays and the orange parcel in Cluff.

We see in none of this any concession or waiver by Cluff. The only place to which Halladays specifically point us in support of their contention that there was such a waiver, is at best ambiguous. The exchange followed an unreported bench conference and is, in its entirety, as follows:

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 Plaintiffs' Exhibit 8?

The Court: Yes.

While we would in any event be unwilling to construe that brief exchange between the court and Halladays' counsel as a concession by Cluff, we are especially not inclined to do so since the court in its decision made no mention of any concession or waiver by Cluff, but rather spoke in terms of a decision on the merits. At the hearing before the trial court following remand by the Supreme Court, Halladays' counsel acknowledged that the green parcel had been tried and not resolved by stipulation. Moreover, the court's remarks at that hearing, and in its subsequent written ruling, make clear the exclusive basis for its decision not to reconsider its disposition of the green parcel was its conclusion that the failure of Cluff to cross-appeal precluded it from doing so. No mention was made by the court of any pre-judgment concession or waiver by Cluff.

Accordingly, the trial court's order of October 18, 1984 is vacated and the case is again remanded to the trial court "for the entry of a new decree in conformity with" the Supreme Court's prior decision. In that regard, Cluff is entitled to an opportunity to show the trial court that the evidence adduced at trial as to the green parcel, when squared with the Supreme Court's decision, entitles Cluff to the green parcel. If it does, the "new decree" contemplated by the Supreme Court should so provide. Costs of this appeal to Cluff.

Gregory K. Orme, Judge

WE CONCUR

R. W. Garff, Judge

Norman H. Jackson, Judge

1 The orange parcel was actually occupied and claimed by the Bigelows and Cluff, adjacent landowners, apparently as though the undisputed boundary between them continued on through the orange parcel. Bigelows are not parties to the instant appeal and in the interest of simplicity we refer only to Cluff even in situations where technically the reference should be to "Cluff and Bigelows."

2 The orange parcel, labeled MNOP on Cluff's exhibits, was referred to in *Halladay v Cluff*, 685 P 2d 500 (Utah 1981), as the ABCD parcel. *Id.* at 502. The green parcel, labeled WXYZ on the exhibits, was not delineated on the Supreme Court's map, but lies to the west of the ADE line on their map. See *id.*

3 The trial court appreciated the need for a consistent approach to the entire dispute and later referred to its decree as "a fence-line decree."

4 The facts of this case are extremely unusual and it might even look like a case where some kind of "contingent" cross-appeal should have been filed. That illusion disappears if one focuses not on the component parts of the dispute but rather on the dispute as a whole and the pivotal role in its resolution of the selection and consistent application of one of two competing legal doctrines. Generally, however, the decision whether to cross appeal is simple. If a respondent wishes to modify or vary the trial court's judgment, he must cross appeal. See *Mann v Oppenheimer & Co.*, 517 A 2d 1056, 1060 (Del. Supr. 1986) ("[A]bsent a cross-appeal, the [respondent] may not attack the judgment of the court below with a view to enlarging its own rights or lessening the rights of its adversary"). *Terry v Zions Co-Op. Mercantile Inst.*, 617 P 2d 700, 701 (Utah 1980). If he only wants the judgment affirmed, he should not cross appeal. Nothing in this opinion should be taken to create allowances for parties who should cross appeal but do not. See, e.g., *Bentley v Potter*, 694 P 2d 617, 622 (Utah 1984), *Cerritos Trucking Co. v Utah Venture No. 1*, 645 P 2d 608, 613 (Utah 1982), *Ehason v Watts*, 615 P 2d 427, 431 (Utah 1980). See also *Ryan v State*, 150 Ariz. 549, 724 P 2d 1218, 223 (Ariz. App. 1986) (respondent can't raise assignment of error because issue not made subject of cross appeal), *Broadhead v McEntire*, 19 Ark. App. 259, 720 S.W. 2d 313, 318 (1986) (respondent can't argue for specific performance because filed no cross-appeal), *Hein Enterprises, Ltd. v S.F. Real Estate Invts.*, 720 P 2d 975, 980 (Colo. App.

1985)(respondent's failure to perfect cross-appeal precluded raising attorney's fee issue)

5 Trial courts are in a much better position to evaluate an entire case, including its nuances and undisclosed pitfalls, than an appellate court. It is for this reason that where, as in this case, all possible ramifications of a decision on appeal may not be readily apparent, a case will be remanded for such proceedings as are appropriate in view of the guidance offered in the opinion. It is no doubt for this reason the Supreme Court, in addition to specifically directing the trial court to quiet title to the orange parcel in the Halladays, remanded in general terms for "the entry of a new decree in conformity with" its opinion.

6 Loosely following the trial court's characterization quoted in Note 2, *supra*, Cluff wants nothing more than an opportunity to persuade the trial court that the Supreme Court's decision simply means the court's decree should have been a "title-lines decree" rather than a "fence-line decree."

Cite as
61 Utah Adv. Rep. 44

IN THE UTAH COURT OF APPEALS

BRAY LINES INC.,
Plaintiff and Respondent,
v.
UTAH CARRIERS, INC., a Utah
Corporation, and G. Eugene England, an
individual.
Defendants and Appellants.

Before Judges Billings, Greenwood and Orme.

No. 860133-CA
FILED: July 10, 1987

THIRD DISTRICT
Hon. Raymond S. Uno

ATTORNEYS:
John T. Caine for Appellant.
Michael K. Mohrman for Respondent.

OPINION

BILLINGS, Judge:

G. Eugene England appeals from the trial court's granting of Bray Lines Incorporated's motion for summary judgment. We affirm.

In April of 1978, Bray Lines Incorporated ("Bray Lines") was approached by Duane Barker ("Barker"), president of International Contract Carriers trucking company. In that capacity, Barker entered into negotiations with Bray Lines for the purchase of its Interstate Commerce Commission ("ICC") authority to operate motor carrier service over certain routes. Barker was advised that Bray Lines could not sell the authority directly to an existing company, but could only sell it to a new

entity. For purposes of satisfying the ICC's requirements for the sale of authority, Barker established Utah Carriers Incorporated ("Utah Carriers") with his father-in-law, G. Eugene England ("England") as President and a director of the corporation.

On April 12, 1978, Bray Lines transferred its authority to operate a motor carrier service to Utah Carriers. In exchange, Utah Carriers executed and delivered to Bray Lines a promissory note for the sum of \$309,438.49. The promissory note was signed on behalf of Utah Carriers by England, President. Also on April 12, 1978, England executed an unconditional personal guarantee as collateral for the principal obligation. Following consummation of this arrangement, England was not active in the operations of Utah Carriers nor was he compensated by Utah Carriers.

In 1980, the trucking industry was deregulated, rendering the previously granted operating authority worthless. Subsequently, Utah Carriers defaulted on the note; Bray Lines consequently filed suit against Utah Carriers and England to recover the \$44,556.39 outstanding balance. The court granted summary judgment against both defendants.

I.

Summary judgment should be granted only when it is clear from the undisputed facts that the opposing party cannot prevail. *Frisbee v. K & K Const. Co.*, 676 P.2d 387, 389 (Utah 1984); see Utah R. Civ. P. 56(c). In considering a summary judgment, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment. *Frisbee*, 676 P.2d at 389. This Court must determine whether the undisputed facts support the trial court's conclusion that England, as a matter of law, was liable on his personal guarantee.

II.

England asserts that enforcement of the note and guarantee would be unconscionable because the operating rights were rendered worthless due to deregulation. The determination of whether a contract is unconscionable is made with reference to the conditions that existed at the time the contract was executed. *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 461 (Utah 1983). In analyzing whether the contract is unconscionable, it is appropriate to consider the terms of the contract as well as the relative positions of the parties and circumstances surrounding the execution of the contract. *Id.*

In this case, the terms of the guarantee are unambiguous, straightforward, and understandable.¹ Moreover, there is no evidence of a gross inequality of bargaining power. Rather, the parties are experienced in business and they freely entered into this business venture;

BRENT D. YOUNG
IVIE & YOUNG
Attorneys for Plaintiffs
48 North University Avenue
P.O. Box 672
Provo, UT 84603
Telephone: 375-3000

1984 OCT 10 PM 3 40

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", "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".

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 $0^{\circ} 03' 17''$ East along a fence line 55.31 feet, thence South $89^{\circ} 51' 20''$ East along a fence line 118.20 feet thence South $0^{\circ} 09' 25''$ 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 15, 1984.

BY THE COURT:



GEORGE E. BALLIF, Judge

Mack HALLADAY and Merle Halladay.
Plaintiffs and Appellants.

v.

Madge CLUFF, Perry K. Bigelow and
Norma G. Bigelow. Defendants and
Respondents.

No. 18032.

Supreme Court of Utah.

May 1, 1984.

In a boundary dispute, the Fourth District Court, Utah County, George E. Ballif, J., sustained defendants' ownership of disputed tract under doctrine of boundary by acquiescence, and record owners of the tract appealed. The Supreme Court, Oaks, J., held that: (1) with regard to requirements that there must be uncertainty or dispute over location of boundary before claim based on boundary by acquiescence can be maintained, existence of dispute or uncertainty should be measured against objective test of reasonableness, so that dispute is not proved by mere difference of opinion, and uncertainty is not proved by mere lack of actual knowledge of true location of the boundary; (2) where boundary dispute involves property in city for which survey information is readily available, party claiming boundary by acquiescence has burden of proving objective uncertainty as one of the *prima facie* elements of the doctrine of boundary by acquiescence; and (3) defendants failed to establish applicability of doctrine of boundary by acquiescence, where defendants had ready access to deeds and had actually examined surveys clearly establishing plaintiffs' record title to property in dispute.

Reversed and remanded with directions.

Howe, J., filed an opinion concurring and dissenting.

1. Boundaries ⇌48(3)

Period of acquiescence required for reliance on a "boundary by acquiescence" depends on the circumstances of the particular case, but only under unusual circumstances would period be less than 20 years.

2. Boundaries ⇌48(2)

For purposes of rule that doctrine of "boundary by acquiescence" cannot be applied where there is no dispute or uncertainty concerning location of the boundary, "dispute" is not proved by a mere difference of opinion, and "uncertainty" is not proved by a mere lack of actual knowledge of the true location of the boundary; "dispute or uncertainty" should be measured against an objective test of reasonableness, rather than against a subjective test under which a boundary line could be uncertain or in dispute even though capable of being readily ascertained; rejecting *Ekberg v. Bates*, 121 Utah 123, 239 P.2d 205 and *Willie v. Local Realty Co.*, 110 Utah 523, 175 P.2d 718.

See publication Words and Phrases for other judicial constructions and definitions.

3. Boundaries ⇌48(2)

Under doctrine of "boundary by acquiescence," property line shown on record title cannot be displaced by another boundary unless it is shown that during the period of acquiescence there was some objectively measurable circumstance in the record title or in the reasonably available survey information, or other technique by which record title information was located on the ground, that would have prevented a landowner, as a practical matter, from being reasonably certain about the true location of the boundary; by the same token, a claimant cannot assert boundary by acquiescence if he or his predecessors in title had reason to know the true location of the boundary during the period of acquiescence.

4. Boundaries ⇌48(2)

Examples of objectively measurable uncertainties in location of boundary, based

on which doctrine of boundary by acquiescence would be appropriate if the doctrine's other requirements were met are inability to locate monuments established in original survey, internal inconsistencies in plat, no official or original plat or survey by which boundary line could be located, disagreement among different surveyors on location of boundary line, landmarks referenced in deeds that have disappeared, uncertainties or disputes created by conflicting terms in deeds such as overlapping description or metes and bounds descriptions that do not close, boundary by acquiescence should also be available where there are other inconsistencies that create reasonable doubt in the meaning of the record title or in its application to the actual on-the-ground location of the property identified in the record.

5. Boundaries ⇐33

Where boundary dispute involves property in city for which survey information is readily available, party claiming boundary by acquiescence has burden of proving objective uncertainty about the location of the boundary as one of the prima facie elements of the doctrine of boundary by acquiescence, rejecting *Brown v. Milliner*, 120 Utah 16, 232 P 2d 202, *Wright v. Clissold*, 521 P 2d 1224, *Universal Investment Corp. v. Kingsbury*, 26 Utah 2d 35, 484 P 2d 173, *King v. Fronk*, 14 Utah 2d 135, 378 P 2d 893, *Mortzkus v. Carroll*, 7 Utah 2d 237, 322 P 2d 391.

6. Boundaries ⇐48(2)

Notwithstanding allocation to party claiming boundary by acquiescence of burden of proof of objective uncertainty as one of the prima facie elements of the doctrine of boundary by acquiescence, record landowner may conclusively negate the existence of objective uncertainty by proving that the claimant or his predecessors in title had reason to know the location of the true boundary before the expiration of the period of acquiescence.

7. Boundaries ⇐48(2)

Claimants failed to establish applicability of doctrine of boundary by acquies-

cence where claimants had ready access to deeds and had actually examined surveys clearly establishing adjoining landowners' record title to property in dispute.

Brent D. Young, Provo, for plaintiffs and appellants

M. Dayle Jeffs, Provo, for Cluff

S. Rex Lewis, Provo, for Bigelow

OAKS Justice

This is an appeal from a judgment relying on boundary by acquiescence to quiet title to a 52.5- by 118-foot parcel of real property in the city of Provo. The issues are whether a showing of uncertainty or dispute on the location of a boundary line is necessary to the application of boundary by acquiescence and if so, what is meant by "uncertainty" and who has the burden of proving it.

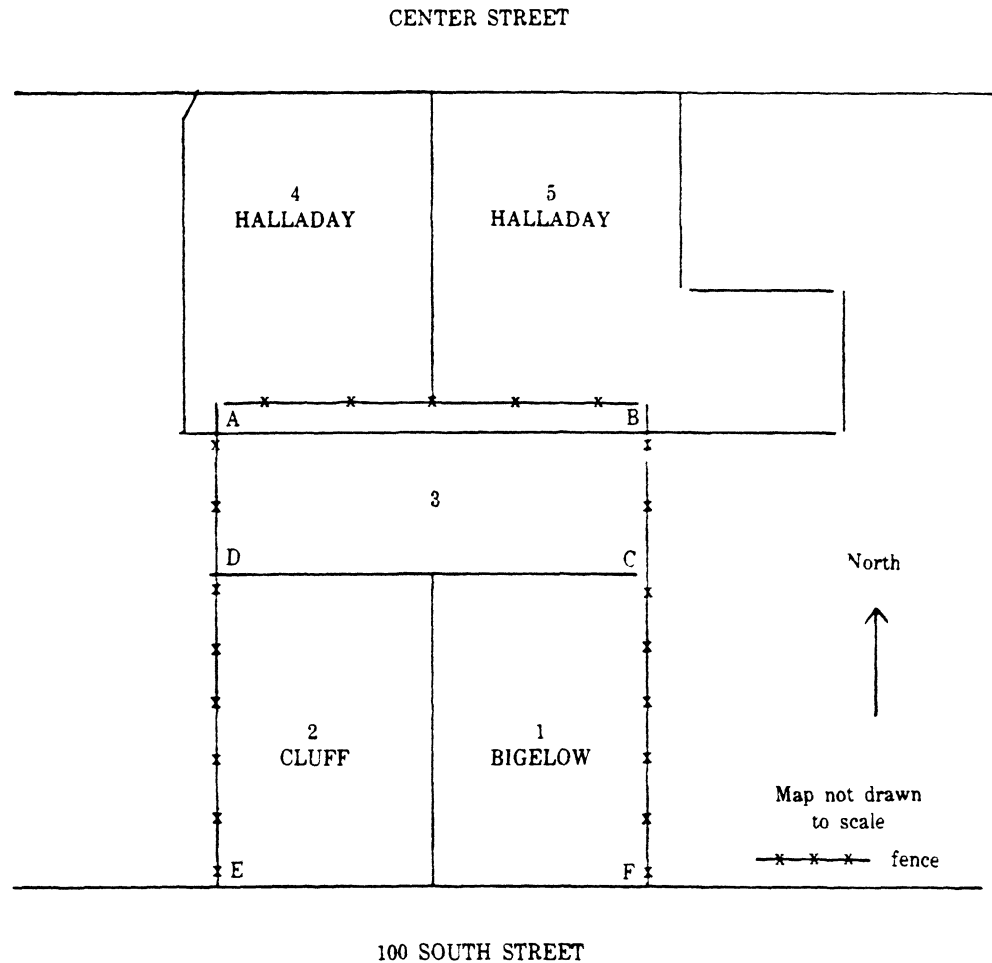
The property in issue is located in Provo City and is shown as parcel A-B-C-D on the accompanying map. From 1930 to the present, there has been a fence along lines E-A-B-F. It extends approximately 52 feet behind the rear property lines (C-D) of lots 1 and 2. This extension apparently resulted from an assumption that the 231-foot depth of these lots was measured from the edge of the street instead of from the points across 100 South Street shown on the legal descriptions.

The fence was clearly visible when the Bigelows purchased lot 1 in 1947 and when Cluff acquired lot 2 in 1948. The Halladays acquired lot 3, which contains most of the disputed parcel, in 1958. (They purchased lot 5 in 1950 and lot 4 in 1961.)

When the Bigelows and Cluff purchased lots 1 and 2, they assumed their properties extended to the back fence at line A-B. Acting accordingly, they cultivated gardens and built and maintained several chicken coops on their respective portions of parcel A-B-C-D. Bigelows had a survey made in 1956 that placed their rear boundary near line C-D, but they and Cluff apparently believed the survey to be erroneous. In

1975 Cluff obtained a plat that placed her rear boundary at line C-D

During the period of their adjoining property ownership the Halladays maintained that Bigelows and Cluff's true



boundaries were at line C-D Mr Halladay informed Mr Bigelow of this fact on one occasion in the 1950s and told him not to use the disputed parcel on several occasions in the 1970s Halladays had no discussions with Cluff regarding the property line until shortly before this litigation commenced Halladays made very little use of lot 3

In 1979, the Halladays commenced this suit to quiet title to parcel A-B-C-D. The

Bigelows and Cluff counterclaimed and the district court sustained their ownership of this parcel under the doctrine of boundary by acquiescence. On appeal the Halladavs 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 Halladavs the record owners.

I UNCERTAINTY OR DISPUTE AS AN INGREDIENT IN BOUNDARY BY ACQUIESCENCE

The doctrine of boundary by acquiescence has been the source of considerable confusion and controversy among judges, lawyers, and landowners in this state. *Kino v Fronk*, 14 Utah 2d 135, 139, 378 P 2d 893, 895 (1963), Note *Boundary by Acquiescence*, 3 Utah L Rev 504, 504 (1953). See generally Note, *Boundaries by Agreement and Acquiescence in Utah*, 1975 Utah L Rev 221. One of the primary areas of confusion is the requirement of the 'presence or absence of dispute and/or uncertainty as to boundary.' *King v Fronk*, 14 Utah 2d at 139, 378 P 2d at 895.

[1] Much of the confusion has resulted from the intermingling of rules governing boundary by acquiescence and boundary by parol agreement. Annot., 7 A L R 4th 53, 59 (1981). Both of these doctrines identify circumstances in which landowners can establish boundary lines without a written agreement. Originally the two were easily distinguishable because boundary by parol agreement required an express parol agreement with respect to a boundary but no period of acquiescence, while boundary by acquiescence required a lengthy period of acquiescence but no express parol agreement. *Hummel v Young*, 1 Utah 2d 237, 239-40, 265 P 2d 410, 411 (1953), *Brown v Millner*, 120 Utah 16, 25, 232 P 2d 202, 207 (1951). Note, 1975 Utah L Rev, *supra*, at 224.¹

With time, the distinctions between boundary by agreement and boundary by acquiescence became blurred. The requirement of an express parol agreement began to be articulated among the elements of boundary by acquiescence, although this Court said that "the law will imply an agreement fixing the boundary as located, if it can do so consistently with the facts

appearing." *Hummel v Young*, 1 Utah 2d at 240, 265 P 2d at 411. Similarly, the requirement of a long period of acquiescence was applied to boundary by agreement. *Hobson v Panguitch Lake Corp.*, Utah, 530 P 2d 792, 794 (1975). *Blanchard v Smith*, 123 Utah 119, 121, 255 P 2d 729, 730 (1953). In various opinions the Court even referred to boundary by agreement and boundary by acquiescence as if they had merged into one. See e.g., *Hobson v Panguitch Lake Corp.*, 530 P 2d at 794 (reference to "the doctrine of boundary by acquiescence or agreement"), *Carter v Lindner*, 23 Utah 2d 204, 460 P 2d 830 (1969) (reference to "boundary line by acquiescence under an oral agreement"), Note, 1975 Utah L Rev, *supra*, at 222-23.

The confusion stemming from the intermingling of boundary by agreement and boundary by acquiescence has carried over to the subject of uncertainty or dispute over the boundary. Originally, this was mentioned as a requirement only in connection with boundary by agreement. *Rydalch v Anderson*, 37 Utah 99, 109, 107 P 25, 29 (1910). In that context, uncertainty or dispute over the boundary would precede and provide the motivation for the oral agreement. In 1928, this Court began to refer to uncertainty or dispute as a matter to be considered in boundary by acquiescence. *Tripp v Bagley*, 74 Utah 57, 66-72, 276 P 912, 916-18 (1928). Thereafter, the opinions of this Court frequently referred to a showing of uncertainty or dispute as an essential ingredient in the application of the doctrine of boundary by acquiescence. *Madsen v Clegg*, Utah, 639 P 2d 726, 728-29 (1981), *Leon v Dan-sie*, Utah, 639 P 2d 730, 731 (1981), *Wright v Chissold*, Utah, 521 P 2d 1224, 1226 (1974), *Universal Investment Corp v Kingsbury*, 26 Utah 2d 35, 37-38, 484 P 2d 173, 174-75 (1971), *Glenn v Whitney*, 116

1. The period of acquiescence required for boundary by acquiescence has not been quantified into an exact period of time, it depends on the circumstances of the particular case. This Court's most recent discussion identifies it as a "long period of time" generally related to the common law prescriptive period of 20 years,

and only under unusual circumstances would a lesser period be deemed sufficient." *Hobson v Panguitch Lake Corp.* Utah 530 P 2d 792, 795 (1975) (10 years held insufficient). *Accord King v Fronk*, 14 Utah 2d 135, 141-42, 378 P 2d 893, 897 (1963).

Utah 267, 272-73, 209 P.2d 257, 260 (1949); *Home Owners' Loan Corp. v. Dudley*, 105 Utah 208, 219, 141 P.2d 160, 166 (1943); *Peterson v. Johnson*, 84 Utah 89, 93, 34 P.2d 697, 698-99 (1934). Although there are admittedly some other opinions throughout this period that make no mention of a showing of uncertainty or dispute,² we have concluded from the more recent cases and from the clear weight of authority that the relevance of this ingredient is settled in our law. See generally Annot., 69 A.L.R. 1430, 1501-04 (1930), supplemented in 113 A.L.R. 421, 436 (1938); 12 Am.Jur.2d *Boundaries* §§ 78-79, 83, 88 (1964).

The difficult issues in respect to uncertainty or dispute as an ingredient in boundary by acquiescence concern the meaning of these terms and who has the burden of proof. As demonstrated hereafter, our opinions have not given consistent answers to these questions. The contest is typically between interests that are both worthy—the desire to confirm boundaries that have apparently been recognized *on the ground* over a long period of time and the desire to enhance reliance on the property dimensions shown *in the county records*. The law clearly gives precedence to the record title, with boundary by acquiescence being an exception, but the conditions of that exception have not been settled with clarity or adhered to with consistency, in part because of the bewildering variety of factual circumstances in which the question arises.

In general, when survey information is reasonably available (such as when reliable survey control points are accessible to the land and survey costs are not disproportionate to the value of the land) so that it is reasonable to expect the parties to locate their boundary on the ground by surveys, the courts should be less willing to apply the doctrine of boundary by acquiescence.

2. E.g., *Goodman v. Wilkinson*, Utah, 629 P.2d 447 (1981); *Monroe v. Harper*, Utah, 619 P.2d 323 (1980); *Hales v. Frakes*, Utah, 600 P.2d 556 (1979). See also *Brown v. Milliner*, 120 Utah at 25, 232 P.2d at 207 (uncertainty or dispute characterized as the "fiction" on which boundary by acquiescence is grounded).

This reasonable availability of survey information obviously varies from place to place and from time to time. However, it can be said in general that survey information is more available and its cost is less likely to be disproportionate in relation to the value of the land in city and platted areas than in rural or wilderness areas. It can also be said in general that technological advances in survey techniques (as well as in the accuracy and accessibility of record title information) is tipping the scales toward greater reliance on record title information and lesser reliance on boundary by acquiescence.³ The law should conform to those realities.

II. THE MEANING OF UNCERTAINTY OR DISPUTE OVER BOUNDARY

In some earlier cases, uncertainty or dispute had to be traceable to an objectively determinable ambiguity in a deed or survey, so that the true location of the boundary could not be readily ascertained. It was not established by proving that neither adjoining landowner knew the exact location of the boundary, because "lack of knowledge as to the location of the true boundary is not synonymous with uncertainty." *Glenn v. Whitney*, 116 Utah at 273, 209 P.2d at 260; Note, 1975 Utah L.Rev., *supra*, at 231-32. However, later cases rejected this objective measurement in favor of a subjective test in which "a boundary line may be 'uncertain' or 'in dispute' even though it is capable of being readily ascertained." *Ekberg v. Bates*, 121 Utah 123, 127, 239 P.2d 205, 207 (1951), quoting *Willie v. Local Realty Co.*, 110 Utah 523, 531, 175 P.2d 718, 723 (1946). Uncertainty or dispute was much easier to prove under this rule, which therefore had the effect of increasing the availability of

3. When boundary by acquiescence was first introduced in Utah almost a century ago, *Switzgale v. Worseldine*, 5 Utah 315, 15 P. 144 (1887), much of the state had not been surveyed and searches of record title may have been difficult to conduct.

boundary by acquiescence and decreasing reliance on the record title.

[2] After carefully considering our previous decisions on this question, we return to the more rigorous definition set forth in *Glenn v. Whitney*, *supra*, and hold that "dispute" is not proved by a mere difference of opinion, and "uncertainty" is not proved by a mere lack of actual knowledge of the true location of the boundary. This is the thrust of our recent decisions on this subject, *e.g.*, *Madsen v. Clegg*, *supra*, and it is the holding of the better-reasoned cases in other jurisdictions. *E.g.*, *Buza v. Wojtalewicz*, 48 Wis.2d 557, 564-67, 180 N.W.2d 556, 560-61 (1970); *Hartung v. Witte*, 59 Wis. 285, 298-300, 18 N.W. 175, 180-81 (1884). *Fry v. Smith*, 91 Idaho 740, 741-42, 430 P.2d 486, 487-88 (1967). Finally, the ingredient that has been called "dispute or uncertainty" should be measured against an objective test of reasonableness and should therefore more appropriately be called "objective uncertainty."

[3] Under the rule as we have defined it here, the property line shown on the record title cannot be displaced by another boundary unless it is shown that during the period of acquiescence there was some objectively measurable circumstance in the record title or in the reasonably available survey information (or other technique by which record title information was located on the ground) that would have prevented a landowner, as a practical matter, from being reasonably certain about the true location of the boundary. By the same token, a claimant cannot assert boundary by acquiescence if he or his predecessors in title had reason to know the true location of the boundary during the period of acquiescence.

Our decision to measure compliance with the requirement of "objective uncertainty" by whether the landowner, as a practical matter, could be reasonably certain about the true location of the boundary on the ground is supported by two policy considerations.

First, by allowing less latitude for boundary by acquiescence, we minimize conflict with the objectives of our statute of frauds, which forbids the transfer of interests in real property without a written conveyance. U.C.A., 1953, § 25-5-1; *Madsen v. Clegg*, 639 P.2d at 728-29; *Tripp v. Bagley*, 74 Utah at 68-72, 276 P. at 916-18.

Second, an objective test, which minimizes reliance on boundary by acquiescence, corresponds more closely to the purposes of that doctrine. This Court has recognized that "[t]he very reason for being of the doctrine of boundary by acquiescence or agreement is . . . [to avoid] stirring up controversy." *Hobson v. Panguitch Lake Corp.*, 530 P.2d at 794, to prevent litigation, and to promote repose of title and stability in boundaries. *Haies v. Frakes*, 600 P.2d at 559. These purposes are best furthered if those who purchase, use, or sell real property must rely on descriptions in deeds and reasonably available survey information to settle boundary questions in the first instance. Only when it is not reasonable to expect landowners to ascertain the true location of the boundary by this manner should landowners be allowed to claim boundary by acquiescence. See *Hartung v. Witte*, 59 Wis. at 298-300, 18 N.W. at 180-81. Allowing a claimant to forego reasonably available means of determining the true boundary and to assert his lack of "actual knowledge" as a basis for boundary by acquiescence fosters uncertainty on the location of boundaries and magnifies the number of instances in which landowners have to resolve disputes by litigation.

[4] Boundary by acquiescence remains a viable means of establishing a boundary where there is objective uncertainty in the location of the true boundary that cannot reasonably be resolved by reference to the record title and by use of reasonably available survey information. For example, following are instances of objectively measurable uncertainties in which boundary by acquiescence would be appropriate if its other requirements were met: inability to locate monuments established in original

survey, *Holmes v. Judge*, 31 Utah 269, 271, 87 P. 1009, 1010 (1906); internal inconsistencies in plat, *Young v. Hyland*, 37 Utah 229, 233, 108 P. 1124, 1126 (1910); no official or original plat or survey by which the boundary line can be located, *Jensen v. Bartlett*, 4 Utah 2d 58, 60, 286 P.2d 804, 806 (1955); disagreement among different surveyors on location of boundary line, *id.*; landmarks referenced in deeds have disappeared, *Joaquin v. Shiloh Orchards*, 84 Cal.App.3d 192, 148 Cal.Rptr. 495, 496 (1978); uncertainties or disputes created by conflicting terms in deeds, such as overlapping descriptions, *Motzkus v. Carroll*, 7 Utah 2d 237, 239, 322 P.2d 391, 393 (1958); or metes and bounds descriptions that do not close, *Nunley v. Walker*, 13 Utah 2d 105, 110-11, 369 P.2d 117, 120-21 (1962). Boundary by acquiescence should also be available where there are other inconsistencies that create reasonable doubt in the meaning of the record title or in its application to the actual on-the-ground location of the property identified in the record.⁴

III. BURDEN OF PROOF OF OBJECTIVE UNCERTAINTY

An early line of cases placed the burden of proving uncertainty or dispute on the party claiming boundary by acquiescence. *Peterson v. Johnson*, 84 Utah at 93-94, 34 P.2d at 698-99; *Home Owners' Loan Corp. v. Dudley*, 105 Utah at 219-20, 141 P.2d at 166; *Willie v. Local Realty Co.*, 110 Utah at 530-32, 175 P.2d at 722-23; *Glenn v. Whitney*, 116 Utah at 272-73, 209 P.2d at 260. For example, since the fence in *Home Owners' Loan Corp. v. Dudley*, *supra*, "was not shown to have been established to settle any dispute or to establish any boundary line, the true location of which was unknown or even uncertain," boundary by acquiescence was held to have failed. 105 Utah at 219, 141 P.2d at 166.

A few years later, however, in *Brown v. Milliner*, *supra*, this Court rejected the ruling in this line of cases, stating:

4. Parties also remain free to settle uncertainties or disputes through boundary by agreement or by the use of quitclaim deeds or other legal

In some of the opinions of this court on the subject of disputed boundaries, there are statements to the effect that the location of the true boundary must be uncertain, unknown or in dispute before an agreement between the adjoining landowners fixing the boundary will be upheld, citing *Tripp v. Bagley*, *supra*, in support thereof. . . . But the *Tripp* case does not require a party relying upon a boundary which has been acquiesced in for a long period of time to produce evidence that the location of the true boundary was ever unknown, uncertain or in dispute. That the true boundary was uncertain or in dispute and that the parties agreed upon the recognized boundary as the dividing line will be implied from the parties' long acquiescence.

120 Utah at 27, 232 P.2d at 208. Numerous decisions after *Brown v. Milliner* used a similar approach, either by omitting this subject from the list of elements to establish the doctrine or by requiring the defending landowner to prove "the absence of a dispute or uncertainty in fixing the boundary" as a means of rebutting a presumption of boundary by acquiescence. *Wright v. Clissold*, 521 P.2d at 1226. *See, e.g., Universal Investment Corp. v. Kingsbury*, 26 Utah 2d at 37, 484 P.2d at 174; *King v. Fronk*, 14 Utah 2d at 138, 378 P.2d at 895; *Motzkus v. Carroll*, 7 Utah 2d at 242-43, 322 P.2d at 395-96.

However, in *Florence v. Hilene Equipment Co.*, Utah, 581 P.2d 998 (1978), this Court was again squarely faced with the question of who should carry the burden of proof. In holding that boundary by acquiescence did not apply, the trial court had stated as a conclusion of law "[t]hat the doctrine of boundary by acquiescence arises only when the true boundary is either unknown, uncertain, or in dispute, none of which was proved in this case." *Id.* at 1000. The Court, in an opinion authored by Justice Hall (only one justice dissenting), affirmed that decision and its

documents. Disputants may also acquire property through adverse possession, as provided by statute. §§ 78-12-2 to -21.

statement of the law, noting that it was "consistent with this Court's prior holdings." *Id.* The *Florence* holding was apparently ignored (but not questioned) in three subsequent cases.⁵ Then, in rejecting boundary by acquiescence, our two most recent cases discuss the absence of uncertainty or dispute in conjunction with the affirmative requirements of the doctrine and contain no intimation that this subject is part of the burden of a record landowner seeking to rebut a presumption. *Leon v. Dansie*, Utah, 639 P.2d 730 (1981); *Madsen v. Clegg*, Utah, 639 P.2d 726 (1981). In the latter case, this Court stated: "*In the absence of any initial uncertainty concerning the ownership of the property in question, the doctrine of boundary by acquiescence has no application.*" *Id.* at 729 (emphasis added).

The question of burden of proof is about evenly balanced on the authorities. On policy, both positions are supportable by persuasive arguments. The allocation of the burden of proof could therefore depend on what one assumes about whether it is the record owner or the claimant by acquiescence who has superior access to facts about events long past, but that basis of decision is unacceptable because either assumption could be made and neither could be justified empirically. In this circumstance, we are especially well advised to limit our rule of law to the facts before us.

[5, 6] This case involves property in the city of Provo, where survey information is readily available. It is therefore reasonable for the law to require the parties in this case to locate their property lines on the ground by means of the record title and reasonably available survey information rather than by acquiescence in a fence line or other identifiable points on the ground. Consequently, as to this circumstance we

hold that the party claiming boundary by acquiescence has the burden of proving objective uncertainty as part of the prima facie elements of the doctrine of boundary by acquiescence.⁶ Notwithstanding this allocation of the burden of proof, the record landowner may, of course, conclusively negate the existence of objective uncertainty by proving that the claimant or his predecessors in title had reason to know the location of the true boundary before the expiration of the period of acquiescence.

IV. THE FACTS OF THIS CASE

We are mindful that the district court had to rule on the facts of this case in the face of the contradictory authorities we have discussed. Since we have now undertaken to clarify the rules pertaining to this case, our task is much easier.

[7] Although there are no direct findings relating to the requirement of uncertainty, the court did find that "[t]here is no record title in either [the Bigelows or Cluff] to the property in dispute." Neither of these claimants challenges the factual basis for that finding. In addition, there is no evidence of any objectively measureable circumstance in the record title or in the reasonably available survey information that would have prevented the claimants from using these means to ascertain the true boundary on the ground. On the contrary, the evidence clearly shows that both claimants had ready access to deeds and had actually examined surveys clearly establishing the Halladays' record title to the property in dispute. 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.⁷

5. These cases, cited note 2 *supra*, do not list uncertainty or dispute as an affirmative requirement of boundary by acquiescence.

6. We express no opinion on whether this allocation of the burden of proof would apply to property not located in a city or platted area.

7. Our resolution of this issue makes it logically unnecessary for us to rule on the other issues tendered by appellants.

We also forego answering the numerous arguments and charges in the dissenting opinion. We do caution that the meaning and intent of this opinion should not be judged by the content of the dissent, because we do not acquiesce in

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. No costs awarded.

HALL C.J. and STEWART and DURHAM JJ. concur.

HOWE, Justice (concurring and dissenting).

I concur in the result on the limited ground that both the Bigelows and the Cluffs who rely on boundary by acquiescence had actually examined surveys during the period of acquiescence showing the Halladay's ownership of the property in dispute. Once they examined the surveys they had reason to know that the line acquiesced in was not the true line and they could acquire no rights thereafter. In *Tripp v Bagley*, 74 Utah 57, 276 P. 912 (1928) this Court held the doctrine of boundary by acquiescence to be not applicable because the evidence affirmatively demonstrated that when the boundary fence was erected the parties knew that it was not on the true line and further they could not have believed it to be on the true line since the true line was straight north and south along a section line whereas the boundary fence had angle turns in it like a dog's leg. This requirement was again recognized in *Willie v Local Realty Co.* 110 Utah 523, 175 P.2d 718 (1946). More recently, in *Florence v Hilne Equipment Co.*, Utah 581 P.2d 998 (1978) this Court in holding the doctrine of boundary by acquiescence not applicable noted that both the joining owners knew where the true boundary was located and thus they did not treat a fence which ran between their properties as marking the boundary. Similarly in *Madsen v Clegg*, Utah, 639 P.2d 726 (1981), we stressed the fact that the fence running between the two properties ran in a straight line, whereas the parties deeded

the dissent's interpretation of this opinion. To cite only one example a boundary located on a surveyed line *could* qualify for boundary by acquiescence even though a subsequent survey showed the original survey to have been in error. A rule of law that is intended to encourage landowners to rely on record title informa-

tion and reasonably available survey information will not be applied to penalize a landowner who has done just that. If the original survey was in error that is a clear instance of objective uncertainty and boundary by acquiescence will apply if its other elements are proved.

lines which coincided along this course had two right angle turns in them. In all of these decisions the parties had reason to know that the acquiesced line was not the true line or that fact was implicit. The doctrine of boundary by acquiescence was held in each case to be not applicable.

I regard most of the balance of the majority opinion to be dicta and an unwarranted assault upon boundary by acquiescence as it has been developed by the cases of this Court over the past 80 years. I dissent from much of it especially from the announcement that boundary by acquiescence should be further restricted and not applied where the adjoining land owners could have or should have had their properties surveyed before the boundary was marked on the ground. I cannot subscribe to that announcement for the following reasons.

The doctrine of boundary by acquiescence has always been very restrictively applied. Since it operates to take from the fee owner a small strip of his land it has never been given broad application. Only in those exceptional circumstances where all four of the following elements were present has it been employed: (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 land owners. *Goodman v Wilkinson*, Utah 629 P.2d 447 (1981). Since the doctrine was first announced in *Holmes v Judge*, 31 Utah 269, 87 P. 1009 (1906), it has been applied only in approximately 25 cases reaching this Court (see appendix). The effect of the announcement by the majority opinion is to sub silentio overrule most of those cases. In a thoughtful and well-considered opinion written by Justice Frick of this Court in *Holmes v Judge*, *supra*, it was pointed out that the doctrine

and reasonably available survey information will not be applied to penalize a landowner who has done just that. If the original survey was in error that is a clear instance of objective uncertainty and boundary by acquiescence will apply if its other elements are proved.

of boundary by acquiescence rests upon sound public policy; that it was a doctrine of repose with the view of quieting titles and preventing strife and litigation concerning boundaries. Many years later, Justice Crockett in *Hobson v. Panguitch Lake Corp.*, Utah, 530 P.2d 792 (1975), endorsed this same public policy when he said:

That in the interest of preserving the peace and good order of society (sic) the quietly resting bones of the past, which no one seems to have been troubled or complained about for a long period of years, should not be unearthed for the purpose of stirring up controversy, but should be left in their repose.

Now the majority seems to say that this long recognized public policy should be abandoned; that the bones of the past may be unearthed and controversy permitted if when the boundary was marked on the ground (by fences, trees, etc.) 30, 40 or 50 years ago it was feasible for the then owners to have surveyed their properties which supposedly would have resulted in the placement of the boundary on the deed line. There are three major difficulties with that approach. In the first place, a survey may have been actually made and the boundary marked on that line. Because of the lapse of many years, no one who was then present may be alive or available. Just because a recent survey shows the marked boundary to be incorrectly placed does not prove that the then owners, many years ago, did not have a survey made on which they relied in establishing the marked boundary. As finer and more precise instruments of survey are developed, property lines established in accordance with earlier surveys may often be shown to be out of place by later surveys. Under the rule adopted by the majority, apparently the later survey would govern and a marked boundary which may well have been established in reliance on the earlier survey would yield. In *Wacker v. Price*, 70 Ariz. 99, 216 P.2d 707 (1950), the Court emphatically rejected such a suggestion and quoted with approval the following statement appearing in a Michigan case, *Diehl v. Zanger*, 39 Mich. 601 (1878):

Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity. But no law can sanction this course.

The majority assures us that a new survey would not necessarily be allowed to upset a boundary set on an earlier survey. But after the lapse of many years, no one may know that an earlier survey was made. Thus, the later survey will be followed and the boundary, long recognized, will be moved.

Secondly, the boundary dispute is here and now. It does little good to reflect as to what the then owners 30, 40 or 50 years ago might have done and disregard entirely the conduct of the owners and their successors since that time in acquiescing in the markers on the ground. In most cases, the acquiescence is an unconscious act with no thought being given during the period of acquiescence to the boundary, let alone with surveying it. Thirdly, this Court should not embark upon the impossible task of trying to determine in each case whether the owners 30, 40 or 50 years ago could have afforded a survey had they then given thought to the boundary or whether the value of the property at that time would have been worth it, depending upon whether the boundary dispute arises "in city and platted areas" or whether it arises in "rural or wilderness areas." The answers to such inquiries will be impossible to obtain. The inquiry apparently will be subjective. Yet in many cases the builders of the marked boundary will be dead or will have long since sold their interest in the property and be unavailable. Our cases on boundary by acquiescence for the past 80

years have approached boundary disputes with the view that it is not unjust in certain cases to require disputing owners to live with what they and their predecessors have acquiesced in for a long period of time. Today the majority turns its back on that philosophy and now wants to explore and decide boundary cases on what might have been. This approach is not practical and I believe will prove to be unworkable.

Holmes v. Judge supra, and its progeny have been consistent in rejecting the notion that boundary by acquiescence should only be applied when the true line could not have been ascertained by a survey. This contention was put to rest in an earlier case, *Young v. Hyland*, 37 Utah 229, 108 P 1124 (1910). Two years later, in *Binford v. Eccles*, 41 Utah 453, 126 P 333 (1912), Chief Justice Frick again dismissed that contention in the following words:

Appellant would thus be permitted to unsettle boundaries which by the adjoining land owners had been recognized and acquiesced in for approximately a quarter of a century. *Any rule of law which would permit such a result would be pernicious and in the long run would produce strife and litigation, and in the nature of things would often result in injustice if not oppression.* [Emphasis added.]

More recently in *Willie v. Local Realty Co.*, supra and in *Ehberg v. Bates*, 121 Utah 123, 239 P 2d 205 (1951), this Court again rejected the suggestion that boundary by acquiescence should not apply unless it could be demonstrated that the true line could not be ascertained by a survey. The majority advocates that we "return" and now follow an obscure statement made in *Glenn v. Whitney*, 116 Utah 267, 209 P 2d 257 (1949), that "lack of knowledge as to the location of the true boundary is not synonymous with uncertainty." The subject of surveying was not discussed in that case and it is this writer's opinion that that statement does not refer to surveying. However, if that statement means that there can be no uncertainty in the absence of a survey, it is out of harmony with every other case of this Court on the subject and

should be summarily disavowed. The statement was dicta since the evidence showed that the person who had erected the old fence did not own land on either side of it and boundary by acquiescence clearly did not apply.

In a surprising turnabout in thinking and public policy, the majority opinion now proclaims that the stirring up of controversy is avoided, litigation is prevented and repose of title and stability in boundaries is promoted if "those who purchase, use or sell real property may rely on descriptions in deeds and reasonably available survey information to settle boundary questions in the first instance." As I have already pointed out, generally reliance on descriptions in deeds and available survey information is salutary. However in those rare instances where the elements of boundary by acquiescence are present, an exception has been recognized and disputing neighbors are not permitted to depart from that which they have long acquiesced in. This does no mischief to those who purchase, use or sell real property as the majority opinion maintains since it is not unfair to charge buyers with taking notice of a marked boundary which is there to be seen in plain sight. Boundary by acquiescence cases often arise when one adjoining land owner decides to sell his property and a survey is made by him or his buyer revealing that the marked boundary encroaches a few inches or sometimes a few feet. Rather than disturbing the long acquiesced in boundary, the law has been and is that the boundary shall not be disturbed but the buyer may protect himself by requiring a reduction in the purchase price by the vendor to compensate for the shortage of property. If fortuitously the survey shows that the seller has an excess of property, the buyer reaps the bargain of it. Either way the old boundary is preserved and strife and litigation is prevented. No innocent person is harmed. Only that owner who has slept on his rights is made to live with that which he has long accepted.

I dissent from many statements made in part I of the majority opinion. First proof

of uncertainty or dispute is not and has never been an 'ingredient' or element of a cause of action for boundary by acquiescence. *Tripp v Bagley* supra cited by the majority does not so hold. Uncertainty and dispute were discussed in that case in connection with an *express* parol boundary agreement where it must be proved to overcome the bar of the statute of frauds. The party relying on the oral agreement must show that the location of true boundary was unknown, uncertain or disputed when the agreement was made, otherwise the oral agreement is invalid as an attempt by the contracting parties to transfer ownership of real estate without a writing. The plaintiff in that case also relied upon the doctrine of boundary by acquiescence but this Court held it to be not applicable for the reasons already stated in the first paragraph of this opinion viz. when the boundary fence was erected the parties knew that it was not on the true line because of its angle turns. The Court did not hold that a party relying upon boundary by acquiescence had to affirmatively show that the boundary was erected following uncertainty or dispute. Such a requirement would be entirely foreign to the doctrine of boundary by acquiescence because the basis of the doctrine is that the law implies that there once existed uncertainty and dispute and that the adjoining owners mutually agreed upon the marked boundary in settlement. *Holmes v Judge*, supra.

If there was ever any question about this proposition our opinion in *Brown v Miller*, 120 Utah 16, 232 P 2d 202 (1951), decided many years after *Tripp v Bagley*, supra, clarified that matter and put it to rest.

In some of the opinions of the court on the subject of disputed boundaries, there are statements to the effect that the location of the true boundary must be uncertain, unknown or in dispute before an agreement between the adjoining land owners fixing the boundary will be upheld citing *Tripp v Bagley*, supra, in support thereof. Such statements should be understood to mean that if the location of the true boundary line is

known to the adjoining owners they cannot by parol agreement establish the boundary elsewhere. As was pointed out in the *Tripp* case, such an agreement would be in contravention of the statute of frauds. But the *Tripp* case does not require a party relying upon a boundary which has been acquiesced in for a long period of time to produce evidence that the location of the true boundary was ever unknown, uncertain or in dispute. That the true boundary was uncertain or in dispute and that the parties agreed upon the recognized boundary as the dividing line will be implied from the parties' long acquiescence. *Roberts v Brae*, 5 Cal 2d 356, 54 P 2d 698. In *Holmes v Judge* supra, this court, speaking through Mr Justice Frick, set forth the following requirements necessary to establish a boundary by acquiescence. The line must be open, visible, marked by monuments, fences or buildings and recognized as the boundary for a long term of years. It was expressly stated by the court in that case that there was no evidence how the fence and building which were recognized as the boundary came to be erected, or that there was ever any dispute between the adjoining owners concerning the location of the true boundary, or that any question was ever raised as to its location until shortly before the plaintiff commenced his action.

This explanation was again set out in *haec verba* in *Motzkus v Carroll*, 7 Utah 2d 237, 322 P 2d 391 (1958) where we expressly rejected the contention that the party relying on the long recognized boundary must prove that it was once unknown, uncertain or in dispute. Justice Wade, writing for the Court, stated:

[I]t is clear that where a party by evidence establishes a long period of acquiescence in a fence as marking the boundary line between two tracts, he is *not required to also produce evidence* that the location of the true boundary line was ever unknown, uncertain or in dispute. The establishment of a long period

of acquiescence in a fence as marking the boundary line between two tracts by the respective owners gives rise to a presumption that the true boundary line was in dispute or uncertain, which places, at least, the burden of producing evidence that there was no dispute or uncertainty but that the true boundary line was known to the respective owners on the party claiming that such was the fact. Where, as here, there is evidence on that question other than the proof of acquiescence in the fence as marking the boundary line for the required long period of time the trial court must find that the boundary line by acquiescence has been established.

(Emphasis added.) Justice Wade cited as his authority *Brown v. Milliner*, supra, which in turn relied on the original acquiescence case, *Holmes v. Judge*, supra.

In view of the foregoing unequivocal pronouncements of this Court, I cannot agree with the majority that "we have concluded from the more recent cases and from the clear weight of authority that the relevance of this ingredient [uncertainty and dispute] is settled in our law." None of the cases cited by the majority in support of that statement do in fact so hold.¹

The majority opinion in the face of 80 years of cases to the contrary also places the burden of proof that an uncertainty or dispute once existed upon the party relying

upon the old established boundary. By so doing, one of the foundations of the doctrine is destroyed, viz., that the law implies that the landowners were once uncertain or in dispute and the boundary was marked on the ground in settlement. *Holmes v. Judge*, supra. This implication is drawn because due to the passage of time, there is often little or no evidence available as to the erection of the boundary marker. Without being able to rely on the implication, the doctrine of boundary by acquiescence cannot continue to exist as a workable and viable doctrine. Our cases have recognized that lack of uncertainty or dispute can be raised as a defense against the doctrine of boundary by acquiescence by the person assailing the old boundary. *Wright v. Clissold*, Utah, 521 P.2d 1224 (1974). *Motzkus v. Carroll*, supra, and *Universal Investment Corp. v. Kingsbury*, 26 Utah 2d 35, 484 P.2d 173 (1971), properly held that like other defenses the burden of proof is upon the person asserting the defense. We explained in our opinion in *Wright v. Clissold*, supra, that once the four elements of boundary by acquiescence (named above) are established, the Court is required to presume the existence of a binding agreement unless the party who assails it proves by competent evidence that there was actually no agreement between the adjoining land owners or there could not have been a proper agreement. Said the Court:

1. The cases cited by the majority make only the briefest mention of uncertainty and dispute; none of them hold that the party advocating boundary by acquiescence must prove as an element of his cause of action that the fence, etc. was erected because of uncertainty or dispute by the adjoining land owners. For example, in *Madsen v. Clegg*, Utah, 639 P.2d 726 (1981), *Glenn v. Whitney*, 116 Utah 267, 209 P.2d 257 (1949), *Homeowners Loan Corp. v. Dudley*, 105 Utah 208, 141 P.2d 160 (1943), and *Peterson v. Johnson*, 84 Utah 89, 34 P.2d 697 (1934) it appears to this writer that uncertainty and dispute was mentioned as an element of an express parol agreement; most of those cases cite *Tripp v. Bagley*, supra, which gives credence to my interpretation. In two other cases cited by the majority, *Wright v. Clissold*, Utah, 521 P.2d 1224 (1974), and *Universal Investment Corp. v. Kingsbury*, 26 Utah 2d 35, 484 P.2d 173 (1971), it was stated that lack of any uncertainty

or dispute at the time the fence was erected could be shown as a defense by the party resisting boundary by acquiescence. In *Leon v. Dansie*, Utah, 639 P.2d 730 (1981), "dispute" was mentioned not as a requirement but "that there had been no dispute as to record title [not as to the location of the boundary] at any time over the years." In most of the above cases the mention of uncertainty and dispute was dicta since the case was decided on other grounds. For example, in *Leon v. Dansie*, *Wright v. Clissold* and *Glen v. Whitney*, the fence was shown to have been erected not as a boundary but simply to contain livestock. Similarly, in *Glenn v. Whitney*, the person erecting the fence did not own land on either side of it; in *Homeowners Loan Corp. v. Dudley* the same person owned the land on both sides of the fence and in *Peterson v. Johnson* the land on one side of the fence was in the public domain.

Facts which prove the latter include the following: (1) no parties available to make an agreement, e.g., sole ownership of the property with the existing line which was later transferred in tracts to two or more other persons; (2) the line was set for a purpose other than setting a boundary; (3) *the absence of a dispute or uncertainty in fixing the boundary*; and (4) ...

I disagree with the majority opinion that some of our cases have placed the burden of proof upon the party relying upon boundary by acquiescence. My reading of the cases cited by the majority indicates that who has the burden of proof was not an issue in any one of them, and I consider the incomplete statements in those cases upon which the majority relies to be dicta as far as burden of proof is concerned. On the other hand, in *Motzkus v. Carroll*, supra, burden of proof was a vital issue and it was there held that the party relying upon the old boundary fence is not required to produce evidence that the location of the true boundary line was ever unknown, uncertain or in dispute.

I dissent from the adoption of the rule proposed by the majority in Part II that: [T]he property line shown on the record title cannot be displaced by another boundary unless it is shown that during the period of acquiescence there was some objectively measurable circumstance in the record title or in the reasonably available survey information (or other technique by which record title information was located on the ground) that would have prevented a landowner as a practical matter from being reasonably certain about the true location of the boundary. By the same token a claimant cannot assert boundary by acquiescence if he or his predecessors in title had reason to know the true location of the boundary during the period of acquiescence.

I am in accord with the second sentence. The instant case provides an illustration of that rule, viz., during the period of acquiescence, Bigelow and Cluff had access to a survey which indicated that they did not

own to the fence to which they claim. However, the first sentence quoted above seems to be out of harmony with the second sentence. It seems to require proof of a negative, i.e., proof by the person relying on boundary by acquiescence that he and his predecessors were prevented for some reason from having a survey made which would have determined the location of the true line. So far as this writer knows only the lack of money could really keep any land owner from having a survey made. Is that now going to be a vital and valid inquiry by the Court in future boundary cases?

I believe that a rule which would serve us better and which would be workable might be simply stated as follows:

A claimant cannot assert boundary by acquiescence if he or his predecessors in title during the period of acquiescence had reason to know that the boundary acquiesced in was not on the true line. This "reason to know" could come about because of information contained in the record title or in existing survey information or information from other sources which would put a reasonable man on notice that the boundary acquiesced in was not on the true line.

Since the reasonable man standard is used in other areas of the law I would hope that it would work well here. It would provide courts with the basis for refusing to apply boundary by acquiescence where the discrepancy was apparent and the acquiescence was blindly indulged in. On the other hand, we must not expect too much from the rule since being familiar with the legal description of one's property and locating that description on the land are two entirely different things. That is why surveys are made. However, the rule would serve well in instances like *Tripp v. Bagley*, supra, where an old fence line had several angle turns in it whereas the true line was straight north and south along the section line; and in *Madsen v. Clegg*, supra, where the boundary fence ran on a straight line, whereas the deed lines of both parties had right-angle turns in them. In both cases

the landowners had reason to know that the fence was not on the true line.

Part III of the majority opinion ends with the observation that because the property involved in this case is in the city of Provo survey information is readily available and it is reasonable for the law to require the parties to locate their property lines on the ground by means of a survey. It appears to me that this statement is out of harmony with earlier statements in the opinion which indicated that the Court should look at the situation as of when the acquiescence began to determine whether it was feasible for a survey to have been made—not 20 years later when this litigation was commenced.

In conclusion, I am concerned that the rules laid down by the majority are unclear and unworkable as I understand them. The doctrine of boundary by acquiescence has a proper place in our jurisprudence and in my opinion has served well the public policy which brought it into existence in the first place. It has provided a fair basis for settling disputes over often insignificant amounts of land and has discouraged countless property owners from feuding with their neighbors when a recent survey conflicts with long recognized lines. Everything the majority argues and now espouses was considered and rejected by this Court in *Holmes v. Judge*, supra, when Justice Frick wrote:

While the interests of society require that the title to real estate shall not be transferred from the owner for slight cause, or otherwise than by law, these same interests demand that there shall be stability in boundaries, and that, where parties have for a long term of years acquiesced in a certain line between their own and their neighbor's property, they will not thereafter be permitted to say that what they permitted to appear as being established by and with their consent and agreement was in fact false.

For nearly 80 years we have followed that philosophy. But today the majority opinion opens the way for any property owner in

this state to have now his property surveyed (or resurveyed) and gain possession of every inch contained in his legal description. Old surveys and boundaries built in reliance thereon will be meaningless. I believe that the majority opinion is a step backward in achieving stability of boundaries in this state.

APPENDIX

1. *Moyer v. Langton*, 37 Utah 9, 106 P. 508 (1910).
2. *Young v. Hyland*, 37 Utah 229, 108 P. 1124 (1910).
3. *Farr Development Co. v. Thomas*, 41 Utah 1, 122 P. 906 (1912).
4. *Binford v. Eccles*, 41 Utah 453, 126 P. 333 (1912).
5. *Christensen v. Beutler*, 42 Utah 392, 131 P. 666 (1913).
6. *Tanner v. Stratton*, 44 Utah 253, 139 P. 940 (1914).
7. *Warren v. Mazzuchi*, 45 Utah 612, 148 P. 360 (1915).
8. *Bartholomew v. Pickett*, 51 Utah 312, 170 P. 65 (1917).
9. *Van Cott v. Casper*, 53 Utah 161, 176 P. 849 (1918).
10. *Davis v. Lynham*, 67 Utah 283, 247 P. 294 (1926).
11. *Willie v. Local Realty Co.*, 110 Utah 523, 175 P.2d 718 (1946).
12. *Dragos v. Russell*, 120 Utah 626, 237 P.2d 831 (1951).
13. *Ekberg v. Bates*, 121 Utah 123, 239 P.2d 205 (1951).
14. *Blanchard v. Smith*, 123 Utah 119, 255 P.2d 729 (1953).
15. *Jensen v. Bartlett*, 4 Utah 2d 58, 286 P.2d 804 (1955).
16. *Provonsha v. Pitman*, 6 Utah 2d 26, 305 P.2d 486 (1957).
17. *Motzkus v. Carroll*, 7 Utah 2d 237, 322 P.2d 391 (1958).
18. *Harding v. Allen*, 10 Utah 2d 370, 353 P.2d 911 (1960).
19. *Johnson Real Estate Co. v. Nielson*, 10 Utah 2d 380, 353 P.2d 918 (1960).
20. *Nunley v. Walker*, 13 Utah 2d 105, 369 P.2d 117 (1962).

APPENDIX—Continued

21. *King v. Fronk*, 14 Utah 2d 135, 378 P.2d 893 (1963)
22. *Johnson v. Sessions*, 25 Utah 2d 133, 477 P.2d 788 (1970)
23. *Universal Investment Corp. v. Kingsbury*, 26 Utah 2d 35, 484 P.2d 173 (1971).
24. *Lane v. Walker*, 29 Utah 2d 119, 505 P.2d 1199 (1973).
25. *Baum v. Defa*, Utah, 525 P.2d 725 (1974).
26. *Brown v. Peterson Development Co.*, Utah, 622 P.2d 1175 (1980).



**KEARNS-TRIBUNE CORPORATION,
PUBLISHER OF the SALT LAKE
TRIBUNE, Petitioner,**

v.

**Honorable Eleanor S. LEWIS, Circuit
Court Judge, Respondent.**

No. 19612.

Supreme Court of Utah.

May 1, 1984.

Newspaper publisher petitioned for an extraordinary writ seeking to vacate an order of closure and to stay a preliminary hearing in a criminal case involving three defendants charged with aggravated kidnapping, aggravated sexual assault, and aggravated exploitation. The Supreme Court, Oaks, J., denied the stay but called for briefs on the merits, and held that: (1) publisher's appeal was not moot, despite fact that the preliminary hearing had been concluded; (2) public's, including the media's, First Amendment right of access applies to preliminary hearings in criminal cases; (3) the people, including the media, have a right of public access to criminal trials and preliminary hearings under the State Constitution, subject to certain excep-

tions; (4) the court can restrict or deny access altogether where necessary to assure that a defendant receives a fair trial before an impartial jury; and (5) trial court's closure order failed to qualify for the fair trial exception to the constitutional right of access, and thus, was invalid, where the closure order was not accompanied by written findings, and where no evidence was submitted in the hearing on the motion for closure.

Extraordinary writ granted, order closing preliminary hearing set aside.

Daniels, District Judge, concurred in part and dissented in part and filed an opinion in which Howe, J., joined.

1. Action ⇨6

Newspaper publisher's petition for an extraordinary writ to vacate an order closing a preliminary hearing in a criminal case was not moot, despite fact that the closed hearing had been held, in view of fact that the case involved a question of considerable public interest that would recur and evade review unless held to be an exception to the mootness doctrine. U.C.A.1953, 77-35-7(d)(2).

2. Constitutional Law ⇨90.1(3)

Public's, including the media's, First Amendment right of access applies to preliminary hearings in criminal cases. U.S. C.A. Const.Amend. 1.

3. Criminal Law ⇨238(2)

At a preliminary examination, prosecution has burden of introducing sufficient evidence to persuade magistrate that there is probable cause to believe that the crime charged has been committed and that the defendant has committed it. U.C.A.1953, 77-35-7(d)(1).

4. Criminal Law ⇨230, 635

The people, including the news media, have a constitutional right of public access to criminal trials and preliminary hearings under the State Constitution. Const. Art. 1, §§ 2, 15.

M. DAYLE JEFFS OF JEFFS AND JEFFS
 Attorneys for Defendant Cluff
 90 North 100 East
 P. O. Box 683
 Provo, Utah 84601
 Telephone: 373-8848

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

MACK HALLADAY and
 MERLE HALLADAY,

Plaintiffs, DECREE

vs.

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

Civil No. 53,243

Defendants.

This matter came before the Court for trial on the 28th day of August, 1980, Brent D. Young, Esq., appearing for the plaintiffs, M. Dayle Jeffs, Esq., appearing for defendant Cluff, and S. Rex Lewis, Esq., appearing for defendants Bigelow. The parties presented their evidence and after having presented final arguments to the Court on the facts and the law the Court took the matter under advisement. On December 3, 1980, plaintiff brought a motion to reopen for the purpose of offering additional evidence as to plaintiffs' claim of title. The court granted the motion to reopen and received the additional evidence and having entered its Findings of Fact and Conclusions of Law, now makes and enters the following:

D E C R E E

1. Plaintiffs are granted a decree quieting title to themselves to the following described property:

Commencing 606.35 feet West and 319.36 feet North from the Southeast corner of Section 2, Township 7 South, Range 2 East, Salt Lake Base and Meridian; thence North 89°00' West along the North boundary of 100 South Street, Provo, Utah 10.36 feet; thence North 1°00' East 174.10 feet; thence South 89°00' East 7.49 feet; thence South 0°03'17" West along a fence line 174.12 feet to the point of beginning. Area = 0.04 acres

2. Defendants Bigelow are granted a decree quieting title to themselves in the area described as follows:

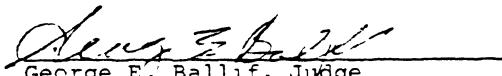
Commencing 488.57 feet West and 317.30 feet North from the Southeast corner of Section 2, Township 7 South, Range 2 East, Salt Lake Base and Meridian; thence North 89°00' West along the North boundary of 100 South Street, Provo, Utah 7.29 feet; thence North 1°00' East 177.60 feet; thence East 4.67 feet; thence South 0°09'25" West along a fence line 177.70 feet to the point of beginning. Area = 0.02 Acres

3. Defendants Cluff and Bigelow are granted a decree quieting title in that portion of tract #4 on Exhibits 8 and 12 cross-hatched in orange, more particularly described as follows:

Commencing 588.08 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 0.15 Acres

Dated and signed this 29 day of July, 1981.

BY THE COURT:


George E. Ballif, Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing Decree was mailed to the following attorneys this 23rd day of July, 1981 by placing same in the United States mails, addressed as follows:

1
2
3 M. DAYLE JEFFS OF JEFFS AND JEFFS
4 Attorneys for Defendant
5 90 North 100 East
6 P. O. Box 683
7 Provo, Utah 84601
8 Telephone: 373-8848

9 IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
10 STATE OF UTAH

11 MACK HALLADAY and
12 MERLE HALLADAY,

13 Plaintiffs,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

14 vs.

15 MADGE CLUFF, PERRY K.
16 BIGELOW and NORMA G.
17 BIGELOW,

Civil No. 53,243

18 Defendants.
19
20

21 This matter came before the Court for trial on the
22 28th day of August, 1980, Brent D. Young, Esq., appearing for
23 the plaintiffs, M. Dayle Jeffs, Esq., appearing for defendant
24 Cluff, and S. Rex Lewis, Esq., appearing for defendants
25 Bigelow. The parties presented their evidence and after
26 having presented final arguments to the Court on the facts
27 and the law the Court took the matter under advisement. On
28 December 3, 1980, plaintiff brought a Motion to Reopen for
29 the purpose of offering additional evidence as to plaintiffs'
30 claim of title. The Court granted the Motion to Reopen and
31 received the additional evidence and having fully considered
32 the same, now makes and enters its:

FINDINGS OF FACT

1. Plaintiffs and plaintiffs predecessors
in interest have occupied up to the visible boundary fenceline
in parcel 3 shown on Exhibit #12 and cross-hatched in green,

1
2 lying within the title of the defendant, Madge Kelson Cluff,
3 for many years, more particularly described as follows:

4 Commencing 606.35 feet West and 319.36 feet North from the
5 Southeast corner of Section 2, Township 7 South, Range 2
6 East, Salt Lake Base and Meridian; thence North 89°00' West
7 along the North boundary of 100 South Street, Provo, Utah
10.36 feet; thence North 1°00' East 174.10 feet; thence
South 89°00' East 7.49 feet; thence South 0°03'17" West
along a fence line 174.12 feet to the point of beginning.
Area = 0.04 acres

8
9 2. The parties hereto have acquiesced in said
10 line as a boundary line for a long period of years as adjoining
11 land owners.

12 3. The court finds that defendants Bigelow and
13 their predecessors in interest have occupied that strip of
14 land within the legal title of plaintiffs Halladay on Exhibit
15 #12 in parcel 1, which is cross-hatched in brown. The parties
16 hereto have acquiesced in said line as a boundary for a long
17 period of years by the adjoining land owners. Said parcel is
18 more particularly described as follows:

19 Commencing 488.57 feet West and 317.30 feet North from the
20 Southeast corner of Section 2, Township 7 South, Range 2
21 East, Salt Lake Base and Meridian; thence North 89°00' West
22 along the North boundary of 100 South Street, Provo, Utah
7.29 feet; thence North 1°00' East 177.60 feet; thence
East 4.67 feet; thence South 0°09'25" West along a fence
line 177.70 feet to the point of beginning. Area = 0.02 Acres.

23
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25 4. As to the property in controversy between
26 the plaintiffs and defendants Cluff and Bigelow shown on
27 Exhibit #12, cross-hatched in orange and marked by points
28 M-N-O-P, the court finds that:

29 (a) The plaintiffs succeeded to a tax
30 title to the description outlined in yellow on Exhibit #12
31 and marked by points A-B-C-D. Tax title was issued to George
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1
2 E. Collard by Utah County on the 23rd day of May, 1951 and
3 recorded June 28, 1951 in the office of the Utah County Recorder.
4 This document is defendant's Exhibit #27.

5 (b) The tax deed is regular on its face.

6 (c) The plaintiffs have never occupied
7 the area cross-hatched in orange on Exhibits #8 and #12, nor
8 the area within the fencelines identified on Exhibits #8 and
9 #12 as points P-M-N-O.

10 (d) The fence between points P-M-N-O have
11 existed for many years.

12 5. The fenceline marked P-M-N-O has marked
13 the boundary of occupancy of the defendants Cluff and Bigelow
14 and their predecessors in interest since before 1948.

15 6. The defendants Cluffs and Bigelow and
16 their predecessors have built improvements upon the land,
17 have occupied it for purpose of farming, storage and business
18 operations.

19 7. The fenceline M-N has been in existence
20 for over 50 years according to the testimony of plaintiffs'
21 witnesses.

22 8. The only evidence of plaintiffs' asserting a
23 claim of ownership and title to the tract in dispute, cross-
24 hatched in orange, points M-N-O-P on Exhibits 8 and 12 was
25 an incident occurring in 1977 or 1978 when plaintiffs'
26 asserted title thereto as against defendant Bigelow and
27 ordered Bigelow to cease digging a potato cellar thereon.
28 Defendant Bigelow moved his digging within the ground to
29 which he held legal title, but testified that he did not
30 acknowledge plaintiffs' superior right to the land is dis-
31 pute.

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2 9. The court visited the premises and in
3 viewing the north boundary of the land in dispute, point
4 M-N on Exhibits 8 and 12, observed that there was a well
5 developed fenceline and a planted area marking that as the
6 area of occupancy as between the plaintiffs' property on
7 the north and defendant's property on the south. The
8 possession of the disputed ground was in the defendants
9 as of the date of viewing as was shown by the witnesses
10 called and the documentary evidence, including photographs,
11 that were submitted to the court.

12 10. There is no record title in either of
13 the defendants to the property in dispute. The defendants
14 legal title to their north boundaries is along a fence
15 approximately from point P to point O on Exhibits 8 and 12.

16 11. The acquisition of title by plaintiffs'
17 through the tax deed to George Collard of May, 1951 includes
18 a 20 foot strip within Halladays chain of title to parcels
19 6 and 7.

20 12. Plaintiffs' chain of title to parcels 6
21 and 7 and the area north of points M to N on Exhibits 8 and
22 12 was not based on the tax sale.

23 Based upon the foregoing Findings of Fact, the
24 Court now makes and enters its:

25 CONCLUSIONS OF LAW

26 1. The court concludes that neither the tax
27 title limitation statutes nor the succeeding to legal title
28 by tax deed cut off the defendants claims to title by
29 acquiescence to the property within the fences described
30 as M-N-O-P on Exhibits 8 and 12.

31 2. The plaintiffs have established the
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1
2 elements for boundary by acquiescence as to the cross-hatched
3 green area in parcel 3 on Exhibit 12 by establishing:

4 (a) Occupation by defendants and their
5 predecessors in interest up to a visible line marked definitely
6 by fences and other visible monuments.

7 (b) Acquiescence in the line as to the
8 boundary.

9 (c) For a long period of years.

10 (d) By adjoining land owners.

11 3. The defendants Bigelow have established
12 the elements of a boundary by acquiescence as to the cross-
13 hatched area in brown on Exhibit 12 in parcel 1 by the same
14 standards set forth in paragraph 2 above.

15 4. The defendants have established title by
16 acquiescence to the property within the fences described as
17 points M-N-O-P on Exhibits 8 and 12 by the same standards set
18 forth in paragraph 2 above.

19 5. The court concludes that as to each of
20 the above matters, the respective parties have established
21 their title by acquiescence pursuant to the rulings in
22 Fuoco vs. Williams, 15 Utah 2d 156, 389 P.2d 143 (1964);
23 Hales vs. Frakes, 600 P.2d 556 (1979); and Brown vs. Peterson,
24 Supreme Court No. 16785 decided December 18, 1980.

25 Dated and signed this 29 day of JULY 1981.

26 BY THE COURT:

27 
28 George E. Ballif, Judge
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