

1980

John Joseph Madsen v. Darrell L. Clegg : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Clair M. Aldrich; Attorneys for Appellant Frank W. Ballard ; Attorney for Respondent

Recommended Citation

Brief of Respondent, *Madsen v. Clegg*, No. 16887 (Utah Supreme Court, 1980).
https://digitalcommons.law.byu.edu/uofu_sc2/2153

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

---oo0oo---

JOHN JOSEPH MADSEN, :
Plaintiff-Appellant, :
vs. : Case No. 16,887
DARRELL L. CLEGG, :
Defendant-Respondent. :

---oo0oo---

BRIEF OF RESPONDENT

Appeal from the Judgment of
The Fourth Judicial District Court
In and For Utah County, State of Utah
The Honorable David Sam, Judge, Presiding

Clair M. Aldrich
Aldrich & Nelson
43 East 200 North
Provo, Utah 84601
Attorneys for Appellant

Frank W. Ballard
381 West 2230 North
Suite 125
Provo, Utah 84601
Attorney for Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
ARGUMENTS	
POINT I:	
ELEMENTS OF BOUNDARY BY ACQUIESCENCE FULFILLED . . .	4
POINT II:	
REPLY TO PLAINTIFF'S CASES	7
POINT III:	
THE TESTIMONY OF THE ABTRACTOR SHOULD NOT BE DISREGARDED	8
CONCLUSION	9

CASES CITED

	Page
<u>Ekberg v. Bates</u> , 239 P.2d 205 (Utah 1951)	6, 7
<u>Florence v. Hiline Equipment Company</u> , 581 P.2d 998 (Utah)	7
<u>Fuoco v. Williams</u> , 421 P.2d 944 (Utah 1966)	4
<u>Hales v. Frakes</u> , 600 P.2d 556 (Utah)	7

IN THE SUPREME COURT OF THE STATE OF UTAH

---oo0oo---

JOHN JOSEPH MADSEN, :
Plaintiff-Appellant, :
vs. : Case No. 16,887
DARRELL L. CLEGG, :
Defendant-Respondent. :

---oo0oo---

BRIEF OF RESPONDENT

STATEMENT OF FACTS

1. Because the plaintiff-appellant has presented his findings of fact in a way that is directly contrary to the lower court's findings of fact, the respondent will present the facts as found by the court.

2. That in 1904 a fence was constructed and the fence line has remained in the same place to the present time. (Tr. Page 9 Line 2).

3. That the defendant has been familiar with the ground in question all of his life and knows the history of the boundary line and the land in question during his recallable lifetime since 1930. (Tr. Page 56 Lines 26-27, Page 58 Lines 3-8, Page 60 Lines 24-30 and Page 61 Lines 2-3).

4. That from 1930 on, the defendant and his predecessors have done the following to the land they claim in this lawsuit:

(a) Have never had permission from nor paid rent to the

plaintiff to occupy or work the ground. (Tr. Page 59 Line 30 and Page 60 Line 1).

(b) Have occupied and worked the ground on the north side of the fence line up to the north side of the fence line. (Tr. Page 59 Lines 27-28, Page 60 Lines 5-8, Page 64 Lines 8-29 and Page 69 Lines 9-10).

(c) Have always considered the land north of the fence line solely their own property. (Tr. Page 62 Line 14 and Page 63 Lines 6-13).

(d) Have raised potatoes, sugar beets, alfalfa, barley and wheat on the ground. (Tr. Page 64 Lines 8-20).

(e) Have leveled and drained the ground and washed the alkali off and improved the soil. (Tr. Page 60 Lines 11-19).

(f) Have never allowed nor permitted nor seen the plaintiff or his predecessors occupy, work, or enter onto the ground in question or give notice of their claims on the ground in question until 1979. (Tr. Page 60 Lines 2-3).

5. That in 1942 the plaintiff purchased the land which he is claiming in this lawsuit and has lived across the street from the property since 1940 but is familiar with the land since 1904. (Tr. Page 68 Line 2 and Page 68 Lines 24-27).

6. That in the spring of 1979 the plaintiff entered onto the land and installed a one-wire steel post fence which was torn down by the defendant as soon as the defendant became aware of the fence. (Tr. Page 61 Lines 16-23).

7. The plaintiff in his brief states that there was a cattle lane immediately north of the fence line. The findings

of fact and the plaintiff's own testimony, as well as the defendant's, shows that the cattle lane was immediately south of the fence, and that the Orem City road replaced the cattle lane. (Tr. Page 13 Line 12, Page 14 Lines 17-23 and Page 59 Lines 22-24). The plaintiff's exhibit is incorrect, in fact the fence line is on the other side of the cattle lane. After the dedication of the cattle lane to Orem City, Orem City put in a substantial asphalt paved road immediately south of the fence and replaced the old fence with a more substantial fence and put in a drainage line south of the fence. (Tr. Page 20 Lines 16-23 and Page 14 Lines 17-23).

8. The registered land surveyor and professional engineer, Roger Dudley, testified that the fence line and the title line of Darrell Clegg was basically one and the same. (Tr. Page 31 Lines 9-15). That the abstractor (which plaintiff stipulated was qualified to map, Tr. Page 32 Lines 13-15) took the title line of Darrell Clegg and of the plaintiff and superimposed them to show that the plaintiff's title line only claimed a small sliver of land on the ground in question. See Exhibits 9, 10, 11, 12 and 13.

9. The plaintiff himself never mortgaged the ground but his predecessors mortgaged it as a part of a much bigger piece by inclusion of an old legal description. (Tr. Page 23 Lines 13-16).

10. The plaintiff applied for water rights and claims he intended on using the water on the ground in question. The legal description used in the water application for the place of

use was "Sec 21, T6S, R2E, SLB&M." The ground in question is in Section 20. (Plaintiff's Exhibit 7).

ARGUMENTS

POINT I

ELEMENTS OF BOUNDARY BY ACQUIESCENCE FULFILLED.

In 1966 the Supreme Court of Utah in Fuoco v. Williams, 421 P.2d 944, stated the elements of boundary by acquiescence. These have been fulfilled as follows:

(a) Acquiescence by Adjoining Owners. It is undisputed that the land owners and their predecessors have been adjoining owners since at least 1904.

(b) Long Period of Years. The fence line has been there since 1904 and it is the plaintiff's own testimony that he has not made any outward manifestation of ownership on the land since he has owned it except for the application of water which will be addressed in (d).

(c) Occupation Up to a Visible Line Spot Marked by Fences. It is undisputed that the defendant has occupied his ground on the north side of the fence and the plaintiff has occupied the ground on the south side of the fence from 1942 on. It is the findings of the court that such occupation has been since 1930 on.

(d) Mutual Acquiescence that the Line is the Boundary. There seems no question that this is the real element of the case. The plaintiff has testified that he has never regarded the fence line as the boundary line. (Tr. Page 22 Lines 5-9). On the other hand, the defendant testified that he felt the

boundary should not morally be there but considered it to be a boundary line by acquiescence. He felt that the line should be further south but was satisfied that the fence line was the real boundary line because of acquiescence. (Tr. Page 62 Line 13, Page 63 Lines 7-19, Page 64 Lines 8-14 and Page 71 Lines 10-20). So the real element is whether acquiescence can be imputed to the plaintiff by his acts or lack of acts.

Plaintiff heavily relies on the fact that his predecessors mortgaged the ground and that he himself applied for water on the ground. It is plaintiff's own testimony that he himself never mortgaged the ground. (Tr. Page 23 Lines 3-16). The inclusion of an old legal description in a mortgage which covered much more area than the land in question does not manifest an intent to claim the ground, nor does it give any notice to the other party of that intent.

The plaintiff's water application clearly shows that his intended use was to be in Section 21 as is shown by his application. The ground in question is on Section 20. Although the plaintiff was relying upon this evidence to show that he is claiming the ground in question, it in fact shows that he is not claiming such grounds.

The plaintiff claims that the dedication of the Orem road where the cattle lane was was simply because the fence line was well established (Tr. Page 15 Lines 27-30), and to keep the piece in question commercially valuable. Commercial value would seem to be greatest with the land being in one large tract and such an argument does not seem reasonable under the circumstances.

The establishment of an asphalt road would be an ideal time to clear up the boundary problem, not 25 years later.

On the other hand, the plaintiff has done nothing until 1979 to stop the defendant from treating the land as his own. Until 1979 the only way in which the defendant would know the plaintiff is claiming the land in question would be to read the plaintiff's mind.

It is well established by the Supreme Court that if the findings and judgments of the court can be supported by any substantial evidence and reasonable inference, then they will be sustained. The plaintiff's own overt act of dedicating the cattle lane to a road and allowing the defendant and his predecessors to exclusively occupy the land and treat it as their own from at least 1930 until 1979 would lead reasonable minds to conclude that acquiescence can and should be imputed in this case. When the only overt act by the plaintiff is to reinforce the establishment of a boundary line, then claims as to what went on in the plaintiff's mind should not be allowed to remove that boundary line.

Although there are five or six cases which parallel the present case and give support to the defendant, perhaps the best is Ekberg v. Bates, 239 P.2d 205, decided by the Supreme Court of Utah in 1951. In that case, the defendant built a fence he claimed, considered the fence the boundary line between the property, and built a stronger and higher fence to keep out dogs and chickens. When the newer fence was built, the other land owner (the father of the present plaintiff) did not protest but

in fact helped build the fence. Later the plaintiff (the son) protested that he considered the fence was on their property. Because the prior owner helped build the new fence he acquiesced in that being the boundary line. In the present case, it was the plaintiff himself who built the stronger fence and acquiesced by dedicating the Orem road and then giving no indication whatsoever that he claimed any of the land on the other side of the road. In the Ekberg case, the court found that where owners of adjoining tracts of land whose true boundary lines were in dispute or uncertain could be established by implication which were binding on the parties and their successors.

Since no one has troubled themselves or complained about the land in question for more than 40 years, it would seem inequitable to raise the controversies of the past, if in fact there were any, when the dust has settled so long. Claims as to what went on in the plaintiff's mind 50 years ago but not manifest by any outward act should not be allowed to disturb boundary lines 50 years later when the price of even this small parcel of land is formidable. It would be unjust for the plaintiff to marshall his recent statements contrary to what has been established for at least 50 years.

POINT II

REPLY TO PLAINTIFF'S CASES.

The plaintiff relies on Florence v. Hineline Equipment Company, 581 P.2d 998 (Utah), and Hales v. Frakes, 600 P.2d 556, for the proposition that a fence put up as a mere barrier does not preclude the parties from claiming up to the true boundary

line and there can be no boundary by acquiescence. These cases are inapplicable for that proposition because the plaintiff's own acts have established the fence line as the boundary line, the plaintiff's overt act of dedication to Orem as well as his allowing the defendant to use the property as his own, shows his own manifest intent that the boundary line was in fact the fence line. Additionally, the defendant's testimony shows that the fence line has been established as the boundary line.

POINT III

THE TESTIMONY OF THE ABTRACTOR SHOULD NOT BE DISREGARDED.

The plaintiff has stated that the abtractor is not a qualified engineer and therefore his testimony should be disqualified. Plaintiff has requested that the abtractor be ignored and that the plaintiff's pleading be binding, even though the plaintiff has no expert and no testimony of any sort that would verify his pleadings. Counsel argues Exhibit 3, which is a copy of a plat map that generally shows the boundary lines. The engineer, Mr. Dudley, testified in behalf of the defendant that the defendant's legal boundary was practically the same as the fence line. The abtractor then extrapolated the meets and bounds of the legal descriptions of both parties and overlaid them. The plaintiff has no testimony or information concerning the change in section line closures by the county surveyor as plead on Page 8 of his brief. If the judges were to decide on the adverse possession issue, then it would be relevant. If this case is to turn on the adverse possession issue, then the best recourse would be a remand for a new trial with testimony

by a qualified engineer as to exactly where the lines are. However, this case can best be resolved in a boundary by acquiescence solution.

CONCLUSION

The four elements of boundary by acquiescence have been met and the decision of the trial court should be sustained with costs to the defendant.

Respectfully submitted this 28 day of May, 1980.

Frank W. Ballard
FRANK W. BALLARD
381 West 2230 North
Suite 125
Provo, Utah 84601
Telephone: 375-9830
Attorney for Respondent

CERTIFICATE OF MAILING

This is to certify that two true and accurate copies of the foregoing Brief of Respondent were mailed to Clair M. Aldrich, Aldrich & Nelson, Attorney for Appellant, 43 East 200 North, Provo, Utah 84601, postage prepaid, this 30th day of May, 1980.

Marilyn Parsons