

1955

Karl Jensen and Georgina K. Jensen v. Earl H. Bartlett et al : Brief of Appellants

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Jensen v. Bartlett*, No. 8308 (Utah Supreme Court, 1955).
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Case No. 8308

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IN THE SUPREME COURT
of the
STATE OF UTAH

**KARL JENSEN and GEORGINA K.
JENSEN,**

Respondents,

—VS.—

**EARL H. BARTLETT and SARAH
E. BARTLETT, His Wife, and HY-
RUM RUSSELL EGGETT and
MARY MARGARET EGGETT, His
Wife,**

Appellants,

BRIEF OF APPELLANTS

EVANS, NESLEN & ELGGREN

Attorneys for Appellants

PRINTED IN U. S. A.—JOE R. BROWN PTG. CO., SALT LAKE CITY

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Appellants,

Case No. 8308

BRIEF OF APPELLANTS

STATEMENT OF FACTS

This is a boundary line dispute case.

The record on appeal prepared by the Clerk of the Court at Davis County upon the request of attorneys for appellants in their designation of record on appeal consisted of two parts, the first part containing the pleadings and other documents consisted of 40 pages each numbered on the bottom by the Clerk. The second part, being the transcript under separate cover, consisted of pages numbered from 1 to 128 on the top of the pages, but these pages were not numbered by the Clerk on the bottom of the pages. So as to eliminate any duplication of numbers, I have numbered the pages of the transcript on the bottom of the pages from No. 41 to and including No. 170. All references in this brief shall be to the record by the letter R followed by the number of the page of the record, the transcript being pages 41 to 170 inclusive of the record.

The properties of respondents, plaintiffs in the trial court, and appellants, defendants in the trial court are located in Bountiful City, Davis County, on the north side of 15th South Street and east of 2nd West Street. The respondents acquired title to certain land by Warranty Deed from George W. Pearson and Katherine W. Pearson, his wife, dated April 11, 1936, recorded in the office of the Davis County Recorder on May 2, 1936, in Book 1-N, page 355. (page 48 of plaintiff's Exhibit A). In said conveyance, the property was described as:

“Beginning at the Southwest corner of Lot 2, Block ‘L’, Plat N.M.C., running thence East $35\frac{1}{2}$ rods; thence North 12.75 rods; thence West $35\frac{1}{2}$

rods; thence South 11.75 rods to the place of beginning. Containing 2.33 acres, more or less, situated in Bountiful Townsite."

The appellant, Hyrum Russell Eggett, acquired title to certain land by Warranty Deed from James H. Moss and Angeline N. Moss, husband and wife, dated October 10, 1936, recorded in the office of the Davis County Recorder on October 20, 1936, in Book 1-0, page 36 (page 26 of defendants' Exhibit 9). In said conveyance the property was described as:

"Beginning at a point on the North side of a certain 2 rod street, running East and West, 35.5 rods East and 1.5 rods South from the Southwest corner of Lot 2, Block 'L', North Mill Creek Plat Survey, Davis County, Utah, and running thence East 12 chains; thence North 3.1875 chains; thence West 12 chains; thence South 3.1875 chains to beginning, containing 3.82 acres, more or less."

The appellant, Hyrum Russell Eggett, acquired title to another parcel of land which was supposed to be immediately east of the last described land from Carl E. Penman as Administrator with the Will Annexed of the Estate of John Penman, Deceased, by Administrator's Deed dated June 14, 1946, recorded in the office of the Davis County Recorder on August 8, 1946, in Book 1-Z of Deeds. (page 68 of defendants' Exhibit 10). In said conveyance, the property was described as:

“Commencing at a point on the East boundary line of land formerly owned by Henry Moss and on the South boundary line of Block 39, North Mill Creek Plat, and on the North side of a certain street 93.01 rods West from the intersection of the West line of Hy. No. 2, Davis County Road Survey with the North line of the street running East and West parallel with the South line of Block 39, N.M.C. (said point of beginning being also 80 rods North and 137.81 rods West from the SE corner of Sec. 30, Tp. 2 North, Range 1 East, Salt Lake Meridian, U. S. Survey) and running thence North 12.75 rods; to the land formerly owned by Stephen H. Ellis; thence East 12.55 rods; thence South 12.75 rods to the South line of said Block 39; thence West along the South line of said Block 12.55 rods to the point of beginning and containing 1.0 acre.”

Using the line claimed by appellants as the true boundary, the appellant, Hyrum Russell Eggett, has an overlap of 37.025 feet on the two parcels of land which he acquired from the two different grantors (defendants' Exhibit 6, R. 107). If the line is established as contended by appellants, the appellants do not end up with a surplus of property but a shortage in width of 37.025 feet. If the line is established as the lower court has decreed, appellants will be shorted and will lose an additional 73.92 feet in width of land, and the respondents who have no shortage will gain an additional 73.92 feet in width of land.

The dispute involves the location of the boundary line between the property acquired by the respondents and described in the deed from Pearson to Jensen dated

April 11, 1936, and the property acquired by appellant, Hyrum Russell Eggett, and described in the deed from Moss to Eggett dated October 10, 1936. There is no conflict between the descriptions of the two pieces of land. The division line between the two tracts was a line running North and South $35\frac{1}{2}$ rods or 585.75 feet East from the Southwest corner of Lot 2, Block "L", North Millcreek Plat Survey (designated as Plat N.M.C. in the conveyance to the Jensens).

As far as the record title is concerned, the Jensens, prior to July 21, 1950, owned the land west of said line, and the appellant, Hyrum Russell Eggett, prior to May 1, 1946 owned the land east of said line.

The appellants, Hyrum Russell Eggett and Mary Margaret Eggett, husband and wife, by Warranty Deed dated May 1, 1946, conveyed a piece of land 53 feet wide, east and west, immediately east of the above described line to their daughter, Sarah E. Bartlett, one of the appellants (page 40, defendants' Exhibit 9, defendants' Exhibit 1).

Sometime prior to August 28, 1951, the appellants, Hyrum Russell Eggett and Mary Margaret Eggett, had conveyed to their son, Merle J. Eggett, a piece of land 72 feet, east and west, immediately east of the land conveyed to Sarah E. Bartlett on May 1, 1946. Merle J. Eggett and Dawn Eggett, his wife, conveyed this land

to the appellants, Earl Henry Bartlett and Sarah E. Bartlett, his wife, by Quit-Claim Deed dated August 28, 1951 (defendants' Exhibit 4).

The respondents, Karl Jensen and Georgina K. Jensen, his wife, by Warranty Deed dated July 21, 1950, conveyed to the Bartletts a piece of land 15 feet wide, east and west, immediately west of the above described line, which is $35\frac{1}{2}$ rods east of the said southwest corner of Lot 2, Block L, North Mill Creek Plat.

The Bartletts thus became the owners of 140 feet fronting on 15th South Street, 53 feet thereof directly from Hyrum Russell Eggett, 15 feet from the Jensens, and 72 feet from Hyrum Russell Eggett to Merle J. Eggett to the Bartletts.

After this conveyance by the Jensen to the Bartletts, the record title of respondents' property extended east of the southwest corner of said Lot 2 to a point 570.75 feet. The former length or frontage of their property along 15th South was $35\frac{1}{2}$ rods or 585.75 feet, and they had now disposed of 15 feet to the Bartletts leaving 570.75 feet.

The respondents made the following additional conveyances of portions of their property:

The 70 feet immediately west of that which they had conveyed to the Bartletts to William F. Strong and Sylvia M. Strong, his wife, by Warranty Deed dated November 8, 1950 (page 61, plaintiffs' Exhibit A);

The 70 feet immediately west of that conveyed to William F. Strong and Sylvia M. Strong, his wife, to Jonathon H. Strong and Beula Strong, his wife, by Warranty Deed dated November 8, 1950 (page 60, plaintiffs' Exhibit A);

The 70 feet immediately west of that conveyed to Jonathon H. Strong and Beula Strong, his wife, to Wilford Belnap and Louise Belnap by Warranty Deed dated December 6, 1950 (page 58, plaintiffs' Exhibit A);

The 60 feet immediately west of that conveyed to Wilford Belnap and Louise Belnap to Hal Ross Belnap and Maxine Driggs Belnap (page 56, plaintiffs' Exhibit A);

The 175 feet immediately east of the southwest corner of Lot 2, Block L North Mill Creek Plat, to Eva Maria Jensen Peterson, daughter of the respondents, by Warranty Deed dated October 4, 1948 (page 55, plaintiffs' Exhibit A).

The remaining property fronting on 15th South Street, 125.75 feet in width, is apparently still owned by respondents. The plat in the back of plaintiffs' Ex-

hibit A shows how the property has been divided by the respondents as outlined above and that which is outlined in yellow is the property which apparently is still owned by the respondents. This plat also shows the original easterly line of the respondents property by a broken line and designates this line as being 35.5 rods or 585.75 feet east of the southwest corner of Lot 2. It also designates the east line of the William F. Strong property which was the east line of the respondents' property after the conveyance of the 15 foot strip of land from the respondents to the Bartletts. This line is designated as being 570.75 feet east of the southwest corner of Lot 2.

Of the land acquired by respondents on April 11, 1936, said land having a frontage on 15th South of 35.5 rods or 585.75 feet, as outlined above they have conveyed to others 460 feet and retain 125.75 feet which accounts for the total property acquired by them.

The County Recorder's office of Davis County shows the present ownership on the plats in said office as set forth above (defendants Exhibit 7). Although respondents have sold and conveyed property having a total frontage on 15th South Street of 460 feet and retain property having a frontage of 125.75 feet, a total of 585.75 feet, or all the land acquired by them, they sought to recover additional land from appellants by reason of the location of an old fence which for many years was

on the property of appellants. This land sought to be recovered by respondents is approximately 68 feet wide and is east of the property sold by respondents to William F. Strong and Sylvia M. Strong, his wife, by the deed dated November 8, 1950.

The old fence was described by several witnesses. The substance of the testimony of Frans Brauer was that he lives at 40 East 1500 South in Bountiful and has lived there since April 1916 (R. 54). His house is about 600 feet east of the Bartlett house and across the street on the south side of 15th south. When he came to Bountiful in 1916, there was a fence running north and south on the north side of 15th South. It was a part wire fence and had some berries planted along it (R. 56). There was a post every 10 or 12 feet. There were some barbed wire strands on the posts (R. 56). The fence remained there until Bartlett bought that piece of property (R. 57). Mr. Winward was the first person he could remember occupying the property later acquired by the Jensens. Winward's irrigation ditch was just west along the old fence. He did not know any of the circumstances involving the placing of the fence (R. 60). In 1920 or 1921 he saw the fence down when he passed the property (R. 61). The fence was moved west and then put up again in the place it originally had been. The fence was down for two or three days.

Eva Peterson, the daughter of the respondents, testified that she and her husband came to the place to take care of it for her father in October, 1931. There was a fence on the east end of the property and it consisted of barbed wire and posts. It was old in 1931 and looked like it had been there quite a while (R. 64). There were black currant bushes, and the fence was right in the middle of the bushes (R. 64). The fence stayed there until Bartlett bought the property from her father (R. 65). The fence line had never been disturbed until Mr. Bartlett bought the 15 feet of property from her father (R. 69).

Karl Jensen, the respondent, testified that he bought the property at Bountiful about the first day of September, 1931. That the same fence on the east of the property was there from the time he bought until Bartlett bought the 15 feet of property from him. The fence wasn't moved for 23 years (R. 77).

Alexander E. Winward testified for the respondent that he was at that time 70 years old and lived at Ogden, Utah. That in December, 1916, he took possession of the property later acquired by respondents. That he had agreed to buy it on contract from a William T. Atkin. That there was a barbed wire fence on the east side of the property. It was an ordinary barbed wire fence with cedar posts set at the usual distance of about 15 feet apart (R. 150). There were some currant bushes growing around the fence. Henry Moss was in possession of the

property to the east at that time. Mr. Winward lived on the property until 1927 and had possession for two years after that. In the spring of 1917 he noticed that the fence had been moved 30 to 50 feet to the west (R. 152). He telephoned Mr. Atkin and told him that Mr. Moss had moved the fence. A day or two later he put the fence back where it had previously been (R. 153). He knew it remained there until he left in May, 1927 (R. 154). When the fence was put back, the land was not surveyed. He knew nothing of any boundary line between the adjacent properties. He knew nothing concerning why the fence was originally put up (R. 156).

The appellant, Earl H. Bartlett, discovered for the first time that the fence referred to was not the boundary on the west side of the property which his wife had acquired from her father, Hyrum Russell Eggett, after he had purchased the 15 foot wide piece of property from the respondents which he thought at the time was the 15 feet immediately west of the fence. This discovery was made when he and Hyrum Russell Eggett measured from the east side of Second West, where they believed the southwest corner of Lot 2, Block L, North Mill Creek Plat was, for a distance of 35.5 rods and discovered that the distance of 35.5 rods was west of the fence line. This measurement was made in April or May of 1951 (R. 130 to 132).

The appellant, Hyrum Russell Eggett, first became aware that the fence was not on the west line of the property which he formerly owned when a Mr. Larsen,

a real estate man, brought two clients to Mr. Eggett's store and wanted to know if Mr. Eggett would give a Quit-Claim Deed (R. 136). About six months thereafter, he had a survey made of the property, by Mr. Bush of Bush & Gudgell, engineers. This survey is defendants' Exhibit 6 (R. 107). Mr. Bush as part of his work in surveying the property put in the ground a steel stake to mark the west boundary of the Bartlett property including the 15 foot wide piece theretofore purchased by the Bartletts from the Jensens (see defendants Exhibit 6). Mr. Bush testified that this steel stake is 570.75 feet east of the southwest corner of Lot 2, Block L, North Mill Creek Plat, and is also 3,005.05 feet west of the east line of Section 30 (R. 115). The steel stake is also three feet east of the east side of the driveway on the William F. Strong property and marks the east boundary of the William F. Strong property. The location of this steel stake is also shown in defendants' Exhibit 15 and 16. Mr. Strong claims no property east of this steel stake (R. 168).

Mr. Robert G. Harding, a civil engineer and surveyor, made a survey for respondents to fix the location of the old fence line in reference to the east line of Section 30. He found the old fence line to be 2,924.09 feet due west of the section line (R. 91, plaintiffs' Exhibit C). He testified that the square post on the north side of the street, the post farthest south in the old fence line was 1.36 feet farther west than a direct line between a power pole, an old charred cedar stump and another square pole, and that the square fence post on the north

side of the street was 3.2 feet west from a power line pole on the north side of the street. Mr. Harding's survey shows that the steel stake is 3,008.75 feet west of the east section line, that is 2924.09 feet plus 1.36 feet, plus 83.3 feet (see plaintiffs' Exhibit C). Mr. Harding placed the fence line as being 653 feet east of the southwest corner of the Jensen's property, although he said he was unable to tell where the southwest corner of Lot 2, Block L, North Mill Creek Plat, was (R. 94). By his testimony the width of the property in dispute would be approximately 69 feet.

The respondents contend that the west line of the Bartlett property is 15 feet west of the old fence line, which line would be on a line 2939.09 feet west of the east line of Section 30 and which line would also, according to the testimony of Mr. Harding, be 638 feet east of the west end of the property recently owned by the Jensens.

The appellants contend that the west line of the Bartlett property is identical with the east line of the William F. Strong property, that said line is marked by a steel stake placed in the ground on the north side of 15th South Street, 3 feet east of the east side of the driveway on the William F. Strong property which point is also 570.75 feet east of the southwest corner of Lot 2, Block L, North Mill Creek Plat and which point is also 3,005.05 feet west of the east line of Section 30.

There is a conflict between the figures of Mr. Bush and of Mr. Harding as to where the steel stake is located in reference to the east line of Section 30. Mr. Bush places it at 3,005.05 feet west of the section line and Mr. Harding at 3,008.75 feet west of the section line. There is a difference of 3.70 feet. The stake, however, is in place on the ground and by both surveyors it is located as being 3 feet east of the east side of the cement driveway on the William F. Strong property.

The trial judge, Hon. John A. Hendricks, decided the issues in favor of the respondents and found that the fence line was the boundary line between the property of respondents and the property of the appellants prior to the time that the Bartletts purchased the stip 15 feet wide from respondents and further that said fence line was 2,918.49 feet west from the east section line of Section 30 and that the property 73.92 feet wide, east and west, commencing 15 feet west of the old fence line or west of a line 2,933.49 feet west of the east section line of Section 30 was the property of the respondents (R. 33). The court found among other things that the respondents and their predecessors had paid the taxes on the land west of the fence line (R. 33). A decree was entered quieting title in respondents to the land west of the line 2933.49 feet west of the east section line and quieting title in appellants, Earl H. Bartlett and Sarah E. Bartlett, to the land immediately east of a line 2,933.49 feet west of the east section line of Section 30, Township 2 North, Range 1 East, Salt Lake Base and Meridian (R.29).

POINTS

Appellants intend to rely for a reversal of the court below upon the following points:

The Trial Court erred in finding that the old fence had been established as the boundary between the properties of the parties.

The finding of the Court on the location of the fence line is not supported by and is contrary to the evidence.

ARGUMENT

The Trial Court erred in finding that the old fence had been established as the boundary between the properties of the parties.

The only evidence about the fence is that it was in existence prior to 1916 and up to 1950, that Jensen and the former owners of the Jensen property farmed and used the land on the west up to the fence and that the Bartletts and the former owners of the Bartlett property farmed and used the land on the east up to the fence; that fence was taken down by a former owner of the Bartlett property and moved 30 to 50 feet to the west in 1917, and a day or two later the fence was moved back by the person who occupied the property to the west, and the fence has been in the location where it was replaced in 1917 until taken down by Bartlett in July, 1950, after he purchased the 15 foot strip of property from Jensen.

There was no evidence as to who put up the fence or why the fence was constructed. There were some raspberry bushes along the fence, and at an earlier date the land east of the fence was excavated to obtain clay for a brick factory.

Prior to October 20, 1877, the property of all the parties was part of a larger piece owned by one person, John Moss. This larger piece of property was described in the deed by which John Moss took title dated August 20, 1874, as

Beginning at the S.W. corner of Lot 2 Block "L" North Mill Creek Plat, Davis County, thence South into a 4 rod street $1\frac{1}{2}$ rods; thence East on the North line of a 2 rod street 216 rods to the East line of SE1/4 of Section 30; thence North $12\frac{3}{4}$ rods; thence West 216 rods; thence South $11\frac{1}{4}$ rods to beginning, containing 17.21 acres. All in Section 30, Township 2 North, Range 1 East, Salt Lake Meridian;

(plaintiffs Exhibit A at page 6, defendants' Exhibit 9 at page 6, defendants' Exhibit 10 at page 5, and defendants' Exhibit 8 at page 6).

The first conveyance establishing the boundary line between the properties which land became the properties of the parties to this case was a deed from John Moss to Thomas Walton dated October 20, 1877, by which Walton was deeded land running east from the southwest corner of Lot 2, Block L, for $35\frac{1}{2}$ rods (plaintiffs'

Exhibit A at page 9). No reference was made to any fence line as a boundary in the conveyance. This is the same described property which later became the property of the Jensens.

The first separate conveyance of the land immediately east of that last referred to, that is, the land east of a point $35\frac{1}{2}$ rods east of the southwest corner of Lot 2, Block L, was a Warranty Deed from the distributees of the John Moss Estate to Moroni Moss dated June 9, 1892, and this conveyed the land commencing $35\frac{1}{2}$ rods east of the southwest corner of Lot 2, Block L, and running east for 48 rods (defendants' Exhibit 8 at page 11, defendants' Exhibit 9 at page 11). No reference was made to any fence line as a commencing point of the land described in that conveyance. This is the same described property which later became the property of the Eggetts and still later the west part of which became the property of the Bartletts.

Both of these earlier conveyances used as the eastern boundary of the tract which later became the property of the respondents and as the western boundary of the tract which later became the property of the appellants a line $35\frac{1}{2}$ rods east of the southwest corner of Lot 2, Block L. Neither refers to any fence as the boundary line.

The trial court found that respondents paid the taxes on the land in dispute (R. 33, Paragraph 7). There is absolutely no evidence to support this finding. The

only evidence of payment of taxes by respondent was given by the respondent Karl Jensen (R. 78 and 80). A tax notice for the year 1949 was introduced as plaintiffs' Exhibit B, which shows the payment of taxes for that year. This was before Jensen had sold any of his property to others. The description of the property taxed was the same as that in the deed by which Jensen acquired the property and described the property as extending east of the southwest corner of Lot 2, Block L, Plat N.M.C., a distance of 35.5 rods. The property east of the line 35.5 rods east of the southwest corner of Lot 2, Block L, North Mill Creek Plat, was never assessed to Jensen and Jensen never paid any taxes thereon. Apparently respondents well knew that it was necessary to pay taxes to get title to land by adverse possession. They attempted to prove said payment, but failed to introduce any evidence of payment, and the finding of the court on payment of said taxes is wholly unsupported by the evidence.

The respondents attempted to show an uncertainty in the location of the boundary line between property of the respondents and the property of the appellant, Bartlett. They contend that the southwest corner of Lot 2, Block L, North Mill Creek Plat, could not be located. A plat of North Mill Creek has been in the Recorder's Office at Davis County for many years. How long, nobody could say. The original plat was brought into the trial by an employee of the Recorder's Office, introduced as defendants' Exhibit 14 (R. 127 and 128). It was withdrawn and returned to the County Recorder's Office with

permission granted to substitute a copy. Defendants' Exhibit 7 is a certified copy issued by the Recorder's Office showing the south one-half of Block L, North Mill Creek Plat, as it appeared in the Recorder's Office on the 10th day of October, 1953. When North Mill Creek Plat came into existence, I do not know. As early as May 8, 1869, it was referred to in a Quit-Claim Deed shown on page 4 of plaintiffs' Exhibit A. It has been referred to and has been used as the basis of all conveyances made since that time affecting the title to the property. The tax notices give descriptions tying to the southwest corner of Lot 2, Block L, North Mill Creek Plat. The respondents have sold most of their property by deeds which describe the property in reference to said southwest corner of said Lot 2, Block L, North Mill Creek Plat. Houses have been built and the building of said houses has been financed with borrowed money and the descriptions used on mortgages refer to the southwest corner of Lot 2, Block L, North Mill Creek Plat. The conveyances have been platted on the records in the County Recorder's Office. Surveyors have made surveys and established boundary lines for property using as the point of commencement the same corner. A steel stake was placed by surveyor Bush marking the western boundary of the Bartlett property. This same steel stake has been recognized as the eastern boundary of the William F. Strong property. The William F. Strong property was the most easterly piece of the property owned by the respondents after they had sold the 15 foot strip of land to the Bartletts which was the

15 feet on the east end of the property. The only uncertainty which could exist as to the location of the southwest corner of said Lot 2, Block L, North Mill Creek Plat is whether it is on the east line of Second West Street or in the Middle of Second West Street. By placing it on the east line of Second West Street and giving respondents all the property the conveyance to them calls for, the western boundary of the Barlett property is fixed at the steel stake and appellant Eggett has an overlap or loss on his property of 37.025 feet. If the southwest corner of said Lot 2, Block L, North Mill Creek Plat, is in the middle of Second West Street and if the boundary of appellants' property were to be moved to the west one-half of the width of Second West Street, the respondents' property would be decreased by one-half of the width of said street, and the shortage or overlapping of appellant, Russell Eggett's, property would largely be eliminated. Appellants do not urge this and are content with having the southwest corner of said Lot 2, Block L, North Mill Creek Plat to be on the east line of Second West Street where it appears to be on the plat in the County Recorder's Office (defendants' Exhibit 7).

The east line of Second West Street to the south of 15th South Street is marked by a line of old fence posts (defendants' Exhibits 21, 22, 23 and 24, R. 163, 164 and 165). Bush, the surveyor for appellants, used the east line of Second West as the point from which he started his measurement to establish his survey of appellants' property. It is not difficult to locate the

southwest corner of Lot 2, Block L, North Mill Creek Plat. It appears on the original plat of North Mill Creek Survey (defendants' Exhibit 14) as well as on the present plats in the Office of the Davis County Recorder (defendants' Exhibit 7).

Highway No. 1 shown on defendants' Exhibit 7 crosses diagonally from the southwest to the northeast through Lot 2 through the western part of the respondents' property. A glance at defendants' Exhibit 7 reveals that Lot 2 is on both sides of Highway No. 1. There can be no doubt that Lot 2 extends west at least to the east side of Second West Street. There is no indication in any document, plat or conveyance in evidence which indicates to the contrary. The west side of Lot 2 being at least as far west as the east line of Second West street and the respondents' property extending to the east from the west side of Lot 2 a distance of 35.5 rods or 585.75 feet, the respondents' property could not extend further east than 585.75 feet east of the east side of Second West Street. There can, therefore, be no uncertainty as to the location of the east boundary of respondents' property beyond a point 585.75 feet east of the east side of Second West Street. If there were an uncertainty as to whether or not the boundary line was farther to the west on the assumption that the west line of Lot 2 was in the center of Second West Street that uncertainty would not justify the establishment of a boundary farther to the east, although it might if a fence were agreed upon as the boundary farther to the west justify the establishment of a boundary line in the area where the

uncertainty existed. Certainly the fact that Highway No. 1 crosses through respondents' property and takes a portion thereof does not justify the establishment of the eastern boundary of respondents property farther to the east.

The above argument has been on the factual situation only. Concerning the law in Utah, appellants deem it necessary to cite only two recent cases decided by the Supreme Court of Utah on the subject of boundary by acquiescence. These cases are *Hummel v. Young*, 1 Utah 2d 237, 265 P. 2d 410, decided on December 24, 1953, and *Ringwood v. Bradford*, Utah 2d, 269 P.2d 1053, decided on March 10, 1954. The facts in both these cases are very similar to the facts in the case now before the court. In both of these cases the court refused to recognize as the boundary the fence line which was not constructed as a boundary line between adjacent properties and was not intended to mark the line.

On the authority of these two cases, appellants respectfully request that this court reverse the judgment of the trial court and order that judgment be entered that the fence did not establish the boundary between the properties of the parties prior to July 21, 1950, when respondents conveyed a 15 foot strip of their property

to the Bartletts and that the appellants, Earl H. Bartlett and Sarah E. Bartlett, are the owners of the property having as its west boundary a line described as beginning at a point 1.5 rods South and 570.75 feet East from the Southwest corner of Lot 2, Block "L", North Mill Creek Plat Survey, Davis County, Utah, and running thence North 12.75 rods, which line is marked by a steel stake placed in the ground on the North side of 15th South Street and which steel stake is 3 feet East of the cement driveway on the land which respondents conveyed to William F. Strong and Sylvia M. Strong, his wife, by Warranty Deed dated November 8, 1950, and recorded in the Office of the County Recorder of Davis County, Utah, on January 21, 1951, in Book 22 at page 332 and that the respondents have no right, title or interest in any land east of said land last described.

The finding of the Court on the location of the fence line is not supported by and is contrary to the evidence.

The court found the location of the fence to be as follows:

Beginning at the North side of 15th South Street, Bountiful, Davis County, Utah, at a point 2,918.49 feet West and 1,312.21 feet North from the Southeast corner of Section 30 Township 2 North, Range 1 East, Salt Lake Base and Meridian, and running thence North 12.75 rods.

The respondents' evidence, the testimony of Robert G. Harding, placed the fence as being 2,924.09 feet west of the section line (R. 91). This figure is also placed on the plaintiffs' Exhibit C which was the diagram prepared by the surveyor, Robert G. Harding. There is a difference of 5.60 feet between the testimony of the respondents' own witness and the finding of the court on the location of the fence. This finding of the court cannot stand because it is not supported by the evidence. Even though this court might sustain the lower court and rule against the appellants on the first point in this brief and argument, it must of necessity rule with the appellants on this latter point.

Respectfully submitted,

EVANS, NESLEN & ELGGREN
Attorneys for Appellants