1982

# Mack Halladay and Merle Halladay v. Madge Cluff et al : Brief of Respondents

Utah Supreme Court


Brent D. Young; Ivie and Young; Attorneys for Appellants;
S. Rex Lewis; Howard, Lewis & Petersen; M. Dayle Jeffs; Attorneys for Defendants;

IN THE SUPREME COURT OF THE STATE OF UTAH

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| MACK HALLADAY and MERLE HALLADAY, | : | |
| Plaintiffs-Appellants, | : | Case No. ~~17754~~ 18032 |
| vs. | : | |
| MADGE CLUFF, PERRY K. BIGELOW and NORMA G. BIGELOW, | : | |
| Defendants-Respondents. | : | |

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BRIEF OF RESPONDENTS BIGELOW

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

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| MACK HALLADAY and MERLE HALLADAY, | : | |
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# BRIEF OF RESPONDENTS BIGELOW

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## NATURE OF THE CASE

Plaintiffs-Appellants brought this action to quiet title in them to certain properties also claimed by the defendants-respondents.

## DISPOSITION IN LOWER COURT

This case was tried to the Court. The Court quieted title in plaintiffs-appellants to the parcel shown as W-X-Y-Z on Appendix A, quieted title in defendants-respondents Bigelow to the property colored brown on Appendix A, and quieted title in defendants-respondents Cluff and Bigelow to the parcel designated P-M-N-O on Appendix A.

## RELIEF SOUGHT ON APPEAL

Defendants-Respondents Bigelow seek to have the decision of the trial Court affirmed in all respects.

## STATEMENT OF FACTS

As long as anyone presently alive can remember, there has been a fence running along the lines shown in red on Appendix A, and designated by the letters Y-X-P-M, M-N, and N-O and its continuation. (R. 300, see also 160-61, 216, 259.) For the same period of time, the property enclosed on three sides by the fence has been occupied and used by the respondents and their predecessors in interest, and, with the exception of some recent verbal assertions of ownership (R. 175-76, 177-78, 277-79), the appellants and their predecessors in interest who have occupied the lands outside the fence have not occupied, used, or attempted to use any of the lands within the fence. (R. 167-68, 221-23, 264, 268, 269-70, 271-73, 277.)

The Bigelows purchased their property (Lot 2 on the attached Appendix A) from the Jewetts on June 18, 1947. (Plaintiffs' Exhibit No. 2; R. 263.) From all visual appearances the property extended from the road in front (south) of the property to the fence in the back (north). The Jewetts, Bigelows' predecessors in interest, had occupied back to the fence. (R. 264.) The Bigelows also occupied the property back to the fence. The evidence presented at trial showed that the Bigelows raised turkeys in a shed in the northeast corner of the property next to the fence. (R. 265.) They built a chicken coop in the northwest corner

of their property next to the fence. (R. 265.) They cultivated a garden in this northern area of what they believed to be their property, and also harvested fruit from trees growing there. (R. 266-67, 274.) The Bigelows acted under the impression that they had purchased the property back to the fence (R. 264, 272); however, the property actually delineated by the legal description on their warranty deed is offset approximately 50 feet south of the property occupied on the ground, giving the Bigelows record title to the roadway but no record title to the north end of the property they occupied. (R. 129, 136, 141.) The Bigelows paid the taxes which were assessed on their property each year since they purchased it. (R. 281; defendants' Exhibit No. 25.)

The Cluff and Bigelow properties were not the only ones offset south of occupancy. In 1924 John Clift, who at the time owned all the property shown on Appendix A, deeded to Athol Blake and James Fisher, respectively, properties somewhat analogous to the present Parcels 6 and 7 (R. 334-35). The present Parcels 6 and 7 have Center Street as their north boundary. However, the parcels conveyed to Fisher and Blake were located 50 feet south of Center Street, and included parts of Parcel 4, the area in dispute (R. 334-35). The approximately 50 foot offset was corrected later that same year by Clift deeding to Fisher and Blake the 50 foot parcels between their properties and Center Street, in

exchange for them deeding back to Clift the south 50 feet of their properties, including much of what is now the disputed Parcel 4 (R. 335-36, see also R. 337, 341).

The Clifts did not pay the taxes for 1946 through 1950 on those parcels received back from Fisher and Blake (R. 337), and the property was therefore sold at a tax sale. However, for some unexplained reason the property purportedly conveyed by the tax sale was slightly larger than those properties Clift had received from Fisher and Blake and upon which he had failed to pay the taxes (R. 340-41).

The property conveyed by the tax deed was the parcel designated as A-B-C-D on Appendix A, which measures 75 feet by 181.5 feet and contains approximately .31 acres [the deed shows an area of .21 acres, but this is apparently in error] (defendants' Exhibit No. 27, plaintiffs' Exhibit No. 29). This property was conveyed to Mayor George Collard upon his payment of $26.34 to the County (id.).

The record does not disclose why Mayor Collard purchased the A-B-C-D parcel of land at the tax sale; it does clearly show, however, that he never occupied it (R. 167, 228). Mayor Collard apparently made no attempts to assert ownership, for it wasn't until later, after Albert Halladay (plaintiff's father and predecessor in interest) affirmatively investigated, that the Halladays knew of Mayor Collard's record title to the parcel in question (R. 167). In July, 1958, the plaintiff

Mack Halladay and his father, Albert Halladay, obtained a quit claim deed to the A-B-C-D parcel of land from Mayor Collard for an undisclosed sum of money, and in November of that same year Albert Halladay quit claimed his interest in the parcel to his son (plaintiffs' Exhibit No. 29).

The appellants and their predecessors in interest were already in possession of over half of the A-B-C-D parcel when they purchased whatever interest Mayor Collard had in it. Slightly less than half of the parcel, the area designated by the letters M-N-O-P on Appendix A, was occupied by respondents. About one year prior to acquiring record title to the M-N-O-P parcel, Mack Halladay told Perry Bigelow that he had purchased a parcel of property in Bigelows' back yard (R. 277, Appellants' Brief at 8). Mack Halladay made no further assertions of ownership until the 1970's, when he periodically told Perry Bigelow that he claimed the property (R. 278). The trial court specifically found that:

> The only evidence of plaintiffs' asserting a claim of ownership and title to the tract in dispute, cross-hatched in orange, points M-N-O-P on Exhibits 8 and 12 was an incident occuring in 1977 or 1978 when plaintiffs' [sic] asserted title thereto as against defendant Bigelow and ordered Bigelow to cease digging a potato cellar thereon. Defendant Bigelow moved his digging within the ground to which he held legal title, but testified that he did not acknowledge plaintiffs' superior right to the land is [sic] dispute.

(R. 54). In 1979 the plaintiff attempted to install a fence

across the back of Bigelows' property, which fence Bigelow removed (R. 278-279), and this action was commenced soon thereafter (R. 4-7).

## ARGUMENT

### POINT I

### THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE IS APPLICABLE TO THE FACTS OF THIS CASE NOTWITHSTANDING THE TAX SALE OF PROPERTY ON BOTH SIDES OF THE BOUNDARY.

The occupancy of the lands involved in this lawsuit is not in dispute. Bigelows and Cluffs occupied the land south of the M-N fenceline since 1947 and 1948; during the same period the Halladays and his parents occupied the land north of the fence. There was substantial evidence that the Halladays did not seriously dispute Bigelows' claim to the disputed area south of the fence until 1977 or 1978 (R. 54). However, for the brief period from 1951 to 1958, a third person held record title to land on both sides of the M-N fenceline, although the evidence indicated that he never in any way attempted to occupy or possess the land. The only substantial question presented by this appeal is what effect, if any, did this third person's unasserted record interest have on the rights to the parties to this lawsuit.

"The doctrine of boundary by acquiescence derives from [the] realization, ancient in our law, that the peace and good order of society is best served by leaving at rest possible

disputes over long established boundaries." Baum v. Defa, 525 P.2d 725, 726 (Utah 1974). The doctrine of boundary by acquiescence evolved from the doctrine of adverse possession. Holmes v. Judge, 31 Utah 269, 87 P. 1009, 1012 (1906). This Court has established four elements which must be shown to establish a boundary by acquiescence:

> (1) occupation up to a visible line marked definitely by monuments, fences or buildings and (2) acquiescence in the line as the boundary (3) for a long period of years (4) by adjoining landowners.

Fuoco v. Williams, 15 Utah 2d 156, 389 P.2d 143, 145 (1964).

Point I of appellants' Brief contends that the last element, that the parties be adjoining landowners, was not satisfied.

Case law exploring the purposes and limits of the requirement that the parties be adjoining landowners is at least scarce and probably nonexistent. The evident purpose of the requirement is to state the obvious rule that the only acquiescence that is material to a boundary dispute is the acquiescence of those who live next to the boundary. The requirement is akin to that of standing: only those whose rights would be affected by the location of a boundary in a certain place have "standing" to acquiesce in the location of that boundary.

This apparent requirement of "standing" is clearly satisfied in the instant case. Each of the parties to this

lawsuit have a very definite interest in the location of the boundaries between their properties, and they are the only ones that have such an interest. In all respects, this is the type of dispute that the doctrine of boundary by acquiescence was developed to resolve. The fact that at one time a third person held record title to land on both sides of the disputed boundary should not be allowed to obscure the fact that the parties to this lawsuit and their predecessors in interest have acquiesced in the fenceline as the boundary between their respective occupancies for a period well in excess of fifty years. The doctrine of boundary by acquiescence should be held to apply to the instant case.

## POINT II

### THE EVIDENCE PRESENTED AT TRIAL CLEARLY ESTABLISHED EACH OF THE ELEMENTS OF BOUNDARY BY ACQUIESCENCE.

A. The decision of the trial court should be affirmed unless the evidence clearly preponderates against the trial court's findings or there was a misapplication of the law.

The decisions of this Court clearly establish that although the appellant's burden on appeal of a suit in equity is somewhat less than for an action at law, that burden is nonetheless very substantial, both as to findings of fact and conclusions of law. The appellant must make a very clear showing of error in order to justify reversing the decree of the trial court. The trial judge is given a considerable latitude of discretion in determining whether

equity and good conscience require that relief be granted. Ferris v. Jennings, 595 P.2d 857 (Utah 1979). There is a strong presumption that the decision of the trial court is correct and supported by the evidence:

> [I]t has long been established and reiterated by this court in numerous cases that due to the advantaged position of the trial court we will review its findings and judgments with considerable indulgence, and will not disagree with and upset them unless the evidence clearly preponderates against them, or the court has mistaken or misapplied the law applicable thereto.

Pagano v. Walker, 539 P.2d 452, 454 (Utah 1975); followed in Ryan v. Earl, 618 P.2d 54 (Utah 1980).

In order to establish their claim of boundary by acquiescence the respondents were required to prove the existance of four elements:

> (1) occupation up to a visible line marked definitely by monuments, fences or buildings and (2) acquiescence in the line as the boundary (3) for a long period of years (4) by adjoining land owners.

Fuoco v. Williams, 15 Utah 2d 156, 389 P.2d 143, 145 (1964). The trial court concluded that each of these elements had been established. As demonstrated below, the evidence does not clearly preponderate against the findings of the trial court upon which its conclusion was based; on the contrary, there is substantial evidence in support of the trial court's findings. Likewise, the trial court was not mistaken in its understanding of or application of the law applicable to

each of the above mentioned elements. The decision of the trial court should therefore be affirmed.

Attached hereto for the convenience of the Court are the following:

Appendix A - Map of the properties.

Appendix B - Findings of Fact and Conclusions of Law.

Appendix C - Decree.

B. The evidence clearly established occupation up to a visible line marked definitely by monuments, fences or buildings.

This element is not in dispute. Appellants' Brief at 6. For a period of time well in excess of 20 years the respondents have used, occupied and treated as their own the land up to (south of) the M-N fence. The fence is definitely marked, clearly visible, and has been in existence for more than 50 years.

C. The evidence established acquiescence in the fence as the boundary between the properties of the respondents and the appellants.

The trial court concluded that the appellants (Halladay) had acquiesced in the M-N fence as the boundary between their property and that of the respondents (Cluff and Bigelow). This conclusion was based on findings that the P-M-N-O fenceline has marked the boundary of occupancy of the respondents since before 1948 and that the respondents and their

predecessors "have built improvements upon the land, [and] have occupied it for the purpose of farming, storage and business operations." (R. 54.) The court further found that the appellants "have never occupied" the disputed area south of the fence, and that:

> The only evidence of plaintiffs' asserting a claim of ownership and title to the tract in dispute, cross-hatched in orange, points M-N-O-P on [Appendix A] was an incident occuring in 1977 or 1978 when plaintiffs' [sic] asserted title thereto as against defendant Bigelow and ordered Bigelow to cease digging a potato cellar thereon. Defendant Bigelow moved his digging within the ground to which he held legal title, but testified that he did not acknowledge plaintiffs' superior right to the land is [sic] dispute.

Appellants advanced two arguments in opposition to the trial court's findings: (1) The appellants' purchase of land south of the fence is antithetical to acquiescence in the fence as a boundary, and (2) the appellants have periodically claimed ownership to the disputed parcel, and the respondents' use thereof was therefore with the appellants' permission. These arguments will be treated in their respective order.

The appellants contend that:

> Although plaintiffs may have allowed defendants to occupy portions of Parcel P-M-N-O, plaintiffs did not purchase an entire parcel of ground simply to give it away to adjoining landowners. Purchasing real estate is not acquiescence that a third party may have it. Plaintiffs' purchase of Parcel P-M-N-O is antithetical to their acquiescence in the M-N

> fence as a boundary between plaintiffs' property and defendants' property.

Appellants' Brief at 5-6.

The above statement is based on the fact that in 1958 the appellants purchased from Mayor Collard a parcel of ground. Insofar as the above quotation implies that all the appellants' purchased was the P-M-N-O parcel, the statement is clearly wrong. The land encompassed by the deed from Collard to the appellants is designated as A-B-C-D on Appendix A, and comprises an area of 13,612.5 square feet. The disputed P-M-N-O parcel, comprising approximately 6,271.6 square feet, is less than half of the total area the appellants purchased from Collard. Appellants' contention that, since they already had colorable title to more than half of the A-B-C-D parcel, all they really purchased was the P-M-N-O parcel is simply not established by the evidence. It is one inference that could be drawn from the evidence, but it is only that. An equally, if not more, plausible inference is that the appellants were simply trying to remove a cloud on their title. In support of this latter inference is the evidence that Mayor Collard apparently paid only $26.34 for the A-B-C-D parcel, and apparently had no intentions of taking possession of the parcel. It wasn't until some time after Collard acquired record title that the appellants were even aware of Collard's claim to the property, and that was only after the appellants' affirmative investigation (R. 167). When the appellants discovered the cloud on their title

they purchased Collard's interest.

The inference that the appellants were simply removing a cloud on their own title is further supported by the evidence, more fully discussed in the next section, that, with the exception of occasional unsupported verbal assertions, the appellants made no effort to take possession of the P-M-N-O parcel until approximately 20 years after they supposedly acquired title to it. This failure to assert their interest in the M-N-O-P parcel was rational only if their intent in buying the A-B-C-D parcel was merely to remove a cloud on their title. However, if the focus of their purchase was really the M-N-O-P parcel, their failure for over 20 years to physically assert possession was so irrational as to belie their stated intent.

The trial court concluded that the appellants' purchase of the A-B-C-D parcel did not vitiate their acquiescence in the M-N fenceline as a boundary. The evidence does not preponderate against that finding, and the court was not under a misapprehension of the law. The decision should be affirmed.

As a second argument in opposition to the trial court's conclusion that the appellants acquiesced in the M-N fence line as a boundary, the appellants assert that:

> There is no testimony that any question about a boundary line arose prior to 1978. Mr. Halladay has always claimed the P-M-N-O property even though he allowed defendants to use it.
>
> . . . .

> [P]laintiffs have on many occasions claimed ownership of the P-M-N-O parcel during the period of plaintiffs' alleged acquiescence in the M-N fence as a boundary line.

Appellants' Brief at 9, 10.

The incidents referred to by the appellants are that Mack Halladay told Perry Bigelow some time between 1957 and 1960 that Halladay had purchased a piece of ground in Bigelows' back yard, and that again off and on during the last ten years Halladay again claimed ownership to the disputed parcel, but never took any action to occupy or use the property (R. 277-78). That such passive verbal assertions unsupported by any form of physical act are not sufficient to vitiate acquiescence was clearly established by this Court in Lane v. Walker, 29 Utah 2d 119, 505 P.2d 1199 (1973). The appellants in that case likewise asserted that they did not "intend" the fence to be a boundary. The court responded:

> To this we say that the test to establish the boundary by "acquiescence" necessarily need not be based on mutual "intent." "Intent" is not synonymous with "acquiescence" in these cases. "Acquiescence" is more nearly synonymous with "indolence," or "consent by silence," --or a knowledge that a fence or other monuments appears to be a boundary,--but that no one did anything about it for 48 years. No one in this case did much except by invective, across the very fence that made irritants out of erstwhile neighbors, for 48 years,--until suddenly the appreciation of property values transmuted yesteryear's minimal values into objects d'art of inestimable value in the real estate market.

The trial Court concluded that the appellant's occasional invectives across the fence did not counteract his physical acquiescence. The evidence does not preponderate against that finding and conclusion, and the trial court was not under a misapprehension of the law. The decision should therefore be affirmed.

D. The evidence established that the appellants' acquiescence was for a long period of years.

As established above, there was substantial evidence presented at trial that the appellants acquiesced in the fence as the boundary for over 20 years.

However, even assuming, arguendo, that the acquiescence only extended over a period of 12 years (appellants' Brief at 11-12), that should not defeat respondents' claim of boundary by acquiescence. Although a period of 20 years is generally required, this Court has clearly stated "that there is no exact time requirement; and that it may depend upon the circumstances of the particular case." Hobson v. Panguitch Lake Corp., 530 P.2d 792, 795 (Utah 1975); see also Boyer v. Noirot, 97 Ill. App. 3d 636, 423 N.E.2d 274 (1981). Under the unusual circumstances of this case, a lesser period should be deemed sufficient. The fence has been treated as a boundary between the properties for over 50 years. The only possible interruption of that acquiescence is the result of a tax deed whose original owner (Collard)

was never seen on the property in question, and whose subsequent purchaser (the appellants) did nothing more than utter invectives across the fence to assert their ownership to the lesser portion of the property covered by the tax deed.

E. The evidence established that the acquiescence in the fence as a boundary was by adjoining landowners.

As established in Point I of this brief, to treat the parties to this action as adjoining landowners would satisfy the purposes of this element of the doctrine of boundary by acquiescence. Each of the elements of that doctrine having been satisfied, the decision of the trial court should be affirmed.

## POINT III

### THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE DOES NOT REQUIRE THAT THERE BE AN EXPLICIT AGREEMENT OR DISPUTE AS TO THE BOUNDARY BETWEEN THE RESPECTIVE PROPERTIES.

Although some earlier cases may have appeared to require that the parties acquiesce or agree on a boundary between their properties after a dispute as to the location of that boundary, that requirement was plainly put to rest in Hobson v. Panguitch Lake Corp., 530 P.2d 792 (Utah 1975); see also Note, Boundaries by Agreement and Acquiescence in Utah, 1975 Utah L. Rev. 221. In that case the court stated that the purpose of the doctrine was not to give effect to the resolution of dispute, but rather to prevent disputes:

> The very reason for being of the doctrine of boundary by acquiescence or agreement is that in the interest of preserving the peace and good order of society 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.

530 P.2d at 794.

## CONCLUSION

For a long period of years, at least 20, and probably more than 50, the appellants and their predecessors in interest have occupied the land north of the M-N fence, and have acquiesced in the fact that the respondents and their predecessors in interest have occupied the land south of the fence. The trial court concluded that that fence should be established as the boundary between the properties of the parties to this lawsuit. The evidence does not clearly preponderate against the findings of the trial Court, and the trial Court was not under a misapprehension as to the law applicable thereto. The decision of the trial Court should therefore be affirmed in all respects.

DATED this 19th day of February, 1982.

Respectfully Submitted,

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Attorneys for Respondents
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MAILED two copies of the foregoing Brief of Respondents to Brent D. Young, Ivie and Young, Attorneys for Appellants, P. O. Box 672, Provo, Utah 84603 and to M. Dayle Jeffs, Jeffs & Jeffs, Attorneys for Respondents Cluff, P. O. Box 683, Provo, Utah 84603, this 19th day of February, 1982.

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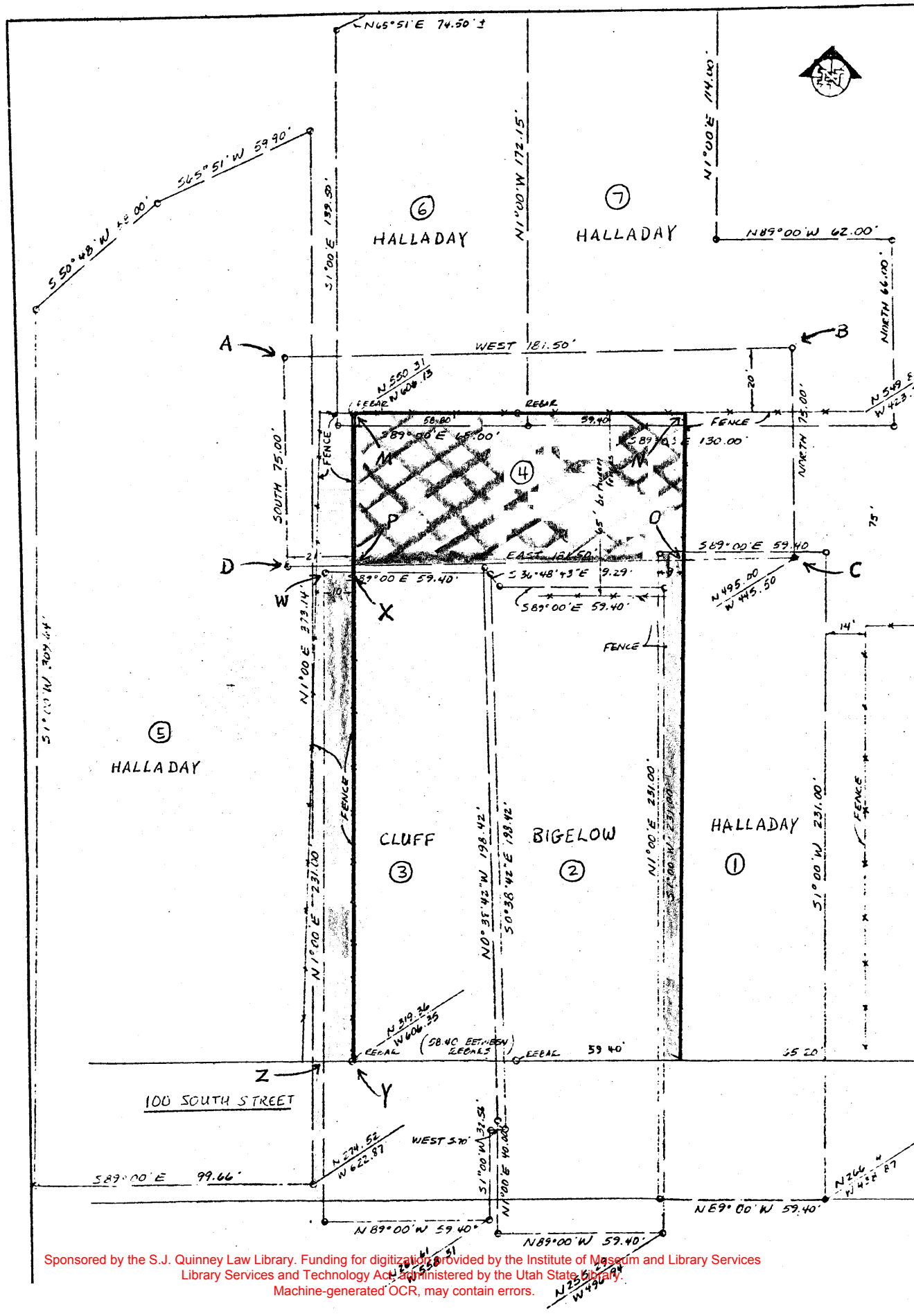
# APPENDIX A



# APPENDIX B

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

MACK HALLADAY and
MERLE HALLADAY,

Plaintiffs,

vs.

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

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Civil No. 53,243

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 fully considered 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,

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

> 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. The parties hereto have acquiesced in said line as a boundary line for a long period of years as adjoining land owners.

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

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

(a) The plaintiffs succeeded to a tax title to the description outlined in yellow on Exhibit #12 and marked by points A-B-C-D. Tax title was issued to George

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E. Collard by Utah County on the 23rd day of May, 1951 and recorded June 28, 1951 in the office of the Utah County Recorder. This document is defendant's Exhibit #27.

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

2. The plaintiffs have established the

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elements for boundary by acquiescence as to the cross-hatched green area in parcel 3 on Exhibit 12 by establishing:

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

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

(c) For a long period of years.

(d) By adjoining land owners.

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

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

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

Dated and signed this 29 day of JULY 1981.

BY THE COURT:

George E. Ballif, Judge

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CERTIFICATE OF MAILING

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

Brent D. Young, Esquire
Ivie & Young
Attorneys for Plaintiff
48 North University Avenue
Provo, Utah 84601

S. Rex Lewis, Esquire
Howard, Lewis & Petersen
Attorneys for Defendants Bigelow
Provo, Utah 84603

Secretary

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# APPENDIX C

B-21 C-26

M. DAYLE JEFFS OF JEFFS AND JEFFS
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Telephone: 373-8848

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

MACK HALLADAY and
MERLE HALLADAY,

Plaintiffs,

vs.

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

Defendants.

DECREE

Civil No. 53,243

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:

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