1982

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

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

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

BRIEF OF RESPONDENT CLUFF

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

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TABLE OF CONTENTS

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NATURE OF THE CASE

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

DISPOSITION IN LOWER COURT

The case was tried to the trial court sitting without a jury. The trial court quieted title in Plaintiffs-Appellants to the parcel shown in green and marked by points W-X-Y-Z on Appendix A; quieted title in Defendants-Respondents Bigelow to the property shown in brown on Appendix A; and quieted title to Defendants-Respondents Cluff and Bigelow to the property cross-hatched in orange and designated by points P-M-N-O on Appendix A.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent Cluff seeks to have the decision of the trial court affirmed in all respects.

STATEMENT OF FACTS

The testimony for witnesses for both appellants and respondents show that there has been a long inplaced fence running along lines shown in red on Appendix A and designated by letters Y-X-P-M, M-N and N-O and its continuation to First South Street (R. 160-161). The property enclosed on three sides by the old fence has been occupied and used by the respondents and their predecessors in interest for over fifty years (R. 162-163, R. 211:6-12). The old fence line ran between the Cluff and Halladay properties on the west (R. 161:29 to 162:5), Points Y-M on Appendix A, and between the Cluff-Bigelow and Halladay's properties on the north, Points M-N on Appendix A (R. 162, 168; R. 216:16-21; R. 202:13-18). The fence line on the west and north of the Cluff property was the continuation of a single fence in place for over 50 years, testimony of Elmo Halladay (R. 161:29-30; 162:18-21). No dispute had ever arisen between Defendant-Respondent Cluff and Plaintiffs-Appellants regarding either the fence line on the west side or the fence line on the north side of the property occupied by the Cluffs, testimony of Elmo Halladay (R. 163:7-9), testimony of Plaintiffs-Appellants (R. 180:11-17), testimony of Madge Cluff (R. 223:3-6).

Madge Cluff purchased her property on the 11th of

March, 1948 (Ex. 18), which formerly belonged to her father, E. G. Durnell (R. 214:26-29). Thereafter, Defendant-Respondent Cluff has occupied the property east of the fence line marked by points M-Y and south of the M-N fence line continuously without interruption (R. 221:25-28). Defendant-Respondent Cluff built a chicken coop upon said property in 1949 (R. 217:17-19), dug a potato cellar on it (R. 218:8-12), placed a garden in it (R. 218:18-23), and has continuously and exclusively used the disputed (cross-hatched in orange on Appendix A) area since 1948 until the commencement of the lawsuit in this proceedings. At no time during that occupancy has there ever been a dispute between the plaintiffs-appellants and the Defendant-Respondent Cluff over the boundary line between their properties (R. 163:7-9, 221:25-28, 223:3-6). Defendant-Respondent Cluff occupied and acted with the understanding that she had purchased the property to the north fence line (R. 216:15-18). However, the property actually described on the legal description of her Warranty Deed is offset approximately 50 feet south of the property occupied on the ground, giving Defendant-Respondent Cluff record title to the roadway but no record title to the north end of the property she occupied, testimony of Clyde Naylor (R. 137:6-26).

The old fence line surrounding the Cluff/Bigelow properties on three sides was testified to by the older brother of the Plaintiff-Appellant Mack Halladay to be the dividing line between the property owned by Albert Halladay,

the father of Elmo and Mack Halladay, and the property of E. G. Durnell, the father of Madge Cluff (R. 162:28-30, 163:1-2).

In 1951 Mayor George Collard obtained a tax deed to a parcel marked on Appendix A by points A B C and D and encompassing most of the disputed area. This tax deed which overlapped the Halladay properties produced a cloud upon the title to the Halladay properties, parcels 5, 6 and 7. In 1958 plaintiffs-appellants obtained a conveyance of that tax title from Collard clearing off the overlapped description of the Collard property (Ex. 4, R. 173:10-11, 196:22-24). At no time between occupancy by Defendant-Respondent Cluff in 1948 and the commencement of this lawsuit did plaintiffs-appellants assert any title to the disputed area occupied by Defendant-Respondent Cluff, as is born out of the testimony of Plaintiff-Appellant Mack Halladay (R. 180:11-17), the testimony of Elmo Halladay (R. 163:7-9, 168:9-17), the testimony of Defendant-Respondent Madge Cluff (R. 221:25-28), and the testimony of Doug Cluff (R. 243:13-16). Neither Plaintiff-Appellant Mack Halladay, nor his father, predecessor in title, ever made or asserted any acts consistent with a claim of ownership on the disputed area (R. 228:3-10, R. 243:5-17, R. 246:4-7).

ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN ITS APPLICATION OF THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE TO THE FACTS IN THIS CASE GIVING RISE TO THE DISPUTE IN THIS PROCEEDING

One of the key cases establishing the guidelines for applicability for a boundary by acquiesence was the decision rendered by Justice Frick in 1906 in Holmes v. Judge, 31 Utah 269, 87 Pac. 1009 (1906) where the Court said at page 281:

> . . . But in all cases where the boundary is open, and visibly marked by monuments, fences, or buildings, and is knowingly acquiesced in for a long term of years, the law will imply an agreement fixing the boundary as located, and will not permit the parties or their grantees to depart from such line.

The Court went on to say at page 282:

> . . . 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 neighbors' 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.

In presenting the plaintiffs' case, plaintiffs called as their key witness plaintiff's older brother, Elmo Halladay, who is 70 years of age (R. 159:8). He was a little over 20 years old at the time he moved to the property (R. 162:13-15). He testified that the fence line marked on Appendix A by points

M-Y and the fence line marked on Appendix A by points M-N is a continuation of the fence line around the property formerly owned by Madge Cluff's father, Mr. Durnell (R. 162:3-4, 12-24) and was for the purpose of dividing the property line between the Halladays and the Durnells (Testimony of Elmo Hallawday, R. 162:28-30; 163:1-2).

In 1954, this Court, in Ringwood v. Bradford, 2 Utah 2d 119, 269 P.2d 1053 (1954), quoted from its holding in Hummel v. Young, 1 Utah 2d 237, 265 P.2d 410 (1953) stated at page 121 as follows:

> We further pointed out in Brown v. Millner, 120 Utah 16, 232 P.2d 202 (1951) that in the absence of evidence that if the owners of adjoining property or their predecessors in interest ever made express parol agreement as to the location of the boundary between them if they have occupied their respective premises up to an open boundary line visibly marked by monuments, fences or buidings for a long period of time and mutually recognized it as the dividing line between them, the law will imply an agreement fixing the boundary as located, if it can do so consistently with the facts appearing and will not permit the parties nor their grantees to depart from such line.

The Court then went on to indicate that the implication of boundary by agreement which is in fact referred to as the doctrine of boundary by acquiescence implies the agreement when such finding is consistent with the evidence. The Court referred the line of cases which followed Holmes v. Judge, supra, and commented at page 122:

> . . . In all those cases such an agreement could be implied without doing violence to the evidence appearing.

The Court then went on to show that the evidence in Ringwood v. Bradford, supra, as in the Hummel case showed that the installation of the fence was to include or exclude livestock and not as a boundary fence. Such finding precluded the application of the doctrine of boundary by acquiescence.

> In the Hummel case, as in the present case, there was evidence that the fence was intended to enclose or exclude livestock. Likewise, there was evidence, as here, that the person building the fence intended to build it upon his own land and hence did not consult his neighbor. Id. at 122

In the case now before the Court, the evidence presented by the plaintiffs-appellants themselves is to the effect that the old fence line was for the purpose of dividing the Durnell-Cluff property from the Halladay property surrounding it.

In the 1963 case of King v. Fronk, 14 Utah 2d 135, 378 P.2d 893 (1963) the Court pointed out the basis in fact for the application of such boundary by acquiesence when it said at page 138:

> Since 1926, no one in the chains of title on either side ever questioned the old fence or the line which visibly was marked in whole or in part at times by a barn's wall, a wire fence, shrubs and a concrete driveway. From 1948 to 1961, Fronk respected the line, and on uncontradicted testimony it seems evident that there was a visible boundary marked with monuments in 1926 that persisted without protest of any kind until 1961, when Fronk, in anticipation of constructing an apartment house, questioned it for the first time.

The testimony of Mr. Halladay himself and that of his older brother shows that the old fence line was never questioned by the Halladays on the other side of the fence from 1930 when they came to the property until the commencement of this lawsuit in 1979. Elmo Halladay said in response to plaintiffs' counsel's questions:

> Q: Did you ever speak with anybody about any kind of problem related to that fence line.
>
> A: No, we never had no problems then. We was always very good friends all the time. We was very good friends.
>
> Q: Are you aware of any conflict regarding the fence line.
>
> A. None at all. (R. 163:3-9)

On cross-examination Elmo Halladay said:

> Q: Now your dad occupied up to the fence line did he not?
>
> A: Right. Yes he did.
>
> Q: Did you not know that Mr. Durnell occupied and claimed to own the property south of the fence line. . .
>
> A: . . . I just know that he had a fence line there. I assumed that he did own it at that time, but I didn't know. (R. 168:6-13)
>
> Q: Did you know that Mr. Durnell farmed that property? Did you know that he grew potatoes on it?
>
> A: I don't remember what they grew on there. I knew he had a garden in there but I don't remember what they grew in there. (R. 168:18-22)

Plaintiff-Appellant Mack Halladay testified:

> Q: Have you talked to Mrs. Cluff about this property or had any problems relating to this fence line?
>
> A: No I never had any problems with her, we never had any question over it.
>
> Q: Now what was the attitude toward that fence line?
>
> A: That was the property line. (R. 180:11-17)

Even Mack Halladay, the plaintiff-appellant who later purchased Parcel No. 1 on Appendix A attached hereto, testified that when he purchased that property he intended to own the property up to the north fence line claimed by Bigelow and Cluff to be their north boundary line. When asked the question:

> Q: When you bought the Boardman piece, did you not then intend to own to this north fence line?
>
> A: That is right. (R. 206:19-21)

As pointed out in King v. Fronk, supra, at page 138, and at page 139:

> . . .a visible, persisting boundary having been shown over a long period of time is convincing evidence of an intended or acquiesced-in boundary. . . .it is incumbent upon him who assails it to show by competent evidence that a boundary was not thus established,. . .
>
> . . . The visible boundary of ancient vintage and persistency of placement are the important aspects of the doctrine, . . .
>
> . . .What we assert is that the doctrine of 'boundary by acquiescence' looks to the

> settling of title under circumstances where claimants, ex post facto, having slept on their claimed rights for a long period of time, presently assert those rights for one reason or another, including appreciation of values, un-neighborly relations, or because of an equity measured by th length of the Chancellor's foot, while insisting on ownership of property that an ancient boundary does not reflect or designate on the surface of the property.

In this case, the plaintiffs-appellants claimed to have acquired title to the property including the disputed area covered by points A B C and D from Collards in 1958 and between that time and the commencement of this suit in 1979, their own admission is that they never had a dispute or asserted title to the property with Madge Cluff for a period in excess of twenty (20) years. They had not asserted title to the disputed property surrounded by that vintage fence from the time they came in to ownership in 1930 through the father of the Plaintiffs-Appellants, Mack Halladay, until the commencement of this suit, a period of over 48 years.

In this case the trial court applied the criteria pronounced in Fuoco v. Williams, 15 Utah 2d 156, 389 P.2d 143 (1964) with specific findings as to each of the four elements set forth therein. The Court went on to explain that the intervention of the tax title deed from Collard to Halladays covering parcel A B C and D is readily explained as a means by which Halladays cleared off the title to their property surrounding the disputed area on three sides and to which they held undisputed title by the securing. That tax title convey-

ance had created a cloud on their title which was cured by securing the conveyance from Collard.

In 1978 this Court speaking in Florence v. Hiline Equipment Co., Utah, 581 P.2d 998 (1978), said at page 1000:

> It is well established that if adjoining landowners occupy their respective premises up to a certain line which they mutually recognize and acquiesce in for a long period of time, the true boundary being unknown, they are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one.

In that case the Court then went on to point out that both of the parties on the respective sides of the fence line knew of the true boundary line between their properties and did not by their actions rely upon the fences as being the true and actual boundary line.

The testimony now before the Court is just the opposite, the parties here and their predecessors in title have always considered and dealt with that old fence line as being the boundary of their respective properties. The testimonies of Madge Cluff, Elmo Halladay and Mack Halladay show that as to the parcel the trial court quieted in the Halladays shown on Appendix A in green and lying west of the vintage fence line, they always considered the fence line as the boundary line despite the fact that the true title line of the Halladay parcel 5 did not even reach over to the title line of the Cluff property. The portion of the Cluff property lying west of the old fence line was only considered by the Cluff's and the Halladays to be the Halladay's property. The Halladays

apparently were not aware of the fact that their title line left a no man's land between the title line of Cluff and the title line of Halladay. They occupied that area pursuant to the same doctrine of boundary by acquiesence. In virtually identical fashion, the Halladays acquiesced for many years in the north boundary of the Cluff property being the old M-N fence line by visiting with the Cluffs over the fence without any assertion of a claim of ownership.

Plaintiffs-Appellants contend that the measuring period of time should not be less than 20 years measured from their 1958 acquisition of the Collard tax title. However, in Hales v. Frakes, Utah, 600 P.2d 556 (1979) the Court used as a basis for application of the doctrine the installation of fence line by the predecessors in interest of the defendant. The Court re-examined the criteria relative to boundary by acquiesence and quoted from Brown v. Mulliner, 120 Utah 16, 232 P.2d 202 (1951) at page 558:

> where the boundary is open, and visibly marked by monuments, fences, or buildings, and is knowingly acquiesced in for a long term of years, the law will imply an agreement fixing the boundary as located. Holmes v. Judge, at 87 P.1014.

In Hales v. Frakes, supra, the Court said that the trial court had found that the fence was erected as a barrier to control livestock, not as a boundary, and was purposely offset so as to be south of an expected road. Thus the proper application of boundary by acquiesence under that set of facts was to hold that it had not been established.

In the case now before the Court the trial court properly applied boundary by acquiesence. By the plaintiffs-appellants' own testimony, it was clear that the fence was a dividing line between the adjoining property owners. The trial court also took into account the recent decision of Victor Brown, et al. v. Peterson Development Co., et al., Utah, 622 P.2d 1175 (1980) where the Court said at page 14:

> It is clear from the undisputed evidence that plaintiffs and their predecessors in title and interest had occupied, possessed and used the land included in the disputed strip for more than 40 years as the owners thereof; that the land had been bounded by a visible fence during all that time, which fence had been accepted by the adjoining landowners as the boundary line between their respective tracts of land.

The Court held that the title marked by the old fence line had established, prior to the more recent events, a boundary by acquiesence that could not be overcome by the mere naked title. In the memorandum decision of the trial court, Appendix "B", which was encompassed in the Findings of Fact, Conclusions of Law and Decision (R. 46-49), the trial court took into account and made specific findings:

(a) The plaintiffs have never occupied the area cross-hatched in orange on Exhibits 8 and 12.

(b) The fence line identified on said exhibits (8 & 12) as points P-M-N-O have existed for a long period of time and have marked the boundaries of occupancy of the defendants Cluff and Bigelow and their predecessors in interest since before 1948.

(c) That during said period said defendants and their predecessors have built improvements upon said land, occupied it for purposes of farming, storage and business operations.

(d) The M-N fence line has been there for over fifty (50) years.

(e) The only evidence of plaintiffs' claim of ownership to the disputed area was an incident occurring between the plaintiffs and the defendant, Bigelow, in 1977 or 1978.

(f) The trial court's visit to the premises disclosed that a well developed fence line and planted area marking that as the area of occupation as between the plaintiffs' property on the north and defendants' property on the south.

(g) Possession of the disputed grounds was in the defendants as to the date of viewing and as the facts were shown over the years by the witnesses called and the other documentary evidence including photographs, that were submitted.

(h) Neither the tax title limitations statutes nor the succeeding to legal title by tax deed cut off defendants' claims to title by acquiescence to the property within the fences described as M-N-O-P.

(i) The trial court concluded that Brown v. Peterson Development Co., supra, would support the

trial court's view that legal title can be defeated by acquiescence as above-set forth.

(j) The acquisition of the tax title from Collard indicates that there were other disputes relative to the boundaries of plaintiffs' land.

Plaintiffs contend that the purchase of the tax title deed from George Collard in 1958 created a new factual situation disallowing the application of the doctrine of boundary by acquiescence. If such be the case, it is extremely strange that plaintiffs would have claimed an ownership in the disputed area from 1958 to 1979 when this lawsuit was commenced without ever communicating such ownership claim to the Cluffs, who were occupying the disputed area for that 21 year period as shown by Mack Halladay's own testimony.

The trial court correctly held that the intervention of the tax deed did not defeat the boundary by acquiescence that had been established since before 1948, and by the testimony of Elmo Halladay had in fact been occupied by the adjoining parties since 1930.

CONCLUSION

The trial court, being fully advised in all the factual circumstances alluded to from the record in this brief, and being fully aware of the respective claims of the

parties, correctly applied the doctrine of boundary by acquiescence in this matter.

Respectfully submitted,

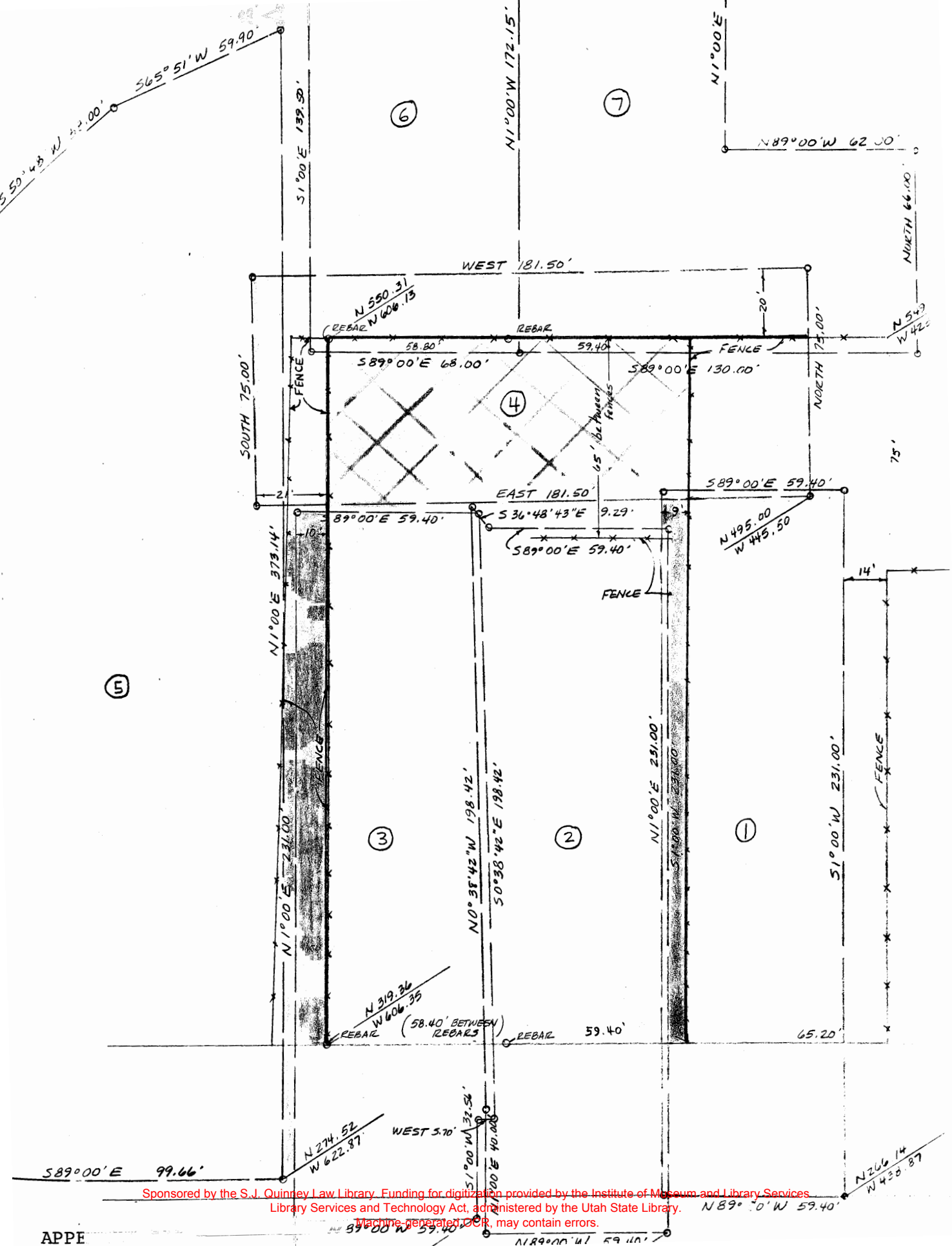
M. Dayle Jeffs

M. Dayle Jeffs

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief of Respondent Cluff were mailed to S. Rex Lewis of Howard, Lewis & Petersen, Attorneys for Respondent Bigelow, at P. O. Box 778, Provo, Utah 84603, and to Brent D. Young of Ivie & Young, Attorneys for Appellants, P. O. Box 672, Provo, Utah 84603, by placing the same in the U. S. Mails, postage prepaid, this 5th day of April, 1982.

Lorene Cox



IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

MACK HALLADAY and MERLE HALLADAY,	:	Civil Case No. 53,243
Plaintiffs,	:	
vs.	:	D E C I S I O N
MADGE CLUFF, PERRY K. BIGELOW and NORMA G. BIGELOW,	:	
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, and having fully considered same, now enters its:

D E C I S I O N

The Court finds that the plaintiffs Halladay have succeeded in establishing their title to the property in Parcel 3 owned by Cluff on Exhibit 12 which is cross-hatched in green, by virtue of title by acquiescence, and that the occupancy of Halladay meets the requirements of Utah decisional law as announced in Fuoco v. Williams, 15 Utah 2d 156, and Hales v. Frakes, 600 P. 2d 556.

The Court also finds that defendants Biglow have established title to that strip of land within legal title of plaintiffs Halladay on Exhibit 12 as Parcel 1 which is cross-hatched in brown on the basis of boundary by acquiescence and title to said property on the same authority as that above-provided for Halladay as against Cluff.

As to the property in controversy between plaintiffs, Cluff and Bigelow cross-hatched in orange on said Exhibit 12, the Court finds that the plaintiffs succeeded to a tax title which encompansses most of the area in controversy and is shown as outlined in yellow on the aforesaid Exhibit No. 12.

The tax title was issued to George 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 Defendants' Exhibit 27. The tax deed is regular on its face and can not be challenged by the defendants herein since the Statutes of Limitations has run against such a challenge.

The Court finds that the plaintiffs have never occupied the area cross-hatched in orange on Exhibits 8 and 12, and that the fence lines identified on said exhibits as point P-M-N-O have existed for a long period of time and have marked the boundaries of occupancy of the defendants Cluff and Bigelow and their predecessors in interest since before 1948, and that during said period said defendants and their predecessors have built improvements upon said land, occupied it for purposes of farming, storage, and business operations, all as testified to by the witnesses called by said defendants, Madge Cluff Kelson, Douglas Cluff, Roy Kelson, Reed Kelson, Perry Bigelow. Elmo Halliday testified that the M-N fence line has been there for over 50 years.

The only evidence of the plaintiffs' claim of ownership and title to the tract in dispute (orange cross-hatch) was an incident occuring in 1977 or '78 when the plaintiffs asserting title thereto ordered defendant Bigelow to cease digging a potato cellar thereon. The defendant moved his digging back to within his legal title ground, although he testified he did not acknowledge plaintiffs' superior right to the land in dispute.

The Court visited the premises and in viewing the north boundary of the land in dispute concluded that a well-developed fence line and planted area marking that as the area of occupation

as between the plaintiffs' property on the north and the defendants' property on the south, and that possession of the disputed grounds was in the defendants as of the date of viewing and as the facts were shown over the years by the witnesses called and the other documentary evidence including photographs that were submitted.

It is further noted that there is no record title in either defendants for the property in dispute. The defendants' legal title for their north boundaries is along a line approximately from Point P to Point O on said Exhibits 12 and 8.

From the foregoing the Court concludes that neither the tax title limitations statutes nor the succeeding to legal title by a tax deed ~~[illegible]~~ Jack cut off defendants' claims to title by acquiescence to the property within the fences described as M-N-O-P on Exhibits 8 and 12. In this respect defendants have established:

1. Occupation by defendants and their predecessors in interest up to a visible line marked definitely by fences and other visible monuments, and,
2. Acquiescence in the line as the boundary,
3. For a long period of years,
4. By adjoining landowners.

The above-cited cases of Fuoco v. Williams and Hales v. Frakes support these conclusions from the facts of this case. The recent case of Brown v. Peterson Development Company, Supreme Court No. 16785, would support the Court's view that legal title can be defeated by acquiescence as above-set forth.

It is further noted by the Court that the acquisition of title by plaintiffs through the tax deed to Collard of May, 1951, includes a twenty-foot strip within Halladays' chain of title to Parcel 7, and is evidence that there were other disputes relative to boundaries which would attempt to lessen the possibility of claims being made north of the fence line in question to which plaintiffs had a separate chain of title not based on the tax sale.

Counsel for defendants are directed to prepare Findings of Fact, Conclusions of Law and Decree quieting title in the plaintiffs for the areas above-set forth, and in the defendants Bigelow for that portion of Parcel 1 cross-hatched in brown and in both defendants Cluff and Bigelow for the portion Tract No. 4 cross-hatched in orange and as defined by the surveys otherwise contained in the exhibits admitted in this matter. The same are to be submitted to counsel for plaintiffs for his approval as to form and then to the Court for signing and entry herein.

Dated at Provo, Utah County, Utah this 9th day of November, 1980.

GEORGE E. BALLIF, JUDGE