

1982

## Earl Michaelson and Mabel Michaelson v. Lyman Larson and Katie Larson : Brief of Respondents

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

 Part of the [Law Commons](#)

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

Dale M. Dorius; Attorney for Defendants-Appellants;

Paul R. Frischknecht; Attorney for Plaintiffs-Respondents;

---

### Recommended Citation

Brief of Respondent, *Michaelson v. Larson*, No. 18175 (Utah Supreme Court, 1982).

[https://digitalcommons.law.byu.edu/uofu\\_sc2/2832](https://digitalcommons.law.byu.edu/uofu_sc2/2832)

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

IN THE SUPREME COURT FOR THE STATE OF UTAH

-----  
EARL MICHAELSON, and MABEL :  
MICHAELSON, his wife, :

Plaintiffs-Respondents, :

-vs- :

Case No. 18175

LYMAN LARSON, and KATIE :  
LARSON, his wife, :

Defendants-Appellants. :

-----

BRIEF OF RESPONDENTS

Appeal from the Judgment of the District Court of  
Sanpete County, the Honorable Don V. Tibbs, District  
Judge presiding.

Paul R. Frischknecht  
50 North Main Street  
Manti, Utah 84642

Attorney for Plaintiffs-  
Respondents

Dale M. Dorius  
29 South Main Street  
Post Office Box U  
Brigham City, Utah 84302

Attorney for Defendants-  
Appellants

FILED

MAR 16 1982

TABLE OF CONTENTS

AUTHORITIES CITED . . . . . 1

QUESTION PRESENTED. . . . . 2

STATEMENT OF FACTS. . . . . 2

ARGUMENT. . . . . 3

POINT I

THE DISTRICT COURT DID NOT ERROR BY ORDERING  
A PARTITION WITHOUT A SURVEY . . . . . 3

POINT II

THE PARTITION ORDER DOES NOT CREATE  
UNMARKETABLE TITLE . . . . . 4

CONCLUSION. . . . . 5

TABLE OF AUTHORITIES

CASES:

Roper -vs- Bartholomew, 30 U.2d 380, 518 P.2d  
683, (1974) . . . . . 3

Aurthur -vs- Chournos, 574 P.2d 723,  
(Utah 1978) . . . . . 3

STATUTES:

Utah Code Annotated, Section 78-39-13, (1953  
as amended) . . . . . 3

### QUESTION PRESENTED

Whether an order of partition may be entered without a survey and if so entered, is there created unmarketable title?

### STATEMENT OF FACTS

Appellants and Respondents are joint tenants and owners of a parcel of real property in Sanpete County, State of Utah, containing 91.42 acres marked as description no. 36 on the attached Exhibit "A". Appellants are the separate owners of real property to the east and south of the above referred to 91.42 acres; marked as description's no. 38 and 39 on attached Exhibit "A". Respondents are the separate owners of real property to the north and east of said 91.42 acres, marked as description no. 40 on attached Exhibit "A".

The trial court appointed referees for a recommendation for partition or sale. The referees recommended that the 91.42 acres be partitioned into two parcels each containing 45.71 acres; one to the north, and one to the south. They recommended that the north 45.71 acre parcel be awarded to Respondents, and the south 45.71 acre parcel be awarded to Appellants.

They further recommended that Appellants have an easement

for ingress and egress across Respondent's property. Said easement being over the northern part of Respondent's property marked Exhibit "A" attached and marked as description no. 30.

A survey was never taken and the 45.71 acre parcels were platted from the jointly owned 91.42 acre parcel as recorded in the office of the Sanpete County Recorder.

#### ARGUMENT

##### POINT I

#### THE DISTRICT COURT DID NOT ERROR BY ORDERING A PARTITION WITHOUT A SURVEY.

Pursuant to Utah Code Annotated, Section 78-39-13, (1953 as amended), a survey in a partition action is not mandatory, but discretionary with the referees and the court.

Application of Utah Code Annotated, Section 78-39-13, (1953 as amended) has been given supporting the statute making a survey discretionary. Roper -vs- Bartholomew, 30 U.2d 386, 518 P.2d 683 (1974).

The failure to have the partitioned property surveyed which is only discretionary by statute, certainly does not advance a compelling reason, justifying setting aside the district court's judgment. Aurthur -vs- Chournos, 574 P.2d

723, (Utah 1978).

POINT II

THE PARTITION ORDER DOES NOT CREATE UN-  
MARKETABLE TITLE.

Prior to the partition, the parties owed jointly 91.42 acres, marked as description no. 36 on the attached Exhibit "A". Respondents were awarded the northern 45.71 acres because it was close to property Respondents' owned separately. The Appellants were awarded the southern 45.71 acre parcel because it was located close to property which Appellants separately owned.

The partition was made by mathematical calculations. Obviously, measurements can be taken to determine the boundaries of the above referred to property. Appellants attempt to advance the theory that the property is unmarketable because the boundaries cannot be plainly and visibly observed, of course, that simply is not true.

Property which has been partitioned is not any less marketable than it was when it was contained in a single parcel of 91.42 acres.

The district court has recorded its order in the Sanpete

County Recorder's Office, awarding to each party 45.71 acres, one-half of the original 91.42 acres. The partition in no way has effected the marketability of the property. There is no cloud on the property.

CONCLUSION

The judgment of the district court should be left intact and by so doing there will not result any unmarketability of title. The partition was fair and equitable given the separate ownership of property by the parties.

For these reasons it is respectfully requested that the judgment of the District Court in and for Sanpete County, State of Utah, be affirmed.

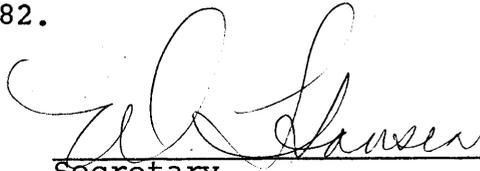
DATED this 15 day of March, 1982.

Respectfully submitted,

  
PAUL R. FRISCHKNECHT  
Attorney for Plaintiffs-  
Respondents

MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing, Brief of Respondents, to Dale M. Dorius, Esquire, 29 South Main Street, Post Office Box U, Brigham City, Utah 84302, postage prepaid thereon, this 18<sup>th</sup> day of March, 1982.

  
Secretary

Ratie P. Larson 1/2 North  
Earl Michaelson et ux 1/2

Earl Michaelson et ux

(36) 20 30  
15.50

(40)

(36)

Ratie P. Larson 1/2  
Earl Michaelson et ux 1/2

Ratie P. Larson

(39)

(38)

Earl Michaelson et ux  
15.75

Ratie P. Larson

(30)

(36)

9.10

(44)

1d

(26)

Down of

Exhibit "A"

Ratie P. Larson  
Earl Michaelson et ux