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Charles H. Stratford et al v. Earl P. Morgan et al : Brief of Appellants

Utah Supreme Court

Spafford, Dibb, Duffin & Jensen; Thomas A. Duffin; Attorney for Respondents;
Armstrong, Rawlings & West; Attorney for Appellants;

IN THE SUPREME COURT

OF THE

STATE OF UTAH

CHARLES H. STRATFORD and ROBERT L. HARRIS, Plaintiffs and Appellants, vs. EARL P. MORGAN, EARL D. MORGAN, GLORIA M. BROADBENT, EVELYN M. NEVILLE and ALICE M. TIMMERMAN, Defendants and Respondents.	)	Case No. 18306

BRIEF OF APPELLANTS

An appeal from a judgment of the
Third District Court of Salt Lake County
the Hon. Dean E. Conder, Judge

ARMSTRONG, RAWLINGS & WEST
DAVID E. WEST
1300 Walker Building
Salt Lake City, Utah 84111
Attorney for Appellants

SPAFFORD, DIBB, DUFFIN & JENSEN
THOMAS A. DUFFIN
311 South State Street
Suite 380
Salt Lake City, Utah 84111
Attorney for Respondents

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Salt Lake City, Utah 84111
Attorney for Respondents

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APPELLANT'S BRIEF ON APPEAL

STATEMENT OF THE KIND OF CASE

This action involves a boundary dispute between adjoining property owners. Plaintiffs seek to quiet title to the disputed portion of land, and claim the establishment of a boundary by acquiescence.

DISPOSITION IN THE LOWER COURT

At the conclusion of plaintiffs' evidence, defendants moved to dismiss the complaint. The trial court granted the motion and summarily dismissed plaintiffs' action, holding that the legal doctrine of boundary by acquiescence is not

applicable where the true boundary is capable of being ascertained.

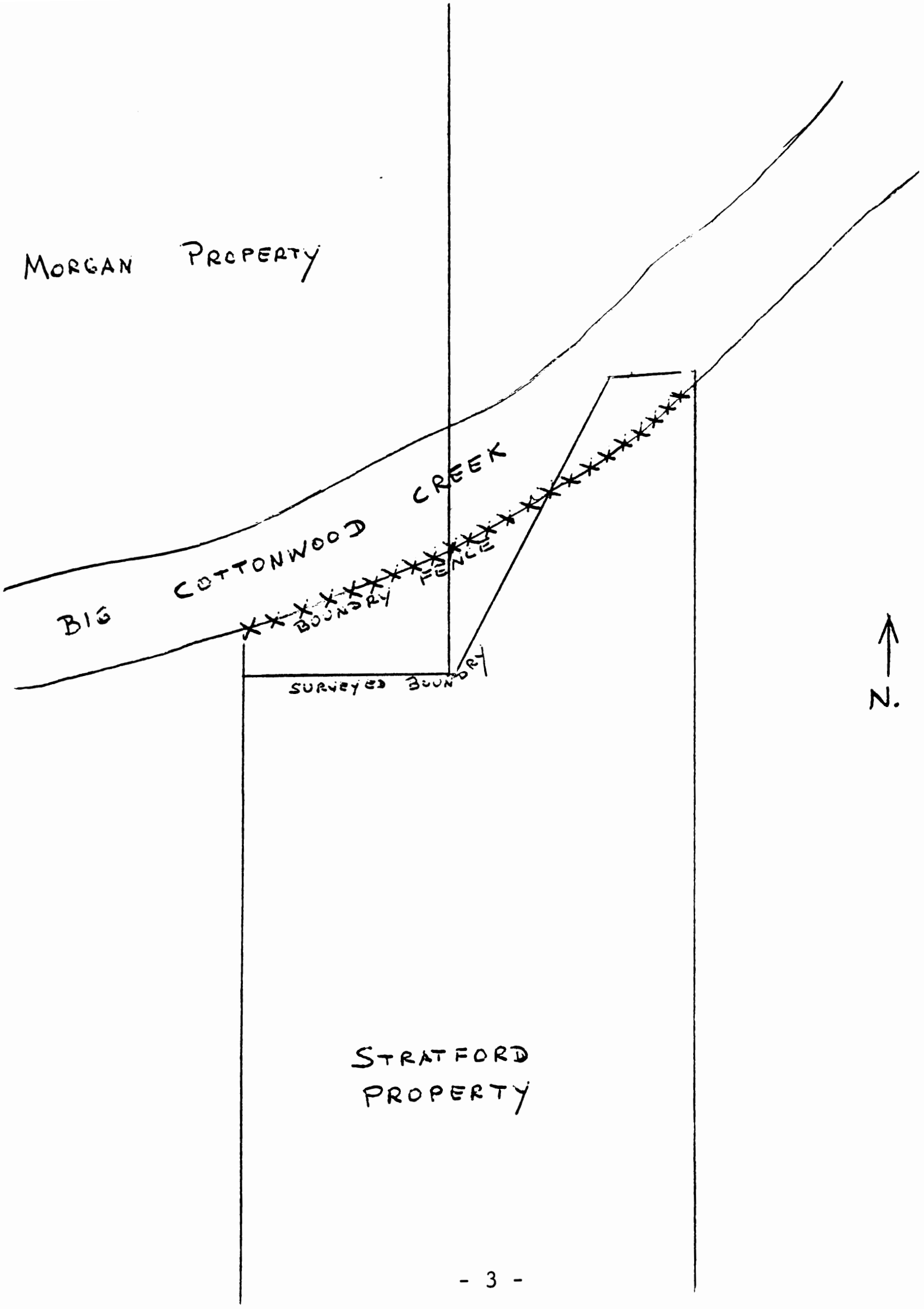
RELIEF SOUGHT ON APPEAL

Plaintiffs seek a reversal of the judgment of the trial court and reinstatement of their action. Inasmuch as respondents have not yet presented their evidence, a new trial will be required.

STATEMENT OF FACTS

On March 10, 1951, L. H. Stratford and Ella Stratford, his wife, purchased approximately five (5) acres of land at 4800 South and approximately 10th East Streets in Salt Lake County (R-111; Exhibit 28). The property was bounded on the north by Big Cottonwood Creek (although the actual boundary is the subject of this litigation). Earl C. Morgan (the father of the defendants) owned property north of Cottonwood Creek, and at the time of the purchase by Stratfords operated a dairy farm on his property (R-150, 151, 153).

The following drawing (although not to scale) is illustrative of the layout of the parties' properties. The area marked in yellow is the parcel in dispute:



The Stratfords purchased their property for the purpose of operating a hobby farm, where Mr. Stratford could raise horses, cows, sheep, other livestock, ducks and birds (R-111, 142, 145).

At the time of the purchase of the Stratford property in the spring of 1951, there was a partial fence in existence along the south bank of Cottonwood Creek. L. H. Stratford, that same spring, reconstructed the fence using the part that was already in existence, and adding new fence materials to the areas where the fence was not in existence (R-116, 131, 133, 147). The completed fence was made partly of cedar posts and partly of steel posts; was spanned by chain link wire; and was from five to seven feet in height (R-115). The fence constructed by Mr. Stratford has remained in place and unchanged since 1951, a period of more than thirty (30) years (R-115, 139).

The Stratfords have exclusively occupied the property to the fence line since they purchased the property (R-118). L. H. Stratford constructed and developed a fish pond, part of which was on the disputed property (R-117). The fishpond itself was surrounded by a seven to eight foot chain link fence with barbed wire at the top (R-117). It was used to stock fish and for private fishing (R-117). In addition, Mr. Stratford constructed a racetrack type training track to train horses. The training track was of wood and pipe

construction and was located partially on the disputed property (R-117). The property was also used for grazing (R-118) and for the raising of alfalfa and other grains (R-118).

Since the purchase of the property by the Stratfords, the Morgans have never used property beyond the fence for any purpose (R-119, 147, 158). In earlier years, there were a couple occasions when the Morgan horses got under the fence and into the Stratford property. The Stratfords were upset and told the Morgans they didn't want Morgans' horses on the Stratford property. Mr. Morgan said that he would see that the problem was taken care of, which he did (R-146).

In addition to the above, no member of the Morgan family ever made any claim to the property in dispute until shortly prior to the commencement of this suit (R-119, 145, 163).

In July of 1972, L. H. Stratford died (R-111). The property was later conveyed by Mrs. Stratford to the plaintiffs, Charles H. Stratford and Robert L. Harris, who hold the title in trust for the Stratford grandchildren (R-142). In 1979, Charles H. Stratford had the property surveyed (R-133). The survey disclosed that the metes and bounds description of the Stratford property does not go to the creek, and that part of the disputed parcel is within the Morgan deed description (Exhibit 27). Charles H. Stratford did not agree that the survey accurately shows the location of the boundary line (R-134).

Earl C. Morgan died in March of 1980 (R-152). The defendants in this action are children of Earl C. Morgan and acquired the property from their father prior to the time of his death (R-152).

After plaintiffs rested their case, defendants made a motion to dismiss. The court expressed its belief that inasmuch as the Stratford survey showed no conflict in the surveyed boundary between the properties that there could be no dispute or uncertainty as to the boundary. In ruling from the bench, the court made the following comment (R-174):

> "I know from my discussion with the Justices at the Supreme Court (in a case where Judge Conder participated) that if the description can be ascertained ... that there is no description which is in dispute".

The court then ruled in effect that a boundary by acquiescence can never apply unless it is shown that the actual boundary cannot be estabilised (R-174).

ARGUMENT

POINT I

PLAINTIFFS HAVE PRIMA FACIE ESTABLISHED A BOUNDARY BY ACQUIESCENCE AND THE TRIAL COURT IMPROPERLY DISMISSED PLAINTIFFS' COMPLAINT

A. In A Boundary By Acquiescence Case It Is Not Plaintiff's Burden To Show That The True Boundary Is Unknown, Uncertain Or In Dispute.

The doctrine of boundary by acquiescence has long been part of the common law of the State of Utah. The doctrine is based

upon sound public policy with a view of preventing strife and litigation, and in establishing stability in boundaries. Holmes v. Judge, 31 Utah 269, 87 P. 809 (1906). It is said that peace and good order of society is best served by leaving at rest possible disputes over long established boundaries. Thus, where there has been any type of recognizable physical boundary, which has been accepted as such for a long period of time, it should be presumed that any dispute or disagreement over the boundary has been reconciled in some manner. Baum v. Defa, 525 P.2d 725 (Utah 1974).

In implementing the above purposes the Utah Courts have consistently and repeatedly held that there are four necessary elements that must be shown in order to establish a boundary by acquiescence. The elements are:

1. Occupation up to a visible line marked definitely by monuments, fences or buildings.

2. Acquiescence in the line as a boundary (meaning mutual recognition).

3. For a long period of time (generally considered to be twenty (20) years).

4. By adjoining land owners.

Fucco v. Williams, 15 Utah 2d 156; 389 P.2d 1943 (1964); King v. Fronk, 14 Utah 2d 135, 378 P.2d 893 (1963); Hale v. Frakes, 600 P.2d 556 (Utah 1979); Monroe v. Harper, 619 P.2d 323 (Utah 1980).

If all of the above elements are met, then the burden shifts, and it becomes the responsibility of the party denying the boundary by acquiescence to show by competent evidence that a boundary is not established. Fucco v. Williams, supra; King v. Fronk, supra. Specifically, the cases hold that a plaintiff is not required to produce evidence showing that there is a dispute or uncertainty as to the true boundary. The existence of a dispute or uncertainty is a fact that is presumed from the passage of time. King v. Fronk, supra; Brown v. Milliner, 120 Utah 16, 232 P.2d 202 (1951); Motzkus v. Carroll, 7 Utah 2d 237, 322 P.2d 391 (1958). In Brown, for example, the court states:

> "But the Tripp case does not require a party relying upon a boundary which has been acquiesced in for a long period of time to produce evidence that the location of the true boundary was ever unknown, uncertain or in dispute. That the true boundary was uncertain or in dispute and that the parties agreed upon the recognized boundary as the dividing line will be implied from the parties' long acquiescence".

And in Motzkus v. Carroll, supra, the court held as follows:

> "From the foregoing, it is clear that where a party by evidence establishes a long period of acquiescence in a fence as marking the boundary line between two tracts, he is not required to also produce evidence that the location of the true boundary line was ever unknown, uncertain or in dispute. The establishment of a long period of acquiescence in a fence as marking the boundary line between the two tracts by the respective owners gives rise to a presumption that the true boundary line was in dispute or uncertain, which places, at least, the burden of producing evidence that there was no dispute or uncertainty but that the true boundary line was known to the respective owners on the party claiming that such was the fact. Where, as here, there is no

> evidence on that question other than the proof of acquiescence in the fence as marking the boundary line for the required long period of time, the trial court must find that the boundary line by acquiescence has been established".

And in King v. Fronk, supra, the court states that the absence of dispute or uncertainty in fixing a boundary is an element "which, it is said, might be eliminated as a factor by an implied agreement based on passage of time".[1]

B. Defendants Have Not Met Their Burden To Show An Absence of Dispute Or Uncertainty As To The Boundary Line.

If the above authorities accurately represent the law in the State of Utah the question is thus posed: Does the fact, in and of itself, that the true boundary line is capable of being ascertained overcome the presumption of a dispute or uncertainty in the boundary line? If so, the trial court properly dismissed plaintiffs' complaint. But if not, the trial court has committed reversable error. It is plaintiffs' position of course, that it does not.

Counsel has been unable to find any reported cases holding that a boundary by acquiescence is precluded if the true boundary is capable of being ascertained. Indeed it is suggested

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[1] At footnote 5 in King v. Fronk, supra, the court goes even further and states that a boundary by acquiescence can be based upon mistake. And in Baum v. Defa, supra, the court upheld a boundary by acquiescence even though the alleged boundary fence was constructed at a time when both tracts were in common ownership.

that in virtually every boundary by acquiescence case it is possible to find the true boundary. There are numerous cases in the Utah Reports where boundaries by acquiescence have been established. See e.g. King v. Fronk, supra; Motzkus v. Carroll, supra; Brown v. Peterson Development Company, 622 P.2d 1175 (Utah 1980). The cases usually recite the location of the true boundary as an admitted or proven fact. The ability to locate the true boundary through deed descriptions, so far as counsel is aware, hasn't even been argued as being inconsistent with a boundary by acquiescence.

In the instant case, there are many possible circumstances that could have caused an uncertainty about the boundary line. For example, the plat at the back of plaintiffs' abstract of title (Exhibit 28) shows Big Cottonwood Creek as the boundary of the property. Obviously, if the 1979 survey admitted into evidence is correct there must have been a movement of the creek at some point in time. There is no evidence to show how or when the creek moved. There is, however, a body of law to the effect that boundaries follow stream beds in the event of accretion or erosion, but do not follow stream beds in the event of avulsion or sudden change.[2] 78 Am Jur 2d, Waters §411. The very existence of this body of law could easily have created

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[2] It is also presumed in the absence of evidence to the contrary that the change was made through erosion and not avulsion. 78 Am Jur 2d, Waters §427.

an uncertainty or dispute between the adjoining land owners as to the location of their boundary.

There are also possibilities that errors were made in earlier surveys (Mr. Charles H. Stratford testified that he did not agree with the survey made in 1979). It is even possible that the parties executed documents changing the boundaries and that the documents are lost or unrecorded. The boundary could even have been established upon an earlier claim of adverse possession. All of these things may be speculative; however, it must be remembered that defendants, not plaintiffs, have the burden to establish the absence of an uncertainty in the boundary line. After 30 years of acquiescence it simply isn't reasonable to believe there was no uncertainty, and certainly there was no evidence before the court to overcome the presumption. It is unfortunate that the parties who really knew about the boundary dispute are now deceased. This, however, is but another reason why a boundary of long standing should not be disturbed. If the parties knowledgable about the circumstances never complained about the boundary, it would seem that the court should not permit heirs, having no knowledge to complain.

It should also be pointed out that in the instant case, the Stratfords not only reconstructed the boundary fence, but also constructed improvements upon the disputed portion of the property, that is a fishpond and a training track. It is

said that the doctrine of boundary by acquiescence rests partly upon the principle of estoppel, and that a landowner who knows the true line and silently permits an adjoining owner to make improvements is estopped to claim the true boundary. 12 Am Jur 2d, Boundaries §89. At best this principle should be an absolute bar to defendants' claims; at worst, it is persuasive evidence of the uncertainty of the boundary and the belief by Earl C. Morgan that the Stratfords were on their own land.

In summary, it is clear that there was insufficient evidence from which the defendants could rebut the presumption of a dispute or uncertainty in the boundary. The only evidence at all on this issue was the deed descriptions and the 1979 survey, and the ability of the trial court to ascertain the true boundaries therefrom. It is illogical that this evidence alone could overcome the presumption, particularly inasmuch as disputes and boundary uncertainties can easily arise from circumstances other than deed descriptions. There is no case authority to support the position of the trial court. The position is not consistent with the policy of the law to give stability to boundaries of long standing.

C. The Case of Madsen v. Clegg Was Not Intended To Overrule Established Utah Case Law.

In granting defendants' Motion to Dismiss in this case, the trial court indicated that it was relying upon the recent

case of Madsen v. Clegg, 639 P.2d 726 (Utah 1981). Unfortunately, Madsen discusses the law of boundary by acquiescence but does not touch upon the matter of presumptions. A casual reading of the case would seem to imply that a party claiming a boundary by acquiescence must prove the existence of a dispute or uncertainty. However, a careful reading of the case shows that the party denying the acquiesced boundary overwhelmingly proved either a lack of dispute or a lack of acquiescense. The facts in Madsen showed as follows:

1. A fence existed on the true boundary line at the time of the construction of the second fence relied upon as the acquiesced boundary.

2. There was affirmative testimony that the new fence had never been agreed upon as a boundary.

3. The plaintiffs paid taxes every year for the purpose of preserving his claim to the entire property.

4. Plaintiffs had made application for a well, supporting his testimony that he regarded the disputed property as his own.

5. Plaintiffs actually drilled a well to "prove up" his water rights.

6. Plaintiffs used the property from time to time to trap muskrats.

It is little wonder in Madsen that the court found that the evidence utterly failed to establish that a boundary had been

established by mutual acquiescence. None of the above facts, nor anything similar thereto, appear in the instant case.

There is nothing in Madsen to imply that the court intended to overrule case law of long standing. The court even affirmatively stated "that in the absence of an express agreement as to the location of the boundary between adjoining landowners, the law will imply an agreement fixing the boundary as located, if it can do so consistently with the facts appearing (emphasis added)". Some of the very cases relied upon by plaintiffs are cited with approval in Madsen. If the court intended to overrule these cases, it would have said so. It would seem that the common law of the state should not be overruled by implication.

There is further no language at all in Madsen to the effect that a boundary by acquiescence cannot exist if the true boundary can be ascertained (the standard applied by the trial court in the instant case).

Madsen should be construed by the court only in light of its own facts. If, however, the court truly intended to make a drastic departure from the prior law, then Madsen should be reconsidered in light of the strong policy of the law to stabilize boundaries.

POINT II

THE TRIAL COURT ERRED IN SUSTAINING OBJECTIONS TO PLAINTIFFS' PROFFERED EVIDENCE

During the course of the trial, the court sustained objections to plaintiffs' proffer of an attorney's title opinion given to L. H. Stratford at the time the Stratfords purchased the property in 1951 (proffered Exhibit 29; R-120, 165); to correspondence between L. H. Stratford and the Salt Lake County Commission relating to the washing conditions on Big Cottonwood Creek (proferred Exhibit 30; R-121, 166); and to the proffered testimony from Mrs. Ella Stratford as to her understanding that the north boundary of the Stratford property was the center of Big Cottonwood Creek (R-143). Plaintiffs submit that all of these rulings were erroneous.

The Title Opinion. The title opinion was a communication between Mr. Stratford and his attorney wherein reference was made to the movement of the creek bed. The opinion also makes reference to Mr. Stratford's belief that the Stratford property went beyond the creek. It also advises Mr. Stratford as to the law of accretion and avulsion. This evidence was excluded on the ground of hearsay.

Hearsay is generally defined as any out of court statement offered to prove the truth of the matter stated.[3] The hearsay

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[3] Rule 63, Utah Rules of Evidence.

rule does not operate to render inadmissible every statement or writing made by an out of court declarant. It does not exclude evidence offered to prove the fact that a communication was made, rather than the truth of the communication. Where the very fact of the communication becomes independently relevant, regardless of its truth or falsity, the evidence is not hearsay. Durfey v. Board of Education of Wayne County, 604 P.2d 480 (Utah 1979); Webb v. Webb, 123 Utah 16; 253 P.2d 372 (1949); 29 Am Jur 2d, Evidence §497. Where the state of mind of a person is a relevant fact, declarations showing the state of mind are admissible as primary evidence, notwithstanding that the declarant is unavailable as a witness. 29 Am Jur 2d, Evidence §650.

The outcome of this litigation turns solely upon the question of whether there was an uncertainty in the boundary line. It would seem that the state of mind of the landowner is highly probative of the existence or nonexistence of an uncertainty. The title opinion was not offered to prove the truth of anything stated therein. It was offered to show Mr. Stratford's state of mind and that he believed his boundary extended beyond the creek. The mere fact that Mr. Stratford asked his attorney and received advice about a questionable boundary, lends high credibility to the existence of a reasonable uncertainty in the boundary line. This evidence was not hearsay and should have been received by the trial court.

Correspondence With Salt Lake County. The correspondence

between L. H. Stratford and the Salt Lake County Commission likewise was offered to show Mr. Stratford's state of mind. It was not offered to prove the truth of anything in the letters, but only to show that Mr. Stratford treated the property to the creek as his own. The same authorities that apply to the title opinion would also compel a determination that this evidence is not hearsay.

Testimony From Mrs. Stratford. Mrs. Ella Stratford, the widow of L. H. Stratford, proffered testimony that she understood their boundary line to extend to the center of Big Cottonwood Creek. This evidence was objected to and excluded without any grounds being stated for the objection. The issue before the court was whether or not an uncertainty or dispute existed as to the boundary line. Mrs. Stratford was the only original party that was still alive. Her understanding, even though subjective, would be relevant as to whether a dispute or uncertainty existed. It could, of course, be argued that her testimony is self serving, but this would go to the weight and not the admissibility of the evidence.

Under the theory upon which the judge disposed of the case, the evidence exclusions may not have made a material difference. On retrial, however, this evidence may become very important to plaintiff's case and the Supreme Court should rule on these issues so that the errors will not be perpetuated.

POINT III

THE FORM OF THE JUDGMENT OF DISMISSAL WAS IMPROPER

The judgment of the court (R-90) decrees that plaintiffs have no fee simple interest in certain property described by metes and bounds in the judgment. The legal descriptions are taken from Exhibit 27 and include areas in which the Morgans have no record title. The Morgan property is not contiguous with Stratfords entire north boundary, but only part of it (see illustration at page 3). Thus, the language of the decree clouds a portion of property possessed by plaintiffs in which the defendants have no interest.

The posture of this case on appeal is the granting of a motion to dismiss at the conclusion of plaintiffs' evidence. The judgment of dismissal should be modified to merely decree that plaintiffs' action against defendants based upon boundary by acquiescence is dismissed.

This issue is, of course, moot if the appellants prevail under Point I of this brief.

POINT IV

THE TRIAL COURT IMPROPERLY DENIED PLAINTIFFS' MOTION TO AMEND THE PLEADINGS TO CONFORM WITH THE EVIDENCE

Plaintiffs approached the trial of this case with a strong belief that they could easily prove all of the elements necessary to establish a boundary by acquiescence. For this reason, they did not see any need to rely upon adverse possession. However, plaintiffs were caught by complete surprise when Judge Conder explained his interpretation of Madsen v. Clegg, supra, as being a radical departure from prior case law. Plaintiffs therefore moved to amend the complaint to conform with the evidence and add an additional cause of action based upon adverse possession (R-166). This motion was denied by the trial court because 1) plaintiffs had earlier indicated to the court that they did not intend to rely upon adverse possession and 2) because the trial court did not believe the evidence showed that the Stratfords had paid taxes on the disputed parcel (R-174).

As to 1), in hindsight it may not have been the smartest thing to be so over-confident and to rely upon what counsel considered to be plaintiffs' strongest theory. However, the adverse possession evidence was before the court and not really in dispute. Rule 15(b), Utah Rules of Civil Procedure, provides that when issues not raised by the pleadings are tried by express or implied consent, they shall be treated in all respects as if they had been raised in the pleadings. The court

has recently interpreted this rule to mean that judgments should be granted in accordance with the law and the evidence as the ends of justice require; and that this is true whether the pleadings are actually amended or not; and in pursuing this objective the proper application of the rules is that amendments are to be allowed if necessary where a case has been tried on a different issue or a different theory than has been pleaded. First Security Bank of Utah v. Colonial Ford, Inc., 597 P.2d 859 (Utah 1979). The ends of justice would require that the court consider adverse possession.

As to 2), the tax notice in evidence (Exhibit 31) was representative of all tax notices received from 1951 through 1981 and it was stipulated that the Stratfords paid the taxes on this description during that period (R-122, 123). Although the tax description is the same as the deed description, the tax notice shows the Stratfords property to contain 5.07 acres. The survey of the Stratford deed description shows 4.77 acres (Exhibit 27). The difference of .30 acres is very close to the amount of acreage in the disputed parcel, and the disputed parcel is, of course, the only other property possessed by the Stratfords. Thus, the Stratfords have in fact been paying taxes on the entire parcel that they possess. Under these circumstances, it is urged that a prima facie showing has been made that would satisfy the tax payment requirement of §78-12-12, Utah Code Annotated.

CONCLUSION

Based upon all of the arguments and authorities as cited herein, it is respectfully urged that the judgment of dismissal of the trial court be reversed and that the matter be remanded for a new trial. Appellants also urge the court to make rulings on the evidence issues in order to avoid further error upon the retrial.

Respectfully submitted,

ARMSTRONG, RAWLINGS & WEST
David E. West
1300 Walker Building
Salt Lake City, Utah 84111
Attorney for Appellants