

1961

Gordon Burt Affleck and Josephine F. Affleck v. Grant Morgan and Eva Morgan : Appellants and Cross-Brief of Respondents

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 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.

Clyde & Mecham; Elliott Lee Pratt; Attorneys for Appellants and Cross-Respondents;

Recommended Citation

Brief of Appellant, *Affleck v. Morgan*, No. 9350 (Utah Supreme Court, 1961).
https://digitalcommons.law.byu.edu/uofu_sc1/3816

This Brief of Appellant 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 (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

GORDON BURT AFFLECK and
JOSEPHINE F. AFFLECK, his wife,
*Plaintiffs, Respondents
and Cross Appellants,*

vs.

GRANT MORGAN and EVA
MORGAN, his wife,

*Defendants, Third Party
Plaintiffs, Appellants and
Cross-Respondents,*

vs.

DAVID BURT AFFLECK and
ISABELLA D. AFFLECK, his wife,

*Third-Party Defendants
and Respondents.*

FILED

MAY 8 - 1961

Supreme Court, Utah

Case No.
9350

Appellants and Cross-Respondents' Brief

CLYDE & MECHAM
ELLIOTT LEE PRATT

*Attorneys for Appellants and
Cross-Respondents*

INDEX

	Page
STATEMENT OF THE CASE	1
STATEMENT OF POINTS	6
ARGUMENT	8
POINT I. THE COURT ERRED IN QUIETING TITLE IN RESPONDENTS TO THE PROPERTY NORTH OF THE HANSON QUARTER CORNER OF SECTION 15.	8
POINT II. THE COURT ERRED IN BASING TITLE UPON THE RESURVEY.....	10
POINT III. THE DECISION OF THE COURT IS INEQUITABLE IN REFUSING TO RECOGNIZE REA- SONABLE ENJOYMENT OF THE LAND SUR- ROUNDING THE BURT AFFLECK HOME.....	15
POINT IV. THE COURT ERRED IN NOT ALLOW- ING APPELLANTS THE OPPORTUNITY OF CLAIM- ING RECOVERY FOR IMPROVEMENTS TO THE LAND.	18
POINT V. THE COURT ERRED IN NOT PERMIT- TING EVIDENCE AS TO THE USE OF THE PROP- ERTY BY APPELLANTS.	19
POINT VI. THE COURT ERRED IN DISMISSING APPELLANTS' CROSS - CLAIM AGAINST THE THIRD-PARTY DEFENDANTS.	20
SUMMARY	22

	Page
INDEX OF AUTHORITIES CITED	
Bertaling, et al v. Frates, 89 Utah 238	20
Bowers v. Gilbert, 63 Utah 245	20
Ernest v. Allen, 55 Utah 272, 184 P. 827	20
Henrie v. Hyler, 92 Utah 530, 7 P. 2d 154	11, 12
Mayer v. Flynn, 46 Utah 498	15, 19
New Mexico v. Colorado, 267 U.S. 30	11
United States v. State Investment Co., 264 U.S. 204	11

STATUTES	
57-6-4 Utah Code Annotated	18

IN THE SUPREME COURT of the STATE OF UTAH

GORDON BURT AFFLECK and
JOSEPHINE F. AFFLECK, his wife,
*Plaintiffs, Respondents
and Cross Appellants,*

vs.

GRANT MORGAN and EVA
MORGAN, his wife,
*Defendants, Third Party
Plaintiffs, Appellants and
Cross-Respondents,*

vs.

DAVID BURT AFFLECK and
ISABELLA D. AFFLECK, his wife,
*Third-Party Defendants
and Respondents.*

Case No.
9350

Appellants and Cross-Respondents' Brief

STATEMENT OF THE CASE

This is an action in equity to quiet title to a tract of land in Mountair Canyon and is also an action for trespass to the same tract of land. The land in question actually involves two

tracts, one lying South and one North of the common section line between Sections 15 and 22.

The appellants claim title to both tracts and further claim that said tracts are contiguous. The respondents, however, claim title to a strip of land approximately 55 feet wide between the two tracts of land owned by appellants. The location of said common section line is perhaps the governing factor in determining whether or not there is a tract of land owned by the respondents lying between the two tracts of land owned by appellants. Exhibit P-11 and Exhibit P-13 point out the locations of the various pieces of property.

Mountair Canyon is a tributary canyon to Parley's Canyon, the mouth of which is about 8 miles east of the mouth of Parley's Canyon. People have built summer homes and have developed the properties in the canyon since prior to 1900. From that date forward to the present, there have been an increasing number of homes constructed throughout the length of Mountair Canyon. There is a private road running from the mouth to the top of the canyon which is owned and maintained by Mountair Private Road Company. (Ex. D-12, Entry No. 17.)

The Morgans, defendants and appellants herein, first came into the canyon about 1910, and purchased Lots 1 and 2 of Merrywood Subdivision, an unrecorded subdivision which had been platted in 1908. (Ex. P-11.) The Morgans and the Bells, predecessors in title to these lots, first constructed cabins on the property in about 1912. (R. 495, 497.) (Ex. D-18.) At this early date, there had been constructed a cedar post and barbed wire fence running diagonally southeasterly from the road to a point on the hill just east of an old outhouse. (R. 497).

Beginning about this time, the Morgans constructed said out-house, a wood shed, several bridges across the stream, a horse-shoe court, and a parking area for buggies. Several cottages were also built, along with paths connecting these improvements. A trail was later on constructed in connection with the parking area. (R. 407, 508, 509). (Exs. D-47, D-48 and D-49.)

The title to this tract of land lying south of the fence and south of the section line originated in Alvaro A. Pratt, as did the property lying north of the section line and the property which is claimed by respondents. (Ex. D-12, P-1 and D-13.) The title to said property became vested in Alvaro A. Pratt in 1907 and was described as Lots 2, 3 and 4 of Section 22, Township 1 South, Range 2 East, according to the official plat of the survey of the said land returned to the General Land Office for the Surveyor General.

The land lying North of the fence line, which we will call the Burt Affleck land, was originally owned by Nephi J. Hansen under patent from the State of Utah, dated January 17, 1905, and subsequently by Alvaro A. Pratt. (Ex. D-12.) The land was conveyed to Richard K. Thomas in 1901, thence to George Mueller in 1905, and thence to David A. Affleck, the father of Burt Affleck, in 1931. Burt Affleck is also the brother of Gordon Affleck, both brothers being parties respondent to this law suit.

Burt Affleck constructed a house on the land conveyed to him in 1934 and in 1935. He thereafter commenced paying the property taxes on the land and house in 1935. (Ex. Nos. D-44, D-45, D-46, D-49, D-50, D-51, D-52, D-54, D-55, D-56.)

Burt Affleck also constructed a fish pond to the west of the house in 1935, and installed a water pump and pipeline running

from the stream to the cabin. (R. 480-483, 489.) From 1935 to 1951, Burt Affleck lived on the property during the summer months, except for the one or two years during which he was in the service. (R. 482.) In 1951, by Warranty Deed, he sold the land upon which the house was constructed, together with all tenements, hereditaments and appurtenances thereto, to the Morgans. (Ex. Nos. D-14, D-15.) After acquiring the property from Burt Affleck, Mr. Morgan constructed a patio and a 20-foot brick wall south of the home. (Ex. D-50.)

There was an old cedar post fence separating the Burt Affleck land from the Morgan land, which fence ran from the road, southeasterly, crossing the land just south of the pump-house north of the old out house to a point which is the Northeast corner of Lot 1 of the Merrywood Subdivision. (Ex. No. D-18.) This fence was originally constructed in 1912 between the Affleck property and the Morgan property. (R. 515.) According to Gordon Affleck, the fence extended along the north line of a 33-foot strip north of and adjacent to the Merrywood Subdivision. The fence was close to the house and between the house and the pump. (R. 632, 634.) (Ex. D-25.) The fence was reconstructed about 1935 by Burt Affleck, and was maintained in good repair up to 1951. A survey made in 1957, by Bush & Gudgell, Surveyors, established the location of the old fence line as generally fitting the south boundary of the description of the Burt Affleck property. There was another segment of the old fence running northerly along the west boundary of the Burt Affleck property. These fence lines were marked on Exhibit D-18 in a red line. (R. 207.) At the north corner of the property, Mr. Gudgell found a peg and at the southeast corner at the juncture of the fence line and the north boundary of the

Merrywood Subdivision, another old peg was discovered. (Exs. D-22, D-23.) (R. 222-225, 639-642.) These old fence lines and corners were also located in an earlier survey for D. A. Affleck by the firm of Caldwell, Richards & Hall. (Ex. D-41, D-42.)

By deed in 1930, Alvaro Pratt conveyed to Parker Pratt, land in Lots 2, 3 and 4 of Section 22, which had not been previously deeded to other persons. (Ex. P-1 at Entry No. 28.) In 1948, Paul Reimann received the same land from the estate of Parker Pratt. He thereafter executed a deed to Gordon Affleck and his wife, purporting to convey a portion of Lot 3, lying along the north boundary of the Merrywood Subdivision and being 33 feet wide from north to south. This deed was executed in 1955. In 1957, Paul Reimann executed a Correction Deed, changing the description and basing it upon the relocated North Quarter corner of Section 22. Paul Reimann also executed other deeds after receiving property from the Parker Pratt estate, placing said deeds upon the original section line.

Gordon Affleck and Paul Reimann were aware of the use of the property by Grant Morgan and by Burt Affleck during the years in which the improvements were constructed on this land.

In 1890, there was an original survey by A. D. Ferron which covered Section 15, but which did not establish the South Quarter corner of said section. (Ex. P-7.) Thereafter, in 1902, Andrew P. Hanson made the original survey of Section 22, establishing the North Quarter corner thereof. (D-21.) In 1928, Howard W. Miller made a resurvey of the area, and re-established the North line of Section 22, designating what had previously been designated as Lots 1, 2, 3 and 4 of said Section 22,

as Tract 37 and Tract 38. (P-6.) The survey notes which accompany the Miller resurvey, locate the South Quarter corner of Section 15 which had originally been set by Hanson, but said notes indicated that the corner was then and there destroyed by Miller. (Ex. P-34 at Page 60.)

The original North Quarter corner of Section 22, as established by Hanson, is 33 feet North of the North line of the Merrywood Subdivision. Said North Quarter corner lies North $87^{\circ}50'$ East 822.8 feet from Contrary Girl Rock, which is a fixed point of reference in the canyon. (Ex. P-11, D-21.) (R. 217, 218.)

The resurveyed North Quarter corner established by Miller is 22 feet further North of the original line established by the Hanson Quarter corner. (Ex. D-18.)

The Court found that all description of the property should be based upon the resurveyed line rather than the original section line, and the resurveyed line, as established by the Court in its Findings, passes through the center of the Burt Affleck home which was purchased by the appellants. (Ex. D-18.)

From this determination, and also from the Court's holding that the appellants obtained no rights in any property South of the resurveyed line, this appeal is taken.

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN QUIETING TITLE IN RESPONDENTS TO THE PROPERTY NORTH OF THE HANSON QUARTER CORNER OF SECTION 15.

POINT II.

THE COURT ERRED IN BASING TITLE UPON THE RESURVEY.

POINT III.

THE DECISION OF THE COURT IS INEQUITABLE IN REFUSING TO RECOGNIZE REASONABLE ENJOYMENT OF THE LAND SURROUNDING THE BURT AFFLECK HOME.

POINT IV.

THE COURT ERRED IN NOT ALLOWING APPELLANTS THE OPPORTUNITY OF CLAIMING RECOVERY FOR IMPROVEMENTS TO THE LAND.

POINT V.

THE COURT ERRED IN NOT PERMITTING EVIDENCE AS TO THE USE OF THE PROPERTY BY APPELLANTS.

POINT VI.

THE COURT ERRED IN DISMISSING APPELLANTS' CROSS-CLAIM AGAINST THE THIRD-PARTY DEFENDANTS.

ARGUMENT

POINT I.

THE COURT ERRED IN QUIETING TITLE IN RESPONDENTS TO THE PROPERTY NORTH OF THE HANSON QUARTER CORNER OF SECTION 15.

The 1903 survey by Hanson was the first official original land survey of the North Quarter corner of Section 22. (The South Quarter corner of Section 15.) The Ferron survey had not established this corner. (Exhibit P-7.)

The title to all of the land in Section 22 originated in Alvaro A. Pratt by reason of his patent from the United States Government in 1908. The patent was very explicit in describing the land with reference to "the official plat of the survey of the said land returned to the General Land Office by the Surveyor General." Therefore, in 1908, the only official plat of the survey of said lands was the Hanson survey, which had established the North Quarter corner of Section 22. From that time forward, all conveyances of land in Section 22 could only convey land up to the North Section line of said section as established by the Hanson survey.

In 1910, Alvaro A. Pratt subdivided the land in Section 22 in accordance with the plat of the Merrywood Subdivision. He established at that time, the North Quarter corner of Section 22, i.e., the Northeast corner of Lot 3 and the Northwest corner of Lot 2 of said section at a point North $87^{\circ}50'$ East 822.8 feet from Contrary Girl Rock. This was 33 feet North of the North line of the Merrywood Subdivision. (Ex. P-11.)

In 1908 and in 1910, Alvaro Pratt could not possibly have

conveyed any land North of the North Quarter corner of Section 22, as established by Hanson's survey. Certainly by no stretch of the imagination could it be argued that he made his conveyance or even received his land from the Government with reference to the Miller resurvey made some twenty years later.

As the abstract of title shows, Mr. Reimann, and thereafter Gordon Affleck, obtained their property from Parker B. Pratt, who in turn had received it from Alvaro A. Pratt. (Ex. P-1.)

It is interesting to note that in the deed from Alvaro A. Pratt to Parker B. Pratt, the description is explicit in locating Contrary Girl Rock at a point South $87^{\circ}50'$ West 822.8 feet. It is difficult indeed to understand how Mr. Reimann's title could be expanded beyond that of Parker B. Pratt, and yet that is the claim that he makes herein. That in effect is the finding that the trial court has made in quieting title in Gordon Affleck to land North of the Hanson North Quarter corner.

It is also interesting to note that in the first deed from Paul Reimann to Gordon Affleck, Mr. Reimann himself recognizes that the North line of said Section 22 was 33 feet North of the North line of the Merrywood Subdivision. Apparently in 1957, for the first time there is a conveyance which attempts to extend the North line of Section 22 North of the original North line, as established by Hanson. Mr. Reimann, in his deed to David A. Affleck and Lillian B. Affleck (Ex. P-1 at Entry No. 52) also refers to Contrary Girl Rock as being South $87^{\circ}50'$ West 822.8 feet from the Northeast corner of Lot 3 of Section 22.

Regardless of what the resurvey may attempt to do to the old established survey plats, it cannot extend the boundaries of the

Reimann property North another 22 feet to a point in the center of the Morgan home.

For this reason, it is evident that the fee title, as established by the documents relied upon by respondents, fails. It is axiomatic that the plaintiff in a quiet title action, must prevail upon the strength of his own title and cannot prevail upon the weakness of his opponent's title. Throughout the pleadings and the trial of the law suit, respondents were continually emphasizing their claim to the land as based upon their ownership of land in Section 22. Their title in no way descends from the State patent to Section 15. For this reason, the Court has erred in quieting title in the respondents to anything North of the original North section line of the Hanson Survey.

POINT II.

THE COURT ERRED IN BASING TITLE UPON THE RESURVEY.

All dealings with reference to the properties in Section 22, and the properties in Section 15, were based upon the original survey. The Government divested itself of title to the land upon the issuance of its patent to Alvaro A. Pratt covering Section 22, and upon making the exchange with the State of Utah for the property in Section 15. At the time that both of these divestures occurred, the original survey had been made for Section 15 and Section 22. Any modifications by the United States by way of the resurvey in 1928, could not affect the titles to land which had vested in the individuals by reason of the issuance of the patents and the exchange with the State of Utah.

In the case *United States v. State Investment Co.*, 264 U.S. 204, a question was presented to the court as to the effect of the resurvey made by the United States of lands after the issuance of the patent. In this case, the patent had issued based upon earlier surveys, and thereafter a resurvey had been made by the United States Land Office, which would have affected the boundaries of the patented land, if the patents had not issued. The court held that the resurvey could not effect the rights of the patentee, stating:

“A resurvey by the United States after the issuance of a patent does not affect the rights of the patentee; the Government, after conveyance of the lands, having ‘no jurisdiction to intermeddle with them in the form of a second survey’ (citing cases). And although the United States, so long as it has not conveyed its land, may survey and resurvey what it owns, and establish and re-establish boundaries, what it thus does is ‘for its own information,’ and ‘cannot affect the rights of owners on the other side of the line already existing.’ *Lane v. Darlington*, 249 U.S. 331, 333, 63 L. Ed. 629, 630, 39 Sup. Ct. Rep. 299.”

Again, in the case of *New Mexico v. Colorado*, 267 U.S. 30, the Court states in a similar type case:

“Thus, after the Land Department has surveyed and disposed of public lands, the rights therein acquired are not affected by corrective surveys subsequently made by the Department.” (Cites *U.S. v. State Investment Co.*)

Our own Supreme Court, in the case of *Henrie v. Hyer*, 92 Utah 530, 7 P. 2d 154, also considered this problem of the reliability and use of original survey corners established by Government surveyors. The Court, in relying upon the original corners, states:

"It is conceded, as it must be, that the original corners as established by the Government surveyors, if they can be found, and the places where they are originally established, if they can be definitely determined, are conclusive of all persons owning or claiming to hold with reference to such survey and the monuments placed by the original surveyor *without regard to whether they are correctly located or not.*" (Emphasis added).

In our trial, respondents brought forth argument and some testimony to the effect that the Hanson South Quarter corner was not accurate and that many of the Hanson corners were in error. There is no question but what the resurvey made by Mr. Miller did attempt to relocate many of the Hanson corners. It is also clear that in making this relocation, Miller definitely pinpointed and recognized the existence of the Hanson South Quarter corner of Section 15, stating:

"South, 34 lks. distant is the Hanson $\frac{1}{4}$ sec. cor. So. boundary Sec. 15, which is a red sandstone, 10 x 12 x 4 ins. above ground, firmly set, marked $\frac{1}{4}$ on N. face; no accessories to cor. I destroy this cor." (Ex. P-34, at p. 60 therof).

This location is further tied to the Hanson survey plat (Ex. D-21) according to Mr. Gudgell's testimony above referred to. The corner is further located with reference to the Merrywood Subdivision by the Merrywood Subdivision plat, by the many deeds of conveyance dating back to 1906, and is consistent with the surveys of the fence lines made in 1931 by Caldwell, Richards & Hall, and in 1957 by Bush & Gudgell.

Certainly one cannot under the *Henrie v. Hyer* case, ignore this original corner, and this corner is determinative of the property descriptions based thereon which have continued down

to the present time—with the exception of Paul Reimann's two deeds.

An examination of the evidence indicates clearly that historically, the people lived on both sides of the common line between Section 15 and Section 22, built fences, platted subdivision plats, established property descriptions, all in reliance upon the old section lines—not upon the resurvey line.

The old fence line built in 1912, and repaired and maintained until 1951, extended along the South boundary of the Burt Affleck property Easterly to a point common with the Northeast corner of Lot 1 of the Merrywood Subdivision. (Ex. D-18.) A survey made for D. A. Affleck July 1, 1931 (Exs. D-40 and D-41) substantiates the location of the fence posts surrounding the Burt Affleck property. The location of this fence line is consistent with the location of the Old Arm Chair road as shown on Exhibit P-5.

All conveyances of the land in Section 22 were made with reference to the original Hanson Quarter corner and without reference whatsoever to the survey line.

The resurvey, of course, modifies the survey lines of the Government land which has not been conveyed to individuals, but it cannot interfere with conveyances after the patent issued. All property descriptions have maintained their original wording and thus cannot have been intended to have been modified by the resurvey. Had the parties intended to be bound by the resurvey, then certainly the property descriptions would have had to reflect a different description.

As has been previously stated, the only conveyances showing a new description because of the resurvey are Mr. Reimann's

own deeds; and even he relied upon the old survey in his first deed to Gordon Affleck.

It is interesting to note that Gordon Burt Affleck, April 3, 1957, in his letter to Mr. Grant Morgan (Ex. P-65) was also under the impression consistent with all prior testimony, that there was only a 33-foot strip of land between the Merrywood Subdivision land of Mr. Morgan and the land Mr. Morgan purchased from Burt Affleck, Gordon's brother. The only way, as the Exhibits indicate, to arrive at the 33-foot strip of land is to consider that the North Quarter corner of Section 22 is based upon the original survey of Hanson, and is located in the position shown on the Merrywood Subdivision plat. Again, it is apparent that the respondent in this case, his predecessors in title, Paul Reimann, who is also his attorney, and Burt Affleck, all considered the original section line as being 33 feet North of Lot 1 of the Merrywood Subdivision. It is difficult to determine just exactly when the respondents had a change in opinion, but certainly it came after April 3, 1957 and even later than September 9, 1957. On this latter date, in a letter to the writer, (Ex. D-64) Gordon Affleck further indicates in the second paragraph, that Burt Affleck's property came down to the North line of the 33-foot strip. Again, there was no indication of the resurvey line being an additional 22 feet further North, to-wit, through the middle of Burt Affleck's home. (Exs. P-64 and P-65.)

The Court should have given recognition to the property descriptions and to the conveyances based upon the original surveyed lines of the Hanson survey, and particularly upon the descriptions emanating from the North Quarter corner of Section 22, as established by Mr. Hanson. To do otherwise is error.

POINT III.

THE DECISION OF THE COURT IS INEQUITABLE IN REFUSING TO RECOGNIZE REASONABLE ENJOYMENT OF THE LAND SURROUNDING THE BURT AFFLECK HOME.

The Court, in its Findings, has determined that the respondents have title to all of the land between the North line of the Merrywood Subdivision and the relocated North Section line of Section 22. The Court has further determined that said relocated line runs through the home which the Morgans purchased from Burt Affleck. The Court, instead of dividing the house, granted an easement to the Morgans covering the exact ground covered by the home and also extending along the pipeline from the home to the stream.

A quiet title action is an action in equity, *Mayer v. Flynn*, 46 Utah 498. The decision granting this easement to the appellants is not consistent with the facts as developed in the evidence, and certainly does no equity for the appellants. The front door of the home is situate on the side of the house encroaching upon respondents' land. There is no access to the front door under the Court's Decree, and as a matter of fact, there is no way to get in and out of the house or to use any land whatsoever around three-quarters of the house under the Court's decision.

The appellants are required, if this decision stands, to construct doors, stairways and paths into the home from the North side in order to make the home at all usable. There is no way for the appellants to move from the home onto the

easement given for the water line. This in effect renders this easement a nullity.

In view of the respondents avowed intentions to construct a fence to fence the appellants off of the respondents' property, the situation which will result from the Court's decision is extremely inequitable in its application to the appellant's use of the land (Ex. P-65). A fence constructed around this house in such a fashion would be so repugnant to the use of this land for a summer home, that the value of the land and the home, because of it, would be substantially decreased.

The Court has completely failed to take into account the use of the land between the Burt Affleck home and the old Morgan cottages. As the evidence shows, from 1912 on to the present time, and particularly after Mr. Morgan acquired the Burt Affleck land in 1951, this land which has now been awarded to the respondents, was used, developed and became as much an appurtenance to the use of these summer homes as did the stream, or the pipeline and pump house. Certainly the construction of the outhouse, the patio, the paths, the bridges across the stream, the parking area, and the fish pond all are essential to the use of this land as a summer home unit. These improvements were being constructed throughout the years with the knowledge of Paul Reimann and Gordon Burt Affleck. Mr. Affleck visited his brother Burt from 1935 on and made no complaint whatsoever of the use of the land South of the alleged relocated section line. He knew of the fence which his brother Burt had constructed and had maintained from 1935 to 1951; he knew of the pump and the pipeline; he should have known of the use by the Morgans

of the parking area inasmuch as he was continually on the property visiting his brother Burt.

Notwithstanding this very evident improvement of these lands for the Morgan summer home, the Court has now quieted title in the respondents to these lands, and has failed and has by its Findings and Conclusions, refused to in any way consider the expenditures made by the appellants and their predecessors in title, and has failed to give any account whatsoever to the complete unitization of this tract of land in connection with the summer home site use of both the Burt Affleck home and the Morgan cottages.

In fact, as one looks at the equities in this matter and sees the construction on the one hand of the various improvements by the Morgans up to the fence line, and the construction and maintenance on the other hand by David Burt Affleck of the improvements North of the fence, all continuing over a great number of years, one cannot help being impressed with the inequity which is now placed upon the appellants by allowing Mr. Reimann and Gordon Burt Affleck to come in with a title originating in 1957, to obtain this land as a wedge between the two homes of the appellants.

Equity does not contemplate such inequality, and the trial court is in error in not giving recognition to the rights of the appellants which have accrued and vested over these many years in this property.

POINT IV.

THE COURT ERRED IN NOT ALLOWING APPELLANTS THE OPPORTUNITY OF CLAIMING A RECOVERY FOR IMPROVEMENTS TO THE LAND.

At the outset of the trial, it was agreed between the parties in open court, that the questions of title would be resolved first before going into the question of damages (R. 141, 142). It was upon this understanding that the trial of this matter proceeded. The court now, in its Judgment, has completely ignored this agreement as to the trial procedure and has disallowed any recovery to the appellants for any improvements to the property or any damages suffered.

It is clear under the law, that even if the appellants do not have title to this land quieted in them, they are entitled to have paid to them the value of the improvements made to the land during such time as they were occupying claimants of the land under some claim of right. See Title 57-6-4 UCA 1953.

There can be no doubt in this case that the appellants, upon obtaining the deeds from Burt Affleck, intended to claim, and did claim, possession of all of the land South to their own land which they had possessed and used since 1912. It is clear from the evidence, that the improvements to the land consisted of the fish pond, the patio, the 20-foot rock wall, the paths, the bridges, the parking lot, the drainage system in the parking lot, and the lighting system. By this Court's decision, the appellants have been effectively circumvented from recovery of any of the costs expended for these improvements.

Under the case of *Mayer v. Flynn*, supra, the Court has clearly stated that under our Occupying Claimant Statutes, a person making improvements to land from which he is ultimately barred, is entitled to payment for these improvements. The court is clearly in error in not allowing further proof in connection with these improvements.

POINT V.

THE COURT ERRED IN NOT PERMITTING EVIDENCE AS TO THE USE OF THE PROPERTY IN QUESTION BY APPELLANTS.

During the trial (R. 541, 542), the Court refused to admit evidence to support appellants' claim that it had acquired by prescriptive easement, the use of the property from the North line of Lots 1 and 2 of Merrywood Plat North to the old fence line. The evidence clearly showed upon a proffer of proof, that appellants and their predecessors had used this land for a driveway, for a parking area for the old carriages and the later automobiles, for foot paths leading to the Mountair stream, for the outhouse, and for recreational usages in connection with the enjoyment of the summer homes. The Court indicated as a basis for its ruling (R. 502-506), that this theory of easement was in gross, and therefore, not a proper easement under the law in the State of Utah. It is submitted that the use of this property for these purposes is a specific use for specific and well defined purposes, all of which are appurtenant to and necessary for the enjoyment and use of the summer home. This is not an easement in gross.

All of the property was formerly owned by Alvaro A. Pratt. If the respondents now have any property, it is the residue or servient estate remaining after Alvaro A. Pratt had conveyed out. The Morgan and the Burt Affleck properties are clearly the dominant estates, having been conveyed out by Alvaro A. Pratt. Respondents could only take through the Alvaro A. Pratt residue, subject to the easements. *Ernst v. Allen*, 55 Utah 272, 184 P. 827; *Bowers v. Gilbert*, 63 Utah 245; *Bertaling, et al v. Frates*, 89 Utah 238. The Court should have considered this evidence in light of all other evidence introduced and should have then granted an easement by prescription upon these properties for the uses covered by the proffer of proof.

POINT VI.

THE COURT ERRED IN DISMISSING APPELLANTS' CROSS-CLAIM AGAINST THE THIRD-PARTY DEFENDANTS.

The very essence of the problem in this law suit is the location of the South boundary of the property purchased by the Morgans from Burt Affleck.

Very clearly, the Court, by its decision, divested Mr. Morgan of over one-half of his home, plus all of the land and improvements lying South of the resurveyed line and North of Lot 1, Merrywood Subdivision. Certainly, Mr. Morgan did not receive from Burt Affleck, for the compensation he paid, the land and the improvements which both he and Burt Affleck believed and agreed he was to receive.

Certainly in view of the Judgment of this Court, the warranty of Burt Affleck has been breached.

If, on the other hand, we should subscribe to the contention of Burt Affleck, belatedly made, that he knew the line extended through his house, then we have more reason than ever to find a breach of warranty, and even a wilfull and malicious breach of warranty, if he did not so inform Grant Morgan at the time of the purchase. To say now that Grant has no recourse on this deed, completely ignores the intent of the parties as represented by the deed.

The deed (Exs. D-14, D-15), is after all only the written account of the parties' intentions. Both parties here testified that they intended to sell and to buy the land down to the fence lines, or at least down to a point South of the water pump (R. 606, 481-485, 490).

Although appellants appreciate the fact that the Court has apparently given them title to the house, but not the land under the house, appellants believe that such a decision by the Court is a contradiction in and of itself.

The tax notices and assessments are all based upon the location of this house being affixed within the boundaries of the property described in the Burt Affleck deeds (Ex. D-12, Entry 37, Ex. D-44). Mr. Morgan has consistently paid the taxes on the house which has been assessed along with the property. Gordon Burt Affleck himself, respondent and plaintiff herein, admitted clearly that Burt Affleck's property extended to a point South of or close to the water pump. He further admitted clearly that the fence line was the South

boundary of what Burt Affleck considered to be his property (R. 496).

With these very evident statements of intent, can we say that if the Court affirms the trial court's location of the North section line, that there has not been a breach of Burt Affleck's warranty? Certainly not.

The Court erred in not permitting further trial regarding the damages suffered by the appellants by reason of the breach of warranty by the third-party defendants, the Burt Afflecks. If this Court upholds the resurveyed line, the trial court should be directed to conduct further proceedings to give the appellants their rightful remedy for the recovery of damages because of a breach of warranty.

SUMMARY

One can only look at the property in question, at the various photographs and at the many deeds and/or improvements on the properties to know that there is no basis for this alleged wedge of property claimed by respondents to be forced into and between the appellants' properties. How confused our titles to land would be if after rights had vested in reliance upon Government surveys and after the Government had relinquished title to the land, the Government could by some strange procedure, change individuals' property lines many years later by the initiation of a corrective resurvey. I respectfully submit that such is not the law and such is not a practical or equitable concept of the handling of real property boundaries. Vested rights are entitled to protection. Appellants

should not now be subject to the uncertainties of a resurvey when all parties' rights will in such an event be upset and appellants damaged and be without recourse.

Since 1912, appellants have been adding improvements to this 55 foot piece of property, not the least of which is the two-thirds portion of the house purchased from Burt Affleck. Should respondents now in 1957, having sat by all these years watching this development, oust appellants therefrom? We do not believe this Court will countenance such a deprivation of people's rights.

We respectfully petition this Court to reverse the Lower Court's decision in accordance herewith.

Respectfully submitted,

CLYDE & MECHAM
ELLIOTT LEE PRATT

*Attorneys for Appellants and
Cross-Respondents*