

1961

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

Utah Supreme Court

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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.*

Clerk, Supreme Court, Utah

Case No.  
9350

BRIEF OF PLAINTIFFS, RESPONDENTS AND CROSS-  
APPELLANTS, AND OF THIRD PARTY DEFENDANTS  
AND RESPONDENTS

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## TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS .....	2- 6
POINTS ON WHICH RESPONDENTS RELY ON THIS APPEAL INCLUDING CROSS APPEAL.....	6- 7
ARGUMENT .....	8-62
Point 1: Gordon Burt Affleck and wife have a valid record title to all lands described in the complaint, and were entitled to decree adjudicating their ownership. The appellants Morgan never acquired any title to any portion of the land by deed, by adverse possession, nor otherwise. ....	8-20
Point 2: Contrary to the arguments of appellants, the court did not quiet title in Gordon Burt Affleck and wife to any land north of the "Hanson south quarter corner of Section 15." .....	20-30
Point 3: Appellants have no capacity to impeach the 1927 Government Resurvey of Section 22. There is no merit to the argument that the "Court erred in basing title upon the resurvey." .....	30-39
Point 4: The contention that "The decision of the Court is inequitable in refusing to recognize reasonable enjoyment of the land surrounding the Burt Affleck home," disregards both the facts and the law.....	39-44
Point 5: There is no merit to the argument that "The Court erred in not allowing appellants the opportunity of claiming recovery for improvements to the land." ....	44-48
Point 6: Contrary to argument of appellants, the trial court permitted the Morgans to present any competent evidence they could produce as to alleged easements, as well as any proffers of proof defendant desired to make. ....	48-52
Point 7: The court properly dismissed appellants' third party complaint against David Burt Affleck and wife. The appeal is obviously designed to harass said respondents and this Court should assess damages against the Morgans for prolonging the groundless litigation against third-party defendants. ....	52-58
Point 8: The evidence does not warrant the granting of any easements to Grant Morgan and Eva Morgan;	

	Page
and the portions of the judgment and decree quoted in the cross-appeal should be stricken from the judgment and decree. The absence of David Burt Affleck from the State of Utah for a period of four years constituted a break in the prescriptive period, although his absence was due to military service. ....	58-62
CONCLUSION .....	-62

## INDEX OF CASES AND AUTHORITIES CITED

Alford v. Rodgers, 242 Ala. 370, 6 So. 2d 409 .....	-59
Bertolina v. Frates, 89 Utah 238, 567 P. 2d 346.....	50, 60
Day v. Jones, 112 Utah 286, 187 P. 2d 181 .....	44, 47
Doyle v. West Temple Terrace Co., 47 Utah 238, 152 P. 1180 .....	44
Deseret Livestock Co. v. Sharp, (Utah) 259 P. 2d 607, 610-611 .....	50
Etz v. Mamerow, 72 Ariz. 228, 233 P. 2d 442 .....	51
Glenn v. Whitney, 116 Utah 267, 209 P. 2d 257 .....	13
Henrie v. Hyer, 92 Utah 530, 70 P. 2d 154 .....	23, 31, 38
Home Owners' Loan Corp. v. Dudley, 105 Utah 208, 141 P. 2d 160 .....	31
Knight v. United States Land Assoc., 142 U. S. 173, 35 L. Ed. 979 .....	31
Mayer v. Flynn, 46 Utah 598, 150 P. 692 .....	40
Neilson v. Sandberg, 105 Utah 93, 141 P. 2d 696.....	51
New Mexico v. Colorado, 267 U.S. 30 .....	37
Olsen v. Noble, 207 Ga. 899, 76 S.E. 775, 780.....	60
Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. Appendix, secs. 525 et seq. ....	60
1 Thompson on Real Property, Sec. 417, page 682-683 .....	50, 60-61
6 Thompson on Real Property, page 439, sec. 3270 .....	56
6 Thompson on Real Property, sec. 3287 .....	56
7 Thompson on Real Property, page 217-218 .....	56-57
Tripp v. Bagley, 74 Utah 57, 276 P. 912, 69 A.L.R. 1417..	50, 61
United States v. State Investment Co., 264 U.S. 204 .....	37
Uthoff v. Thompson, 176 La. 599, 146 So. 161 .....	44
Utah Code Annotated, 1953, Sec. 57-6-4 .....	44
Van Cott v. Jacklin, 63 Utah 412, 226 P. 460 .....	54, 55, 56

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JOSEPHINE F. AFFLECK, his wife,  
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9350

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

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## BRIEF OF PLAINTIFFS, RESPONDENTS AND CROSS- APPELLANTS, AND OF THIRD PARTY DEFENDANTS AND RESPONDENTS

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### PRELIMINARY STATEMENT

The "STATEMENT OF THE CASE" set forth in the Brief of Appellants and Cross-Respondents Morgan is chiefly a misstatement of the facts. Appellants contradict substantially all of the admissions of defendant Grant Morgan and of his witnesses A. Z. Richards and George B. Gudgell III. Appellants

even dispute the United States survey record and attempt to move the section line southward to a place where it never existed. Grant Morgan attempts to vary, extend and enlarge by argument and by parol his deed descriptions to cover plaintiffs' land, although the Morgans never purchased said land nor acquired any title to any part thereof, nor any easement across the same. Since appellants have not stated the material facts, it becomes necessary for respondents to do so. The details are set forth in the argument.

## STATEMENT OF FACTS

Plaintiffs and respondents Gordon Burt Affleck and Josephine F. Affleck, his wife, as record owners brought suit in ejectment to recover possession and damages from defendants and appellants Grant Morgan and Eva Morgan. The property is in Mountair Canyon in Section 22, T. 1 S., R. 2 E., SLM. It is bounded on the north by the north line of Section 22 and on the south by the north line of Lots 1 and 2 of Merrywood, an unrecorded plat. (R. 1). The Morgans by answer and counterclaim falsely alleged that they purchased the property in 1951 from David Burt Affleck (brother of Gordon Burt Affleck), and claimed title by adverse possession. Defendants also sued for \$12,000 "damages" for "loss" of the property if title is adjudged to be in plaintiffs, and also for "easements" over the property. (R. 6-11). By third-party complaint the Morgans sued David Burt Affleck and wife to recover \$12,100 for "breach of warranty," alleging that the property described in the complaint was sold and conveyed to Grant Morgan by two warranty deeds dated June 2, 1951, and February 9, 1952, respectively. (R. 34-42). The two deeds (Exhibits 14-D and 15-D describe lands in Section 15, *but do not cover any land described in the complaint nor any other land in Section 22.*

Defendants have no record title to any of the land described in the complaint. Defendants offered evidence of tax receipts, but they do not describe any portion of the lands conveyed to plaintiffs. The plaintiffs have a clear record title to the land described in the complaint. The abstract of title (Exhibit 1-P) shows United States patent to Alvaro A. Pratt dated December 19, 1907, covering Lots 2, 3 and 4 of Section 22, T. 1 S., R. 2 E., SLM. Said land became identified as Tract 38 of the 1927 Government Resurvey, (Exhibit 6-P). Exhibit 2-P is a bargain and sale deed to plaintiffs dated September 3, 1955. Exhibit 3-P is a correction deed dated July 6, 1957, which covers the land described in the complaint, subject to a pipeline easement in favor of Lillian B. Affleck and subject to Restrictive Covenants. Exhibit 4-P is a plat of the various deed descriptions as platted by Jean R. Driggs, Sr., professional engineer and land surveyor. Said plat shows that there is no conflict whatsoever between any land descriptions in the deeds received by Grant Morgan and the land described in the complaint.

The two deeds to Grant Morgan from David Burt Affleck and wife, Exhibits 14-D and 15-D, do not cover any land in Section 22, but land in Section 15. The descriptions are tied to the northwest corner of Section 15, and constitute part of the Old Arm Chair survey of 1901, which was based on the Ferron survey of Section 15 in 1891. The original section line between Sections 15 and 22 was established in 1891 by Augustus D. Ferron, approved March 23, 1894. The survey plat is Exhibit 7-P. A portion of the field-notes in the United States Survey Office constitute Exhibit 32-P. Ferron marked a stationary boulder or ledge 4 feet high for the corner common to Sections 15, 16, 21 and 22. That monument was found in a good state of preservation during the Government Resurvey of Sections 22 and 23 in 1927, Exhibit 34-P.

Section 22 was surveyed in 1902 by A. P. Hanson, survey

plat approved 1903, Exhibit 21-D (Exhibit 31-P is an enlargement of that plat). Instead of following the original Ferron north line of Section 22 established in 1891, Hanson established a "resurvey line" on the excuse that he could not find the Ferron corner of Sections 15, 16, 21 and 22. On pages 5 and 6 of the brief of the appellants a number of serious misstatements are made with respect to the surveys of Sections 15 and 22. On page 6 appellants falsely assert that "The original North Quarter corner of Section 22, as established by Hanson, is 33 feet North of the North line of the Merrywood Subdivision," and also that "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)." Exhibit 35-P is a plat showing the position of the section lines of the Ferron survey of 1891, the Hanson survey of Section 22 in 1902, and the Government Resurvey of Section 22 in 1927. Said plat was prepared by Jean R. Driggs, Sr., after he made a comprehensive survey of Section 22 including the property in dispute, Exhibits 37-P and 38-P. It is significant that A. Z. Richards and George B. Gudgell III, engineers who testified for the Morgans, did not question the accuracy of the Driggs survey nor his platting. To assure the accuracy of his surveys Driggs made Polaris observations at 5 separate points or stations in Section 22.

There is a plat in the back of this brief which is a copy of Exhibit 35-P with other information from the field-notes and computations shown in red ink. The Hanson north line of Section 22 was not the *original* line as represented by appellants, but a "resurvey line" according to Hanson's own field notes, Exhibit 33-P. Contrary to the assertions of appellants said Hanson north line of Section 22 was not *south*, but *north* of the section line as reestablished on the Government Resurvey of 1927. Instead of being 22 feet *south* of the present section line, the Hanson north quarter corner of Section 22 was shown



by the Hanson field notes and the measurements to the known Hanson corners of the 1927 Government Resurvey, to be 561 feet *north* and about 2800 feet east of the original Ferron corner of Sections 15, 16, 21 and 22. Appellants and their witnesses repeatedly referred to a fictitious monument which was destroyed in 1927 by the government surveyors as the "old original corner" and as the "Hanson corner" and as the "Hanson south quarter corner of Section 15." Hanson never claimed that he set the south quarter corner of Section 15. His north quarter corner of Section 22 was set (if set at all) on his resurvey line. That monument was of different dimensions and marked on the opposite face and about 560 feet northerly from the rock which was destroyed in 1927. Mr. Gudgell admitted that he did not know who set the rock monument which was destroyed, and that it did not fit the description of the corner which Hanson set in 1902. (R. 248-270).

In 1957 Grant Morgan had a survey (Exhibits 30-P and 64-P) by Mr. Gudgell. Said survey was based on the deed descriptions. Mr. Gudgell stated that he found no conflict between the deed descriptions to Grant Morgan and the lands described in the complaint. The deed to Grant Morgan covering Lots 1 and 2 of Merrywood, (Exhibit 16-D) is on the south side of the land described in the complaint, and the lands deeded to Grant Morgan (Exhibits 14-D and 15-D) are on the north. (R. 240, 244-247, 293-294). In 1957 Mr. Gudgell made no note of any fences. He made another survey in 1959 which was a fence line survey following certain sections of fence. (Exhibits 17-P and 18-P). His 1959 survey did not follow the deed descriptions. He did not tie his survey to any monument specified in the deeds, but to a nonexistent monument. His plat shows a land description to be 37 feet farther south than the deed descriptions of Exhibit 14-D and 15-D. (R. 304-305). At least part of the fence was put up after suit was commenced. (R. 680-682).

Defendants introduced in evidence a survey of H. G. Hall made in 1931 which was supposed to be based upon the descriptions in deeds to the predecessors of David Burt Affleck. (Exhibit 40-D). A. Z. Richards, partner of H. G. Hall, admitted that the survey started "at a stake lying on the ground" and did not follow the deed descriptions, but was a projection of some noncontinuous posts, and that such description was 58 feet farther to the south than what is called for in the deeds themselves. (R. 434-435, 441-445, 439, 457, 462, 469-473, 475-478).

Grant Morgan had his own real estate broker make the purchase from David Burt Affleck. Affleck asked \$7,500, but Morgan paid only \$4,500. Affleck made no representations as to boundaries nor what he owned. A year previously Morgan negotiated to purchase from plaintiffs' predecessors the south 16½ feet of the land described in the complaint, and he knew that David Burt Affleck wanted to acquire a tract of land on the north of that 16½ foot strip. (R. 580-587, 661-664). Grant Morgan admitted that he paid no attention to boundaries, and that he did not know just where they are. His alleged improvements were only partially on the land described in the complaint, made from and after 1954, after he had notice of his lack of title. His activities were partially concealed by brush, trees, etc. Grant Morgan took possession of the land described in the complaint, but he did not pay any taxes assessed against the land.

## POINTS ON WHICH RESPONDENTS RELY ON THIS APPEAL INCLUDING CROSS-APPEAL

1. Gordon Burt Affleck and wife have a valid record title to all lands described in the complaint, and were entitled to decree adjudicating their ownership. The appellants Morgan never acquired any title to any portion of the land by deed, by adverse possession, nor otherwise.

2. Contrary to the arguments of appellants, the court did *not* quiet title in Gordon Burt Affleck and wife to any land *north* of the "Hanson south quarter corner of Section 15."

3. Appellants have no capacity to impeach the 1927 Government Resurvey of Section 22. There is no merit to the argument that "The court erred in basing title upon the resurvey."

4. The contention that "The decision of the court is inequitable in refusing to recognize reasonable enjoyment of the land surrounding the Burt Affleck home," disregards both the facts and the law.

5. There is no merit to the argument that "The court erred in not allowing appellants the opportunity of claiming recovery for improvements to the land."

6. Contrary to argument of appellants, the trial court permitted the Morgans to present any competent evidence they could produce as to alleged easements, as well as any proffers of proof defendants desired to make.

7. The court properly dismissed appellants' third party complaint against David Burt Affleck and wife. The appeal is obviously designed for delay to harass said respondents and this court should assess damages against the Morgans for prolonging the groundless litigation against third-party defendants.

8. The evidence does not warrant the granting of any easement to Grant Morgan and Eva Morgan; and the portions of the judgment and decree quoted in the cross-appeal should be stricken from the judgment and decree. The absence of David Burt Affleck from the State of Utah for a period of four years constituted a break in the prescriptive period, although his absence was due to military service.

## POINT I

GORDON BURT AFFLECK AND WIFE HAVE A VALID RECORD TITLE TO ALL LANDS DESCRIBED IN THE COMPLAINT, AND WERE ENTITLED TO DECREE ADJUDICATING THEIR OWNERSHIP. THE APPELLANTS MORGAN NEVER ACQUIRED ANY TITLE TO ANY PORTION OF THE LAND BY DEED, BY ADVERSE POSSESSION, NOR OTHERWISE.

There is no merit to the argument of appellants Grant Morgan and wife that the plaintiffs and respondents Gordon Burt Affleck and Josephine F. Affleck, his wife, "failed to prove" a valid record title to the land described in the complaint. By their admission, A. Z. Richards and George B. Gudgell III, engineers called to testify for the Morgans, helped to prove the record title of plaintiffs and to destroy all pretense of title asserted by defendant Grant Morgan.

The land owned by plaintiffs and respondents Gordon Burt Affleck and wife is 48.7 feet in width on the easterly side of the Mountair Road in Section 22, Township 1 South, Range 2 East, Salt Lake Meridian. The south line of the tract is the north line of Lots 1 and 2 of Merrywood. The north line of the tract is the north line of Section 22. Exhibit 1-P is the abstract of title which shows the patent to Alvaro A. Pratt dated December 19, 1907, covering Lots 2, 3 and 4 of Section 22, a conveyance to Parker B. Pratt, and a decree of distribution in the estate of Parker B. Pratt to Paul E. and Maybeth Farr Reimann. Exhibit 2-P is a bargain and sale deed from the Reimanns to Gordon Burt Affleck and wife dated September 3, 1955. It clearly conveys all land between Lots 1 and 2 of Merrywood and the north line of Section 22. Exhibit 3-P is a correction deed between the same parties dated July 6, 1957.

Exhibit 4-P is a plat of the deed descriptions, with the

deed description of plaintiffs' lands shown in yellow, the deed description of lands conveyed to Grant Morgan shaded in blue, and the description of land conveyed to the David A. Affleck Association, Inc., indicated in green. Said plat was prepared by Jean R. Driggs, Sr., professional engineer and land surveyor, from the deed descriptions after Mr. Driggs completed an extensive survey of lands in Section 22 in 1958 and 1959, including the land in dispute. See Exhibits 37-P and 38-P. (R. 334-425). In order to insure the accuracy of his survey, Mr. Driggs made Polaris observations at five points in Section 22. (R. 337). Neither of the engineers called to testify for appellants questioned the accuracy of the Driggs survey nor the correctness of his platting. Said plat demonstrates that the descriptions in the deeds to Grant Morgan do not in any way conflict with the land described in the complaint.

Exhibit 13-D is an abstract of title covering Lots 1 and 2 of Merrywood, an unrecorded plat. Exhibit 16-D is a special Warranty deed dated October 22, 1953, covering said land, from Zion's Savings Bank & Trust Company to Grant Morgan. The metes and bounds descriptions are tied to Contrary Girl Rock. The north line of Lots 1 and 2 of Merrywood constitute the south boundary of the land described in the complaint. Grant Morgan so admitted at the trial. (R. 572-573).

By answer the appellants made the unfounded claim that they had purchased the land described in the complaint from third-party defendants David Burt Affleck and his wife in 1951. The two deeds which they received from David Burt Affleck, Exhibits 14-D and 15-D *do not cover any portion of land described in the complaint.* (Exhibit 30-P, R. 307). Exhibit 14-D is a deed dated June 2, 1951, which covers a tract of land in Section 15 described as follows:

Beginning at a point in the center of road, said point being South 83° 25' East 150.53 feet from stake #31,

said stake #31 being described in instrument #678340, Book #74 page 513, a s being 79.16 chains South and 28.91 chains East from the Northwest corner of Section 15, Township One South, Range Two East, Salt Lake Meridian; thence running North 28° 44' 44" East 94.69 feet; thence South 49° 45' East 130 feet, *to the South line of said Section 15; thence West along said Section line*, 75.93 feet, more or less, to stake #32 in the center of road; thence North 83° 25' West 54.07 feet, to the place of beginning. (Emphasis added).

Except for the portion of the description "to the South line of said Section 15, thence West along said section line," the southerly line of the deed description would be approximately 20 feet north of the south line of Section 15. As shown by the platting of deed descriptions in Exhibit 4-P, it was necessary for Mr. Driggs to push stake #31 *south* about 20 feet in order for the description to extend to the south line of Section 15 with a closure of the metes and bounds description. The fact is confirmed by the survey plat made by George B. Gudgell III for Grant Morgan in 1957, Exhibit 30-P and 64-P. (R. 293-294). Mr. Gudgell stated that the general rule in surveying is that when a deed description shows a course to be so many feet to a section line, the surveyor recognizes the section line as it then exists. (R. 293). When Mr. Gudgell made his survey in 1957 he was given the description of Exhibits 14-D and 15-D, the deeds from David Burt Affleck and wife to Grant Morgan, and also the deed to Lots 1 and 2 of Merrywood, as the properties he should survey (R. 239-240). Mr. Gudgell platted the area between the north line of Lots 1 and 2 of Merrywood and the north line of Section 22 as about 55 feet in width. (R. 241). He found no conflict between the north line of Lots 1 and 2 of Merrywood and the south line of the land described in the complaint. (R. 246-247). The deed to Grant Morgan covering Lots 1 and 2 of Merrywood, Exhibit 16-D does not conflict in its description with the land described in the complaint. (R. 247). Mr.

Gudgell did not dispute the accuracy of the Driggs survey made in 1958 and 1959. In his 1957 survey Mr. Gudgell located the section line several feet farther north than shown by Mr. Driggs on Exhibit 4-P. (R. 292).

Mr. Gudgell admitted that the west line of Section 15 as surveyed in 1891 by A. D. Ferron was 80 chains or 1 mile in length, and that the south line of Section 15 as surveyed by Mr. Ferron was 80 chains. (R. 250). Mr. Gudgell recognized that the J. E. Evers survey of Old Arm Chair plat in Section 15 in 1901 was based on the Ferron survey. (R. 255-256, 305).

Mr. A. Z. Richards, professional engineer and land surveyor, who was called to testify for the Morgans, likewise did not dispute the accuracy of the Driggs surveys. Mr. Richards recognized that "stake 31" and "stake 32" in the deed descriptions, Exhibits 14-D and 15-D, had reference to those points in the "Old Arm Chair Plat," Exhibit 5-P. Mr. Richards prepared Exhibit 42-D, which showed the position of those points. Stake #31 would be 55.44 feet north of the south line of Section 15 if that section line ran due east and west. (R. 462). Mr. Richards said that the call in the deed of 79.16 chains south of the northwest corner of Section 15 would be .84 of a chain or 55.44 feet north of the southwest corner of Section 15. (R. 469). He said that the position of stake #32 by actual measurement from the northwest corner of Section 15 would be north of, not on the south line of Section 15. (R. 457). On his Exhibit 42-D Mr. Richards projected a line due east from the original southwest corner of Section 15 as set by A. D. Ferron in 1891. Mr. Richards testified that the relocated South quarter corner of Section 15 is 16.13 feet north of that projected line by reason of the fact that the section line as traced on the Government Resurvey in 1927 has a bearing of North 89° 39' East from the original southwest corner of Section 15. Mr. Richards admitted that in platting the deed descriptions on Exhibit 4-P, Mr. Driggs

had to move stake #31 *south* about 20 feet in order for the description in Exhibit 14-D to reach the south line of Section 15. (R. 469, 477-478).

The deed description of Exhibit 15-D does not extend south to the south line of Section 15. There is a strip of land between said tract and the land described in the complaint. Even Mr. Morgan admitted that there is a gap on the survey plat between the land described in the complaint and stake #31. (R. 576). Grant Morgan admitted on deposition that he did not know what lands are described in the complaint and that he did not know whether he ever got a deed to any part of that land. He knew he never got any deed from the Reimanns. (R. 588-589).

In 1948 Grant Morgan said he was advised by Dr. Ralph Pendleton that Paul E. Reimann had bought out the Parker B. Pratt estate. Mr. Morgan said Dr. Pendleton told him that the Reimanns had bought lands in Section 22. (R. 580). In 1950 Grant Morgan stated he had negotiations with Dr. Pendleton to acquire a strip of land  $16\frac{1}{2}$  feet in width on the north side of Lots 1 and 2 of Merrywood, and that he also had a conversation with Mr. Reimann about it. Mr. Morgan knew Dr. Pendleton wanted the Reimanns to deed  $16\frac{1}{2}$  feet of land on the north side of Lots 1 and 2 of Merrywood to Mr. Morgan for some other ground. (R. 580-582). Mr. Morgan admitted on deposition that he talked to Mr. Reimann about such a proposed conveyance. Mr. Morgan said that Dr. Pendleton told him that Dr. Pendleton and the Reimanns owned that land. Mr. Morgan knew that the Reimanns had some interest in that land. (R. 585-587). Grant Morgan admitted that he did not know where the boundaries of that tract of land are situated on the ground. On deposition Mr. Morgan testified that from 1950 to 1956 he did not claim any title to any land which appeared on the records of Salt Lake County in the names of Paul E. Reimann



and Maybeth Farr Reimann or either of them, but that as a result of the survey in 1957 he claimed title to the land described in the complaint. (R. 591-593).

One of the surprise moves in the case was the attempt of the Morgans to assert title "to a fence line." (R. 584). Neither the Gudgell survey of 1957 nor the Driggs survey of 1958 and 1959 showed any fence line whatsoever. No claim of a fence line was made at the pretrial nor in the answer and counterclaim of the Morgans. Mr. Morgan was permitted to testify that a fence was erected in 1912 by the "Bell boys," who allegedly purchased Lots 1 and 2 of Merrywood. The alleged location of the fence was entirely on the land described in the complaint which was then owned by Alvaro A. Pratt. There was no pretense of erection of a fence to settle a boundary dispute between adjoining landowners, nor of any cultivation to the fence, for the fence ran through marshland and brush. It could not have been a boundary line between the predecessors of David Burt Affleck of land in Section 15 and the grantees of Lots 1 and 2 as contended by appellants, for the reason that the land of plaintiffs described in the complaint lies in between. The alleged fence was allegedly erected on land owed of record by plaintiffs whose predecessors had nothing to do with its erection. Under the doctrine of *Glenn v. Whitney*, 116 Utah 267, 209 P. 2d 257, the alleged fence entirely on land of a third party could not be treated as a boundary between lands separated by land owned by the third party. What appellants attempted to do at the trial was to retroactively divide a strip of land belonging to the plaintiff and his predecessors, between the owners of Lots 1 and 2 of Merrywood in Section 22 and between the owners of Lot 26 of the Old Arm Chair subdivision of Section 15 in defiance of every principle of law.

There is no evidence that any fence was maintained at any location. Through A. Z. Richards the appellants attempted

to introduce evidence of a survey by his partner, H. G. Hall, in 1931. Mr. Richards admitted that his partner was instructed to survey the lands described in the deeds Exhibits 14-D and 15-D, but that Mr. Hall disregarded the descriptions in the deeds. There is no reference whatsoever to any fence in either deed. (R. 469). Two courses stated in the field book of Mr. Hall admittedly go in the wrong direction. Mr. Richards stated that "south 49° 45' west" shown in the Hall field-book should be "south 49° 45' east," and that north 83° 25' east" should read "north 83° 25' west." (R. 441-442). Instead of starting where the deed descriptions required a surveyor to start, Mr. Hall did not bother to measure from the northwest corner of Section 15, but started at "a stake lying on the ground near the northwest corner of the tract." (R. 439). Mr. Hall found some fence posts and he projected the lines of his survey according to those fence posts. Mr. Richards admitted that the fence posts did not coincide with the deed descriptions (R. 458), and that Mr. Hall went 58 feet farther south than the point where stake 31 is described in the deed (R. 469, 471). Mr. Hall projected his "fence line" across Mountair Road, although there never was a gate there. (R. 472). The fence was not continuous, for Mr. Hall *found only one post in place* in a distance of 204 feet, and he actually pulled his descriptions 58 feet farther south than the calls specified in the deed. (R. 473). Mr. Richards stated that he was not satisfied with the work done, and he knew Mr. Hall did not follow the calls in the deed, but he merely had Mr. Hall go back and tie the fence posts to Contrary Girl Rock. (R. 443-445, 469, 475). Such survey was incompetent evidence. *There was no continuous fence. There was no enclosure of any land by a fence.*

David Burt Affleck, third-party defendant and respondent, who deeded to Grant Morgan by Exhibits 14-D and 15-D lands in Section 15 only, lived in the canyon near the property in

question from 1911 on, and he testified that he was not aware of any fence until 1935, when he put one up along the creek at the insistence of his wife because she was afraid little children would get into the creek. He said that fence remained up until 1941 when he went into the army. He testified that the fence was not up when he returned in 1944, and there was no fence up in 1949 when he first saw Grant Morgan in the canyon. (R. 680-681). Mr. Affleck went up the canyon to look at the property in September 1959. He saw some cedar posts with some wire on them. The posts he put in during 1935 were not cedar. When he first went up in September 1959 those posts were not there, and in November 1959 when he inspected the posts they looked like they had just been put in. (R. 681-682). David Burt Affleck never had any conversation at any time with Grant Morgan about boundaries. (R. 682).

Grant Morgan testified that when he bought the land from David Burt Affleck in 1951 there was still part of a fence and he took part of it down. (R. 515-517). There was no testimony that any land was ever enclosed by a fence.

The Gudgell survey of 1957 was authorized by Grant Morgan. At the time of the deposition of Grant Morgan his counsel stated that defendants were relying on the survey made in 1957. (Exhibits 30-P and 64-P). The survey plat clearly shows that the deeds to Grant Morgan do not describe any part of the property described in the complaint. No wonder Grant Morgan testified that he was "dissatisfied" with such survey and had Mr. Gudgell make another survey in the fall of 1959. (R. 577).

The "survey" made by Mr. Gudgell with plat dated November 30, 1959, (Exhibits 17-D and 18-D), was anything but a survey of the deed descriptions. Mr. Gudgell admitted that his survey of 1957 as platted on Exhibits 30-P and 64-P

followed the deed descriptions. He said he could not find the northwest corner of Section 15 in the fall of 1959, which is the corner to which the deed descriptions to Grant Morgan from David Burt Affleck are tied. He knew that the southwest corner of Section 15 had been set by A. D. Ferron in 1891 at a point 80 chains south of the northwest corner of Section 15, but he did not attempt to measure from that corner. (R. 264). Mr. Gudgell said he tied his 1959 survey to a nonexistent corner—a corner which was destroyed during the Government Resurvey of 1927. (R. 292). He repeatedly referred to it as the "Hanson corner" and as the "old original corner," but he did not know who set such an alleged monument. He admitted: "I am not saying that the old original corner was set by Hanson. I don't know who it was set by." (R. 259). He admitted that what was called the "Hanson corner" did not correspond with what Hanson stated in his field notes that he had established. (R. 273). The markings were different. He admitted that the line which A. P. Hanson said he ran in 1902 as the resurvey of the south line of Section 15 was located 8.5 chains north of the Ferron south line of Section 15 as established in 1891, and that Hanson said he put in a new section corner for the southwest corner of Section 15 because he could not find the original Ferron corner. (R. 282-283). Mr. Gudgell assumed that the destroyed "monument" which he referred to as the "original corner" and as the "Hanson corner" was a government survey monument, and that "I am not saying that quarter corner was Hanson's or was Ferron's. I say we used the quarter corner referred to in these notes. Who put it in, I don't know." (R. 284). He said he knew that the Cadastral Engineer "has a reason" when he destroys a monument. (R. 289). Mr. Gudgell knew that the property descriptions were not tied to any Hanson corner. He knew that the Old Arm Chair plat of 1901 was based on the Ferron survey of Section 15

in 1891 because that was the only government survey which had been made prior to 1901, and that the Old Arm Chair Survey could not have referred to anything in the Hanson survey because it was not made until 1902. (R. 284). Mr. Gudgell admitted that Exhibit 18-D is in error in referring to the "original south quarter corner of Section 15" as having been established in 1890, since the Ferron survey was not made until 1891 and Ferron did not set the south quarter corner. (R. 276-277, 305).

Mr. Gudgell admitted that he did not run into any fence in 1957 in making his survey to the corner of the house. (R. 316-317). He admitted that by Exhibit 18-D he placed the property description of land deeded by David Burt Affleck to Grant Morgan a little over 37 feet *farther to the south* than what is specified in the deeds themselves. (R. 303-304). He admitted that "stake 31" mentioned in the deed is 43.79 feet north of the section line as it is now located, if the deed description is observed. (R. 300-301). The cross-examination of Mr. Gudgell illustrates that the 1959 survey was made of fence posts, and some sections of a fence which did not exist when his 1957 survey was made. As indicated by the testimony of David Burt Affleck, at least a part of that fence was put up after this lawsuit commenced. The 1959 survey was invalid. It did not pay any attention to the deed descriptions which were supposed to be surveyed. It arbitrarily moved the property more than 37 feet farther south than called for by the deeds themselves, and the descriptions were not tied to any government monument, but to an assumed "quarter corner" which does not exist and was never part of a government survey.

The contention of Grant Morgan that he bought the land described in the complaint from David Burt Affleck and wife is utterly false. Grant Morgan never received a deed from anyone which describes any part of that land. Exhibits 14-D

and 15-D, are the only deeds or instruments ever signed by David Burt Affleck and wife, and both A. Z. Richards and George B. Gudgell III admitted that the deed descriptions do not cover any part of the land described in the complaint. There was no discussion between Grant Morgan and David Burt Affleck with respect to the purchase of the land described in those two deeds. (R. 565). David Burt Affleck offered his property for sale in 1951 for \$7,500. (R. 682). Grant Morgan testified on deposition that in 1951 he told a real estate broker that he wanted "to buy that particular place and he arranged to buy it for me" and that the sum of \$4,500 was paid as the purchase price. Mr. Morgan testified also that the real estate broker carried out his instructions in the acquisition of the property; that he had his real estate broker contact Burt Affleck to make the deal, and that he believed his own real estate broker prepared the deeds. Grant Morgan admitted that *he accepted those deeds* and that he received an abstract of title. (R. 565-566). Mr. Morgan said he could not remember that he ever told anyone that he claimed title to any land other than what was described in those two deeds. (R. 567).

Exhibit 64-P is the survey plat covering the 1957 survey made by Mr. Gudgell which was used by counsel for Mr. Morgan on the deposition. (R. 569). Said exhibit was Exhibit 2 on the deposition of Grant Morgan. During the deposition the following discussion occurred:

"MR. PRATT: I think the record can show that I have put in the figure 31 and the figure 32, which would be along what appears to be the general south boundary of the Morgan property, what is marked as the Morgan property, the north and larger piece of Morgan property.

"MR. REIMANN: The property which he acquired from David Burt Affleck?

"MR. PRATT: Yes." (R. 569).



During the deposition counsel for Grant Morgan also stated with respect to Exhibit 64-P:

"Let me say this: The plat that we have marked here as Exhibit 2 is a plat made pursuant to a survey for Dr. Pendleton and is the one that we would rely on as showing the correct location of these properties and the descriptions." (R. 569-570).

Grant Morgan admitted on deposition:

"Q. Well, then according to the plat which has been prepared by Bush and Gudgell the tract which is described in the complaint does not join onto the tract which was deeded to you or the two tracts deeded to you by David Burt Affleck and his wife, isn't that true?

"A. *That seems correct.*" (R. 570).

The appellants claimed "title by adverse possession" at the trial, but their claims were and are without substance for the following reasons: (a) Neither Grant Morgan nor his wife ever received a deed of conveyance which describes any portion of the land. (b) The land has never been enclosed by a fence. (c) Appellants have never had exclusive possession for a consecutive period of 7 years. (d) Appellants have never paid any taxes on said land. Exhibits 44-D, 45-D, and 46-D consist of statements of taxes paid on land descriptions in the deeds to Grant Morgan, Exhibits 14-D and 15-D. It was expressly stated that the Morgans did not claim that taxes were paid on any descriptions except what are contained in the two deeds. (R. 492-494). Since the deed descriptions in the deeds to Grant Morgan dated June 2, 1951, and February 9, 1952, do not cover any portion of the land described in the complaint, Grant Morgan did not prove any step essential to establish title by adverse possession.

On deposition, Grant Morgan falsely claimed that he acquired title to the land described in the complaint from David Burt Affleck. At the trial Grant Morgan asserted that

he acquired title from his father and "from the Bell boys," although he received no deed from them covering any part of the land described in the complaint. (R. 575). His claims of title were utterly barren of fact or substance.

## POINT 2

CONTRARY TO THE ARGUMENTS OF APPELLANTS, THE COURT DID NOT QUIET TITLE IN GORDON BURT AFFLECK AND WIFE TO ANY LAND NORTH OF THE "HANSON SOUTH QUARTER CORNER OF SECTION 15."

The trial court adjudged that plaintiffs and respondents Gordon Burt Affleck and wife are owners of the following described tract of land (R. 78):

Beginning at a point which is South  $85^{\circ} 57' 35''$  East 26.83 feet from a cross chiseled on "Contrary Girl Rock," a survey monument, which cross chiseled on said "Contrary Girl Rock" has been computed to be South  $85^{\circ} 56'$  West 691.95 feet from the relocated North quarter corner of Section 22, Township 1 South, Range 2 East, Salt Lake Meridian, (which point of beginning is also the Northwesterly corner of Lot 1 of Merrywood, an unrecorded plat); and from said beginning point running thence East 207.45 feet; thence North 48.70 feet, more or less, to the North line of Section 22, Township 1 South, Range 2 East, Salt Lake Meridian, (said North line of said Section 22 also being the North line of Tract 38 of the Government Resurvey of said Section 22); thence west along the North line of said Section 22 to a point where the North line of Section 22 is intersected by the easterly boundary line of Mountair Road; thence Southeasterly along the Easterly boundary line of said Mountair Road to the point of beginning.

The argument of appellants under Point I of their brief at pages 8 to 10 that "The court erred in quieting title in



respondents to the property north of the Hanson quarter corner of Section 15," is a misstatement of the contents of the judgment and decree, and a plain distortion of the facts pertaining to the government surveys. Appellants refrained from quoting the description contained in the decree for the reason that to quote it would refute their specious contentions. On page 9 of their brief appellants make the following assertion which falsely implies that by the conveyance of title to plaintiffs there was some scheme to push the boundary over into Section 15: "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." There never was any attempt "to extend the North line of Section 22 North of the original North line as established by Hanson." Counsel for appellants point to no language which could possibly have the result which is charged.

The description of plaintiffs' land as set out in the decree hereinabove quoted makes no reference to any "Hanson line." As counsel for appellants should know, the section line run by A. P. Hanson as the south line of Section 15 and north line of Section 22 was *not the original line* at all, for the original line was established on the Ferron survey in 1891. Said Hanson line which appellants improperly designate as the "original line" was a *resurvey line* according to the express declarations of Hanson himself. Instead of being located *south* of the north line of Section 22 established and marked on the Government Resurvey of Sections 22 and 23 in 1927 as appellants seek to induce this Honorable Court to believe, the Hanson resurvey line was approximately 561 feet *north* of the *original* Ferron south line of Section 15. The Ferron line was retraced and reestablished on the Government Resurvey in 1927.

The falsity of the argument of appellants is illustrated

by Exhibit 35-P, which is a plat prepared by Jean R. Driggs, Sr. Said exhibit shows the relative location and position on the ground (a) of the south line of Section 15 as surveyed by A. D. Ferron in 1891, (b) the survey of Section 22 by A. P. Hanson in 1902, and (c) the Government Resurvey of Section 22 in 1927. Appellants' engineers did not dispute the correctness of Exhibit 35-P. When confronted with the statements contained in the field notes, Mr. Gudgell admitted that Hanson's resurvey line of the north line of Section 22 appears to have been located about 8.5 chains (561 feet) *north* of the Ferron south line of Section 15. (R. 286). The excuse A. P. Hanson gave on July 8, 1902, for resurveying the south line of Section 15 and north line of Section 22 which previously had been established on the Ferron survey of 1891 was "Being unable to find any trace of the cor. of secs. 15, 16, 21 and 22 upon which to close my survey." (Exhibit 33-P, Book A-292, page 373).

The excuse given by Hanson for his resurvey line was untenable, for he could have found the corner set by Ferron in 1891 to mark the corner to Sections 15, 16, 21 and 22, if he had taken the trouble to look for it at the location described by Ferron. Exhibit 32-P covers a portion of the Ferron field notes in Book A-228, page 102: "80.00 (chains) On line in place marked a stationary boulder 4 x 4 x 2 feet above ground with a cross (X) and 3 notches on S. & E. edges and raised a stone mound 1½ ft. high, 2 ft. base alongside for cor. to Secs. 15, 16, 21 & 22." As shown by Exhibit 5-P, the J. H. Evers survey in 1901 of Old Arm Chair subdivision in the southwest quarter of Section 15 showed the southwest corner of Section 15 to be a "Stationary Ledge marked with X & 3 notches East & South sides." The terms "stake #31" and "stake #32" in the deed descriptions Exhibits 14-D and 15-D originated in the Old Arm Chair survey, and are indicated on

Exhibit 5-P. Apparently J. H. Evers in 1901 had no difficulty in finding the Ferron corner of Sections 15, 16, 21 and 22.

Howard W. Miller, the U. S. Cadastral Engineer, executed the Government Resurvey of Sections 22 and 23 in 1926 and 1927, Exhibits 6-P and 34-P. He had no difficulty in finding the original Ferron corner of Sections 15, 16, 21 and 22 in 1927. As shown in his field notes, Exhibit 34-P, (Book A-491, page 399) in retracing the section line as established by A. D. Ferron, from the reestablished corner of Sections 14, 15, 22 and 23, Mr. Miller ran the line South  $89^{\circ} 39'$  West 80.02 chains to "The original Ferron cor. of secs. 15, 16, 21 and 22, which is a red sandstone boulder or outcropping, 4 ft. high and 4 ft. wide, facing SE., the top of which is marked with a cross, with 3 grooves E. and 3 grooves S. of cross, and witnessed by a scattered mound of stone. This cor. monument is in a good state of preservation." By the Government Resurvey of 1927 the Hanson *resurveyed* "south line of Section 15 and north line of Section 22" was superseded and terminated.

The contention of appellants on page 10 of their brief that "the Court erred in quieting title in the respondents to anything North of the original North section line of the Hanson Survey," is patently absurd. In the first place, the Hanson north line was not the *original* section line, but an invalid resurvey line. *In making a resurvey it is the duty of the engineer to reestablish the line where it was originally located.* See *Henrie v. Hyer*, 92 Utah 530, 70 P.2d 154. A. P. Hanson paid no attention to the location of the original Ferron South line of Section 15, which was the *original* north line of Section 22. Hanson arbitrarily set a new corner 561 feet north and west of the Ferron corner, which was a "limestone 17 x 7 x 5 ins. 12 ins. in the ground for cor. of secs. 15, 16, 21 and 22 marked 1 S on N. E., 2 E on S. E. faces with 3 notches on S. and E. edges." (Book A-292, page 373, Exhibit 33-P).

Mr. Hanson surveyed Section 22 with an acreage of 696.98 acres or nearly 57 acres in excess of a standard section. Since he ran his resurvey line about 561 feet north of the Ferron south line of Section 15, about 70 acres of Section 22 as surveyed by Hanson overlapped onto Section 15 as Section 15 had been surveyed by A. D. Ferron.

The supplemental group instructions, Group 160, Utah, dated February 27, 1926, in the office of Cadastral Engineer, specified:

“These supplemental special instructions provide reestablishment of the south boundary of Sections 13 to 18 inclusive, Township 1 South, Range 2 East, surveyed by A. D. Ferron, also an independent resurvey of the areas of this township by A. P. Hanson in 1902, plat approved 1903.” (R. 328).

On page 7 of the supplemental instruments for the Government Resurvey commenced in 1926 it is stated:

“The third latitudinal section line selected as the limiting north boundary for these resurveys was surveyed generally as an offset line by A. D. Ferron in 1891. A. P. Hanson claims to have resurveyed this line in 1902, but his surveys appear to be spurious and his record may be entirely disregarded. As a result of the investigation, it is believed that the original Ferron corner of Sections 15, 16, 21 and 22 is the only original corner along this line.” (R. 328).

The Government Resurvey of Sections 22 and 23 in 1927 tied that survey to the existing corners of the Hanson Survey of 1902 as well as to the existing corners of the Ferron survey of 1891. The Government Resurvey of 1927 terminated the overlap of the Hanson survey of Section 22 onto the south 561 feet of Section 15. There can be no question about the fact that Hanson's survey of Section 22 extended about 561 feet north over onto Section 15. The distance from the East quarter corner of Section 22 north to the alleged closing corner

of Section 14 clearly shows that overlap into Section 15. The same is true with respect to the west boundary of Section 22 as surveyed by Hanson. From his resurvey line Hanson said he went south 21.30 chains to the creek. The distance to the creek south of the Ferron corner of Sections 15, 16, 21 and 22 is only 16.15 chains, although the creek is intersected at a point farther to the southwest as illustrated on Exhibit 35-P.

The topography described in the Hanson field notes on his resurvey of the south line of Section 15, does not fit the topography described on the Government Resurvey in 1927. From the East quarter corner of Section 22 as set by A. P. Hanson in 1902 (which corner is still in place and was marked as an angle point of Tract 37 of the Government Resurvey of 1927), Hanson went North  $0^{\circ} 21'$  West 45.72 chains instead of 40 chains to "Intersect E. and W. line 2.66 chs. N.  $89^{\circ} 57'$  E. of cor. of secs. 14, 15, 22 and 23 as reestablished by me July 2, 1902, and described under resurveys, subdivision of this Tp. Book S." (Exhibit 33-P, Book A-292, page 339). Hanson states that he set a sandstone 18 x 8 x 5 inches at that point for a closing corner of Sections 22 and 23. He then went back 45.72 chains where he "Set a quartzite stone 17 x 8 x 6 ins. 12 ins. in the ground for  $\frac{1}{4}$  sec. cor. marked  $\frac{1}{4}$  on W. face; raised a mound of stone 2 ft. base  $1\frac{1}{2}$  ft. high W. of cor." The Hanson east line of Section 22 was 5.72 chains in excess of a mile.

The west line of Section 22 as resurveyed in 1927 was only 77.26 chains in length as compared with 87.18 chains as the length of the Hanson west line of Section 22 as surveyed in 1902. The Hanson west line was 9.92 chains longer than the 1927 Government Resurvey west line. However, the south line of the Hanson survey of Section 22 was found to be 1.42 chains south of the south line of Section 22 as resurveyed in 1927. By subtracting 1.42 chains from 9.92 chains

we get a difference of 8.5 chains (561 feet) as the length of the Hanson west line of Section 22 which extended *north* of the north line of Section 22 as reestablished on the 1927 Government Resurvey.

The east line of Section 22 as resurveyed in 1927 was only 77.80 chains as compared with 85.72 chains as the length of the Hanson east line of said section. The offset of 1.42 chains cancel each other. The difference of 7.92 chains or 521.62 feet is the distance which the Hanson relocated south-east corner of Section 15 is north of the 1927 reestablished corner of Sections 14, 15, 22 and 23. At the east the Hanson "resurvey" line was 521.62 feet north and at the west was 561 feet north of the north line of Section 22 as reestablished on the Government Resurvey in 1927. The northwest corner of Section 22 as established on the Government Resurvey in 1927 was and is the original Ferron corner established in 1891. That fact is conclusive in the record.

The plat in the back of this brief is a copy of Exhibit 35-P with additional data from field notes and from the record on appeal superimposed in red ink. Said plat illustrates the position of the survey lines, location of survey monuments, and the relative location of the controverted deed descriptions.

An examination of this plat and of the metes and bounds description of the tract of land to which the court quieted title discloses that there is no possible basis for the argument that the trial court quieted title to any land *north* of the "Hanson South quarter corner of Section 15." As illustrated by the field notes under Point 3 of this brief, *Hanson never claimed that he set the south quarter corner of Section 15.* Furthermore, the description of land in the decree makes the north line of said tract to which title is quieted in Gordon Burt Affleck and wife, the north line of Section 22 as reestablished during the Government Resurvey of 1927. The

north line of the land described in the decree is not north but about 550 feet *south* of the one-time Hanson north line of Section 22. The Hanson line was pronounced "spurious" by the General Land Office after a thorough investigation. Said Hanson north line of Section 22 was superseded and terminated by the 1927 Government Resurvey of Section 22 and 23. The 1927 resurvey reestablished the original Ferron section line. Said Hanson "resurvey section line" has not had any existence since 1927.

In attempting to put the one-time Hanson south line of Section 15 (north line of Section 22) south of the north line of Section 22 as reestablished on the 1927 Government Resurvey, appellants indulge in a highly misleading argument. Appellants seek to create the impression that the Hanson north line of Section 22 was the *original* north line of said section, notwithstanding the fact that Hanson himself stated in his field notes, Exhibit 33-P, that it was a "resurvey line." Appellants falsely contend that the "Hanson south quarter corner of Section 15" was located approximately 22 feet *south* of the north line of Section 22 as reestablished on the 1927 Government Resurvey. The inexorable fact is that Hanson never set the south quarter corner of Section 15, and he stated in his field notes that he set the north quarter corner of Section 22 on his resurvey line, which position was 561 feet *north* and approximately 2800 feet east of the original Ferron corner of Sections 15, 16, 21 and 22.

On page 8 of their brief the Morgans make the unique but absurd contention that by having a plat made of the Merrywood subdivision in Section 22 in 1910, Alvaro A. Pratt as patentee "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 87° 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." Such argument concedes that the respondents Gordon Burt Affleck and wife own a tract of land at least 33 feet in width. However, neither Alvaro A. Pratt nor any one else could legally move the section line south 22 feet (or north) by a private survey. Alvaro A. Pratt did not attempt to move the section line, but he could not have succeeded even if he had tried. As far as the lots in the unrecorded Merrywood subdivision were concerned, it would make no difference where any government corner might be located, for all of these lots were tied directly to a cross chiseled on a large survey monument known as "Contrary Girl Rock." (Exhibit 11-P).

On page 14 of their brief appellants attempt to make it appear that the plaintiffs and their predecessors assumed or believed that the tract of land between the north line of Lots 1 and 2 of Merrywood and the north line of Section 22 was only 33 feet in width, and that plaintiffs having had a mistaken assumption should not be permitted to claim to the section line where it originally existed because the surveyor who prepared the Merrywood plat thought that the distance was only 33 feet. Counsel for appellants do not make clear how a mistaken belief or erroneous assumption of a property owner can move a section line north, south, east, west or in any other direction from where it was originally established. The appellants ignore the correction deed given to Gordon Burt Affleck and wife, and the explantaion counsel for the Morgans drew out of him as the reason for the correction deed. (R. 624).

Counsel misconstrue the original deed to the plaintiffs dated September 3, 1955, in an effort to narrow the tract to 33 feet. That deed description starts on the north line of Section 22. It is elementary that the call of "South 33 feet to the Northeasterly corner of said Lot 2 of Merrywood" conveyed the entire strip between the north line of Section 22



and the north line of Lots 1 and 2 of Merrywood. (Exhibit 2-P). If counsel for appellants were correct in arguing that the north line of Lot 3 of Section 22 necessarily refers to the Hanson survey, then instead of conveying only the strip of ground described in the decree or between the existing section line and the north lines of Lots 1 and 2 of Merrywood, such deed would have purportedly conveyed a tract of land nearly 597 feet in width, for the reason that the Hanson north line of Section 22 was about 550 feet *north* of the tract described in the decree and the tract described in the decree is 48.7 feet in width at the east.

Counsel for appellants infer that the deed from Alvaro A. Pratt did not cover all of the land to the north line of Section 22 as said section line is presently established. On the contrary, such conveyance went north of the present section line because the north lines of Lots 2, 3 and 4 of Section 22 were on the Hanson's north line of Section 22. The Hanson line was considerably in excess of 500 feet farther north than the presently existing section line. The abstract of title, Exhibit 1-P, pages 28 to 30, clearly shows that Alvaro A. Pratt and wife conveyed to Parker B. Pratt all of "Lots 2, 3 and 4, Section 22, Township 1 South, Range 2 East, Salt Lake Meridian, excepting the following tract or parcels, to-wit"; and the exceptions cover only metes and bounds descriptions of Lots 1 to 7, 20, 32 and 34 of Merrywood, which exceptions do not cover any of the land described in the complaint. The argument that the north boundary of the Pratt lands in Section 22 was *south* of the north line of Section 22 as reestablished on the Government Resurvey in 1927 is palpably absurd. According to the Hanson survey, Lots 2, 3 and 4 of Section 22 overlapped into Section 15 from 521.62 feet to 561 feet.

Contrary to the contradictory arguments of the Morgans, the court did not quiet title "to anything North of the original North section line of the Hanson Survey," for the reason that

the north line of the Hanson survey was a "resurvey line" (not the original section line) which was from 521.62 feet to as much as 561 feet north of the presently existing section line as reestablished in the Government Resurvey in 1927. The 1927 resurvey reestablished the section line where it was originally established by A. D. Ferron in 1891. The original Ferron northwest corner of Section 22 was found in a good state of preservation. The 1927 resurveyed section line had to be anchored to that original monument.

### POINT 3

APPELLANTS HAVE NO CAPACITY TO IMPEACH THE 1927 GOVERNMENT RESURVEY OF SECTION 22. THERE IS NO MERIT TO THE ARGUMENT THAT "THE COURT ERRED IN BASING TITLE UPON THE RESURVEY."

Appellants attempt to create title confusion by an unwarranted attempt to impeach the official Government Resurvey in 1927 of the south line of Section 15 and north line of Section 22. Counsel do not and cannot point out in any particular wherein the 1927 survey executed by Howard W. Miller, U. S. Cadastral Engineer, was in error. In their argument, appellants ignore the fact that the *original* corner of Sections 14, 15, 21 and 22 and the *original* corner of Sections 14, 15, 22 and 23 were established in 1891 on the survey executed by A. D. Ferron. The Morgans and their witnesses repeatedly referred to a non-existent monument which was officially destroyed by the United States Government during the resurvey in 1927, as the "old original corner" and as the "original Hanson corner," when there is no evidence that such rock was ever identified with any of the United States surveys. Contrary to the arguments of counsel for appellants, there is no evidence that A. P. Hanson in 1902

established his north quarter corner of Section 22 at any point other than where he stated in his field notes that he established it, which point was 37.38 chains west on his resurvey line from his "relocated" southeast corner of Section 15. Hanson never set the south quarter corner of Section 15.

It is not disputed that the Government Resurvey of 1927 of Section 22 was an official survey of the United States, nor that its purpose was to retrace the original Ferron south line of Section 15, etc. As stated in *Knight v. United Land Association*, 142 U. S. 173, 35 L. Ed. 974, 979, 12 S. Ct. 259, with respect to government resurveys:

"It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding . . . "

In *Henrie v. Hyer*, 92 Utah 530, 70 P. 2d 154 at 157, this Court said:

" . . . Official surveys for the United States government are not open to attack between private parties in disputes over boundary lines."

In *Home Owners' Loan Corp. v. Dudley*, 105 Utah 208, 141 P. 2d 160, the following rule was stated:

"A survey monument relocated by proper authority is presumed to be placed where the surveyor originally located it, until and unless the contrary is shown by competent evidence."

There can be no question about the fact that on the Government Resurvey of 1927, the U. S. Cadastral Engineer retraced the south line of Section 15 and north line of Section 22 as that land was established originally by A. D. Ferron in 1891. The 1927 Government Resurvey superseded the Hanson "resurvey." The Ferron corner common to Sections

15, 16, 21 and 22 was found in a good state of preservation, being an outcropping or boulder of red standstone 4 feet high and 4 feet long and 2 feet thick, marked with a cross, and 3 grooves on the south and east sides.

As shown by the field notes of the 1927 resurvey, "The original  $\frac{1}{4}$  sec. cor. bet. secs. 14 and 15 is a red standstone, 16 x 10 x 6 ins., lying on the ground, marked  $\frac{1}{2}$  on one face, and witnessed by deeply embedded stones around cor. I reset stone 10 ins. in the ground marked  $\frac{1}{4}$  on W. face, and alongside same, set an iron post, 3 feet long, 1 in. in dia., 28 ins. in the ground for  $\frac{1}{4}$  sec. cor., with brass cap marked . . . " (Exhibit 34-P, Book A-491 page 393). After determining that the east line of Section 15 had a bearing of South  $0^{\circ} 40'$  East, the engineers chained on that course 40 chains to a point where they reestablished the corner of Sections 14, 15, 22 and 23, marked with an iron post 2 inches in diameter with a brass cap. (Book A-491, page 394). The reestablished corner of Sections 14, 15, 22 and 23 is 80.02 chains North  $89^{\circ} 39'$  East from the original Ferron corner of Sections 15, 16, 21 and 22.

During the Government Resurvey of Sections 22 and 23 in 1927, the U. S. Cadastral Engineer found at a point 1.97 chains (130.02 feet) east and 2 links (1.32 feet) south of the reestablished corner of Sections 14, 15, 22 and 23, "a sandstone, 10 x 12 x 12 ins. above ground, firmly set, marked with 3 notches on E., 3 notches on W. and 2 notches on S. edge;" from which he found certain "bearing trees" (B. T.) referring to such monument. He stated: "The above stone and bearing trees, while marked for the cor. of secs. 14, 15, 22 and 23, cannot be identified as belonging to either the Ferron or Hanson survey systems in this township; therefore, I conclude that it is of local origin and destroy the stone and deface the bearing trees." (Book A-491, pages 396-397).

On page 12 of their brief appellants attempt to make a big play over an error in the 1927 field notes in referring to a fictitious monument which was destroyed during the resurvey of 1927 as the "Hanson  $\frac{1}{4}$  sec. cor." Appellants argue:

" . . . 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 thereof).

"This location is further tied to the Hanson survey plat (Ex. D-21) according to Mr. Gudgell's testimony above referred to . . . "

Contrary to such argument such location was not tied to anything in the Hanson field notes nor to the Hanson survey plat, nor even mentioned in the Hanson field notes. While the surveyor erroneously referred to such destroyed monument as a "Hanson  $\frac{1}{4}$  cor.", the field notes of the Government Resurvey of 1927 and the Hanson field notes of 1902 clearly demonstrate that such destroyed "corner" was not set by Hanson. Hanson made no pretense that he ever set the south quarter corner of Section 15. As stated in Exhibit 34-P, Book A-491, page 481, field note of the Government Resurvey of 1927:

" . . . No evidence of the Hanson surveys of the N. Bdy. of sec. 22 can be found and his reported closings upon the former surveys in this vicinity are notoriously fictitious. Indications are that land owners have used the Ferron cor. of secs. 15, 16, 21 and 22 to locate their claims and ran in cardinal directions therefrom. Therefore, the N. bdy. of the Hanson survey of sec. 22 is terminated on the reestablished S. bdy. of secs. 14 and 15."

We have heretofore pointed out under Point 2 of this brief that the Hanson north line of Section 22 (south line of Section 15) was an unauthorized resurvey line and that his relocated southwest corner of Section 15 was placed at a point 561 feet *north* (and west) of the Ferron corner. Hanson's relocated southeast corner of Section 15 was at a point 521.62 feet north of the corner of Sections 14, 15, 22 and 23 as reestablished on the 1927 Government Resurvey. It is significant that in his field notes Hanson did not describe any terrain which fits the south line of Section 15 as reestablished on the 1927 Government Resurvey. From his "relocated" southeast corner of Section 15, Mr. Hanson said he ran his resurvey line west. At 34.25 chains he said "Top of spur runs S. 90 ft. high," which cannot be identified with anything in the vicinity of the reestablished section line. At 37.38 chains west of his *relocated* southeast corner of Section 15, Mr. Hanson

"Set a sandstone 18 x 8 x 4 ins. 12 ins. in the ground for  $\frac{1}{4}$  cor. of sec. 22 marked  $\frac{1}{4}$  of S face; raised a mound of stones 2 ft. base  $1\frac{1}{2}$  ft. high S of cor." (Exhibit 33-P, Book A-292, page 347).

It is significant that on his resurvey line Hanson said that he set the north quarter for Section 22, but he did not set the south quarter corner for Section 15. Hanson offset Section 22 from Section 15. The south quarter corner would be the southwest corner of the southeast quarter of Section 15. To set the south quarter corner of Section 15 Hanson would have had to set it approximately 41 chains west from his relocated southeast corner of Section 15, because his resurvey line was 82.02 chains instead of 80 chains in length. However, he only set the north quarter corner of Section 22. Reference to the stone monument which was destroyed in 1927 as the "Hanson  $\frac{1}{4}$  sec. cor. So. boundary Sec. 15" was and is erroneous for the reason that Hanson never set a

quarter corner for the South quarter corner of Section 15, and such destroyed stone cannot be identified with the Hanson survey or any other government authorized survey.

It should be noted that there were *accessories* to the North quarter corner of Section 22 which Hanson set in 1902, consisting of a mound of rocks 2 feet at the base. There were no accessories to the rock monument which was found in 1927. Furthermore, Hanson marked his monument with " $\frac{1}{4}$ " on the *south* face, which would be proper. The rock which was destroyed in 1927 which appellants have improperly referred to as the "original Hanson corner" and as the "original corner," was marked " $\frac{1}{4}$ " on the *north* face. Consequently, such rock was not in the place nor position where Hanson said he set his quarter corner. According to the field notes of Hanson as platted on Exhibit 35-P, the Hanson north quarter corner of Section 22 was set at a point which is about 560 feet northerly from the place where the rock monument was found in 1927 which was destroyed.

Perhaps the most decisive proof that the destroyed monument was not the Hanson quarter corner is the fact that they were of different sizes and dimensions. The rock which was destroyed in 1927 was a red sandstone 10 x 12 x 4 inches above the ground. The North quarter corner of Section 22 set by Hanson in 1902 was 18 x 8 x 4 inches above the ground. It is conceivable that a rock monument might diminish in size by erosion, but it is not conceivable that one of its dimensions will increase in size with age. Thus, the two monuments were different in size. One was marked  $\frac{1}{4}$  on the *north* face and the other was marked  $\frac{1}{4}$  on the *south* face. The monument set by Hanson had accessories consisting of a mound of stones. The monument which was destroyed had no accessories whatsoever. The rock which was destroyed in 1927 was found in a location which was about 560 feet southerly from the place

where Hanson stated in his field notes that he set his north quarter corner of Section 22.

On the Government Resurvey of the section line in 1927 in going west from the reestablished corner of Sections 14, 15, 22 and 23, the surveyors reached the Mountair Road at 50.60 chains. (Book A-491, page 399). On Hanson's resurvey line, west from his relocated southeast corner of Section 15, he reached the road "in bottom of gulch" at 66.15 chains. Hanson in July, 1902, reached the road 1026.30 feet farther to the west than did the U. S. Cadastral Engineer in 1927 for the reason that Hanson's resurvey line was about 561 feet farther north, and the road winds to the northwest. To further demonstrate that Hanson's resurvey line was some distance over into Section 15, all one needs to do is to look at his survey plat, which shows the road running through Lot 4 of Section 22. It is undisputed that there is no road through what was formerly known as Lot 4 of Section 22. By an invalid resurvey, Hanson arbitrarily tried to annex about 70 acres of Section 15 to add to Section 22 to make Section 22 an over-size section.

Mr. Gudgell repeatedly referred to the rock monument which was destroyed in 1927 as the "old original corner," and as the "Hanson corner," but he admitted that he did not know who set it. He said, "I am not saying that the old original corner was set by Hanson. I don't know who it was set by." (R. 259). Mr. Gudgell recognized that what he called the "Hanson corner" did not correspond with the quarter corner which Hanson stated in his field notes that he had established. (R. 273). He also said, "I am not saying that quarter corner was Hanson's or was Ferron's." (R. 284). *Neither Ferron nor Hansen ever set the south quarter of Section 15.* The south quarter corner of Section 15 was never established until 1927 when it was established on the Government



Resurvey. It is known as the relocated or reestablished North quarter corner of Section 22 and also as the South quarter corner of Section 15.

The monument which was found in 1927 south of the section line with a  $\frac{1}{4}$  marked on the north face was never established on any government survey. It was not an official monument, and it was properly destroyed. In this connection it is interesting to note that appellants do not complain of the destruction of the monument which was only 1.32 feet south of the reestablished section line between Sections 14 and 23. Only two monuments were destroyed on said 1927 survey. The Hanson east quarter corner of Section 22 was not destroyed. It was marked by an angle point and tied to the relocated east quarter corner of Section 22. The Cadastral Engineer did not destroy any monument which was set where the field notes stated that it was set, nor if it could be identified with any prior government survey.

Appellants argue that the section line was pushed farther to the north by the Government Resurvey in 1927. In connection with their unfounded argument they cite *United States v. State Investment Co.*, 264 U. S. 204, and *New Mexico v. Colorado*, 267 U. S. 30. We fully agree with the doctrine set forth in those cases. The difficulty is that appellants have the facts in reverse. If the section line was "moved" it was not moved north but south to where it was located in 1891. Consequently, those cases cannot possibly assist the Morgans. Those cases might be applicable to assail the invalid Hanson resurvey of the north line of Section 22 in 1902, since Hanson disregarded the original section line as surveyed by Ferron in 1891 when Hanson attempted to slice off from 561 feet to 521.62 feet from the south side of Section 15 and include that area of about 70 acres in Section 22. The 1927 Government Resurvey remedied the unlawful overlap. In defiance

of the facts appellants have tried to make it appear that the Hanson north line of Section 22 was *south* of the north line of Section 22 as reestablished on the Government Resurvey in 1927 when the Hanson line was from 521.62 to 561 feet *north* of the reestablished section line. The 1927 Government Survey of Section 22 was anchored to the original Ferron corner of Sections 15, 16, 21 and 22. The 1927 resurvey was accurately executed in accordance with the rules established by law.

On pages 11 and 12 of their brief, the Morgans quote from *Henrie v. Hyer*, 92 Utah 530, 70 P. 2d 154. We fully concur in that quotation. The Government Resurvey of 1927 fully complied with that rule. The original corner of Sections 15, 16, 21 and 22 established in 1891 by Ferron was found in 1927 in a good state of preservation, although Hanson represented that he could not find it. The resurvey was accurately executed according to law and according to the rules established nearly a century ago. The incompetent Hanson resurvey of the south line of Section 15, which was made in utter disregard of the rules, was terminated and superseded by the 1927 resurvey.

The arguments of appellants, if adopted would create insurmountable confusion in the law, and place in peril every title in Section 15. On page 14 of their brief counsel for the Morgans say:

"The Court should give recognition to the property descriptions and to the conveyances based upon the descriptions emanating from the North Quarter corner of Section 22, as established by Mr. Hanson. To do otherwise is error."

Counsel for the Morgans seem to overlook the fact that none of the property descriptions in Section 15 ever were tied to any known or assumed monument of the Hanson survey.

All property descriptions of land in Section 15 were tied either to the northwest corner of Section 15 or to the southwest corner of Section 15 as that section was surveyed by A. D. Ferron in 1891. Inasmuch as the Hanson north quarter corner of Section 22 was located at a point which was 561 feet north and about 2800 feet east of the Ferron southwest corner of Section 15, if the argument of counsel for appellants were taken seriously, the Morgans did not get any title to any land in Section 15 by either of the two deeds from David Burt Affleck and wife, Exhibits 14-D and 15-D, for those property descriptions are not only north of the original Ferron section line, but they are within the strip of land 521.62 feet to 561 feet in width which Hanson tried to lop off of Section 15 and include in Section 15 by his incompetent "resurvey" in 1902.

#### POINT 4

THE CONTENTION THAT "THE DECISION OF THE COURT IS INEQUITABLE IN REFUSING TO RECOGNIZE REASONABLE ENJOYMENT OF THE LAND SURROUNDING THE BURT AFFLECK HOME," DISREGARDS BOTH THE FACTS AND THE LAW.

It is admitted that a suit to quiet title is equitable in nature. However, the plaintiffs sued in ejectment to recover damages for trespass. There can be no valid dispute of plaintiffs' record title. What defendants did to plaintiff was not "equitable." The defendant Grant Morgan acquired Lots 1 and 2 of Merrywood on the south side of plaintiffs' land. In 1951 he bought the land in Section 15 owned by David Burt Affleck. Sometime later Grant Morgan arbitrarily decided to "take over" the land of plaintiffs and of a third party which lies in between. There are absolutely no equities in favor of the Morgans.

The case of *Mayer v. Flynn*, 46 Utah 598, 150 P. 692, does not support the Morgan claims. That case involved conflicting conveyances. In this case Morgan never acquired any title to the land described in the complaint. In the *Mayer* case the eaves of defendant's house protruded over the boundary, and it was held that defendant was required to cut off those overhanging eaves. Yet, there was some evidence that defendant sought to avoid encroachment. This Honorable Court said in that case:

“ . . . Of course, where the boundaries described in the title papers are tied to reliable and fixed monuments, so that such boundaries can with certainty be located on the ground, one may not go beyond such boundaries and hope to escape from being required to undo what he has done under the plea that it was done in good faith and by mistake. The invasion of another's property rights in law, if not in morals, constitutes a trespass, and the trespasser is civilly liable, whether it occurred in good faith under mistake of fact or law or otherwise . . . ” (46 Utah 607).

It is possible that David Burt Affleck in building a house in 1935, half of which extended over onto the Pratt land, was misled by the abortive survey made by H. G. Hall in 1931 which utterly disregarded the deed descriptions. However, it should be remembered that in 1951 Grant Morgan did not have any negotiations with David Burt Affleck. Affleck wanted to sell his property for \$7,500. For some reason Grant Morgan did not want to deal directly with Affleck. Morgan had his real estate broker communicate an offer of \$4,500. The deed which the broker had David Burt Affleck and wife sign on June 2, 1951, described a tract land in Section 15, but it did not mention any house. That deed, Exhibit 14-D, only conveyed that portion of the house which stands on that tract of land. On February 9, 1952, Morgan's broker told David Burt Affleck that part of the land had been omitted from the deed and upon request the said Afflecks

executed the deed, Exhibit 15-D. There were no representations made at any time to Grant Morgan by the Afflecks as to what they owned.

In view of what Grant Morgan knew, he could not have been expected to pay David Burt Affleck much more than \$4,500 for the Affleck property. Morgan could readily see that the house built some years previously by David Burt Affleck extended over onto lands Affleck did not own. Morgan admitted that in 1948 he was advised by Dr. Ralph Pendleton that the Reimanns had bought out the Parker B. Pratt estate lands in Section 22. (R. 580). Morgan admitted that he had negotiations with Paul E. Reimann and Dr. Pendleton for the possible acquisition of a strip of land 16½ feet in width on the north side of Lots 1 and 2 of Merrywood. (R. 580-582, 585-587).

The plaintiff Gordon Burt Affleck testified that in 1950 in the vicinity of the north line of Lot 1 of Merrywood there was a conversation between Affleck, Morgan and Reimann. The conversation related to a proposed "sale of 36½ feet with 16½ to Mr. Morgan." Affleck asked Reimann to protect his brother David Burt Affleck with 16½ feet. Reimann told Morgan that he would not protect him nor anyone else unless he obeyed the covenants if there was a septic tank. Morgan said he would like to have the 16½ feet, and said "I hoped you could work out a deal." Referring to David Burt Affleck, Reimann said to Gordon Burt Affleck, "I can't take care of him because he hadn't paid assessments." Affleck said "Burt was pretty sore because the assessments had been abated while he was in the army." As Affleck left the conference to go back to the house, he said he wanted that property and had from the beginning. He told Reimann, "You must preserve it for my mother and father, that is all I want you to do." Affleck also said to Reimann in the presence of Morgan that if they could not get together on their exchange,

Affleck wanted Reimann to protect him on the piece of property he wanted from the beginning, and he wanted a right-of-way to his mother and father protected. (R. 661-664).

Grant Morgan never at any time purchased the portion of the house which stands on the property described in the complaint and in the decree. He did not purchase the fish pond, the trees, shrubs, stream, pipeline or pumphouse. The trial court awarded to Grant Morgan even the portion of the house and pumphouse and pipeline which are on the land described in the complaint which Morgan never built nor bought nor paid for, and granted an easement on the land where such structures are located. Counsel for the Morgans says such easement "is not consistent with the facts as developed in the evidence, and certainly does no equity for appellants." We agree that there is no basis for the award of any easement to the Morgans for reasons hereinafter stated on argument of the cross-appeal. The trial court should have required the Morgans to move the house off the land, since the court awarded the Morgans the portion of the house they did not buy.

Appellants complain because they say they need the use of the land around the house and the trees, the stream, the fish pond and other things which the Morgans want but never bought, in order to enjoy the portion of the house which they never bought. The Morgans make the novel but specious argument that those facilities on property which they do not own constitute *appurtenances* to the adjoining property although none of those items are described in deeds to adjoining property. It is elementary that a house is a "fixture," not an appurtenance. Grant Morgan decided in 1951 or thereafter that by owning the properties on both sides, those properties could better be used as a "unit" by having the property belonging to plaintiffs which is in the middle. Consequently, the Morgans say they should be awarded the permanent use of

the lands of the plaintiffs because of the admitted trespasses of the Morgans, and in effect deprive the plaintiffs of all use and value of property which plaintiffs purchased and leave nothing for the plaintiffs except the duty to pay the taxes.

Appellants also contradict the record by pretending that "these improvements were being constructed throughout the years with the knowledge of Paul Reimann and Gordon Burt Affleck." There is no such evidence. Gordon Burt Affleck was not aware until 1954 that Grant Morgan was making any alleged "improvements." The view from the road was obscured by brush. The cross-examination of Walter K. Fahr, who helped Grant Morgan, shows that Morgan and Fahr were diverting attention of Reimann from what was occurring on the land in question by trespassing on his lands farther up the canyon, by damming up the creek, although they represented to Reimann that they were trying to help him protect his property against trespassers who were turning out the water and washing out the road. Fahr admitted that Reimann ordered both Fahr and Morgan to get off his land in 1955, which most certainly could not be construed to constitute an approval of the trespasses. (R. 649-652).

The alleged "complete unitization of this tract of land in connection with the summer home site" is a myth. The following comment on page 17 is rather impudent: "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." The title did not originate in 1957. It originated with the United States patent. Obviously, Grant Morgan with knowledge of the fact that he did not own the land described in the complaint decided that he could squeeze out the plaintiffs by owning land on both sides. His conduct is utterly unconscionable. He is not in any position

to talk about "equity." The trial court was far too liberal with him.

## POINT 5

THERE IS NO MERIT TO THE ARGUMENT THAT "THE COURT ERRED IN NOT ALLOWING APPELLANTS THE OPPORTUNITY OF CLAIMING RECOVERY FOR IMPROVEMENTS TO THE LAND."

In order for a defendant to be entitled to any judicial relief under the occupying claimants' statute, Section 57-6-4, U.C.A. 1953, he must satisfy each of the following requirements: (a) He must show "color of title" to the real estate on which the improvements are located. (b) He must prove that he constructed the improvements in good faith, honestly believing that he had title when making the improvements. *Day v. Jones*, 112 Utah 286, 187 P. 2d 181, and *Doyle v. West Temple Terrace Co.*, 47 Utah 238, 152 P. 1180. (c) The claimant must prove that he rected the improvements wholly on the land on which his "color of title" has been adjudicated adversely. As stated in *Uthoff v. Thompson*, 176 La. 599, 146 So. 161, the improvements for which recovery is sought "must be on the land of the one from whom reimbursement is demanded, and not wholly or partially on the land of another."

Neither Grant Morgan nor Eva Morgan ever acquired any title nor even a "color of title" to the real estate described in the complaint. The Morgans never paid any taxes assessed against the said real estate. The deeds to Grant Morgan do not describe any portion of the land described in the complaint. It is elementary that a deed to tracts A, C, and D which do not describe tract B nor any portion thereof, cannot create any color of title to tract B. The Morgans have no color of title to the land described in the complaint.



With respect to the house, only half of it was built on the land described in the complaint. Grant Morgan acquired title only to that portion in Section 15. Grant Morgan did not purchase the portion of the house which is on the land described in the complaint, nor the pump-house nor the pipeline. David Burt Affleck probably could not recover himself, and he never assigned any alleged right of recovery to the Morgans for such portion of the improvements made. However, even if David Burt Affleck had given Grant Morgan a bill of sale or other instrument designed to sell and transfer to the Morgans the portion of the house on the land in dispute and the pump-house and pipeline, the Morgans could not possibly recover for the reason that the court awarded an easement for use of those fixtures entirely to defendants, although the court was in error. The trial court in awarding the use of such fixtures to defendants should have ordered them to remove the same from the plaintiffs' property. The defendants want the improvements and everything around them. They want to "eat their cake and have it too." There is no provision under our occupying claimants' statute for any relief where the alleged improvement is partially on the land described in the decree and partly on some other land, nor where the claimant continues to have the use of it.

As to the fish pond there is a question whether it is located on the land of plaintiffs or on land belonging to David A. Affleck Association, Inc., which is not a party to the suit, or partly on the Association land and partly on land of plaintiffs. David Burt Affleck never conveyed the fish pond and did not purport to transfer that land on which it is located to Grant Morgan. The Morgans could not recover for any of those improvements which were made at the expense of David Burt Affleck, and which were never purchased by the defendants. The Morgans seek to unjustly enrich themselves with respect to items which they never purchased nor contracted to purchase.

The only improvements which the Morgans made consisted of putting a toilet on the property, making some paths, building a patio partially on plaintiffs' property and partially on Lots 1 and 2 of Merrywood, and part of a rock wall. As to the patio there could not be any recovery for the reason that it is only partially on the land in dispute. *None of the alleged improvements were built in good faith with an honest belief that the Morgans had title.*

There was ample evidence that Grant Morgan knew he did not have any title whatsoever. The evidence does not support the contention that plaintiffs and their predecessors stood by and watched Morgan "make improvements," or that they assented to the encroachments. The activities of the Morgans were at least partially concealed by brush and trees. The admissions of Grant Morgan show that he knew there was some property to the north of Lots 1 and 2 of Merrywood which had been purchased by the Reimanns. He knew he had not purchased that property. He was aware of that situation in 1948. In 1950 he had negotiations with Dr. Pendleton and with Reimann to acquire a strip of land on the north side of Lots 1 and 2 of Merrywood 16½ feet in width. All of the alleged improvements made by Morgan were made on that 16½ foot strip which in 1950 he negotiated to acquire from the Reimanns. Morgan was put on notice in 1950 during a conference with Affleck and Reimann that the Reimanns also owned land to the north of the 16½ strip which Morgan wanted the Reimanns deed to him. In the presence of Morgan, Gordon Burt Affleck told Reimann that he wanted his brother David Burt Affleck protected with a strip of land; that if the exchange with Morgan did not go through Affleck himself wanted a tract of land, and that he also wanted his father and mother protected with a right-of-way.

Grant Morgan admitted that *he never paid any attention*

to *boundary lines*; that he made no attempt to determine where his boundary line was when he started to build the patio; and that he was not "concerned about determining boundary lines at all." (R. 595-596). The alleged "parking lot" was made in 1950, but there is no evidence that it was on the property described in the complaint. The drain tile was laid within the boundaries of Lots 1 and 2 of Merrywood, and there is no evidence that it extended over the line. Morgan said he did not know where the boundaries were within 20 or 25 feet, but he knew it was marshy along the creek. Morgan claimed that he put in a horseshoe court on the land in dispute some years ago, but he admitted that he did not know whether it was on the plaintiffs' land. He did not know whether the septic tank used in connection with the house is on the land in dispute. (R. 598). There is evidence that Morgan moved the toilet onto the land in question after 1951. Starting 1954 Morgan started to build a patio partially on the land deeded to plaintiff, but brush obscured the view.

The elements of good faith are utterly lacking. Morgan was utterly indifferent to boundaries. Within a year after negotiating to obtain title to a strip of land by exchange, Morgan entered onto the land following his purchase of property farther to the north. Morgan was on notice that the predecessors of plaintiffs owned the land between Lots 1 and 2 of Merrywood and the land farther to the north in Section 15 owned by David Burt Affleck. As pointed out in *Day v. Jones, supra*, (112 Utah 286, 187 P. 2d 181), where notice of lack of title is sufficient to induce a reasonably prudent person to investigate, ignoring such notice does not comport with a claim of good faith; for "appellant should have, before making the improvements, diligently and conscientiously examined the title in the light of the adverse claim. Of course, *Morgan had no title to examine*. He knew he had not received a deed to the property in question from anyone. The trial

court did not and could not possibly treat the acts of the Morgans as manifesting good faith. In 1955 Morgan was told to get off the Reimann lands. Grant Morgan's indifference to rights of others, his contempt for the facts brought to his attention, and his willful conduct in attempting to appropriate to his own use property which he knew he did not purchase and which he knew David Burt Affleck did not own, precludes appellants from obtaining any judicial relief.

On page 18 appellants urge that the Morgans "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 use since 1912." That they intended to claim title to land which was not described in their deed is quite obvious; but their claims were not in good faith and were not asserted openly for some time. Their intention to take over land to which they knew they had no title merely aggravates their trespass. It did not give them color of title. It emphasizes their utter lack of good faith.

#### POINT 6.

CONTRARY TO ARGUMENT OF APPELLANTS, THE TRIAL COURT PERMITTED THE MORGANS TO PRESENT ANY COMPETENT EVIDENCE THEY COULD PRODUCE AS TO ALLEGED EASEMENTS, AS WELL AS ANY PROFFERS OF PROOF DEFENDANTS DESIRED TO MAKE.

The argument of Point V in the brief of appellants is utterly devoid of any merit. A lot of time was wasted in court by the various attempts of the defendants to present evidence as to alleged "prescriptive" use of the plaintiffs' land. The defendant Morgan testified to a lot of immaterial and incompetent matters. He testified to a horseshoe court, a parking area, bridges, footpaths, and about recreational excursions,

but he could not show that any of those activities prior to 1954 were conducted on any part of the plaintiffs' lands except occasionally. He was not regularly in the canyon until 1949. Counsel advised the court that the Morgans were going to show "prescriptive easements" and "adverse use." All the Morgans could show were sporadic acts of trespass during years prior to 1954, and repeated trespasses since 1954 whereby the plaintiffs were deprived of the use and enjoyment of the property.

The defendants did not prove any prescriptive right-of-way, nor any other easement which could be acquired by prescription. The law does not recognize a general "wandering easement" to roam over the lands of another. The court advised counsel that if the Morgans sought to show an easement in gross he would rule that such an easement could not be acquired by prescription. The idea that some possible encroachment onto the land of another by playing baseball or pitching horseshoes, or roaming through the brush, or gazing on the trees and birds and wild flowers, could ripen into a prescriptive easement is patently absurd. Appellants cite no cases which could possibly sustain their unique contentions.

During the trial appellants asserted a claim of "exclusive use and possession" of the property by virtue of their trespasses. They could not possibly establish any prescriptive easement for exclusive enjoyment under the law. They argue that the recreational uses in connection with the enjoyment of the summer homes were "appurtenant to and necessary for the enjoyment and use of th summer home." The cases they cite do not support, but refute their arguments. In the case of *Ernest v. Allen*, 55 Utah 272, 184 P. 287, cited by appellants, the grantor of a tract of land reserved "an equal right" with the grantee to use a tract of land for vehicles, etc. The question in that case was whether the reservation in the deed created an eastment appurtenant to a specific tract of land or consti-

tuted an easement in gross, although the grantor admittedly owned other lands to which she needed access over the land in question. In *Birtolina v. Frates*, 89 Utah 238, 57 P. 2d 346, this Court certainly did not announce any doctrine such as asserted by the Morgans. What this Court said was that "Where a person claims to have acquired an easement by prescription over another's land, he must show that he has acquired it by his own continuous, open, uninterrupted, and adverse use under claim of right for the 20-year prescriptive period," and that the use must not be "by license or favor."

In 1 *Thompson on Real Property*, sec. 417, page 683, it is stated that "An exclusive right of possession cannot be established by prescription, but only a disqualified right for a particular purpose," citing "*Tripp v. Bailey*, 74 Utah 57, 276 P. 912, 69 A. L. R. 1417. The text writer states at page 690 of the same volume that where large areas of "privately owned land are open and unenclosed, owners generally do not object to persons passing over them for their convenience, and many such roads are made and used. Under such circumstances, a person so using such ways cannot acquire a permanent right unless his intention to do so be known by the owner or so plainly apparent from the acts that knowledge should be imputed to the owner. *Thus sporadic passage over land for the purpose of temporary convenience or for emergency use is insufficient to create a way of prescription.*" (Italics added.)

In *Deseret Livestock Co. v. Sharp*, ..... (Utah) ....., 259 P. 2d 607 at 610-611, the defendant claimed a right to use an area 2000 feet in width across plaintiff's land for "trailing sheep," although in the trailing operations all of the forage would be eaten by the sheep. This Court said:

" . . . In the instant case we have a situation where the plaintiff's land is of little value except for the grazing of livestock and if we deprive plaintiff of this

benefit, it is left with an empty fee interest, requiring the payment of taxes but no commensurate value . . .

\* \* \* \*

“The courts have announced a contiguous rule when dealing with an easement, saying that it must be a right to use the land of another for a special purpose, not inconsistent with the general property in the landowner. *Nielson v. Sandberg*, 105 Utah 93, 141 P. 2d 696; *Etz v. Mamerow*, 72 Ariz. 228, 233 P. 2d 442 . . .”

In *Etz v. Mamerow*, 72 Arizona 228, P. 2d 442 at 444, the court said:

“An allegation of exclusive possession is wholly inconsistent with the theory of establishing an easement. The right to possess, to use and to enjoy land upon which an easement is claimed remains in the owner of the fee except in so far as the exercise of such right is inconsistent with the purpose and character of the easement. *Pinkerton v. Pritchard*, 71 Ariz. 117, 223 P. 2d 933; *Lanzago v. San Joaquin Light & Power Corp.*, 32 Cal. App. 2d 678, 90 P. 2d 825. An easement is a right which one person has to use the land of another for a special purpose. *Callahan v. Walters*, Tex. Civ. App. 190 S. W. 829. It is the right to use the land of another for a special purpose not inconsistent with a general property in the owner. It is distinguished from the occupation and enjoyment of the land itself.”

The defendants Morgan argued in the opposition to all of the recognized authorities on the subject in asking for a prescriptive easement for “exclusive use and enjoyment of the property.” Appellants attempted to transform their willful trespasses during the past few years into an “easement of exclusive enjoyment,” which is entirely alien to the law. The Morgans are quite willing for the plaintiffs to continue to pay the taxes.

On page 20 the Morgans admit that “All of the property was formerly owned by Alvaro A. Pratt,” which is quite a concession after arguing some pages previously that the Pratts

did not own all of it. However, without a shred of evidence to support their claims they assert that the Pratt title was subject to "easements." The Pratt title was not subject to any easements. Appellants then say that the court should have "granted an easement by prescription upon these properties for the uses covered by the proffer of proof." Neither the testimony nor the "proffer of proof" showed the creation of any easements. Appellants tried to create some nebulous "easement" after their own engineers shattered their unfounded claims of title. It is elementary that if a person asserts a right-of-way by prescription, for example, he has to show just where it is located. It must be definitely located and definite in dimensions. The Morgans did not know just where the boundaries were situated nor where the cars were parked, except that they admitted that it was marshy along the north line of Lots 1 and 2 of Merrywood so that cars and vehicles could not park there. Having wandered from one unfounded theory to another, the appellants having seized the property which they did not own, made the presumptuous claim that they had an easement of exclusive use, which is a total stranger to the law. Actual and punitive damages should be assessed against the Morgans for their unconscionable conduct.

#### POINT 7.

THE COURT PROPERLY DISMISSED APPELLANTS' THIRD PARTY COMPLAINT AGAINST DAVID BURT AFFLECK AND WIFE. THE APPEAL IS OBVIOUSLY DESIGNED TO HARASS SAID RESPONDENTS AND THIS COURT SHOULD ASSESS DAMAGES AGAINST THE MORGANS FOR PROLONGING THE GROUNDLESS LITIGATION AGAINST THIRD-PARTY DEFENDANTS.

Appellants forced the third party defendants to come into court on a groundless claim of "breach of warranty." The



Morgans falsely alleged that David Burt Affleck and wife had sold and conveyed to Grant Morgan by two warranty deeds, the land described in the complaint. The property described in the complaint lies entirely in Section 22. The properties conveyed to Grant Morgan in 1951 and 1952 are situated entirely in Section 15. The land described in Exhibit 15-D does not even adjoin onto the land of plaintiffs. The deed descriptions are tied to the northwest corner of Section 15. There was not the slightest excuse for trying to stretch the deed descriptions to cover any part of the land owned by plaintiffs.

Accusations against David Burt Affleck of "willful and malicious breach of warranty, if he did not so inform Grant Morgan at the time of the purchase," are inexcusable and in defiance of the law and the facts. Grant Morgan admitted that he never had any discussion with David Burt Affleck about boundaries. The record shows that Grant Morgan was on notice that there was land between the north line of Lots 1 and 2 of Merrywood and the David Burt Affleck property which neither Grant Morgan nor David Burt Affleck owned. Morgan did not tell Affleck he wanted to buy. There was no agreement except the deeds themselves for the sale of any property. Morgan's own broker prepared the deeds. Neither deed mentions any house nor any other fixtures.

The Morgans have tried to alter the express language of those deeds by reading into those deeds a description of land which the grantors never owned and which they never agreed to sell. The argument on page 21 that both parties "intended" to sell and to buy "down to the fence lines" is untrue, but even if true would be immaterial, since a deed cannot be varied by parol. Neither David Burt Affleck nor Grant Morgan ever paid any taxes on the land described in the complaint. David Burt Affleck offered to sell his property for \$7,500. Grant Morgan knew that there was a serious question as to

How far south the Affleck land extended, and being a shrewd business man in the auto finance business, he made a counter offer of only \$4,500, or 9/15th of Affleck's valuation. Morgan did not contract to buy anything more than David Burt Affleck then owned. The deeds did not convey any house nor any other improvements except the portions situated on the land described in the deeds.

There was no conceivable breach of warranty. There has not been a failure of title in any particular as to any land described in the deeds or any improvements within the boundaries of those deeds. The argument that the trial court "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," is contrary to the record. Grant Morgan never was invested with any title to any land or improvements outside the boundaries of the descriptions of land in the deeds from David Burt Affleck. Consequently, Morgan was never divested of any title, and the contention that he was divested of title is plain fiction. Furthermore, although Morgan only bought half of the house the court, by granting easements, actually awarded the use of all of it to him, but failed to require the defendants to remove it from the land of plaintiffs.

In the case of *Van Cott v. Jacklin*, 63 Utah 412, 226 P. 460, the plaintiff sued for breach of warranty. Included in the warranty deed was a small tract of land which the defendant did not own. Defendant alleged that plaintiff knew the boundaries of the land defendant owned and also that defendant did not intend to sell any land except the land which defendant owned. This Court held that what either of the parties might have intended contrary to the recitals in the deed was immaterial, and that the deed description could not be altered by parol evidence:

"As every lawyer well knows, the law is well settled that deeds, like all other written instruments, may not be contradicted, varied, or added to by parol. While that is not precisely what was attempted in this case, in the form stated, yet limiting plaintiff's rights to the boundary lines as they appear upon the land is in legal effect the same as though the defendant had been permitted to vary the terms of the written description of the land conveyed by him and to withdraw the small area in dispute from the effect of his covenants of warranty and for quiet enjoyment. The foregoing covenants are inserted in deeds of conveyance for the protection of the purchaser as against any defect of title and he has a right to rely on the deed as written as against outward appearances or even as against verbal statements to the contrary . . . "

The case at bar is the converse of *Van Cott v. Jacklin*. David Burt Affleck made no representations whatsoever to anyone. In fact, Morgan had no discussion with him personally. The lands described in the two deeds, Exhibits 14-D and 15-D, do not cover any of the land described in the complaint. There has been no failure of title to any land described in the two deeds. Grant Morgan has not been dispossessed. On the contrary, the Morgans have dispossessed the plaintiffs of their land. The Morgans not only took possession of all of the land conveyed by them, but in addition thereto they have seized possession of plaintiffs' land with knowledge that they did not pay for it nor complete an agreement to purchase any part of it although in 1950 Grant Morgan negotiated to purchase from plaintiff's predecessor part of the land now owned by plaintiffs.

There is no merit to the argument that the grantors "intended to pass title" to that portion of the house which was not on the land conveyed. Parol evidence is inadmissible to contradict the express language of the deeds. As stated in *6 Thompson on Real Property*, page 439, sec. 3270:

"Regardless of the parties' intent, a deed passes title to no property other than that which it describes. A deed cannot extend possession to lands not described therein, nor can a specific description be extended to include property not within its terms . . ."

As stated in 6 *Thompson on Real Property*, sec. 3287, extrinsic evidence can not be resorted to in order to

"contradict the deed, or make a description of other land than that described in the deed. It cannot be used to make the deed convey land not embraced in the words used to describe the subject-matter of the deed, but only to ascertain the intention of the parties as expressed by such words."

There was no dispute as to the fact that "stake #31" and "stake #32" mentioned in the deed refer to points on the Old Arm Chair plat (Exhibit 5-P). The exact location of those stakes was described with reference to the northwest corner of Section 15.

The case of *Van Cott v. Jacklin, supra*, ((226 P. 460), refers to the well-established rule that covenants of warranty extend only to the lands described in the deed. As explained in 7 *Thompson on Real Property*, page 217:

"The covenant of warranty is intended as an assurance or guarantee of title; it does not enlarge or curtail the estate granted in the premises of a deed but guarantees such estate as may be granted . . ."

On page 218 of the same volume it is stated:

*"Covenant of warranty limited to estate and land conveyed.*—The covenant of warranty applies to the estate conveyed, and can not enlarge that estate. If the deed conveys merely the grantor's interest in the land, a covenant of general warranty in it is limited and restricted to such interest, and does not warrant the land against a superior title in another.

"It is limited as well to the particular parcel of

ground intended to be conveyed according to the description in the deed.”

The intent of the parties must be ascertained from the express language of the deed. The two deeds from David Burt Affleck to Grant Morgan were prepared by the agent of Grant Morgan. They are limited to the land to which David Burt Affleck had record title. Obviously, the grantors did not intend to convey nor to warrant title to more land than they owned. The south boundary of the deed description in Exhibit 14-D runs through the middle of the house because the house was built across the boundary line. David Burt Affleck could not by parol evidence be proved to have some intention to sell land which he did not own. He did not own land south of the south line of Section 15. His intention is legally expressed in the deed. Except for the language “to the south line of Section 15,” the deed description would be about 20 feet short of reaching the south line of Section 15. Defendants had a competent survey in 1957 which followed the deed descriptions, and which survey clearly showed that the Morgans never acquired any title to the land described in the complaint, and also that the Morgans had no cause of action against their grantors for breach of any covenant of warranty.

The deeds did not warrant that there was a house or other fixtures on the lands conveyed. The covenants of warranty could only relate to the land described in the deed, not to fixtures and improvements on adjoining property not described in the deed. With full knowledge of what was disclosed by the 1957 survey, the defendants Morgan prevailed upon the district court to order David Burt Affleck and wife brought into this litigation as third-party defendants by falsely alleging that said third party defendants had deeded to Grant Morgan the land owned by the plaintiffs. The Morgans had a survey plat (Exhibit 64-D) which clearly shows that one

deed Exhibit 14-D did not extend south of the south line of Section 15 and that the other deed Exhibit 15-D does not by any possible construction extend down to the south line of Section 15. Dragging the third party defendants into the case could only create confusion, annoyance and expense.

Months after the suit was filed, in the fall of 1959, with full knowledge of the fact that the deed descriptions did not follow any fence lines, the Morgans had an abortive "fence line survey," which utterly disregarded the deed descriptions and which contradicted their own valid 1957 survey which followed the deed descriptions. Furthermore, that "fence line survey" showed a section of fence which did not exist in 1957 or 1958, or at any time prior to September 1959. Such "fence line survey" was not tied to a government corner, but to a nonexistent fictitious corner not mentioned in the deeds. In an effort to disprove the title of plaintiffs, defendants Morgan attempted to assail and contradict the official United States surveys and the field notes pertaining thereto, in violation of every known rule.

The defendants Morgan never had any cause of action against third party defendants. Their claims of \$12,100 damages for "breach of warranty" are utterly fictitious. The appeal from the judgment dismissing the third party complaint with prejudice is designed for delay. The third party defendants therefore move that this Honorable Court assess damages against the Morgans for an unwarranted prosecution of such appeal.

## ON THE CROSS-APPEAL OF PLAINTIFFS

### POINT 8.

THE EVIDENCE DOES NOT WARRANT THE GRANTING OF ANY EASEMENT TO GRANT MORGAN AND EVA MORGAN; AND THE PORTIONS OF THE JUDG-

MENT AND DECREE QUOTED IN THE CROSS-APPEAL SHOULD BE STRICKEN FROM THE JUDGMENT AND DECREE. THE ABSENCE OF DAVID BURT AFFLECK FROM THE STATE OF UTAH FOR A PERIOD OF FOUR YEARS CONSTITUTED A BREAK IN THE PRESCRIPTIVE PERIOD, ALTHOUGH HIS ABSENCE WAS DUE TO MILITARY SERVICE.

The plaintiffs and respondents, Gordon Burt Affleck and JOSEPHINE F. AFFLECK, his wife, have cross-appealed from those portions of the judgment and decree (all of paragraph 9 and specified portions of paragraph 8, 12, 13 and 14) which grant to the Morgans an easement on the land of plaintiffs over the exact area on which the house encroaches and easements for continued use of the pumphouse and pipeline. (R. 132-133). What the court did in effect was to grant to the Morgans an exclusive rental-free lease of the entire house and exclusive rental-free lease of the pumphouse and pipeline for the period of time in which those fixtures remain in existence, although the Morgans never purchased nor otherwise acquired title to anything within the boundaries of plaintiffs' land.

If the court wanted to allow the Morgans to have the use of those fixtures which extend over onto plaintiffs' land, it should have required the Morgans to remove the house, pumphouse and pipeline from plaintiffs' land, within a reasonable time. The house is on stilts as shown by the photographs in evidence, and it can be moved. It was error to grant the Morgans easements which amount to rent-free leases when they have never acquired any title thereto by the deeds executed by David Burt Affleck and wife, or from anyone else.

As indicated in *Alford v. Rodgers*, 242 Ala 370, 6 So. 2d 409, a person acquires title only to the boundary line in his deed and he does not acquire title to land beyond it as an

"appurtenance." Furthermore, as indicated in *Olsen v. Noble*, 207 Ga. 899, 76 S. E. 775, 780, in order for an alleged easement to be appurtenant it must already be in existence; it cannot be an inchoate prescriptive claim over the land of another. If a person seeks to convey an inchoate prescriptive claim which has not yet ripened into an easement, such claim must be specifically described in the deed. (a) There was no 20-year period of use which could have established an easement, even if the use had been of the character which could have created an easement by 20 years' use. *Bertolina v. Frates, supra*, (89 Utah 238, 57 P. 2d 346), holds that the use must not only be a claim of right, but must be "continuous, open, uninterrupted, and adverse" for the entire 20-year prescriptive period. David Burt Affleck did not know where his boundaries were situated. Furthermore, there was an interruption in the use in 1941 after only 6 years' use. He was absent from the property for nearly 4 years while in military service. The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. Appendix, secs. 525 et seq., did not specify that prescriptive use should be deemed to run in favor of the service man while he was absent in military service. If such a provision had been incorporated into the statute it would likely have been unconstitutional. Assuming that prescription would begin to run again after return from military service, there was no period of 20 years. Even if the period prior to the military service were added to the period subsequent to military service, (which would not be permissible) there would be less than a period of 20 years. The law requires the prescriptive use to be continuous for 20 years, and there was no period of 20 years.

(b) The encroachment of the house over onto the land of plaintiffs' could never ripen into an "easement for exclusive use and enjoyment" advocated by appellants. As aptly stated in 1 *Thompson on Real Property*, Sec. 417, page 682: "An



interest in the land of another, greater than an incorporeal hereditament, such as the possession and use of a building thereon, cannot be established by prescription." At page 683 the text writer states, "an exclusive right of possession cannot be established by prescription," citing *Tripp v. Bagley*, 74 Utah 57, 276 P. 912, 69 A.L.R. 1417. Neither the Morgans nor David Burt Affleck paid any taxes on the land in question, so that title by adverse possession could not be acquired.

(c) The pipeline and pumphouse installed in 1935 were substantially concealed below the surface, so that prescription could not begin to run until notice, and no notice of any claim was ever given. Independent of that fact, no easement for conducting water could be acquired over the land of another without having a vested right. The evidence is conclusive that David Burt Affleck never acquired a water right under the laws of the State of Utah. He never filed an application with the State Engineer, and he did not acquire a water right from someone who owned one. (R. 486). As indicated in *Neilson v. Sandberg*, 105 Utah 93, 141 P. 2d 696, where a claimant asserts a prescriptive right-of-way for water *he must first show that he acquired a vested and accrued water right*. Since he did not file any application to appropriate, it was impossible to acquire a water right by adverse use when the use was not initiated until 1935. There is no proof that Grant Morgan ever acquired any water right for such property. The prescriptive period could not begin to run for a pipeline right-of-way until a water right were acquired.

No easements could have been acquired by prescription. nevertheless, the trial court by those portions of its decree excepted to on the cross-appeal, in effect gave the Morgans an "easement for exclusive use" of the portion of the house and the pumphouse and pipeline situated within the boundaries of plaintiffs' land. In effect the court fastened on plaintiffs without their consent and without consideration a rent-free

lease in favor of the Morgans which practically takes the heart out of plaintiffs' land and greatly restricts the use of plaintiffs' land for an indefinite period. It is inequitable to allow the Morgans the use of those fixtures which encroach without requiring them to remove the same from plaintiffs' land within a reasonable period of time.

## CONCLUSION

Every finding of fact which is adverse to the Morgans is amply supported by competent evidence. Every provision of the decree which is adverse to them should be affirmed. The only error of the trial court was in granting the Morgans easements over the area where the house encroaches and for pipeline and pumphouse for the period in which those fixtures shall exist. The court in effect granted rent-free leases to the Morgans, and placed burdens on the land of the plaintiffs for which they did not bargain, and which were not established according to law. If the Morgans are to be granted the exclusive use of those fixtures which encroach on plaintiffs' land, it should be on condition that they remove the same from plaintiffs' land within a reasonable period of time.

The court properly reserved the question of damages caused by the trespasses by the Morgans. Damages should be assessed against the Morgans for maintaining the appeal against David Burt Affleck and wife, and thereby prolonging the groundless litigation against third-party defendants.

Respectfully submitted,

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SEC. 15

HANSON  
RESURVEY  
COR. SECS:  
15, 16, 21, 22.

Hanson "Resurvey"  
North line 14 Sec. 22

Hanson  
North 1/4 COR.

WEST 82.02 CH.

66.15 Ch.

- 37.38 Ch.

Mountain Road

Property deeded to  
Grant Morgan by  
David Burt Affleck

1/4 COR. (RELOCATED)

S 89° 39' W 80.02

2. MON. DESTROYED  
BY GOVT. RESURVEY  
1927

Lots 1, 2 and  
part of 3, of  
Merrywood

CONTRARY GIRL ROCK-

-Original 1891  
Fetron corner

Creek

A.P. 2 Tr. 42  
A.P. 3 Tr. 38

03'E 77.26 CH.

87.18 CH.

Moham  
Destroyed  
Resurvey  
1.32 ft.  
130.02 f  
reestabl  
Secs. 14

SEC. 15

Hanson  
North 1/4 COR.

WEST 82.02 CH.

survey "  
Sec. 22

66.15 ch.

37.38 ch.

Mountain Road

Property deeded to  
Grant Morgan by  
David Burt Affleck

1/4 COR. (RELOCATED)

S 89° 39' W 80.02 CH.

CONTRARY GIRL ROCK

Lots 1, 2 and  
part of 3, of  
Merry wood

MON. DESTROYED  
BY GOVT. RESURVEY  
1927

Monument  
Destroyed by Gov't.  
Resurvey 1927 -  
1.32 ft. south and  
130.02 ft. east of  
reestablished cor.  
Secs. 14, 15, 22, 23.

S 0° 09' E (77.80 CH.) 37.80 CH. 2494.8'

NORTH 85.72 CH. 45.72 CH. 3017.52'  
5657.52'

2.34 ch

521.62 ft

2.66 ch.



S 0° 03' E

N 0° 02' W 87.18

SEC. 22  
T1S R2E SLB & M

1927

SECTION 22  
PLATTED FROM ORIGINAL SURVEY NOTES

— LEGEND —

—— FERRON SURVEY 1891 (SEC. 15)  
---- HANSON SURVEY 1902  
—— RESURVEY 1927

OCTOBER 24, 1959

SCALE — 1" = 300'

*Jean R. Driggs Sr.*  
JEAN R. DRIGGS SR.  
PROF. ENG'R. & LAND SURVEYOR LIC.

21

22

2.12 CH.

28

27

N 89° 56' W 80 CH.

73.93 CH.

WEST 80 CH.

6.07 CH.

SEC. 22  
T1S R2E SLB & M

1927 SURVEY  
1/4 COR.

HANSEN  
1/4 COR.

SECTION 22  
PLATTED FROM ORIGINAL SURVEY NOTES  
— LEGEND —

— FERRON SURVEY 1891 (SEC. 15)  
- - - HANSON SURVEY 1902  
— RESURVEY 1927

OCTOBER 24, 1959

SCALE — 1" = 300'

*Jean R. Driggs Sr.*  
JEAN R. DRIGGS SR.

PROF. ENG'R. & LAND SURVEYOR LICENSE 483

N 89° 56' W 80 CH.

73.93 CH.  
WEST 80 CH.

22 23

27 26

40 CH. 2640'

S 0

NORTH

