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Gordon Burt Affleck and Josephine F. Affleck v.
Grant Morgan and Eva Morgan : Brief of
Appellants in Answer to Respondents' Petition for
Rehearing

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.*

Case
No. 9350

APPELLANTS' BRIEF IN ANSWER TO RESPONDENTS' PETITION FOR REHEARING

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Appellants and Cross-
Respondents*

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APPELLANTS' BRIEF IN ANSWER TO RESPONDENTS' PETITION FOR REHEARING

By the Respondents' Petition for Rehearing, Mr. Reimann has placed at issue the entire record of the trial below. In seven instances, he has charged this Honorable Court with misstating the record or incorporating in its Decision false representations. He has also charged appellants and counsel in over thirteen dif-

ferent instances of falsifying the evidence and introducing misleading misstatements and false evidence. This Court has examined the complete record and the authorities cited by counsel, before rendering its Decision herein. Unfortunately the charges now made by Mr. Reimann put in issue not only the entire record, but also the character of appellants and counsel, and the bona fides of this Court's Decision. In his inimitable manner, Mr. Reimann apparently hopes that by waving the magic red flags of *deception* and *misrepresentation*, he can overwhelm and overturn the unanimous Decision of this Court.

The points set forth in Mr. Reimann's brief are unsupported by the evidence and by the law. This matter can be considered on the record and without the inflammatory language employed by Mr. Reimann. That record and the applicable authorities certainly support this Court in its unanimous Decision. All of petitioners' Points are answered by appellants under the following Points I and II.

STATEMENT OF POINTS

POINT I.

RESPONDENTS HAVE NOT BEEN DENIED THEIR CONSTITUTIONAL RIGHTS ON APPEAL, NOR DOES THE DECISION MISSTATE THE FACTS.

POINT II.

THE PROBLEM OF ADVERSE POSSESSION WAS PROPERLY REVIEWED AND DECIDED BY THIS COURT.

ARGUMENT

POINT I.

RESPONDENTS HAVE NOT BEEN DENIED THEIR CONSTITUTIONAL RIGHTS ON APPEAL, NOR DOES THE DECISION MIS-STATE THE FACTS.

The main contention of respondents in their various Points in the Petition for Rehearing seems to be that Mr. Reimann's engineer, Driggs, employed the only correct method of surveying this property, and that all other methods are incorrect. Mr. Driggs' method was based upon the 1927 Miller Resurvey, and ~~not~~ upon the earlier survey which was in existence at the time the original conveyances of the properties were made. (R. 397) The Driggs' method, of course, supports Mr. Reimann's theory of disregarding all surveys prior to the 1927 Resurvey.

Mr. Gudgell and Mr. Richards, in attempting to ascertain the location of the property lines, took many matters into consideration, and from this investigation, determined that the property lines were as indicated on Exhibit D-18 and on the plat attached to this Court's Decision. Mr. Driggs himself indicated that were he attempting to survey the land without regard to the 1927 Resurvey, he, himself, would have used the same method as did Messers. Gudgell and Richards, of examining many factors, such as notes, fence lines, boundaries, etc., in determining the actual boundary lines. (R. 420, 421)

Mr. Reimann continually calls Exhibit D-18 an abortive, fictitious and misleading bit of evidence, further

claiming that said exhibit was never admitted in evidence. In so contending, Mr. Reimann quotes the language of the trial court out of context by stating that the court said:

“The location will not be received to prove location of the old corner, but an explanation solely of how he made Exhibit D-18.”

However, beginning at Page 200 of the record, we see that Exhibit D-18 was offered and received, although it had been marked erroneously as Exhibit 17. Exhibit 17 has the same appearance as does Exhibit 18, except that Exhibit 18 is much more complete. Thereafter, Mr. Gudgell testified concerning the method by which Mr. Miller, in the Resurvey, had relocated the old section corner. In so testifying, Mr. Gudgell was interpreting the Government notes showing the location of the old corner. The record, beginning at the bottom of Page 202, shows the following:

“A. We have a copy of the Government notes, which show it. The old corner is also tied to the Merrywood Plat, which checks out very well with the *nes*.

“THE COURT: You say you did this because this was the description used in the deeds?

“A. Down through the chain of title, and the Abstract prior to 1927.

“THE COURT: You say the old corner ties in your descriptions in the Merrywood tract?

“A. Yes sir.

“THE COURT: All right, now, Mr. Reimann — you may make your objection.

“MR. REIMANN: We object to the testimony, the attempt to interpret the Government Field Notes. We think the Government Field Notes are only competent evidence of what the surveyor found and what he reported as a part of the survey, and it is incompetent, irrelevant and immaterial.

“THE COURT: The objection is proper. The *location* will not be received to prove location of the old corner, but an explanation solely of how he made Exhibit D-18.” (*Italics added*)

Therefore, it is quite apparent that the objection and the ruling of the court related to the testimony, and not to Exhibit 18.

At Page 6 of Mr. Reimann’s Petition, he contends that George Gudgell, having made a prior plat (Exhibit P-30) in 1957, could not thereafter impeach his own plat by making a different one in 1959. The record shows without question (R. 319) that Mr. Gudgell was employed in 1957 by Dr. Pendleton to run a survey upon Dr. Pendleton’s description, which was based upon the Resurvey. There was no attempt by Mr. Gudgell at that time to reconcile the differences between the old section line and the resurveyed line inasmuch as the Pendleton description given him and his instructions related only to the new Resurvey.

Throughout the Petition, Mr. Reimann repeatedly contends that the Government survey cannot be impeached, and he cites cases at Page 19 of his brief in

support thereof. This is not a question of impeaching the Government survey, but rather of determining the existence of property lines based upon the Government survey at the time the properties were divested from the Government. It is a question of which Government survey is to be used. As this Honorable Court has decided, and as the United States Supreme Court has held in the cases cited by appellants, a Resurvey cannot affect property lines and rights which have previously vested in reliance upon an earlier survey, even though said earlier survey may be found by the Resurvey to be in error. Actually, the cases cited by petitioner do not controvert this fundamental principle, but rather, are cases relating to attempts to vary one Government survey line.

Mr. Reimann also contends that the old section line was never in existence. He continually maintains that the beginning point used by Mr. Gudgell was never a Government survey point, and that the original Ferron survey is the same as the recent survey. Neither point is factually well taken.

The Miller Resurvey upon which Mr. Reimann relies points out very specifically that the old Hanson survey South Quarter corner of Section 15 was found and destroyed. At Page 60 of Exhibit P-34 is found Mr. Miller's notes indicating this fact:

“South, 34 lks. distant is the Hanson $\frac{1}{4}$ sec. cor. south boundary sec. 15, which is a red sandstone, 10x12x4 ins. above ground, firmly set, marked $\frac{1}{4}$ on N. face; no accessories to cor. I destroy this cor.”

The Merrywood Subdivision is tied into this very corner. (Ex. P-11) Mr. Reimann's predecessors in title, Parker Pratt and Alvaro Pratt, in conveying the Reimann land down through the chain of title, tie the description to said original section corner, as follows:

“Beginning at a corner which bears South 32°40' East 449.76 ft. from cross on top of Contrary Girl Rock, which cross on said rock bears from the North $\frac{1}{4}$ corner stone of Section 22, South 87°50' West 822.8 ft.;” (Ex. P-1, Page 28)

Therefore, it cannot be said that the old original section line did not exist.

The Ferron survey was not the same as the Miller Resurvey. (See Exhibits P-6 and P-7) The Ferron survey was of portions of Section 15, whereas the Resurvey was of Section 22.

Mr. Reimann, at Page 20 of his Petition, maintains that the Hanson line was over 520 feet farther to the North. This computation, however, is a theoretical figure based upon Mr. Driggs' survey made with reference to the Miller Resurvey. There is nothing in the Miller Resurvey to indicate that Mr. Miller found the Hanson line to be that far North. Actually Mr. Miller did find the Hanson survey, but found it to be 34 links South of the Resurvey line, as it stated above. (Ex. P-34, Page 60)

POINT II.

THE PROBLEM OF ADVERSE POSSESSION
WAS PROPERLY REVIEWED AND DECID-
ED BY THIS COURT.

There is no question but what in an equity case, the Supreme Court may review the evidence and render its Decision based upon the issues presented to it in the record. Section 78-2-2, Utah Code Annotated, 1953, and Rule 72 (a) Utah Rules of Civil Procedure; *Jensen v. Howell*, 75 Utah 64. It is manifest that appellants' Points on Appeal Nos. I, II, III, IV and V relate to the proposition of determining title based upon adverse use. The record shows that appellants spent considerable time during trial under a proffer of proof attempting to show adverse possession either by a prescriptive easement, by the statutory method, or as an occupying claimant.

In so far as the taxes are concerned, it is clear that appellants paid taxes on the description which runs to the South line of Section 15, for the years 1936 through 1958, excepting for the years 1938, 1943, 1949 and 1950. (Exs. D-45, D-46) It is also clear that the tax notices covered land to the fence, since the house was assessed and taxed. However, the taxes were paid without delinquency for seven years from 1951 through 1957. Petitioners maintain that their own Tax Notices (Exs. P-9 and P-10) show that the Reimanns and the Afflecks had paid the taxes on this property. Petitioners ignore the fact, however, that these exhibits were not admitted in evidence. Even if Exhibits P-9 and P-10 had been admitted, they do not show by any definitive description what property was taxed. The descriptions exclude several tracts which are not identifiable, and thus it is impossible to determine the land remaining in the description. Exhibit D-44 shows that the taxes were assessed upon the improvements on the land, and these taxes have been

paid; therefore, all taxes which have been assessed have been paid.

Mr. Reimann places a great deal of emphasis on the fact that Mr. Morgan did not know where the boundary was. It is no wonder, however, since there were approximately six surveys made to his knowledge (R. 609), and further, in view of the fact as this Court has pointed out, the surveyed property lines were questionable. Is it fair to place the burden on Mr. Morgan, a layman, to know and understand survey lines?

Mr. Reimann further indicates that there was no fence line or enclosure by fences, nor was there any use of the property pursuant to Title 78-12-11. A great deal of the proffered evidence related to the placing of an old fence running diagonally South of the house and Northeasterly to the hillside close to the old out house. Considerable evidence was also proffered relating to the construction of bridges, paths, parking areas, patios, fish ponds and the installation of lights. Can it be said that this does not constitute improvement of the land under Section 78-12-11 (2), Utah Code Annotated, 1953? This Honorable Court has recognized this evidence as properly going to the element of adverse possession. The evidence shows that the property is roughly in the shape of a triangle. There is an old fence line running along the Southerly boundary, and also an old fence line running along the Westerly boundary, and there were two well established fence points at the North corner and the Southeasterly corner. There is no evidence of a fence running along the Northeasterly boundary for the simple reason that this area is high on a steep mountain side. The por-

tion of the land which is bounded by adjacent private ownership shows evidence of fence lines.

Mr. Reimann contends at Page 11, that the Court's statement relating to the shift of property lines is entirely unfounded. The Merrywood Subdivision is tied to the old section line. It is about 33 feet South of said line. If that line is determined not to be the section line under Mr. Reimann's theory, and the section line is 22 feet further North, then Merrywood would also have to shift 22 feet North. Mr. Reimann, however, wants to keep Merrywood in place, but move the line 22 feet further North. This Court's statement is the only conclusion that anyone could arrive at, if petitioners' position is examined and sustained.

WHEREFORE, appellants respectfully maintain that this Honorable Court was correct in its appraisal of the record, in its examination of the documents, and its citation of the various authorities. It serves no purpose to now go back and have this Honorable Court retry the entire law suit according to the points raised by Mr. Reimann in his Petition. The matters set forth in said Petition are merely repetitious of the points raised in the Respondents' original brief and the arguments made before this Honorable Court at the hearing previously had.

Respectfully submitted,

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