

1961

# Gordon Burt Affleck and Josephine F. Affleck v. Grant Morgan and Eva Morgan : Petition of Respondents

Utah Supreme Court

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McKay and Burton; Macoy A. McMurray; Paul E. Reimann;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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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

PETITION OF RESPONDENTS GORDON BURT  
AFFLECK ET UX. AND DAVID BURT AFFLECK  
ET UX. FOR A REHEARING, AND BRIEF IN  
SUPPORT OF PETITION FOR REHEARING

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# IN THE SUPREME COURT of the STATE OF UTAH

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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

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PETITION OF RESPONDENTS GORDON BURT  
AFFLECK ET UX. AND DAVID BURT AFFLECK  
ET UX. FOR A REHEARING, AND BRIEF IN  
SUPPORT OF PETITION FOR REHEARING

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## PETITION OF RESPONDENTS FOR A REHEARING

The plaintiffs and respondents Gordon Burt Affleck and wife and third-party defendants and respondents David Burt Affleck and wife come now and respectfully move this Honorable Court to vacate its decision, opinion and judgment written by the Honorable E. R. Callister, Jr., and heretofore entered in this case, and to grant respondents a rehearing for the reasons

and upon the points and grounds hereinafter set forth, because the decision is contrary to the facts and contrary to law:

## POINTS ON WHICH RESPONDENTS BASE THEIR PETITION FOR REHEARING

1. The constitutional requirement that an appeal shall be based upon the record made in the court below, has not been observed, and respondents have been denied due process of law by the decision of this Court which misstates the uncontroverted facts established in the district court.

2. The decision of this Court declaring that an "Old Section Line" was 22 feet south of the original Ferron line which was retraced on the 1927 Government Resurvey disregards the decisions of the United States Supreme Court which preclude contradiction or impeachment of official Government surveys by private surveys or otherwise.

3. In addition to unjustly depriving plaintiffs of 22 feet of their land in Section 22 by adding such strip of land to Section 15, the decision clouds the title of third parties in Section 22 even if it does not actually deprive them of 22 feet of their land without due process of law.

4. The partial remand of the case for a trial of an issue of adverse possession is patently erroneous and prejudicial to the rights of respondents, because (a) defendants made no contention on this appeal that they acquired title by adverse possession; (b) defendants consumed 3 days at trial on that issue and proved they had not title; and (c) the opinion misstates the facts as to payment of taxes and even assumes that the land was enclosed by a fence.

5. Although this Court does not reverse the judgment of dismissal entered in favor of David Burt Affleck and wife on defendants' unfounded claim of "breach of warranty," this

Court unjustly awards costs to the appellants as the losing parties and denies third party defendants their costs on appeal.

WHEREFORE, respondents respectfully request that the decision heretofore rendered be vacated, and that a rehearing be granted, and that this Honorable Court re-examine the record on appeal and the original Brief of Respondents, and the following Brief in Support of Petition for Rehearing, and that this Honorable Court grant relief in accordance with the requests in the original Brief of Respondents.

Respectfully submitted,

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and Respondents*

## BRIEF IN SUPPORT OF PETITION FOR REHEARING ARGUMENT

### POINT 1

THE CONSTITUTIONAL REQUIREMENT THAT AN APPEAL SHALL BE BASED UPON THE RECORD MADE IN THE COURT BELOW, HAS NOT BEEN OBSERVED, AND RESPONDENTS HAVE BEEN DENIED DUE PROCESS OF LAW BY THE DECISION OF THIS COURT WHICH MISSTATES THE UNCON-  
TROVERTED FACTS ESTABLISHED IN THE DISTRICT COURT.

Article VIII, Section 9, Constitution of Utah specifies that "The appeal shall be upon the record made in the court below." This Honorable Court, of course, had no desire to

disregard that constitutional mandate, but unfortunately the decision of this Court misstates the basic facts as to the location of the various tracts of land. Even the uncontroverted documents and admissions of defendants are contradicted.

Jean R. Driggs, Sr., civil engineer and land surveyor, made a comprehensive survey of Section 22 and the area in controversy in 1958 and 1959. Exhibits P-37 and P-38 are his survey plats of Section 22. It is obvious from an examination of those plats that a great deal of expense was incurred to insure accuracy. Mr. Driggs made Polaris observations at 5 points in Section 22. He tied his surveys to the original Ferron Survey made for the United States Government in 1891. He tied his survey to the existing east quarter corner of the Hanson Survey made in 1902. Mr. Driggs also tied his survey to the section corners, quarter corners and angle points of the 1927 Government Resurvey. Neither George B. Gudgell III nor A. Z. Richards, who were the surveyors called to testify for the Morgans, questioned the accuracy of the Driggs surveys. By Exhibit P-4 Mr. Driggs platted the various deed descriptions and adjoining properties. No one challenged the accuracy of the plats prepared by Mr. Driggs. In fact, A. Z. Richards, engineer called to testify for defendants Morgan prepared a plat, Exhibit D-42, which verifies Exhibit P-4 prepared by J. R. Driggs, Sr. Mr. Richards testified that he did not believe there is any difference between the way he platted the deed descriptions on Exhibit D-42 and the way Mr. Driggs platted those deed descriptions on Exhibit P-4. (R. 477-478)

The decision of this Honorable Court utterly disregards those documents, the admitted facts, uncontroverted evidence and even contradicts the official United States surveys as we shall point out. Part of the misstatement of fact in the opinion of this Court is a result of this Honorable Court being misled and deceived by defendants' abortive Exhibit D-18, for not-



withstanding the record made in the District Court requires a conclusion that said exhibit grossly distorts and misrepresents the facts, this Court even incorporated substantial portions of such incompetent exhibit into its decision as if those false representations had been established facts. To illustrate, the fifth paragraph in the opinion of this Court states:

“The Morgans assert ownership to the solid line, triangular shaped lot designated as the ‘Morgan Property’ on the map. This assertion of ownership is based upon deeds conveying said property. The deeds state that the southern boundary of the property is the south line of Section 15.”

The Morgan assertion of ownership to the land described in the complaint is alleged to be based on deeds, but the deed descriptions as correctly platted on Exhibits P-4 and D-42 do not cover any portion of the land in dispute. Contrary to the above quotation, the deed to Grant Morgan dated February 9, 1952 (Exhibit D-15) does *not* go to the south line of Section 15. The deed description does not even mention the south line of Section 15. As illustrated on the plats of the deed descriptions, Exhibit P-4 and D-42, a tract of land owned by the David A. Affleck Association, Inc., lies between the south line of Section 15 and said tract described in the deed Exhibit D-15.

The certificate of George B. Gudgell III on defendants’ Exhibit D-18 recites that he made a survey of the descriptions of land (set forth in defendants Exhibits D-14 and D-15) and that said descriptions are correctly platted. However, said certificate was discredited by Mr. Gudgell himself, for he admitted on cross-examination that on said Exhibit D-18 he placed Stake 31 specified in the deed descriptions at a point 37.79 feet *south* of the point designated in the deeds themselves. (R. 303-304.) The deed descriptions are all tied to the northwest corner of Section 15. The location of Stake 31 in the deed descriptions is South 79.16 chains or 5224.56 feet, and East 28.91 chains or

1908.06 feet from the northwest corner of Section 15. Mr. Gudgell admitted that the west line of Section 15 is 80 chains or 5280 feet in length, and that the original Ferron southwest corner of Section 15 was found on the Government Resurvey of 1927. He could not find the northwest corner of Section 15, but knowing the location of the southwest corner, the position of Stake 31 could be established by projecting a line due east of said southwest corner of Section 15 and going 55.44 feet north. (R. 297-300.) Yet, by his own admissions he arbitrarily disregarded the distance specified in the deeds and platted the position of Stake 31 almost 38 feet farther south.

Exhibit D-18 was never received in evidence to show the location of any section line, government monument or deed description. Counsel for plaintiffs repeatedly objected to the misleading terms "old section line" and "old survey corner" employed in the testimony of Mr. Gudgell because those terms were not identified with any of the surveys made by or for the United States. On objection of counsel for plaintiffs, the trial court *refused* to receive Exhibit D-18 in evidence "to prove location of the old corner, but an explanation solely of how he made Exhibit D-18." (R. 203.) Nevertheless, this Court has treated the false representations and misleading labels contained on said exhibit as if they were established facts. In the last paragraph on page 1 of the decision of this Honorable Court it is stated:

"The plaintiffs claim the section line is located as indicated on the map and designated as the 'Relocated Section Line.' This line has been established as the true section line and the 'Old Section Line' (see map) has been found to be in error. However, all of the people in the area have relied on the old survey."

The inexorable fact is that no section line was ever established by the authority of the United States in the location shown on the plat on page 2 of the decision as "Old Section Line."

The "Old Section Line" was utterly fictitious and nonexistent. No section line was ever established at such location. The statement that "all of the people in the area have relied on the old survey," contradicts the record. There is not a single deed description of any land in Section 15 based on the spurious "old section line." Even Mr. Gudgell admitted on cross examination that "all of the ties to the property in Section 15 are based on the northwest corner of Section 15." (R. 287.) This Honorable Court has been deceived.

Contrary to the above quotation which adopted some of the unfounded arguments of defendants, plaintiffs did *not* make any claim that the 1927 Government Resurvey resulted in any "Relocated Section Line." Plaintiffs have always asserted that the section line run in 1927 between Sections 15 and 22 was and is the *identical* section line established in 1891 by A. D. Ferron in his original survey of Section 15 and other sections for the United States. Exhibit D-18 falsely represents a "Relocated Section Line" 22 feet north of the fictitious "Old Section Line," to falsely infer that the 1927 Government Resurvey of Section 22 moved the section line to a position 22 feet north of where it was originally located. The section line between Sections 15 and 22 was established by A. D. Ferron in 1891, and his survey was approved March 1894. The survey plat is Exhibit P-7. Photo copies of the Ferron field notes relating to Section 15 constitute Exhibit P-32. *There was no survey prior to the Ferron survey.*

The survey plat of the 1927 Government Resurvey of Section 22 and other sections, Exhibit P-6, clearly shows that it was a dependent resurvey of the section line between Sections 15 and 22 and *not* a "relocation" of the original position of the section line at all. The plat states that it was a "*retractment and reestablishment of the lines of the original survey . . . of the south boundaries of Secs. 13 to 18, inclusive, as shown*

upon the plat approved March 23, 1894, *in their true original position* according to the best available evidence of the position of the original corners." On cross-examination Mr. Gudgell admitted that the original southwest corner of Section 15 established by Ferron in 1891 is the identical southwest corner of Section 15 of the 1927 Government Resurvey. (R. 286.) Mr. Gudgell said he was aware of the fact that the field notes of the 1927 Government Resurvey show that the section line was run westerly from the re-established corner of Sections 14, 15, 22 and 23 on a course which is South 89° 39' West 80.02 chains to "the *original Ferron corner* of Sections 15, 16, 21 and 22, which is a red sandstone boulder or outcropping, 4 feet high and 4 feet wide facing southeast, the top of which is marked with a cross, with 3 grooves east and 3 grooves south of cross, and witnessed by a scattered mound of stone. This corner monument is in a good state of preservation." (R. 272.)

Exhibit D-18 shows a "monument" on the fictitious "Old Section Line" designated "Original S 1/4 cor. Sec. 15 T. 1 S., R. 2 E., SLB&M. Established 1890." On cross-examination Mr. Gudgell admitted that there was no survey in 1890, and that when Mr. Ferron made his original survey in 1891 he did *not* establish the quarter corner between Sections 15 and 22. Consequently, if a quarter corner were located at some later date on another survey it could not lawfully be located anywhere except on that straight line extending from the corner common to Sections 15, 16, 21 and 22 to the corner common to Sections 14, 15, 22 and 23.

"Q On this plat marked D-18 which you have referred to as the 'original south quarter corner of Section 15' you are referring to a monument which was destroyed by the United States Government in September 1927, are you not?

"A That is right.

"Q You say it was established in 1890. It was never surveyed in 1890?

"A It refers to the Hanson survey, I believe it was started in 1890.

"Q You don't know whether Hanson ever put this corner in?

"A I didn't see him do it, no.

"Q *You have no way of knowing if Mr. Hanson ever put his corner there?*

"A *No sir.*

"Q Now, Mr. Gudgell, the Hanson survey was in 1902, was it not? Let's look at the date.

\* \* \*

"A I was probably thinking of the Ferron Survey, probably—that was in 1890.

"Q The Ferron Survey was in 1890?

"A Date of contract 1890. He didn't survey until 1891.

"Q There was nothing in Ferron's notes, *nothing to indicate Ferron ever set the quarter corner between 15 and 22, is there?*

"A *No sir, there isn't.*" (R. 275-277)

"Q When you say 'old established section line' you have reference to a point used by the monument destroyed by the Government?

"A Yes.

"Q *You have assumed that to be a section line?*

"A *That is right.*" (R. 304)

Mr. Gudgell admittedly could not identify the destroyed monument with any section line ever established on any survey made by or for the United States Government. When pressed for an explanation as to who located such a monument he said: "I am not saying that the quarter corner was Hanson's

or was Ferron's." (R. 284.) The fact is that it was not a quarter corner but a fictitious monument, and no one seems to know how it got there. Mr. Gudgeall also 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.)

This Honorable Court in its decision disregarded the record made in the District Court, and adopted the fictitious representations contained on Exhibit D-18 which were conclusively shown to be false. On page 3 of the Court's decision it is stated:

"The Merrywood Plat shows the location of the section line to be as indicated on the map as the 'Old Section Line.' This plat is relied upon in conveying and describing property in the area and the county assessor uses this plat as a basis for assessing taxes."

In the first place the Merrywood survey was a private survey and it was utterly incompetent to establish the location of the section line. It is elementary that a surveyor cannot change the location of a government section line by drawing a survey plat to show it in a position where the government surveyors did not locate it. What this Court calls the "Old Section Line" was never established on any survey by or for the United States, and it is utterly fictitious. The so-called "Old Section Line" is shown to be 22 feet south of the original Ferron southwest corner of Section 15, and no section line was every surveyed at any place south of the original Ferron line.

Contrary to the statements contained in the opinion, there is not a shred of evidence in the record to support the argument that people relied on the Merrywood Survey for descriptions of property in Section 15, nor that people relied on the Merrywood plat for the location of the south line of Section 15. Nor is there any evidence whatsoever that the county assessor used the Merrywood plat as a basis for assessing any taxes on land in Section 15. If this Honorable Court will examine the deed descriptions Exhibits D-14 and D-15 it will discover that the

deed descriptions are tied to the northwest corner of Section 15. On page 3 of its decision this Court makes the following comments which cannot be justified by the record:

"If this court accepted the plaintiffs' theory of the case, the section line and all property in Section 15 would be shifted approximately 22 feet to the north. . ."

That statement is entirely unfounded. On the contrary, by the decision of this Court by adopting the fictitious "Old Section Line" which was never surveyed, this Court moves the section line without authority of law to a position 22 feet south of where it was originally located by Ferron. Furthermore, the decision gratuitously cuts 22 feet off of Section 22 and adds 22 feet to Section 15 and deprives the plaintiffs and persons not parties to this suit of 22 feet of land in Section 22. Such deprivation of property is without due process of law.

Continuing, this Court erroneously says:

". . . But for some unknown reason all property in Merrywood Subdivision and Section 22 would remain as platted on the Merrywood Plat. The distance between the north boundary of Lot 1, owned by the Morgans, and the 'Old Section Line' is approximately 33 feet. By waving of plaintiff's magic wand the property owners in Section 22 leave their property lines in a status quo, and we suddenly have a gap of 55 feet between Lot 1 of Merrywood and the south line of Section 15, which gap represents the land in dispute."

Such statements are not supported by the record. Of course, the property in Merrywood subdivision could not be shifted one way or the other because all lots are tied directly to Contrary Girl Rock, a permanent survey monument. The certificate of the surveyor did not certify any survey to the section line, but merely to Contrary Girl Rock as shown in the list of ties shown on the plat. It makes no difference where the section line is located as far as Merrywood plat is concerned. There is no pretense that the lots in Merrywood extend to the section line.



It makes no difference whether the surveyor platted Merrywood subdivision 33 feet from a section line or 66 feet or any other distance. The Merrywood plat, Exhibit P-11 shows "Twelfth South St." (obviously fictitious) on the north side of the subdivision. That "street" is shown to be 66 feet in width. On the north side of such "street" is shown "Armchair Subdivision." An examination of the "Old Arm Chair Plat," Exhibit P-5, shows that the south line of such subdivision surveyed in 1901 is the south line of Section 15. If the Court were to consider matters not certified to by the surveyor, it could be argued with propriety that since "Twelfth South St." 66 feet in width "lies" between Merrywood subdivision and Old Arm Chair Subdivision, the original south line of Section 15 is 66 feet north (not 33 feet north) of the north line of Merrywood subdivision.

There is no contention that the lots in Merrywood extend to the section line. The properties deeded to Grant Morgan in Section 15, Exhibits D-14 and D-15, are parts of the Old Arm Chair Plat in Section 15. Those properties are *not* described in relation to the Merrywood plat. They are tied to the northwest corner of Section 15. The "Old Section Line" cannot be identified with any government survey, and it is utterly fictitious. Even Mr. Gudgell admitted that the 1891 Ferron section corner was the *original* corner:

"Q You knew the southwest corner of Section 15 had been set by Augustus Ferron in 1891?

"A That it had been set, yes.

"Q That was the *original* southwest corner of Section 15?

"A *Yes sir.*" (R. 264-265)

Instead of "waving the magic wand" as this Court accuses counsel for plaintiffs of doing, plaintiffs' counsel presented unassailable evidence of the United States surveys and of the



precise location of boundary lines. The original survey made by Mr. Gudgell for Grant Morgan in 1957, Exhibits P-30 and P-64, fully agreed with the surveys by Mr. Driggs and with the platting of the deed descriptions by Mr. Richards, Exhibit D-42. However, several weeks before trial commenced, defendants Morgan had a "new survey" which utterly disregarded the descriptions contained in the deeds and attempted to shift Stake 31 in the Old Arm Chair Plat nearly 38 feet farther to the south of where it is described in the deeds Exhibits D-14 and D-15. Furthermore, by the abortive and misleading Exhibit D-18, defendants falsely represented that the 1927 Government Resurvey located the section line at a point 22 feet north of where it was originally located, when in fact the 1927 resurvey was a retracement of the original line and was tied to the original southwest corner of Section 15. Defendants attempted to shift the line 22 feet to the south by calling a fictitious line which was never surveyed, the "Old Section Line." There is a record of every section line run by authority of the United States. Defendants could not name the person who was supposed to have established such pretended "Old Section Line" because it was never established.

The original Ferron southwest corner of Section 15 was still in existence shortly prior to trial. The 1927 resurvey line was a retracement of the original Ferron section line. There is a slight bearing of 21 minutes to the north from a due east course for the reason that the original Ferron section line between Sections 15 and 22 had such a bearing of south 89° 39' west. How do we know? The answer is very simple. In re-establishing the corner common to Sections 14, 15, 22 and 23 in the year 1927, the U. S. Cadastral Engineer found the east quarter corner of Section 15 in place. By measuring 40 chains or a half mile southerly on the same course as the existing monuments, he relocated the corner. That re-established corner was 1.32 feet or 16 inches north and 130.02 feet west from a

monument marked as the corner common to Sections 14, 15, 22 and 23, with bearing trees; but the latter monument only 16 inches south of the retracement line could not be identified with any of the prior surveys. The point at which the southeast corner of Section 15 was re-established in 1927, is 80.02 chains north 89° 39' east from the original Ferron southwest corner of Section 15. The 1927 resurvey did not resurvey Section 15.

The original west line of that section was 80 chains. The west line is still 80 chains. The original east line of that section was 80 chains. After the 1927 resurvey it was still 80 chains. The original south line of Section 15 was supposed to be 80 chains. On the 1927 resurvey it was measured at 80.02 chains or merely 16 inches in excess of 80 chains or 1 mile.

The deed descriptions, Exhibits D-14 and D-15, are not correctly platted on Exhibit D-18 but nearly 38 feet too far to the south. Exhibit P-4 prepared by Mr. Driggs, and Exhibit D-42 platted by Mr. A. Z. Richards, shows the deed descriptions are entirely on the north side of the section line as retraced on the 1927 government resurvey. A copy of said Exhibit P-4 with some additional notations placed thereon by Mr. Gudgell and Mr. Richards, is attached to this petition and brief. The Court utterly disregarded such uncontroverted exhibits in its decision, and adopted an incompetent and spurious exhibit.

Attention is directed to other serious misstatements of fact in other portions of this brief. This Court has not considered the record made in the court below on this appeal, and it has adopted a statement of fact which cannot be reconciled with such record, to the prejudice of the respondents.

## POINT 2

THE DECISION OF THIS COURT DECLARING  
THAT "AN OLD SECTION LINE" WAS 22 FEET

SOUTH OF THE ORIGINAL FERRON LINE WHICH WAS RETRACED ON THE 1927 GOVERNMENT RESURVEY DISREGARDS THE DECISIONS OF THE UNITED STATES SUPREME COURT WHICH PRECLUDE CONTRADICTION OR IMPEACHMENT OF OFFICIAL GOVERNMENT SURVEYS BY PRIVATE SURVEYS OR OTHERWISE.

By its decision this Honorable Court disregards the United States surveys and the field notes as to the location of section lines and monuments. There were three surveys for or by the United States. (a) The original survey was the Ferron survey of 1891 approved March 23, 1894, Exhibits P-7 and P-32. Said survey officially established the section line between Sections 15 and 22. The southwest corner of Section 15 still existed at the time of trial.

(b) The next survey was the Hanson survey executed in 1902, approved 1903, Exhibits D-21, P-31 and P-33. Hanson said he "could not find" the Ferron southwest corner of Section 15, so Hanson made a "resurvey" of the section line. It was subsequently found by later surveys that Hanson ran his section line 561 feet north of the original Ferron section line. Hanson also surveyed Section 22 as an oversize section of 696.98 acres. Lot 1 of Section 22 was surveyed with an area of 53.93 acres extended north into Section 15 as surveyed by Ferron as much as 560 feet. Lot 2 of Section 22 was surveyed with an area of 54.33 acres, Lot 3 with an area of 54.35 acres and Lot 4 with an area of 54.37 acres. Lots 2, 3 and 4 of Section 22 as surveyed by Hanson extended north into Section 15 by 561 feet. Lots 2, 3 and 4 of Section 22 were patented to Alvaro A. Pratt in 1907 before the overlap into Section 15 was discovered.

(c) Irregularities in the Hanson "resurvey" were subsequently uncovered. His "closing corners" on the north line of his survey were pronounced "fictitious" and "spurious" by

the U.S. Cadastral Engineer's Office in 1925. In 1926 under Group Instructions 160 Utah, the General Land Office ordered an independent resurvey of Section 22 and other sections and a dependent resurvey (retracement of the original line) of the south boundaries of Sections 13 to 18 inclusive. In 1927 the Government Resurvey was executed by the U.S. Cadastral Engineer, Exhibit P-6 and P-34. As resurveyed, Section 22 was reduced from 696.98 acres to 620.32 acres, chiefly by reason of cutting off the overlap into Section 15 of 65.53 acres. The 1927 resurvey of the north line of Section 22 did not in any sense "relocate" the line 22 feet north of the original line. Said resurvey of 1927 as to the northline of Section 22 was strictly a retracement of the original Ferron line between Sections 15 and 22. The original Ferron southwest corner of Section 15 (northwest corner of Section 22) was still intact. It is a huge rock outcrop 4 feet high and 4 feet long and 2 feet wide. The southeast corner of Section 15 (northeast corner of Section 22) was re-established by chaining southerly 40 chains or 2640 feet from the east quarter corner of Section 15, which east quarter corner of the original Ferron survey was found in place. The monument marked for the southeast corner of Section 15 found 1.32 feet (16 inches) south and 130.02 feet east of the re-established southeast corner of Section 15 was destroyed in 1927. Although it was only 16 inches south of the section line, it was 130 feet too far east.

The following private surveys are in evidence: (a) The J. H. Evers Old Arm Chair survey of part of the southwest quarter of Section 15 was made in 1901, Exhibit P-5. That survey could not have been based on the Hanson survey because the Hanson survey was not made until 1902. The Old Arm Chair plat shows the southwest corner of Section 15 to be a large ledge marked with a cross with 3 grooves east and 3 grooves south of the cross, as shown in the Ferron field notes. Said Old Arm Chair plat had survey points designated as

"Stake 31" and "Stake 32" mentioned in the deed descriptions. Stake 32 was located on the Ferron south line of Section 15. All of the deed descriptions in Section 15 were tied to the northwest corner of Section 15.

(b) In 1910 there was the Merrywood survey of a portion of the lands in Section 22. The certificate of the surveyor did not certify any survey of the section line. All lots were tied to Contrary Girl Rock. As far as said Merrywood survey is concerned, it would make no difference where the section line is located.

(c) In 1931 H. G. Hall, a partner of A. Z. Richards, made a private survey for D. A. Affleck which was supposed to be based on deed descriptions. Instead of measuring from the northwest corner of Section 15 as required by the deeds, he started at a "stake lying on the ground" and adapted his survey to two sections of noncontinuous fences. The survey started at a point 58 feet south of the point specified in the deed descriptions. Such survey was invalid as it disregarded the deed descriptions.

(d) In 1957 George B. Gudgell III was employed to make a survey of the deed descriptions Exhibits D-14 and D-15 for Grant Morgan and other lands. His plat is Exhibit P-30 and P-64. He correctly platted the deed descriptions.

(e) In 1958 and 1959 J. R. Driggs, Sr., made a comprehensive survey of Section 15 and the lands in controversy. To assure the accuracy of his surveys he made Polaris observations at 5 points. He tied his surveys to the known corners of the Ferron survey, Hanson survey (east quarter corner) and the 1927 resurvey of Section 22, including section corners, quarter corners and angle points. Exhibits P-37 and P-38. Mr. Driggs also platted the deed descriptions, Exhibit P-4. No one disputed the platting of Mr. Driggs nor the accuracy of his surveys. A. Z. Richards made a plat of the deed descriptions, Exhibit

D-42, which does not conflict with Exhibit P-4 or Exhibits P-30 and P-64.

(f) Shortly before trial, Grant Morgan was dissatisfied with the 1957 survey, Exhibit P-30. He requested Mr. Gudgell to make a new survey in 1959. Exhibit D-18 was the result. Said plat did not correctly plat the deed descriptions and was not made to conform to any United States surveys. Said plat contradicts the prior survey made by Mr. Gudgell (Exhibit P-30) and also contradicts the plats prepared by Mr. Driggs (Exhibit P-4) and the plat prepared by Mr. Richards (Exhibit D-42). Said D-18 was never received as evidence of the location of boundary lines nor as a plat of deed descriptions.

We take the position that defendants could not assail nor impeach the 1927 Government Resurvey of the section line between Sections 15 and 22. By the abortive Exhibit D-18 they falsely represented that the 1927 resurvey line was a "Relocated Section Line" and that it was located 22 feet north of the "Old Section Line." The "Old Section Line" was utterly fictitious. It could not be identified with any prior surveys of or for the United States. The plat of the 1927 resurvey and the field notes show that it was a dependent survey of the section line consisting of a "retracement and re-establishment of the lines of the original survey . . . of the south boundaries of Secs. 13 to 18, inclusive, as shown upon the plat approved March 23, 1894, Ferron survey *in their true original position* according to the best available evidence of the position of the original corners." The attempts of defendant to contradict the field notes and the plat of the 1927 Government Resurvey were utterly incompetent. They could not impeach that survey by something in any private survey plat, whether the Merrywood survey or the alleged 1959 Gudgell survey. Although defendants were incompetent to impeach such 1927 Government Resurvey, they resorted to the most incompetent evidence in their attempts.



Their Exhibit D-18 not only contradicted their valid 1957 survey, Exhibit P-30, but said Exhibit D-18 contains a number of false representations.

Instead of recognizing the undisputed evidence and documents including Exhibit P-4 and D-42 as to the position of the section line and the location of the boundaries in the deed descriptions, this Honorable Court adopted the gross misrepresentations contained on incompetent Exhibit D-18. In doing so this Court disregarded the decisions of the United States Supreme Court.

In *Knight v. United Land Assoc.*, 142 U.S. 173, 35 L. Ed. 974, 979, 12 S. Ct. 259, with respect to government resurveys, the Supreme Court declared:

"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."

In the 1927 Government Resurvey, the southwest corner of Section 15 (northwest corner of Section 22) was *not* relocated. The original Ferron section corner was found to be in a good state of preservation. What was re-established was the

southeast corner of Section 15. The east quarter corner of Section 15 was found in place. The Cadastral Engineer ran the line 40 chains southerly from that quarter corner to find the correct position for re-establishing the corner to Sections 14, 15, 22 and 23. That point was north  $89^{\circ} 39'$  east from the original southwest corner of Section 15. At a point 130.02 feet east and 1.32 feet or 16 inches south of said re-established corner, the U.S. Cadastral Engineer found a monument marked as the corner to Sections 14, 15, 22 and 23 from which he found certain "bearing trees" as accessories; but such monument could not be identified with either the Ferron survey (because it was too far east although almost on line) or the Hanson survey (because the Hanson line was over 520 feet farther to the north). Midway between the original Ferron southwest corner of Section 15 and the re-established southeast corner of Section 15, the quarter corner was located between Sections 15 and 22. It is abundantly clear from the field notes of the 1927 resurvey that it was a retracement of the original section line, and not in any sense a relocation of the line either to the north or the south of where the line was originally located.

It has been held in California that even if claim is made that a resurvey was executed fraudulently, it cannot be collaterally attacked in a suit to quiet title. *Phelps v. Pacific Gas & Electric Co.*, 94 Cal. App. 2d 243, 190 P. 2d 209, 212 (hearing denied by Supreme Court):

"The attention of this court has not been directed to any case nor has our independent research revealed any authority holding that an official approved survey of the United States government may be so impeached and declared fraudulently by a collateral attack thereon in an action between private parties to determine title to land. On the contrary, the cases appear to be uniform to the effect that an official survey may not be collaterally attacked as in the present case. *Stoneroad v. Stoneroad*, 158 U. S. 240, 15 S. Ct. 822, 39 L. Ed. 966; *Russell v.*



Maxwell Land Grant Co., 158 U. S. 253, 15 S. Ct. 827, 39 L. Ed. 971; Horne v. Smith, 159 U. S. 40, 15 S. Ct. 988, 40 L. Ed. 68. . . .

\* \* \*

“ ‘A survey of public lands does not ascertain boundaries; it creates them Robinson v. Forrest, 29 Cal. 318, 325, Sawyer v. Gray, 205 F. 160, 163.’ Cox v. Hart, 260 U. S. 427, 436, 43 S. Ct. 154, 157, 67 L. Ed. 332, 337. . . .”

To the same effect is *Cragin v. Powell*, 128 U.S. 691, 696, 9 S. Ct. 203, 205, 32 L. Ed. 566, 567. It was not competent for defendants to say that the 1927 Government Resurvey was not actually a retracement of the original Ferron line, nor to argue that the 1927 resurvey relocated the section line in a different place from where it was originally located.

Mr. Gudgell repeatedly referred to the monument which was officially destroyed in 1927 as the “Hanson quarter corner” although he did not know who put that stone there. If it had been put there on some survey for the United States there would have been a record in the field notes. There were no accessories to such stone monument. Its only identification was “ $\frac{1}{4}$ ” marked on the north face. Mr. Gudgell admitted that he did not know who put that monument there. He admitted that the rock which was destroyed in 1927 was not found in the location where Hanson said he located his quarter corner. The two stones were not of the same dimensions. The mark was on the opposite face. Hanson marked the *south* face and had accessories consisting of a mound of stones. Hanson purportedly *resurveyed* the north line of Section 22 because he said he could not find the original Ferron southwest corner of Section 15.

The Hanson north line of Section 22 was a “relocated section line” which was 561 feet *north* (not south) of the Ferron southwest corner of Section 15. This fact is illustrated on Exhibit P-35 which shows the relation of the three United

States surveys. The correctness of that exhibit was not disputed except that Mr. Gudgell computed the distance of Hanson's "resurveyed north line of Section 22" to be 558 feet north instead of 561 feet north of the section line between Sections 15 and 22 as run on the 1927 resurvey. (R. 314.) In 1902 Hanson ran his "resurvey section line" more than 500 feet north of the north line of Section 22 as retraced and re-established on the 1927 Government Resurvey. Yet, Mr. Gudgell *assumed* that the stone which was found *south* of that line in 1927, which had no identification except " $\frac{1}{4}$ " on the north face, and no accessories whatsoever to show that it was ever set during the course of any survey for the United States, was the "Hanson south  $\frac{1}{4}$  of Section 15," although the field notes of Hanson show that he never set the south quarter corner of Section 15. To have set the south quarter corner he would have had to offset it to conform to his "resurvey line." Mr. Gudgell finally admitted that he did not know who put that rock there. There was no evidence to identify such destroyed monument with any United States survey nor to any section corner. Consequently, no section line could have existed at such location of the destroyed monument.

Mr. Gudgell admitted that the Ferron southwest corner of Section 15 was the original section corner and that it was found in place during the execution of the 1927 Government Resurvey. However, he tried to argue that the line should have run due east from that corner. He incorrectly concluded that the south line of the Old Arm Chair Plat was a due east and west line. A. Z. Richards who testified for defendants admitted that the plats in the office of county recorder show that the south line of Section 15 has a bearing of south  $89^{\circ} 39'$  west just as shown on the 1927 resurvey plat, and as shown on his Exhibit D-42. (R. 479.) The plats of the southwest quarter of Section 15 in the office of county recorder also show the survey stakes indicated on Exhibit P-5, the Old Arm Chair survey of 1901.

Notwithstanding the south line of the Old Arm Chair plat does not show any bearing of south 89° 39' west to the original Ferron corner, the deed descriptions of Stake 31 and Stake 32 clearly show that the Ferron south line actually veered to the north going east at least as much as 21 minutes shown on the 1927 resurvey plat.

Both Mr. Gudgell and Mr. Richards testified that the position of Stake 31 on the Old Arm Chair plat is east 28.91 chains or 1908.06 feet and south 79.16 chains or 5224.56 feet from the northwest corner of Section 15. There is .84 chain or 55.44 feet between a line projected due east from the southwest corner of Section 15 and Stake 31 of the Old Arm Chair Survey. By reason of the bearing of 21 minutes to the north as the section line goes east, the 1927 re-established quarter corner between Sections 15 and is 16.03 feet north of a line projected due east of the southwest corner of Section 15. South of Stake 31, the gap between the section line as re-established in 1927 and such line projected due east from the section corner is only 11.66 feet. Subtracting the 11.66 feet from the 55.44 feet, there is a distance of 43.78 feet between the 1927 re-established section line and Stake 31. These measurements are shown on the plat prepared by A. Z. Richards, Exhibit D-42. Since Stake 32 was established on the Ferron section line, it is possible that the Ferron section line was figured in 1901 to have a greater bearing than 21 minutes to the north shown on the 1927 resurvey.

The metes and bounds deed description of Exhibit D-14 which extends to the south line of Section 15, places that tract entirely *north* of the 1927 resurveyed section line. If the Ferron section line had been due east, Stake 32 located on the section line would have been found to be 11.66 feet south of the section line as resurveyed in 1927, but Mr. Richards shows that Stake

32 is actually north of the 1927 resurvey section line. (R. 244, 289, 291, 297-300, 452, 461-462.)

Mr. Gudgell admitted that the general rule in surveying is to recognize the section line as it then exists in surveying a deed description. (R. 293.) By Exhibit D-18 Mr. Gudgell disregarded all rules of surveying in moving Stake 31 nearly 38 feet south of where it is described in the deeds. His 1959 abortive "survey" was utterly incompetent to impeach the 1927 Government Resurvey.

This Honorable Court has committed a fundamental error in adopting the false recitals in D-18 which contradicts the official 1927 resurvey and which exhibit contradicts the official survey notes and even contradicts all of the competent exhibits and correct surveys in evidence. The decision in effect alters the deed descriptions by declaring some fictitious "Old Section Line" to be 22 feet south of the 1927 resurvey line. Such a decision plays havoc with fundamental rules of real property, and jeopardizes all official surveys.

In the Appellants and Cross-Respondents' Brief, pages 8 and 12 it is argued that the stone monument which was found south of the section line as re-established in 1927 on the Government Resurvey, and which stone monument was destroyed in 1927, was on the section line established by Hanson in 1902, and that such destroyed monument was the Hanson "south quarter of Section 15." Such argument is absurd. As illustrated by Exhibit P-35 and the plat in the back of the Brief of Respondents, Hanson did not follow the original Ferron section line because he said he could not find the Ferron southwest corner of Section 15. The Hanson section line was a "resurvey line" which was subsequently discovered to have been run approximately 561 feet *north* of the original Ferron section line. Hanson never claimed that he set the south quarter corner of Section 15. Since he ran Section 22 as an offset, the

north quarter corner of Section 22 could not possibly be the south quarter corner of Section 15. Calling the destroyed monument the "Hanson corner" could not make it so. Even Mr. Gudgell admitted that he did not know who placed that monument in the position where it was found. Said destroyed monument could not be identified with any approved United States survey. It was properly destroyed.

### POINT 3

IN ADDITION TO UNJUSTLY DEPRIVING PLAINTIFFS OF 22 FEET OF THEIR LAND IN SECTION 22 BY ADDING SUCH STRIP OF LAND TO SECTION 15, THE DECISION CLOUDS THE TITLE OF THIRD PARTIES IN SECTION 22 EVEN IF IT DOES NOT ACTUALLY DEPRIVE THEM OF 22 FEET OF THEIR LAND WITHOUT DUE PROCESS OF LAW.

Without any foundation in the record to support it, this Court states several times that the property owners in the area "relied" on the purported "Old Section Line" which we show to be utterly fictitious. As shown by the documents in evidence including the abstracts of title and the deeds, all deeds to lands in Section 15 are tied to the northwest corner of Section 15. Except lots in the Merrywood subdivision which are tied to Contrary Girl Rock, the lands in Section 22 are tied to the re-established quarter corner of Section 22 as said corner was established on the 1927 Government Resurvey, by correction of deeds if they were ever otherwise described.

The correct platting of the metes and bounds descriptions in deeds to the lands in Section 15 do not extend the boundaries south of the section line as established on the 1927 Government Resurvey. This fact is shown not only by Exhibit P-4 prepared by J. R. Driggs, Sr., but also by Exhibit P-30 prepared in 1957

by George B. Gudgell III, and also by Exhibit P-42 prepared in 1960 by A. Z. Richards. Notwithstanding the rule laid down by the United States Supreme Court that an official government resurvey approved by the General Land Office cannot be impeached nor contradicted by a private survey or otherwise in a suit to determine title, in 1959 shortly before trial defendants' Exhibit D-18 was prepared. While such exhibit purported to show a survey of the deed descriptions, the deed descriptions were utterly disregarded and the location of the land was platted nearly 38 feet south of the position specified in the deeds. Such exhibit also disregarded the actual location of all of the lines of the three United States surveys. The retracement of the original Ferron line was mislabeled a "Relocated Section Line." Without any United States survey to support such a designation, a line drawn 22 feet below such mislabeled section line was called the "Old Section Line." No section line was ever established in such location.

The plat was not received in evidence to show location of any boundaries nor of any government corners. However, this Court was undoubtedly misled by such abortive exhibit. The decision in effect makes such incompetent exhibit evidence superior to the United States surveys themselves. Section 15 as surveyed originally by Ferron only had 640 acres, and the east line and the west line were only 1 mile or 5,280 feet in length. Following the Government Resurvey in 1927 said Section 15 was still 640 acres in area, and the east line was still 80 chains and the west line 80 chains or 5,280 feet in length. In the decision of this Court, however, by adopting the position of the fictitious "Old Section Line," a strip of land 22 feet in width is purportedly added to said Section 15, so that instead of the east and west lines being 5,280 feet as originally surveyed, those lines are extended 22 feet into Section 22 to give them a length of 5,302 feet and the acreage in Section 15 is



correspondingly increased, and the acreage in Section 22 is decreased.

By the decision plaintiffs are deprived of 22 feet of their land in Section 22, and that land is granted without consideration to the defendants in Section 15. Persons not parties to this suit are likewise injured. The east half of Section 15 is still owned by the United States. The decision infers that the line which the United States declared to be the original section line is not the original section line and the decision takes 22 feet of land which the United States says is part of Section 22 and gives it to the United States without even an opportunity for a hearing. Such a transfer cannot lawfully be accomplished, but the decision seriously clouds the title of all property owners in Section 22 outside the Merrywood survey. Such a decision is unjust and contrary to all principles of real property.

#### POINT 4

THE PARTIAL REMAND OF THE CASE FOR A TRIAL OF AN ISSUE OF ADVERSE POSSESSION IS PATENTLY ERRONEOUS AND PREJUDICIAL TO THE RIGHTS OF RESPONDENTS, BECAUSE (A) DEFENDANTS MADE NO CONTENTION ON THIS APPEAL THAT THEY ACQUIRED TITLE BY ADVERSE POSSESSION; (B) DEFENDANTS CONSUMED THREE DAYS AT TRIAL ON THAT ISSUE AND PROVED THEY HAD NO TITLE; AND (C) THE OPINION MISSTATES THE FACTS AS TO PAYMENT OF TAXES AND EVEN ASSUMES THAT THE LAND WAS ENCLOSED BY A FENCE.

We were profoundly shocked to read the portion of the opinion dealing with the subject of adverse possession. A careful examination of the Brief of Appellants discloses that the Morgans made no contention whatsoever on this appeal that

they acquired title by adverse possession. Rule 75 (p) (2) of Utah Rules of Civil Procedure specifies that the brief of appellant shall contain

“(3) a concise statement of the points upon which appellant intends to rely for a reversal of the judgment or order of the court below, . . .”

It was a rule of this Court for over 75 years that assignments of error not argued in the brief are deemed waived. In the Statement of Points in the Brief of Appellants Morgan 6 points are set out, not one of which raises any issue of adverse possession. We were astonished to find the following in the Court's opinion on page 3:

“At the trial the defendants Morgan attempted, through testimony given by way of a proffer of proof, to prove the necessary elements of adverse possession. The proffered evidence was refused, and the Morgans' assertion of adverse possession was denied. . . .”

Such a statement cannot be reconciled with the record made in the District Court, for the record shows that a substantial part of three days was spent in the trial of the claims of “adverse possession.” The record on appeal clearly shows that the trial court allowed the defendants to present any proof of title they desired. See pages 195 to 334, and 427 to 679 of the record on appeal. The trial judge did not deny defendants any request to present any evidence of “adverse possession.” (R. 497-498.) After the defendants exhausted every possible effort to prove adverse possession and utterly failed, they sought to introduce a new theory of “easements” not recognized in the law. (R. 506). In the last paragraph on page 3 of the opinion this Court says:

“The defendants' proffered proof, if admitted, would have established that: the house shown on the map was constructed in 1934 and has been occupied a summer home since 1935. Some time well before 1934 a fence was constructed *enclosing the area shown by dotted*



*lines on the map.* The wires on the fence have been down for a number of years but many of the fence posts remain. . . .”

The house was *not* occupied between 1941 and 1945 while David Burt Affleck was away from the State of Utah in military service. Furthermore, *there is no evidence* in the record to show that a fence was constructed “enclosing the area shown by dotted lines on the map.” No fence was found by Mr. Driggs when he made his survey in 1958 and 1959 to locate the house. He went through grass and wild growth. (R. 350.) Mr. Gudgell did not observe any fence when he made his survey in 1957:

“Q When you took the measurements to locate the house, *you didn’t run through any fence?*

“A *No sir, went through open area.*

“Q You have nothing in your notes to indicate there was a fence there at that time?

“A *No sir, not at that time. We did tie in a fence post on this, it would be the northeast corner of the Merrywood plat or in that vicinity.*” (R. 317.)

There was no fence shown on D-18 along the course south 49° 45’ east or in that vicinity. No one ever testified that a fence was ever in existence along such a course. Consequently, there could not possibly be any *enclosure* within the meaning of the statute. The plat which appears on page 2 of the decision of this Court is not even a correct copy what was on the abortive Exhibit D-18. No one testified that any fence was ever seen on that northeasterly course at all. Mr. Gudgell showed a fence on the westerly side of the area on a course north 1° 22’ east, but it was not a continuous fence for the road runs through the area. He also showed a fence in 1959 along a course north 81° 33’ west, but it did not extend the entire distance. Mr. Gudgell showed no fence whatsoever along the course south 49° 45’ east or in that vicinity, but he

showed "Line between iron rods S 47° 53' E 369.84'." In fact, Mr. Gudgell on cross examination stated "we found no fence there." (R. 317.) Furthermore:

"Q You found no evidence of a fence ever established along that course?

"A *Not that line, no sir.*" (R. 318.)

The testimony of Mr. A. Z. Richards shows that in 1931 Mr. Hall found some fence posts along two courses only. Some posts were found along a course south 83° 25' east, but not the entire distance. Mr. Hall looked for fences, and although the deed descriptions did not refer to any fences, he *assumed* that fence lines were boundaries of the Affleck property. (R. 448-449, 451, 464-465). Mr. Hall actually surveyed lines 58 feet south of the points described in the deed. Mr. Richards said that the notes of his partner, Mr. Hall, showed that the fence lines were not continuous. (R. 472-473.)

There was absolutely no "enclosure" by fences or by any other structures, and the statements in the opinion asserting the existence of fences "enclosing the area shown by dotted lines on the map" contradict the testimony. The plat in the opinion materially adds to the unwarranted notations already contained on Exhibit D-18. The defendants never at any time claimed that the land described in the complaint was ever "enclosed with a fence." The plat in the opinion even erroneously shows a fence running through the middle of the "parking area." What is designated on such plat as a "parking area" is actually a marshy area on both sides of the creek. The photographs introduced by defendants clearly show that various objects are mislocated on the plat in the opinion. The survey of Mr. Driggs disclosed that the patio was partly on Lot 1 of Merrywood and only partly on the land described in the complaint. The plat in the opinion incorrectly shows the patio to be entirely north of the south boundary of the disputed tract. It should

be remembered that the markings on Exhibit D-18 were placed there by Grant Morgan who testified that *he did not know* where the boundaries were located. (R. 595.) Grant Morgan also testified:

"Q But those shacks were not built on this strip of land that is described in the complaint, were they?

"A I don't know.

"Q You don't know what land then you used, do you?

"A Not exactly. *I don't know where the line is.*" (R. 595.)

"Q Have you ever paid any attention to boundary lines up there?

"A No." (R. 595.)

"Q Did you attempt to make any determination at all as to where your boundary line was when you started to build that patio?

"A No.

"Q As a matter of fact you didn't care enough to determine where your boundary line was, did you?

"A No, but I did think it was farther north though, because I thought if there was any disputed stuff there it went up the creek bottom.

"Q *But you weren't concerned about determining boundary lines at all, were you?*

"A No." (R. 595-596.)

The Court has accepted the location of various objects as placed on Exhibit D-18 by Grant Morgan, and has disregarded the testimony of the engineers, although Mr. Morgan said he did not know where the boundary lines were and he did not pay any attention to boundary lines. The Court has assumed, contrary to the evidence, that there was an enclosure by a fence surrounding the entire area shown by dotted lines on the plat.

There was not even a continuous fence at any time on two sides. *There never was a fence on the northeasterly side.* Consequently, under the definition of "enclosure" in the dictionary and in the adjudicated cases that the land "must be surrounded," there could not possibly be an "enclosure." Grant Morgan even testified that he took down a section of fence in 1951. "It was in the road getting from one place to the other." (R. 515-516.)

This Court is inexorably wrong in saying that the defendants Morgans paid "taxes on the real property bordered by the solid line, triangular shaped, and designated as the 'Morgan Property' on the map." Defendants Morgan never paid any taxes on any land except what is specifically covered by their deeds. Counsel for defendants so admitted at the trial. (R. 492.)

"MR. REIMANN: Well, now, so we won't spend time on this matter needlessly, do I understand then you do not claim taxes were paid by any description on land with any description other than described in the two deeds?

"MR. PRATT: *That's correct.*"

All of the surveyors admitted that Lots 1 and 2 of Merrywood do not conflict with the land described in the complaint. A. Z. Richards testified on direct examination with respect to the plats prepared by Mr. Driggs and the plat Mr. Richards prepared himself, "there is very little, if anything, contrary between his maps and mine." (R. 451.) Mr. Richards drew on his plat (Exhibit D-42) the section line from the original Ferron southwest corner on the same bearing of north 89° 39' east to the relocated quarter corner, as did Mr. Driggs. Mr. Richards said that at the quarter corner the section line varied about 16 feet from a due east line. (R. 452-453.) Mr. Richards shows that the platting of the deed descriptions of D-14 and D-15 are entirely *north* of the established section line on the

1927 resurvey. The plat in the opinion even contradicts the testimony and the measurements of A. Z. Richards who testified for defendants. The plat in the opinion contradicts Exhibit D-42 by extending the deed descriptions 22 feet too far to the south at the east, and 38 feet too far to the south at the west. The plat utterly disregards the calls in the deeds and the metes and bounds descriptions and even extends 38 feet over onto the property of the David A. Affleck Association, Inc. Most of the property of the David A. Affleck Association, Inc. on the east side of Mountair Road is "wiped off the map" by incorrect platting. It should be remembered that the David A. Affleck Association property lies between the south line of Section 15 and the property described in the deed which is Exhibit D-15.

The Court further states on page 4:

"... Although the tax notices describe the 'Morgan Property', the assessment was based upon the improvements which are located on the strip of land in dispute. Thus the amount assessed for the improvements has been paid by the defendants even though they (the improvements) were not in fact located on the property described in the tax notices."

About one-half the house is located north of the section line as said section line was re-established on the 1927 Government Resurvey. The tax notices do not describe any property such as shown on the plat in the Court's opinion. The tax notices follow the descriptions of Exhibits D-14 and D-15.

This Court erroneously treats two separate tracts of land separately deeded and separately assessed for taxes, as one tract of land. The land described in D-15 is the larger tract. As shown on Exhibit P-4 that tract does not extend down to the south line of Section 15. The southwesterly corner of said tract is Stake 31, which is admitted to be 43.78 feet *north* of the section line as said section line was re-established on the 1927 Government

Resurvey. According to A. Z. Richards, the southeast corner of that tract is approximately 20 feet *north* of said section line as re-established on the 1927 Government Resurvey. (R. 476, 457.) The tax notices and the tax sale record, Exhibit D-46 clearly show that this deed description cannot under any rules of engineering or real property be stretched out to extend down to the south line of Section 15 as re-established on the 1927 Government Resurvey. There never was any assessment of taxes for any "improvements" on the tract of land described in D-15.

The only tract on which there was any assessment of improvements is land covered by D-14. One-half the house stands upon that tract, since the section line runs through the middle of the house.

There is a fatal error in the reasoning of the Court in holding that "defendants have paid all the taxes on the improvements located on the land in question," for defendants never paid taxes on any improvements except those assessed to the land in Exhibit D-14. The tax descriptions of D-14 and D-15 follow the Old Arm Chair plat with Stake 31 described by distance south and east from the northwest corner of Section 15. The land described in the complaint lies between the north line of Lots 1 and 2 of Merrywood and the north line of Section 22.

This Court seems to overlook the fact that even if an adverse claimant pays taxes on improvements, he cannot satisfy the requirement of the statute, for he must pay all taxes "levied and assessed upon such *land* according to law." Furthermore, the taxes must be paid continuously. The land cannot be permitted to go to tax sale or tax deed. The redemption of lands from tax sale does not constitute the payment of taxes required by statute to permit obtaining title by adverse possession. See *Aggelos v. Zella Mining Co.*, 99 Utah 417, 107 P. 2d 170.

The opinion is in error in stating that "it appears that no

taxes have been assessed on the real property involved." Abstract of title covering the lands in Section 22, Exhibit P-1 shows the patent of Lots 2, 3 and 4 of Section 22 to Alvaro A. Pratt. Said Lots 2, 3 and 4 extended to the north line of Section 22. The abstract of title shows tax sales for the years 1940 to 1947 inclusive and even a tax deed, with tax sale redemptions. Thus, the *lands* were not only assessed in Section 22, but there were tax sales with redemptions by or on behalf of the predecessors in title to plaintiffs.

We are unable to understand why this Court contradicts the language of the tax notices by saying that the "area described in plaintiffs' tax receipts, on which plaintiffs base their claim of tax payment, is not the area in question." The plaintiffs, introduced the abstract of title, Exhibit P-1 which shows that defendants could not have met the requirements of the statute since they never paid the taxes. Furthermore, the predecessors of plaintiffs permitted the taxes to become delinquent and later redeemed the lands from tax sales and tax deed. In addition, plaintiffs offered Exhibit P-9 consisting of tax receipts showing payment of taxes by Paul E. Reimann and wife for the years 1949, 1950, 1951 and 1952. The last three tax notices describe "Lots 2, 3 and 4 Sec. 22 T 1 S, R 2 E, SL Mer, excepting tracts deeded to Pendleton, Richards, Larsen, Behrens & Affleck, and Lots 1 to 7, 11, 12, 13, 20 and 34 Merrywood, an unrec plat." The excepted portions do not cover the land described in the complaint, so the tax notices cover the lands described in the complaint.

Exhibit P-10 consist of tax notices and tax receipts showing assessment of land for taxes covering most of the land described in the complaint, for 1956, 1957, 1958 and 1959. The taxes were paid by plaintiffs. Contrary to the language of the opinion the description is not uncertain nor ambiguous. Furthermore, there were tax sales for the years 1938, 1943 and 1949 on lands

in Section 15 according to defendants' Exhibit D-45. The evidence therefore conclusively shows that there was not a continuous payment of taxes for any 7-year period on the land described in the complaint except by the plaintiffs, and that in prior years there were tax sales and subsequent redemptions by predecessors of plaintiffs. The proof is conclusive that defendants never paid taxes on the land described in the complaint even for one year. The tax descriptions on D-14 and D-15 on which defendants paid taxes do not extend into Section 22.

This Court is manifestly in error in remanding the cause with directions to grant a trial on an issue of adverse possession when the defendants had their day in court and utterly failed on that issue. If the cause were remanded they could not possibly prevail on such an issue, for the record conclusively shows that they never paid any taxes on the land in question. Furthermore, *defendants have not made any contention on their appeal that they acquired any title by adverse possession.* The partial reversal is judicial error. The decision should be vacated.

## POINT 5

ALTHOUGH THIS COURT DOES NOT REVERSE THE JUDGMENT OF DISMISSAL ENTERED IN FAVOR OF DAVID BURT AFFLECK AND WIFE ON DEFENDANTS' UNFOUNDED CLAIM OF "BREACH OF WARRANTY," THIS COURT UNJUSTLY AWARDS COSTS TO THE APPELLANTS AS THE LOSING PARTIES AND DENIES THIRD PARTY DEFENDANTS THEIR COSTS ON APPEAL.

The judgment of the District Court dismissing the third party complaint of the Morgans against David Burt Affleck and wife by implication at least is affirmed. The claims of "breach of warranty" were utterly fictitious. This Court not only failed to grant the third party defendants indemnification for



the groundless appeal, but this Court has actually awarded the Morgans as the losing parties costs on appeal against David Burt Affleck and wife. The third party defendants have prevailed on this appeal as they did in the District Court and they are entitled to recover their costs on appeal, being one-half the cost of the combined Brief of Respondents, against the defendants Grant Morgan and wife. The assessment of costs in favor of the losing parties on appeal against the prevailing parties is without a precedent. Such phase of the decision illustrates how far this Court fell into error and departed from the facts established in the District Court and well-established principles of law and equity.

### CONCLUSION

The findings of fact are amply and conclusively supported by competent authentic evidence. The alleged errors in the findings of the District Court are based upon incorrect statements in the opinion. It is obvious that this Court was misled and deceived by the false representations contained on defendants' Exhibit D-18. The recitals in the opinion contradict the undisputed facts in the record, including the admissions of witnesses for defendants.

This Court has erred both in fact and in law in deciding that an "Old Section Line" existed 22 feet south of the section line re-established on the 1927 Government Resurvey, although there is no evidence that there was ever an official survey conducted by or for the United States at such place. Furthermore, it is undisputed that the original section line was run by Ferron and his southwest corner of Section 15 still existed at the time of trial. The 1927 resurvey was a retracement of the original Ferron line. We contend that under the decisions of the United States Supreme Court such official resurvey cannot be impeached nor contradicted by any private survey nor otherwise impeached in a suit between private parties.

This Honorable Court has committed error in ordering the cause remanded in part for a trial on an issue of adverse possession on which defendants had their day in court and failed. The record is materially misstated in the opinion. Furthermore, the appellants have made no contention on this appeal that they ever acquired title by adverse possession. It would be useless to remand the case for a further trial, since the defendants proved that they never paid any taxes on the land in question. The land was not enclosed by a fence as this Court has assumed. This Court also has erroneously assessed costs on appeal against the third party defendants David Burt Affleck and wife and denied them their costs on appeal. The decision is contrary to the facts and contrary to law. The decision should be vacated and withdrawn, and a rehearing should be granted, because the decision as rendered results in a grave miscarriage of justice.

WHEREFORE, respondents respectfully request that the decision heretofore rendered be vacated, and that a rehearing be granted, and that this Honorable Court re-examine the record on appeal and the original Brief of Respondents Affleck, and that the Court grant relief in accordance with the original brief of respondents.

Respectfully submitted,

McKAY and BURTON

By MACOY A. McMURRAY  
*Attorneys for Plaintiffs, Respondents  
and Cross-Appellants*

PAUL E. REIMANN  
*Attorney for Third-Party Defendants  
and Respondents*

REFERENCE LINE EXTENDING DUE EAST FROM N.W. COR. OF SEC. 15

15 N.W. COR.

EAST 28.91 CH. 1908.06'

EAST 26.09 CH. 1721.94'

9,000 E

SOUTH 77.51 CH. 5115.66'

DEED LOCATION OF STAKE  
LOCATION OF STAKE 29  
TO CONFORM TO SECTION

29

S 48° 25' E 1.46 ch 30  
S 65° 01' E 1.8  
124.74'

LOT 23

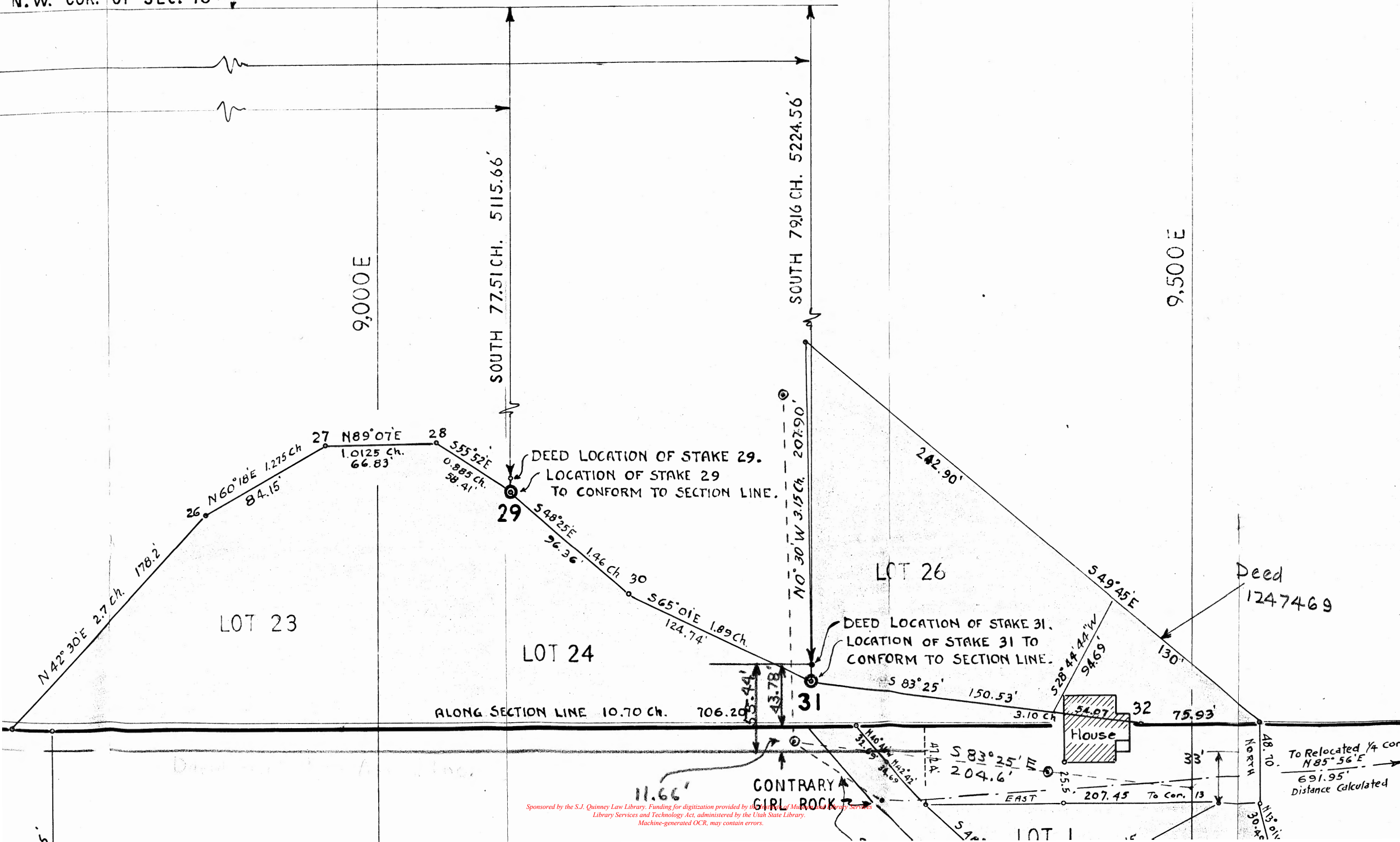
LOT 24

S 89° 39' W 2640.66'

ALONG SECTION LINE 10.70 CH. 706

11.66'

N.W. COR. OF SEC. 15

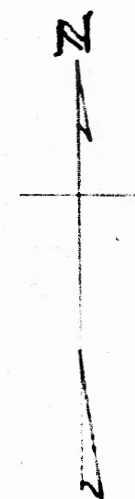




NORTH 80 CH.

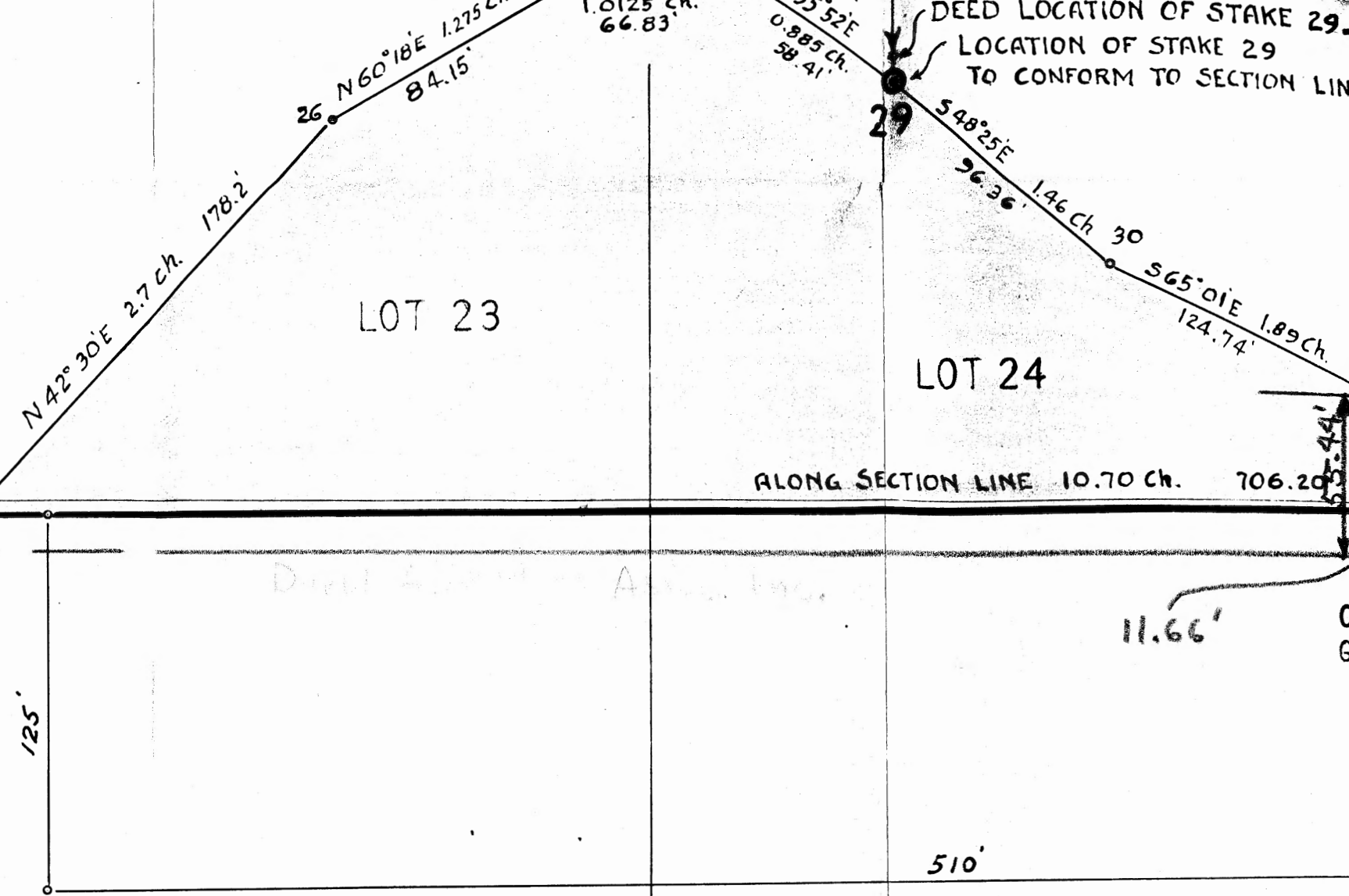
16 15  
21 22

S 89° 39' W 2640.66'



Scale 1" = 50'

125'



# Surveyor's Certificate -

I, Jean R. Driggs Sr. hereby certify that I am a Registered Professional Engineer and Land Surveyor in the State of Utah - License No. 483. I also affirm that I have platted this portion of Mountain Canyon, showing the position of Lots 23, 24 & 26 to conform to the Deed descriptions and the "Old Arm Chair Subdivision Map of June 17 1901, situated in Section 15, T15 R2E SLB & M.

Also Lots Deeded to David A. Affleck Assoc. Inc., and to Grant and Eva Morgan in the vicinity adjacent to the South boundary of said Section 15 and in the vicinity of "Contrary Girl Rock."

The data for platting in Section 22 T15, R2E is based on the original notes of the Perron Survey of Sec. 15, Surveyed 1891 - Also the "Merrywood" subdivision Survey by J.E. Johnson in 1912 - Also the Gout Resurvey of Section 22 made in 1927, at which time the Relocated N. 1/4 Cor. of Sec. 22 was set.

In addition to the above mentioned surveys I have personally surveyed the area in Section 22, starting at the Relocated N. 1/4 Cor., established a correct meridian and carried the survey to Contrary Girl Rock, during 1958 and 1959.

All the above mentioned surveys are in substantial agreement.

Jean R. Driggs Sr. Dec. 5 1959

