1969

Gerald J. Creason and Viola M. Creason, and Hallmark Constructors, Inc. v. Arnt Leroy Peterson and Ruby W. Peterson : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

GERALD J. CREASON and VIOLA M. CREASON, and HALLMARK CONSTRUCTORS, INC., a corporation,

Plaintiffs-Respondents,

v.

ARNT LEROY PETERSON and RUBY W. PETERSON, his wife,

Defendants-Appellants.

Case No. 11878

BRIEF OF APPELLANTS

Appeal from the Judgment of the Third District Court for Salt Lake County, Utah
Hon. Leonard W. Elton, Judge

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STATEMENT OF THE KIND OF CASE

This is an action to recover damages for breach of the covenants of a Utah statutory form of warranty deed.

DISPOSITION IN LOWER COURT

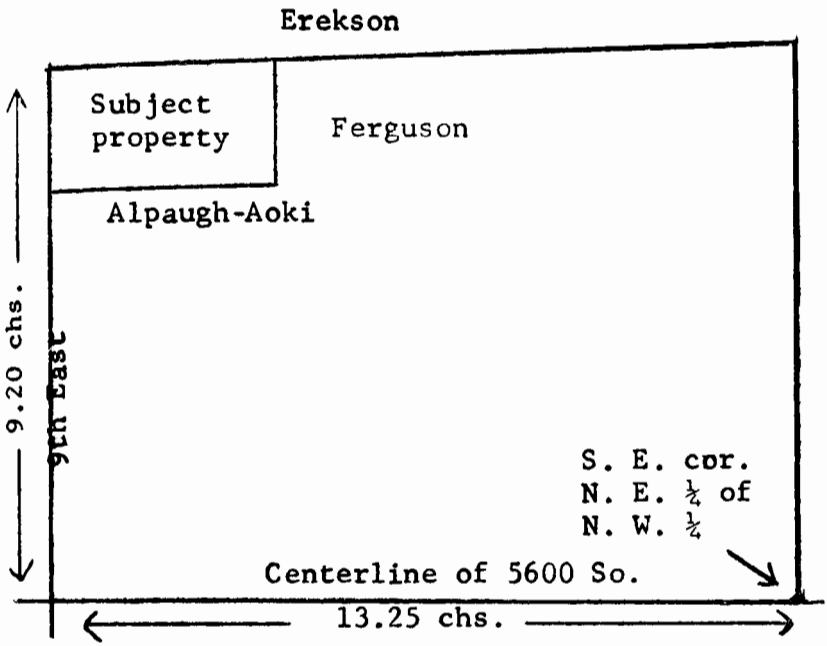
The case was tried to the court. From a judgment for the plaintiffs-respondents for $720.00 attorney's fees, defendants-appellants appeal.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment and judgment in their favor that none of the covenants were broken, or if they were broken there was no recoverable damage sustained by respondents. If appellants are not entitled to that relief, appellants seek reduction of the attorney's fees to a reasonable amount for the actual services performed by respondents' attorney.

STATEMENT OF FACTS

On December 20, 1963, the respondents traded appellants a new house which respondents had built at 5075 Wesley Road, Salt Lake County, Utah, for an older house and lot owned by appellants fronting on the East side of 9th East at 5551 South, Salt Lake County, Utah. It is the latter property which is the subject of this law suit, and which will hereinafter be referred to as the "subject property". Conveyance from appellants to respondents was by a Utah statutory form of warranty deed. (Exhibit P-2). The subject property was fenced on all four sides and the respondent, Gerald Creason, testified he thought he was purchasing the property within the fence lines. (R.58) The property lies in the Northwest corner of a 13 acre tract formerly owned by Joseph Thompson, who had acquired it from the patentee, William Wootton, in 1875. (See abstract, Exhibit D-7, Page 2, and copy of deed stapled to back cover). See the plat below.



In the warranty deed from appellants to respondents the starting point of the subject property was described as:

> "Beginning at a point in the center of 9th East Street, North 9.2 chains from the intersection of the center lines of 9th East Street and 56th South Street, said point being 13.25 chains West and 9.2 chains North from the Southeast corner of the Northeast quarter of the Northwest quarter of Section 17, Township 2 South, Range 1 East, Salt Lake Meridian."

This starting point, "North 9.2 chains from the intersection . . ." of said streets has been referred to in all the deeds and other instruments in the chain title from 1875 to the present time. Until 1943, when the appellants

acquired the property, this starting point was always specified in all the deeds and other instruments to be in line with an old fence, which fence was also described as being the North line of the subject property. There are 13 deeds and other instruments with this reference to the old fence. (Pages 2, 3, 7, 8, 9, 10, 13, 14, 16, 20, 21, 22 and 26 of abstract)

After acquiring the subject property from the appellants, respondents re-sold it to the Sieverts Brothers. Thereafter, Sieverts raised the question with respondents whether the old line of fence which ran along the North side of the property was the true deed line. A survey was made by Coon & King and from that survey two plats were prepared by them, both of which were introduced into evidence at the trial. The first survey plat made by Coon & King (Exhibit P-4) showed that both the starting point of the deed description (which is at the Northwest corner of the subject property) and the North deed line were 6.5 feet North of the old fence line and into property owned by Arion Erekson. The second plat (Exhibit P-3) which was also made by Coon & King after Bush & Gudgell had discovered an error in their first plat, showed the deed line to be 4.5 feet North of the fence. The latter plat (P-3) showed the fence on the South of the property to be South of the deed line about the same or a greater distance as the discrepancy on the North, except at the frontage. The rear or East fence was shown to be between 2 and 3 feet beyond the East deed line. It was undisputed that Exhibit P-3 showed 39,561 square feet to be enclosed by the fences, whereas

there were only 38,874 square feet enclosed by the deed lines.

Respondent Creason testified that he requested permission from Arion Erekson to move the old fence line North to one of the survey lines, but Erekson refused (R.66) because the old fence had stood in the same place since before 1920, when Erekson moved upon his property, and its location had never been questioned. Respondents did not pursue the matter with Erekson, but to satisfy Sieverts they obtained a quitclaim deed to the area between the deed line and fence line on the East of the subject property from George Ferguson and Edith Ferguson, his wife, and also obtained quitclaim deeds to the area between the South deed line and the South fence from Tad Aoki and Harriet Alpaugh's estate, who were the owners to the South. Aoki was purchasing that property under contract from Alpaugh. Respondents then brought this action against appellants for breach of the "covenants under the warranty deed", but did not specify which of the five statutory covenants it claimed were broken. The case was tried before the Honorable Leonard W. Elton, sitting without a jury, on May 16, 1969. The court concluded that appellants breached the "covenants of title" under the warranty deed, (R.29) but did not specify which covenant or covenants were broken. The court found that "the property as described in the subject warranty deed did not coincide with the fence lines on the subject property", (R.20) and concluded that the 9th East frontage was 1.93 feet deficient, and that appellants had failed to deliver

"clear title" to the tract. (R.29) No damages were proved for the alleged 1.93 feet deficiency of frontage, and the court allowed no damages therefor. The only damage which the court allowed was $720.00 attorney's fees allegedly paid by respondents to their attorney for "quieting title", which presumably means obtaining the three quitclaim deeds heretofore mentioned and two satisfactions of judgment against Aoki, which Aoki had paid but had not been satisfied of record. No quiet title action was ever brought by respondents against anyone.

ARGUMENT

POINT I.

THERE IS NO COMPETENT EVIDENCE TO SUPPORT FINDING OF FACT NO. 5 THAT THE "PROPERTY AS DESCRIBED IN THE SUBJECT WARRANTY DEED DID NOT COINCIDE WITH THE FENCE LINES ON THE SUBJECT PROPERTY."

POINT II.

THE LOWER COURT ERRED IN NOT FINDING THAT THE COMMENCEMENT POINT OF THE DESCRIPTION WAS IN LINE WITH THE OLD NORTH FENCE LINE, AND THAT THE NORTH LINE OF THE DESCRIPTION WAS ALONG THE OLD NORTH FENCE LINE.

POINT III.

THE LOWER COURT ERRED IN CONCLUDING IN CONCLUSION OF LAW NO. 1 THAT APPEL-

LANTS BREACHED THE COVENANTS OF TITLE IN THE WARRANTY DEED BETWEEN THE PARTIES.

The above points will be treated together, since they all relate to the location of the commencement point of the description in the warranty deed from appellants to respondents. While the court made no specific finding as to the location of the starting point, the court *apparently* concluded that it began North of the old fence line in land possessed by Arion Erekson. Counsel uses the word "apparently" because Finding of Fact No. 8 seems to be in conflict with that conclusion. Finding of Fact No. 8 states that the description was "clear and unambiguous in its terms and conveyed the property which the defendants intended to convey to plaintiffs". There never was any question but that all parties thought they were selling and buying the property within the fences. Respondent Creason so testified. (R.58) Certainly the appellants, Petersons, did not intend to sell property North of the old fence they had never possessed. Arnt Peterson and his wife, Ruby Peterson, both testified that they had no knowledge that the North fence was not on the deed line. (R.152, 164, 165) If the description conveyed the land the parties intended, then there certainly should not have been any judgment entered for the plaintiffs.

Nor is there any evidence which justified the court below in concluding that there had been a breach of the covenants in the warranty deed. Sec. 57-1-12, U.C.A. 1953, provides that our statutory form of warranty deed contains five covenants, but the lower court did not specify

which ones it found broken. The only reference to covenants is contained in Conclusion of Law No. 1 which reads:

> "Defendants breached covenants of title under the subject warranty deed dated December 20, 1963, in that they failed to deliver to plaintiffs the full street frontage of land described in said deed and wholly failed to convey a clear title to the tract conveyed thereby."

As heretofore mentioned, no damage was proved because of the alleged 1.93 feet of frontage deficiency, and the court awarded no damages to respondents for such deficiency. There could be no damage because respondents actually received 687 more square feet of land than their description called for, (R.143-144), and the property was not zoned commercial and was not sold by the front foot. (R.166-167) Respondents have not filed a cross-appeal from the judgment and thus that question of damages is not an issue before this court. That leaves only the matter of whether appellants failed to convey a "clear title". While it is not specified wherein the title was not clear, presumably this Conclusion of Law No. 1 has reference to Finding of Fact No. 5 that the fence lines and deed lines did not coincide. As will be hereinafter pointed out in Point IV of this argument, even if appellants did fail to convey a clear title, it would not, without more, constitute a breach of any covenant since the grantee must be evicted by someone with paramount title who successfully asserts the same. That never occurred here.

The only testimony adduced by respondents that the fence lines and deed lines did not coincide came from Robert Jones, a surveyor employed by Bush & Gudgell. He testified that Coon & King made a survey of the subject property on February 12, 1964, and prepared a plat, Exhibit P-4. Mr. Creason, one of the respondents, brought the plat to Jones for him to check it. (R.75) Jones did not personally go to the subject property to check it, but sent a crew out which reported back to him that they found a two and a fraction foot error in Coon & King's location of the starting point. Jones contacted Charles King of Coon & King, who reportedly sent his crew back out to double check it and substantiated the error. (R.76) King apparently agreed that he had erred and prepared a new plat (Exhibit P-3) to reflect the correction of his error. The error was a mistake in measuring North 9.2 chains from the center of the intersection of 5600 South and 9th East. (R.82) Because Jones never personally went to the subject property, everything he testified to was based upon what his field crew reported to him after they came back. (R.79) He testified that there had been set a County Surveyor's monument in the intersection (R.77) and he *assumed* that that monument was used by Coon & King both times they surveyed the subject property, but he was not positive. (R.82) He thought his crew used the County Surveyor's monument "as far as my knowledge goes" (R.83), but did not know for sure. (R.79)

The location of the starting point of the description was one of the issues at the trial. The accuracy of Exhibit

P-3 and P-4 were questioned at the trial. (R.64, 73, 74) Yet no one from Coon & King testified at the trial as to their accuracy nor where they began to measure the 9.2 chains to the commencement point. Jones attempted to supply the missing testimony, but he had no first hand knowledge since he did not personally go to the subject property. He had only hearsay information supplied him by his field crew. The testimony of Jones was clearly insufficient to support the court's Finding of Fact No. 8 that the property as described in the subject warranty deed did not coincide with the fence lines on the subject property.

On the other hand, appellants produced an abstract on the property, Exhibit D-7, showing that the description used by the parties was the same description used when appellants purchased the property in 1943. (Pg. 28, Exhibit D-7) The starting point of this description is an ancient point, having appeared first in the deed from William Wootton, the patentee, to Joseph Thompson in 1875. (Page 2 of abstract and copy of that deed inserted in end of abstract, Exhibit D-7). In each succeeding conveyance (Pages 3, 7, 8, 9, 13, 26, 28) there is reference to the point "9.2 chains North of the intersection of the center lines of 9th East and 56th South". The same reference is found in the mortgages and other instruments at Pages 10, 14, 16, 20, 21, and 22. In every instance that point is designated as being in line with an old fence line, until 1943 when appellants purchased the subject property. In the conveyance to appellants there was no reference to the old fence line, presumably be-

cause the description was copied from an abbreviated tax notice. There is no evidence that the parties *intentionally* failed to refer to it as found in Finding of Fact No. 9. Neither party has ever claimed that. The evidence is uncontroverted that the old fence had remained intact and unchanged for more than 49 years, right down to the date of trial. Arion Erekson, who owns the property to the North of the subject property, testified that when he first moved to his property on April 15, 1920, there was an old fence standing (R.121) and that it still stands there in the same place (R.124), although it has been rebuilt several times. He was certain because the fence runs along a high ditch bank, which had also remained unchanged since 1920. (R.134) Ruby Peterson, one of the appellants, likewise testified that she was now 58 years of age; that when she was 10 or 11 years old she gathered in the cows for Mrs. Alpaugh to milk; that the fence on the North side of the subject property "went on the North side of the ditch exactly as it does today". (R.152) Mr. Peterson, her husband, testified that he had resided upon the subject property from 1943 to the date of sale to respondents; that the fence had been re-built but along the same line as the old fence. (R.165) On cross-examination he stated that because of the high ditch bank, "if you moved the fence you would have to move it ten feet either way". (R.169)

This fence line to which these three witnesses referred is the identical one to which thirteen successive references have been made in the chain of title as running North 89° East 13.50 chains (891 feet) from 9th

East Street. Erekson testified it ran East about 900 feet from 9th East along his South boundary. (R.123) The fact that the fence line was not specifically mentioned in the description in the deed by which the appellants acquired title in 1943, nor in the description in the deed from appellants to respondents in 1963, is inconsequential. At the time of both conveyances the fence was there in the same place where it had stood unchanged since before 1920. Respondents did not and could not produce any evidence that the fence had ever been moved. Respondent Creason himself testified that it looked like an old fence. (R.58) Certainly neither appellants nor respondents intended to sell or buy any part of Erekson's property North of the old fence. (R.152, 164, 165) All the parties thought that the fence was the North boundary of the subject property. Respondent Creason testified he thought he was buying the property within the fence lines (R.58) The lower court erred in not holding that the starting point of the description was in line with the old fence line, and erred in not holding that the old North fence line constituted the North boundary of the property in law. This failure was error for several reasons.

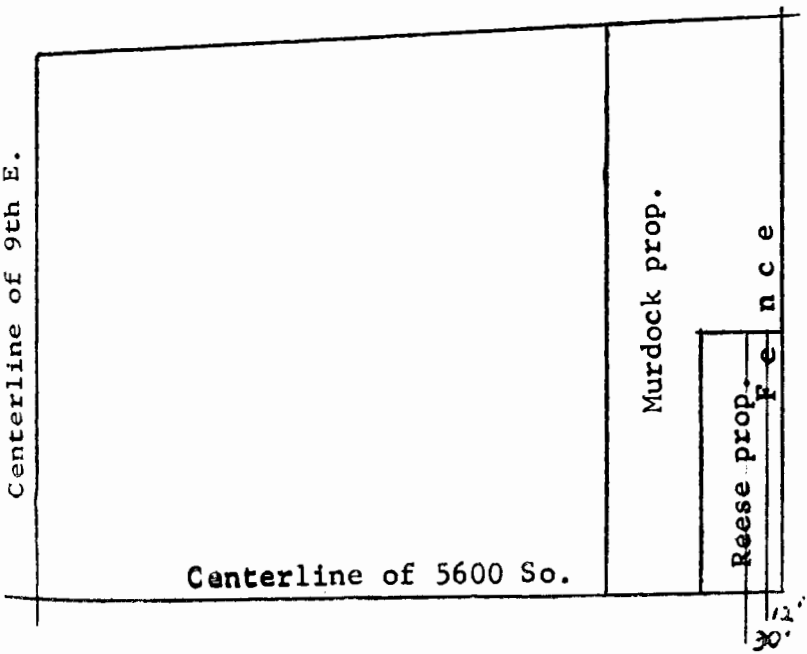
First, there were not in existence at the time of the Coon & King survey any monuments used in the original survey of the subject property, or any monuments of any succeeding surveys which might have been made, except for the old fence lines. A monument in the intersection of 9th East and 56th South was set by the County Surveyor in about 1946 to 1948. (R. 126) This was three

years after appellants had purchased the property in 1943, at which time they had had the property surveyed and no problem was found to exist. (R.151) Respondents' witness, Robert Jones, who did not go to or upon the subject property, but whose crew checked and found the error of Coon & King's 1964 survey (Exhibit P-4), did not personally know whether Coon & King used this monument as their starting point (R.82), nor did he personally know whether his field crew used that monument to chain from in checking the Coon & King survey. (R.79) Jones further testified that his crew made no attempt to locate the center of the intersection by chaining West from the Southeast corner of the Northeast quarter of the Northwest quarter of Section 17 (hereinafter referred to as the 16th corner) as called for in the description. (R.80) He further testified that many times when old monuments are attempted to be re-established such as the one here set by the County Surveyor, they do not agree with old existing fence lines which were established in accordance with earlier surveys. (R.83) He acknowledged that in surveying it is proper to refer to earlier deeds in the chain of title to see if a call is made to a fence, but that in this instance he did not have the benefit of the abstract. (R.89-90) Jones acknowledged that the center of an intersection might change in the course of 80 years and that his determination of where that point is today would not necessarily be the same as it was in 1875. (R.82) All surveyors agreed that they do not try to locate where a property line in law would be. (R.81, 136, 144)

Prior to 1946, there was no monument of any sort in the center of the intersection. There were road stones at the four corners of the intersection but these were set in 1896, 21 years after the first survey when Thompson purchased it from the patentee, Wootton. (R.127) In view of this lack of original or even old monuments at either the intersection or at the 16th corner referred to in the description, other monuments must be looked to to locate the starting point of the subject property. The best and only evidence is the old fence line running along the North side of the subject property, which is referred to throughout the chain of title and which has stood without change since before 1920. Robert Goff, surveyor for appellants, testified that prior to the setting of the road stones, the only monuments were fences which were set in accordance with early surveys. (R.127)

Because original monuments become destroyed and surveyor's instruments become more exact and accurate, it is the duty of the surveyor when tracing an ancient description such as that used here, to follow the footsteps of the original surveyor who laid out the corners. (Washington Rock Co. v. Young, 29 Ut. 109, 80 Pac. 382; 12 Am. Jur 2d, Sec. 61 on Boundaries) This can be done by giving effect to old fences which were presumably established in accordance with early surveys, and by giving effect to the use and conduct of the landowners and their predecessors in title. In such cases the old fence itself is recognized as a controlling monument. Such was the holding of this court in the case of Reese v. Murdock, 121 Ut. 517, 243 P. 2d 948. That case involved the location of

the starting point of a lot lying in the Southeast corner of the 13 acre Thompson tract from which the subject property was also carved. The beginning point was described as the same 16th corner which is found in the description in the instant case, to-wit, the Southeast corner of the Northeast quarter of the Northwest quarter of Section 17. In that case two private surveyors placed the starting point 12 feet West of an old fence line and fence corner which had stood many years without question as the East boundary of the property. The County Surveyor surveyed the property and established the beginning point 30 feet West of said old fence line. See the plat below.



It was contended in that case, as it is by respondents in this case, that one of the surveyed points of beginning must be adopted by the court as the point of beginning. This court rejected that contention holding that because the monuments of the original survey were gone and were lost, the next best evidence of the starting point was the old fence line which presumably was built in accordance with an early survey. This court rejected all surveyed points of beginning and adopted the old fence line, which had been regarded by all owners as the East boundary of the property.

Said this court,

> "The evidence of where that point (beginning point) was according to the original survey establishing that point or as re-establishing it is very uncertain. There is evidence that this fence line has marked the Eastern boundary of this property which has been held without dispute by the predecessors of plaintiffs and defendants for more than 50 years. . . . There are no monuments on the ground which indicate where the starting point was located either by the original or the re-established survey except this old fence. . . . All of the parties concerned in purchasing this property understood that this fence line was the Eastern boundary line of the property."

The instant case is even stronger on its facts for application of the rule of Reese v. Murdock because (1) in Reese v. Murdock there was never any reference in the chain of title to the starting point and East boundary line as being on a fence line, whereas, in the instant case there are no less than thirteen references in the abstract

from 1875 to 1943 to the old fence line as being the North boundary, and (2) the fence line adopted by the court in Reese v. Murdock was 12 feet to 30 feet *outside and beyond* the surveyed deed line, whereas, in the instant case the fence line is 4.5 feet *within* the surveyed line.

As early as 1905, this court in Washington Rock Co. v. Young, 29 Ut. 108, 118, 80 Pac. 382, stated, "The law is well settled that an original survey of lands, upon the fate of which property rights have been based and acquired, controls over surveys subsequently made which injuriously affect such rights". It quoted with approval from Hess v. Meyer, 73 Mich. 259, 41 NW 422, wherein it was said, "If the stakes or monuments placed by the government in making the survey to indicate the section corners and quarter posts can be found, or the places where they originally were placed can be identified, they are to control in all cases. When they cannot be found, or if lost or obliterated, *they must be restored upon the best evidence obtainable which tends to prove where they originally were. For this purpose surveys are made and lines re-traced as near as possible*". (Italics added).

This court then went on to state,

> "In such cases junior or subsequent surveys are not made to dispute the correctness of or to control the original survey, but to furnish legitimate proof of where the lost lines or monuments were so as to aid the jury in determining the exact location of the original survey. It seems clear, therefore, that in making such junior surveys the original survey should be re-traced, where possible. . . . An original survey upon which

property rights have been acquired, cannot thus be changed or diminished or obliterated, with so little regard for existing evidence."

The decisions of this court in Reese v. Murdock and Washington Rock Co. v. Young are in accordance with well recognized law on this point. In 12 Am. Jur 2d on Boundaries, Sec. 61, entitled "Resurveys", it is written:

> "In surveying a tract of land according to a former plat or survey, the surveyor's only duty is to relocate, upon the best evidence obtainable, the courses and lines at the same place where originally located by the first surveyor on the ground. In making the survey, he has the right to use the notes of the original survey. The object of a resurvey is to furnish proof of the location of the lost lines or monuments, not to dispute the correctness of or to control the original survey. The original survey in all cases must, whenever possible, be retraced, since it cannot be disregarded or needlessly altered after property rights have been acquired in reliance upon it. On a resurvey to establish lost boundaries, if the original corners can be found, the places where they were originally established are conclusive without regard to whether they were in fact correctly located, in this respect it has been stated that the rule is based on the premise that the stability of boundary lines is more important than minor inaccuracies or mistakes. But it has also been said that great caution must be used in reference to resurveys, since surveys made by different surveyors seldom wholly agree. A resurvey not shown to have been based upon the original survey is inconclusive in determining boundaries and will ordinarily yield to a resurvey based upon known

monuments and boundaries of the original survey".

In the instant case the trial court disregarded the best and only evidence obtainable as to the original location of the starting point and the North boundary of the subject property. Although he made no finding as to the location of the starting point of the property, nor made any finding as to the location of the North line of the subject property, and refused to do so when such omission was called to his attention in appellants' Motion to Amend Findings of Fact and Conclusions of Law, (R.32) he apparently concluded that the surveyed line over in Erekson's property was the North line of the subject property, since in Finding of Fact No. 5 he found, "that the property described in the subject warranty deed did not coincide with the fence lines on the subject property".

Had he used the old fence as the starting point and the North line, the fences would then coincide with the deed lines except on the East and Southeast where the fences took in too much footage . . . all to the benefit of the respondents. In this regard appellants call attention to the text of Section 71, entitled "Ancient Fences", 12 Am. Jud. 2d on Boundaries. There is stated in part:

> "Ancient fences used by a surveyor in his attempt to reproduce an old survey are strong evidence of the location of the original lines and, if they have been standing for many years, should be taken as indicating such lines as against the evidence of a survey which ignores such fences and is based upon an assumed starting point. It

is said that a long established fence is better evidence of actual boundaries settled by practical location than any surveys made after the monuments of the original survey have disappeared. Accordingly, a fence erected on a surveyed line shortly after the land has been surveyed may serve as a monument to control courses and distances or a subsequent survey after the stakes set out at the time of the original survey have disappeared."

The text cites the following cases in support: F. H. Wolf Brick Company v. Lonyo, 132 Mich. 162, 93 NW 251, and Wacker v. Price, (1950) 70 Ariz. 99, 216 P. 2d 707.

In the Wacker case just cited, the court quoted in its opinion with approval from 110 Am. St. Rep. 681, under the title of "Resurveys and Their Purpose and Effect":

"In Diehl v. Zanger, 39 Mich. 601, where the first survey of lots involved in litigation was made by one Campau, and a resurvey made years afterward by the City Surveyor showed that the practical location of the whole plat was wrong, it was declared that a resurvey made after the disappearance of the monuments of the original survey is for the purpose of determining where they were, and not where they should have been, and that a long established fence is better evidnce of actual boundaries settled by practical location than any survey made after the monuments of the original survey have disappeared. 'Nothing is better understood', said Justice Cooley in delivering the opinion of the court, 'than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors.

> This is true of the government surveys as well as any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would be simply incalculable and the visitation of the surveyor might well be set down as a great public calamity. But no law can sanction this course. The City Surveyor has mistaken entirely the point to which his attention should have directed. The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. . . . The City Surveyor should, therefore, have directed his attention to the ascertaining of the actual location of the original landmarks set by Mr. Campau, and when those were discovered they must govern. If they are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually found in the practical location of the lines made at a time when the original monuments were presumably in existence and probably known. Stewart v. Carlton, 31 Mich. 270. As between old boundary fences, and any survey made after the monuments have disappeared, the fences are far the better evidence of what the lines of the location actually are'."

The Arizona court stated, "that it is a matter of common knowledge that the great majority of original surveys are more or less inaccurate, and since it has always been the rule that courts must resort and be bound by the best evidence available, it follows that the boundaries fixed by the property owners themselves in the absence of the inability of surveyors to definitely fix the monuments from which the original survey was made, must control . . .".

In a concurring opinion in the Wacker case, Judge Phelps stated that in the absence of monuments from which the original survey was made, the fences along the sidelines of the lot themselves may be treated as monuments.

There is an additional reason why the court should have found the North boundary of the subject property to be the old fence line. The starting point is described as, "Beginning in the center of 9th East Street, North 9.2 chains from the intersection of the center lines of 9th East Street and 56th South Street, said point being 13.25 chains West and 9.2 chains North from the Southeast corner of the Northeast quarter of the Northwest quarter of Section 17". Douglas Brammer, Chief Deputy in the Salt Lake County Surveyor's Office, testified that this beginning point left "some question" as to how you arrive at it. (R. 141) To illustrate this doubt, he made a drawing, Exhibit D-6, which shows that starting at the 16th corner and coming true West 13.25 chains, you would arrive approximately 10.9 feet South of the center of the intersection as it is shown on the county reference plat. (R.142-143) However, if you came on the bearing of North 89°17'35" West along the center of 56th South, you would arrive at the center of the intersection as it exists today. Thus, a doubt is raised as to what is intended by the description because it can be interpreted two different ways. (R.147-148) Neither the 16th line nor the center of 56th South runs true East and West (R.148); yet the description as contained in early deeds (Pages 2, 3, 7 and 8 of abstract state: "Thence *true* West

along the centre of County Road on South line of said forty Thirteen Chains Twenty Five Links (13.25)". (Italics added) Robert Goff, a licensed surveyor called to testify by the appellants, corroborated Mr. Brammer and testified that the center of 56th South and the 16th line do not coincide or even parallel each other. (R.129) He testified that at 13th East, the 16th line was in the North half of 56th South Street, but that at Vine Street (750 East) the 16th line is in the South half of that street, and that somewhere between those two points the two lines cross each other. He further testified that the survey plat of Cook & King, Exhibit P-3, suggests to him that a point South of the present center of the intersections of the two streets was used when the fences were put in. (R.130) He further testified that it should be assumed that fences which are established have been surveyed in their location, (R.137) and that survey lines are not necessarily legal property lines, (R.136) and that prior to the setting of the roadstones at the four corners of the intersection on March 14, 1896, the only monuments were fences which were set in accordance with early surveys. (R.127)

To say the least, the starting point contained in the subject warranty deed was ambiguous and prior deeds in the chain of title should be looked to to clear up the ambiguity. In Sec. 100-h on Deeds, 26 CJS, Page 874, it is stated:

> "It has been held or recognized that, where the terms of a deed are ambiguous or uncertain in

> describing land conveyed, a prior deed in the chain of title may be looked to to secure the true description",

citing Jones v. Johnson, 305 Ky. 525, 204 S.W. 2d 961, which held that an omission in a subsequent description cannot enlarge the boundaries of land conveyed by deed. If prior deeds in this chain of title are looked to to secure the true description, we find on 13 occasions the call to the old North fence line which firmly fixes the North boundary of the subject property. Because the deed to respondents failed to mention it did not authorize the trial court to disregard the fence and enlarge the description. The lower court erred in disregarding this ancient monument. It failed to recognize the best evidence of the existence of the starting point and North boundary of the subject property, viz., the old North fence line which had been referred to in deeds since 1875, and which when followed gave the respondents 687 more square feet than their description actually called for. The respondents themselves recognized this when they did not pursue Erekson but adopted the fence line, thereby getting more square footage than had the deed lines been followed. No outsider made any claim to the property within the fences, and no one ever disturbed respondents' possession. If there was any error with the fence lines it was not with the North fence but with the East and South fence which encompassed more area than they should have. This was all to the benefit of the respondents who received more land than they had actually bargained for. No covenant is broken when the

fences encompass too much ground, as the grantees can obviously move the fences back.

POINT IV.

THE LOWER COURT ERRED IN CONCLUDING THERE WAS A BREACH OF WARRANTY BECAUSE THE TITLE WAS NOT CLEAR.

Although the trial court did not specify which covenant or covenants it found to have been broken, it stated in Conclusion of Law No. 1 that appellants breached the covenants of title because they had "failed to convey a clear title". (R.29) This would indicate that the court thought that the covenants for quiet enjoyment and of warranty were broken. If this was the court's conclusion, it was erroneous because they are not broken merely by the existence of an unclear or clouded title. These covenants are not broken until the grantee is evicted, either actually or constructively, by someone with a superior or paramount title. Sec. 57-1-12, U.C.A. 1953, provides the following with respect to the use of our statutory form of warranty deed:

> "Such deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, of the premises therein named, together with all the appurtenances, rights and privileges thereunto belonging, with covenants from the grantor, his heirs and personal representatives, that he is lawfully seized of the premises; that he has good right to convey the same; that he guarantees the grantee, his heirs and assigns in the quiet possession

> thereof; that the premises are free from all encumbrances; and that the grantor, his heirs and personal representatives will forever warrant and defend the title thereof in the grantee, his heirs and assigns, *against all lawful claims whatsoever*. Any exceptions to such covenants may be briefly inserted in such deed following the description of the land". (Italics added)

It should be noted that the above section imposes upon the grantor the duty of forever warranting and defending the title in the grantee against all *lawful claims*. It does not say that the grantor will warrant and defend against *any claim* or against *unlawful claims*. In Sec. 1011, Tiffany on Real Property, the author states:

> "Covenants for quiet enjoyment and of warranty are equivalent. They are broken only when the disturbance of the grantee's enjoyment is by the grantor or by a third person under lawful claim of title".

In the same work in Sec. 1013, it is stated:

> "In order for there to be a breach of warranty or of quiet enjoyment by reason of a paramount title in another, an eviction of the covenantee by such other is ordinarily necessary. The existence of an invalid and unenforceable claim is not a breach, even though it may constitute a cloud on the title".

This court in Baumgarten v. Chipman, 30 Utah 466, 86 Pac. 411, held that in an action for breach of covenant of warranty, the grantee must show that he was evicted from the land conveyed by someone with a paramount title and that the grantor had notice of that suit so that

be had an opportunity to be heard on the question of whether his title or the other party's title was paramount.

Applying the above law to the instant case, the respondents contended in the lower court that there had been a breach of covenants because a strip, 4.5 feet in width lying North of the old North fence line, was in the possession of Arion Erekson. As had been pointed out under Points I, II, and III in this brief, appellants have demonstrated that the description for the 89 years prior to the respondents' purchase had never been construed to include any land North of the fence line, and should not now be so construed. However, if this court does not agree with appellants in that regard, then the question of ownership of the strip becomes important. Appellants may well own said strip if it lies within their description since they and their predecessors have been paying taxes on it even though Erekson and his predecessors have been in possession. Appellants do not admit and have never admitted that Erekson has paramount title to the strip. The question of ownership has never been determined either in this action or any prior action because respondents chose not to pursue it. But before being saddled with liability for breach of warranty, appellants certainly want an opportunity for a day in court when it is judicially determined who is the owner. Until, however, there is a determination adverse to the title conveyed, respondents have no cause of action against appellants on the covenants of warranty. Such adverse determination was required of the grantee, Van Cott, in

the case of Van Cott v. Jacklin, 63 Utah 412, 226 Pac. 460. There, it first had been determined in a suit between Van Cott and Casper, an adjoining owner, that Casper had the paramount title to the strip there in question which had been conveyed to Van Cott. See Van Cott v. Casper, 53 Utah 161, 176 Pac. 849. Thereafter, Van Cott brought an action against his grantor, Jacklin, for breach of warranty. This court required Jacklin to indemnify Van Cott for damages sustained in view of the prior unsuccessful suit with Casper. Had Van Cott won the suit against Casper, Van Cott would have had no cause of action against Jacklin because no covenant would have been broken.

Respondents are, therefore, premature in bringing suit against their grantors, the appellants, for breach of covenants. They have had no litigation with Erekson who they now assert has paramount title to the 4.5 foot strip. Until Erekson's paramount title has been judicially determined, they have no cause of action against appellants. As stated by the above authorities, the existence of an invalid and unenforceable claim is not a breach, even though it may cloud the title. The statement in Conclusion of Law No. 1 that there was a breach of warranty because the title was not clear is a legal non sequitur.

If the lower court concluded that the covenant against encumbrances was broken, it was in error since this court in the case of Utah Savings & Trust v. Stoutt, 36 Utah 212, 102 Pac. 865, held that such covenant contem-

plate. that there must be a lien or valid claim against the property. The mere assertion of a claim is not enough, and unmarketability of title is not enough.

POINT V.

THE LOWER COURT ERRED IN AWARDING RESPONDENTS' ATTORNEY'S FEES INCURRED IN OBTAINING QUITCLAIM DEEDS FROM ADJOINING OWNERS ON THE SOUTH AND EAST.

The only damages awarded respondents in this action were $720.00 for attorney's fees in "quieting title". (Finding of Fact No. 7, R.28) Since they did not bring any quiet title action, this finding presumably means obtaining the three quitclaim deeds and the two satisfactions of judgment from adjoining owners. Appellants have heretofore pointed out in this brief under Points I, II, and III that there were no encumbrances or clouds on the title and it is, therefore, our position that there was no need to obtain the quitclaim deeds. Assuming, however, that there were clouds on the title, no cases have been found where attorney's fees were allowed a grantee-covenantee for clearing clouds. In fact, the authorities are unanimous that attorney's fees will not be allowed in such instances. In 20 Am. Jur. 2d, Sec. 151 on Covenants, Page 710, it is stated:

> "Thus since a covenant of warranty does not protect against every unfounded adverse claim but is broken only where there is actual or constructive eviction under a paramount title, the covenantee is not entitled to demand of his covenantor expenses incurred in the defense of a suit

which sustains the title as valid. *The fact that there is an apparent cloud upon the title is not enough, but its validity must be shown to establish the warrantor's liability.*" (Italics added)

In an annotation on this subject at 61 A.L.R. 169, the same rule is stated, viz. that attorney's fees incurred in removing clouds from the title are not chargeable against the grantor in an action based upon breach of covenants:

> "A covenant is a contract of indemnity against loss because of a defective title, and not a contract to indemnify the covenantee against loss from the unfounded assertion of claims against the title; hence, any expenditures in defending the title against such claims cannot be recovered for on the ground of liability under the covenants (citing Hoffman v. Dickson, 65 Wash. 556, 118 Pac. 737, and Smith v. Parsons, 33 W.Va. 644, 11 S.E. 68). *Under a warranty extending to lawful claims only, expenses incurred in defending against an unfounded claim cannot be recovered from those bound by the warranty. The fact that there is an apparent cloud upon the title is not enough. Its validity must be shown to establish the liability of the warrantor.* (Citing Eaton v. Clark, 80 N.H. 577, 120 Atlan. 433). So where there are clouds upon the covenantee's title, which in order to give him an unembarrassed title it is necessary to have removed, and he accordingly files a bill to remove such outstanding claims as clouds upon his title, if he is successful therein he is not entitled to recover the costs and expenses of the suit and damages for the breach of covenant either of seisin or of warranty since such claims having been adjudicated favorably to the covenantee, do not constitute a breach of such

co enants. (Citing Luther v. Brown, 66 Missouri Appeal 227)'' (Italics added)

Our statute, Sec. 57-1-12, U.C.A. 1953, codifies the rule above stated by those authorities wherein it fixes the liability of a grantor in a warranty deed as follows:

> ''. . . and that the grantor . . . will forever warrant and defend the title thereof in the grantee . . . *against all lawful claims whatsoever''.* (Italics added)

In this action the attorney's fees were incurred in obtaining quitclaim deeds from the adjoining owners on the East, George and Edith Ferguson, and quitclaim deeds and two satisfactions of judgment from the adjoining owners on the South, the Estate of Harriet Alpaugh, deceased, and Tad Aoki, her contract purchaser. None of these landowners had ever made *any* claim to the subject property, let alone any *lawful claim* which Sec. 57-1-12 requires. There has never been any adjudication or determination in this action or any other action that any of these adjoining owners had as much as color of title to any part of the subject property, let alone the paramount title which our statute requires before imposing liability on the grantor. Gerald Creason, one of the respondents, admitted that no one had disturbed his possession in any way or made any claim to any of the property within the fences. (R.71) Indeed, the adjoining owners on the South, the Estate of Harriet Alpaugh, deceased, was the appellants' grantor and it could not legally make any claim to property which she had conveyed to them in 1943 by warranty deed, and

which same property appellants had conveyed to respondents in 1963. In any case of conflict between the two tracts of land, the title to the subject property would of necessity be paramount to the tract on the South which she retained. On the East, the true deed line according to respondents' own surveyor, was 2 to 3 feet inside the fence line, so there was no problem there. (Exh. P-3) But even if one of the adjoining landowners had made some claim to a portion of the subject property and had brought suit to quiet title to that portion, and the respondents were required to defend such action, respondents could not recover attorney's fees under the covenants unless their defense of such quiet title action was unsuccessful and the adjoining owner succeeded in obtaining part of the subject property by being able to prove that his title was paramount.

How, then, could the lower court award respondents attorney's fees for "clearing clouds" by obtaining quitclaim deeds, when it could not have given them attorney's fees for successfully defending a quiet title action? See 61 A.L.R. 169, supra. Only when an adjoining owner with a paramount title takes part of the land conveyed to the grantee away from him can he be heard to complain and recover from his grantor attorney's fees incurred in the unsuccessful defense of the title conveyed. So held this court in Van Cott v. Jacklin, 63 Utah 412, 226 Pac. 460. Furthermore, the attack on the title must be a direct attack. It is insufficient that the title is found unmarketable. 61 A.L.R. 169; Hilliker v. Rueger, 228 N.Y. 11, 126

N.E. 266; Hoffman v. Dickson, 65 Wash. 556, 118 Pac. 737; 20 Am. Jur. 2d, Sec. 150 on Covenants.

There has been, of course, no determination or adjudication that any of the adjoining owners from whom the quitclaim deeds were acquired had paramount title. Respondents' counsel in the trial court admitted in a memorandum written by him that none of the owners on the South or East "asserted any lawful claims" and that "it is obvious that none of the adjoining owners to the East and South had title paramount to plaintiffs [respondents]". (R.42) He further conceded:

> "Plaintiffs agree that attorney's fees should not be allowed with respect to unlawful claims and thus, efforts to obtain land to the South and East are not properly includable as damages in a breach of warranty action". (R.41)

In that memorandum he sought to justify the award of fees on the ground that Erekson had title to the 4.5 foot strip North of the old fence line. We have already pointed out in Point IV of this brief that respondents cannot maintain an action for breach of covenants until they have determined that question with Erekson. But even if counsel were correct that Erekson had title to part of the land conveyed by appellants to respondents, the attorney's fees were incurred in obtaining quitclaim deeds from the owners to the South and East, and were not incurred in litigating or even negotiating with Erekson. Counsel for respondents testified at the trial (R.112) that he probably spent "five minutes" in

dealing with Erekson. Thus, whether Erekson had paramount title or not to the strip North of the fence, respondents spent no time or money in attempting to obtain possession of it. They would be entitled to nothing more than nominal damages. In the court below, respondents relied upon the case of Van Cott v. Jacklin, supra. There, the fees awarded to the grantee had been incurred by him in a prior unsuccessful lawsuit with one Casper, an adjoining owner, to obtain possession of part of the land conveyed to the grantee. It was adjudicated in that suit between Van Cott and Casper, that Casper had the paramount title. See Van Cott v. Casper, 53 Utah 161, 176 Pac. 849. Therefore, in the subsequent action brought by Van Cott against his grantor, Jacklin, this court required Jacklin to indemnify his grantee for the attorney's fees incurred in the unsuccessful suit with Casper.

The Van Cott v. Jacklin rule has no application here because respondents have had no litigation with Erekson who they claimed had paramount title to 4.5 feet of land conveyed to them by appellants, and admitted to spending only "five minutes" in approaching him. Instead, they took the land enclosed by fences South of the old North fence (thereby picking up 687 square feet more than they had bargained for), but yet in this action were awarded attorney's fees incurred in obtaining quitclaim deeds from people who they admit did not have paramount title, (R.42) and in face of their counsel's concession that "efforts to obtain land to the South and East are not properly includable as damages in a breach of warranty action". (R.41)

Clearly, there is no basis for the award of attorney's fees in this action by the trial court to respondents.

POINT VI.

THE AWARD OF $720.00 ATTORNEY'S FEES WAS EXCESSIVE AND UNREASONABLE.

Respondents' counsel at the trial testified of his time and efforts in behalf of his clients. He said it added up to 80 hours of work (R.103) He multiplied it by his hourly rate and came up with $750.00 in fees. (R.104) The court awarded him $720.00. Appellants believe, of course, that there has been no breach of covenants and no amount of attorney's fees should have been awarded. In the event, however, this court determines that respondnts are entitled to attorney's fees, we believe $720.00 was excessive for his efforts in "clearing the title", which was nothing more than obtaining three quitclaim deeds and two satisfactions of judgment. (R.113) We do not doubt that counsel expended 80 hours in behalf of his clients. Most of his time, however, was spent in connection with respondents' sale of the subject property to the Sievert Brothers and in pursuit of other matters not related to "clearing the title", and for which appellants could not be charged. For example, at R.93 he testified, "I negotiated at some length with Mr. Vuyk on behalf of the contract purchasers. We exchanged a number of letters, many, many telephone conversations". Again, at R.97 he testified, "I obtained a quitclaim deed from Mr. Creason and his wife in favor of the Hallmark Constructors, which had been the contract seller to the Sieverts,

to remove that question". Again, at R.98 he testified, "I prepared a warranty deed for the signature of Mr. and Mrs. Creason and Hallmark Constructors, Inc., a Utah corporation", which deed was in favor of the Sievert Brothers. His testimony on direct examination was replete with references to matters which he pursued for his clients, which had nothing to do with "clearing the title". Appellants are not liable for his time in dealing with the Sievert Brothers, in corresponding with and telephoning their attorneys, in preparing quitclaim deeds for Mr. and Mrs. Creason to convey the property to Hallmark Constructors, or for preparing a warranty deed from Mr. and Mrs. Creason and Hallmark Constructors to the Sievert Brothers. At R.94 he testified that it was 18 months after he was engaged by Mr. Creason that he prepared the quitclaim deeds which were to be signed by Mrs. Alpaugh and Mr. Aoki, owners to the South. He asserted that the great majority of his time was spent in doing the title work, obtaining surveys and ascertaining who had judgments on the property. (R.113) Yet when probed on cross-examination he admitted, however, he had a title company search the records and give him a preliminary title report; that he personally did not have to search any records; that Bush & Gudgell, surveyors, provided him with legal descriptions to use in the quitclaim deeds; that thereafter it was largely a secretarial task in preparing the three deeds; (R.113) that the two deeds for Alpaugh and Aoki were mailed to appellants' counsel (R.107), who returned the Alpaugh deed signed (R.108), and who delivered the other deed to Aoki.

(R.113) That he had to walk over the ground with Aoki and explain it to him before he would sign. (R.114) He further testified he could not have spent more than one hour dealing with the Fergusons, owners on the East, or preparing quitclaim deeds for their signatures. (R.112) He spent five minutes with Arion Erekson. (R.112)

It is obvious from his testimony that very little of the 80 hours time was spent in preparing and obtaining signatures on the three quitclaim deeds which he claimed were necessary to clear the title. (He did not include any time for services rendered in the instant breach of warranty law suit (R.115), which, of course, he could not since attorney's fees for bringing a breach of warranty action are not recoverable from the grantor. Van Cott v. Jacklin, supra.) To impose $720.00 upon the appellants for his services in obtaining the quitclaim deeds and satisfactions of judgment is unreasonable. From his own testimony it is difficult to see how he could have expended more than 25 hours in meaningful work reasonably related to "clearing the title". At his hourly rate of $10.00 (R.104) that would give him $250.00. Had he brought a quiet title action against the adjoining owners, the recommended fee by the Utah Bar Association is $250.00, as set forth in the Utah State Bar advisory handbook on office management and fees. His time in obtaining the quitclaim deed from Ferguson is not properly assessable against the appellants because the strip acquired from Ferguson was beyond the deed line and by no stretch of the imagination can appellants be responsible for attempts to secure land in excess of that actually described in the deed.

CONCLUSION

Respondents received title and possession to the lot they intended to purchase and pleasantly found its fences encompassed a greater area than they had bargained for. No outsider made any claim to any part of it, but because a surveyor using modern instruments and apparently measuring from a recently established monument, questioned by a few feet the location of the North line, respondents disregarded 88 years of practical location and set on a course leading to the unnecessary expenditure of their time and money. They erroneously concluded that they should have a strip possessed by Erekson, but without pursuing that matter to a conclusion with him, they prematurely filed this action for breach of warranty against their grantors. They have failed to establish a breach of warranty and have totally failed to show that they expended any attorney's fees in the unsuccessful defense of the title conveyed. The judgment entered below cannot stand on the facts or the law. It should be reversed and appellants awarded their costs.

Respectfully submitted,

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