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

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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

APPELLANTS' REPLY BRIEF

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

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POINT I

THE OLD FENCE IS THE BEST AND
ONLY EVIDENCE OF THE STARTING
POINT OF THE DESCRIPTION.

Respondents seem to argue that the old fence
cannot be relied upon as the beginning point because
there is no evidence that it was built on the point "9.2

chains north of the center of the intersection". Respondents at Page 6 of their brief urge this court to take judicial notice that old fences are often not on the true line. This argument misses the whole point of appellants' contention as set forth in Points , II, and III of appellants' main brief. Appellants there contend that when the property was originally laid out in 1875 in the deed from the patentee to Joseph Thompson, (abstract pg. 2) the point 9.2 chains north of the center of the intersection was designated to be in line with an old fence. The description says so and so do 13 succeeding documents in the abstract right down to 1943. *It matters not whether the original survey laying out the property was accurate or not.* It is sufficient that originally it was so designated and has been so practically located by everyone from 1875 to 1963, a period of 88 years. All monuments, markers and pegs used in the 1875 survey have long since disappeared. The question now is where was the point 9.2 chains north of the intersection originally located when the description was first employed in 1875—not where it *should have been* located. As stated by Justice Cooley in Diehl v. Zanger, 39 Mich. 601, quoted with approval by the Supreme Court of Arizona in Wacker v. Price, (1950) 70 Ariz. 99, 216 P. 2d 707: "Nothing is better understood 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 question is not how an entirely accurate survey would locate these lots, but how the original stakes located them." Some courts have described this process of re-tracing the original survey as "following the footsteps" of the original surveyor.

There is another reason why it matters not that the old fence may not have been established exactly on the point 9.2 chains north of the center of the intersection. It is well recognized law that a call in a description to a specific point such as a fence line prevails over a distance. 11 CJS Sec. 51 on Boundaries. Thus, even though the fence was more or less than 9.2 chains north, the call to the fence governs and makes the fence the north boundary of the property.

Respondents argue in their brief that the source of the dispute in this case is the failure of the appellants to make reference to the fence when they conveyed the property to respondents in December, 1963. That is not so. Whether the fence is mentioned or not, all parties who have had anything to do with this property since 1875 (including respondents when they purchased it) have regarded this fence as the north boundary. Appellants purchased it in 1943, had it surveyed by a Mr. McDonald, and found no problem. R. 151. This was 3 years before the first monument was ever

placed in the center of the intersection. The old fence is a monument itself of where the point 9.2 chains north of the intersection was originally located and where by practical location it was maintained for 88 years prior to respondents' purchase of the property. Respondents suggest that when the reference to the fence is omitted, a different tract of property was conveyed than when the fence was specifically mentioned in earlier instruments. This argument overlooks the intention of the parties which is paramount in construing a description in a deed. 26 CJS Sec. 100 on Deeds. It also overlooks the fence as the only monument remaining of an early survey. Whether the fence is mentioned or not, the same north line viz. the old fence, has always been meant.

Respondents apparently derive some comfort from the fact that all three surveyors at the trial said that in surveying the property today they would go about it as did Coon and King for the respondents. However, all three surveyors qualified their answers by saying that they do not, as surveyors, try to locate where the courts or the law would fix the property line. (R. 81, 136, 144). In other words, they did not presume to know the law regarding location of old points. Robert Jones, the respondents' surveyor, 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). He further acknowledged that the center of an intersection might change over

a period of 80 years and that this determination of where that point is today would not necessarily be the same as it was in 1875. (R. 82). This court in *Reese v. Murdock*, 121 Utah 517, 243 P. 2d 948, rejected the surveys of two private surveyors and the county surveyor and fixed the beginning point of the property there involved at a point on an old fence line which by practical location of the parties had been the starting point for over 50 years.

Respondents' argument would lead to the result that every time property is sold, the description must be checked with any new monuments which have been established, and if the description no longer fits, the description must be revised. Think of the chaos this would result in .When one owner revises his description to meet new surveys, it usually makes the new description conflict with the description of neighboring property and a whole chain of conflicts is started. It was that situation which Justice Cooley in *Diehl v. Zanger*, 39 Mich. 601, called a "great public calamity".

In conclusion, there is no evidence to support Judge Elton's apparent determination that the starting point of the property was a few feet north of the old fence. The Coon and King survey was tied to a new monument established in 1946, and ignores the only monument of the original survey viz. the old fence. The law requires that the starting point be found as it was originally located. On that question, the old fence is the best and only evidence of where that point was

originally located. Additional reasons why the old fence should be regarded as the starting point are:

1. 13 successive references to it in the chain of title as being the north boundary.

2. Practical location of the starting point on the old fence by the owners thereof for 88 years.

3. As pointed out at Page 22 of appellants' main brief, the description is ambiguous since the center of the intersection as now located will not fit the tie to the 16th corner, thereby increasing the necessity for reference to a point on the ground.

4. The rule of law that an omission in a subsequent description cannot enlarge the boundaries of the land conveyed by deed. (See Page 24 of appellants' main brief).

5. The intention of the parties (respondents and appellants alike) that the fence was the north boundary when the property was bought and sold in December, 1963.

POINT II

NONE OF THE COVENANTS OF THE WARRANTY DEED HAVE BEEN BROKEN.

Respondents claim at Point III of their brief that because they did not get possession of the strip north of the old fence there has been a breach of the covenants. They totally ignore the fact that the law requires

that they prove that the claimant Erektion has paramount title. Respondents blandly assert that Erektion has title by adverse possession or by acquiescence. Respondents want this court to *assume* such facts. This court in Van Cott v. Jacklin, 63 Utah 412, 226 Pac. 460, made the grantee prove that the third party claimant had paramount title by bringing suit against him first. Van Cott v. Casper, 53 Utah 161, 176 Pac. 849. Matters of priority of titles are never *assumed*. They are proved in courts of law when all interested parties are parties litigant. The authorities relied upon by respondents at Pages 9 and 10 of their brief require that the claimant have paramount title. That has never been shown because respondents have never tested Erektion's title. They want this court to save them that trouble and *assume* that Erektion's title is paramount. They even want to assume that Erektion's description fits up against the old fence, which is contrary to their contention that they were conveyed the strip north of the old fence. Also, if respondents are correct that their description included the strip north of the old fence, then appellants and their predecessors in title have been paying the taxes upon it since 1875, and adverse possession by Erektion would have been impossible.

If this court can assume, as respondents urge, that Erektion owns up to the old north fence by the doctrine of boundary by acquiescence, then this court should also assume that appellants owned up to the fences on the east and south of the property, and hence it was

unnecessary for respondents to spend any time or money in obtaining quitclaim deeds from the adjoining owners on the east (Ferguson) and the south (Aoki and Alpaugh).

POINT III

Respondents do not cite any authority whatever in opposition to the authorities in Point V of appellants' main brief to the effect that in a breach of covenant suit, attorney's fees are not recoverable when incurred in clearing clouds from the title. They do not cite any authority contrary to appellants' statement that attorney's fees can be recovered in a breach of covenant action only when the fees were expended in the unsuccessful defense of the title conveyed such as occurred in *Van Cott v. Jacklin*, 63 Utah 412, 236 Pac. 460. Respondents simply ignore these authorities and plead that the title conveyed was "defective", that respondents had to "satisfy" their grantees, and that they were mitigating damages when they obtained the quitclaim deeds from Ferguson, Aoki and Alpaugh. No cases have been cited, however, where attorney's fees were allowed under the guise of mitigating damages. If the court were to so allow them it would be going further than any case found by appellants. This court should adhere to the rule of *Van Cott v. Jacklin* supra, Sec. 57-1-12, UCA 1953, and the cases at 61 ALR 169, and allow fees only when incurred in the unsuccessful defense of the title conveyed. There was

no litigation here and respondents incurred no fees in defending the title conveyed.

Respondents have mistaken the law as to the liability of the grantors-appellants to them. In their brief at Pages 4, 10, 11 and 12, they mention what respondents did to "satisfy" their grantee (Sieverts Brothers) and argue that appellants are liable for that cost. The law does not impose the duty on the warrantor to "satisfy" the grantee or successive grantees. The liability of the warrantor is specifically defined in Sec. 57-1-12, UCA 1953, and nowhere does the word "satisfy" there appear. The duty imposed is to protect against "lawful claims". As this court held in *Utah Savings and Trust v. Stoutt*, 36 Utah 206, 102 Pac. 865, the covenants do not even protect against an unmarketable title. Thus, even if we were to assume that appellants conveyed respondents an unmarketable title, respondents cannot recover anything in this suit for breach of covenants. Their remedy would have been to have sued upon the real estate contract, but such an action would have to be brought before the execution and delivery of the warranty deed. This is because the contract is merged into the deed and thereafter the grantor-seller is liable, if at all, only on the covenants of the deed and the terms of the contract cannot be sued upon. See *Utah Savings and Trust Co. v. Stoutt*, supra, and *Knight v. Southern Pacific Co.*, 52 Utah 42, 176 Pac. 689.

There was no suit between the respondents and

their grantee and hence, there has been no judicial determination of whether the demands of Sieverts Brothers were lawful or not. Clearly, appellants are not liable for costs expended by respondents to "satisfy" Sieverts Brothers.

Respectfully submitted,

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