

1951

Melvin Wood et al v. Briant E. Ashby et al : Brief of Appellants

Utah Supreme Court

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Recommended Citation

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IN THE
SUPREME COURT
OF THE
State of Utah

MELVIN WOOD, LAVORA S.
WOOD, LOY WOOD, ALVIN WOOD,
MINNIE ROSE WOOD, HAROLD
C. WEATHERSTON, ATHELENE
WEATHERSON, CHARLES WOOD
and LEONA M. WOOD,

Plaintiffs, and
Respondents.

vs.

BRIANT E. ASHBY, ISABELL C.
ASHBY, LEROY CHRISTENSEN
and WILMA C. CHRISTENSEN,

Defendants and
Appellants.

WILSON and WILSON
Attorneys for ~~Respondents~~

Appellants

APPELLANTS' BRIEF

FILE

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Clerk, Supreme Court, U

No. 7667

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APPELLANTS' BRIEF

STATEMENT OF FACTS

This is an appeal from a judgment in the District Court of Davis County, State of Utah, rendered by Honorable Charles G. Cowley, Judge. Throughout this brief the parties will be referred to as plaintiffs and defendants as they were in the trial court.

On May 27th, 1949, the plaintiffs filed an action against the above named defendants, and also included Chester R. Ashby and Clara E. Ashby as parties defendant. At the conclusion of the plaintiffs' case, however, the action was dismissed as to the latter, and no appeal has been taken from the dismissal.

In their complaint the plaintiffs allege ownership of the following described real estate in Davis County, State of Utah:

A part of the Southwest Quarter of the Southwest Quarter of Section 36, Township 5 North, Range 2 West, Salt Lake Meridian, U.S. Survey: Beginning at a point 10 rods and 7 feet, more or less, East from the Southwest corner of said quarter section, being 9 feet West of a certain cement well, and running then North 3 rods, thence East 1 rod, then South $\frac{1}{2}$ rod, thence East 49 rods, more or less, to the end of the pipe line, thence South $2\frac{1}{2}$ rods, more or less, thence West 50 rods, more or less, to the place of beginning.

Together with the right of way over a strip of land $\frac{1}{2}$ rod wide adjoining the above described tract of land and said pipe line on the North, subject, however, to a right of way for road purposes across the above described premises.

Plaintiffs base their title upon a certain deed executed and delivered by John Traugott and wife to James G. Wood, a copy of which is attached to plaintiffs' complaint as Exhibit A, and a certified copy of which is in evidence as plaintiffs' Exhibit B.

The deed in question, in addition to the foregoing description, contains the following provisions:

- (1) "In case of repairs to said pipeline by the

Grantee herein, work must be completed in a reasonable length of time.”

(2) “There is also conveyed with said land all of the right and title to all waters, drainage or springs from the South half of the Southwest Quarter of Section 36, the said Grantor, his successors and assigns *granteeing* full protection to said pipeline from trees, *shrubery* or willows or anything that would hinder or obstruct the free flow of water in same, also full protection from barns, *corals*, outhouses or filth of any kind that would make the water unfit for culinary purposes.”

The plaintiffs also allege in their complaint that they and their predecessors in interest have been in adverse possession of the property since February 6th, 1907, and have continually paid taxes thereon. They further allege that the property in question was purchased, and has been maintained, for the purpose of obtaining water therefrom, and allege that the defendants have been guilty of acts tending to pollute the water supply.

The plaintiffs further allege that they attempted to build a fence along the North side of the pipeline, and that the defendants have torn down the fence and continued to cross the land claimed by the plaintiffs.

To get in mind the true picture, it is essential to understand the location of the land in question and its importance to the defendants.

It will be observed from the deed, Exhibit A, and from the description hereinbefore set forth that the strip of land specifically in controversy is about 2½ rods in width and about 50 rods in length. However, the court found (Findings page 4, paragraph 1) that part

of the said $2\frac{1}{2}$ rods is contained in a public highway. As a matter of fact, the tract of land particularly involved in this dispute is only about one rod in width after the part in the highway is deducted. That rod lies between the pipeline referred to and a public ditch on the South extending East and West along the North boundary of the public highway. Immediately North of, or rather included within the North margin of this one rod, is a drain pipe, installed by the predecessors of the plaintiffs to catch underground drainage water which is collected in a small cistern and piped some distance to the premises of the plaintiffs. This drainage pipe lies under the surface of the ground at depths varying from ten feet to twenty-five feet (TR 63). It is conceded by the plaintiffs that the use of this strip of land for right of way purposes does not in any way interfere with plaintiffs' water rights or the quality of their water (TR 63) and it is alleged in plaintiffs' complaint that "The said property was purchased and has been maintained for the purpose of obtaining water from certain springs thereon" (Complaint page 3 paragraph 12).

The property of the appealing defendants lies immediately to the North of the plaintiffs' pipeline. The land of the defendants Ashby is about 275 feet in depth and about 523 feet in length, except, that prior to the filing of this action, the defendants Ashby had contracted to sell to one Mikesell a tract of land 92.8 feet in width and about 210 feet in depth, abutting on the highway to the South, and located substantially in the center of the Ashby property (TR 114). Mikesell was not made a party to the action although he was in possession at the time the suit was filed (TR 114). The only means of access which

the defendants have to the public highway running East and West, South of the land in controversy, is across the one rod strip in question.

The defendants Christensen own a tract of land running 213.25 feet East and West and 119.6 feet in width lying immediately East of the Ashby property and abutting on the narrow strip of land in controversy. Upon this land the Christensens built a home in 1949. They have lived there ever since (TR 96 and 97). They paid the taxes on their land, including that portion of the land in controversy extending in front of their home, for the year 1949. They must cross the one-rod strip of land in order to get to the public highway on the South (TR 102). They have installed, and have used, outdoor sanitation facilities ever since they have been in possession of the property (TR 100). There is no testimony whatever that any use which the Christensens have made of the property has in any way tended to pollute the water source of the plaintiffs, or to interfere in any manner with the water right claimed by the plaintiffs. The conveyance from Ashbys to Christensens includes that part of the one-rod strip extending East and West, and lying South of the Christensen home.

The principal issue in this case simmers down to the respective rights of the plaintiffs and the appealing defendants in the narrow strip of land about a rod wide extending along the Southern boundary of the land owned by the appealing defendants Ashby and Christensen. Obviously, there can be no issue as to the two rods which constitute a part of the public highway. There is no question but that the plaintiffs and their predecessors in interest have piped away certain drainage water over

a long period of years through the drainage pipe installed under the surface of the North boundary of the rod of land involved herein. There is, of course, included in this case the additional issue of use to be made of the land belonging to the appealing defendants which lies entirely North of the pipeline.

All the land referred to in the pleadings lies within the corporate limits of the city of Clearfield (TR 68).

Prior to the time that the appealing defendants Ashby purchased their property in 1947, it had been used as a farm and orchard, except that part on the Southwest corner occupied by the residence and out-buildings now belonging to Chester Ashby. There never has been a fence between the one rod strip and the property to the North. Over a period of years pigs, chickens, cattle and horses were kept on the property to the North in the near vicinity of the pipeline, and animals roamed at large over the property including the property in controversy (TR 34).

The Ashbys and their predecessors in interest travelled East and West over the one rod strip to and from the orchard and other property lying to the East (TR 33; 145).

Since the Ashby and Christensen property is now located in Clearfield City, its greatest value lies in its use for building lots and the construction of homes (TR 113). Such use, of course, necessitates access to the public highway on the South. In order to get to that highway, it is necessary to cross the one-rod strip of land.

The court in its findings found that the plaintiffs

and their predecessors in interest for more than forty years had been the owners and in possession of, not only the one rod in question, but of that portion lying within the public highway (Findings page 2 paragraph 8). The court further found that the defendants Christensen, "have no right, title or interest and no right to use the property claimed by the plaintiffs as a highway nor for a right of way in connection with the use of the property claimed" by them (Findings of Fact page 8, paragraph 1).

In the conclusions of law the court finds that the appealing defendants Ashby are entitled to a right of way for road purposes crossing the land in controversy "at a point approximately one-half of the distance between the East and West point where the gate exists in the said fence."

In the decree the court quieted the title of the plaintiffs in a tract of land $2\frac{1}{2}$ rods in width and 50 rods in length. This tract includes half of the public road in use by the public generally since time immemorial.

The court further decreed that all the appealing defendants are "permanently restrained from molesting or using the property in any manner contrary to the deed dated February 6, 1907," and directing the defendants "to remove any and all items which may pollute the water supply to a reasonable distance from said property." There are, however, no findings or conclusions as to what may pollute or what has polluted the water.

In fact the court went "all out" and ignored the real provisions of the deed of 1907 reserving the right

of way across the land in controversy.

The effect of the decree is to deprive the Christensens of their right of way to the public road to the South; to prevent those who have purchased land to the North and East of the Christensens from using the road which they have heretofore used in gaining access to the public road to the South, and prevent the crossing of the strip of land in question at all except at a point approximately half way between the well and the East end of the strip described in the old Traugott deed. That obviously means that the Christensens and those East and North of them find themselves completely land-locked. It also means that the defendants can not even travel East and West over the strip of land in question as they have always heretofore crossed it. It further means that it is impossible to make any other use of the defendants' land except for farming and that in one tract, because with any subdivision there must be a right of way across the strip in question for each owner. Clearly, the real effect of the court's decision is to land-lock the land of the appealing defendants so as to enable the plaintiffs to make defendants' property inaccessible and comparatively valueless.

STATEMENT OF POINTS RELIED UPON FOR REVERSAL OF JUDGMENT

The points relied upon by appellants for reversal of the judgment of the lower court are as follows:

POINT I

THE COURT ERRED IN ITS CONSTRUCTION OF THE TRAUGOTT DEED (PLAINTIFFS' EXHIBIT B) IN THAT THE COURT PLACED AN UNWARRANTED AND

UNREASONABLE CONSTRUCTION UPON SAID DEED BY LIMITING THE RIGHT OF ACCESS TO THE ONE ROD STRIP OF LAND TO A POINT NEAR THE CENTER OF THE ASHBY PROPERTY, AND EXCLUDING THE APPEALING DEFENDANTS FROM ACCESS TO AND FROM CROSSING SAID BORDER STRIP IN ANY OTHER MANNER WHATSOEVER.

POINT II

THE COURT ERRED IN FINDING THAT THE DEFENDANTS CHRISTENSEN HAVE NO RIGHT OF WAY ACROSS OR RIGHT OF ACCESS TO THE PREMISES COVERED BY THE TRAUGOTT DEED OF 1907.

POINT III

THE COURT ERRED IN ENTERING THE FOLLOWING FINDINGS: No. 8 ON PAGE 2 OF ITS FINDINGS; No. 11 ON PAGE 3; No. 1 ON PAGE 4; No. 2 ON PAGE 4, 5, AND 6; No. 5 ON PAGE 7; No. 1 ON PAGE 8; No. 6 ON PAGE 10; No. 7 ON PAGE 10, BECAUSE SAID FINDING ARE NOT SUPPORTED BY THE EVIDENCE.

POINT IV

THE COURT ERRED IN ENTERING THE FOLLOWING CONCLUSIONS OF LAW: No. 1 ON PAGE 10 AND 11 OF THE FINDINGS AND CONCLUSIONS; No. 2 PAGE 11; No. 5 PAGE 11.

POINT V

THE COURT ERRED IN DIRECTING THE DEFENDANTS TO REMOVE ANY AND ALL ITEMS WHICH MAY POLLUTE THE WATER SUPPLY TO A REASONABLE DISTANCE FROM THE SAID WATER SUPPLY WITHOUT FINDING WHICH ITEMS, IF ANY, EXISTING UPON ANY OF THE PROPERTY WILL OR MAY POLLUTE THE WATER SUPPLY.

POINT VI

THE COURT ERRED IN FAILING TO RESTRAIN

PLAINTIFFS FROM BUILDING A FENCE OR OTHER OBSTRUCTIONS ALONG OR UPON THE ONE ROD STRIP OF LAND.

ARGUMENT

POINT I

THE COURT ERRED IN ITS CONSTRUCTION OF THE TRAUGOTT DEED (PLAINTIFFS' EXHIBIT B) IN THAT THE COURT PLACED AN UNWARRANTED AND UNREASONABLE CONSTRUCTION UPON SAID DEED BY LIMITING THE RIGHT OF ACCESS TO THE ONE ROD STRIP OF LAND TO A POINT NEAR THE CENTER OF THE ASHBY PROPERTY, AND EXCLUDING THE APPEALING DEFENDANTS FROM ACCESS TO AND FROM CROSSING SAID BORDER STRIP IN ANY OTHER MANNER WHATSOEVER.

The proper approach to a question of this character is set forth in the case of *Sakansky, et al, vs. Wein, et al*, (N.H.) 169 Atl. 1. The court said:

“In this state the respective rights of dominant and servient owners are not determined by reference to some technical and more or less arbitrary rule of property law as expressed in some ancient maxim . . . but are determined by the rule of reason. The application of this rule raises a question of fact to be determined by consideration of all the surrounding circumstances, including the location and uses of both dominant and servient estates, and taking into consideration the advantage to be derived by one and the disadvantage to be suffered by the other one. The rule is one of interpretation. Its office is either to give a meaning to words which the parties and their predecessors in title have actually used . . . or else to give a detailed definition of rights created by general words actually used or whose existence is implied by law.”

The trial court appears to have considered more than anything else the use to which the one rod strip next to the highway had been put by the various parties and their predecessors in interest for crop production. Little attention was given to the right of way provisions of the deed or the use of the strip by the defendants for road purposes. Instead of construing the deed the court appears to have been guided by the thought that the law as applied to prescriptive rights was controlling.

The law is well settled to the effect that “a right of way by grant derives no strength from time or occupancy. A grant of yesterday is of equal validity to that of a century past and even though the way may never have been enjoyed, the grant is conclusive of the right.” 17 Am. Jurs. 939, Section 26.

A right of way created by express reservation in a conveyance stands upon the same basis as a grant.

“A reservation of an easement in the deed by which the lands are covered is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands.” Brown et al. vs. Christopher et al, 67 Utah 278, 247 Pac 503.

“Thus, a right of way may be created by a reservation. It has been held that a reservation of an easement in the deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grant of the lands . . .”

“The general doctrine of reservation of easements has been stated as follows: When it appears by the true construction of the terms of the grant that it was the well-understood purpose of the

parties to create or reserve a right, in the nature of a servitude or easement, in the property granted, for the benefit of other land owned by the grantor, no matter in what form such purpose may be expressed, whether it is in the form of a condition, or covenant, or reservation, or exception, such right, if not against public policy, will be held to be appurtenant to the land of the grantor and binding on that conveyed to the grantee, and the right and burden thus created and imposed will pass with the lands to all subsequent grantees; and any grantee of the land to which such right is appurtenant acquires, by his grant, a right to have the servitude easement, or right of amenity, as it is sometimes called protected in equity, notwithstanding his right may not rest on a covenant which as a matter of law runs with the title to his land and notwithstanding it may also be true that he may not be able to maintain an action at law for the vindication of his right." 17 Am. Jurs. page 942-943 Section 29.

It was conceded, of course, by the plaintiffs in the trial of the case, that the defendants Ashby are entitled to a right of way for road purposes over the narrow strip of land covered by the Traugott deed. As a matter of fact, the plaintiffs relied in the trial of the case upon the Traugott deed to establish ownership of the property, and the controversy between the parties should have simmered down to the construction of the Traugott deed. The defendants conceded that the plaintiffs have the water rights contended for, but took the position that they (the plaintiffs) had the right to the unrestricted use of their land not within the Traugott deed, and the right to travel East and West as well as North and South over the narrow strip.

The trial court took the position that the land on

the North as it abuts on the narrow strip extending between the pipeline and the public road is entitled to but one point of access to the buffer strip, and that as a crossing North and South. Furthermore, the court took the position that when Ashby sold part of the land to Christensens that the latter obtained no right of access whatsoever to the narrow strip in question although Ashbys deeded to Christensens the land lying between the Christensen home and the South quarter section line. It follows that any further tracts sold by Ashbys must go to the grantees without any right of access to the highway to the South if the decree stands.

The narrow construction given by the trial court to the rights of the defendants cannot be justified.

One having an easement by grant may assign that easement, and it goes to every portion of the dominate estate assigned, however many the tenants may be. Methodist Protestant Church vs. Laws 7 Ohio CC 21, 4 Ohio CD 562.

In the old but leading case of Hills vs Miller, 2 Paige 245, 3 Am. Dec. 218, it is stated that "as the right is annexed to the estate for the benefit of which the easement or servitude is created, the right is not destroyed by a division of the estate to which it is appurtenant. And the owner or assignee of any portion of that estate may claim the right so far as it is applicable to his part of the property, provided the right can be enjoyed as to the separate parcels without any additional charge or burden to the proprietor or the servient tenement."

It should be kept in mind that at the time of the original grant of the right of way the dominant estate con-

sisted of all of the land immediately North of the narrow strip over which the right of way for road purposes was reserved, with other premises — 40 acres in all. Furthermore, we direct attention to the fact that where a reservation for right of way is made, the grantee in the deed is in effect the grantor against whom the provisions should be construed strictly since the reservation is really a grant for the benefit of the dominant tenement. In construing the Traugott deed this background must be considered.

There is no evidence whatever that there was any established road way across the narrow strip at the time the reservation was made, nor is there any evidence to the effect that there is now an established road running East and West or North and South across the strip in question, except the Christensen road and one farther East. The only evidence is that there is a gate in the fence along the South side of the strip next to the canal and the public highway, and this was used by the Woods to gain access to their pipe line, and by Mikesell to whom Ashbys had contracted to sell a tract of land before the filing of the law suit. There never has been any defined "right of way for road purposes" across the premises.

There must, therefore, be a judicial determination of what is the real extent of defendandts' right of way.

"In cases where the construction of a deed is in doubt the language should be construed favorably to the Grantee. First Baptist soc. v. Wetherall, 34 RI 155, 82 Atl. 1061; Gaddes vs. Pautucket Inst., for Sav., 4 RI 177, 80 Atl. 415, Ann Gas. 1913 B 407. This rule of construction is not altered because the portion of the deed construed grants an easement 19 CJ 907, Section 94." Mateodo et al. vs. Capaldi et al. (RI) 138 Atl. 138, 53 ALR 550,

at 552.

“The determination of the extent and nature of an easement granted or reserved in express terms by deed depends upon a proper construction of the language of the instrument, from an examination of all the material parts thereof, and without consideration of extraneous circumstances, where the language is unambiguous. But as in the construction of deeds generally it is the duty of the court to ascertain and give effect to the intention of the parties, and for this purpose it may consider the situation of the property and of the parties, and the surrounding circumstances at the time the instrument was executed; also a practical construction of the instrument given by the parties themselves by their conduct or admission will be considered in determining the intent of the parties if the meaning of the instrument is doubtful. So in accordance with well settled principles governing conveyances generally, the grant must be taken most strongly against the grantor in cases of doubt.” 19 CJ p 907, Section 94.

“A general right of way appurtenant to a tract of land, not limited in its scope by the terms of the grant, appertains to every portion of the tract, and upon a division of the land a right of way will exist in the owner of each of the lots into which it may be divided. It is not limited to the purposes for which it was originally designed, but is available for any reasonable use to which the property is or may be put. Underwood v. Carney, 1 Cush, 285, 290; Whitney v. Lee, 1 Allen, 198, 79 Am. Dec. 727; Miller v. Washburn, 117 Mass. 371, 374; Moland v. St. John’s Schools, 163 Mass. 229, 237, 39 N. E. 1035; Fox v. Union Sugar Refinery, 109 Mass. 292, 298; Parsons v. New York, N.H. & H.R. Co. 216 Mass. 269, 273, 103 N. E. 693; Brookline v. Whid-

dren, 229 Mass. 485, 118 N. E. 981; Mahon v. Tully, 245 Mass. 571, 576, 139 N. E. 797.” 47 A.L.R. 901.

“The mode in which an easement may be exercised is, in the case of an easement created by an express grant, determined by construction of the grant. The circumstances, however, under which the grant was made are to be considered in determining the construction of the grant. So it is generally a question of construction whether the easement is limited by the use made of the dominant tenement at the time of the grant, or whether the burden of the easement may be increased with any increase or change of use of the dominant tenement”. Tiffany Real Property 2 vols. in One Edition Sec. 321, pp 718-19.

A grant of an easement may be “construed as intended to convey an easement which shall appertain to the dominant tenement, in spite of any changes, therein, and in such case the right to its exercise will not be affected by any such change. It is partly, perhaps, on this principle, that it is generally recognized that, upon the division of the dominant tenement by conveyance to different persons, each of such grantees has the right to use the easement as it was before used by the owner of the entire tenement, without reference to whether this increases the burden on the servient tenement.” Tiffany p 724 Section 323.

The court’s decision has the effect really of limiting the right of way so as to be beneficial to only one narrow tract, and of depriving the rest of land of the use of the way bestowed upon all parts of it under the Traugott grant. It also ignores the fact that the owners of the dominant tenement have always travelled East and West over the Wood strip for its full length.

TESTIMONY ON USE OF ONE ROD STRIP FOR
RIGHT OF WAY PRIOR TO FILING OF
LAW SUIT

Melvin G. Wood, one of the plaintiffs, testified as follows:

“Q Did you ever object to Mr. Clark or anyone else traveling over the land owned by you going East and West?

“A You mean across it?

“Q In going East and West?

“A Going into the farm and out of the farm they always went back and forth that way and used for their own.

“Q And you never objected?

“A No” (TR 87).

Howard Hale , a witness called by the plaintiffs, testified as follows:

“Q Did you travel over the South part of the property while you were working for Harrop?

“A Yes, sir.

“Q You often travelled over that part of the property?

“A Whenever I had occasion to go over that way to look into the orchard.

“Q The whole part of it?

“A Well I never was over the whole thing.

“Q You went anywhere you wanted to go?

“A That is right” (TR 33).

Joyce Harrop, a witness called by the plaintiffs, testified as follows:

“Q Did you travel over the South portion of the property during the time you were there, or those represented by you, during that time did they travel over it?

“A Part of it, yes. We went up through the orchard on it.

“Q You understood there was a right of way covering the whole thing, if you wanted to use it?

“A Yes, that is the way we went back and forth to the orchard” (TR 145).

In the face of this uncontradicted testimony offered by plaintiffs, the court entered a decree barring all the defendants from travelling over the rod strip East and West, and from using said strip at all, except the decree permits Ashbys, and no one else, to cross North and South at one specified point (See Court's decree).

To construe the grant across the wood strip now so as to limit the use of the right of way to one small remaining tract is in equitable and unsound.

“The contention of the defendant that the way was confined to farming uses, and was limited to the purposes for which originally it was designed is unsound. The grant was of a general right of way. It is only where a right of way is acquired by prescription or is narrowed by the terms of the grant to definite purposes that the extent of the easement is restricted by prescription, and is not limited in its

scope by the terms of the grant, it is available for the reasonable uses to which the dominant estate may be devoted.” *Parsons vs. N. Y. N.H. N.R. Co.*, 103 NE 693.

In *American Brass Company vs. Serra*, 132 Atl. 656 at 566 the court said: “The language of the deed indicates a grant of a right of way in general terms. ‘A grant of a right of way in general terms will ordinarily be construed as creating a general right of way capable of use for all reasonable purposes.’ 2 Tiff on Real Property (2d Ed) p. 1332, Sec. 367.”

At page 567 of the same case the law is stated as follows: “. . . This long-constinued nonuser by the owners of the dominant tract of the easement of way created by grant did not extinguish it. As to the absence of a duty on the owner of the dominant tract to use a way in order to maintain title to it, the law has been stated as follows:

‘A person who acquires title by deed to an easement appurtenant to land has the same right of property therein as he has in the land and it is no more necessary that he should make use of it (the easement) to maintain his title than it is that he should actually occupy or cultivate the land. Hence his title is not affected by nonuser, and unless there is shown against him. . . . loss of title in some the ways recognized by law, he may rely on the existence of his property with full assurance that where occasion arises for its use and enjoyment he will find his rights therein absolute and unimpaired. *Adams vs. Hodgkins* 84A 530.’

Again at page 569: “. . . Minor and Wurtz on Real Property, Sec. 108, makes the following general statement of the law: ‘An easement once created is not extinguished by the mere acts of the servient owner in themselves, however adverse they may be

to the enjoyment of the easement by the dominant owner and however clearly they may indicate the desire and intention of the servient owner to put a stop to the use of his land. There must be added to these acts other circumstances showing an intention on the part of the dominant owner to abandon or release the easement.' ”

In *Bowers et al. vs. Myers et al.*, 85 Atl. 860, at 861 the court held: “. . . The authorities establish the proposition that a right of way expressed in general terms is to be construed to include any reasonable use to which it may be put. Thus, in *Jones on Easements* (1898) Sec. 375, it is said: “A right of way granted or reserved in general terms may be used for any purpose reasonably necessary for the party entitled to use it. The fact that the person entitled to such way has used it for one purpose only for a long series of years does not restrict its use to that purpose only. The grant being in general terms, it must be construed to include any reasonable use to which the land may be devoted.’ ”

In the case of *Peck vs. Mackowsky*, 82 Atl. Rep. 199, the grantor owned two pieces of land, only one of which bordered highway. In conveying a piece bordering the highway he reserved “for myself, my heirs and assigns forever a right of passway from the highway on the east to my land west of the railroad as now used.” The remaining land was subdivided into two parts. *The court states at p. 201* “. . . It is clear that the easement of way so reserved was not a personal one, but one appurtenant to the 25 acre tract of which Barber retained ownership. . . . As such, it attached to each and every part of that tract, and the benefit of it passed to the plaintiff, as a successor in title to Barber of the entire tract, and remains in him as the present owner of the 6 acre portion of it.

“For a determination of the character and extent of the easement reserved by Barber, we must look to the language of his deed, and, if that language is in any respect uncertain or ambiguous, then to that language as read in the light of the situation of the property and the surrounding circumstances, to the end that the intention of the parties may be ascertained and given effect. . . . ‘In the construction of a deed or grant the language is to be construed in connection with, and in reference to, the nature and condition of the subject-matter of the grant at the time the instrument is executed, and the obvious purpose the parties had in view.’ Walker vs. Pierce, 38 Utah 9497 . . . ‘A right of way granted or reserved in general terms may be used for any purpose reasonably necessary for the party entitled to use it. . . . The grant being general in terms it must be construed to include any reasonable to use to which the land may be devoted.’ Jones on Easements, Sec. 375.”

In Hewitt vs. Perry (Mass.) 34 N.E. 2d 489, at 491, the court said: “. . . It is true that an easement granted in general and unrestricted terms is not limited to the uses made of the dominant estate at the time of its creation, but is available for the reasonable uses to which the dominant estate may be devoted. Parson vs. N. W., N.H. & N. Ry. 216 Mass. 269, 7, 103 N. E. 693; Mahon vs. Tully, 245 Mass. 571, 577, 139 N.E. 797. See also Rice vs. Vineyard Grove Co., 270 Mass. 81, 169 N.E. 664. It may extend to the benefit of different parcels into which the dominant estate may be divided. Anzalone vs. Metropolitan District Commission, 257 Mass. 32, 36, 153 N.E., 47 A.L.R. 897. Compare Baker vs. Willard, 171 Mass. 220, 227, 50 N.E. 620, 40 L.R.A. 754, 68 Am St. Rep 445 . . .”

POINT II

THE COURT ERRED IN FINDING THAT THE DEFENDANTS CHRISTENSEN HAVE NO RIGHT OF WAY ACROSS OR RIGHT OF ACCESS TO THE PREMISES COVERED BY THE TRAUGOTT DEED OF 1907.

The effect of the court's ruling that the Christensens have no right of access whatever to any part of the one-rod strip, extending in front of their premises, is to hold that where there is an express grant of a right of way inuring to the benefit of a large tract of land abutting on the property over which the right of way is to be enjoyed, and the owner or owners of the original dominant tenement deeds away to one or more grantees portions of the original dominant tenement that the servient tenement is relieved of the original servitude.

That such a holding cannot be justified appears clearly from reason and from the authorities cited under POINT I.

While there is no express mention of a right of way in the Christensen deed, yet Ashbys did execute and deliver to Christensens a warranty deed covering all of the one rod strip lying South of the Christensen premises (Defendants' Exhibit 3) and the Christensens thereupon began to use a right of way across the one rod strip as the only means of giving them access to the public highway to the South (TR 102).

Easements appurtenant pass without mention in deed. *Levine vs. Chintz* (Ia) 8 NW2 735; *Greenwalt vs. McCardell* (Md.) 12 Atl. 2 522.

There isn't any question but that a dominant tenement may be sub-divided and sold without destroying

the benefit of the easement as to any part of land.

“It is a general rule where there is an easement of way appurtenant to a tenement, that the subsequent owner of such a tenement has the right of way as appurtenant to his particular part of the land.” Beginning paragraph of annotation 8 A.L.R. 1368.

A consideration of the nature of the one rod strip of land in question will indicate that standing alone it cannot be used to produce crops or for any other beneficial purpose, except as a means of protecting the plaintiff's water supply.

Melvin G. Wood, one of the plaintiffs, who is the mayor of Clearfield, testified as follows:

“Q You cannot use that little narrow tract, can you?

“A I know it is very narrow.

“Q The only use you could make of it would be just to protect your water right?

“A That is right.

“Q That is the only use you have to make of it?

“A That is right.” (TR 87)

It would, therefore, reasonably appear to have been the intention of the parties to the Traugott deed that the use of the strip of land in question was subject to unlimited use for road purposes travelling East and West as well as North and South, since the unlimited use for road purposes would not interfere with the purpose for which the tract was conveyed to Wood, i.e., to obtain the underground water.

Loy Wood, one of the plaintiffs, testified as follows:

“Q You never used that for any purpose except in connection with the protection of your water there, is that right?

“A That was it.

“Q Your sole purpose there is to get the water and protect your water, isn't it, that is correct?

“A That is correct. (TR 61)

The one-rod strip has really remained as part of the tract to the North.

Lottie Clark, awitness called by plaintiffs, testified as follows:

“Q Mrs. Clark do you ever remember any mark on the property by which you could distinguish where the South part that has been referred to as the Wood property, and the North part are separated?

“A I do not.” (TR 42).

There never has been a fence along the North side of the disputed strip, or any other fence except one to the South of the strip.

Loy Wood, one of the plaintiffs, testified as follows:

“Q Talking about fences, when did you first undertake to build a fence along the North line of the South part of the property, the part shown on the map?

“A The first time I ever tried to on the North side, last Spring, '49.

“Q Just prior to the beginning of the law suit is the first attempt you ever made to put a fence along

there?

“A That is the first time I ever tried to fence it.

“Q Then you undertook to put a fence up north of the well and you started east in that direction?

“A What was that?

“Q You attempted to start a fence North of the well?

“A We followed the line given by the surveyor.

“Q Including the one-half rod to the North?

“A Not including the one-half rod.

“Q How far did you get with your fence?

“A I think half-way up with the posts.

“Q Did you put that along the pipe line or along the half rod that is North of the pipe line?

“A We put it along the pipe line.

“Q That is the first time since 1907 you ever attempted to build a fence along the North line?

“A That is the first time.” (TR 59-60).

Melvin G. Wood, one of the plaintiffs testified as follows:

“Q Up to this time there never has been any mark running East and West across the land indicating the South part that your claim is to separate it from the part to the North.

“A No sir, there has been no fence posts to show where it was to go.

“Q If we go on the land now, there is nothing ob-

vious to indicate that to an individual, is there?

“A No.” (TR 92).

Under that statement of facts, coupled with the other facts hereinbefore referred to, we submit the court erred in barring Christensens from buffer strip completely.

POINT III

THE COURT ERRED IN ENTERING THE FOLLOWING FINDINGS: No. 8 ON PAGE 2 OF ITS FINDINGS; No. 11 ON PAGE 3; No. 1 ON PAGE 4; No. 2 ON PAGE 4, 5, AND 6; No. 5 ON PAGE 7; No. 1 ON PAGE 8; No. 6 ON PAGE 10; No. 7 ON PAGE 10, BECAUSE SAID FINDING ARE NOT SUPPORTED BY THE EVIDENCE.

It is submitted that finding No. 8 on page 2 of the COURT'S FINDINGS is not supported by the evidence since the finding sets it forth as a fact that the plaintiffs and their predecessors in interest now are and for the last 40 years have been the owners and in possession of the strip of land in question. While there isn't any evidence but that the plaintiffs have an interest in said land, neither is there any doubt but that the defendants are entitled to free access to the said property.

The court erred in entering that part of finding 11 in which it is found that the defendants Ashby within a year of the filing of the action either moved upon or permitted others to move upon the strip of land in question certain pig pens. It appears conclusively from the evidence that the Ashbys at the time of the complaint were living in the State of Idaho, and knew nothing about the pig pens complained of (TR 109-110; TR 118), and there is no claim Christensens knew anything about the matter. The only person who could have been responsible was C. R. Ashby, against whom the action was dis-

missed. Neither is there any evidence that the Ashbys cut any holes whatever in the fence to the South.

The court further erred in entering the 2nd paragraph of finding 1 on page 4 in that it is not supported by the evidence.

The court further erred in entering those parts of its findings No. 2 on page 4, 5, and 6 of the court's findings in which the court found that the defendants have not grown crops upon the strip of land in question.

The court further erred in entering its finding No. 5 on page 7 to the effect that the plaintiffs are entitled to have their title to said property quieted as against the defendants and that the defendants are entitled to no relief under their counterclaim. The evidence shows the plaintiffs have an undisputed interest in the land in question.

The court further erred in entering its findings No. 1 on page 8 in which it is found that the plaintiffs have been in undisputed possession of the property in question for many years, and where it further found that the answering defendants "have no right, titled or interest and no right to use the property claimed by the plaintiffs as a highway or a right of way to use the property as claimed in the defendants separate answer". Said finding is directly in the teeth of the plaintiffs own evidence. (TR 87; TR 33; TR 145; TR 86).

The court further erred in entering its findings No. 6 and No. 7 on page 10 because said findings are not supported by the evidence.

It appears from the argument, and from the authorities set forth under Points I and II that it is erroneous to

find that the plaintiffs have been “in open, notorius, adverse, hostile, uninterrupted, peaceable, continuous, exclusive, unmolested and undisputed possession of said property”, and that the plaintiffs are entitled to have their title quieted to all of the property lying South of the pipe line to the entire exclusion of the Christensens from any easements therein and to the exclusion of the defendants Ashby except to the limited pin-point crossing North and South at a designated point .

POINT IV

THE COURT ERRED IN ENTERING THE FOLLOWING CONCLUSIONS OF LAW: No. 1 ON PAGE 10 AND 11 OF THE FINDINGS AND CONCLUSIONS; No. 2 PAGE 11; No. 5 PAGE 11.

The court erred in entering conclusion No. 1 on pages 10 and 11 because said conclusions definitely are against the evidence and definitely against the law applicable to the case as set forth in Points 1 and 2, because the Ashbys are entitled to travel East and West as well as North and South across the premises in question and to have the premises unenclosed and open to access, and the Christensens are entitled to their easement over the property south of the pipe line because they are the owners of part of the land for the benefit of which the easement in question was created. This position is sustained by the evidence and by the law as hereinbefore set forth.

The court further erred in entering its conclusion No. 2 on Page 11 in which it finds that the defendants should be permanently restrained from using the strip of land in question in any manner contrary to the deed dated February 6th, 1907, without construing the said

deed and by concluding that all items which pollute the water supply should be removed without designating any items which, as a matter of law, have polluted or will pollute the water. The court further erred in concluding that the counterclaim of the defendants Ashby should be dismissed because the said defendants are entitled to affirmative equitable relief fixing their rights to use the strip of land in question traveling East and West and North and South, and restraining the plaintiffs, and each of them, from interfering with the exercise of the rights of the defendants in the strip in question.

POINT V

THE COURT ERRED IN DIRECTING THE DEFENDANTS TO REMOVE ANY AND ALL ITEMS WHICH MAY POLLUTE THE WATER SUPPLY TO A REASONABLE DISTANCE FROM THE SAID WATER SUPPLY WITHOUT FINDING WHICH ITEMS, IF ANY, EXISTING UPON ANY OF THE PROPERTY WILL OR MAY POLLUTE THE WATER SUPPLY.

On page 2 of the decree a permanent injunction is entered restraining the appealing defendants “from molesting or using said property in any manner contrary to the deed dated February 6th, 1907, and requiring the defendants to remove any and all items which may pollute the water supply to a reasonable distance from said property.”

There is no finding anywhere to the effect that at the time of the trial of the case there was any “item” of any kind upon the strip of land in question which could pollute or which had polluted the water. The provisions, therefore, are so uncertain and indefinite that no one can determine what the court had in mind. Neither is there

any evidence in the records that any of the appealing defendants at any time ever did any act that could pollute the water.

POINT VI

THE COURT ERRED IN FAILING TO RESTRAIN PLAINTIFFS FROM BUILDING A FENCE OR OTHER OBSTRUCTIONS ALONG OR UPON THE ONE ROD STRIP OF LAND.

It appears positively from the records that the answering defendants, and each of them, have the right to use the strip of land in question for right of way purposes, and that they have the right of access to said strip at any point to travel either East and West or North and South, and that the plaintiffs should, therefore, be restrained and enjoined from placing fences or other obstructions upon or along the tract in question to prevent its use by the defendants. The court's decree all the way through treats the land in question as the absolute property of the plaintiffs, open only to the plaintiffs, while the defendants are in effect treated as trespassing strangers. If the decree is permitted to stand as entered, the plaintiffs will be free to carry out their intentions and build a fence along the pipe line, and maintain a deep trench along the North of the strip, which trench they have constructed since the filing of this action.

The decision of the court can lead only to confusion and repeated misunderstanding. It permits the plaintiffs to act as "dogs in the manger" and take over exclusive possession of the strip of right-of-way land in question, while denying access to the strip to the defendants for a right of way for the property to the North.

This is in the teeth of the fact that it is conceded that the unlimited use of the strip for right of way purposes cannot and will not interfere with the only use it was intended for the plaintiffs to make of the buffer strip of land. The decree is unjust and inequitable, and is in contravention of a reasonable and fair interpretation of the Traugott deed.

CONCLUSIONS

It is the contention of the defendants that this is a case in which the equitable construction of the Traugott deed definitely requires that the court take into consideration not along the bare wording of the deed, but the extraneous facts which must have been considered by the parties to the instrument. Obviously, a one rod strip of land extending between a large tract and a public highway would not be intended by the parties as a means of permitting the grantee to land-lock the owner of the dominant estate who reserved a right of way for road purposes over the narrow strip.

We submit that the conduct of the parties in permitting the land constituting the narrow strip to remain part of the larger area for all practical purposes, except such use as would interfere with the plaintiffs underground water, indicates that from the beginning the right of unrestricted access to the strip was intended to be conferred upon the owners of the land to the North.

We respectfully submit that the defendants are entitled to make the most beneficial use of their premises, and that they are not limited to use the land for farming. We further submit that it is inequitable to construe the rights of the parties so that the Christensens are de-

barred of any right of access whatever to the public highway, and from any access whatever to the right-of-way strip.

We further submit that the decree of the lower court must be reversed and changed so as to enjoin the plaintiffs from interfering with the rights of the defendants in their access to the strip reserved for a right of way.

In substance, it is necessary that the Supreme Court place an equitable construction upon the situation in the light of the entire background coupled with deed.

We submit that the decree of the lower court should be reversed and a judgment entered in keeping with the equities of the situation.

Respectfully submitted,

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and Appellants.