

1952

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

Utah Supreme Court

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Ralph J. Lowe; Attorneys for Respondents;

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IN THE
SUPREME COURT
OF THE

State of Utah **FILED**

JAN 28 1952

MELVIN WOOD, LAVORA S.
WOOD, LOY WOOD, ALVIN WOOD,
MINNIE ROSE WOOD, HAROLD
C. WEATHERSON, 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.

Clerk, Supreme Court, Utah

No. 7667

RESPONDENTS' BRIEF

Ralph J. Lowe,
Attorney for Respondents

STATEMENT OF POINTS

- POINT I-The court did not err in its construction of the Traugott deed (Plaintiff's 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 did not err 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 did not err 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 findings are not supported by the evidence.
- POINT IV-The court did not err 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 did not err 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 did not err in failing to restrain Plaintiffs from building a fence or other obstruction along or upon the one rod strip of land.

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
THE ISSUE	2
THE ARGUMENT ON:	
Appellants Point I	3
Appellants Point II	15
Appellants Point III	15
Appellants Point IV	22
Appellants Point V	23
Appellants Point VI	23
CONCLUSION	24

CASES CITED

Adams vs. Hodgkins 84 Atl. 530	9
American Brass Company vs. Serra, 132 Atl. 636	9
Big Cottonwood Taylor Ditch Co. vs. Moyle, 159 P. (2) 596, 174 P. (2) 148	11
Bowers, et al. vs. Myers, et al., 85 Atl. 860	10
Cullison vs. Hotel Seaside, 268 P. 758	11
Eastman vs. Church, 219 SW (2) 406	11
Hewitt vs. Parry, 34 NE (2) 489	8
Minto vs. Salem Water Light & Power Company, 250 P. 722	11
Methodist Protestant Church vs. Laws, 4 Ohio CS 561	10
Moorhead vs. Snyder, 95 Am. St. Reg. 323	5
Nielsen vs. Sandberg, 141 P. (2) 696	10
Peck vs. Mackowsky 82 Atl. 199	9
Sankowsky et al. vs. Wein et al., 169 Atl. 1	8

TEXTS CITED

Goddard's Law of Easements, Berrett's Ed. 351	4
17 Am. Juris 988-9	7
991-2	8

STATUTES CITED

Vol. 6 Utah Code Annotated 1943	
Sec. 104-2-5	
104-2-6	
104-2-7	
104-2-9	
104-2-12	

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RESPONDENTS' BRIEF

STATEMENT OF FACTS AND THE ISSUE

The Brief of the defendant and appellant states the facts of the case adequately with the further explanation that Mikesell was not made a party to the action as

Mikesell's property had been purchased by one of the respondents. As to the taxes as mentioned on page five of plaintiffs' brief, it was stipulated by the parties in open court that the taxes had been paid by the respondents since 1907 on the strip of property in question the property from the year 1933 until the present time. The taxes on this property had been paid double since 1933. (Tr. 7).

The principal issue as presented by the appellants "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." The nature and effect of the Court's Findings, Conclusions and Decree as presented by the appellant on pages 6 and 7 of appellants' brief are somewhat in error in that that portion of the property lying within the public highway was specifically excluded in Findings of Fact and Conclusions of Law on page four paragraph one.

The appellants state that the court found further that the defendant Christensens "have no right, title or interest and no right to use the property claimed by the plaintiffs as a highway or for a right of way in connection with the use of the property claimed." We find in the Decree that "It is further ordered, adjusted and decreed that the said defendants have no estate, right, title or interest whatever in to said land and premises except as stated in said deed and that the title of plaintiffs is good and valid." (Page 2 of Decree). This gives the defendants the right to the right of way for road purposes across the property at a point approxi-

mately one-half the distance between the East and West points where the gate exists in the said fence. The appellants further state on page 7 of their brief that there are no findings or conclusions as to what may pollute or what has polluted the water. On page 3 of the Findings of Fact, the court found "that the defendants Briant E. Ashby and Isabell C. Ashby have within the year before the filing of this action either moved upon said property or permitted the moving thereon of pigpens * * * and that one said pigpen has been placed immediately adjacent to the well house which said pigpen was completely or nearly completely upon the above described property."

Further, the appellants say that the Decree in effect deprives those who purchase land to the North and East of Christensens from using the road which they have heretofore used in getting access to the public road to the South and prevents the crossing of the strip of land in question at all except at a point approximately one-half way between the well and East end of the strip described in the old Traugott deed. That this means that the Christensens and those East and North find themselves completely landlocked. This is not true in that parties North could use the right of way at the half-way mark. Christensens' property is very near to the East end of the respondents' property. Christensens' home is at least forty-three feet back from the road and is well back from the Wood property.

POINT I

The Respondents contend that the findings and decree which limit the right of way over the Wood property to the location "at a point approximately one-half of the

distance between the East and West points where the gate exists in the said fence” is proper and is supported by the evidence. Appellants contend that they are entitled to use respondents’ land as they see fit going East and West on the land as well as making many roadways from North and South. Point one upon which the appellants request a reversal of judgment is concerned with the construction of a deed. We quote from the Traugott deed:

“Reserving, however, to said grantors a right of way for road purposes *across* the above-described premises.” (*italics ours*).

The location of that crossing is shown by the only gate in the South fence which was approximately one-half way between the East and West points and from that gate across the land was the only evident roadway, there being no evidence of a road or travel East and West on the said property. Respondent had never objected to the use of this right of way across the property. We quote the following law, to-wit:

“It is said in *Ritchey v. Welsh*, 149 Ind. 214, 48 N.E. 1031, that: ‘When the way is once selected it cannot be changed by either party without the consent of the other’: Citing *Nichols v. Luce*, 24 Pick. 102, 5 Am. Dec. 302; *Holmes v. Seely*, 19 Wend. 507, 510; *Morris vs. Edgington*, 3 Taunt, 24; *Goddard’s Law of Easements*, Bennett’s Ed., 351. See, also, 2 *Washburn on Real Property*, 4th ed., 306; *Washburn on Easements and Servitudes*, 4th ed., 258, 263.

‘Where the right to an easement is granted without giving definite location and description to it, the

exercise of the easement in a particular course or manner, with the consent of both parties, renders it fixed and certain, and the dominant owner has no right afterward to make changes affecting its location, extent, or character': 10 Am. & Eng. Ency. of Law, 2d Ed., 430 and cases cited in note 3'' 95 Am. St. Rep., Page 317.

“1. Change of Location.—When a private right of way has been once selected and located, its location cannot be changed by either party; neither the owner of the land nor the owner of the easement, without the consent of the other party: *Ritchey v. Welsh*, 149 Ind. 214, 48 N.E. 1031; *Manning v. Port Reading R.R. Co.*, 54 N.J. Eq. 46 33 Atl. 802; *Galloway v. Wilder*, 26 Mich. 96. If a right of way is granted without any designation of the place, it becomes located by usage for a length of time, and, after being so located, it cannot afterward be changed by the grantor without the consent of the grantee: *Wynkoop v. Binger*, 12 Johns. 222. The location of a private way determined by agreement, usage, or acquiescence cannot be changed by one party without the consent of the other: *Kurmuller v. Krotz*, 18 Iowa, 353. The grantee of a right of way has no right to change its location as often as he may think necessary or at will: *Moorhead v. Snyder*, 31 Pa. St. 514. 95 Am. St. Rep. 323.

Appellants have claimed that Christensens have used a road extending from their house to the highway. The Christensens did not buy their land nor build their house until after appellant Briant E. Ashby bought the property in 1947. There is no evidence that the pre-

decessors in interest to Ashby ever claimed any right of way except through the one gate. The testimony of the witness Joyce Harrop, who was one of the owners from whom the appellants purchased, testified that he had traveled East and West to the orchard. Upon being asked where he traveled, he pointed on the plat to an area North of the pipeline and the property owned by Woods. (Tr. 151). The intention of Traugott in his conveyance to Wood to give a fee simple to the property with the reservation of the right of way was evidenced by the testimony of David Warren who had lived in Clearfield for sixty-nine years and who had worked for Traugott and who had been informed by Traugott that he was to cultivate the Traugott land to the pipeline but not to go South of there because the land to the South belonged to Jim Wood. (Tr. 133). Mr. Warren is a disinterested party and his testimony indicates that the intention was to give no more easement to the property but an absolute ownership to James G. Wood.

Appellants cite case after case to the effect that “the subsequent owner of a part of such tenement has the right to use the way as appurtenant to his particular part of the land. They contend that purchasers from Ashby have the benefit of the reservation for road purposes. This is correct, but it is a right to use for road purposes *that particular* roadway or right of way through the gate and across the property. The reservation cannot be extended by giving as many rights of way as Ashby and his successors may desire.

“Thus where a deed conveys an easement over certain land but fails to locate exactly the line over which the easement extends, parol evidence has been

held admissable so to locate it. The general rule is that the location of an easement once selected cannot be changed by either the land owner or the easement owner without the other's consent. The reason for this rule is that treating the location as variable, would incite litigation and depreciate the value and discourage the improvement of the land upon which the easement is charged. Accordingly, a definite location of an easement determines and limits the right of the grantee so that he cannot again exercise a choice * * * Although the owner of an easement, such as a right of way, may do whatever is reasonably necessary to make it suitable and convenient for his use, he is not entitled to deviate therefrom." 17 Am. Juris. 988-9.

As a general rule, the location of a way of necessity may be determined by an agreement which need not be in writing, but may be inferred from words or conduct, for example, where parties build a line fence up to the side of a road, but do not build across the road, setting a bar or gatepost on the side thereof, they will be held to have agreed upon such road as the location of a way of necessity." 17 Am. Juris. 991-2.

In the Wood case we have not only a gatepost but a gate. The location has been fixed.

"There is a rule, however, to the effect that the court should not change the location of a way after such has been fixed. * * * As already stated, with respect to easements in general, it is well settled that when the location of a way of necessity is once de-

fixed, both parties are bound by the lines so fixed; the owner of the dominant estate is not entitled to use any other way. The situation is the same as if there had been an express grant of the particular way. * * * Moreover, after the location of such a way has been fixed, a court will not change it. * * * ”
1 7Am. Juris. 991, Sections 94 & 95.

In Hewitt vs. Parry, 34 N.E. (2) 489 cited by the appellants, we are concerned only with one easement and no others.

In Sakansky et al. vs. Vein et al., N.H. 169 Atl., 1 also cited by the appellants as the law, allow us to read further in this case and on page three the court says:

“The rule merely refuses to give unreasonable rights or to impose unreasonably burdens, when the parties, either actually or by legal implication, have spoken generally.”

Paragraph 6 on Page 3 reads as follows:

“In the case at bar the parties are bound by a contract which not only gave the dominant owner a way across the servient estate for the purpose of access to the rear of its premises, but also gave that way definite location upon the ground. The use which the plaintiff may make of the way is limited by the bounds of reason, but within those bounds it has the unlimited right to travel over the land set apart for a way. *It has no right to insist upon the use of any other land of the defendants for a way, regardless of how necessary such other land may be to it and regardless; of how little change or inconvenience such use of the defendant's land might oc-*

casion to them.” (italics ours).

The above case was one where a deed gave a definite right of way 18 feet wide over some land in 1849. The case was decided in 1933. The land owner desired to build an arch and then

“Lay out a new way over level ground around the westerly end of the new building * * * to the same point on the dominant estate as the old way.”

The master permitted both changes. The Supreme Court states that the road could not be changed.

We quote from *American Brass Company vs. Serra*, 132 Atl. 656 which is also cited by the appellants.

“The company in so doing used, without objection or hindrance, a passageway five or six feet wide over the servient tract. Since that time (1888-89) (these figures are not in the quote) this way has been clearly visible as evidenced by a well-defined course of wheel tracks * * * and by bars across the tracks at the entrance into the highway. As the grant of the passway did not fix the route, its location was apparently determined and thus established, in accord with the reasonable convenience of the dominant and servient owner, by practical location and use by the grantee, acquiesced in by the grantor at the time.”

Adams vs. Hodgkins 85 Atl., 530, is cited by the appellants. This case deals only with the question of ways necessity and abandonment. There is no similarity to the case at bar. *Peck vs. Mackowsky* 82 Atl. 199 is cited by the appellants to show that the reservation for

right of way annexed to two parcels of ground. May it be pointed out, however; that the court held in that case that the two parcels of ground had a right to use the *one* passageway. In *Bowers, et al. vs. Myers, et al.*, 85 Atl., 860, no reference is made to additional right of ways.

Methodist Protestant Church vs. Laws 7 Ohio CC 21, 4 Ohio GS 562 cited by appellants merely points out that the tenants of a dominant estate may use *the* right of way however many the tenants may be. I call your attention to the bottom of page 13 of plaintiffs' brief in quoting the above which among other things states:

“Provided the right can be enjoyed as to the separate parcels without any additional charge or burden to the proprietor or the servient tenement.”

We find no case, however, giving separate easements. It might be added that

“In construing any grant of a right of way the use in connection and extent is limited to such as is reasonably necessary and convenient to the dominant estate and as little burdensome as to the servient estate as possible for the use contemplated.” *Morris vs. Blunt* 161 P. 1127.

Also see *Nielsen vs. Sandberg*, 141 P. (2) 696 which holds that:

“An easement being a burden on the land which it traverses is limited to use by which it was acquired and to the person who acquired it or for the benefit of the property for which it was acquired.”

A Utah case in point says:

“The extent of an easement is determined by the

grant and once the character has been fixed no material change or enlargement of the right acquired can be made if thereby a greater burden is placed on the servient estate." Big Cottonwood Taylor Ditch Co. vs. Doyle 159 P. (2) 596 as modified 174 P. (2) 148.

"Failure to definitely locate and describe an easement does not give grantee right to use servient estate without limitation." Cullison vs. Hotel Seaside, 268 Pac. 758. In this same case "over grantor's land" was held to mean in a convenient, *direct* way.

Minto vs. Salem Water Light & Power Company, 250 P. 722; an Oregon case, held that the extent of the easement depended upon the proper construction of a grant without consideration of extraneous circumstances where the language was unambiguous.

As to how the deed should be construed, Eastman vs. Church 219 S.W. (2) 406, a Kentucky case, holds that if an ambiguity or awkward provision in a deed including reservation or exception is capable of two possible constructions one of which will be more favorable to grantee and the other to grantor all doubts are reserved in favor of grantee and the deed so construed. May we point out that Woods predecessors in interest were the grantees in the Traugott deed.

Appellant states that the court's decision limits the right of way so as to be beneficial to only one narrow tract. This is not true. All the appellants need to do is use a portion of his own land as a roadway down to the right of way provided in the Decree of the court and as provided by the Traugott deed. It is apparent however, that the appellants prefer to travel over respond-

ents property destroying the use of that land rather than to apportion a small portion of their own land for a roadway. As evidence that consideration was given to using their own land for roadway we find that shortly after this property was purchased by the appellants he had contacted a Mr. Smith and a Mr. Allred and arranged for a building plan and arranged for a street to go through the center part of the land owned by the Ashbys lying North of the pipeline. See testimony of Mr. Briant Ashby. (Tr. 122). May I quote from his testimony:

“Q. At one time, Mr. Ashby, you were attempting and you did arrange for a building plan, and you did arrange for a street to go along through the center part of the land lying North of the pipeline didn't you?

A. Yes sir.

Q. I take it you went so far as to employ Allred to build that building.

A. Yes sir.

Q. At that time you had a road running in an irregular line running down through the property at the center.

A. I had about three different plans.

Q. And you had a building facing this proposed new street?

A. Yes sir.

Q. And you had those building lots extended as far South and only as far South to the pipe line didn't you?

A. Yes sir.

Q. And you told Mr. Smith and Mr. Allred that you were only to extend the lots to the pipeline didn't you?

A. Providing there was an agreement made on that street and on that right of way." (Tr. 123).

Calling your attention to plaintiffs' Exhibit "F". As shown by the exhibit, the appellants had access to highway 91 as their property adjoined the said highway on the West. The proposed roadway through appellants property would have given them ingress and egress to highway 91. Since that time, however, apparently appellant has sold all but approximately three acres. (Tr. 115) including that property abutting on highway 91 and is now asking for a separate right of way for each lot which he has sold or might sell. It has been his own doing if he has cut himself off from access to highway 91. He and the others who have purchased or may purchase from him do have a right of access to the road on the South over the designated right of way. The appellants were all informed of the Woods claim to the property as shown by the testimony of Briant Ashby (Tr. 125 & 126) and LeRoy Christensen as shown by his testimony on Tr. 103 and 104 in which he testified that Loy Wood and Melvin Wood had told him they owned property in front of his proposed building spot. He was so informed at the time he contemplated building. The fact that the Woods owned the property was of public record. At the time Briant Ashby contemplated the purchase of the property the evidence indicates that he was informed by Joyce Harrop (Tr. 142 & 150) of the Wood's property. This was sup-

ported by the testimony of Howard Woods (Tr. 29 and 30). Briant Ashby was informed by Woods of their claim shortly after his purchase. (Tr. 125 & 126).

The predecessors in interest to Ashbys never made any claim of right to the property nor to a right of way other than that indicated by the gate in the fence which was a right of way across the property. Witness the testimony of Joyce Harrop. Mr. Harrop testified that he moved grapevines and peach trees at the request of the Woods. (Tr. 138-139). He also testified that he made no claim to the strip of land at the time he owned the Ashby property. (Tr. 140). This man knew what he was selling to the Ashbys. The deed which he signed did not contain that property which he intended to sell to Ashby. He had pointed out that which he intended to sell to Ashbys but the deed was prepared by the bank and this witness signed the same, probably unaware of what the deed conveyed.

Alvin Wood testified that he used to visit the Wood property weekly or more often during a certain period of time to check on it and clean it up. (Tr. 156). Melvin Wood testified that he had worked on the property with his father (Tr. 78) who was predecessor in interest to the current owners. He testified that the right of way at the gate was the only one used. (Tr. 86). Loy Wood testified that his father cultivated the land (Tr. 48 and 49) and that Clark, another predecessor in interest, asked permission to cultivate on occasion. (Tr. 50). That they stopped "Brother Clark" from farming it when tomatoes were being watered in such a manner as to seep through into the well. He also testified that he helped build the first fence (Tr. 52) and that the

second fence was built by Harrops after obtaining permission.

Does this testimony and this evidence indicate anything other than a pleasant relationship between the dominant and servient owners with no claim by the dominant owners to anything other than the evident right of way.

POINT II

A more careful examination of the findings of the Court shows that contrary to defendant's statement that the court found "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 findings of the court were in fact that the Christensens had no right to use the property as a highway and for a right of way in connection with the use of the following described real estate owned by these answering defendants" (A use they had asserted in their counterclaim.) The described real estate describes the property of the defendants Christensen along with the property owned by the plaintiffs immediately South of Christensen's property. Thus the court deprives the defendant Christensens of a right of way across the property directly South of Christensen's own property but Christensen is not deprived of a right of way at a point where the old gate is and these defendants and any who may purchase from the defendants would have a right to use that particular right of way.

POINT III

As to point three of appellants' brief it is submitted that these findings which are objected to were supported

by the testimony of Melvin Wood. (Tr. 78) David Warren, (Tr. 133) Joyce Harrop, (Tr. 138, 139 and 140) Alvin Wood, (Tr. 156) Howard Hale, Lottie J. Clark, (Tr. 38 & 40) Loy Wood, (Tr. 38 & 39 and Tr. 50, Tr. 52) David S. Warren, (Tr. 133). The testimony of those named above other than the Woods and Warren was to the effect that they made no claim on the property. They were all the predecessors in interest to the Ashbys. The Wood testimony all substantiated the fact that they claimed the property as their own since the purchase by their father, who was their predecessor in interest. The testimony of Mr. Warren showed that after the time of the conveyance from Traugott to Wood that Traugott made no claim to the property. As a counterclaim these two defendants plead that they were in the open, notorious, adverse, hostile, uninterrupted, continuous, exclusive, unmolested and undisputed possession of the said property, including this property lying South of the pipeline. The dependants, LeRoy Christensen and his wife, Wilma C. Christensen, filed a separate answer based upon the same defense as Briant E. Ashby and Isabell C. Ashby claimed and in addition plead that they had built a house on the property in question, but the testimony of Mr. Christensen showed that his house was well North of the pipeline.

May we call the court's attention to Title 104, Article 2 of the Utah Code Annotated, 1943. We quote 104-2-5, as amended, the amendment not referring to actions of this kind.

“Seisin or possession within Seven Years Necessary. No action for the recovery of real property or for the possession thereof shall be maintained, unless

it appears that the plaintiff, his ancestor, grantor or predecessor was seised or possessed of the property in question within seven years before the commencement of the action.”

Likewise, 104-2-6 states that no defense or counterclaim shall be effectual unless it appears that the person interposing the defense or counterclaim or the predecessor or grantor was seized or possessed of the property in question within seven years.

We next call the court’s attention to 104-2-7 to the effect that the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law, and the accupation of the property by any other person shall be deemed to have been under and in subordination to the legal title unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action.

104-2-9 shows what constitutes adverse possession under a written instrument, and 104-2-12 reads as follows:

“In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law.”

May we consider the evidence to show which party has been in the open, notorious and adverse possession

of the property lying South of the pipeline. In 1907 James G. Wood was granted this property by warranty deed from the Traugotts. There was no dispute regarding this statement. Various conveyances were made of the property in question after 1907, and all conveyances were made subject to the James G. Wood deed. In 1932 the Clarks deeded part of the southwest quarter to the Harrops but did not except the Wood land, and the deed did not make any reference to the well, pipeline, water rights or the land South of the well nor to the one-half rod immediately north of the pipeline.

In the trial of the case the appellants at no time denied the rights of the plaintiffs to the water rights, the pipelines, the one-half rod right of way and the well. The deed in question, therefore, from Clarks to the Harrops clearly and without question included rights possessed by the Woods and not denied by the defendants. Mr. Clark is dead, but Mrs. Clark on the witness stand testified that the Clarks did not claim any ownership in the water system nor in the land South of the pipeline. She testified on cross examination that they had cultivated at various times the land South of the pipeline but that they always acknowledged that it was owned by the Wood family.

The Harrops owned the property from 1932 until they sold it to Mr. and Mrs. Ashby in 1947. The exact description was used in the Harrop-Ashby deed that had been used in the Clark-Harrop deed. Mr. Joyce Harrop was subpoenaed by the appellants but was called by the respondents and testified that the Harrops had the property surveyed shortly after they had purchased it in 1932, and that they found that the Woods had the water

rights and the one-half rod right of way North of the pipeline, and that the Woods were the owners of the land South of the pipeline and surrounding the well. He testified that during all of the time from 1933 to 1947 the Harrop family recognized and admitted that the Wood family owned the said land and also had the water rights.

Then we have Briant Ashby testifying that he knew nothing about the Wood claims until he purchased the property in 1947. He testified that he had no conversation with Joyce Harrop before he purchased it. And yet on cross examination, after great hesitancy he finally admitted that Joyce Harrop and he had walked over all of the land in question and that Mr. Harrop had shown him the property that he was purchasing. How could Joyce Harrop and Briant Ashby walk over all of this ground without Ashby seeing at least the well and without his observing that at least the great majority of the orchard which he was buying extended only to a distance north of the pipeline?

On the extreme East of the property where Christensen's house is located, Mr. Christensen testified that he removed three peach trees from in front and a trifle to the West of his house. To us it appears that the testimony of Joyce Harrop is amply supported. When he testified that he and his family at all times between 1933 and 1947 recognized that the property belonged to the Wood family, he was testifying against his own interest. Counsel for the defense recognized this testimony against interests when he asked permission to make the Clarks and the Harrops parties defendants. If there were any adverse possession, it did not commence until after the Ashbys purchased the ground, and Briant Ashby testified

that he only cultivated the ground South of the pipeline for one year. That was in 1948. Considering the Utah law regarding adverse possession, we can see how the Ashbys failed in their defense on that ground. This evidence supports Respondents' title not only by legal title but by undisputed possession since 1907 until 1948.

As to the error alleged in second paragraph of finding 1 on page 4, the finding was certainly supported by the evidence. The appellants maintained that the fence was built by them and their predecessors in interest. The evidence, which was undisputed, showed that the first fence was built by James G. Wood and his sons. (Tr. 152). His sons are now the respondents. That fence continued to stand there until during Harrops' ownership of the land North of the pipeline. During the latter part of their ownership they asked permission of the Wood family to change the fence and move the same Southward in order to overcome the danger to animal and human life. (Alvin Wood Tr. 156 and 157). The distance between the ditch, which was known as Swift Creek, and the existing fence was narrow, and it was recognized as a dangerous place. The fence was then moved under permission of the Wood family, and it was placed approximately three feet onto the highway. The ditch has since that time been piped. The testimony of predecessors in interest to Ashby, Joyce Harrop and Lottie J. Clark show that they made no claim to the property.

The question of the double payment of taxes was settled by stipulation at the commencement of the trial.

The finding number 2 on page 4 is substantiated by the testimony of the predecessors in interest to Ashby

who testified that if they grew crops it was permissive and that it was often interrupted by the Woods. Joyce Harrop, (Tr. 138-139) Lottie J. Clark, (Tr. 40). The same testimony goes to prove the further findings on page 5 and 6 along with the testimony of the Woods to the effect that they had built the fence themselves. As to the findings number 5 on page 7 respondent finds it difficult to reconcile appellants statement that "the evidence showed the plaintiffs (respondents) have an undisputed interest in the land in question." The respondents certainly have an interest but the same was being disputed by the appellants to the extent that they were putting further right of ways across the property and were allowing pig pens to be moved from their land onto the Woods property and the appellants removed the fence which the respondents attempted to build to protect their property. The mere fact that this suit had to be filled to protect against his claim indicates that the appellants were asserting some claim to the property.

The findings number 1 on page 8 is supported by the testimony of the predecessors in interest in which none claimed any right or title to the property other than the right of way across the property as provided by the deed.

As to the errors alleged in findings number 6 and 7 on page 10, we find from the testimony of the appellant Christensen himself that he was informed of the rights of the respondent by Loy and Melvin Wood when "he was contemplating building" (Tr. 103-104) also the ownership of the Woods was a matter of public record. As to claiming an open, notorious, adverse, hostile, uninterrupted, peaceable, continuous, exclusive, un-

molested and undisputed possession of said property the evidence shows that up until the time of the purchase by Ashbys such were the existing conditions. At the time of the purchase by Ashby the respondents informed him of their property right. They had an attorney write the appellants informing them of the property rights, as testified by Briant Ashby. (Tr. 126). When these means were not sufficient to keep the appellants from interfering with the property respondents commenced building a fence which was ripped out by the defendants. Respondents used every means short of force to protect their rights.

What further action need a land owner take to inform someone of his rights to the land. The Woods had every reason to believe that they could get along with the adjoining land owners as they had done for many, many years. When they found that the above means were insufficient to protect their rights, a suit was filed.

POINT IV

The evidence supporting the conclusions of law have been discussed elsewhere in this brief. It can only be reiterated that the right of way as established by the court was the right of way which had been used since the original conveyance by Traugott to Wood. It has been established that there cannot be a new and different right of way created for each new piece of property.

The error claimed in conclusion two on page 11 avers that there has been an improper construction of the deed. This also was discussed elsewhere and it can only be repeated that the deed could in no way be con-

strued to be a right to travel unrestrained in any direction over the Woods property. If this had been the intent the Woods would have been given merely an easement a right to the water but would not have been given a warranty deed with a right of way to one-half rod on the North. As to the pollution it would be impossible to designate all items which may pollute the water. Until the advent of the Ashbys, reasonable use of the property North of the pipeline was made by Ashby's predecessors in interest and there was no quarrel. The respondents were reasonable in their requests and the owners of the property adjacent were reasonable in their acquiescence. Upon the advent of the Ashbys, however, they immediately began to misuse and abuse the Wood property as well as the property adjacent in such a way that it may pollute the water supply.

POINT V

As to point V of appellants' brief there was evidence of pig droppings, pig pens and other items brought adjacent to the well house and upon the land belonging to Woods, with manure several inches deep. This certainly was evidence of an item which could pollute the water.

POINT VI

As to point VI, the court does not treat the appellants as trespassing strangers completely. They treat them as trespassers who have a right to utilize a right of way across the property, but who have gone further than utilizing the right of way. They have allowed filth to be moved upon the Wood property or upon their own property so adjacent to the Woods well property as to

pollute the waters and they are claiming innumerable rights of way. There is no reason why the Woods cannot build a fence along the North side of their own property leaving a road across for ingress and egress as required by the court's findings and Decree. There was no evidence brought before the court of a deep trench on the North of the strip. Such a trench however was constructed since the suit to ward away excessive irrigation waters used by defendants Ashby and Christensen. The trench has been filled in by Christensens as soon as it is dug however. As this trench is on the property owned by the Woods and as long as this does not interfere with the right of way given, it certainly is a proper use of their own property. This is not a question of respondents acting as "dogs in the manger" as maintained by the appellants; rather, it is a question of the owners right to utilize his own property without interference from trespassers who desire to utilize his neighbor's property for road purposes in order that it will not be necessary to utilize his own.

CONCLUSIONS

The testimony, the original deed, and the accounts of the parties establish the fact that the Wood family is the owner in fee of the property lying South of the pipeline; and that they have a right of way over the one-half rod of land immediately North of the pipeline; and that they are entitled to continue the use of uncontaminated water for the eight residences it supplies. There is, of course, the right of way (not rights of way) in the present owners of the land to the North. The evidence has shown that appellants had ample means of ingress and egress to their property through highway 91 which abutted on the

West or over the regular right of way on Woods property. That they had information of the Woods ownership of the property. That they had in fact platted their property showing the means of ingress and egress to be from highway 91 or from the North. That in the face of this apparently they have sold their property abutting on highway 91. That they have sold out other property reserving approximately three acres for themselves. That they have means of ingress and egress to this property through the right of way over the Wood property as designated by the lower court. That they now desire to make a mockery of the Wood ownership of their property by having unlimited right of travel back and forth over this property. The fact that the Woods have desired to keep this property free of anything other than the one right of way makes good sense in their utilization of the property. Proper maintenance of the pipe and of the water system may require deep excavations all through Woods property. Driveways, right of ways, roads, excessive watering of lawns all would tend to make the utilization by Woods of the property difficult. Excessive watering of tomatoes by Mr. Clark who had been permitted to plant tomatoes on the property, caused sufficient troubles that "Brother Clark was forbidden to plant any more tomatoes thereon.

The history of Utah is, as in all the arid Western territory, a history of the development of the water supply and the development of the state has been in direct ratio to the water supply made available. Land in the West can only be utilized when there is water to supply it. The Mayor of Clearfield (Tr. 85) testified that they could not supply culinary water for the one hundred sixty acres of

ground to which this spring water runs. To let this water became polluted and unaccessible is not in keeping with the culinary water requirements of this territory. To allow many rights of way to develop from one right of way is inconsistent with the fee simple ownership of the respondents to the strip of land in question.

We submit that the judgment and decree of the lower court should be sustained.

Respectfully submitted,

RALPH J. LOWE

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