

1969

## **Alvin A. Mawson v. J. G. Investment Co. : Respondent's Brief**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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ALVIN A. MAWSON,

*Plaintiff and Appellant,*

vs.

J. G. INVESTMENT CO.,

*Defendant and Respondent.*

Case No.  
11658

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## RESPONDENT'S BRIEF

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Appeal from a Judgment of the Third District Court  
of Salt Lake County  
Honorable Marcellus K. Snow, Judge

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FILED

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State Supreme Court, Utah

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} Case No.  
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## RESPONDENT'S BRIEF

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### STATEMENT OF KIND OF CASE

This is an action by appellant, hereinafter referred to as "plaintiff," against J. G. Investment Corporation, respondent, hereinafter referred to as "defendant," for an order requiring defendant to remove obstructions placed in a roadway and to remove a fence at the end of a right of way which divides defendant's property from adjacent property in question.

## DISPOSITION AT TRIAL COURT

The case was tried before the Honorable Marcellus K. Snow and after the trial the Court made Findings of Fact and Conclusions of Law that plaintiff had no right, title or interest in and to the roadway and gave a judgment of dismissal.

## RELIEF SOUGHT ON APPEAL

The defendant seeks to have the trial court's Judgment of Dismissal affirmed.

## STATEMENT OF FACTS

The defendant agrees with the Statement of Facts as set forth in plaintiff's Brief with exception of the final paragraph which defendant contends is erroneous and with the exception that said statement does not set forth sufficient of the facts to adequately inform the court of the real matter in dispute.

The facts clearly show that the defendant has acquired all of the separate rights in the right-of-way and the plaintiff has no remaining right in the property described.

The defendant admits that the structures as shown in Exhibits P-3 and P-4 protruded into the right-of-way as described some 12 to 18 inches on each side but contend that they do not in any way interfere with

passage in the right-of-way. Defendant admits that there is a fence at the east end of the right of way as shown in Exhibits P-5 and P-6 which defendant erected in 1966 and it has continuously remained there.

The defendant purchased 306.94 feet of property on both sides of the east end of the right-of-way described, and at the same time it obtained a  $2/5$ th interest in the right-of-way, all from Maxfield C. Whitehead. Defendant also obtained a quit-claim deed from other abutting property owners at about the same time for what was thought to be another  $2/5$ th interest outstanding.

The defendant proceeded to build apartments on both sides of the right-of-way. See Exhibits P-4, P-5, P-7, P-8, P-8, and P-10. The end of the right-of-way abutted against a vacant field, so the defendant built a fence along the east property line, including the east line of the right-of-way. The plaintiff subsequently bought the property, which has a right of access on both the north and south, immediately to the east end of the right-of-way in question and now claims he still has a  $1/5$ th interest in the right-of-way and wants to remove the fence for a third access to his newly-purchased land.

The plaintiff, after purchasing the  $1/5$ th interest in the right-of-way described, together with three pieces of land abutting thereto, sold one piece by warranty deed to Perry S. and Margaret Bradley and the deed stated "together with a right-of-way over" without any

reservation of exception for himself in the right-of-way. He also sold one piece to his daughter Nilene Afton Mawson Eskelson, and subsequently by quit claim deed gave her a 1/5th interest in the right-of-way which she later transferred back to him, which he now claims gives him his present interest. Defendant sold the final piece to Richard and Phyllis Allen by warranty deed, which also gave a right-of-way, but attempted to retain the fee in the right-of-way. Defendant subsequently purchased this from Allen. See Exhibit P-11.

The defendant found that Maxfield C. Whitehead still claimed a 2/5th interest in the right-of-way as he had not deeded it away when he sold all his property abutting thereon. The defendant then obtained a quit claim deed on the other 2/5ths Whitehead owned, giving defendant 5/5ths of the property in dispute. (See Findings of Fact R 52-56.)

## DEFENDANT'S POSITION

The trial court's Judgment of dismissal of the plaintiff's complaint should be affirmed.

## ARGUMENT

### POINT I

THE COURT MADE EXTENSIVE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF JUDGMENT AND PLAIN-



## TIFF DISPUTES ONLY ONE CONCLUSION AND NONE OF THE FINDINGS OF THE LOWER COURT.

Defendant does not dispute plaintiff's receipt of a 1/5th interest in the right of way as it claims down thru the plaintiff part of its own title. After hearing all the evidence the court made extensive findings and conclusions. (R. 52-56.) Plaintiff has not attacked any of the findings of fact and his brief only indirectly attacks one conclusion set forth by the court. The court found:

1. That plaintiff had transferred one of his three pieces of property to a Mr. and Mrs. Bradley, which deed stated "together with a right of way over" the property in question and described the property in question. (See R 48) of plaintiff's memorandum.

2. That plaintiff transferred the second piece of property to his daughter, Mrs. Eskelson. (R 53)

3. That plaintiff transferred the third piece to Allens (R. 53).

4. That plaintiff had absolutely nothing left. R. 53). See findings and conclusions in detail (R-52 to R 56).

The only dispute is the conclusion as to the effect of the original transfer to the Bradleys, whether or not there was anything left in the plaintiff after the transfer. It is the contention of the defendant that the findings should stand, as they have not been attacked, and with

the findings intact, there could not be a change of the conclusion of law as set forth, and the judgment should stand. This would also hold true of the findings showing that the defendant had purchased all of the right-of-way as there was no attack on these.

## POINT II

### DEFENDANT HAS OBTAINED ALL THE TITLE IN THE RIGHT-OF-WAY.

The court so found. See number 10, R. 54. There is no dispute as to the testimony concerning the acquisition of the right-of-ways from all other sources except the acquisition down from plaintiff to Bradley then to Hamilton then to the defendant.

The defendant cites 23 Am. Jur. 2d 292:

“In some states the statutes in terms provide that transfers of land shall transfer all incidents except those expressly excepted.”

Here no exceptions were made. It further states on page 294:

“It is well established that all easements appurtenant to land conveyed passed to the grantee,, unless a contrary intention is disclosed by the deed of conveyance, *notwithstanding the deed does not purport expressly to include appurtenances.*” (Emphasis supplied)

Where plaintiff deeded without reservation, 1953 *Utah Code Annotated As Amended* provides at Title 57, Chapter 1, Section 12, that a warranty deed

“Shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, of the premises therein named together with all the appurtenances, rights and privileges thereunto belonging with the covenants from the grantor, . . . any exceptions to such covenants may be briefly inserted . . .”

That is supported in the case of *Petrofesa v. Denver and Rio Grande Western Railroad*, 110 U. 109 169 P.2d 808. The court found that the defendant was not attempting to preclude the plaintiff or his daughter from the right-of-way even though neither has any right left in it, and it admitted by even the plaintiff's own testimony that he was able to drive to the end of the property over which he originally had 1/5th right, but wants to now connect it on and develop his land to the east. Plaintiff has included, as obstructions to be removed, some protrusions of 18 inches on the sides which are all abutted by the defendant's property in addition to the removal of the fence on the end. The exhibits clearly show that these protrusions are merely incidental and the fence is the main object to be removed so that the plaintiff can develop his lot to the east.

### POINT III

PLAINTIFF DOES NOT OFFER THE  
WHOLE TRANSCRIPT AND THE COURT

## **MUST ASSUME THAT FINDINGS AND CONCLUSIONS WERE CORRECT.**

Plaintiff does not offer the whole transcript of the trial to prove his contentions, and it must be assumed that the findings and conclusions were correct and based on proper evidence, as there is no evidence to refute them and none is cited except as to the dispute on the one conclusion. It is true that the defendant could have designated a further position of the record, but not having noted that it was omitted until a later date, this was not done. The plaintiff still has the burden of showing that the original court proceedings were in error, and there is no evidence in the record to show that there was error.

## **POINT IV**

**THERE IS NO CONTROVERSY AS PLAINTIFF AND GRANTEES ARE NOT PRECLUDED FROM USE OF RIGHT-OF-WAY FOR ALL LAND WHICH PLAINTIFF OWNED.**

The fact that the defendant has not precluded anyone who is remotely connected with the plaintiff from using the full length of the right-of-way makes the whole controversy moot as plaintiff has no other right than the use of the right-of-way. The small protrusion on the sides does not hinder passage as there still remains a passageway about 30 feet in width. He can use the full length all but the last 6 inches of the

right-of-way, which is the width of the fence, and to give him the additional 6 inches of use would add nothing. It would do irreparable damage to the defendant in its use of the property, destroying the protection for the children and impairing the value thereof. See Conclusion 4 - R 55. To permit this with no controversy would be a gross injustice.

## POINT V

**THAT PLAINTIFF'S RIGHTS CANNOT BE ENLARGED TO INCLUDE MORE THAN ORIGINALLY GRANTED.**

Even if it is assumed that the plaintiff still has his 1/5th in the right-of-way, he would still not be entitled to have the fence on the dividing line between the defendant's property and his other property to the east removed. At the time the original right-of-way was created, the grantor only owned the property to the east end of the right-of-way and only contemplated that it would be used by those people having abutting property up to the end. To include the land east of the east end would be an enlargement of the use, which is not permitted. The defendant quotes 25 Am. Jur. 2nd 482-3 Sec. 77:

“However, no use may be made of the right-of-way different from that established at the time of its creation so as to burden the servient estate to a greater extent than was contemplated

at the time of the grant . . . nor may he develop the right-of-way into a public thoroughfare.

A grant or reservation of a right to pass on a private way to one lot *does not confer the right to pass further on the same way to another lot.* Similarly, a right of way appurtenant to a particular lot cannot be used as a mode of access to another lot to which it is not appurtenant." (Emphasis supplied. )

This cites as a footnote:

"One having the right to use an alley for access to certain property may not use it to transport to such property goods for use on adjoining property."

Taken from *Percy A. Brown & Co. v. Raub*, 357 P. 271, 54 A2d 35.

In the Utah case of *Wood et al v. Ashby et al.*, 122 U. 580 253 P.2d 351, the court held:

"Since it is manifest that a grantee may receive only what a grantor has to give, defendant's rights are based upon the construction of the original Traugott deed to the plaintiff's predecessors."

It also states:

"It is also established in this state that a deed should be construed so as to effectuate the intentions and desires of the parties as manifested by the language made use of in the deed."

The Utah case of *Nielsen v. Sandberg*, 141 P.2d 696, 28 CJS on Easements, Sec. 65 (b) 732 states:

“And when the resulting use will increase the burden upon the servient estate, the right to the easement will be extinguished.”

In 10 ALR 962, *Right of Way*, it states:

“As a general rule if the increased or additional use or burden brought about by the subdivision of a dominant tenement materially burdens the servient estate, the courts will not allow the right-of-way easement to pass to the subsequent purchasers of the subdivided parts.”

In 3 ALR 3d 1258, on page 1259 it states:

“The determination of the extent and reasonableness of use of a right-of-way created by express grant necessarily involves a construction of the grant. Several basic principles govern:

1. The grant must be construed in the light of the situation of the property and surrounding circumstances in order to ascertain and give effect to the intention of the parties.

2. If the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant.

3. The past behavior of the parties in connection with the use of the right-of-way may be regarded as a practical construction of the use of the way . . . ”

At 1260 from the same treatise it provides that the rule that the right of way cannot be used to burden the servient tenement to an extent greater than was contemplated.

At 1261 also from 3 ALR, it provides:

“In assessing the chances of obtaining a judicial limitation of the use of ‘unreasonable,’ counsel will want to examine the terms of the grant and to investigate, as far as possible, the situation of the parties and of the land at the time the grant was made, as well as the practical construction given thereto by the parties over the years, since all these matters are relevant to the determination of the scope of the easement.”

At 1270 of the same work it states:

“And the principle that the servient tenement may not be subjected to new and unreasonable burdens not contemplated by the parties has also been recognized in a number of other cases.”

Therefore, it is submitted that even if plaintiff still owned a 1/5th interest in the right-of-way, it is clear from the law that he would not have the right to expand the use over that originally contemplated at the time that the grant was originally made, as the original grantor did not own the property to the east which the plaintiff is now trying to include, and in no circumstances should the plaintiff be permitted to enlarge the use and require the defendant to remove the fence.

## CONCLUSION

From all the circumstances in the case, the defendant concludes that the judgment of the lower court



should be affirmed as he owns the fee title to the property, and even without fee title the plaintiff is not entitled to enlarge the use on the right-of-way to include more than that originally contemplated by the grantor creating the right-of-way.

Respectfully submitted,

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