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Joseph F. Merrill v. Bailey & Sons Company;
Seymour N. Bailey and Emma Z. Bailey; J. W.
Summerhays & Sons Company; Colorado Animal
By-Products Company; Leona B. Whitehill; Robert
Bailey Whitehill; C. E. Summerhays; J. J.
Summerhays; and John Snowcroft & Sons
Company : Reply Brief of Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

JOSEPH F. MERRILL,
Plaintiff and Respondent,

vs.

BAILEY & SONS COMPANY, a cor-
poration; SEYMOUR N. BAILEY,
and EMMA Z. BAILEY, his wife;
J. W. SUMMERHAYS & SONS COM-
PANY, a corporation; COLORADO
ANIMAL BY-PRODUCTS COMPANY,
a corporation; LEONA B. WHITE-
HILL, administratrix of the
Estate of Bert N. Bailey, De-
ceased; ROBERT BAILEY WHITE-
HILL; C. E. SUMMERHAYS and
J. J. SUMMERHAYS,
Defendants and Appellants,

JOHN SCOWCROFT & SONS COM-
PANY, a corporation,
Defendant not appealing.

APPELLANTS' REPLY BRIEF

ON APPEAL FROM THE DISTRICT COURT OF THE THIRD
JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, HON. P. C. EVANS, JUDGE.

HURD & HURD,
MOYLE, RICHARDS & MCKAY,
JUDD, RAY, QUINNEY & NEBEKER,

J. D. SKEEN and
E. J. SKEEN,

Attorneys for Appellants.
FILED

Attorneys for Respondent.

In the Supreme Court of the State of Utah

JOSEPH F. MERRILL,
Plaintiff and Respondent,

VS.

BAILEY & SONS COMPANY, a corporation; SEYMOUR N. BAILEY, and EMMA Z. BAILEY, his wife; J. W. SUMMERHAYS & SONS COMPANY, a corporation; COLORADO ANIMAL BY-PRODUCTS COMPANY, a corporation; LEONA B. WHITEHILL, administratrix of the Estate of Bert N. Bailey, Deceased; ROBERT BAILEY WHITEHILL; C. E. SUMMERHAYS and J. J. SUMMERHAYS,
Defendants and Appellants,

JOHN SCOWCROFT & SONS COMPANY, a corporation,
Defendant not appealing.

No. 6219

APPELLANTS' REPLY BRIEF

With leave of court we submit briefly appellants' reply to certain contentions made by respondent in his brief and upon the oral argument.

At the risk of some repetition we believe it will be helpful to reset some of the historical background against which the problem must be viewed. It will be remembered that respondent's property rights in the south half of Lot 3 are immediately north of appellants' property, which is in Lot 2. Titles of respondent and appellants all came from a common grantor. When title to the south half of Lot 3 and Lot 2 was in the same owner substantial improvements were made upon Lot 2. Such improvements came to the north line of Lot 2 so that the full enjoyment of the same could be had only by using a portion of the south half of Lot 3 for purposes of ingress and egress. A spur track was necessary to give real value to the buildings on Lot 2. Such a track necessarily had to occupy a portion of the south half of Lot 3. Such a spur was built and of course it approached the buildings to be served upon a curve. In order to make the the curved track serve the buildings in the manner in which it must have been intended, it was necessary to build a curved platform to make contact between railroad cars and the buildings.

Having spent the money to improve Lot 2 and having provided the means of access to such improvements over Lot 3 it is certainly most unlikely that the common owner would sell the south half of Lot 3 upon such terms as to impair the easements which had been established and reserved and thereby seriously depreciate the value of the improvements upon Lot 2.

Consistent with what one might reasonably expect, such use was made of the south half of Lot 3 as to give a maximum value to Lot 2. Accordingly, when Seymour Bailey deeded his one-half interest in the south half of Lot 3 to his brother, Bert, he quite naturally inserted in the deed the following reservation:

“Reserving, however, to the grantors the perpetual right to the maintenance and use of the platform now located on the Southern portion of said premises about 10 feet wide including the over-lapping roof for said platform including also the curve thereof along the railway spur as at present constructed, with full right to repair, reconstruct or rebuild the same within its present location.

“Also reserving the perpetual Right to the use of the trackage over and along the South line of said premises (and to the premises) and of the team, truck or auto drive along the said track, all to be used in connection and for the convenience of Lot 2, of said Block for the loading and unloading of merchandise.

“It is also hereby agreed that without the consent of Grantor, Seymour N. Bailey, or his assigns, that no right shall be granted for the use of said railway spur beyond the East end of said Lot 3.”

The language in the reservation second above quoted appears in the abstract of title (Ex. X) at page 23 exactly as set out above, but a check of the record in the County Recorder's office of Salt Lake County reveals that the words “and to the premises” in brackets above are not in the reservations as recorded, and it is, therefore, ap-

parent that the abstracter in copying the record from the Recorder's office must have made a typographical error and inserted the words "and to the premises" by mistake, but the fact still remains that plaintiff in his reply admitted defendants' allegation of the reservation in this language, and Exhibit X is the only abstract which was received in evidence. The record from the County Recorder's office was not offered in evidence, and so far as concerns the record in the trial court and before this Court, the words "and to the premises" are in the reservations, and the findings of the trial court are in fact "false to the record" as made on the trial of this action because the only evidence before the Court as to the exact language of the reservation was the abstract of the rights of way, Exhibit X.

But regardless of whether the words "and to the premises" are in the reservation or not, it should be noted that it is recited that the rights of way and other easements and rights reserved were "all to be used in connection and for the convenience of Lot 2", which clearly shows that the intent and purpose was to reserve the same rights and uses theretofore exercised in order to preserve and maintain the value of Lot 2. The south half of Lot 3 had been impressed with uses for the benefit of Lot 2 and the broad easement "for the convenience of Lot 2" was for the purpose of continuing that use.

Similarly, when Seymour and Bert Bailey conveyed to Bailey & Sons Company they were jealous of the rights of Lot 3, which were necessary to maintain the

value of Lot 2. By that instrument of conveyance there was granted an easement as follows:

“together with the trackage privilege now in use at the North end of said property. * * *

“* * * Also a perpetual Right to the use of the railroad spur together with the team, truck and auto drive along the North line thereof and the platform for loading and unloading from vehicles and cars, through and over a part of the South $\frac{1}{2}$ of Lot 3, of said Block and Plat as at present constituted, with a Right to repair, reconstruct or rebuild the same as shall from time to time become necessary within its present location.”

Respondent would restrict the easements reserved and granted in two particulars to which we desire to here address ourselves. First, it is contended that no easement exists which gives appellants any rights north of the spur track and that if any such right exists it is for the exclusive benefit of one parcel of land in Lot 2. Counsel for respondent would have you believe that the team track or truck drive north of the spur was employed and used only for approach to an ancient hay barn in Lot 3 (see appellants' brief, page 13). Such contention is in conflict with the clear and uncontradicted evidence and with the definite and unambiguous language of the deeds referred to. It was testified by the witness Ryser that he had been secretary of Bailey & Sons Company continuously from the year 1914 to and including the trial, a matter of more than twenty years; that he had seen the premises involved in this suit throughout that

long period and was entirely familiar with the history thereof and the uses made of the property. Speaking of the team or truck track referred to in the easement Ryser stated that throughout the years it was the uniform habit of teamsters and truck drivers to drive in the south half of Lot 3 on the truck track referred to and from that point to back across the spur track to the north to and against the platform for loading and unloading of merchandise to and from the buildings in Lot 2 (Ab. 94, 95, 99).

To the same effect is the testimony of William I. Richards, who has been in the employ of Bailey & Sons continuously from the year 1910 until the time of the trial. During that time he was for fifteen years warehouse foreman; he had the closest acquaintance and familiarity with the property involved and throughout the years had seen and observed the use made of the south half of Lot 3 in relation to Lot 2 and the buildings located thereon. Speaking of the use of the concrete team track, Mr. Richards made the following statement which stands in the record uncontradicted:

“We used the team track in driving teams and later trucks into the front of the Globe Mills building and out again. The use of the area marked on Exhibit ‘7’, ‘concrete team track’, has continued from 1910 right up to the present time. It is still used to drive trucks in there to turn around and to load and unload from the box cars.

“We used practically all of the South half of Lot 3 in pulling our teams in, backing up to the

platforms, and in our other operations. The major portion of the area to the north of the railroad spur track has been used for turning the teams and trucks around and backing them into the platform and cars. We used all of the area west of the old original wood platform in backing the teams and trucks up to the platform. We would put in two wagons from the west, one from the north in the jog and we could spot more wagons along the track to the north. The area to the west and north of the 10 foot jog was all used in pulling the trucks and wagons in. That area is being used today by wagons or trucks driving across it and has been so used all the time since 1910." (Ab. 109-110)

The testimony of the witnesses Ryser and Richards is not only not disputed in the record but is corroborated by the testimony of respondent's witnesses. That the concrete driveway referred to is north of the spur track and that it was used throughout all the years from 1910 until the time of the trial for convenience in backing teams and trucks against the platform for loading and unloading is without dispute.

The easement above referred to describes the right of way as a "perpetual right to the use of the railroad spur together with the team, truck and auto drive along the north line thereof." Counsel would have us believe that the parties intended to use the word "south" rather than the word "north" in the above description. They say that the roadway referred to is south of the tracks but it would take more than a distortion of the language above quoted to indicate anything other than an inten-

tion to describe a spur track and a driveway north of such spur track.

Furthermore, there never was and is no room for a driveway south of the spur track. It is undisputed that the common grantors of the parties prior to 1914, paved with concrete a driveway about 10 to 12 feet wide along the *north* line or side of the spur track and following the curve thereof from the place where the spur now crosses the city sidewalk practically the full length of the spur, and with a paved turn-around in front of the Globe Mills building, and which paved driveway and turn-around still exists and is still in use upon the ground today just as it has been for more than thirty years. After having constructed and paved a driveway along the north line of the spur for the express purpose of enabling trucks and vehicles to conveniently load and unload to and from the platforms adjoining their warehouses on Lot 2, as well as to and from box cars on the spur, it is preposterous to claim, as counsel now attempts to, that the common grantors of the parties did not refer to this paved driveway when they reserved and granted, for the benefit of their warehouse property in Lot 2, a "perpetual right to the use of the railroad spur, together with the team, truck and auto drive along the *north* line thereof, etc.", but instead referred to the area south of the spur where there never was and is no room for a driveway either along the line of the spur or elsewhere on that side of the spur.

But counsel says even if appellants are correct in respect to the truck or auto drive north of the spur track, still such easement is not for the benefit of all of Lot 2, but only for a small parcel thereof standing presently in the name of Summerhays. Even if this contention of respondent were correct, the judgment of the trial court would have to fall because the trial court has deprived all appellants of any rights whatsoever north of the spur track. It is perfectly plain that error has been committed in this particular. But it is by no means admitted that the auto drive north of the spur track constitutes an easement only for the benefit of one parcel in Lot 2. The original easement described the reservation as for the convenience of Lot 2. The use made of the track or driveway has always been for the use of Lot 2 and the whole thereof and a restriction of that benefit to a single parcel in Lot 2 would be a derogation of the language of the reservation and grants themselves and the uninterrupted interpretation of those grants as evidenced by the use made of the driveway throughout all the years since 1910.

Counsel stoutly asserts that by the easement contained in the deed from Seymour N. Bailey to Bert N. Bailey the platform involved in this case was limited to a width of ten feet. Such a conclusion is not supported either by the language of the easement or by the other evidence in the record. It is true that the platform is referred to in the deed as being about ten feet wide but one must read further to learn the true nature of the platform. Witness the language: "reserving, however,

to the grantors the perpetual right to the maintenance and use of the platform now located on the southern portion of said premises about ten feet wide including the over-lapping roof for said platform including *also the curve thereof along the spur as at present constructed.*” It will be noted that the platform was described as ten feet wide but there was also reserved the curve thereof. What was plainly intended was to describe a curved platform which would be ten feet wide if the curve were eliminated. The spur track would have been useless to the property which it was intended to serve unless contact were made between the spur and the buildings. In order to bring the railroad and the buildings into contact it was apparently necessary to build a platform which was ten feet wide on the tangent and which curved with the curve of the spur track, becoming wider constantly as the spur track curved to the north. That the parties never intended to reserve an easement for a platform in the form of a parallelogram 10 x 75 feet is not only made perfectly clear by the reservation itself but by all of the witnesses who testified. So clearly has this been made, in fact, that even respondent has attached to his brief for illustrative purposes a map which shows that the platform must have been wider than ten feet from its western extremity eastward, at least until the point was reached where the curve of the spur track straightened into a tangent.

According to respondent’s own witnesses, Snow and Evans, the platform was at least thirty feet wide opposite the west door of the Northwestern Hide Com-

pany building when Kelly-Springfield Tire Co. built a ramp at right angles to this building and over the platform, so as to roll tires into trucks and box cars on the spur (Ab. 130-135), so it is idle to contend that there ever was a platform only 10 x 75 feet between the spur and the warehouse buildings. As pointed out in our original brief, the language in the reservation, "about 10 feet wide", obviously refers to the approximate width of the platform near its easterly portion and at the east end of the curve of the spur. This is borne out by the sequence of the language of the reservation itself in relation to the actual conditions on the ground. Thus, the reservation, after referring to the platform as "about 10 feet wide", goes on "including the overlapping roof * * *, including also the curve thereof along the railway spur etc." In following this description upon the ground, if one started out at the easterly end of the platform and proceeded westerly, he would find a platform now approximately seven feet wide at its easterly end and in front of the old Scowcroft building, and then proceeding westerly, he would come to the "overlapping roof," which the Court will observe from the pictures in evidence is at the easterly end of the Northwestern Hide Company building, and just west of the old Scowcroft building, and then proceeding west the curve of the spur is encountered, just in the order recited in the reservation. On the other hand, if, the words "about 10 feet wide" in the reservation are attempted to be applied to the westerly end of the platform or its width at such end they neither

coincide with the other language of the reservation, with the conditions as they existed on the ground, or with the testimony of any of the witnesses. As the Court will observe from the diagram in respondent's brief, the darkly shaded area represents the platform which counsel claim is described in and authorized by the reservation in the deed. If you attempt to follow upon the ground the language of the reservation commencing at the westerly end of the claimed platform, you cannot do so because the platform at this point is twenty feet or more away from the spur track, and it is, therefore, impossible to include or follow the spur by proceeding to the east, and it is likewise impossible to include the overlapping roof which is some distance to the east and its westerly edge is a considerable distance from the spur. On the other hand, as above pointed out, if you follow the language of the reservation on the ground commencing at or near the easterly end of the platform, the roof and the curve of the spur all coincide on the ground exactly with the language of the reservation, and in the order or sequence there specified.

Counsel says that if the old platform had been "about 10 feet wide" at its easterly end, it would have extended out into the spur. This is obviously not true. Upon the diagram in his brief, counsel shows the platform in front of the Scowcroft building to be between six and seven feet in width. This is a new platform which replaced an old platform which had originally been some two feet wider—such two feet having been cut off on the spur side to allow better clearance as

testified by the witnesses, and hence it appears that the old platform at its easterly edge and in front of the old Scowcroft building was some nine feet or thereabouts in width, which certainly qualifies as being "about 10 feet wide." When this portion of the old original platform was in existence, there was no roof over the same, and the roof referred to in the reservation is that attached to the Northwestern Hide Company building, which, as previously noted, coincides exactly with the language of the reservation.

As the Court will observe from a careful reading of the evidence, there were originally and at the time the deeds in question were made, two platforms, one on top of the other along the north wall of the Hide Company building. The lower or so-called basic platform followed along the line of the spur as it curved to the north, while the other or upper platform, which was built on top thereof was straight and extended only in front of the two doors of the Hide Company building, and had a ramp at each end thereof so that the doors of the building could be reached with hand trucks from the lower or basic platform, which was some two or three feet below the level of the doors to the building. To the north of the upper platform and set in the lower platform in front of the west door to the building and alongside of the spur were a set of scales upon which meat and other products were weighed when unloaded from cars on the track and transported into the warehouse building. According to the undisputed evidence, these meat trucks, after being weighed on the scales were

pushed or pulled along the basic platform to a point in front of the ramp, and then pushed or pulled to the east up the ramp on to the upper platform and from there into the warehouse (Ab. 120). The location of these platforms may be observed in the pictures in evidence, which disclose lines or marks plainly evident on the Hide Company building showing the exact location of these platforms and ramps.

To have accommodated the upper platform, ramps and scales, and to have been used as it admittedly was used, the basic platform must have been more than ten feet wide and must have come to within a few feet of the spur track. The ramp to the upper platform admittedly extended to the west of the west door of the Hide Company building. Evidence of its location may be seen today on the building, and is shown in the pictures received in evidence (Ex. 1, 3, 6; Ab. 92-3). In order to have reached this ramp with meat trucks from the scales in front or north of the upper platform, the basic platform must have filled in the area between the building and the spur track not only to the west door of the building, but at least as far west as the westerly end of the ramp and some distance beyond in order that the meat trucks could be turned around preparatory to pushing or pulling them up the ramp. A platform only ten feet in width would not have permitted this use, and as there is no dispute in the evidence concerning this use of the platform, it is evident that the same must have been of substantially the width claimed by appellants and their witnesses. The physical facts and

admitted use of the platform bear this out, and the men who worked over the platform for more than twenty-five years testified that it was thirty-two feet wide at its westerly end, and the man who tore down the platform when it was replaced by the concrete testified that it was thirty-two feet wide, that he took out and measured the stringers which supported the platform, and that there were two stringers butted end to end, one measuring eighteen feet and the other fourteen feet in length (Ab. 103).

As pointed out in our original brief, however, the size of the old platform is not of controlling importance. Appellants admittedly have the right to maintain a platform of *some* dimensions along the south line of plaintiff's property and *following the curve of the spur*. Admittedly appellants have and are entitled to easements over *all* of the property south of the spur. This being the case, appellants admittedly have not encroached upon any of plaintiff's ground over which they did not have rights and easements, in the construction of the concrete ramp and paving of which plaintiff complains, and the question therefore, is as to whether appellants are making any use of this property not within the terms of the rights and easements, and which increases the burden upon respondent's property and deprives respondent of some use he is entitled to make of this portion of his property. Admittedly the only use appellants are making of this property is for the maintenance of a loading platform and to drive over the intervening ground to such platform, which are the very uses re-

spondent admits appellants are entitled to make of this property. The point upon which the parties divide concerning the property south of the spur track is not the use of the property or the quantity of property which appellants are entitled to use, but the manner in which it is put to the uses which appellants are admittedly entitled to make of it—it being respondent's contention that appellants should be limited in driving over and traversing the property to driving over level terrain to a platform with a perpendicular edge instead of over a slight incline to the platform itself, which is the manner in which the property is used at the present time.

As we pointed out in our original brief, appellants' easements may not be so restricted in the absence of a showing that the burden upon respondent's property is increased by the manner in which the owners of the easements are exercising their rights. Although counsel assert that the burden is increased by the slight change in the level of the terrain so as to back up to the platform level rather than to a perpendicular edge of a platform, they neither point to any evidence in the record which justifies this assertion, and there is none, nor do they show or attempt to show wherein the burden is increased by this manner of use. They assert that the value of the property has been decreased by this manner of use, but again we observe there is no evidence of any decrease in the value of the land, and likewise there is no evidence whatsoever that the plaintiff cannot make every use of this portion of his property which he could make before the ramp was constructed, or if the terrain

now covered by the ramp was entirely flat terminating at loading platforms of the character that respondent claims were there present before the ramp was constructed. This being the case, the decree appealed from, we submit, is erroneous in requiring removal of the ramp, as well as in excluding appellants from the use of the team, truck and auto drive north of the spur, and for those reasons, as well as for the other reasons discussed in our original brief, should be reversed.

Respectfully submitted,

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