

1959

# Seymour Thompson and Wendell L. Thompson v. Andrew H. Griffiths and Adeline Griffiths : Brief of Respondent

Utah Supreme Court

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Daines & Daines; Attorneys for Respondents;

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Case No. 9009

# In The Supreme Court of the State of Utah

SEYMOUR THOMPSON and  
WENDELL L. THOMPSON,  
Co-Administrators of the Estate of Glenn Wendell  
Thompson, also known as Wendell Thompson,  
deceased,

*Plaintif and Respondents,*

vs.

ANDREW H. GRIFFITHS and wife,  
ADELINE GRIFFITHS,

*Defendants and Appellants.*

**FILED**

OCT 21 1959

Clerk, Supreme Court, Utah

Appeal from the District Court of the First Judicial  
District of the State of Utah, in and for  
the County of Cache

## RESPONDENT'S BRIEF

Honorable Lewis Jones, District Judge

DAINES & DAINES

Robert W. Daines

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ADELINE GRIFFITHS,

*Defendants and Appellants.*

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## BRIEF OF RESPONDENTS

This is an appeal by defendants Andrew H. Griffiths and wife, Adeline Griffiths, from a judgment dated September 22, 1958, in favor of plaintiffs quieting their title to a certain dry farm located some distance north and east of Clarkston, Cache County, Utah. Defendant Adeline Griffiths filed a separate answer in the nature of a disclaimer in which she averred that she had no interest in the premises except as the wife of Andrew H. Griffiths. Andrew H. Griffiths filed an answer in which he claims a <sup>prescriptive</sup> ~~perspective~~ right to travel across plaintiff's premises to the east, ~~crossed~~ plaintiff's premises in a general southwesterly direction to the southwest corner thereof, and entered a county highway extending in a north and south

direction along the west side of plaintiff's premises. The trial was to the Court sitting without a jury. The Court entered Findings of Fact, Conclusions of Law and Decree in favor of plaintiffs and against both defendants decreeing that defendants had no prescriptive right to travel said roadway and assessed costs against both defendants.

## STATEMENT OF FACTS

The respondents will make a complete statement of facts in this brief as it does not appear that the statement in appellants brief is complete.

The defendant, Andrew H. Griffiths is the owner of 160 acres of farm land situated to the northeast of Clarkston and north west of Trenton, Utah. Defendants have been in possession of said tract of land for some 28 years, and have at all times during their possession of said land had access to said tract of land by a way known as the Ravsten Road. The Ravsten Road connects with the southeast corner of defendant's property, which road provided the defendants with access to the whole and complete tract of land alleged to be the dominant estate in this action. Intermittently, during the 28 years in which the defendants were in possession of the property, the defendants also gained access to the property, by traveling over the land of Wendell Thompson and entering their property from the west.

Every year that the land over which the trails and way used by the defendants to gain access by way of the Thompson property, was cultivated and planted, the trails and ways were also plowed, cultivated and planted.

Under the crop rotation generally followed on the Thompson farm, every piece of ground was plowed, cultivated and planted every two years, except during the time that a portion of the land was planted into alfalfa, and even in these years, a portion of the trail or way was plowed.

Throughout the life of Wendell Thompson, deceased, there was a close friendly family relationship between the Thompson and Griffiths families. Throughout this period, both the defendant and the plaintiff had taken part in the same social and religious functions. Also the said parties lived and worked together during a three year period in Ogden, Utah.

Although the Griffiths property includes the crest of a hill, it is not divided in such a manner as to prevent the passage of machinery and crops from east to west or from west to east.

### SUMMARY OF EVIDENCE

We shall briefly summarize the evidence with respect to the nature of trails and ways, and the circumstances under which the roads and ways were used.

Witness, PURL JARDINE, testified that he had been acquainted with the lands in question from the time they were taken from the U. S. Government. Mr. Jardine was the prior owner of the Thompson property.

He testified that while he owned the property in question, there was no road in its present alleged location and that whenever there was any traveling over his property, it was adjacent to the south fence line (R-250).

While Mr. Jardine was in possession of the land, most of the wheat and other crops which were raised on the west portion of the property, now owned by the Griffiths, were hauled to the east side of the property and out by the Ravsten Road. It was called the Sparks road at that time (R-251). Also, when L. H. Daines owned the Griffiths property, he raised about 49 acres of wheat on the west side and it was hauled up over the divide and out the Ravsten road to Trenton.

The respondents point to this evidence for the reason that it is alleged in Appellants Brief, that it is impossible to cross from the west up over the hill and out the Ravsten Road with the farm product. It is made clear by the above witness that it is not only possible to haul their crops up over the hill and out the east side but it was the main course of travel for this purpose for many years, even though Mr. Jardine had allowed them at times to cross over his property on the west. Apparently, prior owners had found it more convenient to haul their crops out the Ravsten Road.

It should be noted that the defendant, Andrew Griffiths, on cross examination, admitted that it was possible to take their farm machinery from the west to the east (R-22) and that the Ravsten Road was one-half mile longer coming from Clarkston and one-half mile shorter going to Trenton where the railroad was located and where the grain elevators were located. (R-23)

JESS BUTTARS on cross examination (R-86) testified that the road he traveled was, for a portion of the way, just adjacent to the Thompson and Anderson fence

on the South side of the Thompson property. It should be noted that the alleged right-of-way in this action, at no point runs adjacent to that fence line and that the use of a way adjacent to the South fence could not in any way affect the use of the presently alleged way.

ANDREW GRIFFITHS testified that at the time he purchased the property in question, he was a close friend of Wendell Thompson. They took part in the same social and religious functions and at all times they worked together and lived together. For the period of about three years, they shared the same apartment in Ogden, Utah while they were working at the same type of work. Mr. Griffiths considered himself a close friend of Wendell Thompson throughout the life of Wendell Thompson (R 25-27) Mr. Griffiths testified that it was impossible to travel up over the ridge with his machinery. (R-21) On cross examination, Mr. Griffiths testified that they did take the machinery up over the ridge. He also stated that it was one-half mile further to go the Ravsten road. (R-23) In (R-43) it discloses that Mr. Thompson always plowed right through any tracks which were made by any vehicle over the Thompson property.

MRS. LILY THOMPSON testified that she heard her husband tell Andrew Griffiths (def) sometime prior to 1940, that if he would not straighten a certain property line (Mr. Griffiths) could not go through the Thompson property. Mrs. Thompson also stated that Andrew did not go through for some time but later was allowed to go through under the conditions that he would go where he was told to go. (R. 260 and 261)



If there was any question left after the direct examination of Mrs. Thompson as to Mr. Griffiths traveling over the property under the direct permission of Mr. Thompson, it was certainly cleared up on the cross examination. It should be noted that in response to direct questions in the cross examination (R-263) to (R-265), that Mr. Griffiths was certainly traveling over the property under the direction of Mr. Thompson and with his permission and not as an adverse claim.

Q: And so, you say that your husband told Andrew that unless he (Andrew) straightened the fence he could not go through the Thompson property any more.

A: No, I said that when they became friends again, why — you won't let me finish. I asked Wendell why he was letting them go through again and he said "I don't hold a grudge, etc."

Q. Well, at any rate, they went on using the road, didn't they?

A: Yes, by permission. He (Mr. Thompson) told him he could go through as long as he (Mr. Griffiths) did go through where he (Mr. Thompson) told him to and he told him he could.

Q: That is who said that?

A: My husband did.

Q: But you didn't hear him tell Andrew?

A: Yes, I did.

SEYMOUR THOMPSON, testified from (R-196) that Andrew went on the north side of the fence and that he also went up on the south side of the fence, according to

conditions. (This is not the South fence line referred to in Jess Buttars testimony that Mr. Buttars traveled along). When the east eighty was stubble in the fall and in the spring, when summer fallowed and until after the hay was cut, Andrew went up the North side. When the hay was cut, and the North side had been drilled in the fall, Andrew Griffiths was sent up the South side. (R. 197). This type of change would take place sometimes in the same year. Andrew changed his course of travel to travel where the least damage would be done at the time. Mr. Thompson also testified that a good seed bed was made on the roadway each time the property was planted.

MYRON THOMPSON testified that he helped on the Thompson farm from 1941 to 1947. That every other year, according to the rotation of crops, every portion of property was plowed, including the road way. (R-223).

Mr. Thompson heard a conversation between his Father and the defendant, Mr. Griffiths. At that time his Father told Mr. Griffiths (R-224) he didn't want him to go through there except when it was into summer fallow. He said "unless we could come to some sort of agreement, if you are willing to straighten up the fence, I'd be willing to give you a right-of-way or make some settlement." Andrew Griffiths would not agree to it. "Well, then the only thing I can do, Andrew (and they were still friendly) is to stop you from coming through there when it is into wheat and when it is in summer fallow is the only time I'll allow you to go through there." During the year 1947, that summer, Andrew Griffiths didn't go through there at all. (R-225).

It has been pointed out in the appellants brief that there was an attempt to impeach this witness on cross examination and that at the time he alleged the conversation took place in 1946, Mr. Griffiths was in the hospital with a broken leg. It should be pointed out in this respect, that on cross examination, neither Mr. Griffiths nor his wife were definite as to the time of the broken leg. It should be noted that this testimony was being given in 1957 and that because of the lapse of years between 46 and 57, it is rather a weak impeachment to show that a person has forgotten the exact month or day when a given conversation took place. Mr. Griffiths wife stated in her testimony that she thought it was around the 18th of August. Mr. Myron Thompson testified that the conversation took place the latter part of August. It is submitted that neither of those dates were definite as to the month or day. It is submitted that these kind of discrepancies, considering so many years intervening, are of little value in showing the unreliability of a witness.

On page 14 of appellants brief they refer the court to the testimony of Myron Thompson to the effect that there was no other way for the defendant to get to his property from the west except to go through the Thompson property. That they did not go through in 1946 and then show an aerial photograph which was taken in September of 1946 and contend that this shows a use in 1946. It should be pointed out that this roadway was not plowed every year nor is there any attempt to show that the way used in 1945 had been plowed up. Therefore, the mere fact that the 1946 photograph shows some indication of a way in 1946, does not indicate that it was used in that

year. Myron Thompson did not testify that the way was not used in 1945. Under this statement of facts, the mere indication on the aerial photographs has very little value to show that the way was used in 1946 to impeach the testimony of Mr. Thompson that it was not used that year.

## STATEMENT OF POINTS

1. The Court did not err in entering judgment against defendant Adeline Griffiths and in assessing costs against her.

2. The court did not err in making that part of finding No. 3 as follows: "The defendants, their agents and employees crossed over and traveled over the above described lands with the consent of the said Wendell Thompson, deceased, and the defendants, their agents and employees traveled over said land on a route and way that the deceased, Wendell Thompson, indicated over which they should travel." The Court did not err for the reason that said finding is supported by credible evidence and the presumptions raised from said evidence.

3. The Court did not err in making that part of Finding No. 4 as follows: "So that every 2 years all of said lands were planted and the crops harvested and the plowing and harvests were made on and over the trails and ways traveled prior thereto." For the reason that said finding is supported by creditable evidence.

4. The Court did not err in making finding No. 5 for the reason that said finding is supported by creditable evidence.

5. The court did not err in making finding No. 7 or any part thereof.

6. The Court did not commit any error in its conclusions of Law No. 1, 3, and 4 or in entering decree in favor of plaintiff and against defendant, inasmuch as all findings and the entering of decree is supported by credible evidence and the law of this State.

### ARGUMENT

POINT 1: The Court did not err in entering judgment against defendant, Adeline Griffiths and in assessing costs against her.

The defendant, Adeline Griffiths, did have at least a contingent interest in the property of her husband and although she made a general disclaimer of all other interest, she did not disclaim the interest she had as the wife of Andrew H. Griffiths.

A wife has a contingent interest in the property of her husband and such an interest in the alleged dominant estate in an action of the alleged servient owner to quiet title is a sufficient adverse interest to make her a proper party. In this respect the respondents direct the Court's attention to 74 C. J. S. 39, page 63, Quiet Title, quote "Assertion of a future or contingent interest or right in property may constitute an adverse claim, a claim may be adverse although defendant is not asserting a present right to recover possession.

POINT 2: The Court did not err in making that part of Finding No. 3 as follows:

“The defendants, their agents and employees, crossed over and traveled over the above described lands with the consent of the said Wendell Thompson, deceased, and the defendants, their agents and employees traveled over said land on a route and way that the deceased, Wendell Thompson, indicated over which way they should travel.” It should be noted that on the cross examination of Mrs. Lily Thompson, she related a conversation between her husband and the defendant. Andrew Griffiths, some time prior 1940 to the effect that if he would not straighten a property line, he (Mr. Griffiths) would not be allowed to cross over the Thompson property. Mr. Griffiths refused to straighten the property line and discontinued going through the Thompson property for some time. Mr. Griffiths later on was allowed to continue going through as long as he would go where he was told to go. (R 260-261). If there was any question left after the direct examination of Mrs. Thompson as to Mr. Griffiths traveling over the Thompson property under the direction and with the permission of Mr. Thompson, it was certainly cleared up on the cross examination. This testimony is set out in the summary of evidence, page 2 of this brief. It should be noted that there was no objection made to this testimony at the time of the trial. Therefore, any objection there might have been as to its admissibility has been waived.

POINT 3: The Court did not err in making that part of Finding No. 4 as follows: “So that every 2 years all of said lands were planted and the crops harvested and the plowing and harvests were made on and over the trails and ways traveled prior thereto.” On this point, there

was no conflict in the evidence. Every witness that testified stated that the roadways were plowed along with the rest of the property. Whenever that portion of the property was plowed, over which the roadways passed, according to the method of farming in that area, half of the property was plowed and planted each year. This is consistent with the findings of the Court, that every 2 years the land over which the trails and ways traveled was plowed. (R 43-44). In the California case of *Lapique vs. Morrison* 154 p. 881, it was held "There is an interruption of continuity where land over which a right-of-way is claimed is plowed up and cultivated." In the New York case of *Gravin vs. State*, 190 N.Y.S. 143, 148 it was held that the plowing, seeding, cultivating and harvesting of crops of an alleged easement, each time, terminated the prescriptive period. The court said:

"The period of alleged user of most importance is that from 1879 to 1907. Beyond question, the tenants of the claimant, or of her predecessors in title, during the period used the alleged way each year extensively. If this user was of the character which the prescription necessitates, the claimant's title to the easement would be indubitable. It is conceded that user, to ripen in prescription, must be open, continuous, uninterrupted and adverse \*\*\*\*\* cases \*\*\*\*\*. It need not actually be known to the owner of the alleged servient estate but must be of such a character — that is, so open, visible and notorious — that knowledge will be presumed." 10 C.J. 880. Mrs. Whitton testified she had knowledge of the adverse claim. Her ignorance is immaterial. The user in this instance was such as to charge her with notice.

The testimony is undisputed however, that during the alleged prescriptive period the owners or tenants of "Whitton premises" in various years, plowed, seeded, cultivated, grew and gathered crops of hay, corn and peas from that part of the latter property affected by the alleged easement. Twenty years did not lapse between such years of use of the exterior parcel. The courts have held and it is our view that these uses of "Whitton premises" interrupted the user of the alleged way, destroyed its continuity, and this was fatal to the claim of a prescriptive period. *Sears vs. Hoyt*, 37 Conn. 406; *Barker vs. Clark*, 4 N.H. 380, 12 Am. Dec. 428; *Aikins vs. New York, N. H. & H. R. Co.*, 188 Mass. 547, 74 N. E. 929.

POINT 4: The Court did not make any error in finding that there was never any 20 year period of adverse hostile use of any one route or roadway over the above described property, by the defendants or their predecessor in interest, and that the defendants have not acquired any prescriptive right over the said land.

In this respect, Mr. Seymour Thompson testified that Mr. Griffiths always traveled during the lifetime of Wendell Thompson in a manner as to do the least damage to the Thompson property. That Mr. Griffiths would change his course of travel from one course to the other, sometimes in the same season. That when Thompsons were growing wheat, Mr. Griffiths would travel the summer fallow. The witness, Mrs. Lily Thompson, testified that Mr. Griffiths traveled where he was told to travel and the evidence of all the witnesses was that there was a close and friendly family relationship. These relationships could only support the findings that there was no adverse



and hostile use for any 20 year period. (R-197). In the Utah case of Lund vs Wilcox, 97 Pac. 33 it was held that any material deviation in the line traveled from the previously traveled way breaks the continuity of the use required to establish a prescriptive right."

POINT 5: The Court did not err in making finding No. 7 or any part thereof. In the light of the testimony set out in the summary of the evidence in the brief, and the record as a whole, the findings and facts are amply supported by competent and creditable evidence. The evidence and the cases cited all support the findings and conclusions of law of the trial court. The cases cited by appellants although not directly in point in this case also are consistent with the findings of the court. The respondents are in agreement with the appellant as to the holding in both cases cited to the effect that where a claim to a right-of-way has shown an open and continuous use of land for the prescriptive period of 20 years, the use will be presumed to have been against the owner. An owner of servient estate, to prevent the prescriptive easement of use has the burden of showing that use was under him instead of against him.

The record of the evidence does not support any open and continuous or adverse use of the same way for any 20 year period. It is respondent's contention that the periodic plowing of the way created a break in the prescriptive period, also that there could be no prescriptive use as it was affirmatively shown that any use made was by the permission of Wendell Thompson. There were substantial changes in the way from year to year and such

changes are also inconsistent with any contention of an adverse use. The case of *Gravin vs. State*, as mentioned in Point No. 3, 190 N. Y. S. 143, 148, holds that the plowing, seeding, cultivating and harvesting of crops of an alleged easement, each time, terminated the prescriptive period. Also the California case of *Lapique vs. Morrison* to the same effect. 154 - Pac. 881.

Respectfully submitted,

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