1966

Harry Riter and Edith Siders Rider v. Aristos Cayias and Dorothy Cayias : Appellant's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

HARRY RITER and EDITH SIDERS RIDER,
Plaintiffs and Appellant,
vs.
ARISTOS CAYIAS and DOROTHY CAYIAS,
Defendants and Respondents

Case No. 10697

APPELLANT'S BRIEF

Appeal from the Judgment of the Second District Court in and for Davis County, The Honorable Thornley K. Swan, Judge.

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STATEMENT OF THE NATURE OF THE CASE

This is an action wherein plaintiff, Harry Riter, sought damages against defendant, Aristos Cayias, for an alleged assault and battery; and plaintiff, Edith Siders Riter, sought to etablish boundary lines by acquiesence between her property and that of the defendants, and to have the Court determine that a pipe-line easement across her property had been extinguished.

DISPOSITION IN THE LOWER COURT

Plaintiff, Harry Riter, abandoned his cause of action before pre-trial. The case of Edith Siders Riter vs. Aristos Cayias and Dorothy Cayias was tried to the Court. The Court found that said plaintiff had gained an ease-

ment along one of the claimed boundary lines, and found that the pipe-line easement had not been extinguished. From this judgment plaintiff-appellant, Edith Siders Riter, appeals.

RELIEF SOUGHT ON APPEAL

Appellant asks that the decree of the trial Court be modified to include an easement along both boundary lines, and that the portion of the decree holding that the pipe-line easement had not been extinguished be reversed.

STATEMENT OF FACTS

Plaintiff, Edith Siders Rider, and defendants are the owners of adjoining pieces of real property in Davis County, Utah (Ex. "A"). Plaintiff has resided on the property since 1939 (R. 29), and defendants have resided there since 1941, having purchased the property in 1936 (R. 96). One of the boundary lines between the two properties runs east from Orchard Drive to a point near the Cayias water hookup, then north in line with a row of grapes on plaintiff's property (Ex. "A''). The east-west line was referred to at the trial as line A (R. 33, 60, 71), and the north-south line as line B (R. 36, 53, 54, 60, 70, 71).

The east-west line lies between a row of peach trees located on plaintiff's property and a similar row of peach trees located on defendant's property, said rows being approximately 18 feet apart (Ex. "A", "D", R. 12, 33, 61). The actual surveyed property line does not

extend to the center of the two rows of peach trees (R. 5). However, plaintiff has irrigated and cultivated to the center of the two rows of peach trees from 1939 (R. 7, 33, 70, 85, 86) until July 4, 1962, when defendants erected a fence near the surveyed property lines (R. 32, 34, 58, 72, 125, Ex. "H"). No fence had existed along said lines prior to that time (R. 45, 53, 99, 102). Prior to the erection of the fence plaintiff had cultivated by tractor, but since that time it was necessary to do so by hand (R. 35, 73, 74, 78).

The surveyed boundary line along the north-south line (line B) runs between a row of grapes located on the paintiff's property and a ditch bank which runs north from the end of a row of grapes on plaintiff's property (Ex. "A", "C", R. 101). Plaintiff had irrigated and cultivated her grapes up to that ditch bank since 1939 (R. 36, 57, 70, 85, 104). The fence which defendants erected on July 4, 1962, runs near the surveyed north-south line (R. 5), approximately two feet east of the ditch bank (R. 60). The erection of the fence also necessitated a change in irrigation and cultivation along this line (R. 36, 74).

On October 25, 1937, plaintiff conveyed an easement to Frances H. Odell, a predecessor in title to defendants (Ex. "A" Page 67). The purpose of easement was to carry water from the Bonneville Irrigation Canal to the land of defendants (R. 42, 97). The water came through an irrigation ditch on plaintiff's land, then through an underground pipe-line and on to defendants' land (R. 48).

Defendants shared the ditch right of way with twenty-two other people (R. 48). Defendants used this pipe-line easement for the purpose of carrying water from the Bonneville Irrigation Canal from 1937 to the spring of 1960 (R. 51, 65, 98, 111). The South Davis County Water Improvement District was organized for the purpose of furnishing culinary and irrigation water from the Weber Basin Conservancy District to property within the district, which includes the properties of plaintiff and defendants (R. 14). Defendants signed up for the use of Weber Basin water on December 2, 1958 (R. 15). They subsequently received two water hookups (R. 15, 17). The parties first received water through the Weber Basin hookups in the spring of 1960 (R. 16, 44, 74), the reservoir from which the water was furnished being 108 feet above the property of defendant (R. 21). Use of the water through this system has been unlimited, except for the year 1961, when the users were put on turns (R. 17). Defendants have complained to the water district of low pressure (R. 22), but have never made a request for additional hookups (R. 24, 26). The water district wanted to give the defendants a higher pressure hookup on the north side of their property, but the defendants wanted the low pressure hookup where it is now located, the pressure being twenty-five pounds per square inch (R. 26, 140). This hookup is located at the junction of the east-west line and north-south line, near the outlet of the former underground pipe-line (Ex. "A," "F", R. 43). Water was observed running west from this hookup during 1960, 1961, 1962, and 1963 (R. 25, 27, 42,

43, 44, 75, 83, 131). Plaintiff and her husband observed the area almost every day (R. 83, 131). Even during 1961 all those ditches normally irrigated by defendants were reached by water (R. 76). During the spring of 1960 many peope along the old Bonneville Irrigation Canal filled in the Canal (R. 16, 77), and there has been no water in the canal since 1959 (R. 16, 42, 124). Defendants last used the pipe-line easement in 1959, and have not used it since (R. 41, 75). Plaintiff received a conveyance from the Bonneville Irrigation District of any rights of way claimed by the District (Ex. "B" Page 90). The headgate on the irrigation ditch on plaintiff's property was cemented in 1960 (R. 99, 123), and the underground pipes were removed by plaintiff in 1961 (R. 45, 50, 58, 59, 75), four months after notifying defendants that she was going to do so (Ex. "G", R. 62). Defendant Aristos Cayias actually observed the removal of the pipes (R. 59, 66, 67, 68, 75, 79, 80, 81, 130, 135). It has been the position of the plaintiff that since the spring of 1960 there has been no source from which water could run through the claimed pipe-line easement. Defendants claim that they can still find water to bring on to their land through the pipe-line easement although the only source they gave at the trial was another Weber Basin hookup (R. 24, 112). However, Foss Peterson, the manager of the South Davis County Weber Improvement District testified that Weber Basin water is not available through the Bonneville Irrigation Canal and he knows of no other source for irrigation water other than the South Davis County Water Improvement Dis-

trict (R. 16). The Bonneville Irrigation District has been dissolved (R. 90).

POINT I

THE TRIAL COURT ERRED IN REFUSING TO ADMIT IN EVIDENCE THE FULL ABSTRACT OF TITLE OFFERED AS EXHIBIT "A".

Section 1-1-15 Utah Code Annotated (1953) provides as follows:

> Any abstract of title certified to be true and correct by any abstracter holding a valid and subsisting certificate of authority from the Board as herein provided, or by any County Recorder shall be received by the courts of this state as prima facie evidence of its contents under such rules and regulations as to procedure as such Courts may promulgate.

The Trial Court should not make findings of facts where there is no evidence to support them. If it does so, judgment thereon will be reversed. *Hathaway v. United Tintic Mines Co.*, 42 Utah 520, 132 Pac. 388 (1913); *Greenhalgh v. United Tintic Mines Co.*, 42 Utah 524, 132 Pac. 390 (1913).

As a technical matter the failure to allow the full abstract into evidence leaves findings of fact Nos. 1 (ownership of plaintiff's property), 2 (ownership of defendants' property), and 3 (boundary line between the property of plaintiff and defendants) without any evidence to support them. However, Plaintiff does not consider these items in themselves as reversible error, since the descriptions contained in the findings are in fact correct. If the abstract had been admitted in its entirety

as urged by plaintiff (R. 87) the information contained on Pages 70, and 71 (Creation of Weber Basin Conservancy District) and 74 through 76 (Creation of the South Davis Water Improvement District would have been relevant to the issue of the extinguishment of the pipe-line easement as raised in point III.

POINT II

THE TRIAL COURT'S FINDINGS OF FACT NO. 4 IS ONLY PARTIALLY CORRECT AND IS INCONSISTENT WITH THE CONCLUSIONS OF LAW AND THE DECREE.

Findings of Fact No. 4 reads as follows:

> Plaintiff Edith Siders Rider and her predecessors in title, have occupied property to the center of said rows of peach trees and to a line which runs along a ditch bank running north and south from the east end of the center of said rows of peach trees, for a period of in excess of twenty years, for the purpose of irrigating and cultivating the land.

Paragraph 2 of the conclusions of law and paragraph 3 of the decree each read as follows:

> Plaintiff Edith Siders Riter and Defendants and counterclaimants, Aristos Cayias and Dorothy Cayias, are each entitled to use for the purpose of irrigation and cultivation all of the property up to a line which runs in the center between two rows of peach trees east and west and a reasonable area on either side of that line for purpose of allowing each of the parties herein to cultivate the trees on their respective properties. Each of the parties are restrained and enjoined from interfer-

> ring with the use of the other in connection with the cultivation of the trees on their own property as set out herein.

The findings of fact cover both lines and the conclusions of law and decree cover only the east-west line. It is obvious therefore, that the Trial Court intended to make the same findings and decree on both lines. Plaintiff would have no quarrel with such a finding, since all of the evidence, both from the plaintiff and from defendants indicated that the plaintiff had in fact irrigated and cultivated up to the two lines.

Pursuant to Rule 76, Utah Rules of Civil Procedure, paragraph three of the decree should therefore be modified to read as follows:

> Paintiff, Edith Siders Riter, and defendants and counter claimants, Aristos Cayias and Dorothy Cayias, are each entitled to use for the purpose of irrigation and cultivation all of the property up to a line which runs in the center between two rows of peach trees east and west and to a line which runs along a ditch bank running north and south from the east end of the center of said rows of peach trees, and a reasonable area on either side of said lines, for the purpose of allowing each of the parties herein to irrigate and cultivate on their respective properties. Each of the parties are restrained and enjoined from interferring with the use of the other in connection with the cultivation of their own property as set out herein.

POINT III

THE TRIAL COURT ERRED IN FINDING THAT DEFENDANTS STILL HAVE A SOURCE OF WATER

WHICH THEY COULD CARRY ACROSS THE CLAIMED EASEMENT AND IN RULING THAT THE EASEMENT HAS NOT BEEN EXTINGUISHED.

The law throughout the United States generally is that an easement, regardless of its method of creation, may be extinguished by an intentional relinquishment thereof indicated by conduct respecting the use authorized thereby. RESTATEMENT, PROPERTY, Section 504, Comments a,b,c,d, See also RESTATEMENT, PROPERTY, Section 505; 17A, Am. Jur., easements, Sec. 170, 171; 25 A.L.R. 2d 1265; *Byard v. Hollscher,* 151 Atl. 351 (Conn. 1930); *Crimmins v. Gould,* 308 P. 2d 786 (Cal. 1957).

An easement created by grant may also be lost when the purpose for which it was created ceases to exist. *Woodmen of the World Camp No.* 17720 *v. Goodman,* 193 S.W. 2d 739 (Texas 1945); *McGiffin v. City of Gatlinburg,* 26 S.W. 2d 152 (Tenn. 1953); *Kux v. Chandler,* 112 N.Y.S. 2d 141 (1952); *Jones v. Miller,* 200 A. 2d 484 (Conn. 1964); *Kogood v. Cogito,* 200 F.2d 743 (D.C. Cir. 1952); *Weston v. Whitaker,* 102 Okl. 95, 226 Pac. 1034 (1924); *Griffin v. Dwyer,* 72 P. 2d 349 (Okl. 1937); 28 C.J.S. *Easements* Sec. 54; 17A Am. Jur., *Easements,* Sec. 162.

The Utah Supreme Court made a clear ruling covering situations like the instant case in the case of *Brown v. Oregon Short Line R.R. Co,* 36 Utah 257, 103 Pac. 740 (1909). That case held that an easement is extin-

guished by any obstruction of a permanent nature by the party to whom the servitude is due; or by the voluntary acquisition or acceptance of any other right or privilege incompatible with the exercise or enjoyment of it; and being once lost it is gone forever, and can never be revived except by a new grant. That the circumstances of the instant case fall within the rule of *Brown vs. Oregon Short Line R. Co.*, and the cases cited on the extinguishment of an easement when the purpose for the easement ceases; and that the actions of defendants are incompatible with the use of the easement, is shown by the following:

A. Mrs. Riter testified that the easement was granted for the purpose of carrying Bonneville Irrigation water.

B. Both defendants testified that the easement was granted for the purpose of carrying Bonneville Irrigation water and that it was used for just that purpose until the spring of 1960.

C. Had the abstract of title been properly admitted into evidence it would show that the South Davis County Water Improvement District was created in 1954.

D. Defendants signed up for their Weber Basin hookups in 1958 and first used the Weber water in the spring of 1960, and have been using it since.

E. Since 1959 there has been no water in the Bonneville Irrigation Canal, the Canal having been filled up and the Bonneville Irrigation having been dissolved,

leaving no source of water other than the South Davis County Water Improvement District.

F. One of defendants' hookups is in almost the same location as the outlet for the former pipe-line easement.

G. There is no limitation on the amount of water which can be used from the South Davis Water Improvement District.

H. Defendants have made no request for additional hookups.

I. By erecting the fence between the properties of plaintiffs and defendants on July 4, 1962, defendants completely barred themeslves from any access to plaintiff's property, on which they must pass in order to use and maintain the pipe-line easement.

CONCLUSION

Plaintiff and Appellant respectfully asks the Court to modify the decree of the Trial Court by including an easement over both boundary lines, as set forth in point II, and reversing the decision of the Trial Court by holding that the easement claimed by defendants across the land of the plaintiff has been extinguished.

Respectfully submitted

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