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

IN THE SUPREME COURT OF THE STATE OF UTAH

HARRY RITER and
EDITH SIDERS RIDER,
Plaintiffs and Appellants,

vs.

ARISTOS CAYIAS and
DOROTHY CAYIAS,
Defendants and Respondents

Case No.
10697

RESPONDENTS' 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 whereby the plaintiff, Harry Riter, sought damages against the defendant, Aristos Cayias, for an assault and battery and plaintiff, Edith Siders Riter, sought to establish certain boundary lines between her property and that of the defendants, and also to determine the existence and legal standing of

an easement and right of way across the property of the appellant. The defendants and respondents brought a counterclaim against the plaintiffs to establish that the right of way which they had acquired many years ago still existed for them and was not lost, and for damages for appellants' interfering with and stopping respondent's use of its right of way; and further to establish the boundary line between the parties as determined by a survey.

DISPOSITION IN THE LOWER COURT

The plaintiff, Harry Riter, abandoned his cause of action before the pre-trial. The case of Riter vs. Cayias was tried by the Court, without a jury, and the Court entered a decree which described the property line between the parties and found that both of the parties had easements along the boundary line between their properties for the purpose of cultivating and other matters in connection with their farming, and further determined that the pipeline easement and right of way which had been purchased by the respondents had not been extinguished nor lost. The appellant Edith Siders Riter appeals from that determination by the District Court.

RELIEF SOUGHT ON APPEAL

The respondents ask that the decree of the trial court be sustained, and in accordance with the decree entered by it.

STATEMENT OF FACTS

The appellant, Edith Siders Riter, and the respondents, Aristos Cayias and Dorothy Cayias, are the owners of two adjoining pieces of property located in Davis County, State of Utah. The appellant has resided there since 1939 and the respondents have resided there since 1941, but they having purchased the property in 1936.

The survey line between the properties was shown by surveys and testimony of the parties. The respondents erected a fence a few inches north of the survey line, and between the properties of the appellant and respondent, following a dispute as to where the line existed. (See Tr. 126) There is no quarrel but that the fence erected by the respondents was a few inches or more north of the line as determined by the survey.

The appellant back in 1937 transferred and conveyed an easement and right of way to one Frances H. Odell, a predecessor in interest to the respondent. (See Exhibit "A," Page 67.) The purpose of the easement was to furnish irrigation water to the tract of ground owned by the respondents herein. This right of way and ditch consisted of an open type irrigation ditch for part of the way, and then the water was routed through a pipe approximately 4 to 6 inches wide, and the water flowed through this pipe for some 50 to 75 feet, and then came out on the property of the respondents to water certain peach trees and other products which existed on the south side of the respondents' home. This irrigation ditch-pipe arrangement had been in existence

for many years, and was originally put together upon agreement of the parties concerned. This irrigation ditch had been used up to the time that the appellants cemented the pipe and later destroyed the same. (See Tr. 49 and 50.)

There is no question but that the original main irrigation canal was filled in, but the new irrigation arrangements had pipe connections which would allow water to be placed in this particular ditch at a higher elevation than the farm of the respondent and so water could be used on the south portion of the respondents' property. (See Tr. 112.)

Testimony of the respondents reflected that the Weber Basin hookup was inadequate to water the south orchard belonging to the respondents, and as a result there was considerable damage to peach trees and other farm products growing on the south side of the respondents' home. They attempted to bring this water in their old right of way and which would have watered the south portion of their property, by having water put in the ditch at a point south of the appellants' property and it could then follow along the regular irrigation channel and strike the top of the Cayias property, flow westward along the orchard of the respondents and so adequately water and care for that portion of the respondents' orchard. As a result of the destruction of the irrigation ditch, this plan of watering the south orchard of the respondents' property could not be accomplished.

POINT I

THE TRIAL COURT DID NOT ERR IN REFUSING TO ADMIT IN EVIDENCE THE FULL ABSTRACT OF TITLE OFFERED AS EXHIBIT "A."

Counsel had agreed at pre-trial and by stipulation during trial that the right of way across appellants' property was a deeded right of way owned by respondents. (See Tr. 90.) On two occasions during trial the Court admitted the abstract of title for specific purposes. (See Tr. 64 and 90.) So the Court did admit the abstract for certain purposes but not to a point where it would be objectionable or raise any point as to the agreed fact of respondents' right of way. Adequate testimony was had by the Court with respect to the property line between the properties and the testimony was had of a surveyor to reflect where he had found that line to exist. Counsel points out that without the abstract the findings of ownership do not stand. This matter of ownership of the respective parties had never been questioned. It was an accepted fact. We submit the Court had adequate evidence upon which to base its findings.

POINT II

THE TRIAL COURT'S FINDINGS OF FACT NO. 4 IS CORRECT AND IS NOT INCONSISTENT WITH THE CONCLUSIONS OF LAW AND DECREE.

Reference is made to appellant's statement with respect to the findings of fact and conclusions of law, and which reflect the time which the appellants lived in the area. The Court in its conclusions and decree made a determination that each party had a right to cross the property line between properties but purely for the right of cultivating and caring for the trees or other growth of the parties, and when needed. This is not a constant easement to be used everyday but only when harrowing or other maintenance must be had with respect to the products grown on each of the respective parties' land.

Attention is respectfully called to the fact that the appellant originally prepared the findings of fact, conclusions of law and decree and they were modified after appropriate motions of the respondents herein and that after some considerable argument both in court and otherwise, the proposed findings were submitted to the Court for signature after having been reviewed by counsel for both appellant and respondent. If the appellant had any real objections to the findings of fact and conclusions of law and decree and any inconsistency might exist, there was adequate time to file an objection in the trial Court and, of course, any minor inconsistency that the respondent now claims could have been solved. We respectfully submit that this objection is not timely, and appellants' objections came too late. In the case of Edyth Westerfield vs. Coops, a Utah case, decided by the Supreme Court on May 24, 1957, and found at 6 Utah 2nd 262, 311 Pac. 2nd 78, the Court said: "The Utah Court took it upon itself to make findings appor-

tioning the California judgment among the plaintiff and 3 children equally, though the California Court had awarded an unapportional monthly sum. *There was no reasonable objection directed toward said findings and we will not entertain such objections for the first time on appeal.* (Underscoring ours.) See also Dolores Uranium Corp. vs. Jones, 14 Utah 2nd 280, 382 Pac. 2nd 883, and Keller vs. Wixom, 123 Utah 2nd 103, 255 Pac. 2nd 118.

POINT III

TRIAL COURT DID NOT ERR IN FINDING THAT DEFENDANTS STILL HAVE A SOURCE OF WATER WHICH THEY COULD CARRY ACROSS THE EASEMENT AND RIGHT OF WAY AND IN RULING THAT THE EASEMENT HAS NOT BEEN EXTINGUISHED.

It is well recognized that an easement and right of way which someone buys and pays for, is not to be taken away in some unlawful fashion. See Weggeland vs. Ujifusa, 14 Utah 2nd 364, 384 Pac. 2nd 590. In this case the appellant wilfully and intentionally destroyed the right of way and irrigation ditch which the respondents had acquired by deed and conveyance. Certainly the maximum in equity cases, "Equity will not permit a wrong doer to profit by his wrong," is applicable in this case as the appellants committed a wrong wilfully and

knowingly. (See Jones Mining Co. vs. Carter, 1920, 56 Utah 449, 191 Pac. 426.)

In this case the appellants by their wrongful act deprived the respondents herein of their right of way, removed an easement and right of way which the respondents had properly acquired by deed and grant. If the Court should now refuse to let respondents assert their right and claimed right of way then the appellants have clearly profited by their wrongful act. (See A. L. Williams & Sons vs. A. E. Brown, 18 Utah 2nd 224 418 Pac. 2nd 981.

Appellant claims that an easement created by a grant may be lost when the purpose for which it was created ceased to exist. The Court did not so find, and the Court found that the purpose for which the easement was granted still existed and that the respondents could still utilize that easement and right of way and for the purpose for which is was acquired. For the purpose of appeal the facts are viewed in a light most favorable to respondent. (See many cases cited Pacific Digest — Presumptions Sections 930, 931 and 934.)

Counsel cites the matter of Brown vs. Oregon Shortline, 36 Utah 257, 103 Pac. 740 (1909), but this case is not applicable. There was no obstruction of a permanent nature, there was no voluntary acquisition or acceptance of any other right incompatible with the exercise or enjoyment of the right of way. The respondents had used that easement and right of way for irrigating their farm ground for many years. There was

still water available for the use of that right of way. The only obstruction that came about was created because the appellants wilfully destroyed the right of way and pipeline that the respondents had utilized for many years in irrigating their south orchard.

The court's attention is respectfully invited to the provisions of Volume 17A American Jurisprudence at pages 764 and following, concerning Termination, Extinguishment and Revival of Easements. Section 159 states at the beginning: "The Courts are not inclined to favor the forfeiture of easements," and cites in support thereof Barton vs. Jarvis, 218 Ky. 239, 291 SW 38; Dean vs. Colt, 160 Oregon 342, 84 Pac. 2nd 481.

Quoting again from 17A of American Jurisprudence, Sec. 165 (page 770):

> "The cases are agreed that at least where a right of way or other easement is created by grant, deed, or reservation, no duty is thereby cast upon the owner to make use thereof or enjoy the same as a condition to the right to retain his interest therein, and the mere nonuser of the easement will not extinguish it. (See the many cases cited under footnote 15). In fact, it is held that even nonuser for the length of the prescriptive period does not of itself operate to extinguish an easement created by grant, deed, or reservation."

We disagree with counsel for appellant as to the items set out on page 10 of his brief, and without itemizing, we respectfully point out that the deed itself is the best evidence as to the easement and in this present case it makes no limitation as to the use therein of

Bonneville Irrigation water; and that what use the Respondents made of the Weber Basin hookup would not do away with an easement and right of way acquired by deed and into which the respondents would put water and so adequately and conveniently water their orchard.

CONCLUSION

Respondent respectfully requests that the Court sustain the decree of the trial Court, for the reasons indicated in this brief, and that such decree sustain the right of way owned by the respondents and sustain the property line between the parties as determined by the trial Court.

Respectfully submitted,

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