1959

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

Utah Supreme Court

LeRoy B. Young; Young, Thatcher & Glasmann; Attorney for Appellants;

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,

Plaintiffs and Respondents,

vs.

ANDREW H. GRIFFITHS and wife, ADELINE GRIFFITHS,

Defendants and Appellants.

Appellant's Brief

LeRoy B. Young, of
YOUNG, THATCHER & GLASMANN
Attorneys for Appellants

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BRIEF OF APPELLANTS

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. Plaintiffs' complaint was in the usual form. Defendant Adeline Griffiths filed a separate answer in the nature of a disclaimer in which she avered that she had no interest in the premises except only as the wife of Andrew H. Griffiths. Andrew H. Griffiths filed an answer in which

he claims a prescriptive right to travel across plaintiffs' premises along an established roadway, which road left his premises adjoining plaintiffs' premises on the east, crossed plaintiffs' 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 plaintiffs' 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

Andrew H. Griffiths is the owner of 160 acres of land situate near the top of a mountainous area about 6 miles north and east from the town of Clarkston, the residence of plaintiffs and defendants. The crest of this mountain terrain extends in a northerly and southerly direction across defendants' land in such a manner as to cut his farm into two tracts.

All of the tillable land in this tract is and, during all times mentioned in the evidnece, has been what is known as a dry farm upon which defendant has grown dry land grain and some alfalfa.

Because of the precipitous terrain near the summit it is impossible to transport grain, hay and farm machinery from one tract to the other. The portion of the farm west of the summit consisting of about 100 acres slopes sharply to the west toward Clarkston which is

situate in the lower valley. The easterly portion consisting of about 26 acres of tillable land to the east of the crest or summit slopes to the east towards towns located in the lower area of Cache Valley.

Defendant reached this easterly tract by traveling on what is known as the Rabsten Road but because of the nature of the terrain he cannot cross over to the western 100 acre tract with loads of grain or hay or heavy farm machinery. The only access to this tract is to travel the county highway northward to the southwest corner of plaintiffs' land, then enter the plaintiffs' premises at the southwest corner and follow the road in question across plaintiffs' premises and then enter his premises at a point approximately 22 rods South of the Northeast corner of the Southeast Quarter of the Northwest Quarter of Section 18. (See defendants' Exhibit 4, an aerial map taken by the U. S. Soil Conservation Office on August 7, 1946, which Exhibit shows the location of the Griffiths' property. The high mountain crest is the dark area crossing the same. The Thompson property to the west and the white line appearing thereon is the roadway in question. See also Exhibit 2 being a similar aerial photograph taken October 9, 1937, and Exhibit 3 taken October 29, 1953.) In all these exhibits the white line marking the roadway in question appears thereon.

DEFENDANTS' EVIDENCE

We shall briefly summarize defendants' evidence with respect to the nature of this roadway and the use to which it was applied by defendant, his sons, agents and employees.

JESSE BUTTARS testified that he acquired the defendants' property in 1920, that he farmed the same until 1929 when he sold it to defendant, Andrew H. Griffiths (TR 69), that he went over the road a few days before the trial and it was then in substantially the same place and condition as when he traveled the road. That there were only two slight variations in the road made while he traveled thereon. One slight change was made when Wendell Thompson, the deceased, dug a well near his old home near the south line of his property and a short distance to the east of his west line; that Thompson asked him to go a little further around the well which he did and then came right back into the road (TR 85); that this slight change was made because Thompson wanted it changed (TR 86); that he talked to Thompson only once about the road. He, Thompson, wanted to change the road along the Anderson fence to the south. Buttars told him he would consent if he, Thompson, would make that road as good as the present one. Thompson then went up and put in a day on the proposed new road. Then he said,

> "If I worked to the morning of the first resurrection I would never have that road as good as this, so you go where you were."

He further testified that you couldn't go by way of the Rabsten unless you just took a team of horses and went up there (TR 88-89). Buttars described the use he made of the road from 1920 to 1929 each and every year (TR 74-75).

Defendant, ANDREW H. GRIFFITHS, testified he purchased this property from Jesse Buttars and ob-

tained his deed on September 4, 1929. (See Exhibit 1, abstract entries No. 39 and 40). When he acquired this property the road was there and he understood that he had the right to travel this road; that the road followed substantially the white line shown on Exhibits 2, 3, and 4 (TR 18); that he traveled this road each and every year since 1929 for all purposes incident to going from his home in Clarkston up to the farm, transporting necessary farm machinery and hauling his crops produced upon the 100 acre tract back to Clarkston; that he has claimed the right to use the road at all times; that about 3 years ago, and after the death of Wendell Thompson and after his boys took over the operation, was the first time he ever heard of any objection (TR 19-20). About 15 years ago (1942) a flood cut out the road in one place so he moved out a little; that he talked to Thompson about making this slight change; that Thompson said it was alright to make the change, however, that he continue to travel along the old road when going down hill with a load of grain, the width of this change was about 50 feet wide and 300 feet long (TR 65-66).

WELDON GRIFFITHS, son, age 35, was 7 years old when his father acquired this farm (TR 61). He remained on the farm until 1942. On cross examination he stated that they did not have any trouble while Wendell Thompson was alive (TR 111).

ACIL GRIFFITHS, son, age 31, worked on the farm until fall of 1944. Then from 1946 to 1952 worked off and on. That they always traveled this road for all purposes incident to the operation of their farm

without any objection (TR 120).

JOHN GRIFFITHS, brother of the defendant, was in the property when Jesse Buttars owned it, has been over it recently. The road is in practically the same location now as it was then (TR 135).

DE MAR GRIFFITHS, son, age 29, worked on farm until 1948 then left for a mission. He has operated the farm continously since 1953. (TR 140). About 3 years ago was the first time he ever knew of anyone objecting to our traveling on the road (TR 144).

MURLE GODFREY hauled grain from the Griffiths farm between 15 and 20 years ago. Hauled it over this road. Road in substantially same position now as when he hauled the grain over it. Thompson never made any objection to his traveling over the road (TR 155).

We shall reserve for later discussion the evidence offered by plaintiffs and their witnesses.

STATEMENT OF POINTS

1. The Court erred in entering judgment against defendant, Adeline Griffiths, and in assessing costs against her.

2. The Court erred 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 travelled over said land on a route and way that the Wendell Thompson,

deceased, indicated over which they should travel."

for the reason that said Finding is not supported by any credible evidence.

3. The Court erred 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 not supported by any credible evidence.

4. The Court erred in making Finding No. 5 and the whole thereof for the reason that said Finding is not supported by any credible evidence.

5. The Court erred in making Finding No. 7 and the whole thereof for the reason that said Finding is not supported by any credible evidence.

6. The Court erred in making Conclusions of Law Nos. 1, 3, and 4 and in entering a Decree in favor of plaintiffs and against defendants for the reason that said decree is contrary to all the credible evidence in this case and is against law.

ARGUMENT

POINT 1. The Court erred in entering judgment against defendant, Adeline Griffiths, and in assessing costs against her.

Title to the property is vested in the name of Andrew

H. Griffiths. The abstract, Exhibit "1," shows that Adeline Griffiths never has had any vested title in this property. She filed an answer in which she disclaimed any interest in the property except only her statutory dower rights. There is no evidence that she ever travelled this road or that she ever claimed any right to do so. There is no evidence that she ever trespassed upon plaintiffs' property. How then, could the Court enter judgment against her, enjoining her from trespassing when she had never done so nor claimed any right to do so. The Court also entered judgment for costs against her. This, we think, was clearly erroneous.

POINTS 2 TO 6, INCLUSIVE. We think that Points 2 to 6 can all be discussed together.

Appellants rely upon the case of *Zollinger* v. *Frank,* 110 *Utah* 514, 175 *P.* 2*d* 714, as controlling in this case, wherein this court holds

> "Adverse use of a way, to create a prescriptive right of way, must be against the owner as distinguished from under the owner regardless of whether use is described as peaceable, hostile, adverse to or acquiesced in by servient owner."

and the case further holds

> "Where a claimant 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."

Our reason for summarizing the defendant's evidence is to show that the defendant, Andrew Griffiths, proved

a continuous use of the roadway for more than 20 years and, therefore, a presumption arises that such use was against the owner and the burden of proof was upon the plaintiffs to prove that the use was under the owner rather than against the owner.

The evidence shows without dispute that Jesse Buttars acquired the Griffiths' property in 1920, that he farmed this land continuously each and every year and used the road continuously for all uses incident to his farming operation until September, 1929, when he sold the property to defendant, Andrew H. Griffiths. That his use was open, continuous and against the owner Wendell Thompson, deceased, cannot be doubted.

Thompson recognized his right when he requested Buttars to make a slight change around the well and also when he tried to change the road near the Anderson property but found it to expensive and he told Buttars to continue to use the road as it then existed. We contend, therefore, that the necessary elements requisite to acquiring a prescriptive right was proved from 1920 to the fall of 1929. Griffiths acquired the property in 1929. The road was there at that time and he understood and and believed he had the right to travel this road so he continued the same use previously made by Buttars. When, therefore, would his use ripen into a prescriptive right? We say in the year 1940. So if the evidence shows a use by Griffiths against the owner Thompson until the year 1940, then such use would ripen into a prescriptive right and any subsequent use from 1940 until the date of trial would not destroy the prescriptive right already acquired even though there was some

slight changes in the road travelled after 1940.

The Court found (Finding 3) that there existed a close, friendly and intimate relationship between Thompson and Griffiths. This may be true, but we don't understand the law to be that a feeling of enmity or ill will is necessary to acquiring a prescriptive right.

Then the Court finds that defendants, their agents, etc., crossed and travelled over this road with the consent of Thompson and on a road that Thompson indicated over which they should travel.

We contend there is no credible evidence in this record that can sustain this finding or that between the years 1920 to 1940 the road was travelled with the consent of Wendell Thompson as that term is defined by this court in the Zollinger case, supra. Of course, Thompson knew they were using this road but he made no objection to this use. He recognized their right to travel thereon.

In analyzing this testimony these facts should be considered:

A. This roadway was the only way that the owners of the Griffiths land could gain access to the West 100 acres of the farm. It is admitted that they farmed this land every year since 1920. There is no other road by which they could gain access to this property. No one contends that there was any road leading from the East 26 acre tract over the precipitous mountain terrain. If they crossed by this method, as vaguely suggested, there would certainly be evidence of a road or trail over and across this area which was not farmed.

B. That this was the only road travelled by defendant, Andrew H. Griffiths, and Buttars is

born out by the 3 aerial maps taken by the U. S. Conservation Bureau. The first one (Exhibit "2") was taken October 9, 1937, just 3 years before the ripening of the prescriptive right. It shows by a white continuous line the roadway as it leaves the Griffiths property at the jog in his fence line and entered the county road at the Southwest corner of the Thompson property. The next photograph (Exhibit "4") was taken August 7, 1946, 6 years after the vesting of the prescriptive right. It shows the road in the same identical location. The third photo (Exhibit "3") taken August 29, 1953, or 13 years after the ripening of the prescriptive right, is not as distinct as Exhibits "2" and "4", but the roadway can be seen along the same course. These photographs cannot be disputed. If there was a road, as shown by these photographs, then the only person who used the road from the old house to the denfendant's premises was the use made by defendant Griffiths and Buttars and their agents and servants.

Plaintiffs' evidence does show that they used the road jointly with Griffiths and Buttars from its entry into their farm to the old house and corrals located a short distance to the East, but there is no evidence of any use by plaintiffs from that point Northeasterly to the defendant's farm. In fact their contention was that no roadway existed beyond this point, but the court found otherwise because the court does find that the defendant used the road but the court concludes that the use was under Thompson and not against him. A conclusion which cannot be supported by the evidence.

The Zollinger case, supra, also holds

"Where record did not support claim that defendant opened road over defendant's land for defendant's own use and that defendant used road only infrequently and then only a portion of it and that plaintiff used road for entire length thereof at such time as he desired during prescriptive period, evidence failed to raise presumption that use by plaintiff was permissable and failed to rebut presumption that use was against defendant."

The court also finds in Finding No. 4,

"That each year they plowed approximately one-half of the land so that every 2 years all of the land was plowed except such land as was in alfalfa and every year approximately one-half of said lands were seeded, cultivated and crops grown thereon which were harvested so that every 2 years all of said lands were planted and the crops harvested and the plowing and harvest were made on and over the trails and ways prior thereto."

It seems difficult to rationalize this finding with the evidence. The aerial map shows a well defined road along the same course in 1937 1946 and 1953. It is true that in certain places at certain times plaintiffs, while plowing and planting, would cross portions of the roadway because it was easier to do this than to farm the separate tracts divided by the road, but the road was not destroyed and defendant continued to travel the same. However, most of this occurred during the last few years and since the death of Wendell Thompson which occurred November 19, 1947, or 7 years after the 20 year period.

The Court found (No. 7) that the plaintiffs have

for many years, as a neighborly accomodation, permitted the defendant to travel across plaintiffs' premises but that during the last 3 or 4 years and especially since the death of Wendell Thompson, trouble has developed between the parties with the plaintiffs attempting to more carefully plow up old trails and so-called roadways which defendant has used. In other words, the Court recognized from this finding that the so-called interference was asserted after 1949 and not before. If we are correct in this contention then what may have happened since 1940 would be immaterial under the doctrine announced by this Court in the case of *Dahnken* v. *George Romney and Sons Company,* 111 *Utah* 471, 184 *P. 2d* 214, wherein this court at page 216, syl. 9, says

> "By assuming Romney has the right to cross area "C" both defendants, by their adverse use of segment "B" for the prescriptive period acquired prescriptive easements therein, not mere ways of necessity which might terminate when the necessity no longer existed. That another road for travel became available to the dominant owners does not of itself destroy or admit to an abandonment of their prescriptive easements." See also C. J. S., paragraph 13, page 650.

We contend that Finding No. 5 is not supported by any credible evidence but that on the contrary all credible evidence shows that at least from 1920 to 1940 there was an adverse, hostile use of the roadway as that term has been defined. The plaintiff Thompson's evidence which sought to show interference was so vague both as to time and character as to not be worthy of credence. For instance, see testimony of Seymour Thompson who admitted that when Griffiths hauled out his grain he mostly

followed the hollow right against the fence and then at TR 216 he finally stated

> "There was no trouble until DeMor rented the place and this has been for the last 2 or 3 years."

Myron Thompson, a son, stated that he knew of no other way Griffiths could travel from the West side except through "our" property and then he said there was no road in September of 1946. We invite the court's attention again to the aerial photograph which was taken on September 7, 1946 and which shows conclusively that there was a well defined road in existence at that time.

Myron Thompson on rebuttal stated that in the latter part of August or the first part of September, 1946, he overheard a conversation between his father and Griffiths. It is to be noted that this was 6 years after the prescriptive period. However, after Myron Thompson had definitely fixed the time of this conversation as during the latter part of August, 1946, defendants then proved conclusively that Andrew H. Griffiths was confined to the hospital in Logan for a broken leg which occurred about the middle of August and that he never left his home until several months thereafter so that he couldn't possibly have had any conversation at the time and place indicated.

We call these matters to the court's attention for the reason, as we contend, the evidence of the plaintiffs in many respects was vague, inconclusive and some of it not worthy of belief and we think it falls short of overcoming the presumption heretofore referred to as announced in the Zollinger case.

If we are correct in our analysis of the findings, then it must follow that the conclusions of law and the decree cannot find support in the evidence and that they are against the law. We contend the judgment of the trial court should be reversed and findings entered in favor of defendant Andrew H. Griffiths establishing his prescriptive right to travel the roadway in question.

Respectfully submitted,

LeRoy B. Young, of
YOUNG, THATCHER & GLASMANN
Attorneys for Appellants