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John C. Critchlow, Sophia Critchlow v. Jay L.  
Critchlow, Lois Critchlow, Funnon T. Shimmin,  
Donna Shimmin, Vera Shimmin : Brief of  
Respondent

Utah Supreme Court

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In The Supreme Court of The State of Utah

DEC 6 1975

JOHN C. CRITCHLOW and  
SOPHIA CRITCHLOW, his wife,  
Plaintiffs and Appellants,

BRIGIAM YOUNG UNIVERSITY,  
J. Reuben Clark Law School

vs.

JAY L. CRITCHLOW and LOIS  
CRITCHLOW, his wife; FUNNON T.  
SHIMMIN and DONNA SHIMMIN,  
his wife; and VERA SHIMMIN,  
Defendants and Respondents,

Case No.  
13738

**BRIEF OF RESPONDENT, VERA SHIMMIN**

Appeal from Judgment of the 7th Judicial District Court for  
Carbon County, Utah, the Honorable Edward Sheya, Judge

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In The Supreme Court of The State of Utah

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JOHN C. CRITCHLOW and  
SOPHIA CRITCHLOW, his wife,  
Plaintiffs and Appellants,

vs.

JAY L. CRITCHLOW and LOIS  
CRITCHLOW, his wife; FUNNON T.  
SHIMMIN and DONNA SHIMMIN,  
his wife; and VERA SHIMMIN,  
Defendants and Respondents.

Case No.  
13738

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BRIEF OF DEFENDANT-RESPONDENT  
VERA SHIMMIN.

---

STATEMENT OF THE KIND OF CASE

This is an action brought by appellants in August, 1973, following a partition suit between the Critchlow brothers decided in September, 1971, whereby the former court divided the Critchlow property into two separate parcels of grazing lands and appellants Critchlow seek in this suit to establish a vehicular easement by prescription over the lands of respondents Shimmin

and as a consequence thereof to claim a way of necessity over the partitioned lands of the respondents Critchlow.

### STATEMENT OF FACTS

The properties of the parties are grazing lands in a mountainous area north of Price, Utah, which were unsegregated by complete fencing between the Critchlow parts and Shimmin parts until the middle 1950's (Tr. 229-230, 245). The respondent Vera Shimmin and her husband, Foster Shimmin, who died in 1962, bought their lands in 1935, while the Critchlows acquired their lands in parcels both before and after the Shimmin acquisition (Tr 8-9, 233, 238, 258). For the last 40 years approximately, the cattle have had access in late spring of each year to the grazing lands of the parties by drifting up Deadman Canyon from the south and have returned to the valley in late fall the same way. (Tr 226-227, 230-236, 247-248).

In 1971 the partition suit between John Critchlow and Jay Critchlow divided the Critchlow lands into separate parcels, as a result of which Jay Critchlow trucks his cattle to his property from the north (red property on Exhibit 1), and John Critchlow can drift his cattle on and off the mountain on the south property

(marked green on Exhibit 1) the same as in years past (Tr 283-284).

The issue of the case arises because John Critchlow claims the right of vehicular access over the Shimmin property (marked in yellow on Exhibit 1) by prescriptive right to get to said green tract, whereas the cattle on the green tract were serviced by Critchlows after the fences were completed in 1953, until the partition suit in 1971, by using the intermediate Mathis tract (marked white on Exhibit 1) under an exchange agreement (Tr 66, 279-281).

The Complaint filed herein is entirely couched in terms of demanding vehicular traffic over the Shimmin roadway on the yellow tract together with a vehicle use of necessity on the road over the red tract partitioned to the respondent Jay Critchlow. The respondent Vera Shimmin emphatically disagrees that since July, 1948, a roadway has existed and been used by appellants over the route contended for by appellants as stated on Page 5 of appellants brief. The record shows no evidence initiating a prescriptive user against the respondent Vera Shimmin or against her deceased husband, owners of the property since 1935, which would establish any adverse, hostile, continuous, open, notorious or exclusive right of use by appellants over the Shimmin proper-

ty. Said Complaint alleges in paragraph 20 thereof the interruption of appellants' use of said alleged prescriptive easement by Shimmins on or about September 29, 1971. Any prescriptive right of use must be proven as to the commencement, extent and duration in the record against the owners of the lands for a full 20 year period. No witness nor the appellants testified of an enforced right of entry at any time nor of any circumstances where the Shimmins would be put on notice that the plaintiffs had commenced to earn a right by conquest or adverse user for 20 years. The record is also absent any showing by appellants that they could not operate their green parcel for a cattle grazing operation in the historical manner on horseback without using any road from the north over Shimmins property. Vera Shimmin testified she personally occupied said property for several weeks each summer from 1935 to 1962 (when her husband died) riding horses all over the acreage, planting grass and sowing seed from horseback, salting by horseback, marking calves ears, fixing fences, keeping house in the cabins and riding horses up and down Deadman Canyon, and she testified Critchlows had no reason to come across the Shimmin property and she saw no one using her property or roadway during those years (Tr 223-231). She further therein testified you couldn't drive a car south of the first cabin inside the gate and

had to go on horseback south until 1948 when Chidester bulldozed the sagebrush down and that thereafter her husband and sons hired heavy equipment and made the road south to the rim by 1950 or 1951 and built the fences until completed in 1954 (Tr 228-229). Certainly this evidence is in conflict with the statement on Page 5 of appellants brief that appellants and their witnesses testified that the right of way was used by appellants over its entire length from 1926 to 1948 and thereafter with the first motor vehicle being used in 1932.

Dean Shimmin, a son, testified he ran cattle in partnership with his brother and father and helped build the road and fences until 1953 (Tr 271). He described how Critchlows came through in October, 1952, the first year the road was completed, to go hunting, but how he parked his car across the road at the rocks in October, 1953, blocked the way, asserted ownership of the road in his father and stopped the appellant John Critchlow from going through (Tr 272-274).

Stan Dufrenne testified that in 1952 at round-up time, another son, Lynn Shimmin, broke off the lock placed on Gate 2 by Critchlows and warned Jay and Corner (John) Critchlow not to ever lock a gate to the Shimmin property again. The next year and thereafter Funnon Shimmin supplied the key for the lock (Tr 180-181). Funnon Shimmin locked the gates beginning



in 1953 and constantly since 1955 and replaced Gate 2 with a metal gate in the early 1960's; he prevented Critchlows two or three times from coming through, gave Critchlows permission to scatter salt as a neighborly gesture, furnished all the locks after the first one (broken off by Lynn Shimmin) and allowed Critchlows to buy a key at the airport when he changed locks (Tr 250-281). Shimmins controlled their road through the years as far as Critchlows were concerned and did all of the work and paid all of the expense without assistance in maintaining the roadway, even on the part over the red parcel from the Park belonging to Critchlows (Tr 12, 253, 260-261).

## ARGUMENT

### POINT I

THE COURT BELOW DID NOT ERR IN FINDING THAT THE USE OF THE ROADWAY BY APPELLANTS WAS PERMISSIVE RATHER THAN PRESCRIPTIVE.

If the judge in the lower court found the facts for the respondents under a conflict of evidence, the appellants are quoting the law uselessly to apply to facts in the record which obviously the judge disbelieved. The parade of explorers and hunters offered as witnesses, as

well as the appellants, that they motored on "the road" for years before 1948 when Chidester's bulldozer opened the road were undoubtedly not believed by the trial judge. The testimony of those who built and maintained the road (Shimmins) after 1948 was apparently believed by the trial judge. Finding No. 4 of the Findings of Fact by the trial judge says in effect that "the use of the roadway by the Plaintiffs over the property of the Defendants Shimmin at all times in the past has been permissive and that said use has not at any time been adverse, hostile, notorious or antagonistic to the rights of the Defendants Shimmin."

Even the alleged motor trip in 1936 by John Critchlow out to Section 31 to place salt was in the company of Mr. Foster Shimmin over his property and it would have to be assumed was by the permission of Mr. Shimmin as owner (Tr 18). All of the witnesses of respondents testified it was impossible to get a motor vehicle south of the rocks to Section 31 before 1948 when Chidester took his bulldozer out over the rim to improve the cattle trail (Tr 279). What fact or incident changed the user of John Critchlow from "permissive" in the company of Foster Shimmin in 1936 to adverse? The record is silent as to any adverse use by Critchlows

brought home to the owners and acquiesced in by them for 20 years continuously and uninterruptedly.

25 American Jurisprudence 2nd 252-272 is a fine article on the prescriptive right of way and it lists the following requirements to establish prescription, to-wit:

- A. Continuous
- B. Uninterrupted
- C. Open (not secret or hidden)
- D. Notorious (known or visible to owner)
- E. Adverse or hostile to owner
- F. Use of definite right in land of another
- G. Claim of right with connection to dominant tenement
- H. Exclusive right to use (not dependent on use of others)
- I. Invasion or infringement on rights of owner without license or permission of owner
- J. Disregard for rights of owner
- K. Assertion of rights of user to initiate period of use
- L. Acquiescence or knowledge of the servient owner by passive assent, submission, quiescence or consent by silence to adverse and inconsistent user

M. For the required period (20 years in Utah)

All of the strict and extensive requirements must be met to establish a prescriptive right of way and the extent of the use acquired must be consistent for the whole period and defined with certainty and definiteness. To countermand the finding of the lower court trial judge would require that this record have no evidence of permissive use and that said use was uncontrovertibly adverse, hostile, notorious and antagonistic to the rights of respondents Shimmin. Such is not this record in this case.

Under the Statement of Facts it is clear that Shimmins did not complete their fences to divide off the Critchlow lands until about 1953 or 1954. The road was built in 1951 or 1952 to work on the fences. 25 American Jurisprudence 2nd at page 457 states that where a way is over uninclosed land, there is a presumption that the use was permissive or at least that there is no presumption that the use was adverse. There certainly is no positive evidence of adversity in the use before 1952. When did the adverse use period of twenty (20) years begin in this case? The Complaint alleges that respondents blocked the roadway to appellants on or about September 29, 1971.

25 Am. Jur. 2nd 453 states "Nor can one acquire title by adverse user where his user is as a member of the public, in common with all others exercising and enjoying the privilege of use, since the use in such a case is not exclusive." The witnesses of appellants who were joy-riders, hunters, neighbors or explorers who claimed they went on the Shimmin roadway can contribute nothing to appellants. Neither does their evidence show continuous usage nor to what extent their usage pertained to each year.

There were a number of interruptions after 1951 by Shimmins to any pretended or claimed adverse use by appellants, as follows:

1. Breaking of Critchlows lock on Gate 2 by Lynn Shimmin in 1952.
2. Blocking the road and keeping John Critchlow waiting to go with armed men in deer-hunting party at the rocks in 1953 and asserting it was Shimmins' road.
3. Placing and replacing locks on gates by Shimmins exclusively in 1953 and continuously thereafter.
4. Making Critchlows ask for keys to gain access through locked gates year after year when locks were changed or replaced.

5. Replace Gate 2 with a metal gate in 1960's.
6. Attorney Luck Pappas' letter (Exhibit 17) in 1968 claiming right of way in appellant John Critchlow over Shimmin lands and rejected by Funnon Shimmin with reply that Critchlow use was without right and non-negotiable, being permissive only.
7. Alleged blocking of road by Shimmons on September 29, 1971, causing this lawsuit.

If it is true that John Critchlow and Foster Shimmin rode together in 1936 over the Shimmin property to place salt out on the rim by Section 31, it must be presumed without any other testimony that that incident was friendly, neighborly, permissive and by the consent and license of the owner. There is not one word in the record of a claim of right, adverse user or notice of hostile exercise of continuous disregard of the rights of Shimmins as owners of the property in question over which a roadway or easement is claimed by appellants. 25 Am. Jur. 2nd 462 states the following:

“Use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription. Furthermore, if the original use by the claimant is by permission, it is presumed to so continue. - - - -

Where the owner constructs a way over his land for his own use and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission."

The appellants have failed to show by probative evidence that a twenty year adverse period of user was initiated, continued or completed. At least there is nothing to show that a claim of right to an easement against Foster Shimmin and Vera Shimmin, as owners of the lands up through 1962, had been open, notorious, continuous, uninterrupted, exclusive, hostile or without permission and thereafter acquiesced in or submitted to for a period of twenty years.

## POINT II

THE COURT BELOW DID NOT ERR IN FINDING THAT APPELLANTS ARE NOT ENTITLED TO A WAY OF NECESSITY OVER THE PROPERTY OF RESPONDENTS CRITCHLOW.

The properties partitioned to John Critchlow (green) and Jay Critchlow (red) are not and never were

contiguous. The partition occurred by decision of three referees and was "approved, allowed, settled and confirmed in every respect" by Judge Ruggieri knowing there was no established road from the north parcel to the south parcel and that the acreages were unequal and with limited access. No appeal was taken from the partition suit though there were motions for reconsideration and for a new trial on the issues of access and who was entitled to which parcel (Exhibits 18, 19, 20, and 21).

When the two parcels were owned in common by the Critchlow brothers, they had access over the Mathis property which separated the parcels by reason of an exchange agreement with Rex Mathis. Because of the partition, a court cannot grant a way of necessity over the Mathis property nor over the Shimmin property. Where the parcels are not contiguous, neither can the court order a way of necessity over one of the separate parcels. The appellants have not shown a necessity exists for a way over the red parcel partitioned to Jay Critchlow. Neither is this a proper case for a "way of necessity." 25 Am. Jur. 2nd 448-449 under Easements reads as follows:

"A way of necessity is dependent on unity of ownership of the dominant and servient estates, followed by a severance thereof. A way of



necessity cannot be claimed over the land of a third person, and it cannot exist where neither the party claiming the way nor the owner of the land over which it is claimed, nor anyone under whom they or either of them claim, was ever seised of both tracts of land at the same time. Moreover, there must have been an absolute ownership of both tracts. A way of necessity does not arise, for example, where the grantor owned merely an undivided interest in the land over which the right is claimed."

At page 450 of 25 Am. Jur. 2nd, it is stated also that a way of necessity must be more than a mere convenience and probably be a strict or absolute necessity. It is obvious that ~~unless~~ a prescriptive right over the Shimmin parcel can be established by the appellants, that a way decreed to Appellants by the Court over the red parcel of Jay Critchlow would be useless. The Complaint repeatedly complains that the plaintiffs (Appellants) are denied vehicular access, but never is it alleged that they have no access or are denied usual, reasonable or ordinary access. Vehicle access is a convenience, not a necessity, to these particular grazing lands of appellants, especially when it is realized the use of the land for cattle remains the same today as it has for over thirty

years. You still round up cattle on hundreds of acres of range land in mountainous areas on horseback or afoot. Appellants have other avenues of ingress and egress or to pursue building a rubber-tired access road up Deadman Canyon to their property if they desired to improve their means of access (Tr 255-257, 212-219). Appellants apparently have not sought a means of ingress and egress with the Mathis people to the west with whom they previously exchanged use of property. Such alternatives might prove more costly than to demand a free road and maintainance thereof from Shimmins.

### POINT III

THE COURT BELOW DID NOT ERR IN FINDING THAT THE APPELLANTS WERE NOT ENTITLED TO DAMAGES AGAINST RESPONDENTS.

The trial court found in favor of the respondents and against the appellants on the facts. Since there is no right of way in favor of appellants, there could be no damages for infringement of such right of way.

CONCLUSION

The lower court had ample evidence that no prescriptive right of way had been proven by appellants and that therefore no way of necessity existed nor were there any damages.

Respectfully submitted,

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