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

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

Utah

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SOPHIA CRITCHLOW, his wife,

Plaintiffs and Appellants,

vs.

Case No. 5 1975
13738

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

Defendants and Respondents,

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

BRIEF OF APPELLANTS,
JOHN C. CRITCHLOW AND
SOPHIA CRITCHLOW, HIS WIFE

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

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STATEMENT OF POINTS

POINT I

THE COURT BELOW ERRED IN DECIDING THAT APPELLANTS' USE OF SAID ROADWAY AS TO RESPONDENTS SHIMMIN WAS PERMISSIVE RATHER THAN PRESCRIPTIVE.

POINT II

THE COURT BELOW ERRED IN FAILING TO DECREE THAT APPELLANTS ARE ENTITLED TO A WAY OF NECESSITY OVER THE PROPERTY OF RESPONDENTS CRITCHLOW.

POINT III

THE COURT BELOW ERRED IN FAILING TO AWARD DAMAGES TO THE APPELLANTS FOR THE BLOCKING OF SAID EASEMENT AND RIGHT OF WAY BY RESPONDENTS.

In the Supreme Court of the State of Utah

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

BRIEF OF APPELLANTS JOHN C. CRITCHLOW and SOPHIA CRITCHLOW

STATEMENT OF THE KIND OF CASE

This is an action brought by appellants seeking to establish an easement and right of way for vehicle, animal and pedestrian travel over land belonging to the respondents, under the theory of prescriptive right as to the respondents SHIMMIN and under the theory of a way of necessity as to the respondents CRITCHLOW. Appellants also seek damages for the blocking of such claimed easement and right of way by respondents.

DISPOSITION IN THE LOWER COURT

The court below, sitting without a jury, ruled that appellants did not have an easement by prescription over the property of respondents FUNNON T. SHIMMIN, DONNA

SHIMMIN and VERA SHIMMIN and consequently, that appellants' claim for an easement by way of necessity over the land of respondents JAY L. CRITCHLOW and LOIS CRITCHLOW was not applicable and does not exist. The court also denied any damage to appellants.

RELIEF SOUGHT ON APPEAL

Appellants seek an order reversing the court below and declaring that appellants do indeed have an easement and right of way over respondents' land and that appellants are entitled to damages for the blocking thereof by respondents.

STATEMENT OF FACTS

Appellant JOHN C. CRITCHLOW and respondent JAY L. CRITCHLOW are brothers. Prior to 1971 they operated land in the mountains north of Price, Utah, on a partnership basis. This land was principally acquired from their father, John D. Critchlow, now deceased, who with his two sons had operated such land as a grazing unit for many years prior to 1971 (TR 8-11; TR 16, 17). In 1971 the District Court of Carbon County, State of Utah, in Case No. 9808, entered a Decree of Partition dividing such land between the two brothers (Defendants' Exhibit 21). As shown on Plaintiffs' Exhibit 1, the land partitioned to respondent JAY L. CRITCHLOW (marked in red on said Exhibit 1) lies to the north of that partitioned to appellant JOHN C. CRITCHLOW (marked in green on said Exhibit 1). As is evident from Plaintiffs' Exhibit 1, the land thus partitioned to respondent JAY L. CRITCHLOW and the land partitioned to the appel-

lant JOHN C. CRITCHLOW are not contiguous, but are separated in part by land marked in yellow on said Plaintiffs' Exhibit 1. This land marked in yellow on said Exhibit now belongs to the respondents SHIMMIN.

Vehicular access to the general area involved in this matter from Price, Utah is gained by traveling northwest to Helper, Utah; then to Castle Gate, Utah; then northerly up Willow Creek toward Duchesne, Utah, nearly to the Duchesne County line (see Plaintiffs' Exhibit 1); and then Southeasterly along a public road called the "Park Road" to a point near the northeast corner of the Southeast Quarter of Section 17, Township 12 South, Range 11 East, of the Salt Lake Base and Meridian. (See Plaintiffs' Exhibits 1 through 6). This point is designated as "Gate" in the northeasterly part of the red area marked on plaintiffs' Exhibit 1. At this point one leaves the public "Park Road" and follows a private road southerly through Sections 20, 29 and 32 of said Township and Range (note the red and yellow areas on Plaintiffs' Exhibit 1) until access is gained to the green area, Plaintiffs' Exhibit 1, owned by appellants. (Section 31 said Township and Range and Section 4 and 5, Township 13 South, Range 11 East, Salt Lake Base and Meridian) (TR 11-14). It is this private roadway marked on Plaintiffs' Exhibit 1 and on Plaintiffs' Exhibits 3, 4, and 5 (TR 58-63, 242) which is the basis of the dispute between the parties.

Appellants contend that such roadway was used by the Critchlows as long ago as 1926 to gain access to the area

marked in green on Plaintiffs' Exhibit 1, partly across their own land (red area, Plaintiffs' Exhibit 1) and partly across the area now owned by respondents Shimmin (yellow area, Plaintiffs' Exhibit 1; TR 11). They maintain that since said roadway was used when both the red parcel and the green parcel (Plaintiffs' Exhibit 1) were under common ownership to gain access to the area marked in green, a way of necessity over the red area in favor of the green area arose upon the partition of such areas as above set out. Appellants further contend that by reason of such use for longer than twenty years over the property now owned by respondents SHIMMIN (area marked in yellow, Plaintiffs' Exhibit 1) appellants have effectively established an easement by prescription (R 1-7).

Respondents claim, and the trial court found, that such use as appellants may have made of said roadway over the property now owned by respondents SHIMMIN was permissive only, and since no prescriptive right existed over the SHIMMIN property, a way of necessity could not arise over the property of respondents JAY L. CRITCHLOW and LOIS CRITCHLOW, since appellants' property is not contiguous thereto (Plaintiffs' Exhibit 1; R 72-75).

The CRITCHLOW property now involved was acquired between the 1930's and 1943. (TR 8, 9, 76, 285) but the father of the Critchlow brothers had other property in the general area as early as 1926 (TR 9) and appellant JOHN C. CRITCHLOW recalled hauling salt into the red and green areas (Plaintiffs' Exhibit 1) with his father by means of a wagon and team as early as 1926 (TR 9, 77, 78, 93). The

Shimmin family first acquired an interest in their property in 1935 from a man by the name of Charles Peterson (Section 29) and from a man named McIntire (Section 32), (Plaintiffs' Exhibit 1; TR 14, 223, 238). In 1935 part of the Peterson tract (Northeast Quarter of Section 29, Plaintiffs' Exhibit 1) was already under fence, the only part of the property here involved which was at that time so enclosed (TR 225).

Appellants and their witnesses testified that the right of way indicated on Plaintiffs' Exhibits 1, 3, 4, and 5 was used by appellants over its entire length as above set forth from Section 17 to Section 31 (Plaintiffs' Exhibit 1) from 1926 to 1948 and thereafter, with the first motor vehicle being used in 1932 (TR 18, 19, 88, 116, 145-147).

Respondents and their witnesses on the other hand testified that no road existed south of "Gate 2" (Plaintiffs' Exhibit 1) prior to 1948 (TR 163, 164, 226, 228, 241).

However, all parties agree that since July of 1948 a roadway has existed and been used by appellants over the route contended for by the appellants and as indicated on Plaintiffs' Exhibits 1, 3, 4, and 5, since at that time, July 1948, Loren Chidister at the request of several property owners in the area including the Critchlows and Foster Shimmin, father of respondent FUNNON SHIMMIN, brought a D-4 caterpillar bulldozer from Section 17 south into Section 5 for the purpose of building a cow trail from the top of the mountain in Section 5, south down Dead Man Canyon (TR 188-190, 242-246). The south part of appellants' property (green area, Plaintiffs' Exhibit 1) is rugged, steep country and

does not permit vehicular access from that direction to the northern parts of Sections 4, 5, and 6 and the other property of the parties further to the north (TR 35, 80-82, 91, 92, 103-105, 190, 198), although cattle belonging to the parties have been able to drift from the south to the north in the spring and from the north to the south in the fall through such steep and rugged area (TR 17, 64).

In 1950 or 1951 appellant JOHN C. CRITCHLOW built a fence west from the center of Section 29, which fence intersected the roadway in question and at which intersection appellant installed a gate (Gate No. 2, Plaintiffs' Exhibit 1; TR 15, 69, 74, 249, 250). Later appellant placed a lock on this gate (TR 16, 31, 181, 250) and respondent FUNNON SHIMMIN also placed locks on said gate from time to time as the locks became broken (TR 249-250). However, in all cases all parties were furnished keys to such locks by the other (TR 16, 32, 187, 251). In 1951 or 1952 respondent FUNNON SHIMMIN built a fence on the line between Sections 31 and 32 and placed a gate in that fence line where the roadway in question at that time intersected the same (Gate 3, Plaintiffs' Exhibit 1; TR 24, 244) and in 1953 or 1954 respondent FUNNON SHIMMIN constructed a fence on the south line of Section 32 and placed gates therein at the places where said fence line intersected the roadway in question at that time (Gates 4 and 5, Plaintiffs' Exhibit 1; TR 25, 26, 245). During or about 1954, respondent SHIMMIN with the concurrence of appellant JOHN C. CRITCHLOW (TR 27) made a slight change in the location of said roadway by grading a

road generally parallel to the old one, but on the north side of the south line of Section 32 from a point just north of Gate 4 to a point just north of Gate 3 (Plaintiffs' Exhibit 1: TR 26-28, 244), which then became the main route traveled by appellants across the south end of Section 32 to reach their property in Section 31 (Plaintiffs' Exhibit 1; TR 29, 246).

In the spring of 1972 respondents blocked appellants' use of said roadway (TR 31-33, 56, 57, 114, 115) and have continued to do so. Appellants, as a result, trucked approximately 100 head of cattle which they were intending to graze on their land in Section 31 (green area, Plaintiffs' Exhibit 1) to Roosevelt, Utah, where they incurred expenses for hauling, feeding, treatment and property rental with respect thereto (TR 33-46). Appellants were also unable to collect fees for deerhunting rights on their property in 1972 (TR 47-51).

ARGUMENT

POINT I

THE COURT BELOW ERRED IN DECIDING THAT APPELLANTS' USE OF SAID ROADWAY AS TO RESPONDENTS SHIMMIN WAS PERMISSIVE RATHER THAN PRESCRIPTIVE.

The prescriptive period for acquisition of an easement in the State of Utah is twenty years. (*Anderson vs. Osguthorpe* 29 Utah 2d 32, 504 P. 2d 1000; *Cassity vs. Castagno*, 10 Utah 2d 16; 347 P. 2d 834; *Savage vs. Nielsen*, 114 Utah 22, 197 P. 2d 177; *Morris vs. Blunt*, 49 Utah 243, 161 P. 1127).

The appellants by their testimony and by that of their witnesses have shown their use of the roadway outlined on Plaintiffs' Exhibit 1 from 1926 up until the spring of 1972 (TR 9, 14-18, 69, 72, 73, 86, 116, 145, 147). Even by the testimony of the respondents and their witnesses, appellants have used the road from July 1948 until the spring of 1972, a period of longer than twenty years without interruption (TR 246, 280). The findings of fact of the court below do not indicate otherwise (R 72-75). The only evidence of any alleged interruption was testimony that at one time in 1953 a party of deerhunters, not including appellant JOHN CRITCHLOW by his statement (TR 28, 270), was delayed for a short time by a brother of respondent FUNNON SHIMMIN while the Shimmin hunting party got ready to take off first to hunt the area (TR 274, 275). This alleged temporary interference, principally by a non-owner of the property, certainly did not constitute a legal interruption of appellants' use of said road.

Appellants recognize that their use must be adverse and not permissive. However, appellants have clearly shown an open, notorious and continuous use of the roadway for longer than twenty years. The presumption then arises that the use was adverse and the burden is on the respondents SHIMMIN to show otherwise (*Zollinger vs. Frank*, 110 Utah 514, 175 P. 2d 714; *Dahnken vs. Romney*, 111 Utah 471, 184 P. 2d 211; *Richins vs. Struhs*, 17 Utah 2d 356, 412 P. 2d 314.)

The evidence is clear from respondents and their witnesses themselves that respondents never at any time hindered, denied, or questioned appellants' use of the road (TR 264), although appellant JOHN CRITCHLOW was continually objecting to respondent FUNNON SHIMMIN about SHIMMIN fixing the road (TR 253); although "everytime I'd fix a road, John come along and gave me hell about it" (TR 258); even though the parties had some serious arguments about the road: "They were getting after Funnon pretty good" (TR 181); and although appellant JOHN CRITCHLOW objected to respondent FUNNON SHIMMIN rerouting a portion of said road (TR 26-29). (*Lyman Grazing Association vs. Smith*, 24 Utah 2d 443, 473 P. 2d 905; *Scott vs. Weihheimer (Montana)*, 374 P. 2d 91; 80 A.L.R. 2d 1098).

In further evidence of appellants' assertion of right, appellant JOHN CRITCHLOW himself at one time placed a locked gate across the road and gave respondents SHIMMIN a key (TR 16, 31, 181, 250); appellants never once sought permission from defendants to use the road, but until 1972 used it as they pleased (TR 19); and respondent SHIMMIN recognized said road, and by providing gates through any fences constructed by respondents which intersected said road and repeatedly furnishing appellants with keys to any locks on said gates (TR 244, 245, 251, 261).

These actions by the appellants and the reactions on the part of the respondents clearly show that appellants' use of the road was *AGAINST* respondents and not *UNDER* them (*Zollinger vs. Frank, supra.*).

The facts of this case distinguish it from the rule followed by the Utah Supreme Court in the case of *Sdrales vs. Rondos*, 116 Utah 288, 290 P. 2d 562, and *Harkness vs. Woodmansee*, 7 Utah 227, 26 P. 291, to the effect that when an owner makes a roadway for his own use and another uses the same, the burden is then on the user to show that the use is adverse rather than permissive. Here there is competent and compelling evidence that the road was in use prior to the time respondents SHIMMIN acquired their property (TR 18, 19, 88, 116, 145, 146, 147) and in addition, the work which Loren Chidester did in improving the road with his machine in July, 1948 (TR 188-190, 242-256) was actually not requested by respondent SHIMMIN to make a road on Shimmin's property, but was incidental to the making of a cow trail on the Critchlow property, all of which was as much or more paid for by appellants as by respondent SHIMMIN according to Chidester's testimony (TR 188, 196, 197).

Establishment of an easement by prescription over the property of respondent SHIMMIN is not as far as respondents SHIMMIN are concerned in any way related to the matter of a way by necessity. Even if appellants had other access to their property, which the evidence shows they do not (TR 35, 80-82, 91, 92, 190, 198, 214), such fact would have no bearing on whether or not appellants had acquired an easement by prescription over the property of respondent SHIMMIN (*Dahnken vs. Romney, supra.*).

POINT II

THE COURT BELOW ERRED IN FAILING TO DECREE THAT APPELLANTS ARE ENTITLED TO A WAY OF NECESSITY OVER THE PROPERTY OF RESPONDENTS CRITCHLOW.

There is no question that prior to partition the Critchlow brothers were the owners in common of both the red parcel and the green parcel shown on Plaintiffs' Exhibit 1 and that to get to the green parcel by road it was necessary to first cross the red parcel on the roadway as indicated on Plaintiffs' Exhibits 1, 3, 4 and 5 (Defendants' Exhibit 21).

Where land allotted by order of a court in a proceeding for partition is so situated that one of the parts would be entitled to a way of necessity if an allotment were made by deed from all of the other tenants in common, or from a common ancestor, the effect of the allotment by order of the court is to create a way of necessity (*59 American Jurisprudence 2d 917; 28 Corpus Juris Secundum 690; Blum vs. Weston (California) 36 P. 778*). The trial court in the partition suit (Defendants' Exhibit 21) did not deny the existence of such a way of necessity, but in fact asserted, as shown in the transcript of the argument for a new trial (Plaintiffs' Exhibit 16) that if such a roadway was then in existence, the same should be recognized. The testimony of all witnesses in this case and Plaintiffs' Exhibits 3, 4, and 5 clearly confirm the existence of such roadway at the time of partition.

Although there was some testimony offered at the trial

by the respondents to the effect that appellants could gain vehicular access to their property by building roads leading from the south, it is patent that first of all appellants have no confirmed access to a public road from that direction (TR 213, 214) and secondly, the cost of such construction would be prohibitive (TR 218, 221, 292, 296, 297). The only feasible vehicular access to appellants' property is over the easement now claimed by appellants and the necessity still exists and will continue to do so.

POINT III

THE COURT BELOW ERRED IN FAILING TO AWARD DAMAGES TO THE APPELLANTS FOR THE BLOCKING OF SAID EASEMENT AND RIGHT OF WAY BY RESPONDENTS.

The measure of damages for obstructing an easement is the injury sustained by the easement owner through the loss of use of the easement during the continuance of the obstruction. The law also presumes some damage merely from the infringement even in the absence of a showing of special damage. (25 *American Jurisprudence* 2d 525, 28 *Corpus Juris Secundum* 821). In this case the appellants have proved special damages in the amount of \$1885.71 directly attributable to their loss of use of said roadway by reason of the unlawful acts of the respondents (TR 37-49); Plaintiffs' Exhibits 7-13).

CONCLUSION

The decision of the court below should be reversed and the easement and right of way claimed by the appellants over the property of the respondents should be judicially established and confirmed and appellants should be awarded their proven damages caused by the interference with said right of way by the respondents.

Respectfully submitted,

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