

1949

# James Sdrales and Virginia Zambukos v. Sam Rondos : Brief of Defendant and Appellant

Utah Supreme Court

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McKay, Burton, Nielsen and Richards; Counsel for Appellant;

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In the  
**SUPREME COURT**  
of the  
**STATE OF UTAH**

**FILED**

22 1949

**JAMES SDRALES and**  
**VIRGINIA ZAMBOUKOS,**  
*Plaintiffs and Respondents,*

**vs.**

**WILLIAM RONDOS,**  
*Defendant and Appellant.*

CLERK, SUPREME COURT, UTAH

Case No.  
80031

**BRIEF OF DEFENDANT AND APPELLANT**

**McKAY, BURTON, NIELSEN**  
**AND RICHARDS,**  
*Counsel for Appellant.*

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BRIEF OF DEFENDANT AND APPELLANT

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STATEMENT

This is an action commenced by the plaintiffs to enjoin the defendant from trespassing upon lands claimed by the plaintiffs. Defendant counterclaimed and asked to have the Court determine that the defendant had acquired a right by prescription to a 12-foot strip ex-

tending from West Temple on the West, thence East 165 feet to defendant's property. The defendant prosecutes this appeal from the judgment of the lower court enjoining defendant from using the right-of-way and denying defendant's counterclaim.

This action involves property in down-town Salt Lake City, located on the south side of Second South and immediately to the east of West Temple Street. The Plaza Hotel is located on the southeast corner of the intersection of Second South and West Temple, and east of this hotel are small shops, cafes, beer parlors, restaurants, cleaning establishments, etc., extending east to defendant's property. The property of the defendant is located at 63-65 West Second South Street, Salt Lake City, Utah, and has a frontage of 40 feet on Second South and extends southerly seven rods from the property line of Second South Street.

The west line of defendant's property is 125 feet east of the property line of West Temple Street. Adjoining the Plaza Hotel on the south is a 12-foot right-of-way which extends east from its entrance on West Temple Street to defendant's property, and along the north side of which there are entrances to the various stores, shops and buildings of the occupants of the buildings fronting on Second South. At a point 75 feet east from West Temple the alleyway widens by 26 feet and affords access to buildings fronting on West Temple and Third South, as well as those fronting on Second South. This alleyway has been and is used by various property owners and tradesmen in making deliveries.

The building of the defendant is a two-story brick building erected in 1891. In 1893 a heating plant was erected on the premises which consisted of a large chimney approximately 40 feet high, being an iron stack fixed to a cement base, which cement base extends approximately eight or nine feet above the ground; there is an excavated pit with cement side wall approximately eight feet in depth, containing the coal bin and furnace, with boiler and stoker. The south cement wall of the furnace room is approximately on the south property line of defendant's property.

The evidence in this case showing the use by the defendant and appellant of this right-of-way is not controverted in any manner whatsoever by plaintiffs, and the only evidence introduced as to the use of the right-of-way is that of defendant. This evidence consists of the testimony of two very elderly witnesses called by defendant, one Richard H. Latimer, a co-owner of one-eleventh interest, and who collected rents for the estate for some fifty years, and the other Anton F. Gotberg, a retired tailor, who had occupied the premises since 1890. The evidence of these witnesses is supported by Exhibits 3, 4, 5 and 6, being pictures of the right-of-way. These witnesses testified that the right-of-way had been used for well over forty years by the occupants and tenants of defendant's property in making deliveries of coal, merchandise, materials required for the repair of the building and generally as a means of access for pedestrian and vehicular traffic. This evidence was not controverted in any manner whatsoever by plaintiffs. There is

no dispute whatsoever on the facts of the use of the property and right-of-way by the predecessors in interest of defendant and their tenants and occupants.

Mr. Latimer testified that his father had owned this property as original patentee, and possessed it until his death in 1881. Mr. Latimer made all collections of rent for the family, and started such collecting in 1888. The Latimer family took over the building now located on the premises in 1891.

The coal bin described aforesaid as a part of the heating plant had a capacity of five tons (Tr. 75). At page 76 of the transcript Mr. Latimer testified that from the time he took it over, and practically all of the time, he furnished the heat for the building, and for this purpose he purchased the coal which was brought in by trucks and wagon though the alleyway claimed by defendant. He described the alleyway and right-of-way used in bringing the coal in as the 12-foot right-of-way claimed by defendant, and extending from West Temple east to the heating plant.

At page 76 of the transcript Mr. Latimer also testified that these deliveries of coal would be from one to three loads per month, and this fact is also confirmed by Mr. Gotberg. The course of this right-of-way was marked by the red line appearing on plaintiff's Exhibit A, which likewise appears at Page 82 of the transcript in the testimony of Mr. Latimer.

At Pages 84-85 of the transcript appears the testimony of Mr. Latimer where he states that the materials

for repairing the roof and building were brought in over this same right-of-way and the alleyway for mixing mortar to be used in repairing the building, etc.

In addition to the delivery of coal to the furnace coal bin, Mr. Gotberg, at Pages 98-100 of the transcript, testified that deliveries of coal were also made to the location of the tailor shop occupying the west half of the building for use in the heating and operation of the shop. Mr. Gotberg, at Page 102 of the transcript, further testified that the alleyway was used in making deliveries of merchandise and groceries for a period of twenty-five years to the occupants of defendant's property. Mr. Gotberg confirmed the testimony of Mr. Latimer to the effect that deliveries were made by way of this alleyway; that he observed such deliveries. Mr. Latimer testified that the repairs to the building would occur in the replacement of a new roof at least every ten years, and other construction, such as the erection of a brick addition on the southwest corner of defendant's property, which was accomplished by the use of this right-of-way.

At Page 101 of the transcript, Mr. Gotberg stated that for a period of time the upper floors of the building were advertised as a roominghouse, but that most of the upper floors were used for illegal business; that one of these "ladies" occupied the place for twenty-five years, and that their groceries and merchandise were brought to them through the rear entrance and by way of this alleyway. Mr. Gotberg identified one of these "ladies" as "Babe," and recalls that the grocery man drove to the

back of the shop and took the groceries up to her. At Page 105 of the transcript Mr. Gotberg recalls vividly the traffic that came to the rear entrance of the property, because he saw the girls jumping the fence at the rear without any clothes on, inasmuch as his "eyes were not so bad then."

At Page 107 of the transcript, Mr. Mulliner asked the witness Gotberg on cross-examination:

"Have you ever seen a coal truck actually come in there, back into the boiler plant?"

A. Oh, yes, I seen that quite often, because after they had the garage building right here, right there on that corner, they had such a hard time to get in with coal, so they sometimes had to carry it and sometimes had to have an extremely long chute to shoot it down, if they could get the wagon close enough it was easy to get it into the hole because the hole is in the ceiling of it. The machine shop is built on the top of the ground."

The property claimed by plaintiffs did not at any time, from the issuance of patent until the conveyance to the plaintiffs subsequent to 1939, exist in any one person. The right-of-way crossed at all times property the title to which was in various individuals. In other words, the right-of-way never arose by reason of retention by any one owner for his own purpose. The evidence shows that Second South from defendant's corner west to West Temple and east to the Kearns Garage alley is lined solid with buildings, and the only access to the property of defendant, and particularly for the making

of deliveries of coal, etc., had been for many years over the course of this right-of-way, as claimed and described by defendant's witnesses, and as appeared in the pictures. Any person, upon viewing this property, could readily see the maner in which the delivery of coal and other supplies would be made to defendant's property by following this right-of-way as claimed by defendant.

In connection with plaintiff's motion to strike from the Bill of Particulars all of the material appearing at Pages 140 to and including 145 of the transcript, defendant desires to set forth the following facts:

Defendant's counsel having presented a stipulation and order for the settlement of the Bill of Exceptions in this case in accordance with the transcribed record of the reporter, being Pages 1 to 139 of the transcript, and plaintiffs' counsel having refused to sign the stipulation, counsel for plaintiffs and defendant appeared before Judge Van Cott on December 18, 1948, for the purpose of having the Bill of Exception settled. No written objections had been filed by plaintiffs to the proposed Bill of Exceptions, but under the stipulation as it appears on Page 141, Mr. Mulliner was permitted to make oral objections to the proposed bill. Objection was made by Mr. Mulliner that as a part of the cross-examination of the witness Latimer he stated that he did not make claim to a right-of-way to Mr. Ball or to plaintiffs or their predecessor in title, and suggestion was made that this testimony should be added to the transcript.

At Page 142 of the transcript the exact testimony as claimed by Mr. Mulliner was stated by him to be that the witness Latimer was asked "whether it had been discussed and whether he was on friendly terms with the plaintiff and his predecessor in title," and the last statement he made was to the effect that he had not claimed a right-of-way so far as plaintiff or his predecessors in title were concerned. At that page (142) of the transcript, Judge Van Cott says that in his best judgment and recollection Latimer made the statement "that he at no time made any claim to a right-of-way, the one in question."

As will appear from the transcript, this trial took place November 28, 1947. This matter was presented to Judge Van Cott December 18, 1948, some thirteen months subsequent to the time the witness Latimer testified. Such testimony does not appear any place in the notes of the trial prepared by Judge Van Cott, but there does appear in Judge Van Cott's notes, in his handwriting, and in the testimony of Latimer, the following words: "Never discussed the right-of-way with anyone."

It definitely appears at Page 90 of the transcript in the testimony of Latimer on cross-examination, and at the end of his examination, and in accordance with the notes of Judge Van Cott, that Latimer never had any discussion with any of the owners of plaintiffs' property concerning the right-of-way.

Mr. Rasmussen, the court reporter, at Page 142 of the transcript, states that the witness Latimer was not

a flighty witness but spoke slowly, and Mr. Rasmussen felt that he was able to report accurately all that the witness said. The certificate of Mr. Rasmussen at Page 139 is to the effect that he caused the shorthand notes of the testimony to be transcribed, and that the pages numbered from 1 to 138 constitute a full, true and correct transcript of the shorthand notes taken at the trial of the action and a full, true and correct report of the evidence, testimony and other proceedings had and given in said cause on said dates.

### PETITION

Comes now the defendant and appellant and petitions this Honorable Court to strike from the Bill of Exceptions all of the testimony and proceeding appearing in Pages 140 to 145 of the transcript, together with the attached notes of Judge Van Cott, and that this Honorable Court settle as the Bill of Exceptions in this case the transcript of the evidence, consisting of Pages 1 to 139, together with the exhibits offered in the case, together with the judgment roll. This petition is made upon the files and record in this matter now before the Supreme Court, and for the reason that Judge Van Cott acted without and in excess of his jurisdiction in settling the Bill of Exceptions and adding purported testimony contrary to and not supported by the notes of the reporter Clyde Rasmussen. This petition is made pursuant to Section 104-39-7, U.C.A., 1943.

### SPECIFICATIONS OF ERROR

1. The Court erred in considering as evidence in

this case purported testimony of Richard C. Latimer, as indicated at Page 142 of the transcript, for and upon the reason that notes of the reporter clearly indicate that no such evidence was ever introduced in the case, and that the Court acted in excess of its jurisdiction and authority in considering such evidence.

2. The Court erred in the order settling the Bill of Exceptions, wherein the Court has attempted to add to the reported and transcribed notes of the court reporter, purported testimony of Richard Latimer, and including in the record the Pages 140-145 of the transcript, as contrary to law and fact, and in excess of the jurisdiction of the Court.

3. The Court erred in its third Finding of Fact, in this, that it was found that plaintiffs are now, and that they and their predecessors in interest have for many years been, the owners and entitled to the possession of all of the lands claimed by plaintiffs in their complaint, for and upon the reason that said finding is contrary to law and to the evidence.

4. The Court erred in its fourth Finding of Fact, wherein it excluded from the finding, which shows the property owned by the defendant, the right-of-way claimed by defendant in defendant's counterclaim, for the reason that the failure to include the right-of-way in this Fourth Finding is contrary to law and to the evidence.

5. The Court erred in its sixth Finding of Fact in this: That it found defendant had not used the south-

erly portion of plaintiff's property openly, notoriously and continuously under a claim of right or adversely to plaintiffs and their predecessors in interest for a period of twenty years immediately preceding the filing of this action, or any twenty-year period thereof, which finding is contrary to the law and the evidence.

6. The Court erred in its seventh Finding of Fact in this: That it found that the defendant had no right, title or interest to all or any part of the real estate under consideration belonging to the plaintiffs by way of easement or at all, which finding is contrary to the law and the evidence.

7. The Court erred in its Conclusions of Law, and particularly the second Conclusion, for the reason that the same is contrary to the law and is contrary to the evidence.

8. The Court erred in its third Conclusion in that said Conclusion is contrary to law and is contrary to and not supported by the facts.

9. The Court erred in its judgment, and particularly Paragraph 2 thereof, in determining that the defendant take nothing by reason of the counterclaim, for the reason that said judgment is contrary to evidence in the case and is not supported by the Findings or Conclusions of the Court.

10. The Court erred in entering its judgment, and particularly Paragraph 3 thereof, for the reason that said decree is contrary to law and is not supported by the evidence, findings or conclusions.

11. The Court erred in entering its judgment, and particularly Paragraph 5 thereof, in that said judgment is not supported by the Findings of Fact or Conclusions and is contrary to the evidence and law of the case.

12. The Court erred in entering its judgment, and particularly Paragraph 6 thereof, restraining defendant from the use of the right-of-way, for and upon the reason that said judgment is not supported by the evidence, Findings or Conclusions, and is contrary to law.

13. The Court erred in entering judgment for costs in the sum of \$13.20 for the reason that the judgment for costs is not supported by the evidence and is contrary to law.

14. The Court erred in refusing to grant the motion of the defendant for a new trial, particularly upon the grounds specified in said motion to the effect that the judgment is contrary to the evidence and is against law.

## ARGUMENT

The Specifications of Error have been grouped under the following headings and will be consolidated for the convenience of counsel and court in the headings as they appear in the argument.

### I.

THE COURT ERRED IN ATTEMPTING TO INSERT IN THE BILL OF EXCEPTIONS THE PURPORTED TESTIMONY OF ONE OF THE WITNESSES CONTRARY TO THE TRANSCRIBED NOTES OF THE REPORTER.

Under this heading we are submitting our argument in behalf of the petition to strike from the Bill of

Exceptions the purported testimony of the witness Latimer as to whether he did or did not claim the right-of-way. We feel that in addition to our petition as a matter of law, Judge Van Cott committed error in making this a part of the Bill of Exception, for he has thereby inserted into the record purported testimony of the witness Latimer which was never given, and evidently considered evidence in making his decision which was never introduced and which was never a part of this case.

First and above all, we want to state that we can at no time determine as a mental process all of the inferences or determinations which Judge Van Cott in his mind attempted to make from such purported evidence. He stated to us in testimony which does not appear in the notes at the time the Bill was being settled that he had in his own mind placed great emphasis in making his decision as to the right-of-way upon the fact that Latimer had nor claimed such a right-of-way.

Mr. Rasmussen's notes, at Page 90, which coincide with the notes kept by Judge Van Cott, are to the effect that Latimer never discussed the right-of-way with any person. The fact remains that the testimony and record in this case shows that the property had originally come to the father of the witness Latimer. The record further shows that for a period of forty years or more, Latimer had only a one-eleventh interest in this property, and that he collected the rent and purchased the coal for furnishing heat to the premises.

Assuming, therefore, for the purpose of argument,

that Latimer had never orally made a claim to the right-of-way to any of the predecessors in interest of plaintiffs, the only emphasis that could be placed upon this is that Latimer, an owner of one-eleventh interest, has never said anything to anyone about the right-of-way by way of claiming it. In other words, Latimer's purported testimony is that he had never discussed the right-of-way with anyone.

So, consistent with this must be the fact that he never made any statement of any kind about it, so that any testimony of Latimer, as aided or interpreted by Judge Van Cott, would be a reflection of a mental process of Latimer and not a vocal or physical one. If Judge Van Cott, therefore, was to give any emphasis and, as he said, base his judgment upon the mental process of a one-eleventh owner of the property, then we submit that there is no more clear indication of the error that Judge Van Cott fell into, because, as we will show further on, there is no necessity or requirement that the party claiming this prescriptive right must vocally proclaim his intentions to the other party or to the world, and that his use of the right-of-way, or the use of the right-of-way by his tenants for a prescriptive period, is sufficient to establish his right. Judge Van Cott has clearly disregarded that law if he gave any weight or emphasis (which he indicated he did) to this purported testimony of the witness Latimer.

We cannot help but feel that this matter goes beyond this for a judge, thirteen months after a trial, inserts as

purported evidence statements of a witness which do not appear in the transcribed notes but which would also be contrary to the whole tenor of the witness' testimony and to his actual statement as appears herein. In this case there was no evidence introduced by the plaintiffs as to the use of this right-of-way, and the evidence of the defendant is clear and conclusive that the right-of-way had been used for a period greatly in excess of forty year, and for Judge Van Cott to make his judgment, as he did, contrary to that evidence, it appears to us he was attempting to find some fact which would support his conclusion contrary to the evidence, as he appears to have selected what he thought the witness testified to, rather than the actual testimony of the witness, to destroy the effect of that evidence.

In other words, Latimer and Gotberg shared the use of the right-of-way for over forty years, and the only way that Judge Van Cott could have ignored all of that testimony, which was uncontroverted in every respect, was to attempt to find some flaw, which he attempted to do in basing his decision upon the mental process of Latimer. Certainly, any purported mental process of this one-eleventh owner, Richard Latimer, will not vary many times the opinion of this Court that an open and continuous use for a period of twenty years established the prescriptive right, nor can it be effective to any other owner, or the other ten-elevenths interest in the property.

The petition to strike from the bill and to have the Supreme Court settle the bill, as heretofore mentioned,

is made pursuant to 104-39-7. And, in this connection we desire to point out to the Court the fact that the claimed omission from the reported testimony of the question put to the witness, Latimer, and his reply is contrary to all of the evidence and to the contentions of Latimer. We desire in this connection to call the Court's attention to the circumstance appearing at Page 91 of the transcript, and following, wherein Latimer details a circumstance where one of the tenants, a Mr. Moore, had been requested by the plaintiffs to change his practice of parking his car on this right of way. Mr. Mulliner, in his cross examination of Mr. Latimer, brought out the fact that the plaintiff had requested the witness, Moore, not to park back there. Mr. Latimer stated that they wanted Moore to pay rent, and Moore kicked up a fuss. He stated that the plaintiffs bought Moore out and took over a lease of the property. At Page 92 of the record, Mr. Latimer details that Moore made a report to Latimer of this claim of the plaintiffs' and Latimer, therefore, went down to talk to the plaintiffs about it. Using Mr. Latimer's words, he states that Moore said the plaintiffs "were making a little trouble, I went down and saw them." This was in the year 1940, and at that time Latimer states that his response to the plaintiffs was to take them out and show them that they were using the west wall of his building as a joint wall. After he told the plaintiffs this they didn't say anything more about Moore's using the right of way. Latimer states that on this occasion nothing was said by anyone about the right-of-way.

This shows that the immediate reaction of Latimer to plaintiffs' objection of Moore parking his car in the right-of-way, was Latimer's assertion of the fact that they were relying upon an easement in the use of his party wall, and if they wanted to raise any trouble he would also. As soon as he asserted his rights the plaintiffs had nothing to say about the right of way, and his testimony is that at no time in all of his history and connection with the Latimer property had anyone ever discussed the use of the right-of-way with him, that it had always been used for the convenience of the building.

The Moore incident demonstrated Latimer's reaction to be that he felt they had a right in the right-of-way, and he took a very definite stand in defense of that right, and asserted it in the very manner in which we would expect of a fine old gentleman, such as he is. In other words, by his assertion of his rights he let them know that he was in a position to assert some claims, if they wanted to question his right, or that of his tenant, to use that right-of-way.

It is noted that the defendant herein took exception to Judge Van Cott's settling the Bill of Exceptions with this additional testimony, (Tr. 144) and that Judge Van Cott, in disregard of this exception, settled the Bill of Exceptions.

In the case of *Center Creek Water and Irrigation Co. vs. Thomas*, 19 Utah 360, 57 Pac. 30, at Page 362 of the Utah Report the Supreme Court of this state said:

“If, however there was anything omitted from the bill of exceptions, which the respondent re-

garded as material, then his counsel ought to have objected on that ground, to the settling of the bill until the correction was made. Then if the judge, in disregard of the objection, had settled the bill, counsel should have taken an exception to the ruling, and thereupon instituted proceedings in this court, as provided in Sec. 3289, R. S., to have the bill corrected and settled in accordance with the facts.

Since the defendant has taken exception and, pursuant to the statute, petitioned this Honorable Court to settle the Bill of Exceptions without that additional testimony, under the authority of this case defendant should have the Bill of Exceptions settled to include the transcript from Page 1 to Page 139, inclusive.

We do not believe that this Honorable Court will permit a District Court in settling a Bill of Exceptions to bring into the evidence of the case testimony that was never submitted and entered, and to base the judgment upon or give any weight to such purported testimony. If this Court will permit the lower District Court to vary the evidence as shown by the transcribed notes of the reporter, then there would be no sacredness in the right of appeal and no protection whatsoever to the parties litigant if the District Judge can open wide and make his own record of the testimony, and thereby make judgments on facts never presented and preclude the injured party in his right of appeal.

We feel that the institution of court reporters and their place in the lower court, and their accuracy in reporting testimony, is for a purpose, and was instituted

to prevent such a thing from occurring as has happened here. What does it avail us to have highly paid and trained individuals, able to properly take and transcribe testimony, if that testimony can be set aside by mere recollection, especially when that recollection is so contrary to the actual notes of the judge which he himself kept? We submit, therefore, in our Specifications of Error that Judge Van Cott, in failing to consider this testimony and in failing to grant our motion for a new trial, has committed error for which this Court should give us redress.

## II.

THE EVIDENCE SHOWS THE DEFENDANT TO HAVE ACQUIRED A PRESCRIPTIVE EASEMENT OVER THE LANDS OF PLAINTIFFS AS DESCRIBED IN DEFENDANT'S COUNTERCLAIM.

The facts in this case show that since 1891 up to the time of the trial the right-of-way as claimed by defendant had been continuously and uninterruptedly and adversely used by defendant and his predecessors in interest. The elementary proposition as to the creation of a prescriptive easement is stated in the Restatement of the Law of Property, Vol. 5, Section 457, as follows:

“An easement is created by such use of land, for the period of prescription, as would be privileged if an easement existed, provided the use is (a) adverse, and (b) for the period of prescription, continuous and uninterrupted.”

The uncontroverted facts show that the owners of the building had for forty years rented the building,

and, under the terms of the rental, furnished the heat; that in furnishing this heat, the coal to operate the furnace was brought to the heating plant on defendant's property over the right-of-way; that in addition, the tenants in the building used the right-of-way in securing the delivery of merchandise, supplies, etc. This is clearly shown in the evidence.

Mr. Latimer testified that this heating plant was put in in 1893 (Tr. 74), and that since its installation they, the Latimer family, have furnished the heat and ordered the coal for the building ever since (Tr. 76). He was asked, "How was the coal brought into this property?" The reply by Mr. Latimer was, "Brought in by trucks through the alleyway on the south." (Tr. 76)

Exhibits 3, 4, 5 and 6 are pictures of the right-of-way and clearly show this alleyway and its location in respect to the heating plant. Obviously the only means of getting the coal into the plant was by means of this right-of-way. When asked to draw the course taken by the delivery trucks, Mr. Latimer drew a red pencil mark, which is shown on Exhibit A and is referred to at Page 82 of the transcript. This property remained in the Latimer family for over forty years and they made use of this right-of-way all of that time—all of which evidence is without contradiction. Not only did Mr. Latimer testify to the use of the right-of-way for the deliveries of coal, but construction work was also carried on in the rear of his premises, and deliveries for the materials were made by means of this right-of-way (Tr. 80-85).

The witness Gotberg testified that he actually saw the deliveries of coal by means of this right-of-way (Tr. 99-100). Not only were deliveries of coal made by means of this right-of-way, but also deliveries of groceries and other merchandise were made by this means (Tr. 101-102). He was asked, "Would there be any merchandise, any groceries, any deliveries at that time go into that property?" To which he replied, "Yes, they had the back part of the building that had a kitchen, but you see, there wasn't only one lady — it changed hands three or four times, but one of them was there for about 25 years, I guess." All of this testimony is uncontradicted in any manner whatsoever. Mr. Gotberg further testified (Tr. 103):

"Q. Did you ever see them make any deliveries of material for the repair of the roof?

A. To do that with?

Q. Yes.

A. They had a tar wagon and all out on the south side of the building.

Q. Would they bring the tar wagon in through this same right-of-way you have described?

A. Yes."

On cross-examination, Mr. Gotberg was asked, "Have you seen a coal truck actually come in there, back into the boiler plant?" To which Mr. Gotberg replied, "Oh, yes, I seen that quite often, because after they had the garage built right in there, right there on that corner, they had such a hard time to get in the coal, so they sometimes had to carry it and sometimes had

to have an extremely long chute to shoot it down. If they could get the wagon close enough it was easy to get it into the hole, because the hole is in the ceiling of it. The machine shop is built under the ground, under the top of the ground.”

The evidence shows that all of the use heretofore mentioned was made without asking the permission of any person; was made openly, notoriously and with a claim of right. No objection was ever made to the use of the right-of-way.

On cross-examination Mr. Latimer was asked (Tr. 90): “The question of your using this right-of-way, using, you say, Mr. Latimer, and I believe you’re right, in this, that the question of these people in this part using this entrance to get to the back of the premises has never been discussed by you at all, has it? To this Mr. Latimer replied: “I never had any trouble with anybody about it.” Then Mr. Mulliner asked, “And it has never been even talked of, has it?” The reply was, “No.”

At Page 91 of the transcript Mr. Mulliner asked Mr. Latimer: “Your relations with Mr. Sdrales and Mr. Latses have always been friendly and neighborly while you have been there?” To this Mr. Latimer replied: “Yes, sir.” Even in the one instance when one of Mr. Latimer’s tenants was parking his car in this alleyway and the question arose over his right to so park, no objection was made by Mr. Sdrales or Mr. Latses over the use of this right-of-way (Tr. 93).

In the Utah case of *Zollinger v. Frank*, 110 Utah 514, 175 Pac. (2d) 714, at Page 715, in speaking of the character of use necessary to initiate a prescriptive right, our court said:

“Regardless of the words used to characterize this element of the nature of the use necessary to give rise to a prescriptive easement, it is our opinion that the courts mean that the use must be against the owner as distinguished from under the owner.”

And again, at Page 716, our court stated:

“We think the better rule is that described as the prevailing rule in the above quotation. That is, where a claimant has shown an open and continuous use of the land for the prescriptive period (20 years in Utah) the use will be presumed to have been against the owner and the owner of the servient estate to prevent the prescriptive easement from arising has the burden of showing that the use was *under* him instead of *against* him. This rule was mentioned in the recent case of *Big Cottonwood Tanner Ditch Co. v. Moyle*, Utah, 159 P. 2d 596, (on rehearing) 174 P. 2d 148, 155, where it was said: ‘It is true that to establish an easement the use must be notorious and continuous and on this adverse-ness—that is, holding against the owner—will be presumed.’ See also *Northwest Cities Gas Co. v. Western Fuel Co.*, 13 Wash. 2d, 75, 123 P. 2d 771; *Eagle Rock Corporation v. Idamont Hotel Co.*, 59 Idaho, 413, 85 P. 2d 242; *Fleming v. Howard*, 150 Cal. 28, 87 P. 908; *Stetson v. Youngquist*, 76 Mont. 600, 248 P. 196.”

One of the latest Utah cases on this point is that of *Dahnken v. George Romney & Sons Co.*, ..... Utah .....,

184 Pac. (2d) 211. It presents a fact situation almost identical with that of this case. That case involved downtown Salt Lake City business property on the west side of Main Street, which was serviced by an alleyway running north from Third South, and in that case the witnesses testified that the alleyway had been used from 1897 to 1940 to haul in merchandise of all kinds and to take out trash; that this use was by the employees and lessees of the defendant in that case. Also in that case there had been no controversy at any time over the use of the alleyway until shortly prior to the filing of the suit.

This court sustained the lower court's judgment that an easement by prescription had been acquired by the defendant in that case under a fact situation identical with that in the case we are now presenting to the Court. In so holding the Court stated as follows:

We held in *Zollinger v. Frank*, Utah, 175 P. 2d 714, 716, that, 'where a claimant (to an easement) has shown an open and continuous (and uninterrupted) use of the land for the prescriptive period (20 years in Utah) the use will be presumed to have been against the owner and the owner of the servient estate to prevent the prescriptive easement from arising has the burden of showing that the use was *under* him instead of *against* him.'

"There is no evidence in the record tending to rebut the presumption of adverse use by the occupants of the defendants' premises. It was, therefore, not error for the lower court to adjudge the defendant Romney to be owner of an ease-

ment over segments 'A' and 'B' and defendant Investment Company the owner of an easement over segment 'B,' said easements appurtenant to the defendants' lands."

We submit, therefore, that the presumption having arisen, it was then the burden of the plaintiffs to show that the use was *under* him instead of *against* him. We submit that there is no such evidence in this case.

In Vol. 28 of Corpus Juris Secundum, Page 736, the general rule is stated that:

"proof of an open, notorious, continuous and uninterrupted user for the prescriptive period, without evidence to explain how it began, raises a presumption that it was adverse and under a claim of right, or, as is sometimes stated, raises a presumptive of a grant, and casts on the owner of the servient tenement the burden of showing that the user was permissive or by virtue of some license, indulgence, or agreement, inconsistent with the right claimed."

This presumption to which we have referred has been held in a number of cases to be conclusive, as stated in Am. Jur., Vol. 17, at Page 970:

"On the one hand, many courts favor the view that an adverse user of an easement for the required period creates a conclusive judicial presumption of a prescriptive right by a lost grant, and that it is not a proper question to be submitted to the jury to determine whether this user gives a right."

We submit that where there has been no evidence introduced to rebut the testimony presented by the de-

fendant, as a matter of law the easement of the defendant had been established, and as a matter of law a grant of right-of-way would be presumed.

There can be no question that the use by the defendant had been for the prescribed period for, as stated in 17 Am. Jur. at Page 973:

“If an easement is claimed by prescription as appurtenant to other lands, it is not generally considered necessary for the owner of the dominant tenement to show continued user by himself for the prescriptive period; he may tack the user by his predecessors intitle, provided there is no interval between the successive possessions during which the user was not adverse. It has been held, however, that if the right to the use of a driveway across neighboring land has not been specifically conveyed by the successive owners of property, there can be no tacking the rights so as to build up any claim of right or title to an easement by prescription. The tacking of periods of user in respect of leased premises is discussed in another article of this work.”

It is further submitted that under the *Zollinger v. Frank* and *Dahnken v. Romney* cases, supra, the open, continuous and uninterrupted use of the right-of-way for the prescribed period presumes that the use is against the owner.

We submit that the evidence in this case as transcribed by the reporter is clearly to the effect that the use was open, notorious and continuous for almost sixty years. At Page 142, Judge Van Cott says he has a recollection, or it is his best judgment, that Latimer

said he had made no claim to the right-of-way. What the record shows is that Latimer said he never *talked* with anyone about the right-of-way. Do we try cases on the evidence introduced in a case or on the misconception by the Court of the evidence? Judge Van Cott cannot justify his decision on facts not in evidence.

This is a most ambiguous statement in any event, as we cannot determine from the recollection of Judge Van Cott whether he meant that Latimer had never claimed it to any person, or whether Latimer stated in court that he did not himself at any time believe he had an easement or right-of-way. We submit that this last is so entirely against the whole tenor of Latimer's testimony as to be wholly without support for the Judge's recollection.

We have heretofore submitted the testimony showing that from the circumstances surrounding the use of the right-of-way by Moore, Latimer very definitely asserted their right to the use of this easement.

The case of *Zollinger v. Frank*, supra, is well annotated in 170 A.L.R., 776, and in that annotation is stated the general rule and numerous authorities are cited in support thereof. On Page 778 it says:

“Under common-law principles, any unauthorized entrance upon another's land is a tort, a trespass, the subject of action. The right of its owner is that of exclusive possession; an invasion of that possession is theoretically as much a breaking of his ‘close’ as when the latter consisted of stockaded ground, and when the law re-

quired any person approaching the stockaded homestead to blow a horn loudly and thus give notice that he came openly and peaceably.

“The breach of possession being thus a wrong, it is presumed that ‘no man would suffer another to enjoy an easement in his land if he could help it, an easement being a burden necessarily detrimental to his estate.’ Goddard, Easements, p. 134. And correlatively it is presumed that ‘if one man does make such use of another’s property without objection on the owner’s part, it is because he had a right by some instrument or grant, which is lost or cannot be produced.’ Shaw, Ch. J. in *Carrig v. Dee* (1860), 14 Gray (Mass.) 583.

“Implicit in this view of the relationship of the parties is the notion that a continuing breach of the owner’s possession without his permission is adverse to his ownership. Every unauthorized trip over a way is necessarily adverse to the owner of the soil and under a claim of right. *Foreman v. Greenburg* (1921), 88 W. Va. 376, 106 S. E. 876.

“ ‘The better definitions do not use the words ‘hostile right’—they say ‘provided the use is adverse’.” *Jacobs v. Brewster* (1945), 354 Mo. 729, 190 S. W. (2d) 894.

“The resulting rule affirmed by a majority of American courts, though stated in varying forms, is as follows: Upon its appearing that a servitude has been enjoyed during the period required for prescription, openly, continuously and uninterruptedly, a presumption arises, in the absence of any other explanation, that the user was adverse and under a claim of right. The burden

is then upon the owner of the soil to show that the use was permissive, or otherwise that it was not adverse.”

It has been shown by the evidence and in this brief that there was a continuous use of this easement in excess of forty years by the defendant and his predecessors in interest. It is not necessary for the defendant to be the sole user for the entire period. As long as there is privity between the predecessors in interest of defendant, this use may be tacked on to the use of defendant to gain the full prescriptive period.

An annotation in 171 A.L.R. at Page 1279 states the rule as follows:

“Although there are a few cases to the contrary, the overwhelming weight of authority supports the view that the owner of a dominant estate need not show continued use by himself for the prescriptive period to establish an easement, but may tack the user by his predecessors in title, where such successive owners are privies in estate and their possessions constitute one continuous possession.”

It is noted that the following Utah cases have applied this rule:

Bertolina v. Frates (1936), 89 Utah 238, 57 P. 2d 346 (rule applied);

Malouf v. Fischer (1945), 108 Utah 355, 159 P. 2d 881 (rule applied);

Zollinger v. Frank (1946), 110 Utah 514, 175 P. 2d 714, 170 A.L.R. 770 (rule applied).

At Page 1284 of 171 A.L.R. authority is cited to the effect that the use by a tenant can be tacked on to

the landlord's or subsequent owner's use to complete the period essential to establish an easement by prescription.

### III.

THE COURT ERRED IN GRANTING COSTS TO PLAINTIFFS FOR THE REASON THAT NO COST BILL WAS EVER SERVED OR FILED WITH THE COURT IN THIS CASE.

The Court in this case granted costs to plaintiffs in the amount of \$13.20, which costs are not supported by the evidence. Costs are a matter of statute, and the statute of Utah requires that the person who claims his costs *must* deliver to the clerk and serve a copy of the cost bill upon the adverse party within five days after the verdict or notice of the decision of the Court.

Utah Code Annotated, 1943, Sec. 104-44-14.

Since the plaintiffs have failed to file a cost bill in this case within the prescribed time, or failed to file one at all, plaintiffs cannot recover costs.

A decision by the Utah Supreme Court in the case of *Openshaw v. Openshaw*, 80 Utah 9, 12 Pac. (2d) 364, at Page 365 states:

“The right to costs is purely a statutory right. A litigant claiming his costs and to whom the trial court has awarded costs, in order to recover the same from the adverse party, must file his cost bill within the time prescribed by the statute. *Houghton et al v. Barton*, 49 Utah 611, 165 P. 471; *Checketts v. Collings* (Utah), 1 P. (2d) 950, 75 A.L.R. 1393. This the plaintiff did not do. Since the cost bill was not filed in time,

the inclusion in the judgment of the amount claimed in the bill renders the judgment to that extent contrary to law. It should be amended by striking out the costs.”

### CONCLUSION

We therefore respectfully submit that the Court erred in granting costs in the decree, and that plaintiffs are not entitled to recover any costs whatsoever in this case.

In conclusion it is respectfully submitted that this Court should strike from the Bill of Exceptions, Pages 140 to 145 of the transcript, and that Judge Van Cott erred in considering and basing his judgment upon supposed evidence, and which testimony was never introduced in the trial of the case.

We further submit that the trial court erred as a matter of law and contrary to the evidence in failing to find that the defendant used the right-of-way openly and notoriously and adversely for the prescriptive period, and had acquired a right-of-way by prescription as claimed in his counterclaim. The defendant clearly showed that he had an open, continuous and notorious use of their right-of-way for a period in excess of forty years, and that such use gives him a presumption of adverse use necessary to establish a prescriptive easement. This presumption was never rebutted by the plaintiffs, nor did they ever show that the use was permissive. The Court erred, and the judgment should be set aside wherein title is quited in plaintiff and defendant enjoined from using the right-of-way.

It is also respectfully submitted that the trial court erred in granting costs to the plaintiffs, since they failed to comply with the statute in furnishing a cost bill in time, or for that matter at all.

We, therefore, respectfully urge this Court to hold as a matter of law that the defendant had acquired a prescriptive easement over the portion of the plaintiffs' premises claimed in defendant's counterclaim, and that this Court should declare as void that portion of the judgment granting costs to the plaintiffs.

Respectfully submitted,

McKAY, BURTON, NIELSEN  
AND RICHARDS,

*Counsel for Appellant.*