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James Sdrales and Virginia Zambukos v. Sam Rondos : Brief of Respondents

Utah Supreme Court

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In the Supreme Court of the State of Utah

JAMES SDRALES and VIRGINIA
ZAMBUKOS,

Plaintiffs and Respondents,

vs.

SAM RONDOS,

Defendant and Appellant.

Case No.
80031

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

I

STATEMENT

This action was commenced by respondents to enjoin the appellant from trespassing upon property owned by respondents, and for damages resulting therefrom. Upon respondents' motion the damage action was dismissed.

Appellant's pleading, until the day of trial, con-

sisted of a general denial of the allegations of respondents' complaint. At the trial, an amended answer and counterclaim was filed, wherein appellant sought to establish a right-of-way over all of respondents' land not occupied by buildings. The trial court held that appellant had not established such right-of-way.

Respondents' buildings consist of structures on the Southeast Corner of Second South and West Temple Streets in Salt Lake City, Utah. They own a frontage of 125 feet on Second South Street and of 128½ feet on West Temple Street. The buildings are occupied by retail stores. The wall of a building, owned by third parties, is erected on the South line of respondents' property, and extends from the West Temple Street sidewalk line to the East, approximately 76 feet. This structure, together with the Southern structure of respondents' building, forms an alley-way extending from West Temple Street Eastward for 76 feet, into an area-way approximately 90 feet square. In this 90-foot area are three one-story structures, two of which consist of extensions to respondents' and appellant's buildings, which face on Second South Street, and the third is a double garage owned by respondents, and located to the rear of appellant's premises. Access to this rear area, above referred to, could be and was had from three sides, the West, South, and East.

There is no pleading on the part of appellant to the effect that he claims a 12 x 165 foot right-of-way to the rear of his premises. Nor is there any pleading, or any proof, as to the extent of the burden of such purported

right-of-way. Nor can the extent of such use, or claimed use, be determined from a reading of appellant's brief.

The testimony offered to establish such right-of-way was given through two elderly gentlemen, Richard C. Latimer and A. F. Gotberg. A fair statement of their testimony is as follows:

LATIMER TESTIMONY

This witness testified that he had been connected with the operation of the property owned by appellant for practically all his life, and, insofar as there was a manager, he managed it (Tr. 129, 132). On direct examination, he stated that coal had been brought to these premises from West Temple Street over the 76 foot right-of-way at irregular periods. On cross-examination, he stated positively that he had never seen coal delivered to appellant's premises in his life (Tr. 143).

This witness testified, futher, that he had never discussed a right-of-way with respondents, their predecessor in title, or any one else during his life, and that he had never claimed a right-of-way (Tr. 136, 146, 147). He had frequently seen respondents and their predecessors in title and talked with them.

Mr. Latimer also testified that aaccess to the rear of his premises was obtained both from the South and from the East (Tr. 145, 146). He also testified that he had never seen any of the work being actually done on his building, except for some bricks which were stored on his premises. He also testified that his building had been leased to Jim Latsis from the early 1920's until 1938, and from 1939 or 1940 it was leased to Mr. Latsis

and Mr. Sdrales and Bob Latsis, the nephew of Jim Latsis. In this connection, it will be noted that Mr. Latsis and Mr. Sdrales owned respondents' premises from 1939 until the present time.

He further testified that a party by the name of Jack Moore rented his premises for approximately a year, and that Mr. Moore tried to park his car at the rear of the premises, but was forced to move.

GOTBERG TESTIMONY

This witness testified that a fence was built on appellant's property along the South line, where it joined the North line of respondents' property, and that, by reason of the position of the garage and this fence, considerable difficulty was encountered when coal was delivered over this fence to the stoker (Tr. 153, 154, 157, 164). He testified that from 1893 to 1930, practically all traffic, except the delivery of coal, came from the right-of-way to the South, and not the 12 x 76 foot right-of-way to the West, and that he'd seen coal delivered "quite often" over this period.

Tr. 161 and 162:—

"Q Before 1933 and for, say from 1893, when you went there until 1930, this was all open for traffic in through here, wasn't it?

A Yes, all of it. They offered me to let me park my car, when I first got one, for fifty cents a week.

Q But there was considerable traffic behind these buildings all around through here and around?

A And this beauty parlor, after they come in there they took in big car loads of stuff. They come every three or four days and filled up their whole basement. At first they were in the Block, and they bought a building on the north of that and then I heard there was some objection about using the alleyway, when they were going to put up a gate or something.

Q There was just as much traffic, or I should say there was more traffic came from up here than through here to service the Eagle block, wasn't there?

A Yes, sure. This business was only really for coal. That was about the only business it was used for for the first thirty-five years I was up there.

Q And the coal could have been delivered here just as easy as here?

A It could have but it never was. They always come in this way.

He also testified that some coal was delivered for use in his tailor shop, but this had been discontinued since about 1900.

This witness did not testify that *all* the coal used in appellant's building was delivered over the 12 x 76 foot entrance to the area-way. He stated he saw coal delivered "quite often" since 1893. This witness testified to all sorts of miscellaneous use, but the period of such use was since 1930, and, therefore, not within a prescriptive period.

It is upon this testimony that appellant seeks to

establish a right-of-way. It can be seen from the above statement that it varies considerably, and to such an extent, that no useful purpose would be served by indicating to this court wherein the statement of facts appearing in appellant's brief differ from the record.

The only use by appellant's predecessor in title, over a prescriptive period, appears to be the induction of coal to appellant's stoker for some length of time, as testified to by Mr. Gotberg, who, on cross-examination, testified that all the traffic to the rear of these buildings came from the South, over what he described as the "Cullen right-of-way" (see above excerpt from transcript) except for some coal deliveries, for the period from 1893 to 1930.

Mr. Gotberg also testified that the garages located on respondents' premises had been there since coal was delivered, and that the garages, so situated, were in use during the period.

It is undisputed that the garage was owned and occupied by respondents, and their predecessors in title, and used by them since their erection, and that all the area-way had been used by respondents themselves, or the use of such area-way was permitted for their tenants.

There is a door, located at the rear of appellant's premises, and to the East of the one-story brick structure, and, in view of Mr. Gotberg's testimony that a fence existed on the rear line of appellant's property, it would affirmatively appear from the position of this door that access, for some years, to the rear of appellant's premises had been maintained to the East, where

Mr. Gotberg and Mr. Latimer testified an open field existed for the greater part of the period involved. Appellants stipulate there was access to the east (Tr. 193, 194).

No claim is made that appellant used the area-way at the south of his premises to the exclusion of every one else including respondents. It is agreed that this area was used by respondents, their predecessors in interest, together with their tenants and licensees. It appears further that the respondent's garages were used as such for many years.

II

APPELLANT'S EVIDENCE INSUFFICIENT TO ESTABLISH RIGHT-OF-WAY OVER RESPONDENTS LAND.

The physical condition, existing at the rear of appellant's premises, shows a coal stoker on the Southeast Corner. A double garage is located 3 feet South of appellant's premises, and extends to the West. A one-story brick building extends from the South side of appellant's main building to within a few feet of appellant's South boundary. The East line of the one-story brick building is due North and South of the West line of the tin garage (see exhibit "A"). The distance between the Southeast Corner of the one-story brick building and the Northwest Corner of the tin garage has varied from a little over 3 feet to almost 8 or 9 feet, since the existence of these buildings. Any coal delivered must have been carried over the fence or moved by means of a chute, approximately 20 feet from the corner points of these buildings to the stoker. The placing

of the stoker in its position indicates that coal was delivered from the East side, where access has been available for the full period of its existence.

It also seems very peculiar that from 1893 to 1930 all traffic should come from the South, except coal deliveries. It seems almost unbelievable that a vehicle, usually a team of horses, carrying a bulky commodity, such as coal, would prefer to back for a distance of approximately 150 feet from West Temple Street, as testified by Mr. Gotberg, rather than enter by pulling a load forward from the South, and turn around in the area-way.

The trial court was present when this testimony was given, and was inclined to disregard this phenomenon. The trial court, also, had an opportunity to view these witnesses and the manner in which their testimony was given, in determining the facts concerning the delivery of coal.

From the foregoing, it is readily apparent that the evidence of any use of the 12 x 76 foot entrance by appellant is highly unsatisfactory, and far from the positive proof thereof required to establish an easement in a down-town area, where property values are the highest. And, that such evidence is wholly insufficient to sustain a finding of an easement by the trial court.

Appellant has not pleaded a 12 x 165 foot right-of-way, nor does the evidence show such use. In other words, he asks the court to delineate an estate in respondents' property, without pleading the same, or without proving it.

There is no evidence whatsoever of the use claimed. There is no pleading to support a finding of the burden imposed on respondents' land, by way of easement, nor is there even a definitive statement in appellant's brief as to the extent of such use. Notwithstanding the absence of these factors, appellant asks this court to determine the physical limits of a right-of-way, together with the use permitted on such right-of-way, after its limits are established by the court. This procedure is unheard of.

In order to establish a prescriptive easement, there must be a use thereof, under a *claim of right*. The evidence as to any claim of right, as given by Mr. Latimer, is as follows:

Direct examination, Tr. 136:—

“Q Let us start from the time you started the managing of this property for the Latimer heirs. Have you ever had occasion to discuss the use of this right-of-way with anyone?

A No, I haven't.”

Cross examination, Tr. 146:—

“Q But for 15 or 20 years there was another entrance cut in there?

A Yes.

Q 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?

A I never had any trouble with anybody about it.

Q And it has never been even talked of, has it?

A No.

Q Do you remember Mr. Ball, who ran the Eagle Block, these stores, did you know him?

A Yes.

Q And you know Mr. Ball, who is still alive now?

A Yes, I know him.

Q And he is not too young now and his father before him ran it, did he not?

A Yes, I think so.

Q All these other interests, and it is my information, and I think it is a fact, is it not, you never had any discussion with those people about it?

A That is right.

Q You were there frequently with them?

A Yes."

Cross examination, Tr. 147:—

"Q Your relations with Mr. Sdrales and Mr. Latses have always been friendly and neighborly while you have been there?

A Yes, sir."

It is the further recollection of counsel for respondents, and the trial court, that Mr. Latimer expressly testified that he claimed no right-of-way as against respondents.

It should be noted that Mr. Latimer testified that he had not discussed his right-of-way with *anyone*, so he must not have claimed it.

In addition to the objection that no claim of right was ever made, there is absolutely no testimony to the effect that any use whatsoever was adverse to the rights of respondents.

There exists also a further reason why no prescriptive right was obtained by appellant. Respondents acquired their property in 1939, and since that time, the evidence of Mr. Latimer affirmatively shows that respondents, or the nephew of the Latsis interest, leased the building of appellant. The use, if any, of the Latsis interest, while they were the owners of the servient estate, is conclusively presumed to be permissive, and not adverse. Therefore, for the period from 1939 to the date of trial, the use was clearly permissive, and this period cannot be considered in determining a prescriptive right.

The rule of law sought to be invoked by appellant is that where a use of a way has been open, notorious, and continuous, under a claim of right, for a period of 20 years, a presumption of grant arises, and the use made of the servient tenement is, thereby, established.

In this case, however, there is no claim of right, nor was the use continuous to the time of trial, nor was any particular use established. Therefore, the authorities cited by appellant, do not apply.

In support of respondents' contention that a prescriptive right must be pleaded and proved, the court is referred to the case of *Farr v. Wheelwright Construction Co.*, 163 P. 256, 49 Utah 274, and to the case of *Bertolina v. Frates*, 57 P. (2) 346, 89 Utah 238. In the latter case, the court, in citing the former case, says:

“As pointed out by Mr. Justice Frick in *Farr v. Wheelwright Construction Co.*, 49 Utah 274, 163 P. 256, 257: ‘It should require no argument, however, to show that where one claims an easement over real property he should set forth his claim in apt terms in his pleading’.”

The two above cases hold squarely that to obtain a prescriptive easement there must be a use adverse and under a claim of right. The court, in *Farr v. Wheelwright Construction Co.*, supra, says.

“Appellant’s counsel, however, also insists that the allegations of the complaint are insufficient to constitute adverse user. By again referring to the allegations of the complaint hereinbefore set forth it will be seen that it is not alleged that the alleged use was adverse and under a claim of right. This court, in common with many other courts, has frequently held that in order to acquire an easement or right-of-way over real estate in this state by user, such user must be continuous for a period of 20 years; must be adverse to the true owner, and under a claim of right. *Lund v. Wilcox*, 34 Utah 205, 97 Pac. 33; *Harkness v. Woodmansee*, 7 Utah 227, 26 Pac. 291; *Funk v. Anderson*, 22 Utah 238, 61 Pac. 1006. Respondents’ counsel seeks to distinguish this case from the cases we have just cited, but there is no distinction in principle.

In 1 Elliott, Roads and Streets (3d Ed.) Sec. 194, in speaking of what is sufficient to constitute an easement by user, the author says:

‘We have already shown that the use must be under claim of right. Where the use is merely permissive and not adverse, there is no basis on which a right of way by prescription can rest’.”

This court re-affirms the above rule in *Bertolina v. Frates*, supra, in the following language:

“Where a person claims to have acquired an easement by prescription over another’s land, he must show that he has acquired it by his own continuous, open, uninterrupted, and adverse user under claim of right for the twenty-year prescriptive period. The prescriptive right is based originally upon the theory of a grant implied from long user. *Funk v. Anderson*, 22 Utah 238, 61 P. 1006.”

This court has also considered the claim of right necessary to establish an easement in *Dahl v. Roach*, 76 Utah 74, 287 P. 622, where this court held that the claim to a right-of-way must be made known to the owners of the servient estate. This was an action by plaintiff to establish a right-of-way over premises by defendant. The trial court entered judgment in favor of defendant, and plaintiff appealed. The court found that the appeal failed, because:

- “(1) The testimony is not conclusive of any open, adverse, continuous, uninterrupted, and exclusive use of the way with the knowledge and acquiescence of the owner of the servient estate, and
- (2) It appears without dispute that during at least seven of the years necessary to create a prescriptive right the plaintiff occupied the premises as a tenant of the owner.”

As to the requisite for establishing a prescriptive right-of-way, the court said:

“The first headnote to *Tarpey v. Heath*, 22 Cal. App 289, 134 P. 367, is: ‘*A right of way claimed by a prescription was not established without showing that the use was adverse, and under claim of right communicated to the owner, or was so continuous, openly and notoriously adverse as to create the presumption of knowledge.*’

“Among other cases cited to the same effect are: *Crosier v. Brown*, 66 W. Va. 273, 66 S. E. 326, 25 L.R.A. (N.S.) 174; *Gardner v. Swann*, 114 Ga. 304, 40 S. E. 271; *Schulenbarger v. Johnstone*, 64 Wash. 202, 116 P. 843, 35 L.R.A. (N.S.) 941; *Watson v. Board of County Com’rs.*, 38 Wash. 662, 80 P. 201.

“Plaintiff makes no claim that the owner of the servient estate was ever notified that plaintiff claimed a right to travel over or use the way in controversy. *Nothing was ever said at any time to the owner of the servient estate that plaintiff did claim such a right.* The evidence on behalf of defendants is to the effect that no right was ever granted to plaintiff to use such way for any purpose whatever. Moreover, the proof by plaintiff’s own witness, of the use by plaintiff of defendant Jeremy’s land, does not show that in driving cattle to or over said premises, or in driving wagons or other vehicles thereover, they were confined to any particular strip or portion of Jeremy’s land. In fact, the testimony fails to show a continuous and exclusive use of the right of way not only for the prescriptive period, but for any length of time whatever.”

The California decisions hold to the same effect, and, as to the rule invoked in the factual situation existing in this case, see *Smith v. Skrbeck*, 162 P. (2) 674.

This was an action by plaintiff against defendant to establish a right-of-way by prescription. Defendant cross-complained to quiet title to their property free and clear of the alleged right-of-way. From a judgment for defendants, plaintiff appealed. As to the proof necessary to establish a right-of-way, the court said:

“We may assume from testimony adduced by plaintiff that she and her husband used the roadway whenever they had occasion to travel that way; but such use is insufficient to establish a prescriptive title, unless there is evidence that such use was made for the prescriptive period, under claim of right *made known to, or asserted in such manner as to make known to*, the titular owner a knowledge of the asserted claim. There is no evidence that plaintiff ever asserted any such claim to the previous owner, defendants’ grantor, or that her occasional use of the road was not with his permission and a a neighborly accommodation. We cannot assume, in the absence of evidence, that the prior owner had knowledge, either actual or constructive, that plaintiff’s use was hostile or adverse.”

and further:

“The right to the use of a roadway over another man’s land may be acquired by grant or by prescription. A prescriptive right to a roadway may be secured only by clear evidence of adverse use, openly, notoriously and continuously asserted for a period of five years or more. *The claim of right must be communicated to the owner* of the land, or the use of the roadway must be so obvious as to constitute implied notice of the adverse claim. The burden is on one who claims a prescriptive right to use a private roadway to

affirmatively prove the essential elements thereof. *Clarke v. Clarke*, 133 Cal. 667, 66 P. 10; *Grimmesey v. Kirtlan*, 93 Cal. App. 658, 270 P. 243; 1 Cal. Jur. 608, sec. 81; 2 C.J.S., Adverse Possession, p. 558, sec. 45.’’

The same rule was applied in the California case of *Dooling v. Dabel*, 186 P. (2) 183, (California 1947). In this case, the court held that using the land of another for several years, without protest from the owner, does not establish an easement. The court said:

“We are of the opinion the findings and judgment are adequately supported by the evidence. A prescriptive right to an easement in a roadway over the real property of another person may be acquired only by clear evidence of adverse use, openly, notoriously and continuously asserted for the statutory period of five years. The claim of right must be communicated to the owner of the land, or the use of the roadway must be so obviously exercised as to constitute an implied notice of the adverse claim.”

The Supreme Court of Arizona had this same problem before it in *LaRue v. Kosich*, 187 P. (2) 642. In this case, no claim to a right-of-way was ever made by the persons claiming it to those persons owning the servient tenement. On this phase of the case, the court said:

“Again, in the same case the court further said: ‘The defendant and his tenants were in the habit of passing over the unenclosed strip of land when going to or from their business. The question as to whether or not the use was under a claim of right, or a mere matter of neighborly accommodation, was a question of fact to be de-

terminated by the court in the light of the relations of the parties, their conduct, the situation of the property, and all the surrounding circumstances. The court below saw the witnesses, heard them testify, and found the facts against the defendant. Defendant testified that he used the way and claimed the right to use it, but it does not appear that any such claim was ever made to plaintiff or to his grantor. *It is not sufficient that the claim of right exists only in the mind of the person claiming it. It must in some way be asserted in such manner that the owner may know of the claim.* The fact that the owner knew of the travel and occasional use of the property does not ever raise a presumption that such use was hostile or under claim of right. If any party who is allowed by silent permission to pass over the lands of another, nothing being said as to any right being claimed, after five years, without showing that he ever communicated such claim in any way to the owner, can thus gain title by prescription, it would be a blot upon the law. An owner could not allow his neighbor to pass and repass over a trail, upon his open, unenclosed land, without danger of having an adverse title successfully set up against him. If he had several neighbors who so used the land, several separate titles to right of way might thus be acquired. The law will presume that the land belongs to the owner of the paper title, and that the use was by permission or silent acquiescence. If this presumption is overcome by evidence showing the use to have been hostile, and that the owner knew of such hostile claim and took no steps to protect his property for a period of five years, then the pre-

sumption changes.' (Emphasis supplied.)''

* * * * *

“From his testimony, it will be noted that plaintiff used the way and claimed a right to use it but it does not appear that any such claim was ever made to the defendant or to his grantor prior to the building of the fence.”

Mr. Latimer testified that he had never seen coal delivered, and had never made a claim to a right-of-way here involved. Mr. Gotberg, as indicated in appellant's brief on page 21, testified that he had seen a coal truck come over the purported right-of-way “quite often.” No case has ever held that a right-of-way could be established on such testimony.

Appellant here tries to sustain the position that his use of the premises was “notorious” and “continuous,” yet Mr. Latimer, the owner for most of the period, has never seen a coal truck come in on the right-of-way, which is an instance of the claimed use.

If the appellant is to prevail in this case, the court, upon its own motion, will be required to define the physical limits of a right-of-way, and to establish, with certainty, the use to which such right-of-way can be put by appellant. And, this use must include what type of vehicle can use such right-of-way, and on what occasions, in order that respondents can restrict any excessive use over that so established.

It is submitted that no evidence on either of the above propositions is contained in this record on appeal.

III

NO PRESUMPTION IN FAVOR OF A PRESCRIPTIVE EASEMENT ARISES, BECAUSE THE UNCONTROVERTED EVIDENCE IS THAT THE LAND SOUGHT TO BE SUBJECTED BY APPELLANT TO A PRESCRIPTIVE RIGHT, WAS USED IN COMMON WITH RESPONDENTS.

The land owned by appellant and respondents was never in a common grantor, so no question of implied or reserved easement is involved in this case at all. Nor is there any question of an easement arising from necessity.

Respondents, in pointing out that the rear of appellant's premises was accessible from other direction, did so only to show that there was no use of the particular ground, as claimed by appellant.

The evidence, on behalf of all parties, shows conclusively that the rear area-way was used by a number of people, and, perhaps, by the public. The 12 x 165 foot area, claimed by appellant in his brief as a right-of-way, extends from West Temple Street in a straight line to respondents' garages, and these garages, it is undisputed, were continually in use, as was the 12-foot extension of the alley-way.

An examination of respondents' Exhibit "A" clearly shows the relative position of the respondents' garages and the South property line of appellant's land. Any use of these garages requires traffic over the strip claimed by appellant as a right-of-way.

From this exhibit, it can be seen that any use of this

area-way by respondents, in servicing the rear of their buildings, necessarily requires the use of the greater portion of the right-of-way now claimed by appellant.

These facts stand undisputed, as does the fact that the area-way was used by respondents, and their predecessors in title. Therefore, if there was any use of this area by appellant, or his predecessors, it was in common with owners of respondents' premises. This factual situation is the decisive feature of this case.

Assuming appellant had proved a sufficient use of the premises, his right to an easement depends entirely on favorable presumptions of law with regard to all the necessary elements, because there exists no express grant of this estate to him. However, no such presumptions arise under the facts in this case, because the land sought to be impressed with an easement was used in common with the owner.

The law is well-established that, when one constructs, maintains, or uses a right-of-way on his own land, and his neighbor, or some adjacent property owner, uses the same area, that no presumption of adverse use arises, but that a presumption of permissive use arises. A permissive use, for no matter how long, cannot ripen into an easement.

This doctrine has been maintained by this court since the case of *Harkness v. Woodmansee*, 7 Utah 227, 26 P. 291, where the court stated the rule to be:

“Where a person opens a way for the use of his own premises, and another person uses it also without causing damage, the presumption is, in

the absence of evidence to the contrary, that such use by the latter was permissive, and not under a claim of right. Washb. Easem. 151.”

This rule was re-affirmed in *Jensen v. Gerrard*, 85 Utah 481, 39 P. (2) 1070, where the court says:

“A twenty-year use alone of a way is not sufficient to establish an easement. Mere use of a roadway opened by a landowner for his own purposes will be presumed permissive. An antagonistic or adverse use of a way cannot spring from a permissive use. A prescriptive title must be acquired adversely. It cannot be adverse when it rests upon a license or mere neighborly accommodation. Adverse user is the antithesis of permissive user. If the use is accompanied by any recognition in express terms or by implication of a right in the landowner to stop such use now or at some time in the future, the use is not adverse.”

In the recent case of *Zollinger v. Frank*, 110 Utah 514, 175 P. (2) 714, cited by appellant, the rule is recognized in the following language:

“It is contended that the road and the gate in the fence at the west terminus of the road were opened for and used by the landowner and that Zollinger’s use of the road did not injure the land and did not interfere with the landowner’s use of same and therefore his use was permissive and under the landowner. In the early case of *Harkness v. Woodmansee*, 7 Utah 227, 26 P. 291, 293, this court recognized the principle as follows: ‘Where a person opens a way for the use of his own premises, and another person uses it also without causing damage, the presumption is, in

the absence of evidence to the contrary, that such use by the latter was permissive, and not under claim of right'."

The question is annotated in 170 A.L.R. page 825, where the rule is stated as follows:

"Where the way in question is shown to have been opened or maintained by the owner of the soil for his own benefit, and the claimant's use of it appears to have been merely in common with him, no presumption arises that the latter's use of it was adverse or under a claim of right. In the absence of additional circumstances pertaining to the origin or nature of the claimant's use, and expressing a purpose to impose a separate servitude upon the land, the use is presumed to be permissive only."

Numerous cases are cited in this note.

In 19 C. J. at page 898, the rule is stated thus:

"Section 75. USE BY OWNER FOR HIS OWN PURPOSES. Where a landowner opens up a way on his own land for his own use and convenience, the mere use thereof by another, under circumstances which do not injure the road nor interfere with the owner's use of it, will not in the absence of circumstances indicating a claim of right be considered as adverse, and will not ripen into a prescriptive right no matter how long continued. *Where a space is left open by the owner for his own convenience the presumption ordinarily is that the use of such space by another, even for his own purpose, is permissive.* Nevertheless, it has been held that the mere fact that a way has been established by the owner of the land for his own use does not of itself prevent a user of the way by another from becoming ad-

verse. But in order to acquire this character knowledge must be brought home to the owner of the land that the user is claimed as of right. The requirement is not satisfied by keeping the road in repair for the use of both parties, or by constructing and maintaining bridges on it. And it has been held that the fact that a tenant of one claiming an easement in a right of way by adverse user had complained, on one occasion, that poles which had been piled on the way obstructed it, and that the agent of the owner removed the same, was not evidence of an assertion of right to use the way sufficient to ripen into title by adverse user.”

The texts cited above are amply supported in many recent decisions, among which are the following:

Smith v Skrbek, 162 P. (2) 674, (California 1945). The evidence in this case was that the defendant constructed the road for his own use, and that, thereafter, plaintiff used it with defendant, as a common means of access. When this condition exists, the court, quoting *Jensen v. Gerrard*, 39 P. (2) 1070, (Utah), said:

“It is a reasonable presumption that since the roadway was constructed by the defendants’ predecessor in title, upon his own land, for his personal benefit, as a means of access from the public highway to his dwelling house and farm buildings, that the plaintiff’s use of the road was merely perimssive, as a neighborly convenience. *Jensen v. Gerrard*, 85 Utah 481, 39 P. 2d 1070; 28 C.J.S., Easements, p. 668, sec. 18(2). In the text last cited it is said: ‘Where a landowner opens up a way on his own land for his own use and convenience, the mere use thereof by another, under circumstances which do not injure the road

nor interfere with the owner's use of it, will not in the absence of circumstances indicating a claim of right be considered as adverse, and will not ripen into a prescriptive right no matter how long continued.'

"In this case there is no evidence that the plaintiff or her predecessor in title helped to construct or keep in repair the roadway over defendants' land. No actual notice of her claim of prescriptive right to travel the road was ever given. Although the defendants talked with her about their title to the land before they purchased the ranch in November, 1941, and again while they were changing the course of the road in August, 1942, she failed to mention her claim to a right to use the road. Plaintiff's occasional use of the road for a short distance of less than a hundred feet from the highway to her garage and gate did not interfere in the least with defendant's use thereof."

The later California case of *Dooling v. Dabel*, 186 P. (2) 183, (California 1947), affirms this rule in the following language:

" 'It is a reasonable presumption that since the roadway was constructed by the defendants' predecessor in title, upon his own land, for his personal benefit, as means of access from the public highway to his dwelling house and farm buildings, that the plaintiff's use of the road was merely permissive, as a neighborly convenience. *Jensen v. Gerrard*, 85 Utah 481, 39 P. 2d 1070; 28 C.J.S., Easements, p. 668, sec. 18(2). In the text last cited it is said:

" 'Where a landowner opens up a way on his own land for his own use and convenience, the

mere use thereof by another, under circumstances which do not injure the road nor interfere with the owner's use of it, will not in the absence of circumstances indicating a claim of right be considered as adverse, and will not ripen into a prescriptive right no matter how long continued'.

The preceding declaration of laws appears to fit the facts of this case.

In *LaRue v. Kosich*, 187 P. (2) 642, (Arizona 1947), the evidence was to the effect that the persons seeking the easement, used the premises together with the owners and others. The court held permission of the owner was conclusively presumed, in the following language:

"It is a recognized rule of law that where the use of a private way by a neighbor is by the express or implied permission of the owner, the continued use is not adverse and cannot ripen into a prescriptive right. *Pacific Gas & Elec. Co. v. Crockett, etc., Co.*, 70 Cal. App. 283, 233 P. 370; *May Bernard*, 40 Cal. App. 364, 180 P. 827; *Irvin v. Petitfils*, 44 Cal. App. 2d 496, 112 P. 2d 688. The law raises no presumption that the use is under a claim of right. 28 C.J.S., Easements, sec. 18(i); *Boullioun v. Constantine*, 186 Ark. 625, 54 S.W. 2d 986; *Schudel v. Hertz*, 125 Cal. App. 564, 13 P. 2d 1008, 1186.

"Under a heading, 'Way by prescription when use is permissive only,' it is said in 2 Thompson on Real Property (Perm. Ed.) sec. 521: 'The modern tendency is to restrict the right of one to acquire a prescriptive right of way whereby another, through a mere neighborly act, may be deprived of his property by its becoming vested in the one whom he favored. * * * * '

“It is said in *Howard v. Wright*, 38 Nev. 25, 143 P. 1184, 1188:

‘A right of way by prescription can only be acquired by a user which is neither expressly nor impliedly licensed or permissive. It must be adverse and hostile to the owner of the servient estate, and must be under a claim of right so expressed as to charge the owner of the servient estate with knowledge thereof.

* * * *

‘Nothing less than an adverse user, under claim of legal right, will perfect an easement by occupancy for the statutory time. A use acquired merely by consent, permission, or indulgence of the owner of the servient estate, can never ripen into a prescriptive right, unless the user of the dominant estate expressly abandons and denies his right under license or permission, and openly declares his right to be adverse to the owner of the servient estate. *Hurt v. Adams*, 86 Mo. App. 73.

* * * *

‘*The rule that precludes a permissive use from ripening into a right to continued enjoyment, where the permission, consent, or license is expressly given is no less effective where the permission or license may be implied. Thomas v. England*, 71 Cal. 456, 12 P. 491.’ (Emphasis supplied.)

“The evidence presented in the case at bar conclusively shows that the plaintiff, together with the general public, had enjoyed implied permissive use of the roadway through the neighborly indulgence of its owner and his predecessors in

interest. And, a use that has its inception in the permission of the owner will continue as such until a distinct and positive assertion of a right hostile to the owner is brought home to him by words or acts. *Omodt v. Chicago, M. & St. P. Ry. Co.*, 106 Minn. 205, 118 N.W. 798; *Clarke v. Clarke*, 133 Cal. 667, 66 P. 10; *Howard v. Wright*, 38 Nev. 25, 143 P. 1184; *Brandon v. Umpqua Lbr. & Timber Co.*, 26 Cal. App. 96, 146 P. 46; *Scheller v. Pierce County*, 55 Wash. 298, 104 P. 277; *Pitzman v. Boyce*, 111 Mo. 387, 19 S.W. 1104, 33 Am. St. Rep. 536; *Smith v. Oliver*, 189 Ky. 214, 224 S.W. 683; *Smith v. Fairfax*, 180 Ky. 12, 201 S.W. 454; *Flagg v. Phillips*, 201 Mass. 216, 87 N.E. 598; *Holm v. Davis*, 41 Utah 200, 125 P. 403, 44 L.R.A., N.S., 89; *Naporra v. Weckwerth*, 178 Minn. 203, 226 N.W. 569, 65 A.L.R. 124; *Johnson v. Olson*, 189 Minn. 183, 248 N.W. 700; *Reider v. Orme*, 17 Tenn. App. 497, 68 S.W. 2d 960.”

The Supreme Court of Montana, in *White v. Kamps*, 171 P. (2) 343, (Montana 1946), affirms this rule, and propounds the sound reasoning underlying it, in the following language:

“In *Scheller v. Pierce County*, 55 Wash. 298, 104 P. 277, 278, it was said, in quoting from Jones on Easements, section 282:

“‘If the use of a way over one’s land is shown to be permissive only, no right to use it is conferred, though the use may have continued for a century or any length of time. ‘A different doctrine would have the tendency to destroy all neighborhood accommodation in the way of travel; for if it were once understood that a man, by allowing his neighbor to pass through his farm without

objection, over the pass way which he used himself, would thereby, after the lapse of 20 or 30 years, confer a right on him to require the passageway to be kept open for his benefit and enjoyment, a prohibition against all such travel would immediately ensue. To create the presumption of a grant of a right of way, the circumstances attending its use must be such as to make it appear that it was established for the benefit of the claimant, or that its use was accompanied by a claim of right, or by such acts as manifested an intention to enjoy it, without regard to the wishes of the owner of the land. The use must have been enjoyed under such circumstances as will indicate that it has been claimed as a right, and has not been regarded by the parties merely as a privilege, revocable at the pleasure of the owner of the soil.' ” Jones on Easements, Sec. 282.’

“The record here shows that the road in question was used by the respondent and his predecessors in interest for their own purposes in farming the land involved. Under such circumstances the general rule is that the use of the road by another will generally be regarded as permissive where such use does not injure or interfere with the owner’s use. In 28 C.J.S., Easements, Sec. 18, p. 668, the rule is stated thus:

‘Where a landowner opens up a way on his own land for his own use and convenience, the mere use thereof by another, under circumstances which do not injure the road nor interfere with the owner’s use of it, will not in the absence of circumstances indicating a claim of right be considered as adverse,

and will not ripen into a prescriptive right no matter how long continued. Where a space is left open by the owner for his own convenience the presumption ordinarily is that the use of such space by another, even for his own purpose, is permissive. Nevertheless, the mere fact that a way has been established by the owner of the land for his own use does not of itself prevent a user of the way by another from becoming adverse, as by some act or circumstance showing a claim of an exclusive or peculiar right in claimant distinct from that of the general public.

‘However, in order to acquire this adverse character knowledge must be brought home to the owner of the land that the user is claimed as of right. The requirement is not satisfied by keeping the road in repair for the use of both parties, or by constructing and maintaining bridges on it. It has also been held that the mere fact that a tenant of one claiming an easement in a right of way by adverse user had complained, on one occasion, that poles which had been piled on the way obstructed it, and that the agent of the owner removed the same, is not evidence of an assertion of right to use the way sufficient to ripen into title by adverse user.’ See supporting authorities cited.

“In *Howard v. Wright*, 38 Nev. 25, 143 P. 1184, it is said: ‘. . . the law in this respect is well established that where the owner of land opens a road across it for his own use and keeps it open for his own use, the fact that he sees his neighbor, or other parties, also making use of it under circumstances that do not tend to injure

the road or interfere that he is yielding to his express claim of right, or that his neighbor is asserting any right.'

"To the same effect is the case of *Anthony v. Kennard Bldg. Co.*, 188 Mo. 704, 87 S.W. 921."

Chief Justice Budge, in *Simmons v. Perkins*, 118 P. (2) 740, cites numerous State decisions, including Utah, in upholding this same doctrine. At p. 744, the Idaho Supreme Court says:

"The rule would seem to be that where the owner of real property constructs a way over it for his own use and convenience, the mere use thereof by others which in no way intereferes with his use will be presumed to be by way of license or permission. *Harkness v. Woodmansee*, 7 Utah 227, 26 P. 291; *Howard v. Wright*, 38 Nev. 26, 143 P. 1184; *Bradford v. Fultz*, 167 Iowa 686, 149 N.W. 925; *Burk v. Diers*, 102 Neb. 721, 169 N.W. 263; *Long v. Mayberry*, 96 Tenn. 378, 36 S.W. 1040; *Parish v. Caspar*, 109 Ind. 586, 10 N.E. 109; *Null v. Williamson*, 166 Ind. 537, 78 N.E. 76; *Gascho v. Lennert*, 176 Ind. 677, 97 N.E. 6; *Kilburn v. Adams*, Mass., 7 Metc. 33, 39 Am. Dec. 754; 18 C. J. Sec. 120, p. 105; 26 C.J.S., Dedication, Sec. 19.

"The use of a driveway in common with the owner and the general public, in the absence of some decisive act on the user's part indicating a separate and exclusive use on his part negatives any presumption of individual right therein in his favor. *Clarke v. Clarke*, 133 Cal. 667, 66 P. 10; *Heenan v. Bevans*, 51 Cal. App. 277, 196 P. 802; *Bradford v. Fultz*, 167 Iowa 686, 149 N.W. 925; *Pirman v. Confer*, 273 N. Y. 357, 7 N.E. 2d 262, 111 A.L.R. 216."

The soundness of this rule of law becomes apparent in the situation existing here. Respondents' buildings are leased and occupied by a number of commercial enterprises. The people with whom their tenants do business are permitted the use of the premises, and these people are unknown to respondents. In order to keep their neighbors from imposing an encumbrance on their premises, respondents would be required to police all the entrances thereto, and identify those seeking admittance. This procedure is, obviously, burdensome, and, as the courts indicate, mitigates against neighborliness, and, therefore, license or permission is presumed in the absence of actual notice of a claim of right.

If such notice is brought home to the servient owner, then he can take steps to protect himself, by fencing, and thereby obstructing access along the property line between his land and the land of the person claiming an easement. No such notice exists in this case. The affirmative evidence is that the respective owners were friendly and good neighbors.

IV.

ANSWER TO PETITION TO STRIKE PORTION OF BILL OF EXCEPTIONS

Appellant objects to the proceedings appearing in Pages 140 to 145 of the Record.

At the conclusion of the case, and on the argument of the motion for a new trial, Judge Van Cott expressed himself to the effect that Mr. Latimer had testified he had not claimed a right-of-way. No particular objection

was made in either instance by counsel for appellant.

The transcript was furnished counsel for respondents, and they were asked to stipulate to the effect that such transcript could be settled as the bill of exceptions. Upon examination, counsel discovered that the disputed testimony did not appear in this transcript, and this fact was referred to the trial court, which resulted in the supplemental proceedings complained of.

The statutes involved, obviously, require the trial court to resolve any disputes as to what the bill of exceptions contains. This was done according to the recollection of the court and counsel, in trying to correct what appears to be a mistake of the reporter.

An examination of the proceedings indicates that the greater part thereof was made at the instance of appellant, to which he now objects.

It is submitted that no prejudice resulted therefrom. Counsel for appellant had notice of the objections made by respondents to the settling of the bill, and, if the fact was otherwise than as expressed by the court and counsel for respondents, he had an opportunity to bring Mr. Latimer before the court and resolve the question. Counsel did not see fit to do this, and is, therefore, in no position to complain.

V.

CONCLUSION

Appellant objects to the taxing of costs in the sum of \$13.20 being made in the absence of the serving and filing of a cost bill, as provided by the statute.

His position in this matter appears to be correct, and respondents have satisfied this judgment for cost, together with interest, in the proper manner. No objection was made to this cost item prior to this appeal, and it can, therefore, be assumed that this matter was not the primary factor in the appeal. No such claim is made and no prejudice has resulted.

In the trial of this action, the appellant had the burden of proving that an easement was established by his use of respondents' premises for the prescriptive period. The trial court found that there was a failure of proof in this respect.

There is no evidence of adverse use or a claim of right. Appellant attempts to invoke the rule of law that an *established use* of the ground for the prescriptive period gives rise to presumptions of adverse use and a claim of right. There is no evidence of an *established use*.

Appellant, in the conclusion of his brief, states:

“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.”

How can a use be *continuous and notorious*, when the owner, Mr. Latimer, who must sustain such an assertion, has never in his life seen respondents' premises so used.

No contention is, or can be, made that the use claimed is exclusive. Any use made of these premises was in

common with respondents' use. This being the admitted case, the legal presumption arising from this fact is that such use was permissive, and could never ripen into an easement.

In view of this circumstance, appellant could not prevail, even though he had proved a sufficient use.

The use, if any, made of the premises by appellant was in common with the owner, and makes unnecessary a determination of the fact as to whether the use was sufficient to establish an easement, which is the ground of appellant's appeal.

It is submitted that the trial court did not err in applying the foregoing principles of law to the facts in this case.

Respectfully submitted,

MULLINER, PRINCE and MULLINER

Attorneys for Respondents.