2001

Richard Richards v. Pines Ranch, Inc : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD RICHARDS and ANNETTE RICHARDS, GEORGE Q. NIELSEN and SHERRY NIELSEN, RONALD HARRINGTON and MARY HARRINGTON,

Plaintiffs and Appellants,

vs.

PINES RANCH, INC., a Utah corporation,

Defendant and Respondent.

Case No. 14460

RESPONDENT'S BRIEF ON APPEAL

Appeal from a Judgment
of the District Court of Summit County
The Honorable Stewart M. Hanson, Sr., Judge

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STATEMENT OF THE NATURE OF THE CASE

Defendant and Respondent, Pines Ranch, Inc., referred to hereafter as defendant, has been sued herein by the Appellants hereafter called plaintiffs, in a declaratory judgment action wherein plaintiffs allege that they are the owners of a 40-acre tract of land located in Section 34, Township 1 North, Range 7 East, Summit County, Utah, which is surrounded by property owned by the defendant. They allege that a "road" to plaintiffs' property does now exist and has for many years existed across the defendant's land, and that it has been used for "logging and general access" to plaintiffs' property. (The Complaint does not state who allegedly used this "road" nor the extent of such alleged use nor the location thereof.) Plaintiffs seek a declaratory judgment that they have a prescriptive easement to use this "road" and seek a restraining order preventing defendant from interferring with such use. No order to show cause or other preliminary proceedings were had seeking a temporary restraining order or preliminary injunction.

DISPOSITION IN LOWER COURT

A motion for summary judgment made by the plaintiffs was argued (with supporting and opposing affidavits and memoranda) to the Hon. James S. Sawaya, and the motion was denied. Thereafter the matter came on for trial before the Hon. Stewart

M. Hanson, Sr., hearing the matter in Salt Lake City, beginning at 1:30 P.M. on January 6, 1976, pursuant to request of Court and stipulation of counsel, due in part to inclement weather. (T-2). At the conclusion of plaintiffs' evidence, defendant moved to dismiss, and the Court took the motion under advisement. At the conclusion of the trial, the Court (after all the evidence was in and the case had been argued and submitted by all parties) granted said motion. (R-31, 34-37).

RELIEF SOUGHT ON APPEAL

The ruling of the trial court was proper; the plaintiffs failed to meet their burden of proof to establish an easement by prescription. The judgment below should be affirmed.

STATEMENT OF FACTS

The plaintiffs' State of Fact is selective and in at least four instances is totally misleading, which will be pointed out initially. Additional relevant facts not mentioned in the plaintiffs' Brief are then set forth in this Statement of Facts and to some extent in the Argument hereafter.

Plaintiffs, in the second paragraph of their Statement of Fact (their Brief, page 2) in its final sentence, say: "The property was deeded subject to any easement or right of way of the public, even at that time." presumably suggesting thereby that there was an existing easement to plaintiffs' property.

Although Exhibit 9-P is the deed through which plaintiffs claim, and although it does contain the statement that said conveyance is "subject to any easement or right of way of the public, to use all such highways as may have been established" across said tract, such language is totally irrelevant and immaterial to this lawsuit because:

1. The deed does not purport to declare that there is any right of way in fact. It says "as may have been established". (Emphasis added.)

2. It deals only with rights of way to which said tract is subject. (It does not deal with rights of way benefitting said tract.)

3. It deals only with the rights of the public. Although the facts of this case fail to show any such public right of way, even if there were such, that could not be the basis of support to a claimed private right of way. In the case of Chournos v. Alkema, 27 Ut 2d 244, 494 P 2d 950 (1972), the Supreme Court of Utah held:

> "One cannot claim a right of way as a private one by showing that it has been used by the public; he must show user by himself or his predecessors of the way to his own lot."

At page 3 of their Brief, plaintiffs claim that the plaintiff, George Q. Nielsen, used the property for "logging". Plaintiffs' counsel cites no reference to the record to substantiate the claim, and indeed there is no evidence to that

effect unless removal of a Christmas tree constitutes logging, as the most that can be said from the record is that Mr. Nielsen occasionally cut a tree, usually at Christmas time, and presumably (with the exception that hereafter appears) upon his own property.

In the final paragraph of plaintiffs' Statement of Fact, it is averred that "Shortly before this lawsuit was filed, the defendant began interferring with plaintiffs' access to the property, and the plaintiffs filed this action for declaratory judgment." Again no reference to the transcript is made to substantiate that assertion and it is misleading if intended to imply that defendant acquiesced or failed to object to trespass of defendants prior thereto. All the evidence shows that a fence along the western boundary of Section 34 had been in existence at least since 1940 (T-85) and that after--not before--the lawsuit was filed (specifically on October 4, 1975) the barbed wire gate in the existing fence was replaced with a chain and padlock by Mr. Matheson, who was a co-owner of four lots (No. 32, 33, 34 and 35) abutting said fence and gate to the west of Section 34 (which lots were located in the Pine Mountain Subdivision and were acquired by him and his partners in June 1971.) (T-66-69). The boundary was thus protected by fence and gate since 1940 or before (T-85), and the objections of defendant to trespassing by plaintiffs and others has been incontrovertibly of long standing. (T-113, 94), and it is not something that occurred just before

this lawsuit was commenced.

4. Plaintiffs state at page 3 of their Brief as fact: "In 1938, Virgil Smith, a resident of Summit County, used the property for logging and used an established roadway across the Curt Wilde property to remove the logs." That is plaintiffs' "left-handed" way of trying to get before the Court a statement that was not presented in evidence before Judge Hanson, specifically an affidavit of one Virgil Smith, which was used in connection with plaintiffs' motion for summary judgment, but which was not verified or introduced or offered by counsel at the trial. No opportunity, of course, was afforded the defendant and its counsel to cross-examine Mr. Smith or to determine when or where or how (or even if) he logged and across what property, if any, he traversed in taking out his timber. In any event his connection, if any, to the owner of the property remains a mystery, and his activity, if any, cannot help them.

In that connection, plaintiffs did move the admission of an affidavit of Ethel Gibbons, and the Court erroneously and over the objection of defendant did admit it. (T-64). Plaintiffs had adduced from Mrs. Gibbons' nephew, one Robert E. Walsh, (who was a witness) that Mrs. Gibbons is an elderly person and has periods of lucidity and others of incoherence. No effort was made by plaintiffs to establish Mr. Walsh as an expert on mental conditions, and no effort was made to ascertain or prove her state

of mind or provide foundation as to her lucidity as of July 5, 1974, when the said affidavit was purported to have been executed. Apparently, the Court below gave said affidavit no credence. (Otherwise, admission of said affidavit would constitute prejudicial error.) In terms of supporting plaintiffs' position, it contains but one statement, and that is: "During my lifetime, my family and I have had occasion to utilize the roadway into the Southeast Quarter of the Northwest Quarter of Section 34, for purposes of taking out timber, grazing sheep, picnicking and other purposes." (R-11). She then continued, "The roadway that we commonly called Shinglemill Canyon Road was the only means of getting to the property described above. Other people used it besides me and my family, and I have specific recollection of having used it personally in excess of Forty (40) years." Nothing in the affidavit indicates when the purported 40 years began or ended, nor whether it was continuous and uninterrupted, nor in what capacity she used it.

The testimony of Mr. Walsh, Ethel Gibbons' nephew, was that he, in company with his uncle (Mrs. Gibbons' husband) went annually to the said area to cut a Christmas tree each year until 1952, and from that time on has not been on it. (He wasn't actually sure he went to the property in question, however.) (T-54). It is further important to note that plaintiff, Nielsen, got a deed to the subject property in 1966. He testified that

there was a contract of purchase of the property in existence as early as 1962.(T-8, 9). So there is a dearth of evidence, testimony or otherwise, with the exception of the nebulous "40" years referred to in Ethel Gibbons' inadmissible affidavit showing any use by the plaintiffs or their predecessors in interest of the purported easement or right of way prior to 1962. There has not been a 20-year period elapse since 1962 to the present, but in any case the activity of plaintiffs relating to this property has only been sporadic at best since 1962.

The defendant's witnesses, Mr. Stevens, Mr. Lund and Mr. Rogerson, all testified that the "road" running easterly from the gate in the boundary fence was there principally for the purpose of servicing an irrigation canal for the downstream water-rights owners (who were principally the Stevens family and Mr. Wilde and their predecessors). (T-25, 77, 85). In addition, Mr. Rogerson testified that on one occasion, the predecessor in ownership of 200 acres of the Pines Ranch, one Curtis Wilde, (who sold those acres to Pines Ranch in 1957) (T-83) asked permission of the defendant to take timber off the land one time in the year that he sold it. In doing so, he actually cut the "road" as such to a loading dock he built where he brought the logs and loaded them on to conveyances. (T-84, 85).

Mr. Rogerson was specifically asked, "Did the 'road' run to the Ethel Gibbons property?" His response was, "It did not." (T-84,85). He later said the "road" ends at the loading dock and that is approximately 150 to 200 yeards from the plaintiffs' property. (T-89). Mr. Lund testified that the "road" turns into a "horse-trail" well before reaching plaintiffs' property. (T-80). Mr. Stevens described the "road" as a "horse-trail". (T-25). Mr. Scott Matheson testified that the way was not honestly a road. (T-73). One of the plaintiffs, Ronald Harrington, testified he had used the "road" twice, both times occurring in 1975, and that the "road" narrows to a "path". (T-47).

In short, all of the competent witnesses acknowledge that what was a road to service a canal and in one instance to provide access to load some logs cut by a predecessor of the defendant (not of plaintiffs) is being claimed now by the plaintiffs as a right of way to their property for general access, on the strength of two crossings on foot by plaintiff, Harrington, and the sporadic cutting of Christmas trees and hauling the same across said way by the plaintiff, Nielsen.

The evidence further showed that in order to get to the gate in the said fence, one would have to cross the land formerly owned by the Stevens family, but subdivided in 1965 as Pine Mountain Estates. (T-27). In that connection, Mr. Stevens testified that if people (other than the Stevens) used that route,

they would have been trespassing. (T-31). He also said that only lot-owners and subdivision developers have keys issued to them, and that Mr. Stevens had given no key at any time to the plaintiff, George Q. Nielsen. (T-34). He testified finally that prior to the subdivision when the property was owned by his family (then doing business ad the Brooklawn Creamery) that there was a gate on the Shingle Mill Road, which was locked most of the time. (T-38). The following questions and answers were then elicited at page 38 of the transcript:

"Q. This gate now has a "No Trespass" sign on it, has it not?

A. Yes.

Q. Do you remember whether there was a similar "No Trespass" sign on the gate before the subdivision?

A. I don't recall.

Q. But the Shingle Mill Road has never, during the period of your ownership, has never been open to the public for people to needlessly go in and out, is that correct?

A. No, not in the twenty-five years that we have owned it."

Mr. Harrington testified that on several occasions between 1971 and 1975, he went into plaintiffs' property. He testified that he went on foot from the Weber Canyon Road except on one occasion he was let in the Pine Mountain Estates gate by someone who was there at the time he arrived and drove his car to the boundary fence separating Pine Mountain Estates from Pines Ranch. (T-44,

49). As noted above, in October of 1975, Mr. Matheson put in a padlock and chain on the fence separating Section 34 from the Pine Mountain Estates lots and delivered keys to Pines Ranch and to the Stevens. (T-68,69). He was expressly asked it he gave any permission to any of the plaintiffs or copies or sets of keys to any of them to which he replied universally in the negative. (T-69).

Finally, in the Statement of Facts, counsel wishes to call to the Court's attention the fact that just as Mr. Stevens testified that a "No Trespassing" sign appeared out at the Weber Canyon Highway bordering Section 33, so did Mr. Rogerson testify that at the main entrance to Pines Ranch at the north edge of Section 34, which faces the Weber Canyon Highway, a similar "No Trespassing" sign exists and has been in place for more than 20 years. Mr. Rogerson further testified that admittedly there is not a "No Trespassing" sign at the gate or along the fence separating Section 34, the Pines Ranch property, from the Pine Mountain Estates property (Section 33) because "we expected no one else to use the property except the Stevens people and ourselves." (T-92,93).

ARGUMENT

POINT I. THE TRIAL COURT CORRECTLY FOUND THAT THE USE CLAIMED BY PLAINTIFFS WAS SPORADIC ONLY AND INSUFFICIENT TO SHOW SUCH REGULAR, OPEN, NOTORIOUS, CONTINUOUS AND ADVERSE USE AS TO ESTABLISH AN EASEMENT BY PRESCRIPTION.

Plaintiffs brought this action as a declaratory judgment action (R-1) seeking to have the court declare that they are entitled to a right of way across the defendant's property, which they claim to have acquired by "20 years prescriptive use." (T-4).

As to the proper rule of appellate review, we refer the court to the case of London Guarantee and Accident Co. vs. Frazee, at 112 Ut 91, 185 P 2d 284 (1947), which involved an action for a declaratory judgment, and in that case, the Supreme Court of Utah held at page 96 that the rule of appellant review was as follows:

> "Our duty is to affirm the judgment of the trial court if, after a search of the record, we conclude there is substantial, competent evidence to sustain its findings. Even though we might have come to a different decision had we originally heard the action, we cannot now substitute our judgment for that of the trial court."

In support of this, we cite the cases of Jensen v.Gerrard, 85 Ut 481, 39 P 2d 1070 (1935) and Norback vs. Board of Directors, 84 Ut 506, 37 P 2d 339 (1934), which are cases involving prescriptive easements and in which the court held that prescriptive easement cases were in law. See, however, Richins v. Struhs,

17 Ut 2d 356, 412 P 2d 314 (1966) where the court proceeds in equity. It is, however, respectfully submitted that even under equitable principles of review the same result is inevitable in this case.

The plaintiffs, throughout their Brief, frequently and freely assert that the plaintiffs established their prescriptive easement by clear and undisputed testimony. We submit that a careful search of the record reveals that the plaintiffs' contentions are not only disputed by credible, competent, substantial evidence, but that plaintiffs' own testimony, even if considered by itself, is anything but convincing or clear. We have canvassed the record carefully and submit that the following is a fair summary of all of the evidence which conceivably bears upon the use of the property in question by plaintiffs and their predecessors or privies and upon the question of ingress and egress by such persons across the property of the defendant:

1. Plaintiff, George Q. Nielsen, testified that he went on the property (with the person from whom he later purchased it) in 1961, which was one year before he purchased the same. (T-10).

2. George Q. Nielsen testified that he had the property surveyed in 1962 at the time he acquired it. (T-12).

3. George Q. Nielsen testified, when asked what uses he had put the property to, as follows: "Well, we rode horses up

in there we have hired on many occasions. We have cut timber. We have taken out trees, and we have cut Christmas trees every year." (T-12). With reference to this statement, Nielsen is not asked, nor does he state, how many times he used it nor what route of ingress or egress, nor the means of transportation (except that one could perhaps infer that he went by horseback at times.) Nielsen does testify that he used the gate at the northwest of the property belonging to the Pines (entering through the Stevens property to get there. (T-17). With reference to said supposed "road", Nielsen states as follows at page 13 of the transcript:

> "Q. Would you please for the Court describe the nature of the roadway, and I am looking at 1962 when you purchased the property. Describe the nature of the roadway from the time you crossed the Smith and Moorehouse stream until you got as close to your property as you could on the roadway. Tell us at the start of it.
>
> A. It was a regular canyon-type of rough dirt, graveled road that ran up that, ran up Shingle Mill, was clearly defined, and then it is true it never, going to my property was clearly defined but as you got to the edge of the Pines Ranch you could clearly see trails for a car and we have driven a car when we have-- Well, the fire department used, and we have driven a quarter-ton truck to get into it. The terrain became more of a trail and you could see that they hauled timber out of there and driven wagons out of there, and I could get to my property at any time with a four-wheel drive and with clearing a little foliage I could drive a car."

If Nielsen drove his "four-wheel drive" vehicle into the property more than once, he is careful not to say so.

4. George Q. Nielsen testified that he went hunting in the area in 1956 and 1957, which was five years before he acquired the property. There is no testimony, however, that such vists were in any way authorized by the then owner. (T-19).

5. Defendant, Ronald Harrington, testified that he had been on the property several times between 1971 and 1975. He testified that the first time he went in from the Pines north gate and that in May or June 1975 he came in over the Stevens property through the gate at the northwest corner twice. (T-42, 43).

6. Robert C. Walsh testified that he had been to the area about one time each year from 1936 to 1952 to get Christmas trees. Walsh testified that he was a nephew of a former owner, but he admitted that he did not actually know the location of of the property, but assumed that they were on the proper tract in obtaining the Christmas trees. (T-54).

7. Walsh also testified that he had been hunting in the area, but did not know whether he was on the property in question or not, nor did he testify that he was there by authority of the then owners. (T-54).

8. William Ray Hauter testified that he was a lieutenant in the Salt Lake County Sheriff's Department and co-worker of plaintiff, George Q. Nielsen. He testified that he went upon the property in question 6 or 7 times with Nielsen to obtain Christmas trees and to hunt grouse and testified that these visits

commenced approximately seven years ago. He testified that they had gone by car as far as the gate at the northwest fenceline, but not by car beyond (T-59, 61). In response to the question as to how far from the fence an automobile could be driven (going east) he said at page 61 of the transcript:

> A. Well, this would be difficult. There was an old roadway there. It appeared to be a roadway. It hadn't been used probably for vehicular traffic for sometime, but it was a road. Probably could have driven a short distance on that, yes.

This seems to contradict Nielsen's testimony about going to the property by motor vehicle or at least tends to show such an event to have been isolated and remote.

9. The Court, over the objection of the defendant, admitted the affidavit of Ethel Gibbons. (T-64). Testimony in this form is clearly inadmissible and would be prejudicial and reversible error if indeed the Court had relied upon same. (If Mrs. Gibbons was unable to come to court, her testimony should have been secured by deposition, assuming competency. As it is, defendants never were given an opportunity to cross-examine and there is no showing of her mental capacity at the time she made the affidavit in any event.) Actually the affidavit does not materially assist the plaintiffs. The trial court apparently concurred with this view. The affidavit, so far as the issues of this lawsuit are concerned, says that Ethel Gibbons and her family used the roadway into the property for purposes of taking

out timber, grazing sheep, picnicking and other purposes. It further states that Ethel Gibbons personally used what she termed "Shinglemill Canyon Road" for in excess of 40 years. (see paragraphs 2 and 3 of the affidavit.) She does not, however, state in her affidavit what roadway she is referring to in paragraph 2, and although she does refer to the name of a roadway in paragraph 3 as being "Shinglemill Canyon Road", there is no way of determining what Ethel Gibbons understood to be the "Shinglemill Canyon Road" is it relates to a supposed prescriptive easement across the Pines Ranch. There is no way of determining what, in her mind, the situs of the road would be. Furthermore, although she states that she personally used this road for in excess of 40 years, we are not told what 40 years is meant, and we are not told when any such use began or ended and we are not told if it was continuous and uninterrupted, nor whether it was regular, open or notorious. In fact, her entire affidavit is consistent with sporadic (and even permissive) use in any event.

10. Milton Kenneth Rogerson, who was a part-owner of the Pines and a member of the Board of Directors, testified that he has been acquainted with the property in question since 1928 and has been a part-owner of the defendant since 1940. (T-81) When asked regarding use prior to the mid-1960's, he stated, "Nobody used it without our permission." (T-113). He further stated at page 113 of the transcript:

"Q. Nobody objected?

A. Yes, we objected.

Q. How did you object?

A. We objected because it was ours.

Q. How did you object?

A. There was no traffic on it.

MR. MADSEN: Let him answer, Counsel.

A. There was no purpose for anybody to go on our property. For whatever they used it for they would have to have used our property. That is the reason we objected.

Q. How did you object? Did you write letters, go on the ground, kick them off?

A. We kicked them off if we saw them.

11. The said Rogerson also testified that the Gibbons family had used the Gibbons property for sheep at some time in the past, but that the sheep had been brought in from the south and had left by the northwest gate, but that had not occurred since about 1950 or 1951. Furthermore, this reference to the Gibbons family was not to Ethel Gibbons and her husband as such, but rather to the Gibbons family as a whole. It was the Gibbons family in the larger sense that was referred to by Rogerson and he stated that Albert, who was representative for the Gibbons family, admitted to Rogerson that he had no right of way. (T-105). There was also testimony that the Gibbons family had used what is referred to as the "Wilde Road", which was at a different

location to the alleged road in question in this lawsuit. It should be noted that even in connection with the testimony concerning the ingress and egress of sheep, there is no testimony as to how often it was used and no basis upon which to establish a prescriptive easement by that activitiy, which has long since been abandoned in any event.

12. The aforesaid Rogerson also testified that in approximately 1965 he met the plaintiff, George Q. Nielsen, on the premises and told him that he was trespassing. Plaintiff, Nielsen, in his testimony admitted the encounter, but denied portions of Rogerson's testimony in that regard. (T-93, 94, 116, and 122).

13. The said Rogerson testified that the Gibbons family was a permissive user through the north gate on occasion. (T-104).

14. Rogerson further testified with reference to the northwest gate of the Pines property, that owners to the west had used it to cross the Pines Ranch for purposes of keeping the canal to their premises cleared each year. As to its creation as a road, he testified that this was accomplished in 1956 by Mr. Wilde (T-83, 84), at which time Wilde obtained permission from the Pines to remove timber through their property and he cut the road for that purpose. The remains of that road are apparently visible in the photographs admitted in evidence, but Rogerson testified that the so-called road as shown in the

photographs ended 150 to 200 yards from the plaintiffs' property in any event. (T-89). He also testified that beyond that point it was at most a game trail. He used the phrase "indications of animal traffic." (T-85, 89). Nielsen even characterized the supposed road as a "trail". (T-13). Harrington calls it a "path". (T-47) Walsh refers to a "trail", (T-55) but isn't even sure of the location of the Gibbons property with reference thereto. Scott M. Matheson, owner of the lots just west of the gate, testified that even at its beginning, the so-called road does not appear to be a road, but rather just a few tire tracks. (T-73). Herman Lund, a part-owner of the Pines and the predecessor in interest of Matheson in the lots just to the west of the said gate, refers to the so-called road as a "horse-trail", (T-80) as does Stevens. (T-25).

The prerequisites in Utah to the establishment of a prescriptive easement are clearly set forth in the case of Jensen v. Gerrard, supra, in the following language found at page 487:

> "Before a right of way can be acquired by prescription, the use for the prescriptive period must be peaceable, continuous, open, adverse as of right, and with the knowledge and acquiescence of the plaintiff and his grantors and predecessors in interest. Actual notice to the owner of the servient estate is not necessary if the user is so notorious that in the exercise of reasonable diligence the owner should learn thereof; then he will have constructive notice of the user which is sufficient."

In the light of these principles, it is abundantly clear that the plaintiffs totally failed in their testimony to

establish a prescriptive easement for at least the following reasons:

1. The testimony totally fails to show a continuous, uninterrupted use for a period of 20 years. If the affidavit of Ethel Gibbons is excluded, as it should be, all that remains is an occasional use by George Q. Nielsen, Ronald Harrington and William Ray Hauter since 1962, which at best is a period of 14 years. The testimony of Walsh's limited use likewise does not meet the 20-year requirement as it commenced in 1936 and ended in 1952, a period of 16 years. The Walsh period and the Nielsen period are interrupted by ten years of non-use from 1952 to 1962. Even if Ethel Gibbons' testimony were admissible, it does not improve the situation because the period of her use is not identified in terms of time of beginning or ending, nor does her testimony establish that her use was continuous or regular, uninterrupted, open or notorious, or peaceable, or that defendant knew, or should have known, of such use. It also fails to identify the location or route used and how often such route or routes were used.

2. In addition to failing to show 20 years continuous, uninterrupted use, the use testified to is only incidental and sporadic in nature and is not such as to establish a prescriptive easement in any event. A review of the testimony of Nielsen, Harrington and Hauter does not show the kind of use which is

necessary to establish a prescriptive easement. This use of the property is occasional and temporary, and they do not show any consistent activity unless it could be the removal of a Christmas tree each year. Even this activity takes place in the winter when the occupants of the Pines Ranch are hampered by snow from acquiring knowledge of the activities of Nielsen and certainly cannot be said to have been aware thereof, except for the one instance in which Rogerson happened to find Nielsen on the property and told him that he was trespassing. The activity of Walsh is likewise of a sporadic nature only and amounts to going on to the property one time per year to remove a Christmas tree, and this we submit is not sufficient activity to establish a prescriptive easement. Even Ethel Gibbons' affidavit does not establish the kind of activity which would be required to establish a prescriptive easement because it does not indicate that the actitities that she sets out in her affidavit were other than incidental and temporary in nature.

3. Finally, it should be observed that even if the usage testified to by the plaintiffs was sufficient to make a prima facie case, it is directly contradicted by the testimony of Milton Kenneth Rogerson. He testified that any use prior to the mid-1960's was permissive and he stated that if they found people on the property without permission they told them to leave. This, of course, creates a situation in any event of

conflicting testimony and under general rules of appellate review, the decision of the trial court in this regard will not be overturned.

The general rule is well established that in order to obtain a prescriptive easement, the use must be continuous and uninterrupted, and this means it must have substance and significance. Whereas it is true that "what shall constitute such continuity can be stated only with reference to the nature and character of the right claimed", it is nevertheless equally clear that a prescriptive easement cannot be acquired by "occasional and sporadic acts for temporary purposes". The foregoing language is taken from 25 Am Jur 2d, Easements, §56. The reason for this, at least in part, is that the use must have sufficient substance and magnitude that the owner of the fee can reasonably be charged with knowledge thereof. A prescriptive easement cannot be obtained by stealth. In Zollinger v. Frank, 110 Ut 514, 175 P 2d 714 (1947) the court at page 522 states that it is important to know "whether the servient estate owner knew of should have known during the entire prescriptive period that the claimant was using the claimed right of way." (Emphasis added.)

In their Brief, plaintiffs cite the case of Cooper v. Carter Oil Co., 7 Ut 2d 9, 316 P 2d 320 (1957) in which the Supreme Court of Utah found adverse possession under circumstances which consisted of grazing sheep upon the land in question for three

weeks out of the year. We do not think that that case supports the plaintiffs' position at all. First of all, it does not deal with a prescriptive easement, and furthermore, under the circumstances of the case, the evidence disclosed that the land was grazing land and that the grazing thereon was only good for three weeks per year and, therefore, although the use was only three weeks per year, it did, in fact, constitute 100% use of the property. In the instant case, we do not even have a use of the property approaching three weeks per year. Little more has been done with the property than to occasionally remove a tree at Christmas time. That amounts to a use of about one day per year at most, in the wintertime when no one much is about and, furthermore, there are not even 20 continuous years of removing the Christmas trees.

Further , the plaintiffs have subdivided the property in question into 8 five-acre tracts for summer home use, and there is no evidence whatsoever in this record that anyone ever slept as much as one night on their property. Plaintiffs seek to establish a right of way for use as a summer home subdivision, but totally ignore the lack of any prior use of that nature, and at the very least, summer home use or more exactly, lack of it, is a significant factor in determining what past use will be held to be sporadic, occasional or temporary.

Finally, it should be noted that plaintiffs admit their claimed use was sporatic(Plaintiffs'brief, p.14).

POINT II. THE TRIAL COURT WAS JUSTIFIED IN FINDING THAT IN RECENT YEARS THE USE MADE OF THE ALLEGED RIGHT OF WAY WAS ESSENTIALLY PERMISSIVE AND THAT DEFENDANT HAS MADE EVERY ATTEMPT IT COULD TO KEEP PEOPLE FROM TRESPASSING ACROSS ITS LAND.

In its Findings of Fact, the trial court found that in recent years the use made of the alleged right of way has been essentially permissive, and that defendant has made every attempt it could to keep people from trespassing across its land. (R-35). This finding is fully supported by the evidence and we cite particularly the following items:

1. Since at least 1940, there has been a gate and fence along the west boundary of the Pines Ranch to control access. (T-85).

2. There is a locked gate on the north boundary of the Pines and "No Trespassing" sign. (T-49, 50,92, 104).

3. Rogerson found plaintiff, George Q. Nielsen, on the premises in about 1965 and complained to him that he was trespassing. (T-93, 94, 122).

4. Rogerson testified that prior to the mid-1960's no one entered the premises without permission and if persons were found on the property without permission, they were "kicked off". (T-113).

5. Wilde constructed the road and used it to remove timber during one season, all with permission of defendant. (T-83, 84)

6. Rogerson testified that the Gibbons family were

permissive users through the north and that the family spokesman acknowledged that the Gibbons had no right of way. (T-104, 105)

7. All of the foregoing actions must be considered in the light of the measures taken by the Stevens family and their successors on the west to prevent access to their property, all of which has resulted in cutting off access to the defendant's west boundary. But for the measures taken by the Stevens family, more severe measures by defendant would perhaps have been appropriate as defendant might reasonably have been required to anticipate trespassers from the west. It should be noted that the Stevens people:

(a) Maintained a fence and locked gate across the north of their property for at least the last 25 years. (T-9).

(b) Keys were given to those entitled to them, but not to plaintiffs. (T-34).

(c) The area to the west of the Pines gate has been subdivided and sold to Matheson, who has put a locked chain across the gate. (T-66-69).

Without arguing the matter further, it appears clear that the record contains more than enough evidence to support the aforesaid finding of the Court and, in fact, compels the finding as set out in Point IV above.

POINT III. THE COURT CORRECTLY DETERMINED THAT THIS CASE DOES NOT FALL WITHIN RICHINS V. STRUHS.

In its Memorandum Decision, the trial court held that this case does not fall within the decision of the Supreme Court in the case of Richins v. Struhs, supra. In this, the trial court was correct. The real issue in the Richins case was whether the use was permissive or not permissive. As we read it, that case stands for the proposition that when a claimant has shown that his use has been open, notorious and continuous for more than 20 years, that the "law presumes that the use is adverse to the owner; and that it had a legitimate origin". (page 359). That case, therefore, does not do away with the requirement that the use be open, notorious, continuous and adverse for over 20 years. That is still a condition precedent. In the instant case, that requirement was never met and, therefore, the presumption never comes into effect. Furthermore, the presumption is rebuttable, and under the circumstances of this case, it is respectfully submitted that any such presumption has been fully rebutted in any event.

POINT IV. THE TRIAL COURT'S DECISION DOES NOT DENY PLAINTIFFS ACCESS TO THEIR PROPERTY NOR RENDER IT WORTHLESS.

In Point IV of their Brief, plaintiffs make a very emotional appeal that the trial court has denied them access to their property and rendered it worthless. That is absurd.

The trial court has only ruled, and properly so, that plaintiffs failed to prove a prescriptive easement. If plaintiffs' property is worthless without a prescriptive easement, it was not the decision of the Court that brought it about. If such is the case, it was worthless before the Court ruled, as the Court only declared the status between the parties in a declaratory judgment action. It appears, however, that plaintiffs can obtain access to their property by eminent domain pursuant to Section 78-34-1(7), Utah Code Annotated (1953) as amended. They will, of course, have to pay the reasonable value thereof, and the right of way will have to be placed on the ground in a location which will do the minimum of damage to defendant.

In Point IV of their Brief, plaintiffs appear to complain that defendant is allowing livestock to graze on plaintiffs' subdivision. The record does not support that as a bona fide complaint, but if indeed it is, there are proper means to deal with it, but not in an action seeking a prescriptive easement.

Also in Point IV, plaintiffs raise the issue of what was paid for their property. Nielsen did not know the principal amount that he paid for the land (T-21) and even if it were the $7,000 total that he did refer to, there is no evidence that the resulting cost of the land of $175 per acre for the 40 acres was a reasonable price with right of way, but not without. For all the record shows, the $175 per acre price was based upon lack of right of way and, in fact, it may be at a level which contemplates an additional expenditure for a right of way. It may indeed be the plaintiffs who would be getting the "windfall" if the trial court were to be reversed.

Plaintiffs allege in Point IV that defendant is guilty of taking "all they can take, giving nothing in return." That is a totally unfounded and irresponsible statement. If anyone is trying to get something for nothing in this case, it would appear to be the plaintiffs. They are attempting, on the basis of isolated, sporadic, and really inconsequential contacts with the property (involving mainly the removal of an occasional Christmas tree--accomplished on foot or at most perhaps some-

times by horseback) to subject defendant's property to a full-fledged right of way for motor vehicles to service a subdivision of eight lots for summer home use for who knows how many people. This is not fair play and it is not the law. Even if there were a right of way, the owner thereof cannot increase the burden on the servient estate, and in the event of subdivision of the dominant estate, the easement does not inure to the benefit of the owner of a parcel which, after the division, does not abut on the way. The Utah cases so hold. In this case, the evidence did not show right of way even going to the 40-acre tract as a unit, and it certainly does not show that it went to each of the eight five-acre tracts which have been subdivided from the orginal. Undeniably, eight summer homes will constitute an increased burden under any circumstances. In support of the foregoing, we refer the court to the following cases: Wood v. Ashley, 122 Ut 580, 253 P 2d 351 (1952); and Nielsen v. Sandberg, 105 Ut 93, 141 P 2d 696 (1943).

CONCLUSION

We respectfully submit that the decision of the lower court is fully supported by the evidence, that the decision is a fair and just one, and respectfully pray that the Supreme Court affirm the decision of the trial court.

DATED this 5th day of August, 1976.

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Mailed two copies of the foregoing Brief to Richard Richards, attorney for plaintiffs, at his address, 2506 Madison Avenue, Ogden, Utah 84401, postage prepaid, this _____ day of August, 1976.

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Attorney for Respondent