

1952

Rachel P. Lunt and Dilworth Strasser v. George W.  
Kitchens, Albion L. Kitchens and Minnie E.  
Kitchens : Brief of Appellants

Utah Supreme Court

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7871

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF UTAH**

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**FILED**  
AUG 28 1952

RACHEL P. LUNT, and  
DILWORTH STRASSER,  
*Plaintiffs and Appellants,*

vs.

GEORGE W. KITCHENS, ALBION  
L. KITCHENS, and MINNIE E.  
KITCHENS,  
*Defendants and Respondents.*

Clerk, Supreme Court, Utah

Case No.  
7871

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**BRIEF OF APPELLANTS**

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**RICHARDS AND BIRD,**  
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**BRIEF OF APPELLANTS**

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**STATEMENT OF FACTS**

This was an action to quiet title to a driveway 10 feet wide and 99 feet deep across the property of appellants at 418 East Fourth South, Salt Lake City, Utah, claimed

by the respondents, their neighbors to the west, residing at 414 East Fourth South. Respondents filed a counterclaim asserting right to the driveway. The complaint was resolved against the appellants and the counterclaim in favor of the respondents by the Honorable Clarence E. Baker, Judge of the Third District Court.

The complaint alleged that appellants own land with 3 rods frontage and 10 rods depth, which land was particularly described but which is the property at 418 East Fourth South. The complaint alleged that defendants claim a right of way over the west 10 feet of the north 99 feet of that property in connection with their adjoining land.

In the answer the respondents admit ownership of the plaintiff, admit claiming the right of way and deny that it is without right and then by way of counterclaim allege that respondents are the owners of the lot immediately west of the land of appellants. Respondents allege that they are the owners "of a right of way across the premises of the plaintiff for the purpose of passing over the same with or without horses, wagons, automobiles, trucks and other vehicles, and in any and all other reasonable manner and for ingress to and egress from the premises of the defendant above described, which said easement and right of way has been used by the defendants and their predecessors in interest openly, adversely, continuously and uninterruptedly for a period of more than 35 years last past, and the same

is appurtenant to the said above described premises owned by the defendants as aforesaid," (R. 3-4). The counterclaim then alleges that the appellants threaten to obstruct the easement and right of way of the defendants and that the claim is wrongful. The respondents pray for adjudication of their easement and right of way as mentioned and that the land of the appellants be held subservient to the said easement and that appellants be enjoined from interfering with the right of way, (R. 4-5).

At the opening of the case the question was raised whether the claim of respondents was by deed or prescription. Respondents stated that the claim was by prescription only, (R. 9-10).

Witness Dilworth Strasser testified for the appellants and offered in evidence Exhibits A, B, and C. Exhibit A, an abstract of title, shows the property in appellants, Fred E. Weidner and Bessie Evelyn Ferguson. Exhibit B is the deed from those owners to Ada C. Pace, dated October 8, 1950; and Exhibit C, a deed to the appellant Strasser. The witness testified that he was buying the property from Rachel P. Lunt and upon this showing the appellants rested.

In opening their case, respondents offered in evidence Exhibit 1 which is an abstract consisting of 34 pages. Appellants objected only to Page 30, a quit claim deed of the right of way, which page was received tentatively (R. 13). Page 24 of Exhibit 1 is a warranty

deed to Willie Ann Kitchens, a widow and the mother of all of the respondents, dated in 1920, of the property at 414 East Fourth South which deed includes a right of way described as follows:

“Together with a right of way for foot passengers over the following tract:

Beginning 84' 2" East from the Northwest corner of said Lot 5, and running thence South 68'; thence West 1' 4"; thence North 68'; thence East 1' 4", to beginning.

Together with a right of way over the following:

Beginning at a point 84' 2" East from the Northwest corner of said Lot 5, and running thence South 68'; thence East 1' 4"; North 68'; thence West 1' 4", to the place of beginning for foot passengers.”

Exhibit 1 shows on Page 31 the warranty deed from Willie Ann Kitchens to her five children. Willie Dee Kitchens and Homer Nelson Kitchens subsequently conveyed their interests to the respondent, George W. Kitchens, as shown at Pages 33 and 34. The abstract also includes a quit claim deed dated May 15, 1936, and recorded May 18, 1936, from Carrie E. Weidner to Willie Ann Kitchens describing the right of way in dispute.

The pictures, Exhibits 3, E, and G, are taken of the properties involved and show the property of appellants as the house on the left, and the property of respond-



ents as the house on the right, and drive way running south from Fourth South Street between the two houses. Exhibit 2 is taken from near the southeast corner of the house belonging to respondents and shows the woodshed on the left of the house and some distance south of the property and that there is an open space between the house and the woodshed. This is likewise shown by Exhibit F which is looking north from the woodshed on the property of respondents and shows the house of respondents.

The respondent, George W. Kitchens, testified he is a  $\frac{1}{3}$  owner of the property at 414 East Fourth South, and that the other respondents are also part owners, (R. 14). He testified that he has been acquainted with the property since 1920 when it was purchased by his mother, Mrs. Willie Ann Kitchens, (R. 15). When he first drove to the property in 1920 he parked his car on the property of appellants part way down the right of way, (R. 18). Afterward he and his brother frequently drove down the right of way in going to their mother's home, and the coal company used the driveway for delivering coal and wood as there was no other way to deliver to the woodshed, (R. 22). Pedestrians walked down the driveway to the rear of the property of respondents, (R. 22), and in those days there was a fence on the east side of their property about 3 feet east of the houseline which fence ran south to the coal shed through which there was a gate just at the coal house, (R. 22-23). This gate was  $4\frac{1}{2}$  feet wide and for

pedestrians only, (R. 23). There was and is a window on the east side of the coal shed through which coal was thrown when coal was delivered; (R. 24). Exhibit 2 shows the property as in 1920, (R. 24). The driveway was used by the mother of respondents and the family for parking cars, for the delivery of wood and groceries, for every purpose that served the house from 1920 down to the present time, (R. 27). Mrs. Carrie E. Weidner was the next-door neighbor, (R. 27). She and her husband resided there and owned the property when the Kitchenses first moved into their property. The two families visited back and forth, outside and inside the houses, back yard and in the front yard more or less constantly, (R. 28), and on a half-dozen occasions George Kitchens was with the Weidners when deliveries were made into the Kitchens property and neither Mr. nor Mrs. Weidner ever objected to use of the driveway and there was never any objection made to the use of the driveway until 1946 when some people who rented the property of appellants built a gate between the two houses and across the driveway, (R. 29). This gate was removed by respondent George W. Kitchens and the driveway has been used ever since without objection, there having been no interruption from 1920 until the gate was placed in 1946, (R. 29-30). The fence extending along the east boundary of respondent's property as far south as the coal shed was in place until up to the year 1946 when he tore it down, (R. 31). The driveway was

repaired and kept up by the family of respondents by placing ashes on it, filling mud holes and water holes and smoothing it down, but it was used more by the Kitchenses than by the Weidners, (R. 31). He never saw the Weidners repair the driveway, (R. 32).

On cross examination Mr. Kitchens testified that he did not inspect the property at 414 East Fourth South prior to its purchase by his mother and that when he first saw it about 30 days later there was a fence from the southeast corner of the house to the coal shed, (R. 33), with a door on the north of the coal shed and a kind of window on the east side, and that the coal shed was no longer used for storing coal for heating but only for the coal stove in the kitchen (R. 34). There was a gate in the fence right next to the coal shed, (R. 34). There was and is a sidewalk to the west of the house of respondents that goes along the west side of the house and turns east at the back to the back door. The shortest route from the sidewalk to the back door was along this sidewalk and into the back door, since to reach the back door across the back way required a pedestrian to go to the south end of the fence and through the gate and then back across the yard to reach the back door, (R. 35). There is also a woodshed on the property of respondents located west of the coal shed and being of approximately the same size, (R. 35). The woodshed could not be reached from the driveway and to unload materials from a wagon it could be carried through the gate at

the back or from the front along the west walk and into the wood shed, (R. 35-36). The witness never saw coal or wood delivered into the back by bringing it in bags or bundles along the sidewalk west of the house, (R. 36). He remembered no gate placed across the driveway prior to 1946 and no gate in 1932. He tore down the fence on his own property and the gate placed across the driveway by the tenant at separate times which might have been two or three days apart in 1946, (R. 37-38). The gate was across the driveway two or three days. Mr. Evans put it up one day and Kitchens took it down the next, (R. 39). He denied ever having an argument with one of the tenants concerning the parking of cars in the back of the property of appellant, (R. 39).

George W. Kitchens further testified that he owns two houses on Fourth South west of the property of respondents and two houses on Fourth East going south from Fourth South and that he plans to operate the entire group of houses as a motel and that there is no means of getting an automobile off the streets except through the driveway between the properties of respondents and appellants, (R. 40).

“Q. Is it your intention, if you are successful in establishing a right-of-way between 414 and 418 to park cars in back of 414 for the benefit of all the Motel?

A. For any use necessary.

- Q. In connection with that Motel?
- A. Anything that is necessary.
- Q. Well, by that you mean, necessary in connection with any of those properties?
- A. If anything is necessary, I would use it like I always have.
- Q. Your contention is you have absolute right-of-way for any purpose you desire to put the property to?
- A. Yes.
- Q. Including the building of garages on your property?
- A. Yes.
- Q. And using this driveway as a means of access?
- A. Yes, sir.
- Q. What do you base that claim on?
- A. I own the land on both sides of it, and certainly if I have used that right-of-way for forty years, I can do what I please on my own side of the property." (R. 40-41).

When his mother purchased the property in 1920, the driveway was in use, it gave the appearance of vehicles having been driven down it and people having walked down it. No new driveway was made and they simply added some use to an existing driveway which had been there for a long time, (R. 42). The Kitchens family put ashes in the driveway more or less all the time and no one ever complained about it, (R. 43). The use of the driveway by the Kitchens family didn't make the driveway wider, longer, or deeper; it didn't require



the moving of any buildings, trees, or shrubs and they used the driveway just as they found it, (R. 44).

George W. Kitchens is buying the other two-thirds ( $\frac{2}{3}$ ) interest in the property from his brother and sister, the other respondents, and has the entire property under contract, (R. 45). He is a shoe salesman at Z.C.M.I (R. 45-46). He also owns a motel at 3007 South State Street, besides the motel on Fourth South and Fourth East, (R. 46).

Mrs. Minnie Kitchens Packard testified that she is one of the defendants. She was living with her mother when the property at 414 East Fourth South was purchased by her mother. She went with her several times to look at the property, (R. 47). There was a driveway at that time between the two properties, its use was apparently well established, this was spring of the year and the driveway was muddy, (R. 48). There was a fence on the east side of her mother's property which began at the north side of the house about three feet east of it and extended back to the little gate next to the coal house, (R. 49). She lived with her mother at that time for about two years. The driveway was used for coal, wood, and as a driveway for them and their friends, (R. 49). The use of the driveway was not interrupted until the fence was put up in 1946. There was a very friendly relationship between the two families and they parked their cars on the Weidner property with the Weidners' permission, (R. 50). The Weidners made

no objection when the Kitchens cars used the driveway in their presence, (R. 50).

Mrs. Packard further testified that the Kitchens family never had exclusive use of the driveway (R. 51), and that the usual way into the Kitchens home in connection with a car was through the driveway between the two houses and that someone in her family has had a car all the time during the past thirty years. She has had one herself since 1923, (R. 51). The Kitchens family used to put ashes in the driveway to cover up the mud holes during the winter and rainy weather, (R. 52). She took the pictures which are Exhibits 2 and 3 in 1947, (R. 52). Neither Mr. nor Mrs. Weidner ever told Mrs. Kitchens in the presence of Mrs. Packard that the Kitchens family should not use the driveway or that they had no right to use the driveway and never until that gate was put across the driveway did anyone ever question the Kitchenses' right to use the driveway, (R. 54).

On cross examination Mrs. Packard testified that the pictures that she took could have been taken in 1949 and she knows that they were taken after her mother's death which was in 1946, (R. 55-56). She lived in the Kitchens property about eight months out of each year until 1946, (R. 58). It was the practice of her mother to call Mrs. Weidner to the telephone which she did very frequently, and her mother and Mrs. Weidner were very friendly and visited back and forth all of the time using the little gateway by the coal shed, (R. 59). There was no agreement between Mrs. Kitchens and Mrs. Weidner that the

Kitchenses could use the driveway in exchange for the Weidners' use of the Kitchenses' telephone, (R. 59). The gate by the coal shed was in the fence before the Kitchenses moved on the property and Mr. Weidner repaired the gate once after the Kitchenses moved in when the gate was falling off its hinges, (R. 60). There was never a gate across the driveway except the one in controversy which was put up in the year 1946.

The defendants hereupon rested their case on the counterclaim and appellants moved to dismiss the counterclaim on the ground that no prescriptive right had been shown. The testimony showed an uninterrupted use for the necessary prescriptive period but no adverse use and the testimony shows that the use made was with permission, and that Mr. Weidner repaired the gate. There never was any objection made until 1946, (R. 65). This motion was denied by the Court, (R. 65).

In behalf of appellants Rachel Petty Lunt, one of the plaintiffs, testified that in the months of October and November, 1946, there was a fence between the Kitchens property and the disputed driveway which fence ran clear back to the barn or coal shed, (R. 68). That fence was taken down during the year 1947 or 1948, (R. 69). She and Mr. Howell, attorney for the Kitchenses, went to the property together and inspected the driveway fence. When she purchased the property she had an attorney examine the abstract which pointed that there was a deed concerning a right of way on record, but that in his opinion the deed was of no value, (R. 71).



Clarence James Evans testified in behalf of appellants that he lived in the property at 418 East Fourth South for seven years from 1941 to late 1946 or 1947, (R. 74-75). While he lived there the occupants at 414 East Fourth South were Mrs. Tanner and Mrs. Kitchens, who was the mother of Mrs. Tanner, and an elderly woman. Mrs. Tanner passed away while he lived in the home, (R. 75). He has seen Mrs. Packard but is not acquainted with her although he believes he has seen her visit there, (R. 75-76). George Kitchens visited the Kitchens home while Evans was living in 418. He didn't visit very often and Mrs. Packard didn't visit very often, (R. 76). When Mrs. Packard would visit she would drive her automobile in and ask Mr. Evans if she could park in the driveway and he gave her permission to do so, (R. 76). Mr. Kitchens also occasionally drove in the driveway to the gate and Evans never made any objection as it wasn't hurting them, (R. 77). He left a car or two in the back of the property where Mr. Evans lived and he and Mr. Kitchens had a little argument about it and Evans told Kitchens to put the car out or he would call the cops; whereupon Mr. Kitchens moved the cars out and never again parked in the driveway north of the south line of the woodshed, (R. 77). While he lived there Mr. Weidner put a fence up in April or May of 1946, and it stayed there quite a while, maybe three months. He believes it was George Kitchens and his son who took the fence down while Evans was on

a fishing trip (R. 78-79). When Evans moved away from the property, the fence running from the Kitchens house to the coal shed was still up, (R. 79).

On cross examination Mr. Evans testified that he gave Mrs. Packard permission to leave her car in the driveway and never objected when a coal truck used the driveway, (R. 81-82).

Mr. Fred E. Weidner testified in behalf of appellants that he was a son of Carrie E. Weidner who owned the property at 418 East Fourth South, and that he acquired an interest in the property pursuant to warranty deed shown at page 16 of Exhibit A, (R. 83). When he executed the deed, which is Exhibit B, conveying the property to Mrs. Pace, he didn't know that the owners of the property at 414 East Fourth South claimed a right of way, (R. 84). He visited the property frequently from 1920 to 1946 and lived in the property for three months in 1932, just after the death of his father. There was very little use of the driveway but there was one load of coal delivered down the driveway. He used the driveway himself and his use was never interfered with. He made no objection to the carrying of a load of coal down the driveway, (R. 85). While he lived there in 1932 there was a gate across the driveway about three feet south of the house. The gate had a little catch on it and was standing when he moved away in April, 1932, (R. 86). He once called Mrs. Kitchens on the phone and asked if she would call his mother to the

phone as he hated to bother her. Mrs. Kitchens said, "Oh, don't think about that, you let us use your driveway and that is in payment of the telephone calls." This conversation was prior to the death of Mrs. Weidner in 1939, (R. 86). He had the gate put up in April of 1946 but doesn't know exactly where it was placed or how long it stood, (R. 87). For two years after Mrs. Kitchens moved in 414 East Fourth South she had coal and wood carried in from the street and after that they were permitted to use the driveway and so far as he knows no objection was made to that, (R. 87). The gate in the Kitchens fence just north of the coal shed was put in by Mr. Weidner's father two or three years after the Kitchenses moved in, (R. 88).

On cross examination Mr. Fred E. Weidner testified that during the months he lived in the property in 1932 he talked to his mother about the use of the driveway, and was told that she had an understanding with Mrs. Kitchens that she could use Mrs. Kitchens' phone and that Mrs. Kitchens would call her to the phone for the use of the right of way, (R. 89). When he drove his car into the driveway he sometimes parked in front and sometimes in the driveway and sometimes in back of the Weidner property, (R. 91). The gate was across the driveway until after his father died and when anyone wanted to get a delivery in they drove in the driveway, opened the gate, and drove down the driveway, (R. 92). His mother deeded the property to him and his sister

in 1934 shortly after the probating of his father's estate, (R. 92-93). There was no consideration except moral consideration for this deed, (R. 93-94).

Mrs. Rose Weidner, the wife of Fred E. Weidner, testified that she was well acquainted with the property on Fourth South and lived there for three months following Mr. Weidner's death, (R. 94-95). She saw people use the driveway in connection with the Kitchens family and at one time a plumber came in and removed the gate and stayed there until she had to ask him to move for some reason and he backed his wagon out, but there was no objection to the use of the driveway, (R. 95). Mr. Weidner never had the driveway without a gate across it. He was very particular about his back yard, (R. 95). She remembered the gate being there the morning Mr. Weidner died and she could hear Mrs. Weidner sobbing in the kitchen and she couldn't unlock the lock on the gate. She remembers it well after he died and when they had renters in there the gate was across so the babies couldn't go out into the street. There were never any disputes with the Kitchenses about the gate that she remembers (R. 95-96).

Mrs. Bessie Evelyn Ferguson testified on behalf of appellants that she is the daughter of Mr. and Mrs. William Weidner and lived in the property at 418 East Fourth South off and on but in either 1929 or 1930 lived there for six months until she and her husband could get in their own home, (R. 96-97). She visited

often with her mother on Fourth South and very seldom saw Mr. George Kitchens there. During the six months she lived there Mrs. Kitchens and her mother didn't visit very often. Once in a while they made use of the driveway and Mrs. Kitchens had some coal brought in once which she remembers as her mother asked her if she would please open the gate so the coal could get in and she did open the gate, (R. 98). When Minnie Kitchens went away she asked Mrs. Weidner if she could park her car while she loaded it and let it stay all night and her mother said it would be all right, (R. 98). She never saw pedestrians use the driveway to get to the Kitchens home as they would drive up to the front door or else use the sidewalk west of the home, (R. 98-99). There have been many gates across the driveway, each of which would stay for a long time until somebody would knock it down then it would be put up again, and she thinks that there have been about five gates that she remembers, (R. 99). Her father put the gate in the fence between the driveway and Kitchens property so Minnie and Mrs. Kitchens could run back and forth to the Weidner home and it was put in after Mrs. Kitchens moved in, (R. 99).

On cross examination Mrs. Ferguson testified that the Kitchenses got their coal in by using the driveway and that they would continually break the fence and Mr. Weidner would fix it up, (R. 100).

Mr. C. B. Petty testified on behalf of appellants that the day before trial he took pictures which are Exhibits

E, F, and G, and took some of them from across the street and one at the back showing the old coal bin, (R. 102). Whereupon the appellants rested.

Robert B. Schick testified on behalf of the respondents that he has lived in Salt Lake about ten years off and on and he is the son of Mrs. Packard, was born at 414 East Fourth South in 1922 and lived there about eight of the ten years he has lived in Salt Lake, (R. 103). He lived at 414 several times after he had moved away and stayed there with his grandmother. He doesn't recall there being a gate across the driveway, the driveway itself being bounded by buildings on the two pieces of property, (R. 104).

On cross examination Mr. Schick testified that he was about five years old when he moved away from the Kitchens home on Fourth South (R. 105).

Mrs. Minnie Kitchens Packard was recalled by respondent and testified that Exhibit 4 was in her mother's handwriting and that she first saw it among her mother's effects in the safety deposit box after her death. Signature is that of Mrs. Weidner, (R. 106).

Exhibit 4 is dated July 8, 1935, and recites that it is the last wishes of Carrie E. Weidner and after referring to a number of pieces of furniture and personal things states, "I also want Mrs. W. A. Kitchens to have a ten foot by 99 foot driveway on West side of my lot." Both parties rested.

Appellants objected to the proposed findings of fact

and conclusions of law and decree on the grounds generally that they were against the evidence and that respondent had not shown a prescriptive right and more specifically objected to finding No. 4 for the reason that there was a fence between the property of the plaintiffs until 1946 or 1949 and there was no testimony that any vehicle was ever driven from the right of way onto the Kitchens property until after the removal of the fence; and further that the right of way, if granted, should be limited to the use that was made by the Kitchens family and that it should either be limited to loading or unloading of passengers or goods or should be limited to uses in connection with the property at 414 East Fourth South for pedestrian purposes, for delivery of goods and for parking on the right of way with the permission of the appellants; or that it should be limited so that the use of the right of way cannot be connected with the use or occupancy of any property other than the property at 414 East Fourth South, (R. 113-114).

Appellants filed a motion for new trial urging insufficiency of the evidence to justify the decision, and that the decision is contrary to law and also on the basis of newly discovered evidence contained in the attached affidavit of Eloise Bowden, (R. 117). Said affidavit recites that she is a daughter of Bessie Weidner Ferguson and a granddaughter of the Mr. and Mrs. Weidner who owned and lived at 418 East Fourth South for many years and that she lived with her grandparents in one-



half of the house at 418 East Fourth South from April, 1937, to the fall of 1939 and was well acquainted with Mrs. Kitchens and with the use of the driveway made by Mrs. Kitchens and her family, and that in or about June, 1937, Mrs. Kitchens called at the home of Mrs. Weidner and asked Mrs. Bowden to go with her into the grandmother and said to her, "I am giving your grandmother this dollar in front of you, Eloise, so that if anything ever comes up concerning the driveway you can say that I have paid for the use of it," and on another occasion just before Christmas, 1939, Mrs. Kitchens gave Mrs. Bowden \$1.00 and asked her to give it to her grandmother in the hospital in payment of their agreement that \$1.00 a year be paid for the use of the right of way so that it wouldn't be for nothing, (R. 117). On April 16, 1937, she and her husband had a telephone put in their home at 418 East Fourth South and thereafter Mrs. Weidner used their telephone and on several occasions thereafter Mrs. Kitchens brought over bread "to pay for the driveway" as Mrs. Kitchens stated. From the period April, 1937, to the time Mrs. Bowden moved in 1939 the driveway was used by Mrs. Kitchens and her family for delivery of coal only except when Mrs. Kitchens' grandson was home on furlough and asked permission to park his car on the Weidner property, which permission was given, (R. 118). In the summer of 1924 Mrs. Bowden lived with her grandparents, and during that summer the driveway was used only for making deliveries of coal. In 1933 after Mr.



Weidner had died, Mrs. Weidner rented part of the home to a family which had a little girl and to keep her in a gate was put across the driveway which had a little gate in it so people could walk through on the sidewalk and this gate remained across the driveway for three to six months, (R. 118). The trial court denied the motion for new trial, (R. 119).

### STATEMENT OF POINTS RELIED ON

1. The court erred in finding any prescriptive easement in favor of respondents.

(A). The applicable presumptions favor appellants.

(B) The motion to dismiss the counterclaim should have been granted.

(C) If appellants' evidence be believed, there was no acquiescence by predecessors of appellants.

2. The court erred in making a right of way available to respondents for use which would benefit other lands than the property known as 414 East Fourth South.

3. The court erred in permitting respondents to drive across the right of way onto their land where a fence had existed until at least 1946.

4. The court erred in denying the motion for new trial.

## ARGUMENT

THE COURT ERRED IN FINDING ANY PRESCRIPTIVE EASEMENT IN FAVOR OF RESPONDENTS.

It fairly appears from the evidence of respondents that the right of way was used by the Kitchens family openly and continuously for twenty years, but there is no evidence that this use was adverse or under claim of right. Respondents' testimony was that the families were very friendly and that in the presence of the Weidners the driveway was used without objection from the Weidners. The Weidners used the driveway all the time and the use by respondents was not burdensome and did not alter or extend the driveway in any way. The use was not adverse or under a claim that the Weidners could not have interfered or stopped the use that was being made. The real question to be decided, is, therefore, the following: "where an existing right of way is used by a purchaser of property for twenty years in a manner which does not interfere with its use by the owner of the land and does not extend the right of way in any way is a prescriptive easement acquired?"

(A). THE APPLICABLE PRESUMPTIONS FAVOR APPELLANTS.

In *Jensen v. Gerrard*, 85 Utah 481, 39 P. 2d 1070, the plaintiff was the owner of a small farm across which ran a roadway used by him and his predecessors in interest. The defendant claimed an easement over the roadway

and established use by him and his predecessors in interest for more than 20 years. The court held that the defendants had the burden of establishing their prescriptive right "by clear and satisfactory evidence" and then said:

"A 20 year use alone of a way is not sufficient to establish an easement. Mere use of a roadway opened for his own purpose 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."

The oldest Utah case dealing with claim to prescriptive right in a roadway used by the owner of the premises is *Harkness v. Woodmansee*, 7 Utah 227, 26 P. 291 at 293 where the court said:

"Where a person opens a way for the use of his own premises, and other persons use 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."

This court reaffirmed this rule in *Sdrales v. Rondos*, (Utah) 209 P. 2d 562 at 565.

The *Sdrales* case arose in Salt Lake City and involved the claim of an owner next to a corner property

to have an easement across a road way used also by the owner of the corner property. After discussing the rule of the *Harkness v. Woodmansee* case the court said:

“The facts of the instant case bring it within the rule laid down in *Harkness v. Woodmansee* since the defendant does not contend that the plaintiffs and their predecessors in title did not use the alleyway for their own purposes. Indeed, the evidence clearly shows that the plaintiffs and their predecessors made use of the alleyway in receiving deliveries to their buildings and in gaining access to the tin garage at the east end of the alleyway.

“There is no evidence to rebut the presumption arising from the facts of the instant case that the use of the alleyway by the defendant and his predecessors in title was permissive and not under claim of right.”

*Cache Valley Banking Company v. Cache County Poultry Growers Assoc.*, ..... (Utah) ....., 209 P. 2d 251 at 255 and 256, is a strong case for the position of the appellants here. In that case the District court found that the claimant had used the disputed right of way as a means of ingress and egress to and from its property for more than 20 years and further found that there was no evidence of any communication either oral or written between the respective owners of the two properties with respect to use. “No permission for the use thereof has been expressly sought and no right thereto

expressly claimed and none has been expressly given or denied." Upon this showing the court found that the use of the right of way was open, continuous and uninterrupted and with a claim of adverse right and was not permissive and therefore gave judgment for the claimant and enjoined the plaintiff from interfering with that right. Upon appeal the Supreme Court stated the problem before it as follows:

"If the evidence is sufficient to sustain the finding that the usage was adverse and with the claim of right on the part of the claimant and its predecessors and was not by permission of the owner then the judgment must be affirmed otherwise it must be reversed."

The Supreme Court then adverted to the rule in the *Harkness v. Woodmansee* case, and reaffirmed it, referring also to *Jensen v. Gerrard* and referred then to *Zollinger v. Frank*, 110 Utah 514, 175 P. 2d 714, 170 A.L.R. 770 in which the correctness of the doctrine in the *Harkness* case was reaffirmed although the court had held that the facts of the *Zollinger* case were different and did not call for application of the presumption that a use is permissive. The Supreme Court then stated and held:

"\* \* \* The presumption stated in that rule is that in the absence of evidence to the contrary, the trier of fact is required to find that the use was with the permission of the owner and not under

a claim of right. Here all of the elements required to establish that presumption are present. The railroad company opened up this way on its own premises, for its own use in operating its freight yards, the additional use thereof by the defendants and its predecessors did not interfere with that use or damage the owner, and there is not a word of evidence contrary to the premise that this usage was with the permission of the railroad company and not against it under a claim of right or adverse. So under that rule defendant cannot succeed."

Actually, this case is stronger for appellants than the *Cache Valley Banking Company* case because there the evidence shows no permission and no discussion of use between the parties whereas in the case at bar Mrs. Packard and Mr. Kitchens both testified that their use of the property was known to Mr. and Mrs. Weidner, (R. 29, 50), that Mr. and Mrs. Weidner saw them using it, (R. 29, 50), and testified that on occasion specific permission was given to put cars in the driveway and to use the driveway, (R. 50). A daughter of the Weidners on one occasion opened the gate so that a delivery could be made, (R. 98), and on another occasion Mr. Weidner repaired the gate by which the Kitchenses passed from the right of way onto their own property at the rear of the house, (R. 60), and Mrs. Packard asked permission of the tenant Mr. Evans before she parked her car in the driveway, (R. 76).



Citations from other jurisdictions probably are superfluous since the point has been specifically covered by the Utah Supreme Court in several cases and only one other such case will be cited: *Cusic v. Givens*, Idaho 1950, 215 P. 2d 297. The Supreme Court of Idaho succinctly stated the facts and its ruling at Page 298 where it is stated:

“The record shows that the road was laid out and established by Mr. Duffy, for his own use, prior to the sale to McMullen. Through the years following it was used by the owners and by all who had occasion to go to either of the adjacent farms, by the ditch rider, the milk trucker, hay buyers, and the occupants of the farms in their farming operations. This use was entirely permissive. Mr. Duffy made no objection. There is nothing in the record to indicate that any user claimed an adverse right. Mr. Morgan, a predecessor of plaintiffs in the ownership and occupation of the west eighty, and who farmed that land in 1939, 1940, and 1941, said he used it because he thought it was a public road. The plaintiff, Cusic himself, testified he thought it was a county road and that the county owned it. A prescriptive right cannot be acquired by such use.”

The general rules as to presumptions are thus stated in C. J. S. pages 736 and 737:

“*Presumptions arising out of user.* The continuous user of an easement under a claim of

right is presumptive evidence of ownership thereof, as against anyone who does not show a superior right. While the contrary is true in some jurisdictions, sometimes by reason of statute, the general rule is 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 presumption 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. The facts to admit of such presumption are not, however, presumed, and the presumption itself is merely *prima facie* and may be rebutted. The presumption does not arise where the user is shown to be permissive in its inception, or where it is not shown to have continued for the prescriptive period; nor, in the absence of some decisive act indicating separate and exclusive use, does it arise where the user is not inconsistent with the rights of the owner, as, for instance, where the user is in connection with that of the owner or the public or is claimed with respect to unoccupied, uninclosed, and unimproved lands, the use in such cases being presumed to be permissive and in subordination to the owner's title."

Two Utah cases should be considered. *Zollinger v. Frank*, 110 Utah 514, 175 P. 2d 714, 170 A.L.R. 770 and *Dahnken v. George Romney & Sons Company*, 111 Utah 471, 184 P. 2d 211.



In the *Zollinger* case which arose in Cache County, the claimant Zollinger showed open and continuous use of a right of way across the defendant's land for the prescriptive period of 20 years. The defendant apparently relied in the Supreme Court on the rule in *Harkness v. Woodmansee* that there is a presumption that the use is permissive. The Supreme Court held that the rule in the *Harkness* case did not apply in the *Zollinger* case because the road had not been opened by the land owner Frank nor had it been used by him. The Supreme Court said at Page 773 of 170 A.L.R. :

“The facts of this case do not bring it within the above quoted rule from *Harkness v. Woodmansee* because the evidence does not support the proposition that this road was opened by the landowner for his own use. The record shows that the landowner used the road only infrequently and then used only a portion of it.”

This distinguishes the case at bar from *Zollinger v. Frank* since there is no dispute in the testimony here that when Mrs. Kitchens bought the property to the west in 1920 there was a well established and well used right of way to the east of the 414 property and the testimony was definite that no bushes were interfered with, the right of way was not extended in any way and there was testimony from both sides that the Weidners continued to use the right of way as much as they wanted to and in

whatever way they wanted to and that the use of it by the Kitchens family did not interfere with their use.

In *Dahnken v. George Romney & Sons Company* the claimant of the right of way prevailed. But in this case there was no evidence whatever that Dahnken who owned the piece of ground in dispute ever used the right of way or indeed that he could use the right of way. It was simply an effort by the owner of the ground to foreclose the right of the only people who had ever used the right of way to continue to use it. The case is not at all similar to the facts in the case at bar where the right of way was used by the owner, was opened by the owner and was in full use and existence at the time the claimant first purchased the property.

(B). THE MOTION TO DISMISS THE COUNTER CLAIM SHOULD HAVE BEEN GRANTED.

Not only do the presumptions favor appellants and indicate that the use of the driveway was permissive, but the evidence of the respondents affirmatively establishes that Mr. and Mrs. Weidner gave permission to Mrs. Kitchens and her family to use the driveway. When the house was purchased in 1920, the driveway was in use and yet the only right of way contained in the deed to Mrs. Willie Ann Kitchens was a pedestrian right of way along the west side of the house, (Exhibit A. p. 24). The window in the coal shed indicated that the driveway had been used for making deliveries of coal, (R. 34). There is no record

of any unpleasantness until 1946, no assertion of claim by the Kitchenses and when the driveway was used in the presence of Mr. and Mrs. Weidner no objection was made, (R. 29, 50). Mr. Weidner even repaired the gate to facilitate access to the driveway, (R. 60), and Mrs. Packard obtained permission to park her car on the Weidner property, (R. 50). The cases hold that such facts constitute a permissive, and not an adverse use.

In *Harkness v. Woodmansee*, 7 Utah 227, referred to supra, the Supreme Court held that the use was permissive and referred to the presumption of permissive use where the facts were that the plaintiff claimed a right of way and filed a suit to compel removal of a building erected by the defendant on the defendant's property which made use of the right of way by the plaintiff impossible. The use had been for less than twenty years and no prescriptive right had been acquired as we understand it but the court went on to consider whether the use was adverse or permissive. The evidence was that the defendant used the strip of land as the means of entering the rear of his own building on his property and that he had gates on the right of way a portion of the time and that his tenant was accustomed to keeping a team standing on the right of way and on the defendant's properties and that at such times it was impossible for the plaintiff to use the right of way. The court held that this evidence showed insufficient conflict with the defendant's use to constitute an adverse use under claim of right and applied

the presumption of permissive use under such circumstances.

In *Jensen v. Gerrard*, Utah 1935, 39 P. 2d 1070 (supra) the court found that the owner had not lost a prescriptive easement to the claimant although the claimant had used the right of way uninterruptedly and continuously for more than 20 years. The reason for the holding against the claimant was that periodically the owner had asked for payments or the claimant had asked permission to use the roadway for a specific purpose and there was no evidence that the claimant had asserted an adverse use under a claim of right for a period of 20 years.

In *Cache Valley Banking Company v. Cache County Poultry Growers Assn.* 209 P. 2d 251, (supra), the court found open and continuous use of a right of way for more than 20 years in such volume that there could be no question that the owners of the land had notice of the use. The original owner had been the Utah-Idaho Central Railroad Company and the user of the right of way was originally a commission warehouse dealing in poultry which shipped its produce over the lines of the owner. The property of the claimant was purchased adjoining that of the railroad company at the suggestion of the railroad company and the right of way was made available to the shipper indicating a policy to invite the use of its facilities, including its right of way. There was no evidence of any communications either written or oral

concerning the claims of the two owners of the properties and there was no express permission given or denied for use of the right of way. Under these facts the court found that the use was permissive as it was presumed to be because the use by the claimant did not interfere with the use of the property by the railroad company.

The applicable general rule is stated in 17 Am. Jur., at page 978 as follows:

“User under an adverse claim of right is requisite to the acquisition of an easement by prescription. The rule is well settled that use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription, since user as of right, as distinguished from permissive user, is lacking.”

Likewise in 28 C. J. S. at page 668 the general rule is stated as follows:

“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.”



If the use was originally permissive, the burden was on the respondents to show when it changed to adverse use. The record was that the first adverse claim was in 1946 when, according to the testimony of George W. Kitchens and Minnie Kitchens Packard, a gate erected by the then owners was taken down. It was at about the same time that the fence was removed. These acts came too late to commence an effective prescriptive period. And in the absence of other evidence or adverse claim, it must be assumed that the permissive use was never changed.

It might be argued that the use became adverse at the time the will was written, (Exhibit 4), or the deed was given, (Exhibit A page 30) but the respondents didn't know that the will had been given until Mrs. Kitchens died (R. 32, 106), and at the time of the so-called deed in 1936 Mrs. Weidner did not own the property and could not effectively convey it. These two documents are evidence of the permissive nature of the use and of abortive attempts to make that use permanent. If it be assumed that a claim as of right was made as soon as the earliest of these documents was prepared, such claim would date from 1934 and the necessary prescriptive period has not run. It was knowledge of these documents which lead appellants to ask at the beginning of the trial whether respondents claimed by prescription or by deed, (R. 9-10). If the claim were by deed, the only question would be the validity of the deed since the necessary twenty years

had not run since the deed was given. That question was not determined as respondents claim by prescription.

In *Savage v. Nielson*, 114 Utah 22, 197 P. 2d 117, the claimant of the right of way was successful in the district court in quieting an easement over the plaintiff's land and on appeal the Supreme Court reversed the judgment and remanded the case to the district court with instructions. In the course of its opinion the Supreme Court said:

"Of course, it is possible for a use which starts out permissive to become adverse, after which the prescriptive period will run. *Bowers v. Gilbert*, 63 Utah 245, 224 P. 881; *Holm v. Davis*, 41 Utah 200, 125 P. 403, 44 L.R.A. NS 89; *Jensen v. Gerard*, *Supra*, 19 C.J.S. Corp. Sec. 1210, p. 889, Note 89.

"The point is, that where the use begins as permissive it is incumbent upon the party asserting that it has afterward become adverse to show at what point this occurred, in order to show a 20 year hostile period. This is in conformity with the general rule as previously announced. We are not justified in conjecturing as to when or if such a hostile period began. This does not conflict with *Zollinger v. Frank*, Utah, 175 P. 2d 714, 170 A.L.R. 770."

The court held that the trial court had erred in quieting an easement and directed the trial court to proceed with determination of whether a way of necessity existed.

The Supreme Court recognizes this rule in *Jensen v. Gerrard*, (supra), where it first discusses the fact that a use must be antagonistic and not permissive in order to support a prescriptive right and then goes on to say at page 1073 of 39 Pac. 2d:

“The use may spring by permission, and a prescriptive right thereafter acquired if the right has been used and exercised for the requisite period under a claim of right. If a use of the way is under a parol consent given by the owner of the servient tenement to use it as if legally conveyed, it is a use as of right.”

For the last proposition the court cited *Holm v. Davis*, 41 Utah 200.

This rule is stated in 17 Am. Jur., pages 981 to 982 as follows:

“If the use originates by permission or license and an easement by prescription is claimed, the burden of proving that the permissive use had ceased and that the use for the necessary period had been adverse under claim of right is on the party asserting the fact of the adverse user, and in case of doubt, such fact will be resolved against him.”

C.J.S. page 656 as follows:

“The fact that a user is permissive in its inception does not in itself prevent it from subse-



quently becoming adverse and ripening into an easement by prescription. If a licensee renounces the authority by which he began the use and claims it as his own right, and that fact is brought to the knowledge of the licensor, after which the licensee continues the use under such adverse claim exclusively, continuously, and uninterruptedly for the full prescriptive period, the right will become absolute. Nevertheless, if the use begins as a permissive use it is presumed to continue as such, and in order to transform it into an adverse one there must be a distinct and positive assertion of a right hostile to the rights of the owner, and such assertion must be brought to the attention of the owner, and the use continued for the full prescriptive period under the assertion of right, excluding the time under which the user was permissive \* \* \*"

And in any event there was no notice or effort to give notice to the appellants or their predecessors in interest that an adverse claim was being made and there must be such notice before a prescriptive period can commence.

That the assertion of a claim under a void deed even though there has been a permissive use up to that time can ripen into a prescriptive easement is established by the Utah Supreme Court in *Jensen v. Gerrard* where at 39 P. 2d 1070 at page 1073 this Court said as above quoted:

"If a use of the way is under a parol consent given by the owner of the servient tenement to use it as if legally conveyed it is a use as of right."

And it may be conceded that use of the right of way for 20 years by the Kitchens family following the giving of the deed in 1936 could result in a prescriptive easement provided only that the giving of the deed and the claim of ownership was known to the owners of the servient tenement who are the plaintiffs here.

“The rule that a permissive user will not ripen into an easement by prescription does not apply where there has been an attempt to grant an easement which is void because of the statute of frauds. The claim of right which enters into adverse enjoyment need not be a well-founded claim, and therefore, it has been held that a user under a contract void under the statute of frauds is a good claim of right on which to found a prescriptive easement.” 17 Am. Jur. 979.

← If the only claim of the respondents of a change from a permissive to an adverse use be the tearing down of the fence and the gate in 1946 or later then it is obvious that no prescriptive rights can have been acquired. Likewise if the claim is under the 1936 deed no prescriptive rights have accrued.

Repair of the road way cannot be considered evidence in favor or against acquisition of a prescriptive right, as was stated in *Zollinger v. Frank*, (supra), and also in 28 C.J.S. page 668 where the following is stated:

“However, in order to acquire this adverse character knowledge must be brought home to the

Rawlins vs. Blackden, 112 Me. 459, 92 At. 521, Ann.  
Cas. 1917 A 875.

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, therefore, appears that the evidence of respondents failed in an essential of proof, namely, in showing that the use of the driveway was adverse.

(C). IF APPELLANT'S EVIDENCE BE BELIEVED, THERE WAS NO ACQUIESCENCE BY PREDECESSORS OF APPELLANTS.

In general the testimony of appellants confirms that of respondents since the relationship between the two families was friendly and no objection was ever made to use of the right of way. Both Mrs. Fred E. Weidner and Bessie Evelyn Ferguson testified affirmatively to rendering help to delivery men in using the driveway for the benefit of the Kitchens family, (R. 95 and 98). The chief differences were that appellants' witnesses testified that several previous gates were put across the driveway, (R. 86, 95, and 99), that there was an agreement permitting Mrs. Kitchens to use the driveway, (R. 86 and 89), and the witness Evans testified that he had an argument with George W. Kitchens in which he compelled Mr. Kitchens to back down from his claim of right, (R. 77). This evidence if it be believed, conclusively establishes that no claim of right was successfully asserted by respondents and that the judgment will fall because of that defect.

This evidence should be believed as it must be born in mind that Fred E. Weidner and Bessie Evelyn Ferguson sold their interest in the property in 1946 and had no interest in protecting the property against right of way. And the witness Evans was completely disinterested in the outcome of this suit.

2. THE COURT ERRED IN MAKING A RIGHT OF WAY AVAILABLE TO RESPONDENTS FOR USE WHICH WOULD BENEFIT OTHER LANDS THAN THE PROPERTY KNOWN AS 414 EAST FOURTH SOUTH.

It will be noticed that the decree does not limit use of this right of way, but permits respondents "in any and all other reasonable manner and for ingress and egress from the premises of the defendants" and then describes the right of way over a 10 foot wide strip 99 feet in depth, (R. 112, paragraph 2). This right of way is made appurtenant to the property described in paragraph 3 of the decree which is the property at 414 East Fourth South, (R. 112), and then the plaintiffs are enjoined from interfering with the right of way, (R. 112 paragraph 5). Mr. G. W. Kitchens testified that he has purchased the interests of the other respondents, (R. 45), that he owns property adjoining 414 East Fourth South to the west and then to the south, (R. 40), and that he intends to operate all of the property as a motel, (R. 40), intending to drive cars used for other portions of the motel down the driveway and park them in the rear of 414 East Fourth South, (R. 40).

This failure of the court to restrict the right of way was objected to by appellants, (R. 113 to 114 paragraph 4).

The general rule is that a prescriptive right shall be limited to the minimum use which existed for the prescriptive period and for the benefit of lands which have been benefited during the prescriptive period. *Nielson v. Sandberg*, 105 Utah 93, 141 Pac. 2d 696; 17 Am. Jur., on Easements, Section 100; 95 Am. St. Rep. 325.

3. THE COURT ERRED IN PERMITTING RESPONDENTS TO DRIVE ACROSS THE RIGHT-OF-WAY ONTO THEIR LAND WHERE A FENCE HAD EXISTED UNTIL AT LEAST 1946.

A more difficult question is whether it would be departure from the alleged prescriptive use for the Kitchens family at this late date to start driving vehicles down the right of way and across the point where a fence used to exist onto the back of their property. The same question stated differently is whether the Weidners are now to be deprived of the privilege of fencing the west side of the right of way and placing a gate across the right of way so as to give a private enclosure in their back yard which was enjoyed by them more or less continuously until 1932 and periodically since that time. In *Nielson v. Sandberg*, (supra), this court held:

“An easement, being a burden upon the land which it traverses is limited to uses for which, or



by which it was acquired, and to the person who acquired it, or for the benefit of the property for which it was acquired.”

This rule found further expression in *Big Cottonwood Canyon Ditch Company v. Moyle*, 109 Utah 197, 159 P. 2d 596, where the question before the court was whether an easement to convey water across the servient owner's land which had theretofore resulted in seepage with beneficial advantage to the servient owners through stimulated growth of trees and shrubs, was such that the dominant owner could place a culvert and stop the seepage thereby depriving the servient owners of the benefit they had theretofore enjoyed. The court thus propounded the only question decided in this case:

“Will the proposed changes by the owner of the easement right create a greater burden on the servient tenements?”

The court thus answered its own question:

“The extent of the easement is determined by the grant, or if based upon a prescriptive right, by its use, and once the character of the easement has been fixed no material change or enlargement of the right acquired can be made if thereby a greater burden is placed on the servient estate.”

And the court held that the change of use in that case would place a greater burden on the servient estate. On



rehearing this rule was left intact but its application in the case of seepage water was denied for the reason that Utah's water law is different from the common law which still, however, controls the law of easements.

In Am. Jur. on Easements, at pages 973 to 974 it is stated:

“Moreover, to entitle a person to an easement by prescription, he must show that he has always used the right claimed without change or variation. The right derived from use does not exceed the user in which it has its origin. \* \* \* A claimant who, within the prescriptive period, enlarges the use cannot, at the end of that time, claim the use as so enlarged.”

The law is settled that a substantial change in the use cannot be made during the prescriptive period and that the changes which do not injuriously affect the rights of the owner of the servient tenement will not be held to break the continuity of the prescriptive period. It is then said:

“While a party who has increased his use of an easement during the prescriptive period cannot claim the enlarged use, a more extensive and burdensome use for a portion of the prescriptive period will not impair the effect of such user as has been continuous for the full prescriptive period, provided the two uses are separable, but not otherwise, since such a mingling of uses is wholly the

part of the party claiming the easement. If a more burdensome user than that originally exercised is continued for the prescriptive period, an easement for such use may be acquired."

In *Riggs v. Springfield*, (Missouri, 1939) 126 SW 2d 1144, 122 A.L.R. 1496 at page 1503, the law was thus stated:

"Necessarily, therefore, when a way is claimed by prescription, the character and extent of it is fixed and determined by the use under which it is gained. Any material change in its use during the course of the prescriptive period interrupts and may prevent the acquisition of the right. Washburn on Easements and Servitudes, page 136, Et. seq. Under prescription an exclusive right of possession cannot be established but only a qualified right for a particular purpose. Jones on Easements, Sec. 161."

A greater burden would be placed on this right of way if the Kitchenses were allowed to drive cars down the right of way and across onto their land in several different particulars:

First: So long as the Kitchenses have been using the right of way, according to the testimony, they have used it so as not to interfere with the use thereof by the Weidners which means that the use would not be frequent, that the vehicles would move slowly, and that there could not be a number of vehicles in the possession or use of the right of way at the same time.

Second: Since George Kitchens plans to operate a motel on the entire corner it would be impossible to determine whether the owner of 414 is using the right of way for himself as permitted or whether one of the tenants or guests of the motel is using the right of way contrary to right unless the cars are detained on the right of way. This would involve an additional burden which could be avoided by placing the fence where it was.

Third: Hithero the Weidners enjoyed the privilege of an enclosed and fenced backyard which is convenient for children as well as for privacy and might support additional uses not hitherto enjoyed. For the Kitchenses now to assert the right to remove the fence and prevent erection of a new fence deprives the appellants of a very substantial benefit.

#### 4. THE COURT ERRED IN DENYING THE MOTION FOR NEW TRIAL.

Whether the facts and the law will support the decree of the trial court is amply raised on the record without a new trial. The only new question raised by the motion for new trial is, therefore, whether the affidavit of Eloise Bowden, (R. 117 to 118), presented material evidence which might alter the result. The motion was considered and the affidavit was, therefore, accepted as newly discovered evidence and it must be assumed that on a new trial the evidence would be produced as stated in the affidavit.

The decree of the court can be upheld only upon the

theory that the Kitchenses used the driveway under claim of right and adversely to the Weidners. This result would be completely destroyed if it were shown that the right was permissive as to the Weidners or that the use was not under claim of right but by agreement with or license from the Weidners. The affidavit establishes an agreement or license between the Weidners and the Kitchenses for use of the driveway in exchange for use of the telephone, and after a telephone was installed shows an acknowledgement of ownership in the Weidners with a license to use the right of way for which license Mrs. Kitchens paid \$1.00 on two different occasions and made gifts of bread and puddings on other occasions. Furthermore, the affidavit establishes the erection of a gate in 1933 which remained there for at least six months and which interrupted the use of the driveway and recommenced the prescriptive period as of 1933, which leaves insufficient time for running of the period to the date of commencement of the action.

It is true that similar matters were testified to by Mr. and Mrs. Weidner, by Mr. Evans, and by Mrs. Ferguson. The court obviously did not accept the testimony of these witnesses, and that can be only on the theory that the witnesses were not believed. It does not follow that Mrs. Eloise Bowden would likewise be disbelieved, and since her testimony, if credible, would destroy the case made by respondents, the motion for new trial should have been granted, at least to the extent of receiving the

testimony of Mrs. Bowden for the effect it might have in the final result.

## SUMMARY AND CONCLUSION

The evidence offered by respondents in this case fell far short of establishing a prescriptive right and was based upon the erroneous theory that by showing use for 20 years without objection from the Weidners a right of way would be established. This could be the only theory upon which the trial court based its decree, unless the court found that some how the writing of a supposed will and the giving of an abortive deed gave support to the claim of right of way which had been permissive up to that time. We do not find cases or other authorities which support a right of way by prescription under these circumstances.

Appellants recognize the sentimental force back of the suggestion that since the aged Mrs. Weidner attempted to give a quit claim deed to her friend the aged Mrs. Kitchen, the court should recognize that intent; but that ignores the position of the owners of the land. Mr. Fred E. Weidner and Mrs. Ferguson acquired the land from their mother in 1934, and it was for them to say whether a deed to the right of way should have been given gratis to Mrs. Kitchens in 1936.

More accurate under the facts is the argument that here were the Weidners who wanted to be neighborly and in a friendly fashion and as a personal accommodation

permitted the Kitchenses to use the right of way. This use continued from 1920 to 1946 when a gate was erected for the convenience of tenants, in a manner similar to the erection of other gates in earlier years and with no intention of preventing the use of the driveway. At this point, however, the accommodated users had decided to make a claim and they not only torn down the gate but removed the fence which had always separated their property from the driveway and proceeded to use the driveway as though it were their own property. If this claim were based upon the deed, it is invalid and the claim must be denied. If the claim is based upon prescription, it is an effort to take advantage of neighborly accommodation and occurs at the end instead of at the beginning of a 26 year period of permissive use. No such claim was asserted before that.

The motion to dismiss should have been granted upon the evidence produced by respondents. The applicable presumptions make this a permissive use of a right of way upon which no rights can be founded. The evidence of appellants, if this court believe it, showed a limited permission to use, based upon the erection of successive gates to enclose the backyard of the Weidners and an agreement covering use of the driveway. If confirmation of appellants' witnesses were needed, it is to be found in the affidavit of Eloise Bowden filed in support of the motion for new trial.



And beyond all these arguments, any right of way granted would have to be limited to use consistent with erection of a fence between the driveway and the property of respondent and limited to use for the benefit of the Kitchens property when used as a residence and not as a motel.

Respectfully submitted,

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