

1952

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

Utah Supreme Court

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W. G. Howell and Gaylen S. Young; Attorneys for Respondents;

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

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

*Plaintiffs and Appellants,*

**VS.**

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

*Defendants and Respondents.*

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**BRIEF OF RESPONDENTS**

**FILED**

**SEP 20 1952**

**W. G. HOWELL AND  
GAYLEN S. YOUNG,**

*Attorneys for Respondents.*

**Clerk, Supreme Court, Utah**

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# IN THE SUPREME COURT of the STATE OF UTAH

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RACHEL P. LUNT and DILWORTH  
STRASSER,

*Plaintiffs and Appellants,*

vs.

GEORGE W. KITCHENS, ALBION  
L. KITCHENS, and MINNIE E.  
KITCHENS,

*Defendants and Respondents.*

Case No.  
7871

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## BRIEF OF RESPONDENTS

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### STATEMENT OF FACTS

The right of way involved in this case is situate on the south side of 4th South Street between 4th and 5th East Streets in Salt Lake City, Utah. It has a frontage of ten feet and extends South ninety-nine feet. It is over and across the West ten feet of the North ninety-nine feet of the appellant's property. Respondent's property adjoins the right of way on the West.

It was the contention of the appellants during the

trial of the case that the use of the right of way by the respondents and their predecessors in interest was permissive. The respondents contended and the court found that the respondents had used the right of way since 1920 openly, continuously, uninterruptedly, adversely and under a claim of right. This issue is the crux of the case.

## ARGUMENT

The appellants first point relied upon for reversal of the District Court is "That the court erred in finding any prescriptive easement in favor of respondents," and this point is divided into three subdivisions, namely:

- “(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.”

We will discuss these matters in the order in which they were discussed in the appellants’ Brief.

Counsel for the respondents have no quarrel with the authorities set out in the appellants’ Brief at pages 22 to 39. The authorities there cited establish the rule that in the absence of any evidence of an adverse use, there is a presumption that the use was permissive. In the opinion of this court, in *Harkness v. Woodmansee*, 7 Utah 227, 26 P. 291 at 293, this court stated the rule in the following language:

“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.”

The same rule was announced by this court in *Cache Valley Banking Company v. Cache County Poultry Growers Association*, .... (Utah) ...., 209 P. 2d 251 at 255 and 256:

“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.”

See also, *Dahnken v. George Romney & Sons Company*, 111 Utah 471, 184 P. 2d 211, and *Zollinger v. Frank*, 110 Utah 514, 175 P. 2d 714.

The authorities referred to above and those cited in the appellant's Brief establishes that presumptions fade into oblivion in the face of direct positive evidence of an adverse use.

The question then presents itself, was there any evidence that the use of the right of way by the respondents and their predecessors in interest was adverse and under claim of right.

George W. Kitchens, a witness for the respondents, testified that he had been familiar with the use of the right of way since 1920 (R. 15) and that the right of



way had been used by the respondents and their predecessors in interest from 1920 to 1946 continually and without any interruption and for every purpose (R. 27, 28). That in 1946, tenants of the appellants built a gateway across the driveway, and that he went down and moved the gate (R. 29).

Minnie Kitchens Packard testified that she was living with her mother at the time her mother purchased the property adjoining the right of way on the West, and continued to live with her for two years (R. 48, 49), and that during that time, the driveway was used for bringing in coal and wood and when people, friends and relatives came in cars, they parked in the road and that "it was used constantly as ours." (R. 49). That in 1923, she moved to the southern part of Salt Lake City but visited her mother all of the time. That during the past 30 years, she and her family had used the driveway, and had put ashes on the driveway when it became muddy and rutty (R. 52).

An Abstract of Title covering the respondents' property was admitted in evidence as Defendants' Exhibit "1." Entry 30 of Exhibit "1" is an abstract of a quit-claim deed from Carrie E. Weidner to Willie Ann Kitchens dated May 15, 1936 and recorded in the Recorder's office for Salt Lake County, Utah, May 18, 1936 in Book 159 at page 75 and describing the right of way in question (R. 13). (Res. Ex. "1").

The Abstract of Title covering the appellants' property was also introduced in evidence at least in so far as Entry 16 thereof is concerned (R. 11). Entry 16



of that Abstract is an abstract of a Warranty Deed from Carrie E. Weidner to Fred E. Weidner and Bessie Evelyn Ferguson as tenants in common and not as joint tenants, dated December 27, 1934, and recorded in the Recorder's office for Salt Lake County, Utah December 27, 1934 in Book 143, at page 144, describing the appellants property without reference to the respondents' right to use the right of way in question.

While it is true that the Warranty Deed to Fred E. Weidner and Bessie Evelyn Ferguson was made and recorded in 1934 and the Deed of the right of way to Mrs. Kitchens was made and recorded in 1936, yet the fact that Mrs. Weidner executed and delivered the Quit-Claim Deed establishes beyond any doubt that the use of the right of way for sixteen years prior to the delivery of the Deed was under a claim of right, and this becomes even more impressive in the light of the testimony of Fred E. Weidner, a witness for the appellants. Mr. Fred E. Weidner testified that his mother had an interest in the property in question until the time of her death, and that there was no consideration other than a moral consideration for the execution and delivery of the Deed (R. 93, 94).

As further proof that the use of the right of way by the respondents was adverse and under claim of right, the will of Carrie E. Weidner provided, "I also want Mrs. W. A. Kitchens to have a ten foot by 99 foot driveway on the West side of my lot." (Res. Ex. "4"; R. 106).

The respondents do not base their claim to a prescriptive right of way either on the Quit-Claim Deed

to Mrs. Kitchens nor upon the will of Mrs. Weidner but the Quit-Claim Deed and the will establish beyond the question of a doubt that the use of the right of way by the respondents and their predecessors in interest was adverse and under a claim of right.

There is, of course, some evidence introduced by the appellants and referred to in their Brief, that the use was permissive. We respectfully submit that the great preponderance of the evidence established the fact that the use was open, continuous, without interruption, adverse and under claim of right, and therefore the District Court properly resolved this issue in favor of the respondents.

Subsection "B" of the appellants first point relied upon for a reversal is that the Appellants Motion to Dismiss the Counter-claim should have been granted. Counsel argues that the motion should have been granted because the presumptions favor the appellants and that the evidence of the appellants establishes that the use was permissive.

We have heretofore pointed out that presumptions have no application whatsoever in a case where there is direct positive evidence of an adverse use. It may well be that some of the evidence of the appellants was that the use was permissive, but we have heretofore pointed out that the respondents evidence which the court believed was that the use was adverse and under claim of right.

Referring to subsection "C" to-wit: "If appellants' evidence be believed, there was no acquiescence by

predecessors of appellants," it appears to counsel for the respondents that a complete answer to the appellants' argument in this part of their Brief is that the evidence of the appellants was in direct conflict with the evidence of the respondents and that the court found the issue in favor of the respondents, which carries the inference that the court did not believe the evidence introduced for and on behalf of the appellants.

A case very similar to the case at bar was recently before this court in the case of *Buckley v. Cox*, 1952, 247 P. (2) 277. In that case, the Plaintiff brought an action to quiet title to a driveway. It was the contention of the Plaintiff and he introduced evidence in support thereof that the use of the driveway by the Defendant was permissive. The Defendant contended and introduced evidence in support of his contention that his use of the driveway was adverse and under claim of right.

There was a direct conflict between the evidence of the Plaintiff and the evidence of the Defendant and the court resolved the issue in favor of the Plaintiff.

The Defendant appealed upon the ground that the Plaintiff's evidence was insufficient to support the finding of the trial court. In its opinion, this court said:

"Under the criteria set out in *Norback v. Board of Directors*, 84 Utah 506, 37 P. 2d, 339, this action is one at law. Hence if there is any competent evidence in the record to support the court's findings the judgment should not be disturbed. *Brown v. Union Pac. R. Co.*, 76 Utah 475, 290 P. 759; *Jenkins v. Stephens*, 64 Utah 307, 231

P. 112. This principle is well stated in *Jensen v. Gerrard*, 85 Utah 481, 39 P. 2d, 1070, 1072:

“As this is a law action, the question is not whether the evidence would have supported the decision in favor of the appellants, but whether the decision made by the trial court finds support in the evidence. If there is competent credible evidence to support the findings made by the trial court, then those findings should stand.” . . . .

“The evidence as revealed by the record is conflicting. It is sufficient to support a decision for either party. The trial judge saw and heard all the witnesses and viewed the exhibits. He found that the use by defendant was permissive and not adverse. Since competent evidence in the record supports the court’s finding and judgment, we may not disturb the latter. See cases *supra*.”

## APPELLANT’S POINT No. 2

Counsel for the appellants complain that the driveway should be used only to the extent that the ownership and occupancy of the respondents property adjoining on the west requires, and in support of their contention, they referred to the testimony of Mr. G. W. Kitchens that “he owns property adjoining 414 East Fourth South to the west and then to the South, and that he intends to operate all of the property as a motel, 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).

We would like to point out that the testimony of one of the witnesses could not in any way alter or affect

the Findings of Fact and Conclusions of Law and Decree of the court and their Findings of Fact, Conclusions of Law and the Decree did not grant to the respondents the right to use the driveway in connection with the use of any property other than the property at 414 East Fourth South. Paragraph four of the Findings of Fact provides:

“4. That the Defendants are the owners of an easement consisting of a right of way over and across the said premises of the Plaintiff described in Finding No. 3,” appellants property. “The purposes for passing over the same with or without horses, wagons, automobiles, trucks and other vehicles and in any and all other reasonable manner and for the ingress to and egress from the premises of the Defendants above described in Finding number two, which said easement and right of way have been used by the Defendants and their predecessors in interest openly, adversely, continuously, uninterruptedly and under claim of right for a period of more than twenty-five years last past, and the same is appurtenant to the said above described premises used by the Defendants as aforesaid.” (R. 109).

The Decree of the District Court provides as follows:

“2. That the Defendants, George W. Kitchens, Albion L. Kitchens and Minnie E. Kitchens are the owners of an easement and right of way over and across that portion of the premises of the Plaintiff above described for the purposes

of passing over the same with or without 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 hereinafter described, which easement and right of way is described as follows:” (A description of the easement follows) (R. 112).

Paragraph three of the court’s Decree describes the property belonging to the respondents and adjoining the right of way on the west. The Decree provides that the right of way shall be appurtenant to the Defendant’s property and limits the use to the use and occupancy of respondents’ property adjoining the right of way on the west.

It will thus be seen that the Findings of Fact and Conclusions of Law and Decree of the District court limit the use of the right of way in exactly the manner that the appellants desire and there is therefore, no need for any complaint on that score by the appellants.

### APPELLANT’S POINT No. 3

The appellants third point of error is that it would be an enlargement of the prescriptive right to give the respondents the right to drive from the right of way in question on to the respondents’ lot in the rear of the respondents’ home.

We concede that the prescriptive right cannot be enlarged if it thereby imposes a greater burden on the servient estate. We contend also and the cases cited by the appellants hold that the use may be enlarged



if it does not impose a greater burden on the servient estate. The rule is stated in 14 Cyc. 1193 as follows:

“Alterations which do not materially increase the servitude will not extinguish the right.”

Prior to the time when the fence on the west side of the right of way in question was torn down, it was necessary for cars and trucks using the right of way for delivery of various commodities to unload and then either to back out of the driveway or drive onto the appellants' rear lot and turn around. The evidence shows that during the prescriptive period people came to deliver all manner of things, visitors came to see them, and all who lived in 414 over the prescriptive period made use of the driveway. The fence was on the Kitchens property running north and south with a gate near the coal shed. During the prescriptive period they drove their cars into the driveway down to or near the gate, left them parked in the driveway and went through the gate into Kitchens lot. A concrete walk from the house to the gate was there when Kitchens moved in (R. 59). Kitchens always claimed the right to use the right of way but they never claimed a right to park east of the right of way on the Weidner property. At times they wanted to get out of the driveway and so asked permission to park behind the Weidner property. That was east of the driveway. The fence was on the Kitchens property. When the fence was taken down it did not cast any additional burden on the Weidner property. In fact it relieved the burden. When cars are driven



in and deliveries are made they do not have to park the cars and trucks in the driveway as they had done for more than the prescriptive period but they can drive off the right of way on to the Kitchens property, turn around and drive out. The Weidners never did have anything to do with the fence on the west side of the right of way. The use with the fence down will relieve the burden on the servient estate.

It is of no concern of the appellants that Kitchens took down his own fence. The Kitchens family could have taken it down anytime and it would have made no difference to the appellants, except to relieve the servient tenement of some of its burden.

The appellants argue on page 45 of their Brief, that one way in which the servient estate would be burdened by permitting the respondents to drive from the right of way on to the rear of their lot, was that George Kitchens planned to operate a motel on the corner and planned to use the right of way in question in connection with the use of the entire corner. We have heretofore pointed out that the Decree of the District Court grants no such right or privilege to the respondents.

#### APPELLANT'S POINT No. 4

In support of the appellants' fourth point of error, it is stated that the only question raised by a Motion for a New Trial is "Whether the Affidavit of Eloise Bowden presented material evidence which might alter

the result.” We find ourselves in complete disagreement with this statement of the law.

In order to entitle a party to a new trial upon the grounds of newly discovered evidence, the evidence must not be merely cumulative and where the case is tried to the court without a jury, it must appear that if such evidence was produced at the trial of the case the court’s Findings would have been different. *Heichmer v. Peterson*, 75 Utah 107, 111, 283 P. 432. *Larson v. Onesite*, 21 Utah 38, 59 P. 234.

Let us therefore, examine the record and see whether the evidence which the appellants offered in support of their motion for a new trial is cumulative.

The affidavit of Eloise Bowden filed in support of the appellants’ motion for a new trial states that she is the daughter of Bessie Weidner Ferguson and that she lived in the Weidner house from April, 1937 to the fall of 1939. That she was present when a conversation occurred between Mrs. Kitchens and her grandmother, Mrs. Weidner. That Mrs. Kitchens said to the affiant, “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 I paid for the use of it;” that on another occasion just before Christmas in 1939, Mrs. Kitchens gave the affiant one dollar and asked her to give it to her grandmother in the hospital in payment of the agreement, that one dollar a year be paid for the use of the right of way. That in April, 1937, the affiant and her husband installed a telephone in that part of the Weidner house in which they lived and on several occasions

Mrs. Kitchens brought over bread and puddings "to pay for the driveway." That from April 1937 to the time when the affiant moved in 1939, the driveway was used by Mrs. Kitchens and her family only for making delivery of coal, except when Mrs. Kitchens grandson was home on furlough and when he asked for permission to park his car on the Weidner property. The affiant's husband gave him permission. That in the summer of 1924 the affiant lived with her grandparents and that the driveway then was used only for making delivery of coal. That in about the year 1933, after the death of Mr. Weidner, Mrs. Weidner rented a part of the home to a family with a little girl, and to accommodate the family, a gate was put up across the driveway and that the gate remained for at least six months.

The testimony of Eloise Bowden is all cumulative. Mr. Fred Weidner, a witness for the appellants, testified as follows:

"Q. Did you ever have any conversation with any of the Kitchens people about the use of that driveway?

A. Oh, indirectly.

Q. When?

A. I called up Mrs. Kitchens one time and asked if she would call my mother to the phone. I said, "I hate to bother you." She said, "Oh, don't think about that, you let us use your driveway and that is in payment of the telephone calls." (R. 86).

He also testified that his mother had an understanding with Mrs. Kitchens that she could use Mrs. Kitchens

phone and Mrs. Kitchens would call her to the phone for the use of the driveway (R. 89).

The statement of the affiant that between April, 1937 and the time when the affiant moved in 1939 that the driveway was used only for the delivery of coal, except when Mrs. Kitchens' grandson was home on furlough, is also cumulative. Mr. Fred E. Weidner so testified (R. 85). Her statement that in 1924 the driveway was used only for the delivery of coal is also cumulative. Mr. Fred E. Weidner so testified (R. 96).

Her statement that in 1933 a gate was put across the driveway and that it remained for at least six months is cumulative, for both Mr. Weidner and Mrs. Ferguson so testified (R. 85, 99).

We respectfully submit that the record establishes beyond a doubt that the evidence offered in support of the appellants motion for new trial was all cumulative and therefore the motion was properly denied.

This court has repeatedly held that in order to entitle a person to a new trial upon the grounds of newly discovered evidence, diligence must have been shown to produce such evidence at the time of trial. *Vandyke v. Ogden Savings Bank*, 48 Utah 606, 161 P. 50. *Shields v. Ekman*, 67 Utah 474, 248 P. 128.

There is not one single statement or allegation of anyone in the record that diligence had been used to uncover the testimony of Eloise Bowden and to present it at the trial of the case. On the contrary, the record leads one to the conclusion that if diligence had been used, the testimony of Eloise Bowden would have been

uncovered long before the time of the trial. Eloise Bowden is the daughter of Bessie Weidner Ferguson, and a granddaughter of Mrs. Weidner. It appears from her affidavit that she lived at the Weidner residence in 1924 and from 1937 to 1939, and it appears further that she had some knowledge of the installation of a gate in 1933. Bessie Weidner Ferguson was a witness for the appellants, and a simple inquiry directed to Mrs. Ferguson would have uncovered the fact that her daughter, Eloise Bowden, had lived in the Weidner home during the periods mentioned and had some knowledge which had a bearing on the outcome of this case.

We respectfully submit that the newly discovered evidence offered in support of the appellants' motion for a new trial was cumulative; that it would have had no bearing on the outcome of the trial and that the record does not disclose that any diligence was used to uncover the testimony of Eloise Bowden, but on the contrary, the record discloses that if the slightest diligence had been used, such testimony would have been discovered.

## CONCLUSION

We respectfully submit that the records show by the great preponderance of evidence that the respondents and their predecessors in interest have used the driveway in question openly, continuously, adversely, uninterruptedly and under a claim of right since 1920 and by reason thereof, the respondents have acquired a

prescriptive right to use said driveway within the limitations set out in the Decree of the District Court.

We further respectfully submit that since the testimony of Eloise Bowden was merely cumulative, and since the appellants have not shown any diligence whatsoever in uncovering her testimony, the District Court ruling on the appellants motion for a new trial should be sustained.

Respectfully submitted,

W. G. HOWELL AND  
GAYLEN S. YOUNG,  
*Attorneys for Respondents.*