

1963

Harriet E. Rippentrop v. Minnie G. Pickering : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

of the
STATE OF UTAH

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APR 26 1963

HARRIET RIPPENTROP, Clerk, Supreme Court, Utah
Plaintiff-Appellant,
vs.
MINNIE G. PICKERING,
Defendant-Respondent.

No.
9896

BRIEF OF APPELLANT

Appeal from Judgment of Dismissal of the
3rd Judicial District for Salt Lake County
Honorable Merrill C. Faux, Judge

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IN THE SUPREME COURT
of the
STATE OF UTAH

HARRIET RIPPENTROP,
Plaintiff-Appellant,

vs.

MINNIE G. PICKERING,
Defendant-Respondent.

No.
9896

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

Appellant brought action against respondent seeking to establish a right-of-way used for a period of more than twenty years (R-1, pp. 5). Appellant alleged that the driveway in question has been used by appellant and her predecessors for a period of sixty or more years (Tr 2-4). Appellant also contends that the use of the driveway was continuous and uninterrupted, open and visible and that the use was adverse (R-1 pp. 5). Appel-

lant further contends that the use of this driveway does have a definite and direct connection with the dominant tenement. Appellant alleges that recently, respondent did have constructed a fence which prevents any use of the said driveway by appellant (R-2, pp. 6b). Appellant further contends that this driveway is the only reasonable way to ingress and egress to and from appellant's backyard (Tr-3, Tr 41).

DISPOSITION IN LOWER COURT

The pretrial order stated that appellant will seek only to establish a right-of-way used for a period of more than twenty years (R 14). A jury was duly selected and impanelled. After the appellant had introduced evidence in support of her case and rested, the respondent made a motion for dismissal upon the ground that appellant had failed to prove facts upon which relief could be granted to appellant against respondent. The motion was denied, but the Court reserved the right to reconsider it at the close of the case. After evidence had been introduced by respondent and both parties had rested, the appellant and the respondent each made a motion for a directed verdict, which motions, after oral argument, were duly submitted to the Court. The Court, being fully advised in the matter, granted the motion for dismissal of respondent previously made in said cause (R 17).

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower Court's Order of Dismissal .

STATEMENT OF FACTS

This case involves the right of appellant to use the common driveway located between the residences of appellant and respondent on the east side of Ninth East Street, the appellant's residence being at 241 South Ninth East (Tr 2) and the respondent's residence is immediately south thereof at 251 on the same street (Tr 94). Only a narrow driveway separates the two homes.

Appellant's residence was built before 1893 (Tr 2) and the driveway involved was built at the same time and has been the only driveway ever used to service that home and yard (Tr 3) (Ex 2-P). The home of respondent was not constructed until 1913 (Tr 3). There is no other way for a vehicle to enter the backyard of appellant (Tr 3, 27). Appellant's predecessor, S. Randolph Skidmore, who built appellant's home, was the son of Samuel Randolph Skidmore, and he acquired this narrow lot—25 feet wide—from his said father in 1892 (P. 5, Ex 3-P) (Tr 3, 28). He later acquired an additional 1¼ feet along the south of the lot (P. 17, Ex P-3). This driveway has been continuously used by appellant and her predecessors for seventy years (Tr 2, 4). The witness, Mrs. Karen S. Wilde, 70 years of age, has had personal knowledge of this use for her entire

life, having lived in the residence thirty-one years or more and then her son lived in it after her parents had died, down to 1955 (Tr 5), and the parents, S. Randolph Skidmore, lived there until 1946 (Tr 6). Mrs. Wilde visited her parents and her son in the home after she ceased to live there and used the driveway on all occasions (Tr 5, 6). No permission was ever requested or granted for the use of this driveway (Tr 7, 38).

The witness, Mrs. Wilde, owned the appellant's property from about 1946 to 1958 or 1959 (Tr 26). The driveway between the two residences is narrow and will not permit vehicles to pass between the residences (Exs 4, 5, 6, 7). The narrow residence shown in the photographs is the residence of appellant and the wide bungalow-type home to the right is that of respondent (Tr 45-6). Respondent had constructed a fence in 1962 (Tr 45) (Ex 8-P) to preclude appellant from using the driveway to get into her backyard with any vehicle, within about 18 inches of the southeast corner of the appellant's house (Tr 26, 27).

The father of S. Randolph Skidmore also deeded the lot to his daughter, Mae, the first wife of Alex Pickering, in about 1909, but before he did that, and in the same year, he deeded an extra strip to his son to extend to the center of this driveway to prevent any future trouble about the use of the driveway (Tr 30, 31, 35, 36). It was intended that the property line between the Rippentrop and the Pickering properties be the center of the driveway with which we are involved

(Tr 36, 37, 38). This old line was accepted and lived by for more than the last forty years (Tr 20).

Mrs. Rippentrop bought the property involved here in 1959 (Tr 40) and used the said driveway, which is ten feet and four inches wide (Tr 41) with trucks and other automobile travel (Tr 42). No other driveway exists nor is there room for one on the north side of the house (Tr 41). No permission was asked by the Rippentrop children of the respondent for use of the driveway, but they used it as their own property (Tr 43). The respondent granted no permission for this use (Tr 44). The fence, which the respondent built in 1962 to shut off this long-established use of the driveway, is constructed so close to the appellant's house that, not only does it prevent vehicles from using the property as theretofore, but they cannot enter the backyard of appellant's property and there is not room for a person to squeeze between the fence and the appellant's house without turning sideways. It is impossible to get the garbage cans through this narrow aperture (Tr 44, 45).

The line accepted and respected by the property owners on the north of appellant's property is 26¼ feet north of the center of the driveway in dispute, and this center line of the driveway was likewise accepted and acquiesced in as the property line between appellant's and defendant's properties until respondent built the fence last fall (Tr 54). This is the width of the lot conveyed by Mrs. Wilde's grandfather to her father, predecessor in appellant's property (Pages 5 and 17 of Ex 3-P).

POINTS URGED FOR REVERSAL

POINT I

APPELLANT RAISED SUFFICIENT EVIDENCE TO SHOW THE USE HAS BEEN OPEN, VISIBLE, CONTINUOUS AND UNMOLESTED FOR A PERIOD OF TIME SUFFICIENT TO ACQUIRE AN EASEMENT BY ADVERSE USER AND THAT IN LIGHT OF THIS EVIDENCE AND BECAUSE OF THE PREVAILING RULE IN UTAH, THERE SHOULD BE A PRESUMPTION OF ADVERSE USER AND THIS PRESUMPTION SHALL EXIST UNTIL REBUTTED BY RESPONDENT.

POINT II

RESPONDENT DID NOT PRESENT SUFFICIENT EVIDENCE TO REBUT A PRESUMPTION OF ADVERSE USER AND FAILED TO BRING FORTH EVIDENCE WHICH WOULD PROVE AN ADVERSE USE DID NOT CONTINUE FOR A PERIOD OF TWENTY YEARS.

ARGUMENT

POINT I

APPELLANT RAISED SUFFICIENT EVIDENCE TO SHOW THE USE HAS

BEEN OPEN, VISIBLE, CONTINUOUS AND UNMOLESTED FOR A PERIOD OF TIME SUFFICIENT TO ACQUIRE AN EASEMENT BY ADVERSE USER AND THAT IN LIGHT OF THIS EVIDENCE AND BECAUSE OF THE PREVAILING RULE IN UTAH, THERE SHOULD BE A PRESUMPTION OF ADVERSE USER AND THIS PRESUMPTION SHALL EXIST UNTIL REBUTTED BY RESPONDENT.

Appellant did present evidence to show that the driveway in question was constructed by appellant's predecessors seventy or more years ago (Tr 2-4) (Ex 2-P). Evidence was also presented to show that the driveway in question was constructed approximately thirty years before the home in which respondent now resides was constructed (Tr 2, 3). There has also been evidence to show that respondent did not become the wife of Alex Pickering until 1942 (Tr 63), which was a period long after the alleged right-of-way was established.

Appellant also has presented evidence of a second deed (Tr 30, 31, 35, 36) which purports to convey one-half of the driveway in question to appellant's predecessors. There has been testimony to the effect that the deed in question was conveyed for the purpose of preventing any controversy which might arise over the driveway in the future (Tr 30). Appellant contends this should be evidence to show that the driveway was used under a

claim of right. Appellant now contends that if the Court so finds the facts as they have been presented, there should be a presumption of adverse user.

In 17 A Am.Jur., Page 687, Section 74, the author states

“Generally the establishment of a prescriptive right depends upon showing a *continued* and *uninterrupted*, and an *open* and *visible* use of a definite right in the land of another which is identical to that claimed as an easement and which has a relation to the use of, and a direct and apparent connection with, the dominant tenement, under an *adverse user and claim of right* for a period corresponding generally to the statutory period of limitations.” (Italics ours.)

In Utah, the statutory period is twenty years.

When an easement does arise, it creates two distinct tenements:

1. Dominant—To whom the easement belongs.
2. Servient—Upon whom obligation rests.
(Corporeal estate).

It is further stated in 17A Am.Jur., Page 682, Section 70,

“In absence of circumstances to the contrary, if a way has been enjoyed for a long time under circumstances which would be sufficient, under the local statute of limitations, to bar a recovery of real estate, there is a *presumption of grant* the evidence of which has been lost.” (Italics ours.)

A prescriptive easement, being founded upon the supposition of a grant must necessarily be exercised or

made use of in such a way as to indicate that it is *claimed as a right*. See *Northwest Cities Gas Co. v. Western Fuel Co., Inc., et al*, 123 P.2d 771, wherein it is stated:

“A claim of right in essence rests in intent as exemplified by acts and conduct. Failure of the servient owner to interrupt the user of a right of way across his land by another is strong evidence that the parties thought that the way was used as a matter of right.”

There is, however, a conflict of authority as to whether a use of a claimed easement for the prescriptive period raises a presumption of permissive use or, on the other hand, a presumption of adverse user. 27 ALR 2d, 324.

“The *prevailing rule*, however, is that where a claimant has shown an open, visible, continuous, and unmolested use of land for the period of time sufficient to acquire an easement by adverse user, the use will be presumed to be adverse (17A Am. Jur., Section 73, Footnote 19, Page 684) and under a claim of right; 17A Am. Jur., Page 685, Section 73, Footnote 20) and the owner of the servient estate, in order to avoid the acquisition of an easement by prescription from arising has the burden of showing evidence which will rebut this presumption by showing that the use was permissive.” (Italics ours.)

In the case of *Zollinger v. Frank*, 110 Utah 514, 175 P.2d 714, the Utah Supreme Court said

“We think the better rule is that described as the prevailing rule in the above quotation. That is, where a claimant has shown an open and continuous use of the land for the prescriptive period

(20 years in Utah) the use will be presumed to have been against the owner and the owner of the servient estate of prevent the prescriptive easement from arising has the burden of showing that the use was under him instead of against him."

In the case of *Savage v. Nielsen, et al*, 114 Utah 22, 197 P.2d 117, the above case of *Zollinger v. Frank*, *supra* was cited, and the Court clearly indicated that they preferred following the rule as it is set forth in said case. This case also indicated by discussion that construction without permission by one who is not the designated owner, would be evidence that the person so performing the construction intended to claim and possess premises or a right of way over premises adversely.

In the case of *Big Cottonwood Tanner Ditch Company v. Moyle*, 109 Utah 197, the Court stated

"It is true that to establish an easement the use must be notorious and continuous and on this adverseness—that is holding against the owner—will be presumed."

In a minority of instances in which no oral agreement as foundation of the common use was directly shown (although, of course, the existence of some sort of understanding is usually inferable from the circumstances), the use was regarded as permissive only so as not to give rise to a prescriptive right in either owner as against the owner. A discussion with citations is set

forth in 27 ALR 2d 351. It should be noted that this does not seem to be the tendency in Utah.

If the use be so open, visible and apparent that it gives the owner of the servient tenement knowledge and full opportunity to assert his rights, by his inaction or his failure to assert his rights, his *acquiescence* can be presumed. Furthermore, if the owner knows from other sources of a use which is not open and visible and he acquiesces in it, a prescriptive easement may be acquired against him. Acquiescence defined: Passive compliance or satisfaction; distinguished from avowed consent on the one hand, and, on the other, from opposition or open discontent. See *Norfolk and W. R. Co. v. Perdue*, 40 W.Va. 442, 21 SE 755, wherein it is stated

“It arises where a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that, under the circumstances of the case, the other party may fairly infer that he has waived or abandoned his right.”

Permissive user means more than acquiescence: See *Feldman, et ux v. Knapp, et ux*, 250 P.2d 92,

“An owner’s acquiescence in an adverse user of driveway across his land without more, does not show that the use, claimed to be adverse, was in fact permissive.”

As the testimony and evidence brought forth indicates, the predecessors of both appellant and respondent were related and on excellent terms (R-18) (Tr 29). This fact by itself is insufficient to permit the court to

presume a permissive use existed. In order to establish adverse intent or hostility, a hot controversy, or declaration of adverse intent or the existence of unrelated parties is not necessary. See *Jacobs, et ux v. Brewster, et al*, 190 SW 2d 894, wherein it is stated

“To establish the hostility required for acquisition of an easement by prescription it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate, nor is it necessary that the claimant make declarations of an adverse intent during the prescriptive period, or that he testify later that his intent was of that character.”

To further support this conclusion, there are many cases in which controversies of this type arise between immediate members of families. Respondent has failed to bring forth any evidence, other than evidence to indicate the relationship of the predecessors of both appellant and respondent, that would allow the court to infer that a permissive use, expressly or impliedly, existed between the predecessors of appellant and respondent.

In absence of express license or permission, how should the character of the use be determined? See 103 ALR 677, wherein it sets forth the following

“The character of the use of an easement as adverse or permissive, where there is neither proof of an express license or permission from the landowner nor of an express claim of right by the person using the easement, is to be deter-

mined from the circumstances of the parties and the nature and character of its use.”

There is evidence which indicates that the predecessors of appellant constructed and used the driveway in question before the house in which respondent resides was constructed (Tr 2, 3). So far as anyone knows, this driveway was constructed and used in absence of any permission or form of oral agreement between the involved parties. The discussion in *Savage v. Nielsen, et al*, supra, indicates that construction without permission by one who is not the designated owner, would be evidence that the person so performing the construction intended to claim and possess premises or a right of way over premises adversely. Furthermore, when respondent’s predecessors built their home, they acknowledged the existence of the driveway and to avoid interfering with the use of the driveway, built their home a few feet to the south of the driveway. From their acts and conduct, it is reasonable to infer their acquiescence to the use of the driveway. It should be noted, also, that the home in which respondent now lives was not constructed until approximately thirty years after the construction of the driveway.

The driveway, which was constructed by appellant’s predecessors, throughout the years, has been used for the purpose it was constructed for, that is, ingress and egress to appellant’s backyard and by the very early predecessors, it was used for ingress and egress to a barn which, at one time, existed behind appellant’s home (Tr 4, 5). The use, over the years, has been generally

the same type use that has been made and that is made of driveways in general.

It should be apparent to the Court that there has always existed a claim of a definite right, which has been and still is a claim of right to use the driveway in question as a passageway to and from the backyard (Tr 3) (Tr 41).

The right to use this driveway definitely has a direct effect upon the dominant tenement. If the Court were to destroy appellant's right to use the driveway, it would cause the market value of appellant's property and as well, the rental value of the various units to decline considerably. Also, to deliver coal, or in the event of a fire, or to haul other supplies or rubbish to and from appellant's backyard, it is necessary to use this driveway because it is the *only reasonable route* to the the backyard (Tr 3) (Tr 41).

In light of the foregoing facts and in reference to the law that has a direct bearing on the problem at hand, which the courts in the majority adhere to, it is only reasonable and practical, as well as just, that the Court make a presumption of adverse user, such presumption being rebuttable by respondent.

POINT II

RESPONDENT DID NOT PRESENT
SUFFICIENT EVIDENCE TO REBUT A
PRESUMPTION OF ADVERSE USER AND

**FAILED TO BRING FORTH EVIDENCE
WHICH WOULD PROVE AN ADVERSE
USE DID NOT CONTINUE FOR A PERIOD
OF TWENTY YEARS.**

Respondent has presented evidence, which indicates that since about 1935, there have been intervals of time during which the use of the driveway in question has been limited (Tr 32, 66). Respondent, also, has contended that her consent was given to those who have used the driveway since she became entitled to rights in the property. These allegations made by respondent present two different questions, which must be answered by apply ing the facts of this case to the law.

1. Presuming there was an acquisition of a prescriptive easement by appellant's predecessors, it must be determined whether or not there has been an abandonment of this prescriptive right.
2. What effect does informal consent which is given subsequent to a hostile entry have upon the rights of the holder of the prescriptive easement?

In answer to Question 1, see *Johnson v. Hyde* (1881), 33 NJEq. 632; also *Polson v. Ingram* (1884), 22 SC 541; 25 ALR 2d 1283:

“Mere nonuse of a prescriptive right will not destroy the right unless there be evidence of an intention to abandon it.”

It is further set forth in 17A Am.Jur., Page 780, Section 173:

“An easement acquired by prescription may be extinguished by a nonuser under circumstances indicating an intention of abandonment whenever such nonuser has extended over a length of time equal to the prescriptive period. *But mere non-user* of a prescriptive easement for a relatively short time will not constitute abandonment.” (Italics ours.)

Also, it is further stated by the author at 17A Am.Jur., Page 776, Section 170 that

“The *intention* to abandon is the material question and may be proved by an infinite variety of acts. It is a question of fact to be ascertained from all of the circumstances of the case, and the moment the *intention* to abandon and the *relinquishment of possession unites*, the abandonment is complete.

“*Time* is not an essential element of abandonment, and is not necessarily an important consideration in determining whether an easement has been lost by abandonment.” (Italics ours.)

See Anno: 25 ALR 2d 1285; *Weideman v. Staheli* (1948), 88 Cal.App. 2d 613, 199 P.2d 351:

“If the fee owner, to show an abandonment of a way originating in prescription, relies on evidence of a long period of nonuse, it is enough for the easement claimant to show that during this period he visited his property from time to time and passed over the way until a wash-out rendered it impassable; that for several years he was unable to secure a bulldozer to make repairs, that upon his securing it and beginning repairs, the fee owner placed a chain across the way and denied his right to use it.”

The *burden of proving* the abandonment of an easement is upon the party alleging it. The abandonment *must be established by clear and unequivocal evidence of decisive and conclusive acts*, and unless the intent to abandon and easement plainly appears, the courts are not inclined to favor the forfeiture of the easement on that ground.

Even though there has been a period during the last thirty years during which time, the use was limited, if the reasons for the limitation of the use are analyzed, it is evident that there has been no indication of an intent to abandon the prescriptive easement which if acquired would have been acquired prior to respondent's occupancy.

In answer to Question 2, see Anno: 65 ALR 128, which states as follows:

“There is authority to the effect that where an entry is hostile and adverse to the true owner and the user following such entry is likewise adverse, the later *unsought* and unrecognized consent of the owner will not prevent the adverse claimant from gaining an easement by prescription.” (*Italics ours.*)

The respondent has failed to produce evidence which would permit an inference that any subsequent acts of the predecessors of either appellant or respondent changed the adverse use into a permissive use. It seems as though from the testimony of both appellant and respondent, even if respondent did give her consent to the use of the driveway in question that it was informal

consent subsequent to an acquisition of a prescriptive easement.

The acts and conduct of appellant certainly do not indicate that she was ever under the impression that the driveway was to be used by permission only, in fact, her acts and conduct indicate just the opposite. Furthermore, the people who owned the property prior to appellant were under the same impression as indicated by their testimony (Tr 4, 5, 7).

By interpretation of respondent's testimony and by her acts and conduct, it is reasonable to assume respondent did not positively know that she was the sole owner of the driveway in question until she had the driveway and her property surveyed (Tr 69).

In order to arrive at a just result, the Court should not, in light of the existing circumstances, be permitted to presume that the construction and use of the driveway by appellant's predecessors was permissive and further, in light of the testimony and evidence, should not be allowed to conclude that if there was an adverse user, subsequent consent by respondent's predecessors was sufficient to change the adverse use into a permissive use. The Court should be required to presume the use was adverse; that is, in reference to the original entry and use made of the property by appellant's predecessors. The Court should also be required to presume an adverse use continued for the prescriptive period until respondent presents sufficient evidence to rebut this presumption.

CONCLUSION

The appellant has presented sufficient evidence to show that the use of the property in question by appellant's predecessors was open, visible, continuous, and unmolested, and because of this evidence, there should be a presumption of adverse user and that such presumption continues until rebutted by evidence presented by the respondent.

It should clearly be evident that the respondent has failed to present the kind of evidence required by law in sufficient quantity to rebut such a presumption. Respondent, also, has failed to bring forth evidence which in any way indicates that the use of the driveway by appellant's predecessors was not continuous for a period of twenty years. It must be remembered that the law only requires use of the property which is continuous and uninterrupted for a period of twenty years. This means a use that is not interrupted by the act of the owner of the land, or by voluntary abandonment by the party claiming the easement. If use is interrupted, prescription is annihilated and must begin again. The right cannot be acquired by occasional and sporadic acts for temporary purposes. However, it is not required that such use be made every day of the statutory period, but simply, the exercise of the right more or less frequently according to the nature of the use.

The lower Court erred when it inferred that because of the relationship of the predecessors of both appellant and respondent, that a permissive use existed. The lower

Court erred again when it granted the motion for dismissal of the suit.

In the alternative, if the Court should infer that a permissive use did exist between S. Randolph Skidmore and Samuel Randolph Skidmore, his father, it would be only reasonable for the Court to hold that from the date of the execution of the second deed, the driveway from that point on was used under a claim of right.

It is respectfully urged that the case be remanded to the lower court with instructions to enter judgment for the plaintiff (appellant) and against the defendant that plaintiff is entitled to the free and unobstructed use of the driveway; that defendant remove the fence already constructed so as not to interfere with plaintiff's access to her back yard.

Respectfully submitted,

Milton A. Oman

Attorney for Plaintiff and Appellant