1974

# John C. Critchlow And Sophia Critchlow v. Jay L. Critchlow And Lois Critchlow Funnon T. Shimmin And Donna Shimmin : Brief of Respondents

# IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN C. CRITCHLOW and
SOPHIA CRITCHLOW, his wife,
*Plaintiffs and Appellants,*

vs.

JAY L. CRITCHLOW and
LOIS CRITCHLOW, his wife;
FUNNON T. SHIMMIN and
DONNA SHIMMIN, his wife;
and VERA SHIMMIN,
*Defendants and Respondents,*

Case No.
13738

BRIEF OF RESPONDENTS, FUNNON T. SHIMMIN and DONNA SHIMMIN and JAY L. CRITCHLOW and LOIS CRITCHLOW, his wife

Appeal from Judgment of the 7th Judicial District Court for Carbon County, Utah, the Honorable Edward Sheya, Judge


BOYD BUNNELL
Attorney for Respondents
FUNNON T. SHIMMIN and
DONNA SHIMMIN
23 South Carbon Avenue
Price, Utah 84501

S. J. SWEETRING
Attorney for Respondents
JAY L. CRITCHLOW and
LOIS CRITCHLOW
23 South Carbon Avenue
P. O. Box 823
Price, Utah 84501

CULLEN Y. CHRISTENSEN, for
CHRISTENSEN, TAYLOR & MOODY
55 East Center Street
Provo, Utah 84601
*Attorneys for Appellants*

DEAN W. PAYNE
Attorney for Respondent
VERA SHIMMIN
128 East Center Street
Provo, Utah 84601

TABLE OF CONTENTS



AUTHORITIES CITED

TABLE OF CONTENTS (Continued)

# IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN C. CRITCHLOW and SOPHIA CRITCHLOW, his wife,
*Plaintiffs and Appellants,*
vs.
JAY F. CRITCHLOW and LOIS CRITCHLOW, his wife; FUNNON T. SHIMMIN and DONNA SHIMMIN, his wife; and VERA SHIMMIN,
*Defendants and Respondents.*

Case No. 13738

BRIEF OF DEFENDANTS-RESPONDENTS JAY F. CRITCHLOW and LOIS CRITCHLOW, his wife, and FUNNON T. SHIMMIN and DONNA SHIMMIN, his wife.

THE NATURE OF THE CASE, DISPOSITION IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT ARE AS STATED IN APPELLANT'S BRIEF

THE FACTS AS STATED IN APPELLANT'S BRIEF ARE SUBSTANTIALLY CORRECT EXCEPT FOR THE FOLLOWING MODIFICATIONS AND ADDITIONS:

1. There are other access roads to the property of Appellants (area colored green, Exhibit 1), that have been used over the years. (Tr 80, 81, 121, 139, 255). The Appellants contracted for the removal of timber in the area cut in 1972 and vehicles were used to haul the timber out (Tr 81), and did not use the road in question.

B. Critchlows did not obtain the property in gre Exhibit 1, now owned by the Appellants, until 1943 ( 76) and there was no road through Respondent Shimmi property to the green area (Appellants' present propert until after 1948. In July of that year, Leon Chidester w hired to improve cattle trails off the mountain into t canyon going South from Appellants' present proper toward Price, Utah, and he was paid for this job by Shi mins, Critchlows, and others (Tr 196). He was not hir or paid to build a road through Shimmins' property (T 199). He could not get his Jeep to the top of the rid (Appellants' land in green Exhibit 1), by going throu Shimmins, so he lowered the blade on his bulldozer a cut a trail where the present road is located throu Shimmins', so that he could haul gas with his Jeep t where his bulldozer was working. There was no road t trail prior, at that location, until Chidester went throu with his bulldozer (Tr 189, 195, 197). Also confirme by testimony of Vera Shimmins (Tr 228), Jay Critchlo (Tr 279), Sutton (Tr 211), Campbell (Tr 163, 164, 16 Funnon T. Shimmin (Tr 241), and Frank World (Tr 20

C. After the bulldozer made the first trail in 194 through the Shimmins' property, Respondent Shimmi then developed the road with his own equipment, at hi own expense, for his own use, and without any contribu tion or help from the Appellants. The Appellant, John Critchlow, so testified (Tr 73). Funnon Shimmon testi fied that he worked on the road from 1948 to 1954 t make it passable and has continued to maintain the roa since that time, without assistance from anyone (Tr 24

69, 254). Also, see the testimony of Vera Shimmin (Tr 278), and Earl Campbell (Tr 169).

D. The first lock on the gate No. 2, Exhibit 1, was placed there by Appellant, John Critchlow, when he fenced that portion of the range in about 1951, and that lock was torn off by Shimmin and replaced with his locks that he kept on the gate periodically from that time to the present. Shimmin even installed his own metal gate in 1961 and took out the original gate placed in the fence by the Appellant (Tr 250, 252, 281).

E. The gate No. 3, Exhibit 1, was placed in the fence constructed by Shimmin in 1953 and 1954, and was placed there to allow cattle to exit the Shimmins' property (Tr 244), and eventually Shimmin changed the route of the road North of the South line of Section 32, after the line was surveyed (Tr 243), and the road reached dead end at the Shimmin fence line and did not go through gate No. 4 (Tr 245).

F. That before the partition suit between the Critchlow brothers, 1971, they ran their cattle and serviced their range by going over the forty-acre tract (white area between the green and red, Exhibit 1), owned by Mathis, by horse back, on an exchange of use agreement with Mathis (Tr 66, 281).

## ARGUMENT

### POINT I

### THERE WAS COMPETENT EVIDENCE FROM WHICH THE COURT FOUND THAT THE USE OF THE ROAD ACROSS THE SHIMMINS PROPERTY BY APPELLANTS WAS PERMISSIVE.

To establish a Right-of-Way by prescription, the use must be adverse and not permissive and must be under claim of right. It has been well established by this Court that the mere use of a roadway for twenty (20) years alone is insufficient to establish an Easement by prescription, but that such use must be adverse and under claim of right and that it cannot be adverse when it rests upon license or mere neighborly accommodation. In Jensen vs. Gerrard, Et. Al., 85 Utah 481, 39 P. 2d 1070, the Court stated that the Defendants who claim a right to use a roadway by prescription have the burden to establish such claim by clear and satisfactory evidence, and that a 20-year use alone, of a way, is insufficient to establish an Easement, since the mere use of a roadway opened by a land owner for his own purpose will be presumed permissive, and adverse use of the way cannot spring from permissive use, and further, that the prescriptive Title must be acquired adversely, and it cannot be adverse when it rests upon license or *mere neighborly accommodation.*

To the same effect, is Sdrales, Et. Al. vs. Rondos, 114 Utah 288, 209 P. 2d 562, decided in 1949, where the Court reaffirmed the ruling in Jensen vs. Gerrard and cited with approval, Harkness vs. Woodmansee, 7 Utah 227, 26 P. 291, wherein the Court said, "Where a person opens a

way for the use of his own premises and another person uses it also, without causing damage, the presumption is, in the absence of evidence to the contrary, that such use by the latter was permissive and not under claim of right."

The Court, at that time, distinguished the facts in Zollinger vs. Frank, 110 Utah 514, 175 P. 2d 714, cited by the Appellant, since the facts in that case showed that the servient owner did not open the Right-of-Way for his own use and he used only a portion of it infrequently, which is certainly not the facts as established in this case.

To the same effect, is Bertolina, Et Al. vs. Frates, Et. Al., 89 Utah 238, 57 P. 2d 348, wherein the Court states, "A user by an individual will be considered permissive and not adverse unless there is evidence that it was under a claim of right in himself, and that the owner, knowing of such claim, acquiesced in it."

All of the evidence submitted to the Court in this case is to the effect that Mr. Shimmin permitted the Appellants the use of the road and supplied them with a key (Tr 251, 281), as a neighborly gesture to allow them the permissive use of his road (Tr 251, 253, 265) that he built and maintained, (Tr 73, 169, 228, 242, 249, 253), and at no time did he acquiesce in any claim of right in the Plaintiffs to the use of the road.

From the time that Mr. Chidester first ran his bulldozer through the sage brush and rocks (1948), Mr. Shimmin, with no assistance from the Plaintiffs in either labor or money and using his own equipment, developed and

made the road passable for his own use. He even built one completely new section of the road on the South boundary of his property, in 1952 (Tr 243, 245), over which the Appellants now claim a Right-of-Way. Therefore, the presumption is present that the use by the Appellants was permissive and not under any claim of right.

Not only does the presumption exist, but the facts further substantiate and show that the use was permissive, since the Appellants used the road by obtaining a key to the locked gate placed on the road by Shimmin in approximately 1955 and continued to use the road thereafter by use of the key supplied by Shimmin (Tr 251, 253, 281), and even called him and requested a key, in 1972 (Tr 254), which clearly shows that they used the road by his permission and not under any claim of right or adversely. They were not free to use the road as they pleased, but only to use the road if they had a key supplied to them by Mr. Shimmin. Any gates placed across the road were established for Mr. Shimmin's use and not in any recognition of any right in the Plaintiffs.

The case of Rippentrop vs. Pickering, 15 Utah 2d 59, 387 P. 2d 94, decided in 1963, affirmed the prior holding of the Court in Lunt vs. Kitchens, 123 Utah 488, 260 P. 2d 535, which case stated as follows:

> "If, of course, the landowner consents to the use of his land, then the right created is a license and a prescriptive right cannot arise from a license unless the licensee renounces openly his claim under the license."
>
> However, it is obvious that where a special relationship such as a license exists, the owner of the

land is entitled to more notice than the mere use of his land not inconsistent with the license. Thus it is said in the Restatement of Property #458J:

"Where a use of land and one having an interest affected by the use have a relationship to each other sufficient in itself to justify the use, the use is not adverse unless knowledge of its adverse character is had by the one whose interest is affected. The responsibility of bringing this knowledge to him lies in the one making the use."

No evidence was presented to the Court that the Appellants claimed a right to use the road adverse to the interest of Shimmin or that Shimmin at any time ever had any notice or knowledge that the Appellants claimed a right adverse to Shimmin, until 1968, when Shimmin received the letter from the Appellants' then Attorney, Luke G. Pappas (Exhibit 17), who wanted to discuss the use of the road with Shimmin. At that time, Appellants were told and informed that they were using the road by permission and as a neighborly accommodation, and that there was nothing to negotiate (Tr 254).

## POINT II

### THE TRIAL COURT DID NOT COMMIT ERROR IN ITS FAILURE TO DECREE THAT APPELLANTS ARE ENTITLED TO A WAY OF NECESSITY OVER THE PROPERTY OF THE RESPONDENTS CRITCHLOW.

At the opening of the Trial it was Stipulated that some of the property partitioned to the Plaintiffs in the partition suit (Defendants' Exhibit 21) is contiguous to that which was partitioned to the Respondents Critch-

A "way of necessity" over the property of the Respondents Critchlow being entirely dependent upon the question of whether the Plaintiffs have a prescriptive easement over the property of the Respondent Shimmin; and the Trial Court, having heard and observed the witnesses of the respective parties, and weighed their testimony; and the Court having concluded, from a preponderance of the evidence that Plaintiffs' use of the alleged roadway over the property of the Respondents Shimmin was permissive and not adverse, hostile, notorious or antagonistic to the rights of the Respondents Shimmin; and that Plaintiffs failed to establish a right of way over the lands of the Respondents Shimmin by prescription or otherwise; the Trial Court could not find and conclude otherwise than that the Plaintiffs were not entitled to a "way of necessity" over the lands of the Respondents Critchlow.

## POINT III

## THE COURT DID NOT COMMIT ERROR IN FAILING TO AWARD DAMAGE

The Appellants not only failed to establish any Right-of-Way, but failed to prove any damage. The Appellants put on evidence of expense incurred in moving their cattle to another area, but did not show that they suffered any damage or loss. They may have made a profit as a result of the move. All cattle operations have expense, but they are not all losses.

## CONCLUSION

The Trial Court had sufficient and adequate evidence presented to it from which a finding could be made that the use of the alleged roadway over the Shimmins' property was permissive, that no "way of necessity" over the Respondents Critchlow was acquired; and that Appellants failed to establish any damage.

Respectfully submitted,

BOYD BUNNELL

Attorney for Defendants-Respondents FUNNON T. SHIMMIN and DONNA SHIMMIN

Oliveto Building
Price, Utah 84501

S. J. SWEETRING

Attorney for Defendants-Respondents JAY L. CRITCHLOW and LOIS CRITCHLOW

Oliveto Building
Price, Utah 84501