

**IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA**

**E.L. SPENCER, JR.,**

Plaintiff,

vs.

**JON DAVENPORT,**

Defendant.

Case No. CI00-46

**DECREE**

**DATE OF TRIAL:** October 30, 2000.

**DATE OF RENDITION:** November 1, 2000.

**DATE OF ENTRY:** Date of filing by court clerk (§ 25-1301(3)).

**APPEARANCES:**

For plaintiff: W. Gerald O’Kief with plaintiff.

For defendant: James H. Quigley with defendant.

**SUBJECT OF ORDER:** Decision on the merits following trial to the court in equity.

**PROCEEDINGS:** At the trial, these proceedings occurred:

There were no preliminary matters. Opening statements were presented by counsel for plaintiff and counsel for defendant. The plaintiff presented his case-in-chief. The plaintiff, E.L. Spencer, Jr., and Austin Thomas Davis and Gerald R. Beel were sworn and testified. The plaintiff rested. The defendant moved to dismiss. Arguments of counsel were heard. The motion was denied. The defendant presented evidence. The defendant, Jon Davenport, was sworn and testified. The defendant rested. The plaintiff presented rebuttal evidence. Austin Thomas Davis, having been previously sworn, was recalled and testified. The plaintiff rested on rebuttal. Closing arguments were presented by counsel for plaintiff and counsel for defendant. The matter was taken under advisement.

**FINDINGS:** The court finds and concludes that:

1. The plaintiff seeks an injunction to prohibit the defendant from preventing the plaintiff’s employees and cattle from crossing the defendant’s land. The plaintiff claims that he holds a prescriptive easement entitling him to that relief. The defendant counterclaims for damages to the land from the previous cattle crossing and for an injunction prohibiting the plaintiff from future trespass.

2. The law treats a claim of prescriptive right with disfavor. Such a claim requires that the elements of such adverse user be clearly, convincingly, and satisfactorily established. *Simacek v. York County Rural Public Power Dist.*, 220 Neb. 484, 370 N.W.2d 709 (1985).

3. The principles of law generally applicable to prescriptive easement claims have been frequently stated and are well-known.

a. In order to obtain rights in the real property of another by prescriptive easement, i.e., a private prescriptive easement, a claimant must show that his use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period. *Werner v. Schardt*, 222 Neb. 186, 382 N.W.2d 357 (1986).

b. A use is adverse and under a claim of right if the claimant proves uninterrupted and open use for the necessary period. Once the claimant has established this presumption, it will prevail unless the owner of the land proves by a preponderance of the evidence that the use was by license, agreement, or permission. *Id.*

c. Exclusive, in reference to a prescriptive easement, does not mean that there must be use only by one person but, rather, means that the use cannot be dependent upon a similar right in others. *Id.*

d. The nature and extent or scope of the easement claimed by prescription must be clearly established. *Id.*

e. In establishing a prescriptive easement, a use is continuous and uninterrupted if it is established that the easement was used whenever there was any necessity to do so and with such frequency that the owner of the servient estate would have been apprised of the right being claimed. *Breiner v. Holt Cty.*, 7 Neb. App. 132, \_\_\_ N.W.2d \_\_\_ (1998).

f. If a use begins as a permissive one, it retains that character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate. *Simacek v. York County Rural Public Power Dist.*, *supra*.

g. Where the claimed use is over unenclosed lands, the presumption is that the use is permissive. *Gerberding v. Schnakenberg*, 216 Neb. 200, 343 N.W.2d 62 (1984). Where the

claimed right-of-way entails use over a way opened by the landowner for his own purposes, the presumption is that the use is permissive. *Id.*

h. Where adjoining proprietors lay out an alley between their lands, each devoting a part of his land to that way or alley, which is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close that part which is on his own land; and in those circumstances the mutual use of the whole of the alleyway is to be considered to be adverse to a separate and exclusive use by either. *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 921 (1983).

i. Abandonment of a prescriptive easement must be pled and proved, the burden of proof being on the party alleging it. *Grint v. Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984).

j. A claimed easement must be viewed from both ends of the prescriptive period. The nature and extent or scope of the user must from the beginning be clearly established. At the end of the period it must appear in retrospect that there has been no material change or variance from the limits or course adopted or established at the beginning. A lesser use prevents a right to an easement and a greater use if of no importance until the full prescriptive period has elapsed from the initiation of the greater use. *Stricker v. Knaub*, 215 Neb. 372, 338 N.W.2d 757 (1983).

k. The law requires that the easement must be clearly definable and precisely measured. *Id.* A bill to establish a right of way and to enjoin encroachments upon it cannot be sustained where it does not furnish the means for declaring exactly what the right is and the precise locality which it occupies with the shape and dimensions thereof. *Wemmer v. Young*, 167 Neb. 495, 93 N.W.2d 837 (1958).

4. Similarly, the law regarding a public prescriptive easement has been long established. Nebraska law recognizes that a highway may be established by prescription when used adversely by the public continuously for a period of 10 years or more. *Sellentini v. Terkildsen*, 216 Neb. 284, 343 N.W.2d 895 (1984); *Lancaster Cty ex rel. Rosewell v. Graham*, 120 Neb. 785, 235 N.W. 338 (1931); *Leu v. Littell*, 2 Neb. App. 323, 513 N.W.2d 24 (1993). In order to establish the requisite public prescriptive easement, the public must show that the use and enjoyment of the land was exclusive, adverse, continuous, uninterrupted, open and notorious, and under a claim of right for the full 10-year prescriptive period. *Sellentini, supra*. Furthermore, there must be a use by the general public under a

claim of right adverse to the owner of the land of some particular defined line of travel, and the use must be uninterrupted and without substantial change for 10 years or more. *Id.*

5. For a period of years, the plaintiff's employees moved cattle to and from one of plaintiff's ranch properties and national forest land owned by the federal government. In most of these years, the plaintiff's cattle crossed the defendant's land once in the spring and once in the fall. For most of that time, the land was owned by the defendant's predecessors-in-title, Bruce Fischer and Debra Fischer. The Fischers used the tract for their own cattle, including moving their cattle across various paths to other pastures, including a route to the forest service land.

6. Although Gerald R. Beel testified regarding use of the land for movement of cattle in the late 1920s and the 1930s, his testimony also shows that this particular land was then part of the federally-owned forest service land. Consequently, usages during that period may be disregarded as to any claim of adverse use, as no claim of adverse right could have been maintained against the federal government.

7. This court is persuaded that the use by the plaintiff began as a permissive use. The plaintiff himself testified about a general practice of crossing other lands by following the general customs of the community regarding attention to gates.

8. Austin Thomas Davis (to whom the parties referred and this court will subsequently refer to as Tom Davis), the plaintiff's ranch manager or ranch foreman, testified regarding the nature of the use. He admitted that, in the spring of 1998, Bruce Fischer called Davis. Fischer, being unhappy about Davis's previous, adverse testimony in court, told Davis that Fischer did not want the plaintiff's cattle to cross the contested land. Davis testified that he and Fischer resolved that problem through discussion. Davis testified that, prior to that conversation, Fischer's cattle crossed the plaintiff's lands and the plaintiff's cattle crossed Fischer's lands by mutual consent. He also testified that this arrangement continues today, and that each crosses the other's lands by mutual consent. Of course, the ownership of the particular real estate in question transferred from the Fischers to the defendant in November of 1998. E4.

9. The court finds a situation similar in law to that noted in *Connot v. Bowden*, 189 Neb. 97, 100-102, 200 N.W.2d 126, \_\_\_\_ (1972), where the Supreme Court stated:

The situation appears to be similar to that described in *Burk v. Diers*, 102 Neb. 721, 169 N.W. 263, wherein it is stated: "The road in controversy, if it was a road, which is disputed, was a neighborhood road. Oftentimes farmers or owners of city lots, out of mere

generosity and neighborly feeling, permit a way over their land to be used, when the entire community knows that the use is permissive only, without thought of dedication or adverse user. This use ought not to deprive the owner of his property, however long continued. Such rule would be a prohibition of all neighborhood accommodations in the way of travel. . . .

“The use necessary to estop the owner from claiming his land must be such that interruption would affect private rights or public convenience. Where the public has exercised no control or dominion over the road, nor used it to such an extent as to inform the owner, exercising reasonable care for his rights, that the public is using it under claim of right, then neither implied dedication nor adverse user is shown. There is no evidence in this case that the general public has depended upon the existence of this road and will be seriously inconvenienced by the loss of it; nor have private persons made improvements in the belief that this is a road. In fact, the road is a cul-de-sac.”

In the vast holdings of grazing lands in western Nebraska, many well-defined trails may be found which are accessible to all through gates provided. Entry by nonowners of the land for various purposes cannot ordinarily be deemed to be adverse. It is not under a claim of right but generally recognized as permissive in nature. In the present case, no “claim of right” was ever asserted until the incidents occurred which gave rise to this action. As stated in *Stubblefield v. Osborn*, 149 Neb. 566, 31 N.W.2d 547: “In the instant case the evidence by the plaintiffs shows the original entry and use to have been permissive. The plaintiffs did not inform Bolton that they claimed a right-of-way and perpetual easement across his land. They crossed the land on occasions to go hunting, as did others. There was no claim of right or exclusive use. The most that can be said as to their crossing the lands in question is that it was permissive only, a neighborly act on the part of the owners or tenants on the land. There was no claim of ownership on the part of plaintiffs of such a nature that they openly and forcibly asserted directly against the actual owners of the land in such a manner that the owners would be required to take affirmative action against the plaintiffs.” It is well settled that a permissive use cannot ripen into a prescriptive right until 10 years after notice of the adverse claim is brought home to the landowner. See *Walsh v. Walsh*, 156 Neb. 867, 58 N.W.2d 337. “A permissive use of the land of another, that is a use or license exercised in subordination to the other’s claim and ownership, is not adverse and cannot give an easement by prescription no matter how long it may be continued. . . .”

10. According to Tom Davis, the spring cattle crossing took 35 to 40 minutes and the fall crossing took only 20 minutes or less. This use was not of sufficient character to bring home to the defendant’s predecessors in title that any claim of right was being asserted. The plaintiff’s testimony establishes the sort of community knowledge described by the Supreme Court, which is consistent with permissive use. Davis’s testimony shows that the commencement of the use was mutually permissive. The

court concludes that the plaintiff failed to establish the character of the use as open and notorious for the 10-year statutory period.

11. Moreover, the greater weight of the evidence shows a permissive use for the reasons discussed above.

12. In addition, the plaintiff failed to adduce evidence to clearly define and precisely measure the claimed easement. The width was never established with any certainty. The precise location of the path cannot be determined or described from the evidence. This court is not persuaded that the path ever possessed any characteristics which would show a reasonably careful owner that anyone was or could be exercising user under a claim of right.

13. The court also observes that the plaintiff failed to establish any specific property to which the claimed easement would be servient. This court finds no specific requirement in the case law that a specific property must be identified as the property served by the easement. Thus, the court does not view the absence of such proof as a disqualifying element. Rather, it lends more support to the conclusion that the original use was permissive and to the character of the use as similar to that discussed in *Connot*.

14. The evidence fails to sustain the plaintiff's petition, and the petition must be dismissed with prejudice.

15. At pretrial, the parties stipulated to damages of \$200.00 for wrongful crossing if it was determined that the plaintiff had no right to cross. Judgment will be rendered for the stipulated damages.

16. The owner of real estate has the legal right to use and operate his land free from repeated acts of trespass, and an injunction will issue to restrain such acts, especially where committed under a claim which indicates that the trespass will be continued. *Van Donselaar v. Conkey*, 177 Neb. 169, 128 N.W.2d 390 (1964). Equity will afford relief by the process of injunction against repeated acts of trespass, especially where committed under a claim which indicates a continuance and constant repetition of it. *Id.* The defendant is entitled to injunctive relief.

**DECREE:**

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. The plaintiff's petition is dismissed with prejudice.

2. Judgment is hereby entered in favor of the defendant and against the plaintiff in the amount of \$200.00.

3. The plaintiff and the plaintiff's agents, employees, and assigns are perpetually restrained and enjoined from trespassing upon the defendant's real estate, legally described as the Northwest Quarter of the Northeast Quarter (NW<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub>) and the East 15.0 chains of the East Half of the Northwest Quarter (E<sup>1</sup>/<sub>2</sub>NW<sup>1</sup>/<sub>4</sub>) of Section 20, Township 31 North, Range 30, West of the 6<sup>th</sup> P.M. in Cherry County, Nebraska.

4. Costs are taxed to the plaintiff, and judgment is entered against the plaintiff and in favor of the defendant for costs incurred by the defendant of \$117.00.

5. Any judgment hereunder shall bear interest at the rate of 7.241% per annum from the date of entry until paid.

6. Upon expiration of time for appeal, the judgment shall be satisfied from the cash deposit in lieu of bond made by the plaintiff herein, and any excess shall be refunded to the plaintiff.

Signed in chambers at Valentine, Nebraska, on November 1, 2000.

DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Enter judgment **for costs and damages** on the judgment record.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Note the decision on the trial docket as: [date of filing] Signed "Decree" entered.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel  
District Judge