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UTAH SUPREME COURT
BRIEF

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SUPREME COURT

OF THE

STATE OF UTAH

RICHARD RICHARDS and ANNETTE RICHARDS, GEORGE Q. NIELSEN and SHERRY NIELSEN, RONALD HARRINGTON and MARY HARRINGTON,

Plaintiffs, Appellants,

vs.

PINES RANCH, INC., a Utah corporation,

Defendant, Respondent.

Case No. 14460

APPELLANTS' BRIEF ON APPEAL

Appeal from a Judgment of the District Court of Summit County, the Honorable Stewart M. Hanson, Judge

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JUN 22 1976
Clerk, Supreme Court, Utah

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RICHARD RICHARDS and ANNETTE RICHARDS, GEORGE Q. NIELSEN and SHERRY NIELSEN, RONALD HARRINGTON and MARY HARRINGTON, Plaintiffs/Appellants, vs. PINES RANCH, INC., a Utah corporation, Defendant/Respondent.	Case No. 14460

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

Plaintiffs-Appellants, herein referred to as plaintiffs, filed an action in the District Court for a Declaratory Judgment seeking a ruling from the Court that they were entitled to cross Defendant-Respondent, herein referred to as defendant's property in order to reach property then owned by the plaintiffs. Plaintiffs further sought a permanent restraining order preventing the defendant from barracading or interferring with plaintiff's access.

DISPOSITION IN LOWER COURT

At the conclusion of plaintiffs' evidence, defendant moved to dismiss plaintiffs' Complaint. The Court took the motion under advisement and after defendant presented his

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evidence, the Court granted defendant's motion to dismiss.

RELIEF SOUGHT ON APPEAL

Plaintiffs on appeal seek reversal of the trial court's decision and a permanent restraining order preventing the defendant from interfering with plaintiffs' access across defendant's property to allow plaintiffs access to their forty acre parcel.

STATEMENT OF FACTS

All of the plaintiffs are owners of a parcel of real property located in Summit County within Section 34, Township 1 North, Range 7 East. The plaintiffs George Q. Nielsen and Sherry Nielsen acquired title to their property from Ethel Gibbons by Warranty Deed in 1962. The other plaintiffs acquired title by conveyance from George Q. Nielsen and Sherry Nielsen. The ownership of the property was stipulated by counsel (T.3, 63).

Ethel Gibbons and her family owned the property for a long period of time. Alma Gibbons was deeded the property by the State of Utah in 1914, (plaintiffs' Exhibit No. 9). The property was deeded subject to any easement or right of way of the public, even at that time.

Ethel Gibbons acquired the property from her family in 1935, and continued ownership until 1962, when she conveyed the property to George Q. Nielsen. During her lifetime, the

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only means of getting to the property was over what she and her family had called "Shingle Mill Canyon Road". (R-11), (T-63). For a period of over forty years, she and her family used the roadway to the property as a matter of right. (R-11).

In 1938, Virgil Smith, a resident of Summit County, used the property for logging and used an established roadway across the Curt Wilde property to remove the logs. Curt Wilde later became the grantor of the defendant herein. (R-13).

The Pines Ranch originally consisted of 160 acres, four 40-acre parcels. They were acquired from the original homesteader, a Mr. Pyrie. They ran in an east-west direction, parallel to the river and the roadway. (T-81).

Thereafter, the defendant acquired three more 40-acre parcels along the west fence line and an additional 40-acre parcel from Curt Wilde. These purchases were made in 1961, and 1964. (T83 and T102-103).

George Q. Nielsen purchased the 40-acre parcel in question from Ethel Gibbons in 1962, and used the roadway to reach his property. (T-9) He used the property for logging, recreation, removal of Christmas trees, hiking, etc.

Subsequently in 1964, the defendant purchased one more 40-acre parcel from the Gibbons estate headed by Albert Gibbons. This transaction gave the defendant ownership of all of Section 34, with the exception of that property owned by the plaintiffs herein.

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Shortly before this lawsuit was filed, the defendant began interfering with plaintiffs' access to the property, and the plaintiffs filed this action for declaratory judgment.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING THAT USE OF THE RIGHT OF WAY BY THE PLAINTIFFS AND THEIR PREDECESSORS WAS PERMISSIVE.

The clear and undisputed testimony is that the plaintiffs, their predecessors, and other persons used the contested right of way for nearly a half century, commencing in 1938. (R11-13).

The defendant acquired the property surrounding the property of the plaintiff, from Mr. Curt Wilde. Mr. Rogerson testified that he believed the purchase was made in 1957. (T-83) But on the cross examination he identified the deed from Mr. Curt Wilde to Pines Ranch, dated September 7, 1961. (T102-103). And the last 40 acre parcel was purchased by the defendants from the Gibbons estate in 1964. (T-83).

The Court found that in "recent years" the use by the plaintiffs became permissive because defendant has made every attempt to keep people from trespassing. (R-32, paragraph 2).

In Utah, the period of time required to acquire a prescriptive right is twenty (20) years, so said this Court in Cassity v. Castigano, 10 Utah 2d 16, 347 P. 2d 834. That principle is so clearly established that it does not deserve further attention here.

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It is clear that the prescriptive rights were established very early by the plaintiffs' predecessor in interest, Ethel Gibbons. Any permissiveness on the part of defendant in recent years would not affect or upset prescriptive rights already acquired by the plaintiffs or their predecessors in interest. (See Zollinger v. Frank, 110 Utah 514, 175 P. 2d 714.)

The plaintiffs believe the instant situation is governed by this Court's decision in Richins v. Struhs, 17 Utah 2d 356, 412 P. 2d 314, where the Court speaking of the fundamental principles applicable to prescriptive rights, said:

> "The origin and purpose of their recognition arises out of the general policy of the law of assuring the peace and good order of society by leaving a long established status quo at rest rather than by disturbing it. In order to serve this purpose, when a claimant has shown that such a use has existed peaceably and without interference for the prescriptive period of 20 years, the law presumes that the use is adverse to the owner; and that it had a legitimate origin. The latter presumption is usually placed on the ground that there was a lawful grant of such right, but that it had been lost. It is appreciated that this lost grant theory is fictional. But the theory upon which the presumption rests is not important. Whatever theory it may be based based upon, what is significant is that it has a well justified and salutary purpose which is in conformity with the policy just discussed; and that it is so well established in our law that its validity is no longer open to question. Consequently it should be given effect to prevent the very thing which defendants have attempted here: the upsetting of a situation which has existed amicably since "the memory of man runneth not to the contrary."
> (emphasis added)

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The Court further made clear the burden of the parties in this kind of case. Where the claimant has shown that such use has existed peaceably and without interference for twenty (20) years, the law presumes that its use is adverse to the owner and that it had a legitimate origin. The plaintiffs herein have clearly shown the use commencing in 1935, without any interference whatever until the time this lawsuit was commenced, and the defendant herein had no standing to complain about crossing the Curt Wilde property until 1961, when the Wilde property was acquired by them.

The Court in Richins also stated,

> "The presumption above mentioned that a use is adverse which arises from its continuance for a long period of time is not absolute. It would not preclude the owner of the servient estate, (defendant herein), from proving that the use was by permission. If he sustains that burden and overcomes the presumption of proof that the use was initially permissive, then the burden of going forward with the evidence and of ultimate persuasion shifts back to the claimant to show that the use became adverse and continued for the prescriptive period."

The Court made clear that the reason for this rule was to insure that a claimant would not "sneak up" on the owner by using his property under permission and thereafter claim the use as a matter of right. It is abundantly clear in this situation that the initial use and continued use from the date Ethel Gibbons acquired the property in 1935, and until this action was filed in 1974, that the use was claimed as a matter of right

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and certainly could not have been permissive with the defendant herein because defendant had no ownership interest until 1961.

The record is replete with evidence and admissions by the defendant's witnesses that the roadway was used by Curt Wilde, by the Stevens and other people, and there is absolutely no evidence in the record that anyone was ever denied access across defendant's property until the neighbors started sub-dividing their property. Counsel for the defendant asked Rogerson on direct examination whether or not prior to 1964 or 1965, they had "no trespassing" signs posted on their gate, to which he responded, "I don't remember specifically". (T-92)

The only direct evidence of blocking out the plaintiffs, or other persons, was made by one of the defense witnesses, Scott M. Matheson, who testified very precisely that he acquired some of the real property on June 22, 1971. (T-66). And he installed a chain and padlock over the roadway in question on the 4th day of October, 1975. (T-69). Until that time there is no evidence that the plaintiffs were deprived access to the property, and there is no evidence, with the exception of the short statement by Mr. Rogerson, that sometime in 1962, 1963, or 1965, he told the plaintiff Mr. Nielsen that he was trespassing on the property, while cutting Christmas trees. (T-109). The conversation was denied by Mr. Nielsen. (T-117).

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Mr. Rogerson admitted at trial that Albert Gibbons, his grantor, used the property for lumbering, and took the lumber down the Wilde road. (T-105)

The clear and undisputed testimony is that the plaintiffs and their predecessors and other persons used the contested right of way for nearly half a century, commencing in 1938. (R11-13). This use obviously occurred before the defendant even acquired the Curt Wilde property, which was the property over which the plaintiffs and their predecessors traversed. The Curt Wilde property was not purchased until 1961, and the last 40 acre parcel was acquired from the Gibbons estate in 1964.

POINT II

THE TRIAL COURT ERRED IN FINDING THE USE BY THE PLAINTIFFS TO BE TOO SPORADIC TO ESTABLISH PRESCRIPTIVE RIGHTS.

The trial court found that the plaintiffs and their predecessors had used the property sporadically and said use had not been sufficient to require the Court to find that the plaintiffs or their predecessors had established an easement. (R-32).

Unfortunately, the courts have not stated with precision the amount of use required to establish the prescriptive rights, but it appears clear that the legislature addressed itself to that question relative to adverse possession by persons claiming title under written instrument. UCA 78-12-9 provides,

> "For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or a judgment or decree, land is deemed to have

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> been possessed and occupied in the following case: ... (3) where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purpose of husbandry, or for pasturage, or for the ordinary use of the occupant."...

The "ordinary use of the occupant" is dictated by the nature of the land and the desires of the occupant. In Cooper v. Carter Oil Company, 7 Utah 2d 9, 316 P. 2d 320, the court found adverse possession where the open, notorious and continuous use of the property consisted of grazing sheep upon the land for only three weeks out of the year.

The property in question here was utilized for the "ordinary use" of persons who owned this kind of land. According to the affidavit of Ethel Gibbons, (R-11), it was used for harvesting timber, grazing sheep, picnicking and other purposes. The affidavit of James Smith, (R-13), indicates it was utilized for securing logs for building his home. It is evident from the plaintiffs' Exhibits 4, 5, 6, 7, 8, that the roadway was utilized often enough that it is plainly visible deep into the property, even in August, 1972, when photographs were taken. (T45)

The very nature of the land would limit, somewhat, its use. There were no highways to it, it was recreational land, but it was used by Mr. Nielson for horseback riding, cutting timber, taking out Christmas trees. (T-12). Relatives of Ethel Gibbons had used it for harvesting the Christmas trees. (T-54) And Mr. Nielsen and his friends used it for hunting grouse. (T-62). Admittedly

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the use of the property was not great because of the very nature of the property itself.

However, the aerial photograph, (plaintiffs' Exhibit No. 1), taken in 1952, shows the road very clearly indicating substantial use of the access road across what is now the Pine Ranch property. At the time the photograph was taken, of course, the defendant was not the owner of the property. That portion designated as "Stevens Property" was owned by the Stevens, as it is today. The portion across the fence was owned by Curt Wilde. Mr. Rogerson, the chief defense witness, admitted that Mr. Wilde took timber from the property, that he improved the road and constructed a loading facility for removing timber. (T-84). But he stated that the roadway did not go to the Ethel Gibbons property. It was short by at least 100 yards, although admitted that there were indications of animal traffic to the plaintiff's property. (T-85).

POINT III

THE TRIAL COURT ERRED IN FINDING THAT THE CASE OF RICHINS V. STRUHS WAS NOT APPLICABLE.

The facts in the Richins case, supra, are remarkably similar to the present case. In both cases, peaceable use of the easement had continued for nearly half a century. In both cases the use had been begun by predecessors to the present parties in interest. In both cases, the defendants erected a fence to interfere with the plaintiffs' access to their property. In both cases, defendants asserted permissiveness in recent years as a defense to the use by the plaintiffs. And in both

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cases, the testimony as to use by the plaintiffs was undisputed. and finally, in both cases, the defendant's erected a fence to prevent access to the property.

The principles enunciated in Richins should be applied to the case now before the Court. The fundamental philosophy of Richins is as applicable and pertinent here as it is in the Richins case itself. The evidence shows that the use has existed peaceably without interference for the prescriptive period of twenty years. The law presumes that the use was adverse to the owner, and it had a legitimate origin. There is no evidence to the contrary and no logical reason whatever to deny application of the principles in Richins to this case.

POINT IV

TO DENY PLAINTIFFS ACCESS TO THEIR LAND RENDERS THE PROPERTY WORTHLESS TO PLAINTIFFS.

The past use of the property has been consistent with its mountainous terrain and character. It has been used for logging, Christmas tree harvesting, hunting, prospecting, herding sheep and recreational purposes.

The defendant initially owned only four 40-acre parcels in Section 34, but gradually increased their holdings by purchasing additional property. They purchased the Curt Wilde property in 1961, which was the property over which the plaintiffs had traversed to gain access to their property, and in 1964, purchased additional property from the Gibbons estate and thereby completely surrounded and isolated the plaintiffs' property.

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In the event this court sustains the trial court's judgment it means, in effect, that the plaintiffs' property is totally inaccessible and is worthless to the owners. It amounts to a forfeiture to the defendants, who, incidentally, have utilized the property for their own purposes by allowing livestock to graze upon it. (T-108)

To deny plaintiffs access is in effect to grant to the defendant the plaintiffs' 40-acre parcel of property. The nature, character and use of the property is identical. If the plaintiffs are isolated and cannot gain access, it amounts to a grant of plaintiffs' property to the defendant.

It is interesting to note in the testimony of Mr. Rogerson, that at the time the defendant acquired the property, there was already a steel post fence running along the north boundary of plaintiffs' property and what is now the south boundary of the defendant's property. (T-91-92). Mr. Rogerson also testified that they, the defendants, installed a gate on the plaintiffs' property because their horses would get upon the plaintiffs' property and they had to have a convenient way to get them back. (T-108) But when the Gibbons' sheep strayed off what is now the plaintiffs' property onto the defendant's property to get water, the defendant brought legal action against them. (T-105). It is obvious that the defendant herein has taken every advantage for itself, to the detriment of the plaintiffs. No one can logically deny the existence

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of the roadway across what was the Curt Wilde property into the area now owned by the plaintiffs. The evidence is clear and conclusive. The defendants embarked upon a course of gradually purchasing all of the property to surround that now owned by the plaintiffs.

The very attitude of the defendants herein is to take all they can take, giving nothing in return.

The judgment of the district court, if allowed to stand would be the "icing on the cake", granting to the defendant an additional 40 acre parcel of property which cost the plaintiffs $8,000.00 (Eight thousand dollars). (T-21). This is a windfall to which the defendants are not entitled, and a detriment or loss to the plaintiffs that they do not deserve. This is particularly true, where a continued use of the roadway would not constitute any substantial damage to the defendants.

CONCLUSION

The plaintiffs' predecessor, Ethel Gibbons, has utilized the access roadway to her property in excess of forty (40) years. The defendants did not even acquire the property on the west to thereby isolate the plaintiffs' property until 1961, although there was some testimony that Mr. Rogerson believed the land was purchased in 1957. The roadway in question had been used by many people other than the plaintiffs and their predecessors without objection, and without interruption.

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Stevens used it for securing his water, cattlemen used it for transporting cattle, and it was used for harvesting timber, and there is absolutely no evidence that it was used by the permission of the defendants. The defendants had no right to grant or withhold permission until 1961. They now assert that right over the plaintiffs and all others. It is clear that the time required to acquire a prescriptive right in this state is twenty (20) years, and that right was acquired by Ethel Gibbons by 1955. The use by her and her successors in interest was consistent with the nature and use of the property itself and in fact, is the very use of the property today. True, the use was sporadic, but that is consistent with the nature of the land and the logical use by any occupant.

All of the criteria laid down by this Court in acquiring prescriptive rights have been met by the plaintiffs herein. There is no evidence of permission given by the defendants herein, and the plaintiffs are therefore entitled to the presumptions enumerated in Richins.

To hold otherwise will upset the situation which has existed amicably for nearly five decades and would amount to a taking of the property of the plaintiffs without compensation, and simply giving it to the defendant, a result which is not deserved by either the plaintiffs or the defendants.

Respectfully submitted this_____day of June, 1976.

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