

1954

# Maybell Griffiths v. Archulious Buttars Archibald and David Archibald : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MAYBELL GRIFFITHS,

Plaintiff and Appellant

vs.

ARCHULIOUS BUTTARS ARCHIBALD  
and DAVID ARCHIBALD,

Defendants and Respondents.

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APPELLANT'S BRIEF

Case No. 8135

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FILED

FEB 18 1954

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Appellant.

Clerk, Supreme Court, Utah.

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Appeal from the District Court of the  
First Judicial District, in and for the  
County of Cache, State of Utah.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MAYBELL GRIFFITHS,

Plaintiff and Appellant,

vs.

ARCHULIOUS BUTTARS ARCHIBALD  
and DAVID ARCHIBALD,

Defendants and Respondents.

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STATEMENT OF FACTS

The parties to this action reside in Clarkston, Utah. Plaintiff, Maybell Griffiths, and defendant, Archulious Buttars Archibald are sisters and since 1926 have been adjoining landowners. (They have lived side by side since 1929, the year plaintiff built her house.) Defendant owns the southwest corner lot of Block 12 and plaintiff owns the lot just to the east (Def. Ex. 1; Tr. 2, 5).

The other defendant, David Archibald, is the husband of Archulious.

Plaintiff testified that for twenty-six years she has been continuously using a ditch that runs across the center of defendant's lot to irrigate her garden and lot (Tr. 4, 5) and that the ditch was in existence when she purchased her lot (Tr. 2). The defendant testified that there was "no such ditch" for "eight years" after plaintiff built her house. That "the first time there was ever a ditch running up on the west" of defendant's garden was "about 1938" (Tr. 70). Plaintiff irrigates her garden during the summer "about once a week" (Tr. 17). Plaintiff testified that she has used the ditch from the time she purchased her lot and has "claimed a right to use the ditch



since that time." That she would "have used it no matter who owned the lot to the west of hers" (Tr. 30). Both plaintiff and her husband testified that they had never asked the defendants or either of them for permission to use the ditch nor did the defendants ever give them permission to use the ditch (Tr. 5, 17). The plaintiff's use of the ditch has been exclusive according to defendant's own testimony. Defendants bring the water onto their garden through a "separate ditch" to the south of plaintiff's ditch, and just to the north of defendants' house. According to David Archibald, "That's where we take it now, and we've always taken it" (Tr. 80). Defendants do not irrigate the rest of their lot which produces alfalfa because they "don't



have enough water to irrigate it" (Tr. 96). The defendants testified that they had never made any verbal objection to plaintiff's use of the ditch prior to 1952 (Tr. 75, 89). But they claim they have given Plaintiff's husband permission to use the ditch each year he has used it (Tr. 87). But the defendants "plowed it up in '36" (Tr. 96), and "it was plowed under" in 1946 (Tr. 48). That David Archibald would drag a little dirt in the ditch when he "drug the harrows over and partially filled it, then Mr. Griffiths would clean it out before he could use it" (Tr. 99, 100). That the defendants run over the ditch with their equipment when they "feel like it" because it is the "entrance to our garden to work it." That in plowing their garden when defend-

ants make a turn they "run over the ditch" and "that's the reason he (Griffiths) has to clean it out." That defendants have "filled up (the ditch) partially every year, and he's (Griffiths) cleaned it out every year" (Tr. 81). That the ditch is and has been against the defendants' interest because of its inconvenience to them. David Archibald said that "every time I go in there I have a truck and bounce through the ditch and it's wet, I can't go from one end of the lot to the other with a load" (Tr. 90). But despite this inconvenience and adverse acts of filling up the ditch the defendants have never "blocked the ditch or prevented (plaintiff) from bringing water through it when (plaintiff) desired to use or (was) using the water" (Tr. 19).

The action was tried before a jury and from these facts the jury found by their answers to special interrogatories submitted by the Court as follows (See Instruction Number One and Special Verdict):

1. That plaintiff has been in actual possession of said ditchway. Or paraphrasing the Court's instruction, that plaintiff has unfurled her flag on the land (so to speak) and kept it flying, so that the owner could see, if he would, that an enemy has invaded her domains, and planted the standard of conquest.

2. That said possession was open and notorious. The plaintiff's use was "evidenced by such acts and conduct as are sufficient to put a man or woman of ordinary prudence on notice of the fact that the ditchway in question is claimed

by the plaintiff as her own."

3. That the possession was friendly.

4. That the possession was continuous for a twenty year period. That the use by plaintiff was "uninterrupted for the full twenty year period." That the ditch followed "a definite and certain line for 20 years."

5. That the said use of said ditchway by plaintiff was exclusive. That plaintiff showed "an exclusive dominion over the land and an appropriation of it to her own use and benefit."

Upon receiving the special verdict the Court made findings in favor of the defendants and against the plaintiff, no cause of action. The action was dismissed with prejudice.

From this judgment the plaintiff appeals.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY FOR REVERSAL OF JUDGMENT AND DECREE:

POINT I: THE COURT ERRED IN RENDERING A JUDGMENT OF NO CAUSE OF ACTION BASED ON THE ANSWERS OF THE JURY TO THE SPECIAL INTERROGATORIES.

POINT II: THE COURT ERRED IN GIVING QUESTION NUMBER THREE AND THE INSTRUCTIONS FOLLOWING QUESTION NUMBER THREE IN INSTRUCTION NUMBER ONE.

POINT III: THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IF PLAINTIFF SHOWED AN OPEN, VISIBLE AND CONTINUOUS USE WITHOUT PHYSICAL INTERRUPTION OR MOLESTATION BY DEFENDANTS FOR A PERIOD OF TWENTY YEARS OF SAID DITCHWAY, THEN THE PRESUMPTION IS THAT THE USE WAS ADVERSE AGAINST THE DEFENDANTS.

#### ARGUMENT - POINT I

From the answers of the jury to the interrogatories, plaintiff is entitled to be adjudged the owner of a prescriptive easement for irrigation water in the ditch described in plaintiff's complaint.

The jury found that plaintiff had been in actual possession of the ditchway



and that such possession was open, notorious, continuous and uninterrupted for a twenty year period, and that the ditchway was claimed by the plaintiff as her own. On these findings plaintiff is presumed to have used the ditch against or adverse to the defendants.

In *Zollinger v. Frank*, 110 Utah 514, 175 P.2d 714, 170 ALR 770, the plaintiff claimed a right of way for travel across defendant's land. The land was enclosed by a fence and used by the defendant. The lower Court found for the plaintiff and was affirmed. In that case the Court said:

"As said in Section 72, Easements, 17 Am. Jur. 981: 'The prevailing rule 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 under claim of right. The owner of the servient estate, in order to

avoid the acquisition of an easement by prescription, has the burden of rebutting this presumption by showing that the use was permissive. \* \* \* See also Thompson on Real Property, Sec. 394, Vol. I, page 509.

"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 to prevent the prescriptive easement from arising has the burden of showing that the use was under him instead of against him. This rule was mentioned in the recent case of Big Cottonwood Tanner Ditch Co. v. Moyle, Utah, 159 P.2d 596, (On rehearing) 174 P.2d 148, 155, where it was said: '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 this case Zollinger shows and the court found an open and continuous use for the prescriptive period. The presumption that the use was against the landowner therefore arises."

The Zollinger case affirms the early Utah case of Holm v. Davis, 41 Utah 200,



125 P. 403, 44 L.R.A. (NS) 89, in which the Court said after quoting from an Oregon case, *Coventon v. Seufert*, 23 Ore. 548, 32 P. 508: "The court also held that, in view that the party who claimed the easement had used it for the purposes intended for a period longer than would create a prescriptive right, 'the burden of proving that plaintiffs held possession by license or indulgence was cast upon the defendants.'" To the same effect see *Jones on Easements*, Sec. 182; *Washburn on Easements*, 2ed. Sec. 106; *Dahnken v. George Romney & Sons. Co.* 111 Utah 471, 184 P.2d 211. Later on the Court says:

"Upon the other hand, we are of the opinion that, although a canal, ditch or flume may have been constructed by a person on or over lands owned by another with the consent or permission of such other owner, yet, if the owner of the canal, ditch, or flume,

or his assignee, has used and maintained the same in the same manner as if the same were constructed over his own lands, and where such use and maintenance has continued uninterruptedly and under claim of right for more than twenty years, in such event the owner of the ditch has acquired a right to use and maintain the same perpetually as an easement."

In that case the court points out that in most cases ditches were constructed with the express or implied permission or consent of the owners of the land, and says:

"If the owners of lands over which ditches have been thus constructed can now claim, as is claimed by respondent, that the owners and users of those ditches have acquired no right to maintain them for the reason that the ditches or canals were in fact constructed with the consent of the original owners of the lands, and hence the ditch users are mere licensees, and their ditches, flumes, and canals are maintained and used only by the sufferance or indulgence of the landowners, then the law has proved to be a mere delusion and a snare."

The rule as to the presumption of an easement is stated clearly in *Coventon v. Seufert*, 23 Ore. 548, 32 P. 508, cited and followed by the Utah Supreme Court in *Holm v. Davis*, *supra*. The Oregon Court said:

"It may be stated as a general proposition of law, that if there has been an uninterrupted user and enjoyment of an easement in a particular way for more than ten years (20 years in Utah), it affords a conclusive presumption of right in the party who shall have enjoyed it, provided the use be not by authority of law or by agreement with the owner of the inheritance."

That the Court erred in refusing to apply this presumption and in refusing to allow the jury to apply this presumption will be pointed out later. But even under erroneous instructions the Court's judgment for defendants based on the finding by the jury that the use was "friendly" and not "hostile" was error.

The meaning of the words "hostile"

and "adverse" has long plagued the Courts.

As is stated in *Hollinger v. Frank*, *supra*,  
at page 715:

"Heldsworth's comments on the law of prescription in England (that there is no branch of English law which is in a more unsatisfactory state) are probably equally applicable to the condition in this country which exists as a result of the courts' unfortunate choice of words in characterizing the use necessary to initiate a prescriptive right. Some courts say it must be 'peaceable', others says 'hostile'. How can the use be both 'peaceable' and 'hostile'? Some courts say it must be both 'adverse to' and 'acquiesced in by' the servient owner. 'Acquiescence' by the servient owner seems inconsistent with 'adverse' use; it hints more of 'permissive' use for certainly the servient owner 'acquiesces' in a permissive use.

"Regardless of the words used to characterize this element of the nature of the use necessary to give rise to a prescriptive easement, it is our opinion that the courts mean that the use must be against the owner as distinguished from under the owner."

That the use by plaintiff was against

the owner as distinguished from under the owner is clear from the finding that the ditchway was "claimed by the plaintiff as her own" (Instruction No. One, par. 2 and Special Verdict), that her use was exclusive (Special Verdict, Question 5), and from the evidence as to adverseness heretofore set out (See *City of Rock Springs v. Sturm*, Wyoming, 273 P. 908, 913 and authorities cited). But does the finding by the jury that the use of the ditch by plaintiff was "friendly" and not "hostile" harm the plaintiff?

If we adopt the layman's definition of the word "hostile"<sup>1</sup> the words "hostile" and "friendly" are antonyms. The lower

1 Webster's New International Dictionary, 2nd Ed., G&C Merriam Co., defines hostile as "belonging or appropriate to an enemy; having or showing ill will; inimical; unfriendly."



Court in phrasing its question must have had in mind the layman's definition of the word for if we adopt the legal definition of the word "hostile", then "hostile" and "friendly" are not necessarily opposite in their meaning. 1 American Jurisprudence, page 472, gives the following definition of hostile:

"The definition of the word 'hostile' given by the lexicographer--viz., 'showing ill will and malevolence, or a desire to thwart and injure--does not correctly state the character of the occupancy necessary to create adverse possession, for there need be no ill will, malevolence, or desire to injure anyone, and the element of hostility in that sense is not necessarily involved. It means only that one in possession of land claims the exclusive right thereto. It also imports a denial of the owner's title."

The jury found that plaintiff's possession was exclusive and that she claimed the ditchway as her own, which imports a denial of the owner's title.

This is sufficient to satisfy the legal definition of the word hostile as quoted from American Jurisprudence above. The lower court's definition of the word "hostile" is also satisfied by the finding that plaintiff's use of the ditch was exclusive (Special Verdict, Question No. 5). For in Instruction No. One under the third question the court said: "By the word 'hostile' as used in this case is meant that one in possession of a ditchway claims the exclusive right thereto and a denial of the owner's right to possession."

Since the lower court chose to use the word "hostile" in its third interrogatory, it should have defined the word as clearly as did the writer in American Jurisprudence, *supra*, instead of using only a part of the definition. Especially



so since counsel for both plaintiff and defendants would not offer a definition of the word without a dictionary and since counsel for the defendants incorrectly used the word "hostile" as being synonymous with "ill will" (Tr. 33-35, 40). And the fact that the jury found that hostility commenced in 1952 clearly shows that they were applying the laymen's and not the legal definition of the word as this was the year that friction arose between the sisters over their mother's estate (Tr. 40). The defendant himself indicated that he deemed the use in 1951 as being adverse to his rights (Tr. 84, 89).

As a result of the two definitions of the word "hostile" the jury found that the use was "friendly", but not "hostile."

They made this finding despite the fact they also found that plaintiff's use of the ditch was "exclusive" which was sufficient to make the use "hostile" under the court's own definition of the word. The answers to Questions Number Three and Number Five are therefore inconsistent. In 53 Am. Jur. p. 750, Sec. 1082, the rule is stated: "Inconsistent and conflicting findings on special verdicts and answers to interrogatories neutralize each other and must be disregarded." Following this rule the answers to both questions must be stricken leaving us with sufficient findings to give judgment for plaintiff under the rule set forth in Zollinger v. Frank, supra, and Kolm v. Davis, supra. That open, continuous, and uninterrupted use for 20 years raises

the presumption of adverseness and is sufficient to establish an easement in plaintiff.

A judgment for the plaintiff would be consistent with the findings of the jury that they believed the plaintiff's testimony rather than the defendants' testimony where the two were in conflict. In the first place the defendants said that plaintiff had not used the entire ditch prior to 1938 (Tr. 70, 85). The plaintiff said she had used it from the time she bought the lot in 1926 (Tr. 4, 5). The jury found plaintiff had used the ditch continuously for more than twenty years (Special Verdict, Question No. 4).

Secondly, defendants said the course of the ditch had changed about 15 to 20 feet (Tr. 77). The plaintiff said its

course had never materially changed (Tr. 4). The jury found that its course had never materially changed (Instruction No. One, paragraph No. 4 and Special Verdict).

Thirdly, defendants testified that they didn't know plaintiff was using the ditch under claim of right (Tr. 78).

Plaintiff testified that she used it under claim of right from the first (Tr. 30). The jury found that plaintiff's use was evidenced by "such acts and conduct as would put a man or woman of ordinary prudence on notice of the fact that plaintiff claimed the ditchway as her own" (Instruction No. One, paragraph No. 2 and Special Verdict).

Such findings by the jury are sufficient to show that the jury believed plaintiff's testimony, were confused by

the erroneous instructions and that therefore judgment should have been entered for the plaintiff.

### ARGUMENT - POINT II

The lower court's Question No. 3 and Instructions under Question No. 3 were both misleading and confusing. The rule as to misleading and confusing instructions is stated in 53 Am. Jur. p. 440-442:

"The judge presiding at a trial should, while instructing the jury, be careful not to mislead them, or to allow them to be misled by others. He may not, either on his own motion or at the request of either party, give an instruction which as applied to the facts is misleading or well calculated to mislead, or which will tend to confuse the jury in the consideration of the issues in the case. Such instructions are ground for a new trial or reversal. . . Instructions tend to confuse the jury where, for example, conflicting propositions of law are stated, and also where a vital word is used in several different senses."



Or as was stated by the Missouri Supreme Court in *Neff v. Cameron*, 213 Mo. 350, 111 S.W. 1139, 18 L.R.A. (NS) 320, 326: "The preliminary office of an instruction is to lay down to the plain men in the box, who use plain fireside language in reasoning, a plain rule of law to guide them in arriving at a just result on the facts they find to exist."

Instructions should be given in plain language. If they tend to confuse the jury, they are grounds for reversal. Was paragraph number three in Instruction Number One "plain"?

The court asked the question, "Was said possession hostile or friendly?" In view of the discussion in open court as to the meaning of the word "hostile" (Tr. 33, 35), and the plain meaning of the

word "friendly" the jury at this point must have considered the issue to be whether there was ill will or good will during the time plaintiff was in possession of the ditch. The court at no time defined the word "friendly". If it had been defined as permissive, the jury would have known what was meant and would have been able to reach a verdict without being confused. But without being thus defined, we must assume the jury used the ordinary meaning of the word which is "showing good will, amicable, or kindly disposed."<sup>1</sup> Since the court used "hostile" and "friendly" as antonyms, there is a strong inference that the jury did not change their minds in reading the instruction, and continued to consider the issue

1 See Webster, *supra*.



to be whether there was ill will or good will between the parties during plaintiff's possession, and not whether the possession was under or against. This, of course, would not be correct (See Zollinger v. Frank and 1 Am. Jur. p. 472, *supra*). In any event the jury must have been confused and the judgment should be reversed. (The jury would not have been confused if the court had asked, "Did the defendants give their permission to plaintiff to use the ditch?" as requested by plaintiff.)

Had the court clearly defined "hostile" this error may have been corrected. The court however says: "By the word 'hostile' as used in this case is meant that one in possession of a ditchway claims the exclusive right thereto and a denial of the owner's

right to possession." This is only a part of the definition contained in 1 Am. Jur. p. 472, supra, and does not clearly define "hostile" in legal terms. At this point if the jury found that the plaintiff claimed the exclusive right to the ditchway, they could find the possession was hostile.

But the court continues and says, "For the plaintiff to succeed in this case, the evidence in this case as to adverse usage must be clear and satisfactory." Hostile now means "exclusive" and hostile also now means "adverse." Now the jury is confused as to whether they must find the possession was "exclusive" in order for it to be "hostile", or whether they must find the possession to be both "exclusive" and

"adverse" before it is hostile, or whether a finding that the possession is "adverse" is sufficient to make it "hostile."

Finally the court says: "The usage must be actual, adverse, hostile, open and notorious, continuously, and exclusively . . . All of these elements must be present." Now the jury is completely confused. "Hostile" was defined as "exclusive", then "adverse" and now it apparently means something else, too, for "all of these elements must be present." There must be adverseness, hostility, and exclusiveness. The jury naturally returns to their original conclusion (if they had ever left it) that there must be ill will or enmity before the usage can be hostile as "hostile" means something more than "exclusiveness"

and "adverseness." And the jury are justified in this conclusion because the lower court used "hostile" as an antonym to "friendly" in the question.

But whatever their conclusion, the jurymen could not help but be confused as to the meaning of the word "hostile" as well as the meaning of the word "friendly" under the lower court's instruction. This conclusion is supported by the finding in question number five that the usage was "exclusive" which is inconsistent with the finding that the use was not "hostile" under paragraph three of Instruction Number One.

Instruction Number One, paragraph three was confusing and erroneous. It does not "lay down to the plain men in the box, who use plain fireside language

in reasoning, a plain rule of law to guide them in arriving at a just result on the facts they find to exist."

The judgment should be reversed.

### ARGUMENT - POINT III

The lower court erred in instructing the jury that the plaintiff must establish by a fair preponderance of the evidence (Instruction Number Two) or by clear and satisfactory evidence (Instruction Number One, paragraph three) that plaintiff's use of the ditch was adverse rather than instructing the jury as requested by plaintiff in her second requested instruction, to-wit:

"If you find that such use was open and visible to the defendant's and not clandestine, and was continuous for the said period of 20 years in that plaintiff or her husband used the ditch when they needed it without physical

interruption or molestation by the defendants, then you may presume that the use by plaintiff or her husband was adverse and under claim of right and you should find for the plaintiff unless the defendants establish by clear and convincing evidence that such use was permissive."<sup>H</sup>

That plaintiff had the burden of proving open, visible, continuous, and uninterrupted use for twenty years is clear. The jury found that plaintiff met that burden of proof (See Special Verdict). That thereupon a presumption arises that the use is adverse or against the defendants and that the burden of proving license or permission is then upon the defendants is equally clear (See *Zollinger v. Frank*, *Holm v. Davis*, and cases cited under point one, *supra*.).

Nothing needs to be added to the previously quoted material in these cases to



show that the rule exists and is part of Utah law (See pp. 13-17). Something should be said as to why the lower court refused to so instruct the jury.

The lower court seems to have felt that this rule as to the presumption of adverseness did not apply here because there was either a license or neighborly accommodation. Such was the rule stated in *Lunt v. Kitchens*, \_\_\_ Utah \_\_\_, 260 P.2d 535. The Court in the *Lunt* case cited the case of *Yeager v. Woodruff*, 17 Utah 361, 53 P. 1045, as authority for the proposition that the presumption of adversity will not arise under mere use by a licensee. The *Yeager* case is distinguishable from the instant case. In that case Wilford Woodruff had constructed a ditch about two-thirds of the



distance to his north line, from which he irrigated a portion of his land; Henry (his nephew who rented his uncle's land and who cultivated his father's land adjoining Wilford's), "thinking it would be more convenient to irrigate a portion of his father's land from the last-named ditch, requested the privilege of extending it for that purpose; that Wilford said it would make no difference to him as long as it did not interfere with anything; that the privilege was temporary; that Henry thereupon extended the same." Later Henry's father conveyed the land to plaintiff who brought the action after using the ditch seven years. In the Yeager case there is no dispute but that the use began with the express permission of the landowner, and, as the

use did not change, the presumption is that the usage by Henry and plaintiff was permissive. In the instant case there is a conflict between the parties whether permission was granted to use the ditch at any time (Tr. 5, 17, 27). The jury made no finding either way, but only found the usage was friendly (Special Verdict). That the jury believed the plaintiff's testimony in the findings they made on the conflicting testimony of the parties has previously been pointed out (p. 24, 25). But in any event there was a dispute as to whether plaintiff used the ditch under a license or not. In such a case if the jury finds that plaintiff's use was open, continuous, notorious, and uninterrupted for 20 years they are entitled to presume that the

usage was adverse and the burden is on the defendants to show that the use was by permission (*Zollinger v. Frank*, *supra*). The court erred in failing to so instruct the jury.

If the lower court took the position that this presumption of adverseness did not apply because the use was by "neighborly accommodation", then we feel that the lower court misinterpreted the *Lunt* case and erroneously applied it to the facts in the instant case.

In the *Lunt* case the defendants counterclaimed for an easement by prescription. Plaintiff's predecessor had opened a driveway on his own land for his own use and had used it. Defendant's predecessor living next door used the driveway for delivery of

fuel, parking their cars and for foot passengers. The Court in explaining what conditions prevent the presumption of adverseness arising from twenty years continuous use says:

"The failure of the Weidners to object to the use of their property by the Kitchens in the case at hand must have been because of an implied consent in order to accommodate their neighbors. The use by the Kitchenses added no burden to the driveway; they did not attempt to widen it, nor to interfere with the use by the Weidners. Where a person opens the way for use of his own premises and another uses it without interfering with the landowner's use or causing him damage, the presumption is that the use was permissive and in absence of proof to the contrary, the person so using it does not acquire a right of way by prescription."

The presumption that a use is permissive where a person opens a way for use of his own premises and another uses it without interfering with the landowner's use or causing him damage does not apply

in the instant case. The Archibalds did not open this ditch for the use of their own premises (Tr. 8, 70). It was always used to irrigate plaintiff's lot (Tr. 8, 80, 96). Defendants used another ditch for their garden as their testimony shows (Tr. 80, 96). The use by the plaintiff was exclusive. The defendants also covered over the ditch and left it to Mr. Griffiths to clean out each year (Tr. 17, 18, 88, 98, 100), indicating that they were not using it for their own premises. That the ditch interfered with defendants use of the land is brought out by their own testimony (Tr. 81, 90). The presumption of adverse-ness arising from continuous and unmolested use for 20 years therefore should apply in this case.



Other cases in which the Utah Supreme Court has refused to apply the rule that open, continuous, uninterrupted use for 20 years of a way raises a presumption of adverse possession are all cases in which the landowner has opened up the way for his own use and the use by the alleged dominant owner has not interfered with his use or damaged the owner of the land. See *Parkness v. Woodmansee*, 7 Utah 227, 26 P. 291; *Cache Valley Banking Co. v. Cache Co. Poultry Growers Ass'n et al.*, 116 Utah 258, 209 P.2d 251; *Jensen v. Gerrard*, 85 Utah 481, 39 P.2d 1070; *Savage v. Nielsen*, 114 Utah 22, 197 P.2d 117; *Buckley v. Cox*, \_\_\_ Utah \_\_\_, 274 P.2d 277; and *Schreles v. Rondos*, 116 Utah 288, 209 P.2d 563. In the last case we again have a way used in its



entirety by the owners of the alleged servient estate for their own land and the Court again makes clear that the presumption of adverse use on continued use does not apply here:

"The defendant contends that he has shown an open and continuous use of the alleyway by himself and his predecessors in title for over twenty years and that under the rule laid down by this court in *Zollinger v. Frank*, 100 Utah 514, 175 P.2d 714, 170 A.L.R. 770, the use is presumed to be against the owner of the servient estate. True in that case we said 'we think the better rule is that 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 to prevent the prescriptive easement from arising has the burden of showing that the use was under him instead of against him.' However, the facts in *Zollinger v. Frank* are entirely distinguishable from the facts in the present case. In the *Zollinger* case the servient owner did not open the right of way for his own use and he used only a portion of it infrequently. Because of these facts we distinguished

the Zollinger case from Harkness v. Woodmansee, 8 Utah 227, 26 P. 291, 293, where in we 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 a claim of right.'

We submit that the facts of these cases denying the presumption of adverse-ness where the way was opened by the land-owner for his own use and the person using it did so without causing damage are entirely distinguishable from the instant case. Here the ditch was opened for the use of plaintiff's land and not for defendants' land (Tr. 8, 14, 80, 96). The ditch is used exclusively by plaintiff for her land (Tr. 80, 82, 96). The ditch is a burden to the defendants, is injurious to their land and causes damage to them

(Tr. 81, 90). Such facts makes this case more like the Zollinger case.

The court said:

"The facts of this case do not bring it within the above quoted rule from *Harkness v. Woodmansee* because the evidence does not support the proposition that this road was opened by the landowner for his own use. The record shows that the landowner used the road only infrequently and then used only a portion of it. Zollinger used the road at such times as he desired which was much more frequently than the landowner and Zollinger used the entire length of the road not just part of it.

"The evidence shows that the strip of land used was not readily susceptible for use as farm land because it was higher than the surrounding land and difficult to irrigate. It is contended that because of the condition of the land the landowner had no reason for keeping persons from using the land and therefore a normal inference would be that the use was permissive . . . Again the facts of the case do not justify the suggested inference. This land was enclosed by a fence. The landowner was using part of the strip for an irrigation ditch and part for a road. It is not in accordance with the facts to say that the landowner

had no reason for keeping other persons out."

Plowing over the ditch, covering it up, and dragging equipment through the ditch would be inconsistent with any supposed license the defendants professed to give plaintiff. Plaintiff's continual clearing of the ditch and using it shows a use of the ditch as though it were her own and hence adverse to the defendants (Pioneer Investment & Trust Co. v. Board of Education of Salt Lake City, 35 Utah 1, 99 P. 150, 151-2). The lower court clearly erred in refusing to instruct the jury that if they found an open, visible, continuous, and uninterrupted use by the plaintiff for twenty years that they could presume that the use by the plaintiff was adverse to the defendants.

The importance of ditches in arid Utah cannot be over emphasized. Many acres of land have been cultivated and made useful through irrigation water. Many of the farms now using these lands depend on ditch rights acquired by long continued and unmolested user. A pronouncement by this Court forcing plaintiff to resort to eminent domain proceedings in order for her to continue to have a garden might well be ruinous to some farmer who irrigates his land through ditches acquired in a similar manner. If plaintiff has not acquired a right to use this ditch through long, continued, open, notorious, exclusive, and unmolested user under claim of right for over twenty years, "then the law has proved to be a mere delusion and a snare" to her as this

Court stated in *Holm v. Davis*, *supra*,  
p. 406.

We submit that the judgment should  
be reversed.

Respectfully submitted,

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and Appellant.