

1981

# Gus Chournos and Veve Chournos v. Nick D'Agnillo, Et Ux. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

GUS CHOURNOS and  
VEVE CHOURNOS,

Plaintiffs  
and Appellants,

v.

NICK D'AGNILLO, et ux.,

Defendants  
and Respondents.

CASE NO. 12

BRIEF OF APPEAL

Appeal From the Judgment of the  
Judicial District Court of the

State of

THE HONORABLE THE  
DISTRICT COURT

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Attorney for Defendants  
And Respondents

## TABLE OF CONTENTS

STATEMENT OF THE KIND OF CASE . . . . .	1
DISPOSITION IN LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF FACTS . . . . .	2
ARGUMENT . . . . .	5
POINT I.	
APPELLANTS ACQUIRED A RIGHT-OF-WAY BY PRESCRIPTION AS AGAINST RESPONDENTS . . . . .	5
POINT II.	
THE COURT ERRED IN NOT RE-OPENING TRIAL FOR THE PURPOSE OF TAKING TESTIMONY OR FOR ALLOWING OF NEW TRIAL REQUIRED BY SURPRISE TESTIMONY . . . . .	11
POINT III.	
RESPONDENTS HAVE NO RECORDED TITLE TO RIGHT-OF-WAY CLAIMED BY APPELLANTS AND HAVE NOT ACQUIRED RIGHTS BY ADVERSE POSSESSION OR BY PRESCRIPTIVE RIGHTS . . . . .	15
CONCLUSION . . . . .	16

# TABLE OF AUTHORITIES

## CASES CITED

<u>Anderson v. Bradley</u> <u>590 P.2d 339</u> (Utah, 1979) . . . . .	14
<u>Anderson v. Osguthorpe</u> <u>29 Utah2d 32</u> 504 P.2d 1000 (1972) . . . . .	10-15
<u>Big Cottonwood Tanner Ditch Company</u> <u>v. Moyle</u> <u>159 P.2d 596</u> 174 P.2d 148, 155 . . . . .	8
<u>Buckley v. Cox</u> <u>247 P.2d 277</u> . . . . .	15
<u>Dahnken v. George Romney &amp; Sons</u> <u>184 P.2d 211</u> . . . . .	8-15
<u>Financial Credit Corporation v. Douglas</u> <u>239 P.2d 1002</u> (Ida., 1951) . . . . .	14
<u>Morris v. Blunt</u> <u>161 P.2d, 1127</u> . . . . .	15
<u>Richards v. Pines Ranch, Inc.</u> <u>559 P.2d 948 (1977)</u> . . . . .	9-15
<u>Richins, et al. v. Struhs</u> <u>412 P.2d 314 (1966)</u> . . . . .	10-15
<u>Zollinger v. Frank</u> <u>175 P.2d 714 (1946)</u> . . . . .	6-7-8

## REFERENCES

<u>Thompson On Real Property</u> <u>Section 394, Vol. 1, p. 509</u> . . . . .	7
<u>Easements</u> <u>17 AmJur. 981</u> <u>Section 72</u> . . . . .	7

IN THE SUPREME COURT OF THE  
STATE OF UTAH

GUS CHOURNOS and	)	
VEVE CHOURNOS,	)	
	)	
Plaintiffs	)	CASE NO. 17362
and Appellants,	)	
	)	
v.	)	
	)	
NICK D'AGNILLO, et ux.,	)	
	)	
Defendants	)	
and Respondents.....	)	
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BRIEF OF APPELLANTS  
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STATEMENT OF THE KIND OF CASE

Appellants filed a Complaint for Declaratory Judgment to establish a right-of-way by prescription in the Appellants as against the Defendants and Respondents.

DISPOSITION IN LOWER COURT

The Lower Court granted Judgment to the Respondents quieting title of Respondents, and denied to Appellants a right-of-way by prescription, and further denying to the Appellants' Motion for a new trial.

## RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the Judgment of the Lower Court in denying Declaratory Judgment to the Appellants, and further to seek as an alternative thereto that this Court grant to the Appellants the right of new trial or upon reconsideration of the evidence before the Court, and the totality of the record, grant Judgment to the Appellants.

## STATEMENT OF FACTS

The Appellants are owners of property contiguous to that of the Respondents, and claim a right-of-way by prescription, by reason of continued use of right-of-way by the Appellants' and by the prior owners of the property acquired by the Appellants for a period substantially in excess of twenty (20) years, during which there was an open, notorious and adverse use of the right-of-way.

The Respondents' property was conveyed from a Becker to Giuseppe D'Agnillo and his wife in December, 1939, and in the description of the property, there was excepted from the conveyance to D'Agnillo, the following described property to-wit:

Excepting a right-of-way 14 feet wide, the center line of which is described as follows:

Beginning at a point 567.6 feet North and North 88°34' West 167.2 feet from the Southeast Quarter (SE 1/4) Section, and running thence North 1034 feet, as same is described and accepted in Deed recorded August 23, 1911, in Book 67 of Deeds, at Page 278.

(Plaintiff's Exhibit 6P). The same property was again conveyed in April, 1949, by Giuseppe D'Agnillo to his wife, containing the exception of the 14-foot wife right-of-way. (Exhibit 7P)

A conveyance was made then by the wife Maria D'Agnillo to herself and a Nicola D'Agnillo as joint tenants on March 23, 1959, and contained therein the exception to the right-of-way of 14 feet. (Plaintiff's Exhibit 8P)

A Warranty Deed conveyed the property from Maria and Nicola D'Agnillo to Maria D'Agnillo and Nicola D'Agnillo on April 10, 1975, giving each a one-half interest as tenants-in-common, and containing an exception of 14 feet for a right-of-way. (R 25)

The conveyance was made by Maria D'Agnillo, as a widow, to Nicola D'Agnillo, the Respondent herein, Joseph D'Agnillo and John D'Agnillo, the same property, again subject to the existing right-of-way of 14 feet, which conveyance was made also on April 10, 1975, (R 26), and subsequent thereto, a Warranty Deed conveyed the property from Nicola D'Agnillo and his wife, Maria D'Agnillo, to Nicola D'Agnillo, Joseph M. D'Agnillo, and John D'Agnillo, as joint trustees for Grantor, under a Trust Agreement dated April 10, 1975, wherein Nicola D'Agnillo was the Trustor, and again made the property subject to the existing right-of-way of 14 feet. (R 27) The record contained in the transcript of testimony shows that a Warner purchased the property in

1951, and used it for motor vehicle repairs, and that both Warner and his customers used the right-of-way. (T 109)

There were a succession of tenants, commencing in 1951, which evidenced that there was no fence across the right-of-way, and that people used the right-of-way for ingress, and egress, loading and unloading, and parking. (R 109, 110) That as a matter of fact, one Stephens used the property from 1944 to 1951, and that the right-of-way was used. (T 111) That there was no fence existing, nor were any of the successive tenants, except the Appellant, ever restricted from the use of the 14-foot right-of-way. (T 112, 113, 114, 115, 120, 122, 123)

The Appellant was the tenant of the dominant estate commencing in 1964, and both he and his customers used the 14-foot right-of-way. (T 136) The record further evidences that the present tenant and owner, Appellant, of the adjoining property used the 14-foot right-of-way, not only from 1964, but subsequent thereto when he purchased the property in 1969; and that at all times made use of the 14-foot right-of-way for the purpose of loading and unloading to his place of business, as well as for personal and customer parking. (T 131-139)

The record reveals that there was a continued existence of the right-of-way since 1911, and a continuous use of the right-of-way by owners of the property presently owned by



the Appellants from 1944, until the property was fenced off by the Respondents in 1977, and that at no time until the erection of the fence by the Respondents was any objection made to the open and notorious use of the property by the successive owners of the dominant estate over the servient estate, and all such use was open, notorious and adverse without objection or consent of the Respondents or their predecessors in ownership of the servient estate.

The current action before the Court was brought by the Appellants against the Respondents in a suit filed September 14, 1978, in the Lower Court, seeking Declaratory Judgment as to the right of the Appellants to the continued use of the right-of-way by right of prescription.

### ARGUMENT

#### POINT I.

#### APPELLANTS ACQUIRED A RIGHT-OF-WAY BY PRESCRIPTION AS AGAINST RESPONDENTS.

The record stated in the Statement of Facts, clearly shows that the Respondents at all time conveyed and received the property which they owned contiguous to the property owned by the Appellants, and at all times since 1911, an exception was made in each conveyance as to the 14-foot right-of-way, which is in question before the Court, and is the property over which the Appellants claim a right-of-way by prescription.

In Zöllinger v. Fränk, 175 P.2d 714 (1946), this Court held:

Where a claimant (to an easement) has shown an open and continuous (and interrupted) 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 a burden of showing that the use was under him instead of against him.

There is no evidence in the record which tends to rebut the presumption of adverse use by the Appellants, and the Appellants' predecessors.

There is no evidence whatsoever in the record that any of the users of the 14-foot right-of-way made use of said right-of-way under the Respondents or their predecessors.

If the Respondents ever had any claim as against the 14-foot right-of-way, it was never established by any use made by the Respondents or their predecessors, and that no evidence was presented to show that at any time the Respondents cultivated or made any constant use of the 14-foot right-of-way, and the claim of the Respondents, if it is to exist at all, would require the establishment by the Respondents of the fact that they had some basis for claim of right to the 14-foot right-of-way (notwithstanding the continuous exclusion of said right-of-way from lands conveyed to the Respondents and their predecessors), or that the Respondents had somehow established by adverse position or

prescriptive use, the right to the 14-foot right-of-way, and had subsequently consented to allow the use of same by the Appellants and their predecessors of which the record is entirely bare of any such claim.

In Zöllinger v. Fränk, supra, the Court held that the nature of the use necessary to give rise to a prescriptive easement would be evidenced by showing that the use was against the owner, as distinguished from under the owner. The Court, in adopting the rule, stated in Thompson on Real Property, Section 394, Vol. 1, p. 509, and in Section 72, Easements 17 AmJur. 981, that the rule is:

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 a 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.

The Supreme Court adopted the rule to be:

We think the better rule is that described as the prevailing rule in the above question. That is where a claimant has shown an open and continuous use of the land for a prescriptive period (20 years in Utah) the use will be presumed to have been against the owner, and the owner of this servient estate to prevent the prescriptive easement from arising has the burden of showing that the use was under him instead of against him.

In Big Cottonwood Tanner Ditch Company v. Moy,  
159 P.2d 596, (on rehearing) 174 P.2d 148, 155, where 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.

None of the conveyances of the property as set forth  
herein from 1911 to the instant owners of the servient  
estate conveyed the property without excepting from the con-  
veyance, the 14-foot right-of-way in question.

This Court further held in the Zöllinger case, that the  
conveyance of the servient estate, in and of itself during  
the descriptive period, does not interrupt the running of  
that time (prescriptive acquisition).

In Dahnken v. George Romney & Sons, 184 P.2d 211, the  
Court held at p. 215, the adoption of the Zöllinger rule for  
the adoption of the rule in Zöllinger, supra, of the manner  
in which a use will be presumed to have been against the  
owner, and that the burden was on the servient estate to  
show that such use was under instead of against the servient  
estate.

It is submitted that there is no evidence in the record  
to rebut the presumption of adverse use by the Appellants,  
nor by the predecessors and ownership of the property of the  
Appellants.

In Richards v. Pines Ranch, Inc., 559 P.2d 948 (1977),  
this Court held:

A right-of-way by prescription is established by open, notorious, adverse use thereof for a period of 20 years. Once the adverse use is established for the 20-year period, the burden is showing that it was not adverse as upon the owner of the servient estate.

The Court further held in the Richards case, supra:

It would seem that his Honor also erred in thinking that the adverse use had to be regular. All that is required is that the use be as often as is required by the owner of the dominant estate. While the use made could limit the future use, it does not entirely prevent a prescriptive use to cross the defendant's land.

It is submitted to the Court that the Appellants herein do not claim title to the land by adverse possession, but they do claim a prescriptive easement in and over the land in question and for which the land has been used, namely the parking of motor vehicles, use for ingress and egress and use for loading and unloading merchandise to the premises of the dominant estate, and that the use of the property of the servient estate has been for over 20 years, and that all such use was as against any claim of the Respondents and was not with consent of the Respondents, nor have the Respondents evidenced any claim to title to said property, except by the recent erection of a fence to exclude the Respondents from use of said property.

This Court held in Anderson v. Osguthorpe, 29 Utah 32, 504 P.2d 1000 (1972):

The assumption, however, that one cannot acquire an interest in property by adverse possession when the legal owner pays the taxes thereon is erroneous. One will not be able to acquire a title to the property, without complying with the statutory provisions relating to adverse possession, but that does not preclude interest from attaching after an adverse use for 20 years.

In the instant matter before the Court, the fence was erected in 1977, by the Respondents, and this Court held in Richins, et al. v. Struhs, 412 P.2d 314 (1966), that the use of a strip jointly established and used by landowners for more than 40 years as a common driveway, constituted an open, notorious, continuous and adverse use for more than 20 years, and that a prescriptive right to continued use was established.

The Court stated in the Richins case, supra, as follows:

It is our opinion that a reasonable conclusion to be drawn from the facts here shown, were the parties (predecessors) jointly established and used a driveway on what they thought their common boundary is that the use meets the requirements of being open, notorious, continuous and adverse years for more than 20 years, and therefore has established a prescriptive right to continue to so use it.

POINT II.

THE COURT ERRED IN NOT RE-OPENING TRIAL FOR THE PURPOSE OF TAKING TESTIMONY OR FOR ALLOWING OF NEW TRIAL REQUIRED BY SURPRISE TESTIMONY.

The Appellant made a motion for new trial and/or motion to re-open for further evidence, based upon testimony made by witness for the Respondent that a previous occupier of the dominant estate (Appellants' property) had placed telephone poles as a barrier to prevent use of the 14-foot right-of-way.

During all of the discovery made by the Appellants and in depositions taken prior to trial, no allegation or claim was made as to such placing of such telephone poles by Ray Hansen.

The witness for Respondents further gave testimony at time of trial as to an alleged conversation between the witness and Ray Hansen. Prior to trial date, the counsel for Appellants advised the counsel for Respondents that Ray Hansen would be a witness, but at time of trial, Ray Hansen was totally disabled and unable to physically appear as a witness, and the Appellants without knowledge of the testimony of Respondent's witness as to an alleged conversation of Mr. Hansen in the placing of poles as a barrier to use of the 14-foot right-of-way, and not knowing that such a claim would be a matter in issue, and proceeded to trial.

At time of motion of Appellants for new trial or re-opening of trial for the purpose of taking the testimony of Mr. Hansen, an Affidavit of Mr. Hansen was attached thereto which was totally contradictory to the testimony of Respondents' witness and in denial of the allegations made by the Respondents' witness.

The Court, in its Finding of Fact, upon which the Court granted Judgment and Decree quieting title in favor of the Respondents, relies substantially upon the testimony of Respondents' witness in regards to the alleged conversation with Ray Hansen, accepted the allegation of the witness of the Respondents, when the Court made the findings:

Mr. Ray Hansen agreed to accomodate the defendants and did place a series of old utility poles along what had before been the east fenceline of the right-of-way to prevent vehicles from driving onto defendants land or onto the right-of-way. These utility poles lay in place for approximately two years on or about 1961 and 1962. While said utility poles were in place, they completely closed off any possibility of any vehicular use of the 14-foot right-of-way by plaintiffs' predecessor in interest.

The Appellants' Motion for New Trial (R 47-49) sets forth Appellants' basis for request for new trial, and is supported by Affidavit (R 43-46), which is the sworn Affidavit of Ray Hansen as to his illness and inability to be present at time of trial, and states that his son, William Hansen, was the prior owner of the business known as "Club Somoa", which operated out of the premises now owned



by the Appellants (R 44). The records shows that Hansen had a lease upon the premises for the years 1961, 1962, and 1963, and was prior to the leasing of the premises by the Appellants in 1964. (T 118)

The Hansen Affidavit states that he was familiar with the property for a period of 10 years prior to the leasing of the premises and had observed the use of the right-of-way for that period of time (R 45), which would have been for a period extending back to approximately 1951.

The Affidavit of Ray Hansen further sets forth that the affiant's customers and the affiant used the 14-foot right-of-way on a regular basis; further that the affiant has installed an additional light pole to illuminate the parking area, which light pole was installed by Utah Power & Light Company during the period of tenancy of the affiant. The affiant further states that the only conversation that he had with D'Agnillo was concerning cleaning up of beer bottles and beer cans, which were thrown onto the area proper of the D'Agnillos, and not upon the right-of-way, and the affiant did undertake to pick up bottles and beer cans on the fenced in area of the servient estate, which did not include the 14-foot right-of-way. (R 44-45)

The affiant further testified that he placed the telephone poles along the fence of the Respondents in order to protect the fence from being broken down by cars parking.

and that the poles were placed at the edge of the easement property, but did not in any way interfere with the right-of-way, and the utilization of the right-of-way, and further that the right-of-way was utilized during the entire time by affiant for ingress and egress, and for patrons of the business.

The affiant further stated under oath that for a period of 4 1/2 years, he observed the use of the right-of-way 5 days per week on daily basis, and that at all times the patrons used the right-of-way at all those times. (R 45)

The affiant further stated in his Affidavit that in addition to the use of the right-of-way for patrons ingress, egress and parking, that suppliers and local citizens and residents in the area used the right-of-way, and that the affiant kept the right-of-way filled with gravel, so that the area would be passable at all times. (R 46)

The Appellants through searching depositions and interrogatories, had no knowledge that the Appellants would make claims that telephone poles were installed by an occupant of the dominant premises to allegedly terminate and prevent the use of the right-of-way easement and that the Appellants are entitled to a new trial, pursuant to Rule 59 of the Utah Rules of Civil Procedure, as amended in 1957, with specific reference to § 59(a) and § 59(c), and submit to the Court holdings of the Court in Financial Credit Corporation v. Douglas, 239 P.2d 1002 (Ida., 1951); Anderson v. Bradley, 590 P.2d 339 (Utah, 1979).

POINT III..

RESPONDENTS HAVE NO RECORDED TITLE TO RIGHT-OF-WAY CLAIMED BY APPELLANTS AND HAVE NOT ACQUIRED RIGHTS BY ADVERSE POSSESSION OR BY PRESCRIPTIVE RIGHTS.

It is submitted to this Honorable Court that the deeds conveying the properties from 1911 to title in present Respondents, excepted from the conveyance the 14-foot right-of-way, and that there is no title to said property by deed as evidenced by the Exhibits presently before the Court showing the continued conveyance of the property of the servient estate, with the right-of-way being excepted by each conveyance.

It is further submitted that there is no affirmative evidence in the record showing the acquisition by use or occupancy of the right-of-way by the Respondents in that no such right can vest in the Respondents to said 14-foot right-of-way by reason of any claim to such right made by the Respondents, either by adverse possession or by prescriptive rights; and that the law of the State of Utah is specific and clear as to the manner of acquiring right of adverse possession or prescriptive use. See, Richards v. Pines Ranch, supra; Zollinger v. Frank, supra; Buckley v. Cox, 247 P.2d 277; Morris v. Blunt, 161 P.2d, 1127; Dahnken v. Romney, supra; Anderson v. Osguthorpe, supra; Richins v. Struhs, supra.

### CONCLUSION

It is therefore submitted to this Honorable Court that the record before the Court clearly evidences the establishment of a right by prescriptive use by the Appellants, and that the use by the Appellants has been without the acquiescence or consent of the Respondents, and that the Court should award Judgment on the case to the Appellants; or in the alternative, that the Appellants were wrongfully denied the right of re-opening the case for the purpose of considering the testimony of Ray Hansen, by reason of surprise in the claims of the Respondents at time of trial, and that if this Court does not find that the Appellants are entitled to Judgment, that the Court remand the case for retrial, so that the testimony of Ray Hansen may be included in the record; and that the Court or trier of facts may judge the credibility of Ray Hansen as against the testimony of the witness who testified in a manner contrary to that of Ray Hansen.

Respectfully submitted this 26 day of January, 1981.

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BY 

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20 day of January, 1981, I mailed a true and correct copy of the above and foregoing Brief of Appellants, by placing same in the United States Mail, postage prepaid and addressed to the following:

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