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Elmer J. Richins, Blanche E. Richins, and Zella F. Harries v. Merle R. Struhs and Jackie Struhs, His Wife v. Leslie C. Gold and Floris C. Gold, His Wife; William F. Salt Ad Della Jo Salt J. His Wife; and Clara M. Whipple : Brief of Defendants-Respondents Merle R. Struhs and Jackie Struhs : Brief of Respondents

IN THE SUPREME COURT
of the
STATE OF UTAH

ELMER J. RICHINS, BLANCHE E. RICHINS, and ZELLA F. HARRIES,
Plaintiffs and Appellants,

vs.

MERLE R. STRUHS and JACKIE STRUHS, his wife,
Defendants and Respondents,

vs.

LESLIE C. GOLD and FLORIS C. GOLD, his wife; WILLIAM F. SALT and DELLA JO SALT, his wife; and CLARA M. WHIPPLE,
Third Party Defendants.

Case No.
10402

BRIEF OF DEFENDANTS-RESPONDENTS MERLE R. STRUHS and JACKIE STRUHS

Appeal from the Judgment of the Third Judicial Court in and for Salt Lake County, State of Utah.
HONORABLE A. H. ELLETT, Judge

JOE P. BOSONE and
ALLEN H. TIBBALS
Suite 604 El Paso Natural Gas Bldg.
315 East 2nd South Street
Salt Lake City, Utah
Attorneys for Defendants-Respondents Merle R. Struhs and Jackie Struhs.

RAWLINGS, WALLACE, ROBERTS & BLACK
330 Judge Building
Salt Lake City, Utah
Attorneys for Plaintiffs-Appellants

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IN THE SUPREME COURT
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ELER L. RICHINS, BLANCHE E. RICHINS, and ZELLA F. HARRIES, *Plaintiffs and Appellants,* vs. MERLE R. STRUHS and JACKIE STRUHS, his wife, *Defendants and Respondents,* vs. LESLIE C. GOLD and FLORIS C. GOLD, his wife; WILLIAM F. SALT and DELLA JO SALT, his wife; and CLARA M. WHIPPLE, *Third Party Defendants.*	Case No. 10402

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STATEMENT OF THE NATURE OF THE CASE

Plaintiffs-Appellants, as owners of a tract of land adjoining land owned by defendants-respondents in Killyon Subdivision, Emigration Canyon, Salt Lake County, Utah, sought in the Court below to enjoin the erection and maintenance by defendant-respondents of a boundary fence between their respective properties, claiming it interferred with a prescriptive right of plaintiffs-appellants to use a driveway on defendants-respondents land as a means of access to the land of plaintiffs-appellants.

Hereafter, in this brief, the parties will be referred to as in the Court below.

DISPOSITION OF THE CASE IN LOWER COURT

The case was tried to the Honorable A. H. Ellett, judge, sitting without a jury. The Court denied the relief sought by plaintiffs, dismissed plaintiffs' complaint with prejudice, dismissed the cross claims against the Third Party defendants with prejudice, and quieted title of the defendants against the claims of the plaintiffs to the property described in the defendants counterclaim and permanently restrained plaintiffs from interference with the said property.

RELIEF SOUGHT ON APPEAL

Defendants seek the affirmance of the judgment of the Court below.

STATEMENT OF FACTS

Defendants find the Statement of Facts as set forth in the Plaintiffs' brief, argumentative rather than an orderly presentation of proved or admitted facts. For this reason defendants elect to make their own statement of facts.

Defendants acquired from Leslie C. Gold and Floris C. Gold, his wife, by warranty deed dated September 12, 1960 the following described property:

> The upper or north half of Lot 31, and the lower or southerly half of the lower or south-

erly half of Lot 33, Block 2, Killyon Subdivision, Emigration Canyon, Salt Lake County, Utah. (R. 11)

Gold and his wife had acquired the described property from William F. Salt and Della Jo Salt, his wife, by warranty deed dated the 8th day of June 1960. (R. 11)

Salt and his wife in turn acquired the described property by warranty deed from Clara M. Whipple on the 29th day of May 1956. (R 12) In none of these deeds was there any reference to any right of way or easement to which the property was subject. (R. 12)

The tract of land next adjoining that of defendants on the north is owned by the plaintiffs. Plaintiff Zella Harries owns an undivided one-fourth interest in the property, plaintiff Elmer J. Richins owns an undivided one half interest as a joint tenant with his wife, Blanche Richins, who is also the owner of the remaining interest in her own right. (R-51 Ex P-2, P-3) The legal description of the property owned by plaintiffs is,

> The lower half of the upper half and the upper half of the lower half of Lot 33, Block 2, Killyon Subdivision, Emigration Canyon, Salt Lake County, Utah. (R-51 — Ex. P-2, P-3)

The property now owned by plaintiffs was acquired by Leo A. Jones from the Emigration Canyon Improvement Company by deed dated July 10, 1912. (R 83, P-7) Leo A. Jones remained the owner of

the said tract until February 18th, 1952 when he gave the property to his four daughters, Zella Fay Harries, Blanche Evelyn Richins, Mary Maxine Clark and Bonnie Joyce Graves. (R-50 Ex. P. 2) In none of the deeds affecting conveyance of the Jones Title was there any mention or reservation of the right of way or easement involved in this litigation. (R. 51 Ex. P. 2 & 3) John W. Whipple, husband of Clara M. Whipple, acquired the adjoining tract of land also from Emigration Canyon Improvement Co. in 1912, and built a cabin on the tract the year following. (R. 83) Leo A. Jones was married to the sister of John W. Whipple. (R-56, 83, 97) The two families were on good terms and neighborly with each other. (R. 94, 107) Up until 1918 the canyon property was reached by the Jones and Whipple families respectively by taking the street car or train up Emigration Canyon and then walking to the property from the nearest stop. (R-97, 99, 100) They crossed the creek to their respective properties over small footbridges, one of which served the Whipple property and one of which served the Jones property. (R-100) The railroad ceased to run in about 1918. (R-134) Mr. Whipple acquired a car and he and his sons built a bridge of railroad ties across the creek so that they could drive from the road across the creek onto their property. (R-100) The details of the construction of the bridge and the location thereof with relation to property lines are obscured by the passage of

time and the failing memories of the participants. Mr. Jones testified that his small son helped bring down the railroad ties used to build the bridge. (R-84, 86) Mrs. Whipple denied that Mr. Jones or his son participated. (R-100) One of the Whipple children, Mrs. Pettit, remembered the building of the bridge as rather a family project with all of the uncles and nephews joining in. (R-135) On one point everyone was in agreement, that there was no discussion of whose property the tie bridge was located on (R-121) and that it was built to serve the Whipples who owned a car. (R-87, 93, 107, 113) In fact Mrs. Whipple said that she never even thought about the boundary at the time that the bridge was built or thereafter. (R-114) Mr. Jones admitted that he did not own a car when the bridge was built but rode up the canyon with his brother-in-law, Mr. Whipple, for more than two years after the bridge was built before he acquired a car. (R-93, 114) and that there was never any issue over the driveway or bridge (R-94) between Jones and Whipple. As originally drawn the complaint set out a claim on behalf of the plaintiffs based on an actual ownership of part of the land involved in the driveway. (R-2, P. V) This was abandoned at pre-trial, however. (R-19) The original driveway was only the width of a railroad tie. (R-91, 103, 136) The present driveway is at least, even by the estimate of Mr. Richins, the plaintiff, some 4 to 5 feet wider than the original driveway. (R-157) The change in

the driveway came about somewhere between 1934 and 1937 and resulted from the fact that the county changed the main road up Emigration Canyon. (R-56, 73, 87) At the time that the change was made by the county, and the new culvert put over the stream, the north end, that is the end of the culvert adjacent to the property of the plaintiffs, was placed in the same position as the old bridge of railroad ties as is shown by a clump of birches which it was admitted stood at the end of the original tie bridge and still stands today at the end of the culvert placed by the county. (R-88, 137, 139, 140, 157, 158, 159) The additional width, therefore, was gained by encroaching further upon the property now owned by the defendants Struhs. (R-140) The change in the county road up Emigration Canyon resulted in the abolition of the parking area east of the creek which had theretofore been used by the Jones family, predecessors in interest to the plaintiffs. (R-160, 74, 75)

From time to time in the intervening years, the Whipples had built up the earth fill across the culvert. (R-125) After Mr. Struhs acquired the property, he rocked up the end of the culvert and filled it in an additional 28 to 30 inches onto his property. (R-149) From the edge of the culvert, as it is now placed on the north side next to the plaintiffs, to the point at which Mr. Struhs placed the fence which created the controversy is some 51 inches. (R. 147) The length of a railroad tie, a fact of

which the lower Court took judicial notice, is only 6 feet. (R-30, F-14) Exhibit D-11 shows that from the edge of the culvert to the edge of the traveled surface of the driveway which lies, according to the survey (Ex. D-11), entirely on the land owned by Struhs, is a distance of 48 inches or 4 feet. Thus, Mr. Struhs placed the fence 3 inches inside of his own property line as established by the survey. (R-117 & Ex. D-11) and the entire travelled portion of the driveway even under the testimony of Mr. Jones lies entirely on defendants' ground. (R-147, Ex. D-11)

In April, 1952, a landslide occurred which demolished the Leo Jones house. The landslide also completely filled the parking area used by Jones so that parking of cars on the land owned by Jones was rendered virutally impossible. (R-60, 70, 106, 108, 122, 130, 145) This condition existed until after Mr. Struhs bought the property. (R-145) Some time in the intervening years, after the property claimed by plaintiffs was given by Leo Jones to his daughters, a cabin of sorts was reconstructed on the Jones' property. (R-60, 71)

Richins, present plaintiff and husband of Blanche Richins, acquired no actual interest in this property in his own right until April, 1957. (R-29, Finding No. 4) It is freely admitted by Leo A. Jones and by Mrs. Whipple, the respective owners of the adjoining tracts now claimed by plaintiffs and defendants respectively, that there was never

any question raised of the location of the boundary line between their respective properties or of the use of the driveway during their respective ownerships. (R-94, 107, 114) Mrs. Whipple indicated that she thought that the boundary line was marked by an iron stake which stood in the ground for many years immediately to the north side of the old tie bridge over the creek and which was still there for some years after the new culvert was placed. (R-101) Mrs. Whipple indicated that she had never, until the day of the trial, heard that the boundary line was marked by a tree next to the corner of the Whipple home. (R-103) From 1952, when the landslide occurred and the Jones' house was destroyed, until 1961 or 1962 there was never any clear-cut evidence of use of the driveway by the plaintiff Richins or his wife and no claim was ever asserted or testimony offered of any use by plaintiff Zella Harries. The plaintiff claimed to have made an occasional use after the landslide but no effort was made to prove the extent thereof. (R-70, 71)

When Struhs began to use his house the year round and desired to fence his land was the first occasion that it became manifest and clear that anyone on the plaintiffs' side claimed the right to use the driveway other than permissively. (R-148) There had been one or two incidents immediately prior to this time when Richins had requested Struhs to remove his car parked in the driveway, but these incidents were very shortly prior to putting up the

fence (R-60, 61) and occurred after Struhs bought the property. Defendants, in the interest of neighborliness and good will, despite the contention that the plaintiffs had no right whatever to use the driveway, made a formal offer through the court to put a culvert across the creek and put in a driveway at defendants' expense on plaintiffs' land so that Richins could reach his property from the road without traversing any portion of the defendants' land. (R-19, 20) This offer was rejected by Richins as is shown by the record. (R-28)

ARGUMENT

POINT I.

THE DRIVEWAY, WHICH PLAINTIFFS CONTEND THEY HAVE A RIGHT TO USE, WAS NOT A JOINT OR COMMON DRIVEWAY INTENTIONALLY LAID OUT AND CONSTRUCTED ON PROPERTY OWNED BY THE PREDECESSORS OF PLAINTIFFS AND DEFENDANTS, BUT WAS BUILT ON THE PROPERTY OF THE DEFENDANTS' PREDECESSOR IN TITLE, WHIPPLE, FOR HIS OWN USE AND AS IT STANDS TODAY INVOLVES NO PROPERTY OF THE PLAINTIFFS. JOINT DRIVEWAY CASES ARE NOT APPLICABLE PRECEDENT UNDER THE FACTS OF THIS CASE.

The plaintiffs sought originally in the commencement of this action to base their claim of right to utilize the driveway in question on the theory of the construction of a joint, common driveway utilizing property donated by plaintiffs' and defendants' predecessors in title respectively, utilizing an equal portion of the property of each. (R-2,

P. III) This claim was abandoned at the pre-trial and the plaintiffs chose to rely solely upon a claim of a prescriptive right acquired by adverse possession or adverse use. (R-19) Plaintiffs nevertheless persisted throughout the trial, in the argument before the lower Court and in the presentation to this Court, place emphasis on the purported contribution by plaintiffs to the creation of the driveway. The trial court permitted introduction of such evidence and the record is replete with the efforts by the plaintiffs to establish the fact that the boundary line between the respective properties lay somewhere in the driveway. Mr. Richins, whose testimony was characterized throughout the trial by an amazing lack of candor and frankness, attempted to claim that the boundary line lay in the middle of the driveway. (R-157) Mr. Richins, likewise, attempted to claim that there was a clearly demarked boundary by trees which was recognized by both parties. (R-67, 68) This was denied by Mrs. Whipple and by all of the witnesses of the defendant. (R-103, 119, 120, 128, 129, 142) The effort by Richins to lift himself by his own boot straps in attempting to establish a recognized and established boundary line between the respective properties favorable to his contention is reminiscent of the situation depicted in the musical comedy "Guys and Dolls" where Big Julie, a gambler from Chicago, suffering serious losses, compelled the other gamblers to play a round with his dice from which he

had removed the spots but remembered where they used to be. Mr. Richins, without the benefit of any other than his own testimony not even supported by his father-in-law, Mr. Jones, tried to establish unilaterally, a boundary line between these properties. He derided the survey which the defendants had caused to be made, Exhibit D-11, (R-63) but though the plaintiffs had the burden of proof to sustain this point, produced no tangible evidence of the location of the boundary. Plaintiffs relied solely on the testimony of Richins himself whose bias is manifest from the mere reading of the Transcript of Testimony.

Under the proof offered in the instant case, the plaintiffs cannot sustain a right based upon ownership of any portion of the driveway, for as it is presently placed, the traveled surface of the driveway is at least 2 feet south of the point at which Leo A. Jones testified he believed the boundary line to be at the time the original tie bridge was constructed. (R-91, 138, 157, 158) Even Mr. Richins admitted that the clump of birches standing at the north end of the bridge or culvert was there in the same relative position at the time that the tie bridge existed. (R-157, 158) This being true, and it being shown that the north end of the culvert is now 51 inches north of the disputed fence line, and 48 inches north of the traveled surface of the driveway, there can be no claim made that the present driveway, even under the most favorable

view of the plaintiffs' evidence, is upon land owned by the plaintiffs. Mr. Richins, while admitting the extension of the width of the bridge and of the driveway, refused to admit that the boundary line did not move as the driveway was extended. His testimony on this point was evasive in the extreme. He placed the boundary line, conveniently in the middle of the driveway (R-157) though Mr. Jones, owner at the time the tie bridge was built and plaintiffs' predecessor in title, admitted that no more than one third of the land in the original driveway was his at any time and probably not more than two feet. (R-91) Mr. Richins, while admitting that the driveway had increased in width some four to five feet, (R-157) and admitting that the end of the culvert placed by the county to replace the tie bridge, was, in so far as its position on his side in the same place as the tie bridge by referral to the clump of birch which remained constant in its position throughout the period, (R-157, 158) he nevertheless claimed that the boundary line still lay in the middle of the widened driveway. (-157) This is, of course, a mechanical impossibility.

Mr. Richins lack of truthfulness in his testimony is well illustrated in his exchange with the Judge regarding the number of cars which could be parked on his side of the driveway.

> "Q. The area that would be west of the creek, how many cars could you park on the area that is north of the driveway and west of the stream?

A. Well, if you want to ask that question, I could tell you quite a few.

Q. THE COURT: He's already asked the question. Just answer it.

A. Twenty-five, but you can say it is wrong, see. It all depends.

THE COURT: Well, if you want me to say it is wrong, just —

A. You can put ten.

THE COURT: I want you to answer his question, and I want you to answer it truthfully. I don't care what he says about it. I want you to tell me the truth. If you don't intend to tell me the truth, get off the stand. No need of my listening to you if it is not true.

A. I never did measure.

MR. BLACK: I wonder if counsel would clarify the question.

THE COURT: It is clear enough. He just asked how many cars could he park on their property west of the stream. He says he could tell us twenty-five, but he wouldn't believe it. I don't like that kind of answer. It is taking my time for nothing.

A. Well, I will say you can put twelve cars in there if you parked them right.

Q. Sir, now, this is in 1932 before the change of the road?

MR. BLACK: No, I believe —

A. You had it the other way.

MR. BLACK: I believe that that question was geared to after the culvert was —

THE COURT: Let the witness tell what the facts are. I thought it was before the road was changed when you were parking, but if it isn't —

MR. BLACK: Well, he said —

THE COURT: Let's find out both ways. There are no secrets. How many cars could you park on your lot, the one you now own, west of the stream before the road was changed?

A. Before the road was changed?

THE COURT: Yes.

A. Well, I wouldn't estimate it.

MR. BLACK: Well give us an estimate.

A. Well, I would say four.

THE COURT: Four?

A. And I could say ten.

MR. BLACK: Well give us your best —

THE COURT: You don't need to bother him. Go ahead Mr. Tibbals." (R-31, 32)

Mr. Jones, the owner of the land now claimed by plaintiffs at the time that the original tie bridge was put in across the creek, made no claim that he had participated in the creation of the bridge or the driveway, and made no claim that the same had been intentionally laid out by the adjoining owners to utilize portions of their respective properties in the driveway. (R-87, 91) Mr. Jones only claim to any participation in the original creation of the bridge was that his son, who was then about eight years of age, (R. 143) helped Mr. Whipple, de-

fendant's predecessor in title bring down some of the ties that were used in making the bridge. (R-91, 86)

This is a far cry from the situation which is recognized as creating a common right of way or driveway to which neither party may deny access to the other. Corpus Juris Secundum Vol. 28 on EASEMENTS at page 673 Sec. 18j as quoted by appellants' brief outlines the conditions essential to the creation of this kind of an easement or right of way as follows:

> "The mutual use by adjoining landowners of a way laid out between their lands, each devoting a part of his land to the purpose, will generally be considered adverse to a separate and exclusive use of the way be either owner. As stated in Corpus Juris, which has been cited and quoted with approval, while there are some decisions to the contrary, the weight of authority is to the effect that, where adjoining proprietors lay out a way or alley between their lands, each devoting a part of his land to that purpose, and the way or alley is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close the part which is on his own land; and in these circumstances the mutual use of the whole of the way or alley will be considered adverse to a separate and exclusive use by either party."

Appellants' problem is that the facts in this case do not support the application of this doctrine as to the case before the court. Plaintiff's predecessor

in title, Jones, made no claim that he had participated in the laying out of the driveway. He admitted he had no car at the time it was established or for at least 2 years thereafter. He admitted that Whipple did the work. He claimed his eight year old son had helped carry some of the railroad ties but no proof was offered by plaintiffs that Jones and Whipple ever mutually laid out the driveway as a joint driveway.

POINT II.

PLAINTIFFS' CLAIM TO A PRESCRIPTIVE RIGHT TO USE THE DRIVEWAY IN QUESTION IMPOSES UPON PLAINTIFFS THE BURDEN OF PROOF OF SUCH RIGHT. PLAINTIFFS FAILED TO SUSTAIN THIS BURDEN. DEFENDANTS' TITLE TO THE AREA IN QUESTION WAS THEREFORE RIGHTFULLY QUIETED BY THE COURT BELOW AS AGAINST THE CLAIMS OF PLAINTIFFS.

Plaintiffs presentation of this case on appeal is based on the assumption that the defendants have the burden of showing that the plaintiffs did not acquire a prescriptive right to the use of the driveway in question. (Appellants Brief p. 10) In so arguing, plaintiffs have lost sight of the fact that the burden in the first instance is theirs. This Court has spoken clearly and unequivocally on this point:

> "Furthermore, since the defendants claim the right to use the driveway by prescription, they have the burden of establishing such claim by clear and convincing evidence. Jensen v. Gerrard, Supra; 2 Tiffany on Real

Property 2d Ed. Sec. 519. P. 2046." Buckley v. Cox 122 U. 151 247 P2d 277.

In aid of their position, the plaintiffs have relied on a presumption of adverse use to show that their use of the driveway in question by themselves and their predecessors in interest was hostile and adverse to the defendants. It was shown that the driveway had been used by plaintiffs and their predecessors in title for more than the prescriptive period of twenty years recognized in this state as essential to establishment of a prescriptive right.

Plaintiffs attempt to rely on the theory of joint driveway as a means of creating a presumption of adverse use in plaintiffs' favor fails for the reasons argued in Point No. I of this brief. There simply was never creation of a joint driveway. There is not one word of dispute in the record but that defendants' predecessor in title John Whipple created the driveway in question for his own use. The mere fact that the eight year old son of the brother-in-law of Whipple, Jones, helped his uncle when his uncle built the tie bridge by carrying ties, does not make this a joint or common driveway. Plaintiffs' reliance on a presumption of adversity is mistaken under the facts of this case.

The law in the State of Utah is clear and unambiguous on the matter of what is required to establish a claim of prescriptive right to use of a right of way. The position of this Court has been

consistent down through the years as is shown by the following cases.

The case of *Harkness v. Woodmansee*, 7 Utah 229, 26 P. 292 states,

> "The right to a public road or private way by prescription arises from the uninterrupted adverse enjoyment of it under a claim of right known to the owner for the requisite length of time. Anciently the right to the easement arose by prescription from the use of the land for so long a time that there was no existing evidence as to when such use commenced. Its origin must have been at a time 'whereof the memory of man runneth not to the contrary.' Later the rule was changed by limiting the time of uninterrupted possession to 20 years."

This rule was cited favorably and enlarged upon and interpreted in the case of *Morris v. Blunt*, 49 Utah 243, 161 P. 1127. This case held,

> "Under the well-established rule, the use, in order that it may ripen into a prescriptive title, must, in any case, not only be adverse and continuous, and under claim of right for a period of twenty years, but it must be uninterrupted throughout that period. . . ."

In the case of *Jensen v. Gerrard*, 85 Utah 481, 39 P.2d 1070, the court there stated, quoting from page 1072 of the Pacific Report,

> "Since the defendants claimed the right to use the roadway by prescription, the burden was upon them to establish such claim by clear and satisfactory evidence. 2 Tiffany on

Real Property (2d Ed.) Sec. 519, p. 2046; 19 C.J. 958, Sec. 181; 1 Jones' Comm. on Evid. 522. Before a right of way can be acquired by prescription, the use for the prescriptive period must be peaceable, continuous, open, adverse as of right, and with the knowledge and acquiescence of the plaintiff and his grantors and predecessors in interest. Actual notice to the owner of the servient estate is not necessary if the user is so notorious that in the exercise of reasonable diligence the owner should learn thereof; then he will have constructive notice of the user which is sufficient. Dahl v. Roach, 76 Utah, 74, 287 P. 622; Bolton v. Murphy, 41 Utah, 591, 127 P. 355; Crosier v. Brown, 66 W. Va. 273, 66 S.E. 326, 25 L.R.A. (N.S.) 174; Gardner v. Swann, 114 Ga. 304, 40 S.E. 271; Schulenbarger v. Johnstone, 64 Wash. 202, 116 P. 843, 35 L.R.A. (N.S.) 941; Watson v. Board of County Commissioners, 38 Wash. 662, 80 P. 201; 2 Tiffany on Real Property (2d Ed.) Sec. 521.

"A twenty-year use alone of a way is not sufficient to establish an easement. *Here use of a roadway opened by a landowner for his own purpose will be presumed permissive. An antagonistic or adverse use of a way cannot spring from a permissive use. A prescriptive title must be acquired adversely. It cannot be adverse when it rests upon a license or mere neighborly accommodation.* Adverse user is the antithesis of permissive user. If the use is accompanied by any recognition in express terms or by implication of a right in the landowner to stop such use now or at some time in the future, the use is not adverse. 2 Tiffany, supra, Sec. 519; Horne v. Hopper,

72 Colo. 434, 211 P. 665; Eddy v. Demichelis, 100 Cal. App. 517, 280 P. 389." (Emphasis ours)

The case of *Sdrales v. Rondos*, 116 Utah 288, 209 P2d 562 involves some property on West Temple in Salt Lake City and an alleyway running behind the one tract upon which the owner of the next adjoining tract claimed a right by prescription. The question which was of significance in that case was the means of application of the rules and presumption relative to when a use is hostile or permissive. The court said,

> "[2] 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, 110 Utah 514, 175 P. 2d 714, 716, 170 A.L.R., 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, 7 Utah 227, 26 P. 291, 293, wherein 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.' This rule was reaffirmed in Jensen v. Gerrard, 85 Utah 481, 39 P.2d 1070. See the cases cited in support of the rule in 170 A.L.R. 825."

In the case of *Buckley v. Cox*, supra, the plaintiff as the owner of a home in Provo, Utah had a driveway on the north 12 feet of the property. The driveway was used as a means of ingress and egress to and from the rear of plaintiffs' property. The driveway had been constructed by Plaintiff's father some fifty years prior to the commencement of the action. No trouble existed between plaintiff and defendant until approximately three years prior to the commencement of the action. During this period defendant's son acquired an automobile and persisted in parking it on the driveway in question. Defendant contended that the driveway was appurtenant to his property; that his property line extended to the middle line of the driveway making a joint right of way. He further contended adverse use for more than twenty years. Under survey the description in defendant's deed revealed that his property line constituted the northern boundary of the driveway and did not extend to the middle of the driveway.

(Note: We direct the court's attention to the fact that this is also true in the instant case. While the survey showed that the entire subdivision was laid out incorrectly from the starting point, the section corner as now established, if the survey was made from the stake used as the starting point originally, in setting the lines on the lots in question, the improvements are properly located, the county road is properly placed, and the travelled area of the driveway is on the defendant's property. (Ex. D-11)) It further shows that even originally when the tie bridge was built the boundary could not have been in the middle of the driveway.) (Ex. D-11)

This Court, in the *Buckley* case, while admitting that there was a conflict in the evidence pointed out,

> "*A presumption well established in this state is that where a person opens a way for the use of his own premises, and another person also uses it without causing damage, in the absence of evidence to the contrary, such use by the latter is permissive, and not under a claim of right.* Jensen v. Gerrard, supra; Savage v. Nielsen, 114 Utah 22, 197 P2d 117; Cache Valley Banking Co. v. Cache County Poultry Growers Ass'n., Utah 209 P2d; Sdrales v. Rondos, Utah, 209 P2d 562. It was defendant's burden to overcome this presumption and to establish this claim by clear and convincing evidence. Jensen v. Gerrard, supra. This, in the judgment of the lower court he failed to do." (Emphasis ours)

The factual situation in the case of *Lunt v. Kitchens*, 123 Utah 488, 260 P.2d 535 is close to the factual situation in the case before the court. Weidners opened a driveway upon their own property next adjoining the land owned by the Kitchens. The Weidners and the Kitchens, as adjoining neighbors, lived in harmony and there were never any objections raised to the use of the driveway on the Weidner's property by the Kitchens for delivery of coal and wood, for access to parking of their cars and for foot passage. The Weidners sold to the Lunts. The Lunts objected to the use of the right of way by the Kitchens and shut it off. The law suit resulted. In consideration of this case, the Supreme Court said,

> "However, it is obvious that where a special relationship such as a license exists, the owner of the land is entitled to more notice than the mere use of his land not inconsistent with the license. Thus it is said in the Restatement of Property Sec. 458j;
>
> 'Where a user of land and one having an interest affected by the use have a relationship to each other sufficient in itself to justify the use, the use is not adverse unless knowledge of its adverse character is had by the one whose interest is affected. The responsibility of bringing this knowledge to him lies in the one making the use.'
>
> "[5] In other words, the presumption of adversity will not arise under mere use by a licensee and knowledge of such use on the part of the licensor. Yeager v. Woodruff, 17

Utah 361, 53 P. 1045. *The use cannot be adverse when it rests upon license or mere neighborly accommodation.* Jensen v. Gerrard, 85 Utah 481, 39 P.2d 1070. Sdrales v. Rondos, 116 Utah 288, 209 P.2d 562."

* * *

"The fact that, as witness for the respondents testified, the driveway was used 'constantly as ours [the Kitchenses]' is also insufficient to give notice to a licensor of an adverse claim. The tearing down of a gate erected by the Weidner's tenant, of course, would give actual notice of a claim of right, but this act did not occur until 1946."

* * *

"Where the use begins as permissive, as it does here under the presumption of Harkness v. Woodmansee, supra, it is incumbent upon the party asserting that it has afterward become adverse to show at what point this occurred in order to show a twenty-year hostile period. "We are not justified in conjecturing as to when or if such a hostile period began.' Savage v. Nielsen, 114 Utah 22, 197 P.2d 117, 124." (Emphasis ours)

The recent case of *Harriet Rippentrop v. Pickering* in 1962, 15 U. 259, 387 P.2d 95, again recognizes the fact that neighborly accommodation between kinfolk cannot become the basis of an adverse claim and the court stated,

"For over half century the drive appeared to have been used by adjoining owners, all of whom claimed title to their respective properties through a common grantor, and all of whom, and their predecessors in title, belong-

ed to the same family, until 1959, when the north tract was sold to plaintiff, who brought this action. Before that date, there is no evidence of anything but a cordial family use of the drive, as ordinarily would be the case with kinfolk. Any presumption as to adverse user for more than 20 years seems clearly to have been dispelled by evidence of permissive, neighborly use.

"The metes and bounds descriptions reflected in the abstracts of title were not destroyed by procedure or proof in this case, but on the contrary the record supports the trial court's conclusion that any use of the subject drive, looking at the record favorably to appellant, was not adverse and consequently defendant's record title remained inviolate. We think that after review thereof, we are constrained to and do hold that our pronouncements in Lunt v. Kitchens and the authorities therein cited, pertinently and significantly are dispositive of this, a very similar case."

That the law as laid down by the Supreme Court of Utah is also recognized as the law in other jurisdictions is shown by the annotation appearing at 27 ALR2d 332 on the subject, "Boundary Strip — Reciprocal Use". Many authorities are there cited in support of the views expressed by this Court in the cases above cited. Particular attention is directed to the statement of the annotator found at page 354 of the mentioned annotation:

"If the driveway commenced simply in a use by one of the adjoining owners, or at most is not distincly shown to have originated in con-

current action by adjoining owners, nor through provision made by anyone who at the time owned both properties, the finding that the user was not adverse may be well supported."

In the case of *Rust v. Engledow*, (Texas Civ. App.) 368 SW2d 635, the court said:

"Use of a right of way is permissive and not adverse, as a matter of law, if the way is also used by the owner of the land, along with the other user."

We believe that the cases cited by defendants Struhs in support of their position are pertinent and controlling under the facts in this case. An analysis of the cases cited by the plaintiffs in their brief discloses that almost without exception these cases are clearly distinguishable on a factual basis. They are cases wherein the adjoining property owners either by actual agreement, or in fact mutually joined in the creation of a joint driveway, each contributing land and work in the establishment of the driveway for their mutual or joint use. For this reason, the cases cited by the plaintiffs are not helpful in resolving the problems presented in the instant case, since no such factual situation was here proved.

POINT III.

THIS ACTION IS ONE AT LAW. IF THERE IS ANY COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE COURT'S FINDINGS THE JUDGMENT OF THE LOWER COURT SHOULD BE SUSTAINED.

This Court in the case of *Buckley v. Cox*, 122

U. 151 247 P2d 277 was there confronted with a very similar case to the one now before the Court as shown by the court's analysis of the facts:

> "Plaintiff brought this action to quiet title in the driveway in herself and to enjoin the defendants from further use of such driveway Defendant contended that the driveway was appurtenant to his property and that the property line extended to the middle of the driveway making it a joint right of way. He further contends that by open, adverse, and hostile use under a claim of right for over a period of twenty years he had acquired a right by prescription over the strip of land in question." 247 P2d at page 278.

The Court, after summarizing the facts as above quoted, then said,

> "Under the criteria set out in Norback v. Board of Directors 84 U. 506, 37 P2d 339, this action is one at law. Hence, if there is any competent evidence in the record to support the Court's findings the judgment should not be disturbed. Brown v. Union Pac. R. Co., 76 U. 475, 290 P. 759; Jenkins v. Stephens, 64 U. 307, 231 P. 112. This principle is well stated in Jensen v. Gerrard, 85 U. 841, 39 P2d, 1070, 1072:
>
> > 'As this is a law action, the question is not whether the evidence would have supported the decision in favor of the appellants, but whether the decision made by the trial court finds support in the evidence. If there is competent credible evidence to support the findings made by the trial court, then those findings should stand. * * *

> "The evidence as revealed by the record is conflicting. It is sufficient to support a decision for either party. The trial judge saw and heard all the witnesses and viewed the exhibits. He found that the use by the defendant was permissive and not adverse. Since competent evidence in the record supports the court's findings and judgment we may not disturb the latter." (at page 280 of 247 P2d.)

We believe this language particularly applicable to the case at bar. Here the trial court not only heard the witnesses and examined the exhibits, but took sufficient interest to actually visit the scene and examine the ground, and upon his return to the bench stated:

> "THE COURT: The record may show that I did inspect the properties involved herein. I paid particular attention to the culvert where it now exists and to trees that are on either side of the creek, both above and below the culvert, and I have observed the trees that are near the Struhs home. You may proceed, Mr. Black". (R-86)

After the careful consideration given by the trial court to the facts, testimony and exhibits, the trial court found that the use of the driveway in question by plaintiffs and plaintiffs' predecessors in interest was not adverse but a "cordial family use of the drive as might be and is generally the case between kinfolk and good neighbors and was neighborly accommodation." (R-32 Finding 27)

There is adequate evidence in the record to support the court's findings and decree. Under the doctrine approved by this Court in the case above cited, the judgment in this case should not be disturbed.

CONCLUSION

The decision of the Court below should be affirmed, and the defendants should be awarded their costs here incurred.

Respectfully submitted,

JOE P. BOSONE and
ALLEN H. TIBBALS
Suite 604 El Paso Natural Gas Bldg.
315 East 2nd South Street
Salt Lake City, Utah

Attorneys for Defendants-Respondents Merle R. Struhs and Jackie Struhs.