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# IN THE SUPREME COURT OF THE STATE OF UTAH

FILED
SEP 23 1965
Clerk, Supreme Court, 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

## APPELLANTS' BRIEF

**Appeal by plaintiffs and appellants from a judgment in favor of defendants and respondents entered by the District Court of Salt Lake County, the Honorable A. H. Ellett, Judge, presiding.**

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*Third-Party Defendants.*

Case No. 10402

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## APPELLANTS' BRIEF

---

### PRELIMINARY STATEMENT

The parties will be referred to as in the court below.

## STATEMENT OF THE KIND OF CASE

This is an action brought by plaintiffs for an injunction enjoining defendants from preventing plaintiffs from using a common driveway between the properties of plaintiffs and defendants.

## DISPOSITION IN THE LOWER COURT

The case was tried to the court. The cross claims against third-party defendants were dismissed with prejudice. From a judgment for defendants dismissing plaintiffs' complaint with prejudice and granting defendants' counterclaim quieting title as to the claimed easement, plaintiffs appeal.

## RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the judgment and judgment in their favor granting the injunction prayed for.

## STATEMENT OF FACTS

The subject matter of this lawsuit is a common driveway constructed on the boundary line between the properties of the parties in Killian Subdivision, Emigration Canyon, Salt Lake County, State of Utah. This driveway was originally constructed by the predecessors of the parties in approximately 1918. The origi-

nal bridge over the creek was constructed from railroad ties and used thereafter. In approximately 1937 the County inserted a culvert and constructed a fill driveway in the approximate location of the original bridge. There was joint peaceful use of the driveway by the predecessors and the parties for approximately 45 years.

Plaintiffs' predecessor, L. A. Jones, took title from the Emigration Canyon Improvement Company to a lot described as the:

> "Lower Half of the Upper Half, and the Upper Half of the Lower Half, Lot 33, Block 2, Killian Subdivision, Emigration Canyon, Salt Lake County, Utah"

on July 1, 1912. (Exhibit P-7). Jones testified that the following year he built a cabin on the lot (R. 83) and the following year the Whipples built a cabin on the downstream lot. The Whipple property is described as:

> "The Upper or Northern Half of Lot 31, Block 2, Killian Subdivision and the Lower or Southerly Half of the Lower or Southerly Half of Lot 33, Block 2, Killian Subdivision." (Exhibits P-1, D-9).

The properties are adjacent with the stream coming across and to the front, and a County road roughly paralleling the stream on the other side of the stream from the houses, with one driveway from the road over the stream. (Exhibits P-1, P-4, P-5). Jones' wife was the sister of Whipple. (R. 97).

Jones testified as to the construction of the original bridge in 1918 after a railroad track in the area had been dismantled. (R. 84-88):

"Q. And did you do anything with the railroad ties?

A. My son and the Whipples, they went up and got the railroad ties that was left there and made a bridge, a wooden bridge.

Q. Did they make this out of the railroad ties?

A. Yes.

Q. Did you use the bridge to go in and out to your cabin?

A. That is the only way we could get into the cabin on that bridge.

* * *

Q. Where was the property line on the bridge?

A. Well, I think we had about a third of it, or maybe a little better. I can't tell you.

* * *

A. First one. Well, the Whipples and my son, I think he helped them take the ties from up on the hill down there to fix the bridge, and we all used it conjointly.

Q. Now, about when was that that that bridge was built?

A. That would be about 1918, about the time of the war.

Q. What did you use the bridge for, I mean in the way of vehicular traffic? Did you use cars in those days?

A. Couldn't get across the stream there without a bridge in there.

Q. All right. Did you drive cars across it?

A. Yes, that's right.

Q. Now, when did you do that?

A. Well, 1918 would be—I don't remember the year. It might have been '19 or 1920. I can't tell you. See, my brother-in-law used to take me up there because I never had a car at that time.

* * *

Q. Did you continue to use the bridge in that manner in the years after 1918?

A. After 1918, oh, yes.

Q. And do you recall when the bridge was taken down and replaced with a culvert?

A. With a new one?

Q. Yes.

A. That would be 1936, I think. 1936.

Q. Around 1936? Who put the culvert in?

A. Well, the road crew that built the new road, I went up there and talked to him, and he said, 'Well, we will put you a bridge right there,' so we had it put there so Mr. Whipple and I could use that conjointly.

Q. Did you show them where to put the culvert?

A. Oh, yes.

Q. The bridge?

A. Yes.

Q. Or I mean the roadway. Was it in—can you describe to us where this roadway was over the culvert with respect to where the bridge had been before that? Was it in the same place as the bridge?

A. No. It's just a little closer to the house.

Q. But is it in the same place with respect to the property lines?

A. Yes."

Mr. Jones testified that he obtained a car approximately two years after the bridge was built in 1918. (R. 93).

There was no conflict in the evidence that the bridge and the drive were used peaceably and jointly by the parties from and after the original bridge was constructed up until the time when defendant Merle R. Struhs constructed a fence and prevented plaintiffs from using the driveway. Struhs constructed the fence in the summer of 1962. (R. 64). (Exhibits P-4, P-5).

There is no conflict in the evidence as to the fact that work was done from time to time by the families of both property owners, consisting mainly of putting shale on the roadway and removing obstructions from the culvert. Work was also done in shoring up the entrance and exit to the culvert. The main dispute between the parties was as to the extent of the work done by the various predecessors and parties.

On February 18, 1952, L. A. Jones conveyed the property in question to his daughters, Zella Fay Harries, Blanche Evelyn Richins, Mary Maxine Clark

and Bonnie Joyce Gray. (Exhibit P-2). On April 16, 1957, Mary Maxine Clark and Bonnie Joyce Gray quit claimed their interest to Blanche Evelyn Richins and Elmer J. Richins. (P-3). Clara M. Whipple conveyed the lower property to William F. Salt and Della Jo Salt, his wife, on May 29, 1956. (Exhibit D-9). Struhs obtained the property from Leslie C. Gold and Flora C. Gold, who had obtained the property from the Salts. Struhs testified that he obtained the property in early 1960. (R. 145).

Struhs constructed the fence after having a purported survey made by George B. Gudgell of Busch & Gudgell, Inc. (Exhibit D-11). Struhs claimed that this survey established a boundary line between the properties in accordance with where he later built the fence. It can be seen that the survey on its face cannot establish any property line, since it shows that the property is, according to the legal description, on the other side of the highway. The only basis for the boundary is a measurement made by the surveyor from an old iron rod 25 feet below the purported boundary. Accordingly, there was no reliable evidence produced at trial to establish the exact location of the boundary line between the properties in question. Richins and Jones both testified that they had thought the boundary line between the properties was established by a line from two small trees approximately two feet north of the Struhs house to the back corner of the Struhs house. (R. 88, 89). Jones testified that the original property line had been shown to him by a Mr. Harding, who

informed him that the line was from the small tree to a stake on the opposite side of the old wood bridge, the stake having been obliterated when the County put in the culvert. (R. 89). Richins testified that some time after Struhs moved in, he had a conversation with Struhs in which Struhs asked him where the property line was and that he had pointed out the line from the tree close to the front of the Struhs house back to the back corner and extending out so that part of the driveway was included on the Richins side of the property. Struhs admitted that he had placed the fence along a line other than the line claimed by Richins. (R. 151). Mrs. Whipple denied any knowledge of such a property line as described by Jones and Richins. However, on cross examination she testified that she had thought that the boundary line was on the other side of the driveway; however, she testified further as follows: (R. 115)

> "Q. But you didn't know for sure exactly where it was did you?
>
> A. I didn't bother about it."

Mrs. Whipple further testified concerning a stake where she thought the property line was and when asked how far the stake was from the edge of the bridge, she stated that she could not tell. (R. 101).

William N. Whipple, the son of Mrs. Whipple, testified that he recalled that the Joneses had helped haul in shale and had worked on the driveway. (R. 118). He also admitted that Richins had performed

work on the driveway. (R. 121). And in regard to whether or not he had ever heard any discussion as to whose property the driveway was on, Whipple testified: (R. 121)

> "Q. To your recollection was there ever any discussion or indication that the road was the property of the Whipples rather than the property of the Joneses?
>
> A. I don't think I ever remember it being brought up."

Doris W. Pettit, the daughter of Mrs. Whipple, testified in regard to when the bridge was first built. (R. 135):

> "Q. Now, how did you get from the road into your place?
>
> A. Well, my uncles and — well, everybody pitched in and hauled down logs from—they took all the best ones and all the ones close to the road, you know, and they left a lot of them up at the—
>
> Q. Well, what are you referring to as logs?
>
> A. Ties.
>
> Q. Ties. I see. From the railroad bed?
>
> A. Uh huh.
>
> Q. And when you referred to 'they all pitched in and helped' would you name the people? 'They' doesn't help us much.
>
> A. Well, Uncle Lee.
>
> Q. Now, would that be Mr. Jones?
>
> A. Yes, and oh, there was my dad and Uncle Cal and Uncle Dan and— * * * "

Photographs (P-4, P-5) show the driveway is in an opening of the brush and trees in front of the properties and adjacent to the highway.

## ARGUMENT

## POINT I

## THE EVIDENCE REQUIRES THE FINDING OF AN EASEMENT BY PRESCRIPTION.

### A

### THE PRESUMPTION OF ADVERSE USE WAS NOT REBUTTED BY DEFENDANT.

The case of *Zollinger v. Frank,* (1946) 110 Utah 514, 175 P.2d 714, aligns the State of Utah with the majority view as to the presumption existing in this type of a case of adversity of use from open and continuous use of an easement for more than twenty years. The court discusses in that case the confusion that has arisen in this field of the law from the use of the words "hostile use" by various courts. It appears that some courts have become confused in making determination of adverse use by the use of the word "hostile" as distinguished from "peaceable." And in laying down the correct rule of law in this regard, the court states at page 517:

> "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."

The court lays down the following rule of law in accordance with the majority rule, at page 518:

> "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."

Applying the rule of the *Zollinger* case to the case at bar, plaintiffs established by undisputed testimony some 45 years of open and continuous use of the driveway in question. Following such a showing, the defendants had the burden of showing that the use was under instead of against defendants and defendants' predecessors. Defendants failed to make such a showing. In attempting to show that the use was under the Whipples, the only thing defendants showed was that the relationship between the parties was congenial and friendly as may have been expected between brothers-in-law and sisters-in-law.

In opposition to this rule, the defendant cited the case of *Lunt v. Kitchens* (1953) 123 Utah 488, 260 P.2d 535, as controlling. The *Kitchens* case is no

authority for the trial judge's holding, for the reason that in the *Kitchens* case it was undisputed that the use started as a permissive use, or a license granted by the owner of the land in question. The court stated at page 491:

> "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, pp. 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.'
>
> "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. (Citing cases). The use cannot be adverse when it rests upon license or mere neighborly accommodation."

The basis for the holding in the *Kitchens* case rests squarely on a clear and undisputed showing that the use started as a license. This element is lacking in the case at bar for the reason that there was no showing that the Whipples originally constructed the bridge on their own property and then allowed the Jones family to use said bridge. To the contrary, the evidence is clear that the bridge was originally constructed by

both the Joneses and the Whipples at a place where it was assumed that the bridge was between the two properties. Jones testified that he thought the bridge was one third or more on his property.

It is clear that if the use of an easement commences and continues being used by the parties with the mental element that they are using it as a matter of right and not merely as a matter of permission that can be withdrawn at any time, then the requisite situation for prescriptive use is established. In addition, the presumption established in the case of *Harkness v. Woodmansee* (1891) 7 Utah 227, 26 P. 291, rests on a showing that a way across property is originally opened by the land owner on his own property and another later uses said way. No such situation exists in the case at bar.

A thorough discussion showing the confusion that has resulted from the use of the word "hostile" in describing adverse use is also contained in the dissent in the case of *Griffiths v. Archibald* (1954) 2 Utah 2d 293, 272 P.2d 586. It appears that such confusion is the reason for the holding in the case at bar, inasmuch as the only thing that was shown by the defendant in the case at bar was friendship and harmony between the predecessors of the parties as distinguished from hostility. The dissent states in part at page 299:

> "The law does not require hostility between the user and the owner, nor that the use be against the will, contrary to his wishes or in spite of his opposition, it requires a peaceful use under a

claim of right without active interference of the owner."

The *Restatement of Property,* in discussing the meaning of "adverse use" states, paragraph 458:

> "A use of land is adverse to the owner of an interest in land which is or may become possessory when it is
>
> (a) Not made in subordination to him, and
>
> (b) wrongful, or may be made by him wrongful, as to him, and
>
> (c) open and notorious."

In the comment to clause (a), the *Restatement* states as follows:

> "To be adverse it is not essential that a use be hostile. It is not necessary that it be made either in the belief or under a claim that it is legally justified. It is, however, necessary that the one making it shall not recognize in those as against whom it is claimed to be adverse an authority either to prevent or to permit its continuance. It is the non-recognition of such authority at the time a use is made which determines whether it is adverse. It must be made in non-recognition of any such authority existing in the person as against whom the use is claimed to be adverse.
>
> * * *
>
> "Quite commonly, therefore, the absence of submission to another is evidenced by the fact that the one making the use did so under an affirmative claim of right in himself."

Under the rule in the Restatement, if the parties originally intend an easement as distinguished from a

license, the requisite intent is established. The Restatement states in part, at page 2926, in its comment to Clause (a):

> "Thus, where a conveyance of an easement is made under circumstances which prevent the conveyance from being legally effective to create the easement, a use made on the assumption that the conveyance is legally effective is adverse."

Accordingly, when a person uses an easement with the state of mind that he is using it as a matter of right, the use is adverse. The evidence shows such a use in the case at bar. There was no evidence that any person using the joint driveway asked permission from any one at any time. This in itself shows that no person felt it necessary to ask for permission. Accordingly, the parties were using the driveway as a matter of right.

The rule established by the *Zollinger* case is based on sound public policy that long-continued peaceful enjoyment of real property rights should not be disturbed. 29 *Harvard Law Review,* page 90.

## B

## THE OVERWHELMING WEIGHT OF AUTHORITY SUPPORTS ADVERSE USER IN JOINT DRIVEWAY CASES.

In discussing the law where a joint driveway has been constructed by predecessors in title without any specific oral agreement, it is stated at 17A Am. Jur., *Easements,* 70 at p. 682:

> "In the great majority of cases in which a lane, private road, alley, driveway, or passageway lying over and along the boundary between lots or tracts of land has been used without interruption by the adjoining owners for the full prescriptive period, and for a common purpose, and without any oral agreement therefor being shown, the user of each owner has been regarded as adverse to the other and the claim of a prescriptive easement by either party against the other has been upheld."

This majority rule has also been cited in an extensive annotation at 27 ALR 2d, page 341. This rule is also stated in 28 C.J.S. *Easements,* par. 18 j:

> "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 own 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."

The case preceding the aforementioned annotation in ALR 2d is the case of *Plaza v. Flak,* (1951) 7 N.J. 215, 81 A.2d 137. This case involved a joint alley between the properties of the parties and cited the majority rule as controlling, stating that the mutual use of the whole of such alley or way will be considered

adverse to a separate or exclusive use by either. The court, relying on the presumption established by the 20 years of user, gives some examples of ways by which a defendant in such a case can overcome such a presumption, stating:

> "He may overcome the presumption of adverse use and the right to the easement arising therefrom by proof of permission *asked and granted,* that it was secret user, or that it was such use as to be neither physically capable of prevention or of action." (Citing cases).

The rule followed in the ***Flak*** case conforms with the reality of the situation presented in this type of case, for it would indeed be stretching the imagination to think that parties laying out a joint driveway and expending money and energy in maintaining said driveway and using the whole thereof for a great many years without any conversation or without asking permission from any one, would be doing so with any other intent than that they are doing so as a matter of right. It seems that this same rule should apply whether the original driveway was constructed pursuant to a contract or not, unless the contract was specifically that it was a revocable license.

The court in the case of ***DeForrest v. Bunnie*** (1951), 207 Misc. 7, 107 N.Y.S.2d 396, held this doctrine applicable in a case where the parties by agreement had established the joint driveway with two or three feet of said driveway on plaintiff's lot and seven to eight feet on defendant' lot, where

the parties had each paid one half of the cost of cutting down the curb at the street and laying a concrete apron. The same rule was followed in the case of *Alstad v. Boyer*, (1949), 227 Minn. 307, 37 N.W.2d 372. This case involved a joint driveway constructed on six feet of defendant's property and four feet of plaintiff's property, pursuant to an oral agreement. The court held that the joint use for the prescriptive period created the presumption that the use was adverse. In reply to the argument that the oral agreement should create a presumption that it was a license or a permissive use, the court held that the fact of an oral agreement, if anything, would fortify the presumption that the use was adverse, stating:

> "The conduct of the parties supports this presumption. Reasonable men would not surface a driveway with a slab of concrete 10 feet wide —a type of construction designed to last for many years—if only a temporary use were intended or if either party thought that the use was to be merely permissive and subject to termination at any time. * * * Each party acquiesced in the assertion of a hostile right by his neighbor. Acquiescence is the inactive status of quiescence or unqualified submission to the hostile claim of another, and is not to be confused with permission, which denotes a grant of permission in fact or a license.
>
> * * *
>
> "Although a mere permissive user of a way over the land of another will not ripen into an easement, the weight of authority is that where adjoining owners jointly lay out a way between

their land, each devoting a part of his land to that purpose, the use of the way by the respective parties for the prescriptive period raises a presumption of the granting of an easement on the theory that each party by his use thereof has continuously asserted an adverse right in the portion of the way lying on the other's land." (Citing numerous cases).

Another leading case is *Jacobs v. Brewster* (Mo. 1945), 354 Mo. 729, 191 S.W.2d 894. Plaintiff's and defendant's predecessors constructed a common driveway and a joint garage, splitting expenses and contributing approximately half of the property. The evidence showed use of the driveway thereafter for more than 10 years by the parties and their successors. A letter was placed in evidence, written by defendant's predecessor two years after the driveway was built, stating that he wished to reserve the right to tear up the driveway. The court held that this did not conclusively establish that the parties originally contracted that the use was permissive only. The court stated that the conduct of the parties and mutual use indicated that they intended to create reciprocal easements. Citing *Sanford v. Kern*, 223 Mo. 616, 122 S.W. 1051:

> "Each owner, by use of the driveway, is continuously asserting an adverse right in the portion of the way on the other's lot."

The case of *Gano v. Strickland*, (Miss. 1951), 211 Miss. 511, 52 So.2d 11, also followed the majority rule. The parties owned adjoining property, their homes having been built in 1903 and 1906. In 1906 a common

driveway was built which included five feet on each side of the property line, the total distance between the homes amounting to 15 feet. Each party built a garage in back which was reached by using the joint driveway. The evidence showed that both parties used the driveway jointly for longer than the prescriptive period and that both made repairs in the driveway. The court in applying the majority rule and the presumption of adverse use from such evidence quoted the language heretofore quoted at 28 C.J.S., *Easements*, par. 18) at page 673.

The case of *Johnson v. Whelan, et al.*, (Okla. 1935), 171 Okla. 243, 42 P.2d 882, follows the majority rule. This case involved a driveway between homes owned by plaintiff and defendant. The evidence showed that the prior owners had jointly constructed a driveway intending half on each side, although a later survey showed that there was more property on defendant's side than on plaintiff's. The owners used the driveway jointly for more than 15 years. The defendant later built an additional strip on her side of the driveway and threatened to construct a fence along the property line. The court stated at page 883:

> "Each owner, after the driveway was paved, was by his use thereof asserting an adverse right in the portion of the way laying on the other's land. And this use, having continued for more than 15 years, raises the presumption of an easement which is appurtenant to the other lot.
>
> "To our view, the correct rule, applicable to

the situation here, is laid down in 19 Corpus Juris, at page 902, * * *."

Another case following the majority rule is *Sinnett v. Werelus* (Idaho, 1961), 83 Idaho 514, 365 P.2d 952. The adjoining homes were built in 1919 with a 10-foot strip between the homes. There was use by both owners to gain access to garages and for coal deliveries, etc., from 1919 to 1940. From 1940 to 1942 there was a partial restriction when the appellant erected a fence across a portion of the driveway, the fence being removed in 1942. In 1945 respondent's predecessor surfaced the driveway with concrete, extending from the garage along the driveway between the houses from which point concrete strips were laid and the common use continued to 1959, when the action was commenced. The court stated at page 955:

> "Cases involving similar facts and claimed rights have been considered by the courts of many states and we are satisfied that the weight of authority is to the effect that, where adjoining property owners lay out a way or alley between their lands, each devoting a part of his own land to that purpose, and such a way 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. (Citing cases).
>
> * * *
>
> "Under such circumstances the mutual use of the whole of the way or alley will be considered adverse to separate or exclusive use by either party.

"In *Molene v. Tansey,* 203 Iowa 992, 213 N.W. 759, 760, the court had under consideration a case involving similar facts and said:

" 'We think it is sufficiently shown by the record that the use of the 8-foot strip along the division line between said two lots as a common driveway for the benefit of both lot owners, was established by mutual agreement and acquiescence for such a period of time that each party has acquired a right of easement in the said strip for common purposes of a driveway.' "

The foregoing cases are but a few of the many cases in practically all jurisdictions adhering to the majority rule. See also the following cases which support this rule:

*Andrzejczyk v. Advo System, Inc.* (Conn. 1959), 146 Conn. 428, 151 A.2d 881;

*Sting v. Rothacker,* (Ohio, 1947), 82 Ohio App. 10[illegible] 80 N.E.2d 819;

*Ellsworth v. Martin* (Iowa, 1929), 208 Iowa 169, 2[illegible] N.W. 417;

*Marangi v. Domenici,* (Calif., 1958), 161 Cal. App.2d 552, 326 P.2d 527;

*Shanks v. Forum,* (Ohio) 162 O.S.T. 479, 55 O.Op. 385, 124 N.E.2d 416;

and numerous other decisions cited in the ALR annotation cited above.

The case of *Carmody v. Mulrooney,* 87 Wis. 55[illegible] 58 N.W. 1109, involved adjoining properties owned b[illegible]

*brothers-in-law*, where one having a private way from his house to the highway allowed his brother-in-law who owned the adjoining land to use the way with him for 20 years and more and both worked in building and repairing the way, neither saying anything to the other as to the right of the brother-in-law to use it. It was held that these facts afforded a presumption of a claim of right such as would establish a prescription.

The significance of neither party asking permission from the other party is commented on in the *Marangi* case cited above, at page 531:

> "* * * and the fact that plaintiff never asked permission to use the driveway suggests a claim of right to do so."

## CONCLUSION

The presumption of adverse use from over 20 years' use of the driveway, not having been rebutted, must stand and establishes the easement prayed for. Defendants have failed to produce any evidence tending to show that the use started as a permissive license. The only evidence relied on by defendant to establish this is the fact that the owners were brothers-in-law and that there was a friendly and congenial relationship between them. It seems this element would be present in every joint driveway case. As pointed out, a confusion has arisen in many cases where the word "adverse" has been strictly construed by courts to mean

hostile or unfriendly. The trial court, falling into this error, held that the original parties created a license as distingushed from an easement. The authorities cited show that adverse use is use as a matter of right as distinguished from use as a matter of revocable license. The reason for the presumption is stated in *Tiffany, Real Property,* 3d Edition in par. 1196(a):

> "Since it is the recognition of a right in the landowner to put an end to the user which deprives the user of the element of adverseness, and such recognition is in its nature an affirmative fact, the burden of proof in reference thereto is properly on the landowner, that is, in the absence of evidence to the contrary, the user of another's land is ordinarily presumed to be adverse."

The record shows that the predecessors of the parties jointly constructed a driveway on the boundary line between the properties. No specific oral agreement was shown. The evidence showed continual usage by the parties living on each side of the boundary line for approximately 45 years. The evidence shows that work was performed by the parties on both sides. The evidence further shows that never at any time did any party ask permission of any other party to use the driveway.

The cases cited herein dealing with joint driveways show this to be a classical situation which calls for the rule of the presumption laid down in the *Zollinger* case in accordance with the great weight of authority in this country. This rule realistically holds that the

parties are not jointly using the driveway as a mere matter of accommodation but are using the driveway as a matter of right, clearly establishing adverse use. In accordance with public policy, such long-continued adverse use should not be disturbed. The parties on both sides of the property line on each and every single day asserted by their open use and by their other actions that they were using this driveway jointly as a matter of right with neither party having the right to bar use of the whole driveway to the other.

We respectfully submit that the error committed by the trial court should be rectified and judgment reversed.

Respectfully submitted,

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