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REAL PROPERTY-EASEMENTS BY PRESCRIPTION-USE OF PRESUMPTION

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REAL PROPERTY—EASEMENTS BY PRESCRIPTION—USE OF PRESUMPTIONS—Plaintiffs sought to enjoin defendants from using a driveway located on plaintiffs' property. Defendants counterclaimed to have an easement by prescription declared. The parties occupied adjacent city lots. Defendants' predecessor began using the driveway in 1920 without seeking permission from plaintiffs' predecessor. The respective predecessors were on friendly terms at the inception of the user. Defendants and their predecessors made minor repairs to the driveway and claimed at the trial that they had constantly used it as their own. In 1936, two years after plaintiffs acquired full title to their lot, their predecessor executed an abortive quit-claim deed to the driveway to defendants' predecessor. The prescriptive period in the state was twenty years. The trial court granted the counterclaim. On appeal, *held*, reversed. Defendants' evidence failed to overcome the presumption of permissive user that arises upon a showing that the user had its origin in neighborly accommodation. Although the abortive quitclaim deed of 1936 may have initiated an adverse user, the prescriptive period had not expired before commencement of this action. *Lunt v. Kitchens*, (Utah 1953) 260 P. (2d) 535.

In a large proportion of cases involving claims to easements by prescription, neither party can offer any direct evidence as to the adverse or permissive quality of the user. This had led to the development of a number of presumptions of fact in many courts.[1] Several of these presumptions appear in the principal case. It was stated by the court that a showing of any open, notorious, continuous, and peaceable user for the prescriptive period raises a presumption that the user was adverse, in the absence of evidence to the contrary.[2] Upon a showing that the user had its origin in neighborly accommodation, however, the presumption of adverseness is destroyed and there arises instead a presumption of

[1] The user is presumptively permissive when over unenclosed land. Du Mez v. Dykstra, 257 Mich. 449, 241 N.W. 182 (1932). User is presumed to be permissive until specific direct evidence of adverseness has been presented. Henry v. Farlow, 238 N.C. 542, 78 S.E. (2d) 244 (1953). The user is presumed to be permissive when the landowner has "opened his way" to the use of others and there has been no interference with the landowner's own use of the land. Harkness v. Woodmansee, 7 Utah 227, 26 P. 291 (1891). See generally 170 A.L.R. 776 (1947).

[2] For a collection of cases supporting this presumption, see 170 A.L.R. 776 at 779 (1947).

permissive user.[3] The latter presumption having been entertained in the present case because of the friendly accord in which the predecessors of the parties lived, it became incumbent upon the claimant to prove[4] either that the user was adverse in its inception or that it later became adverse and that notice of such subsequent claim of right was communicated to the owner of the land used. The courts of several other states employ no presumptions and treat the question simply as one of fact, the trier of facts in each case being relied upon to make a determination from *all* of the evidence presented.[5] In the event no evidence directly bearing upon the issue of adverseness is presented, the trier of facts is authorized to draw inferences from such surrounding facts as the nature and location of the land, the use made of it by claimant, and the relationship of the parties.[6] The latter approach seems to have the advantage of simplicity without any offsetting disadvantages. The complications introduced by the use of presumptions are apparent. All too frequently, the immediate issue of fact—whether the claimant's use was "as of right" or in recognition of the landowner's paramount right—is concealed in a jungle of argument over what precise facts will give rise to a presumption and what evidence is adequate to overcome a presumption.[7] As a result, appellate-level litigation increases, appellate courts assume extensive control over an area of determination properly within the dominion of the trier of facts, and juries, if present,[8] are subjected to additional mental gymnastics by the instructions. Finally, appellate court opinions in which the issue is discussed by the use of presumptions lack clarity, because the evidence is necessarily evaluated in terms of its effect upon the subsidiary presumption issues rather than upon the primary issue over adverseness of the user. On the other hand, when the trier of facts is relied upon to determine the issue of adverseness, subject to reversal only when the finding is clearly contrary to the evidence, the central issue is always foremost in his mind. He may be allowed to infer either an adverse or permissive user from the particular circumstances of the parties as disclosed by the evidence.[9] For example, if he

[3] See Jensen v. Gerrard, 85 Utah 481, 39 P. (2d) 1070 (1935), relied upon in the principal case.

[4] There is little uniformity among the courts as to whether the party against whom a presumption is indulged need *prove* the contrary by a preponderance of the evidence. That such should not be the rule, see 9 WIGMORE, EVIDENCE, 3d ed., §2491(3) (1940).

[5] O'Banion v. Borba, 32 Cal. (2d) 145, 195 P. (2d) 10 (1948); Phillips v. Bonadies, 105 Conn. 722, 136 A. 684 (1927).

[6] See 41 MICH. L. REV. 1130 (1943), suggesting that the extent of claimant's reliance upon the continuance of the user should also be a factor from which it might be inferred that the claim was "as of right."

[7] The hopeless inconsistency among the cases as to the effect which is given to a presumption of fact is described in Morgan, "Further Observations on Presumptions," 16 So. CAL. L. REV. 245 (1943).

[8] Most prescriptive easement cases are equity actions for injunctions.

[9] For an argument in support of abandoning presumptions in prescriptive easement cases, but for different reasons, see 34 CALIF. L. REV. 445 (1946). It has been suggested that some presumptions are necessary because "surrounding circumstances" are frequently not in evidence in these cases. 170 A.L.R. 776 at 796 (1947). It seems inconceivable, however, that a user could be proved to have been continuous, uninterrupted, peaceable, open, and notorious without there also being evidence showing the relationship of the

finds that the friendship of the parties and the nature of the user are suggestive of an implied permission, he may also find that a subsequent conveyance of the "servient" land to a stranger with whom the claimant never acquired a friendship changed the user into an adverse one.[10] Where evidence of express permission or express assertion of right is frequently not available, the trier of facts should be allowed substantial flexibility in drawing inferences.[11] In cases like the principal one, where the appellate court assumes the task of re-evaluating the evidence in relating it to the several presumptions indulged, this flexibility is severely restricted. While the result of this case appears well justified, the same conclusion could have been reached through the simpler process attained by the abandonment of presumptions.

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parties or their predecessors, the type of land over which the user is exercised, and the nature of the user.

[10] That such a change in ownership presumptively converts a permissive user into an adverse one was concluded in Beechler v. Byerly, 302 Mich. 79, 4 N.W. (2d) 475 (1942).

[11] This need not interfere with the normal rule that the burden of proof rests with the claimant.