

Neighbour Erects Fence along Driveway

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In *Hodkin v. Bigley* there was a twelve foot strip of land between two houses. Hodkin owned eight feet over which a driveway led to a garage behind her house. Bigley erected a fence, on his property, immediately beside the driveway. Although Hodkin could, with difficulty still drive her car to and from the garage, the fence made it difficult for her to park her car on the drive or to get in and out of her car when it was parked between the two homes. Hodkin and her predecessors had used the entire twelve foot strip since 1954. Hodkin sought an order that she was the owner of the twelve foot strip by adverse possession or alternatively, that she had established an easement by prescription. The Court disagreed and she appealed to the Ontario Court of Appeal.

To establish adverse possession the claimant must prove:

- a) actual exclusive possession;
- b) with the intention of excluding the true owner; and
- c) by using the lands in a way which is inconsistent with the rights of the true owner.

The facts showed that Bigley and his predecessors had used his four feet to wash windows, maintain eavestroughs and to provide access to the back lawn. Accordingly Hodkin's occupation had not been exclusive nor had her use been inconsistent with Bigley's property rights.

In order to establish a right of way by prescriptive easement, "the claimant must demonstrate a continuous, uninterrupted, open, and peaceful use of the land for a period of twenty years" without the permission of the true owner. Four elements are required to establish such an easement:

- a) there must be a dominant and servient

tenement;

- b) the easement must accommodate the dominant tenement;
- c) the dominant and servient owners must be different persons; and
- d) the lands in question must be capable of forming the subject matter of a grant.

The Court of Appeal agreed with the trial judge that although the benefit that accrued to Hodkin before the erection of the fence facilitated her parking, it could not "be said to accommodate the dominant tenement in such a way as to justify the creation of an easement". Although the Court expressed the view that it hoped that the fence would be removed, it rejected the appeal on the basis that the fence does not substantially interfere with the appellant's use of her driveway. The case is reported at (1999), 20 R.P.R. (3d) 9.

