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PRESCRIPTIVE EASEMENTS
By: Barbara Schuhmann
March 11, 1987

I. Easement. The right of one person to go onto the land in possession of another and make a limited use thereof. (i.e., to walk or drive across another's land).

II. Creation.

A. Express grant/reservation (deed, will, plat)
B. Implication - intention of parties proved by parole ev. apparent, continuous, and reasonable necessary to the enjoyment of neighboring land.
C. Necessity - to prevent land - locked parcel without access.
D. Estoppel.
Elements: Reasonable and detrimental reliance upon the representations of another; inequitable not to enforce.
E. Prescriptions:
Elements: adverse use that is open, notorious, continuous for the required period.

III. Prescriptive easement statutes.

A. Alaska statutes of limitation.
1. AS 09.10.030 - 10 years to recover real property.
2. AS 09.25.050 - Adverse possession.
(a) The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more as conclusively presumed to give title to the property except as against the state or the United States.

(b) Except for an easement created by Public Land Order 1613, adverse possession will lie against property that is held by a person who holds equitable title from the United States under paragraphs 7 and 8 of Public Land Order 1613 of the Secretary of the Interior (April 7 1958). Effective 6/11/86. (§ 3.15 ch 101 SLA 1962; am § 1 ch 141 SLA 1986)

IV. Recent Alaska cases. "dedication"

V. Termination. (non-use after statutory period does not terminate)

A. Expiration of time of grant.
B. Merger of title.
C. Release.
D. Adverse use contract to easement for statutory period.

Donald STEPHAN, Petitioner,

v.

STATE of Alaska, Respondent.

Malcolm Scott HARRIS, Petitioner and Cross-Respondent,

v.

STATE of Alaska, Respondent and Cross-Petitioner.

Nos. S-387, S-406.

Supreme Court of Alaska.

Feb. 4, 1985.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS and MOORE, JJ.

ORDER

The Court of Appeals' decisions in *Harris*, 678 P.2d 397 (1984), and *Stephan* are REVERSED. The cases are REMANDED for further proceedings, with orders that Harris' and Stephan's statements made during their interrogations be suppressed.

An opinion will follow.

IT IS SO ORDERED.

COMPTON, J., not participating.

DILLINGHAM COMMERCIAL COMPANY, INC., Appellant and Cross-Appellee,

v.

CITY OF DILLINGHAM, Appellee and Cross-Appellant.

Nos. S-317, S-348.

Supreme Court of Alaska.

Aug. 16, 1985.

City brought separate actions against property owner seeking title to roadway and sought easements on north and east borders of property. The actions were consolidated, and partial summary judgment was entered in favor of the city in the road dispute. The Superior Court, Third Judicial District, Daniel A. Moore, Jr., J., entered a second summary judgment in favor of the city in the alley dispute. Owner appealed and city cross-appealed. The Supreme Court, Matthews, J., held that: (1) certain land was public until 1940 when owner's predecessor made first valid entry under homestead law and grant under statute, which grants right-of-way for construction of highways over public lands not reserved for public uses, could have been accepted by public until that time; (2) testimony established that public had accepted land; (3) trial court erred by granting town fee simple interest in road over land; (4) no evidence supported conclusion that public used alleys existing on north and east boundaries of land in such manner as to encroach on land and accept grant; (5) theory of adverse possession was not applicable; (6) material issue of fact remained as to whether public use of portions of alleyways abutting on property was permissive or adverse, precluding summary judgment upon the town's attempt to establish proper leasing by prescription; and (7) award of attorney fees was not unreasonable but had to be vacated.

Affirmed in part as modified; reversed and remanded in part; vacated in part.

1. Public Lands ⇐64

43 U.S.C. (1970 Ed.) § 932, which grants right-of-way for construction of highways over public land, not reserved for public uses, is applicable to state lands.

2. Public Lands ⇐6

Even though 43 U.S.C. (1970 Ed.) § 932, which grants right-of-way for construction of highways over public lands, not reserved for public uses, was repealed in 1976, it governed right-of-way in dispute,

since right-of-way claimed would have existed at date of repeal.

3. Public Lands ⇐64

In order to complete grant under 43 U.S.C. (1970 Ed.) § 932, which grants right-of-way for construction of highways over public lands, not reserved for public uses, there must be either some positive act on part of appropriate public authorities of state, clearly manifesting intention to accept grant, or there must be public user for such period of time and under such conditions as to prove that grant has been accepted.

4. Public Lands ⇐64

Public may not, pursuant to 43 U.S.C. (1970 Ed.) § 932, which grants right-of-way for construction of highways over public lands, not reserved for public uses, acquire right-of-way over lands that have been validly entered.

5. Public Lands ⇐35(2), 64

Certain land was public until 1940 when owner's predecessor made first valid entry under homestead law and grant under 43 U.S.C. (1970 Ed.) § 932, which grants right-of-way for construction of highways over public lands not reserved for public uses, could have been accepted by public until that time.

6. Public Lands ⇐64

Testimony of two individuals who had lived in town prior to 1940 when predecessor of owner of land made first valid entry under homestead law, that trail had existed across land for access to and from beach, and later for hauling freight to town, established that public had accepted land under 42 U.S.C. (1970 Ed.) § 932, which grants right-of-way for construction of highways over public land, not reserved for public uses.

7. Public Lands ⇐64

Testimony of two individuals who had lived in town prior to 1940 when owner of land made first valid entry under homestead law established that location of road over land currently and in 1920's, had essentially remained unchanged. 43 U.S.C. (1970 Ed.) § 932.

8. Public Lands ⇐64

If there was public road on certain land, it could be used for any purpose consistent with public travel.

9. Public Lands ⇐64

Generally, term "right-of-way" such is as granted under 43 U.S.C. (1970 Ed.) § 932, granting right-of-way for construction of highways over public lands, not reserved for public uses, is synonymous with "easement," unless right-of-way grants only right of use.

10. Public Lands ⇐64

Right-of-way granted public over certain land under 43 U.S.C. (1970 Ed.) § 932 was only for purpose of construction of highways and trial court erred by granting town fee simple interest in road over land.

11. Public Lands ⇐64

There was no evidence that would have allowed trial court to conclude that before 1940, when predecessor of owner made first valid entry onto land under homestead law, public used alleys existing on north and east boundaries of land in such manner as to encroach on land and then to accept grant under 43 U.S.C. (1970 Ed.) § 932, which grants public right-of-way for construction of highways over public lands, not reserved for public uses.

12. Adverse Possession ⇐1

Theory of "adverse possession" allows individual to acquire title to land if he possesses land adversely for statutory period. AS 09.10.030.

See publication Words and Phrases for other judicial constructions and definitions.

13. Highways ⇐6(1)

Theory of adverse possession was not applicable where town did not seek to possess property, but rather sought right to use road and alleys on land and since, at most, public only used property as roadway and therefore could not establish first element of adverse possession claim: continuous and uninterrupted possession.

14. Highways ⇐7(1)

Right of public to use land as public highway may be acquired through public use.

15. Dedication ⇐15, 31

In order to establish public road by implied dedication, two basic elements must be shown; first there must be intent to dedicate road to public and second there must be acceptance of this offer.

16. Dedication ⇐44

One seeking to establish road on theory of implied dedication must meet high threshold of proof and thus, evidence of public use without more is insufficient to prove dedication.

17. Dedication ⇐15

Town could not prevail upon theory of implied dedication with regard to widening of alleys, where city did not come forward with any evidence indicating that owner of property or its predecessors in interest intended to dedicate parts of land for public road or alley.

18. Highways ⇐1

Public easement may be acquired by prescription.

19. Highways ⇐17

In order to prove that use was adverse for purpose of establishing public easement by prescription, party seeking easement by prescription must overcome presumption that use was permissive.

20. Judgment ⇐181(15)

Material issue of fact remained as to whether public use of portions of alleyways abutting on property was permissive or adverse, precluding summary judgment upon the town's attempt to establish easement by prescription.

21. Appeal and Error ⇐984(5)

When reviewing award of attorney fees fo. abuse of discretion, inquiry is whether trial court's award was manifestly unreasonable. Rules Civ.Proc., Rule 82(a)(1).

22. Appeal and Error ⇐1171(3)

Municipal Corporations ⇐1040

Award of attorney fees of $8,000 to city, which had attempted to establish right-of-way over certain property, was not unreasonable, even though town contended that it actually expended $28,483; however, judgment for attorney fees had to be vacated since part of judgment on which it was based had been reversed.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Daniel A. Moore, Jr., Judge.

Barry Donnellan, Fairbanks, for appellant and cross-appellee.

Kenneth P. Jacobus, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for appellee and cross-appellant.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS and COMPTON, JJ.

OPINION

MATTHEWS, Justice.

This is an appeal from an order of the superior court for the Third Judicial District establishing, in fee simple, two rights of way in favor of the City of Dillingham (the City) on property owned by Dillingham Commercial Company, Inc. (D.C. Co.).

I.

The property (hereinafter Survey 2541) is located in downtown Dillingham. Dillingham Commercial Company, Inc. has operated a general store on Survey 2541 since the late 1920's. The City makes two claims to Survey 2541: the first is that there is a right of way that cuts across the northeast corner of Survey 2541 (road dispute), and the second is that the public alleys already existing on the north and east boundaries of the parcel should be widened to include portions of Survey 2541 (alley dispute).

Dillingham is located on the estuary of the Nushagak River. Survey 2541 is located on the estuary, in what now is the center of town. In the late 1920's, John W.

Felder and his partners built a general store and other buildings on Survey 2541. It was not until 1940, however, that Felder made a valid entry onto Survey 2541 under the homestead laws. In 1941, Survey 2541 was surveyed by the federal government, and in 1953, a patent over Survey 2541 was issued to John Felder.

Sometime in the early to mid-1930's, Felder constructed a dock of sorts on the tideland immediately south of Survey 2541. Much of the freight arriving in town was unloaded at this dock and transported to the town, first north over a public alley immediately bordering Survey 2541 on the east, and then northeast across a "road" running over the northeast corner of Survey 2541. In 1972, the City built a large public dock on the waterfront immediately east of Survey 2541. Most of the freight shipped to Dillingham arrives at this dock. It is transported into town by the same alleyway and road over Survey 2541.

On May 30, 1979, the City of Dillingham brought an action against D.C. Co. seeking title to the roadway. On July 19, 1979, the City brought a second action, seeking easements over strips of land on the north and east borders of Survey 2541, which were claimed to have been added to already existing alleys. The two actions were consolidated.

Judge Ripley entered partial summary judgment in favor of the City in the road dispute, holding that a public road of undetermined width existed on Survey 2541 on two alternative theories: (1) adverse possession, and (2) pursuant to 43 U.S.C. § 932. The determination of the width of the road was left for trial. Judge Moore entered a second summary judgment in favor of the City in the alley dispute on August 7, 1981. He determined that strips of land on Survey 2541 bordering the platted alleys were established in favor of the City on the same two theories. The determination of the width of the strips was also left for trial.

A trial was held before Judge Moore on the issue of the width of the road and the alley strips. Judge Moore determined that the road across Survey 2541 was sixteen feet wide, occupying approximately 2,592 square feet, and that the strips on the northeast corner of Survey 2541 occupied some 578 square feet of the property, coming within three feet of the building located on that corner. These findings have not been appealed.

In his judgment dated September 19, 1983, Judge Moore specified that the City's interest in the road across Survey 2541 was an estate in fee simple. The alley interest was not expressly characterized. Judge Moore further awarded the City $8,000 in attorney's fees.

D.C. Co. appeals, contending that the summary judgments that established the City's interest to the road and alleys on Survey 2541 were erroneously granted. The City cross-appeals, contending that the award of attorney's fees was so low as to constitute an abuse of discretion.

II. 43 U.S.C. § 932

[1, 2] The superior court held that a public right of way over D.C. Co.'s property was established by 43 U.S.C. § 932. This provision, enacted in 1866, reads: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." It is applicable to Alaska lands. *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961). Although § 932 was repealed in 1976 by Pub.L. No. 94–579, Title VII, § 706(a), 90 Stat. 2793, Oct. 21, 1976, it nevertheless governs here since the right of way claimed in this case would have existed at the date of repeal. Pub.L. No. 94–579, Title VII, 90 Stat. 2786, § 701(a).

[3] The operation of § 932 is not obvious from its terms. Case law has made it clear that § 932 is one-half of a grant—an offer to dedicate. In order to complete the grant "there must be either some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept a grant, or there must be public user for such a period of time and under such conditions as to prove

that the grant has been accepted." *Hamerly*, 359 P.2d at 123.

[4] A preliminary argument by D.C. Co. is that Survey 2541 was not "public land" open to grant under § 932 because John Felder entered the land prior to use of Survey 2541 as a public way. It is clear that the public may not, pursuant to § 932, acquire a right of way over lands that have been validly entered:

> When a citizen has made a valid entry under the homestead laws, the portion covered by the entry is then segregated from the public domain. It has been appropriated to the use of the entryman, and until such time as the entry may be cancelled by the government or relinquished, the land is not included in grants made by Congress under 43 U.S.C.A. § 932. Consequently, a highway cannot be established under the statute during the time that the land is subject of a valid and existing homestead claim.

Hamerly, 359 P.2d at 123 (footnotes omitted). The question thus is whether Felder made a "valid entry under the homestead laws" before portions of Survey 2541 were used as a public highway.

[5] Felder's first valid entry under the homestead law was made in 1940. D.C. Co. admits that until then Felder was only a squatter, but claims that the land was nevertheless withdrawn from the public domain.[1] We disagree with D.C. Co.'s conclusion. The *Hamerly* court explicitly required official action in order to withdraw lands from the public domain. In the paragraph quoted above, the court referred to entry "*under the homestead laws.*" *Accord City of Miami v. Sirocco Co.*, 137 Fla. 434, 188 So. 344, 345–46 (1939). Therefore, Survey 2541 was public land (within the meaning of § 932) until 1940, and the § 932 grant could have been accepted by the public until that time.

1. For support, D.C. Co. cites an early Alaska decision which held that a squatter has a paramount right to possession against all but the U.S. Government. *Bradford v. Danielsen*, 11 Alaska 406, 412–13 (1947).

A. *The Road Dispute*

Having concluded that Survey 2541 was public land until 1940, the next question is whether the public's use of the road across the northeast corner prior to 1940 was "for such a period of time and under such conditions as to prove that the [§ 932] grant has been accepted." *Hamerly*, 359 P.2d at 123. One old timer who testified, Milo Adkinson, first came to Dillingham in 1925. He spoke of a trail to the beach that cut across Survey 2541, and testified that "it's right in the—roughly in the—same spot" now as it was in 1926. His testimony establishes that the road across Survey 2541 was used first for access to and from the beach, then later (in the late 30's) for hauling freight into town. Another long-time Dillingham resident, David Carlson, testified that ever since he arrived in Dillingham in 1936, the road was used by the public to haul freight to and from the beach. D.C. Co. did not produce any contrary evidence.

[6] The superior court did not err by finding that no genuine issue of material fact existed as to the public's acceptance of the § 932 grant over the road prior to 1940. Summary judgment on this issue was properly granted.

[7] D.C. Co. contends, however, that the route of the road across Survey 2541 was not definite enough to satisfy § 932. D.C. Co. asserts first that "a right of way created by public user pursuant to 43 U.S.C. § 932 connotes definite termini." We agree, but this does not change our conclusion. The road ran from Main Street on the north to the estuary on the south. This is not the sort of "dead end road or trail, running into wild, unenclosed and uncultivated country" that we held insufficient for the purposes of § 932 in *Hamerly*. 359 P.2d at 125. Rather, the road connects two essential transportation arteries.

D.C. Co. next contends that there was no evidence showing the specific location of

the road across Survey 2541. This contention is incorrect—Milo Adkinson testified that its location both now and in the 1920's has essentially remained unchanged.

[8] D.C. Co. further argues that even if a road has always been located on the northeast corner of Survey 2541, it is improper now to use that road for access to the City dock. We disagree. If there is a public road on Survey 2541, it may be used for any purpose consistent with public travel. *E.G., Albee v. Town of Yarro Point*, 74 Wash.2d 453, 445 P.2d 340, 344 (1968).

[9, 10] D.C. Co.'s final contention is that the superior court erred by awarding the road to the City in fee simple. Section 932 by its terms grants only a "right of way." The general rule is that the term "right of way" is synonymous with "easement." Thus, a right of way creates only a right of use. *See Wessells v. State Dept. of Highways*, 562 P.2d 1042, 1046 n. 5 (Alaska 1977). *Cf. Brice v. State, Div. of Forest, Land & Water Management*, 669 P.2d 1311, 1315 (Alaska 1983) (rights of way created by § 932 referred to as "easements"). If this was not the case, and the City did receive fee simple title to the road, then the City could use the land for any purpose, such as a park. We think that this result would be contrary to the intent and scope of § 932, which contemplates rights of ways "*for the construction of highways* over public lands." Thus, the superior court erred by granting to the City a fee simple interest in the road over Survey 2541.[2]

B. *Alley Dispute*

[11] In order to prevail on this issue, the City needed to show that the public used the alleys[3] before 1940 in such a way as to encroach on the north and east boundaries of Survey 2541. The testimony relied on by the City for this point is inapposite because it refers to the 1940's, rather than pre-1940. Likewise, pictures submitted by the City clearly show worn paths very close to the house on the northeast corner of Survey 2541, but these pictures were taken in the mid or late 1950's. There simply was no evidence that would have allowed the superior court to conclude that before 1940 the public used the alleys in such a manner as to accept the § 932 grant. As such, the superior court's award of summary judgment in the alley dispute on the basis of § 932 was error.

III. ADVERSE POSSESSION/ALLEY DISPUTE

[12] At the outset, we note that the superior court made an error in nomenclature when it based its decision on the theory of adverse possession. The theory of adverse possession allows an individual to acquire title to property if he possesses the land adversely for the statutory period, which in Alaska is ten years.[4] AS 09.10.030.

[13] The theory of adverse possession is not applicable to the present case. Rather than seeking to *possess* the property, the City is seeking a right to *use* the road and alleys on Survey 2541. Since at most the public only *used* the property as a roadway, the City cannot establish the first element of an adverse possession claim: continuous and uninterrupted *possession*. *Bentley Family Trust v. Lynx Enterprises, Inc.*, 658 P.2d 761, 765 (Alaska 1983). This does not end the inquiry, however, because there are alternate theories, similar to adverse possession, which may be used to uphold the superior court's award of the alleyways to the City.

2. Because of our decision on the road dispute under § 932, any error committed by the superior court on the adverse possession or prescription theories was harmless.

3. The *existence* of the alleys along the north and east borders of Survey 2541 is not in dispute. Rather, the city is claiming that strips of Survey 2541 were added to the existing alleyways by virtue of 42 U.S.C. § 932.

4. The period is seven years when the claimant possesses the land under color of title. AS 09.25.050; *Bentley Family Trust v. Lynx Enterprises, Inc.*, 658 P.2d 761, 764 (Alaska 1983).

[14] It is clear that the right of the public to use land as a public highway may be acquired through public use. II *American Law of Property*, § 9.50, at 483 (J. Casner ed.1952). Two theories are most commonly used to establish such a right: prescription and implied dedication. Comment, *The Acquisition of Easements by the Public Through Use*, 16 S.D.L.Rev. 150, 150 (1971).

[15, 16] In order to establish a public road by implied dedication, two basic elements must be shown. First, there must be an intent to dedicate the road to the public, and second, there must be an acceptance of this offer. 6A R. Powell, *The Law of Real Property* ¶ 926 (1984). One seeking to establish a road on the theory of implied dedication must meet a high threshold of proof. In *Hamerly*, we stated:

> There is dedication when the owner of an interest in land transfers to the public a privilege of use of such interest for a public purpose. It is a question of fact whether there has been a dedication. This fact will not be presumed against the owner of the land; *the burden rests on the party relying on a dedication to establish it by proof that is clear and unequivocal.*
>
> ....
>
> Dedication is not an act or omission to assert a right; mere absence of objection is not sufficient. *Passive permission by the landowner is not in itself evidence of an intent to dedicate.* Intention must be clearly and unequivocally manifested by acts that are decisive in character.

359 P.2d at 125 (footnotes omitted) (emphasis added). Thus, evidence of public use without more is insufficient to prove dedication.

[17] In the present case, the City did not come forward with any evidence indicating that D.C. Co. or its predecessors in interest intended to dedicate parts of Survey 2541 for a public road or alley. As such, the City could not prevail on this theory.

[18] This leaves the doctrine of prescription. There is a split of authority as to whether a public highway may be created by prescription. A number of older cases hold that the public cannot acquire a road by prescription because the doctrine of prescription is based on the theory of a lost grant,[5] and such a grant cannot be made to a large and indefinite body such as the public. *See* II *American Law of Property* § 9.50 (J. Casner ed.1952). The lost grant theory, however, has been discarded. W. Burby, *Real Property* § 31, at 77 (1965). In its place, courts have resorted to the justifications that underlie statutes of limitations: "[The] functional utility in helping to cause prompt termination of controversies before the possible loss of evidence and in stabilizing long continued property uses." 3 R. Powell, *supra* note 5, ¶ 413, at 34-103-04; W. Burby, *supra*, § 31, at 77; Restatement of Property ch. 38, Introductory Note, at 2928 (1944). These reasons apply equally to the acquisition of prescriptive easements by public use. The majority view now is that a public easement may be acquired by prescription. 2 J. Grimes, *Thompson on Real Property* § 342, at 209 (1980). We impliedly joined this majority in *Hamerly* and do so explicitly now.

The requirements for establishing a public easement by prescription are nearly identical to the requirements of adverse possession, and the string of adjectives used to describe prescription have a familiar ring: the use must be open, notorious, adverse, hostile, and continuous. *See* W. Burby, *supra*, § 31, at 76-77. These general requirements have been reduced to a simple statement by this court in the adverse possession context: "(1) the possession must have been continuous and uninterrupted; (2) the possessor must have acted as if he were the owner and not merely one acting with the permission of the own-

5. This fiction is a conceptual basis for prescription. After adverse use for the statutory period, the law will presume that the use of the land was made pursuant to a grant which has since been lost. 3 R. Powell, *The Law of Real Property* ¶ 413, at 34-103 n. 3.

er; and (3) the possession must have been reasonably visible to the record owner." *Alaska National Bank v. Linck*, 559 P.2d 1049, 1052 (Alaska 1977). *See also* Restatement of Property § 457 (1944).

[19] In order to prove that use was adverse, the party seeking an easement by prescription must overcome the presumption that the use was permissive. In *Hamerly*, this court stated:

> Use alone for the statutory period—even with the knowledge of the owner—would not establish an easement. When one enters into possession or use of another's property, there is a presumption that he does so with the owner's permission and in subordination to his title. *This presumption is overcome only by showing that such use of another's land was not only continuous and uninterrupted, but was openly adverse to the owner's interest, i.e., by proof of a distinct and positive assertion of a right hostile to the owner of the property.*

359 P.2d at 126 (footnotes omitted) (emphasis added).

[20] We find that a triable issue of fact exists on the question of whether the public use of the portions of the alleyways abutting Survey 2541 was permissive or adverse. Since its occupation in the 1920's, Survey 2541 has always contained public businesses. A reasonable inference is that the public used the alleys on the north and east borders of Survey 2541 in conjunction with conducting business at either the general store or (later) at the Sea Inn Bar, or both. Indeed, a review of the aerial photographs taken of Dillingham in the mid to late 1950's shows that there was a circular driveway around the house on the northeast corner of Survey 2541, and that the entrance to the general store faced this driveway. If the public did use these alleys in conjunction with business at the store, then use of the portions of Survey 2541 adjoining the public alleys would have been with permission. This theory, together with the presumption of permissiveness, leads us to conclude that the issue of whether a prescriptive easement was created by public use should have been submitted to a factfinder. As such, summary judgment was inappropriate.[6]

IV. CROSS-APPEAL/ATTORNEY'S FEES

[21, 22] The City appealed the superior court's award of $8,000 in attorney's fees, contending that this was too low in light of the fact that it actually expended $28,483. When reviewing an award of attorney's fees made pursuant to Rule 82(a)(1),[7] our inquiry is whether the superior court's award was manifestly unreasonable. *Haskins v. Shelden*, 558 P.2d 487, 495 (Alaska 1976). Although we believe that the award was not unreasonable, the judgment for attorney's fees must be vacated, as part of the judgment on which it is based has been reversed.

As to the road dispute, the judgment shall be modified to reflect that the road is an easement. As modified the judgment is AFFIRMED. As to the alley dispute, the judgment is REVERSED and the case is REMANDED for further proceedings. The award of attorney's fees is VACATED.

MOORE, J., not participating.

6. On remand, the superior court should note that if a public highway was established by prescription, the appropriate interest created would be an easement, and not fee simple absolute.

7. Civil Rule 82(a)(1) provides in relevant part: Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court in its discretion in a reasonable amount.

guarantees expansive right-to-counsel opportunities, indigent defendants in forfeiture actions should receive the aid of appointed counsel.

To avoid reaching the preceding conclusion, the court advances the fictional proposition that forfeiture is not a form of punishment. The previous quote from *Graybill* indicates the court has concluded differently on another occasion. Today's decision likewise acknowledges the "punitive component to the forfeiture laws...." *Opinion* at 292. I find it troubling that the court emphasizes "the strong deterrent aspect of the forfeiture laws," *Opinion* at 292, suggesting thereby that deterrence and punishment are mutually exclusive. This is plainly untenable since one of the principal factors to be considered in administering our penal laws is the deterrence of future undesirable conduct. *State v. Chaney*, 477 P.2d 441 (Alaska 1970); AS 12.55.005(5). The court acknowledged in *Chaney* that the deterrent effect of a sentence is a key factor to be considered by a sentencing court. *Chaney*, 477 P.2d at 444. Deterrence does not lose its punitive character simply because it is called "civil" rather than "criminal." The court should not base its holding on the erroneous theory that forfeiture is not punishment.

Equally troubling is the court's abdication of its responsibility to examine the severity of a fine as an indication of the criminality of an offense. Even if the court is not prepared to hold that forfeiture is punitive in all cases, it should require determining whether forfeiture rises to the level of punishment in each case. This approach comports with established precedent. *Baker*'s definition of criminal prosecution includes "offenses which ... connote criminal conduct in the traditional sense of the term." *Baker*, 471 P.2d at 402. The accompanying footnote explains that "[a] heavy enough fine might also indicate criminality because it can be taken as a gauge of the ethical and social judgments of the community." *Id.* at 402 n. 29. Courts should not divest themselves of their authority to judge the severity of a forfeiture on a case-by-case basis.

The only reason the court provides for distinguishing forfeiture of money from other fines is legislative intent. We should not be so willing to let a mere label foreclose judicial inquiry into the underlying nature of a legal proceeding. The substance of this area of the law should not be determined by semantics—not where penalties severe enough to be criminal are potentially involved.[2] The court's refusal to permit appointed counsel in forfeiture cases represents an unwarranted retreat from the expansive approach of *Baker* and *Alexander*.

William & Anna SWIFT and David & Ellen Dahl, Rockne & Sandra Wilson, and David & Carol Slater, Appellants,

v.

Darrell & Marjorie KNIFFEN, Fairhill, Inc., and Lot 14, Block 2 of a portion of the Southwest Quarter of Section 36, Township 1 North, Range 1 West, Fairhill Subdivision, Fourth Judicial District, State of Alaska, Appellees.

No. S-364.

Supreme Court of Alaska.

Sept. 13, 1985.

Rehearing Denied Oct. 9, 1985.

Owners of property in subdivision filed suit against subdivider to obtain an ease-

2. It is also rather anomalous to provide counsel for indigent defendants who face the loss of a driver's license, *Baker*, 471 P.2d at 402, but not for those who face loss of real property whose value may far exceed that of any license. Textually, neither the Alaska Constitution nor United States Constitution differentiates between the intrinsic worth of property versus liberty. To this extent, I share Justice Powell's view that deprivation of property can be just as serious as deprivation of liberty insofar as the right to counsel is concerned. *Argersinger v. Hamlin*, 407 U.S. 25, 48, 92 S.Ct. 2006, 2018, 32 L.Ed.2d 530, 545 (1972) (Powell, J., concurring).

ment to a disputed roadway in subdivision. The Superior Court, Fourth Judicial District, Fairbanks, James R. Blair, J., entered judgment against owners on all theories submitted by them, and owners appealed. The Supreme Court, Burke, J., held that: (1) owners did not have a right to use disputed roadway on theory of common-law dedication since, even assuming an intent to dedicate could be established from act of subdivider in filing a preliminary plat, subdivider engaged in sufficient activities to negate any presumed intent to dedicate roadway to public; (2) a private easement by estoppel was not established in absence of allegations that subdivider made an oral grant of easement to use disputed roadway or that owners relied on a belief that roadway was public; (3) right to a private prescriptive easement could be established if owners could show that use was continuous and uninterrupted, was adverse and hostile, and was notorious in its own right, not dependent on a similar right in others; (4) owners were also entitled to assert a claim to a public easement by prescription; (5) appearance of impropriety required that another judge be assigned to case on remand; and (6) award of attorney fees would be vacated so that issue could be redetermined on remand in view of prevailing party or parties.

Reversed and remanded.

1. Dedication ⇐1

A common-law dedication occurs when the owner of an interest in land confers to the public a privilege of use of such interest for a public purpose; essential elements are offer of dedication by the owner and an acceptance by the public.

2. Dedication ⇐15

Passive permission by a landowner is not in itself evidence of an intent to dedicate; intention must be clearly and unequivocally manifested by acts that are decisive in character.

3. Dedication ⇐19(4)

Act of subdivider in filing preliminary plat which included roadway to which owners of property in subdivision sought access, even assuming an intent to dedicate could be inferred therefrom, was insufficient to establish an act of common-law dedication since, after plat was rejected, subdivider ran a newspaper ad warning public against future trespassing on road and in vicinity and engaged in sufficient activities to negate any such intent.

4. Dedication ⇐20(5)

Alleged acquiescence of subdivider to public use of disputed road to which owners of property in subdivision sought access was not evidence of a common-law dedication of road in absence of evidence of affirmative acts on part of subdivider.

5. Dedication ⇐39

Estoppel may be the basis for finding an implied intent to dedicate property for public use provided the claimants show detrimental reliance by the public at large in addition to fulfillment of the requirements for a private easement.

6. Dedication ⇐39

Act of subdivider in building disputed roadway to which owners of property in subdivision sought access and in leaving roadway in such condition that it looked like every other road in subdivision was not a basis for establishing an implied intent to dedicate via an estoppel inasmuch as subdivider made no oral grant of a public easement and no evidence was presented that individual members of the public, or the local government itself, detrimentally relied on the roadway's dedication.

7. Easements ⇐12(1)

A private easement may be created by estoppel but only upon a showing of an oral grant and detrimental reliance.

8. Easements ⇐61(8)

Right to a private roadway easement for owners of property in subdivision was not established on basis of estoppel in absence of allegations that subdivider made an oral grant of easement to use roadway or that owners relied on their belief that roadway was public.

9. Easements ⇐36(3)

A party alleging creation of a private easement by prescription must prove by clear and convincing evidence that the possession has been continuous and uninterrupted, that he has acted as if he were the owner and not merely one acting with the permission of the owner, and that the possession has been reasonably visible to the owner.

10. Easements ⇐5

Owners of property could establish private prescriptive easement over disputed roadway in subdivision by showing that their use of road for ten years was continuous and uninterrupted, that use was adverse and hostile to that of subdivider, and that use was notorious in its own right, not dependent on a similar right in others.

11. Easements ⇐7(5)

Fact that disputed road in subdivision was sometimes unplowed and impassable for weeks at at time did not signify either abandonment or interrupted use which precluded owners of property in subdivision from claiming a private prescriptive easement over road.

12. Easements ⇐7(5)

To establish abandonment of private prescriptive easement, the period of nonuse must indicate that the adverse user has ceased his use and claim.

13. Easements ⇐7(5)

Interruption of possession or use of a road over which a private prescriptive easement is claimed must be caused by the record owner or third parties.

14. Easements ⇐7(6)

Subdivider's posting of signs warning against trespassing was insufficient to interrupt adverse use of road in subdivision by owners of property claiming a private prescriptive easement.

15. Easements ⇐8(1)

The party claiming a private prescriptive easement must have acted as if he were claiming a permanent right to the easement in order to establish hostility against the owner.

16. Easements ⇐36(1)

Presumption that party assuming possession of property does so with rightful owner's permission is overcome in context of a private prescriptive easement only by showing that such use was not only continuous and uninterrupted, but was openly adverse to owner's interest.

17. Easements ⇐8(1)

Use of disputed roadway by owners of property in subdivision was adverse and hostile to subdivider in context of claimed private prescriptive easement if it resulted from an acquiescence by subdivider rather than an intent to permit use of roadway.

18. Easements ⇐5

A party claiming a private prescriptive easement need not show that record owner had actual knowledge of adverse party's presence, but when his use is as common with public's use, he must perform some act with owner's knowledge clearly indicating his own individual claim of right.

19. Pleading ⇐248(17)

Owners of property seeking access to disputed roadway in subdivision may have acquired a public easement by prescription and, to that end, could seek leave of trial court to amend their pleadings to include a claim to a public easement by prescription.

20. Judges ⇐47(1)

Appearance of impropriety required that another trial judge be assigned to matter on remand where present trial judge had disclosed that ten or 11 years previously, while in private practice, he had represented owners in litigation involving trespass in subdivision where road which was subject of present easement dispute with subdivider was located.

21. Appeal and Error ⇐1178(1)

Award of attorney fees in easement case which was being remanded for additional factual findings on entitlement to an easement by prescription would be vacated in favor of allowing trial court to redeter-

mine attorney fees on remand after considering issue of prevailing party or parties in matter. Rules Civ.Proc., Rule 82.

Charles D. Silvey, Schaible, Staley, DeLisio & Cook, Fairbanks, for appellants.

Patrick T. Brown, Rice, Hoppner, Brown & Brunner, Fairbanks, for appellees.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

BURKE, Justice.

OPINION

Appellants own property in a Fairbanks subdivision and filed suit against the subdivider (appellee) to obtain an easement to a disputed roadway in the subdivision. Four theories were presented at trial: common law dedication, private roadway easement (estoppel), easement by prescription and easement by necessity. After the superior court ruled against them on all four theories, appellants appealed on the first three theories and on the court's denial of their motion for a new trial. In addition, three attorney's fees claims are raised.

We affirm the superior court's judgment on the theories of common law dedication and private roadway easement, but reverse and remand the case for additional factual findings on the Swifts' entitlement to an easement by prescription. On remand, the appellants may ask leave of the trial court to amend their pleadings to allege the creation of a public easement by prescription. Since the final judgment is reversed and remanded we vacate the attorney's fees awards. To avoid the appearance of impropriety, we order that a new judge be assigned to make the findings on remand.

I. BACKGROUND

In 1968 Marjorie and Darrell Kniffen purchased a tract of undeveloped land near Fairbanks. The Kniffens held the land until it was subdivided. Ownership was then transferred to Fairhill, Inc., (Fairhill) a development corporation controlled by the Kniffens. Fairhill immediately began to develop the parcel by building roadways.

A number of preliminary plats were submitted to the North Star Borough Planning and Zoning Commission. The Borough rejected one plat, which reflected the disputed roadway as the main access to the subdivision, because the road was not compatible with grade requirements. Consequently, in another plat Fairhill dedicated Fairhill Road, approximately 900 feet north of the disputed road, as access to the subdivision.

The disputed roadway was partially built at the time the Borough rejected it as an access road. The uphill section, between Gruening Way and Peters Road, was subsequently reseeded and is not part of this dispute. At issue here is the downhill portion, between City Lights Boulevard and Gruening Way, which already had tailings on it and could not be reseeded. Fairhill left the road as a driveway to two undeveloped lots and continued to pay taxes on it.

The Kniffens, the subdivision's first residents, moved to Peters Road in 1971. The subdivision's second residents, Bill and Anna Swift, purchased Lots 26 and 27 and began clearing them in early August 1971. They began constructing their home in the spring of 1972 and moved into it in the spring of 1973. David and Ellen Dahl first came to Fairhill in 1973 or 1974 and used the roadway frequently. They purchased Lot 2 in 1981. A number of other people have purchased lots since Fairhill began selling them in 1969.

Many of the subdivision's residents used the disputed roadway daily or a few times each week, especially when Fairhill Road was impassable. Use increased as more people purchased lots and built homes in the subdivision. Mr. Swift recalled first driving on the roadway in 1969. From the time the Swifts bought their lot in 1971 to the time they moved into their new home in 1973, they claim to have used the roadway anywhere from several times a day to several times a week. Once they were living in the subdivision they claim to have used

the roadway often. The general public used the roadway periodically as an access road to visit subdivision residents and for recreational vehicle use. Marjorie Kniffen testified that she and her husband used the road once in awhile.

The residents who testified maintained that Fairhill did nothing to suggest to them that the disputed road was not public until 1981. No resident claimed that the Kniffens or any other agent of Fairhill told them that they could use the roadway, but most testified that they had never been told they could not use it. They claim that while other private areas of the subdivision were posted against trespassing, the disputed road never was. They claim that while the Kniffens confronted trespassers on other private areas of the subdivision, the Kniffens never reprimanded people for using the road.

Marjorie Kniffen testified that she stopped trespassers on the road, although she admits she never stopped the Dahls or Swifts. She claims to have posted the road repeatedly against trespassing before 1972, but ceased posting because no property was being damaged and the signs were always ripped up quickly anyway. No residents recalled seeing these postings; however, none except the Swifts lived in the subdivision during those years. In 1972, when use of the road and the surrounding area resulted in property damage, Marjorie Kniffen ran an ad for three months in the local newspaper announcing that snowmachines, motorcycles and cross country vehicles were prohibited in the area and warning the public against future trespassing on the road and in the vicinity. Appellants contend that this ad gave no notice that Fairhill sought to prevent normal vehicular use of the disputed roadway. Marjorie Kniffen also claimed to have blocked the road with snow berms, but none of the witnesses recalled her having done this.

Marjorie Kniffen acknowledged that she was aware that people were using the road in the early 1970s, but she did not believe they were subdivision residents. She claims she never saw the Swifts use the road and had no reason to believe they used it regularly before they moved into the subdivision in 1973. However, she admitted that by 1974 she thought the Swifts were using the road and that Mr. Swift had plowed it.

In 1981 several residents informed Marjorie Kniffen that they were pooling their resources to upgrade the subdivision roads and that they planned to grade the disputed road. Marjorie Kniffen objected, claiming it was private property. Fairhill physically blocked the road in October 1981.

Residents of the subdivision, the Wilsons, Slaters, Dahls, and Swifts, filed a complaint in May 1982 against Mr. and Mrs. Kniffen and Fairhill,[1] seeking an easement to the disputed road. Fairhill's answer raised a trespass counterclaim. In December 1982, the Wilsons and Slaters obtained an order dismissing their complaint without prejudice. The counterclaim against them was eventually dismissed in December 1983, just days before the trial commenced.

At trial, the Swifts and Dahls sought judicial recognition of an easement to use the disputed roadway, for the public at large, the subdivision owners, or for the Swifts only under four legal theories. The court ruled for Fairhill on the four easement theories and the trespass counterclaim; however, no damages were awarded for the counterclaim. On appeal, appellants have abandoned their claim to an easement by necessity, but challenge the superior court's rejection of the other three theories.

II. COMMON LAW DEDICATION

[1, 2] A common law dedication occurs "when the owner of an interest in land transfers to the public a privilege of use of such interest for a public purpose." *Ham-*

1. The plaintiffs decided Fairhill was the proper defendant and dropped the complaints against the Kniffens. Plaintiffs added Mr. William Aversa, the purchaser of lot 14 which contains the disputed road. Pursuant to a stipulation, the court ordered that Aversa was no longer a party.

erly v. Denton, 359 P.2d 121 (Alaska 1961); *see also State v. Fairbanks Lodge No. 1392, Loyal Order of Moose*, 633 P.2d 1378 (Alaska 1981); *Olson v. McRae*, 389 P.2d 576 (Alaska 1964). There are two essential elements of a common law dedication: (1) an owner's offer of dedication to the public and (2) acceptance by the public.[2] 6A R. Powell & P. Rohan, *The Law of Real Property* ¶ 926[1] (1980). The crux of the offer requirement is that the owner must somehow objectively manifest his *intent* to set aside property for the public's use. The existence of an intent to dedicate is a factual issue which the claimant must clearly prove. "Passive permission by a landowner is not in itself evidence of intent to dedicate. Intention must be clearly and unequivocally manifested by acts that are decisive in character." *Hamerly*, 359 P.2d at 125 (footnotes omitted); 6A R. Powell & P. Rohan, *supra*, ¶ 926[2]. The appellants present three arguments for the existence of an implied dedication.

[3] First, the Swifts and Dahls claim that an intent to dedicate can be inferred from the preliminary plat which included the roadway. While the final plat does not show the disputed roadway, appellants maintain that Fairhill's failure to withdraw its proposed dedication by words or conduct means that the offer is outstanding. We disagree. In some circumstances a recorded plat may evidence intent to dedicate property for public use. 6A R. Powell & P. Rohan, *supra*, ¶ 926[2], at 84-89-90. However, even assuming an intent to dedicate can be established from the filing of the preliminary plat, the superior court found that after the plat was rejected, Fairhill engaged in "sufficient activities to negate any presumed intent to dedicate to the public." The court's finding on this factual issue is not clearly erroneous. *See* Alaska Civil Rule 52(a) (a trial court's findings of fact shall not be set aside unless clearly erroneous).

[4] The Swifts and Dahls also contend that because Fairhill allegedly acquiesced to public use from the time the disputed road was built in 1969 until 1981, an intent to dedicate should be implied. As noted above, a landowner's acquiescence is not sufficient to show an intent to dedicate; rather, evidence of affirmative acts must be produced. *Hamerly*, 359 P.2d at 125.[3]

Finally, the Swifts and Dahls argue that the estoppel theory establishes an implied intent to dedicate. They claim that Fairhill built the disputed roadway and left it in such condition that it looked like every other true road in the subdivision. They contend, therefore, that the public detrimentally relied on the reasonable belief that it would be able to utilize the roadway.

[5, 6] In a proper case, estoppel may be the basis for finding an implied intent to dedicate property for a public use.[4] Under Alaska law, a private easement is created by estoppel only upon a showing of an oral grant and detrimental reliance. *See* discussion *infra* section III. The requirements for a public offer of dedication by estoppel are the same as those for a private easement, except that claimants must show detrimental reliance by the public at large to establish an intent to dedicate for public use. In this case, Fairhill made no oral grant of a public easement. Moreover, there is no evidence that individual members of the public, or the local government itself, detrimentally relied on the road's

2. The superior court held that the Kniffens did not "dedicate" the disputed road to the public, because neither the intent to dedicate nor public use was present. We affirm the superior court's rejection of the dedication theory, on the ground that there was no intent to dedicate the roadway for public use. Consequently, we need not reach the question of acceptance by public use.

3. Conversely, some jurisdictions imply an intent to dedicate land from an owner's acquiescence to public use. *Flake v. Thompson*, 249 Ark. 713, 460 S.W.2d 789, 794 (1970); *Gion v. City of Santa Cruz*, 2 Cal.3d 29, 84 Cal.Rptr. 162, 465 P.2d 50 (1970).

4. Other courts have found implied intent to dedicate by estoppel. *Diamond Match Co. v. Savercool*, 218 Cal. 665, 24 P.2d 783 (1933); *Bailey v. Thompson*, 300 S.W.2d 235 (Ky.App.1957); *Henry v. Ionic Petroleum*, 391 P.2d 792 (Okla.1964).

dedication. *See* discussion *infra* section III. Consequently, dedication by estoppel must be rejected.

III. PRIVATE EASEMENT BY ESTOPPEL

[7] The Swifts and Dahls claim the right to a private roadway easement for the Fairhill Subdivision residents on the basis of estoppel.[5] Estoppel has been accepted in Alaska as a theory for the establishment of a private easement. *Hawkins v. Alaska Freight Lines*, 410 P.2d 992, 993 (Alaska 1966); *Freightways Terminal v. Industrial and Commercial Construction*, 381 P.2d 977, 983 (Alaska 1963). We have made it clear, however, that a party "may not rely upon the theory of creation of an easement by oral grant and estoppel, when there is no evidence to support a finding that an oral grant was made." *Hawkins*, 410 P.2d at 993 (footnote omitted). *See Freightways Terminal*, 381 P.2d at 984; 3 H. Tiffany & B. Jones, *Real Property* § 801, at 317–18 (3d ed. 1939).

[8] In the instant case, there are no allegations that Fairhill made an oral grant of easement to use the disputed roadway. Furthermore, the record does not support the contention that the subdivision residents relied on their belief that the roadway was public. Caleb Pomeroy is the only witness who testified that he would not have bought his lot in the subdivision had he known that the roadway was not public. Other witnesses, including appellants, proclaimed only failed expectations, but not reliance.[6] We hold that the superior court properly rejected the creation of a private easement for the subdivision residents by estoppel, due to the lack of both an oral grant and detrimental reliance.

IV. PRESCRIPTIVE EASEMENT

[9] The Swifts, but not the Dahls, claim to have established a private prescriptive easement over the disputed roadway. To establish a claim for prescriptive easement, a claimant must show essentially the same elements as for adverse possession. *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 417 (Alaska 1985). We discussed the three basic requirements for adverse possession in *Alaska National Bank v. Linck*, 559 P.2d 1049, 1052 (Alaska 1977): "(1) the possession must have been continuous and uninterrupted; (2) the possessor must have acted as if he were the owner and not merely one acting with the permission of the owner; and (3) the possession must have been reasonably visible to the record owner." *See also Bentley Family Trust v. Lynx Enterprises*, 658 P.2d 761, 765 (Alaska 1983). The main purpose of these requirements is to put the record owner on notice of the existence of an adverse claimant. *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826, 830 (Alaska 1974). To prevail, the claimant must prove each element by clear and convincing evidence. *Bentley Family Trust*, 658 P.2d at 765 n. 10 (citing *Curran v. Mount*, 657 P.2d 389, 391 (Alaska 1982)).

Because the disputed roadway was physically blocked in the fall of 1981, the superior court correctly determined that the Swifts must show adverse use between the fall of 1971 and the fall of 1981, in order to satisfy the ten-year statutory time requirement. AS 09.10.030. The superior court made the following factual findings regarding use of the property during this time period:

> During the fall of 1971, Fairhill Subdivision was basically uninhabited land. The Swifts were the first to build in the subdivision. They purchased lots 26 and 27 in early 1971 and commenced clearing at least in August of 1971. Actual house construction began in the spring of 1972 and they occupied their house in 1973.

5. Both the appellee and superior court thought the theory argued was one of private dedication and rejected the theory on that ground.

6. Many of the subdivision residents claimed that the disputed road looked just like the other subdivision roads and that from the time they purchased their property until 1981 they believed that the disputed road was a public roadway.

> At best, plaintiffs' testimony shows only sporadic use of the roadway in question from August of 1971 until the spring of 1972.[7] The testimony of Mr. and Mrs. Swift, Kim Kniffen and Marjorie Kniffen establishes that the road was often closed and unplowed for long periods of time during some winters between 1971 and 1981.

The superior court rejected the Swifts' claim because "[s]uch periodic use is insufficient to show, by clear and convincing evidence, that the use by the plaintiffs was either continuous or sufficiently notorious to give the required notice to defendant to establish a prescriptive easement."

[10] We find the superior court's factual findings on the issue of private prescriptive easement inadequate for purposes of our review. We remand the case for factual findings on all three elements of prescriptive easement, so that we may have a clear understanding of the basis of the superior court's decision. *See Uchitel v. Telephone Co.*, 646 P.2d 229, 236 n. 16 (Alaska 1982); *Wigger v. Olson*, 533 P.2d 6, 7–8 (Alaska 1975).

A. *Continuity*

The key Alaska case defining the continuity requirement in the context of adverse possession is *Alaska National Bank v. Linck*, 559 P.2d 1049, 1052 (Alaska 1977). In *Linck* we stated:

> The nature of possession sufficient to meet this requirement depends on the character of the property. One test is whether the adverse possessor has used and enjoyed the land as "an average owner of similar property would use and enjoy it."
>
> *An interruption of possession caused by the record owner or third parties,* or abandonment by the possessor, tolls the running of the statute of limitations.

Id. at 1052 (emphasis added) (citations omitted).

[11–14] The superior court appears to have misapplied the test for continuity. The fact that the road was sometimes unplowed and impassable for weeks at a time does not signify either abandonment or interrupted use. First, to establish abandonment the period of non-use must indicate that the adverse user had ceased his use and claim. Failure to plow and use a road for a few weeks in winter in Fairbanks does not demonstrate that the Swifts no longer intended to use the road as an alternative route to their property. Second, interruption of possession or use must be caused by the record owner or third parties. *Id.* The Swifts' use of the roadway was not interrupted until the fall of 1981, when the Kniffens physically blocked the roadway. Prior to that time, the Kniffens apparently posted signs warning against trespassing and ran an advertisement. These acts, however, were not sufficient by themselves to interrupt the Swifts' adverse use.[8] The roadway's closure due to snowfall cannot be considered an interruption because it was not caused by the Kniffens or Fairhill.[9]

B. *Hostility*

[15] In *Linck*, we interpreted hostility as requiring the adverse possessor to show that he acted as if he were the owner and not merely one acting with the owner's permission. 559 P.2d at 1053. In the easement context, the user must have acted as if he were claiming a permanent right to the easement. *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1331 (Alaska 1975).

[16] The sort of permission which would negate the claim of an adverse user is not mere acquiescence because:

7. The superior court actually referred to the years "1981 until the spring of 1982," however, we assume the court intended to refer to the relevant period in the 1970s.

8. If anything, the Kniffens' acts merely add support to the Swifts' claim that their use was hostile, an issue that is discussed in the following section of this opinion.

9. We do not hold that the continuity requirement has been met. On remand, other factual findings might indicate that the Swifts' use of the roadway was not continuous.

> [T]he whole doctrine of title by adverse possession rests upon the acquiescence of the owner in the hostile acts and claims of the person in possession.

Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d at 833; 4 H. Tiffany, *supra*, § 1196, at 984 (3d ed. 1975); 2 G. Thompson, & J. Grimes, *Commentaries on the Modern Law of Real Property*, § 341, at 203 (1980). In the context of adverse possession we have consistently held:

> When one assumes possession of another's property, there is a presumption that he does so with the rightful owner's permission and in subordination to his title. "This presumption is overcome only by showing that such use of another's land was not only continuous and uninterrupted, but was openly adverse to the owner's interest, i.e., by proof of a distinct and positive assertion of a right hostile to the owner of the property."

Ayers v. Day and Night Fuel Co., 451 P.2d 579, 581 (Alaska 1969) (quoting *Hamerly*, 359 P.2d at 126); *Peters*, 519 P.2d at 833. This presumption has been applied to easement disputes as well. *Dillingham*, 705 P.2d at 415 (Alaska 1985); *Nesbett*, 530 P.2d at 1330 n. 16.

[17] In rejecting the Swifts' claim for prescriptive easement, the trial court made no findings of fact or conclusions of law regarding the hostility requirement. The hostility element turns on the distinction between acquiescence and permission. On remand the trial court must determine if Fairhill intended to permit use of the roadway or whether the Swifts' use was the result of Fairhill's acquiescence. If the latter is found, then the Swifts' use of the roadway was adverse and hostile.

C. *Notoriety*

[18] In *Linck* we held that in order to satisfy the notoriety requirement, the adverse possessor (here the adverse user) need not show that the record owner had actual knowledge of the adverse party's presence. Rather, the owner is charged with knowing what a duly alert owner would have known. 559 P.2d at 1053; *see also Shilts v. Young*, 567 P.2d 769, 776 (Alaska 1977). What a duly alert owner is expected to know depends on the nature of the property:

> [A]s with the other elements of adverse possession, to determine what constitutes sufficient notoriety we must consider the character of the land. We cannot expect the possessor of uninhabited and forested land to do what the possessor of urban residential land would do before we charge the record owner with notice.

Linck, 559 P.2d at 1053.

The Swifts claim that they used the disputed roadway regularly since 1969, and that Fairhill was aware that members of the public sporadically used the road even at that time. The Swifts' use, however, must be notorious in its own right, and not dependent on a similar right in others. *See Nordin v. Kuno*, 287 N.W.2d 923, 926 (Minn.1980). When a claimant's use is in common with the public's use, the claimant must perform some act with the owner's knowledge clearly indicating his own individual claim of right. *Saunders Point Association v. Cannon*, 177 Conn. 413, 418 A.2d 70, 73 (1979); 2 G. Thompson & J. Grimes, *supra*, § 341, at 203.

The superior court concluded that the Swifts' use had not been notorious, but made no factual findings on the issue. A remand is necessary to determine if a duly alert owner would have known that the Swifts were regularly using the roadway, at least since 1971.

[19] One further aspect of the prescriptive easement issue deserves our attention. The Swifts are the only parties who claim to have established a private prescriptive easement over the disputed roadway, however, a number of other Fairhill residents and members of the public appear to have also adversely used it. In an attempt to gain a public easement, appellants argue the theory of implied dedication. They are unsuccessful on this theory because Fairhill made no offer of dedication. *See supra* section II. This, however, does not end the inquiry. A closely related theory

remains a viable alternative. In a recent decision, *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 415, we explicitly held that a public easement may be acquired by prescription.[10] The rule in *Dillingham* was announced while this appeal was pending, long after appellants filed their initial complaints and submitted their appellate briefs. On remand, appellants may ask leave of the trial court to amend their pleadings to include a claim to a public easement by prescription.[11] The trial court may entertain such a motion, applying the rules that govern the amendment of pleadings.

V. JUDGE ON REMAND

In their reply brief, appellants present newly obtained evidence which they claim is ground for a new trial under a different judge. At trial, Judge Blair disclosed that ten or eleven years previously, while in private practice, he represented the Kniffens in litigation involving trespass in the Fairhill subdivision. Appellants claim that in July 1984, after their primary appellate brief was filed, they were advised that Judge Blair was the primary attorney in the earlier case and that one of the issues was common law dedication of a roadway in Fairhill subdivision. Appellants do not allege intentional wrongdoing, only the appearance of impropriety.

[20] We have the utmost confidence in Judge Blair's ability to remain impartial despite his previous involvement with the Kniffens over ten years ago in a similar suit.[12] The appearance of impropriety, however, compels us to order the assignment of another judge on remand.[13]

VI. ATTORNEY'S FEES

The Wilsons, Slaters, Swifts and Dahls commenced this litigation by filing a complaint on May 7, 1982. After an answer, counterclaim and reply were filed, the Wilsons and Slaters obtained a voluntary dismissal of their complaint, pursuant to Alaska Civil Rule 41(a)(2). Approximately ten months later and four days before the trial began, appellees voluntarily dismissed their counterclaim against the Wilsons and Slaters.

After a memorandum opinion was entered in favor of appellees on all counts, appellees moved for attorney's fees against the Wilsons and Slaters for fees incurred litigating their complaint before it was dismissed. The Wilsons and Slaters moved for attorney's fees against appellees because of the counterclaim dismissal.[14] The trial court ordered the Wilsons and Slaters to pay appellees $200 in attorney's fees. Appellees also obtained $4403.95 in attorney's fees against the Swifts and Dahls.

[21] Since we have concluded that the judgment in favor of appellees must be reversed and the case remanded, the superior court's order granting $200 in attorney's fees against the Wilsons and Slaters

10. While implied dedication and prescriptive easement are both theories commonly used to establish the public's right to use land as a public highway, there are important distinctions between the two. Implied dedication cannot be established through an owner's acquiescence to the public's use of his land. A manifest intent to dedicate is required. *Hamerly*, 359 P.2d at 125. Prescription, however, is created not when the land is used with the owner's permission, but instead when he acquiesces to the public's use for the statutory time period. *Peters*, 519 P.2d at 833.

11. Amendment to the pleadings may be proper on remand. *See City of Columbia v. Paul N. Howard Co.*, 707 F.2d 338, 341 (8th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 238, 78 L.Ed.2d 229 (1983) (interpreting Fed.R.Civ.P. 15(a)); 6 C. Wright & A. Miller, Federal Practice and Procedure § 1489, at 449–50 (1971); 3 J. Moore, Moore's Federal Practice ¶ 15.11, at 15–150 (1984).

12. Disqualification is required if either party has retained the judge as their attorney in any matter within two years preceding the filing of the action. AS 22.20.020(a)(5).

13. Due process requires the appearance as well as the fact of impartiality. *State v. Lundgren Pacific Constr.*, 603 P.2d 889, 895–96 (Alaska 1979).

14. We find no order denying their motion in the record; however, we presume it was denied since the court ordered the Wilsons and Slaters to pay fees to appellees.

and $4403.95 against the Swifts and Dahls must be vacated. After final judgment is reached on remand, the superior court can redetermine the prevailing party or parties under Civil Rule 82, and award attorney's fees accordingly. *Curtiss v. Hubbard*, 703 P.2d 1154, 1154 (Alaska 1985).

The superior court's judgment is REVERSED and the case is REMANDED for adequate findings of fact and conclusions of law consistent with this opinion.

Ed WEASON, Appellant,

v.

Dave HARVILLE, Appellee.

No. S-280.

Supreme Court of Alaska.

Sept. 20, 1985.

Seaman brought admiralty action against his employer. The Superior Court, Third Judicial District, Kodiak County, Roy H. Madsen, J., awarded seaman damages for his medical expenses, maintenance, and back shrimp season wages, awarded seaman prejudgment interest, and awarded attorney fees, but refused to award seaman lost wages for crab season and punitive damages. Seaman appealed. The Supreme Court, Matthews, J., held that: (1) Superior Court's finding that seaman was employed only for shrimp season, and thus was not entitled to damages for crab season, would be upheld; (2) punitive damages may be awarded in admiralty actions where shipowner in bad faith refuses to pay maintenance and cure to seaman and it is clearly owed; and (3) whether employer's conduct was of such a character as to require punishment through imposition of punitive damages was question for trial court.

Affirmed in part; reversed in part; vacated in part; and remanded.

1. Admiralty ⇐1.20(1)

Federal admiralty law rather than state law applies to admiralty action, even though action is brought in state courts.

2. Seamen ⇐11(5)

Remedy of maintenance and cure for seamen who are injured while serving vessel for which they work is absolute, with seaman being entitled to his wages, maintenance, and cure without regard to his fault.

3. Seamen ⇐11(5)

Exception to general rule, that remedy of maintenance and cure for seamen who are injured while serving the vessel for which they work is absolute, is where seaman willfully misbehaves and misbehavior brings about his injuries, including such injuries as venereal disease and injuries resulting from intoxication.

4. Seamen ⇐11(5)

The exception to absolute remedy of maintenance and cure for injuries suffered by seamen while serving vessel for which they work for willful misbehavior by seaman is narrowly construed in favor of the seaman.

5. Seamen ⇐11(5)

Comparative fault would not reduce seaman's award in admiralty action for maintenance and cure.

6. Seamen ⇐11(6)

Damages recoverable in seaman's action for maintenance and cure are maintenance, defined as cost of room and board comparable to that which seaman received while on board vessel, cure, defined for instant purposes as medical expenses until maximum possible cure has been attained, and wages which seaman would have earned until end of the voyage.

7. Seamen ⇐11(9)

Generally, plaintiff seaman bears burden of proving each element of maintenance and cure cause of action in admiralty action.