

Prescriptive Easements: Revisited
by Dale S. Alberstone, Esq.

During the more than twenty years this column has appeared in AOA Magazine, I have included numerous articles concerning the acquisition of prescriptive easements. Readers know that a prescriptive easement is the right acquired by a person (often the next door neighbor) to traverse or trespass on an owner's property. That right is acquired after five years of hostile use against the owner's consent, or at least without the owner's permission.

The technical legal elements are the following: (1) open and notorious use, (2) hostile and adverse usage across the owner's property, (3) continuous and uninterrupted usage for a five-year period, and (4) "under a claim of right." The first four elements are rather straightforward. "Open and notorious" use means that the usage of the trespasser is visible and not in any way concealed from the owner. "Hostile and adverse" means that it is repugnant to the owner's ownership interest in his own property. "Continuous and uninterrupted" means that the usage is on some sort of regular basis or use which is typically consistent with the season (such as regular walking through a person's side yard in the summertime to access the beach).

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But, the concept of usage under "a claim of right" has been particularly troubling to the courts for many years, as illustrated in the recent case of *Felgenhauer v. Soni* decided by the California Court of Appeal on August 5, 2004. In that litigation, Mr. Felgenhauer owned a parcel of real property and restaurant which was situated thereon next to a parking lot owned by another. For the four years that Mr. Felgenhauer operated the restaurant, his delivery personnel and vendors made deliveries to the restaurant by driving across the parking lot next door. For the next four years, Mr. Felgenhauer leased his property to various other businesses. Apparently, deliveries were made across the parking lot for at least 5-1/2 years.

The testimony at trial suggested that none of the delivery personnel or vendors using the parking lot to access Mr. Felgenhauer's property believed that they had the legal right to do so. But they used the lot anyway.

The Court of Appeal held that the requirement that the usage be "under a claim of right" really does not mean what those words might literally imply. Thus, instead of the usage having to be made with an assertion by the trespassers that they had a right to use the property, the court held that the requirement simply means that the parking lot owner had not expressly consented to the use. This is significant in that there no longer seems to be any justification for having an independent element that a prescriptive easement can only arise under "a claim of right." As one commentator said as early as 1952: "In most of the cases asserting the requirement of a claim of right, it means no more than that possession must be hostile, which in turn means only that the owner has not expressly consented to it. . . ."

This recent court decision retreats from expressions by the California Supreme Court in the 1980's. For example, in *Gilardi v. Hallam*, 30 Cal.3d 317, which was decided by the Supreme Court in 1981, the high court held that when the occupier enters the land mistakenly believing he is the owner, that was sufficient to establish the required "claim of right." Under the recent Court of Appeal ruling, it seems as though the element of "claim of right" is mere surplusage, as it adds nothing to the other element of "hostile and adverse" use.

Regardless of these technicalities and the exact elements which must be proved, it is clear that the law of prescriptive easements is still alive and well in the State of California.

In order to preserve and protect all rights an owner has to his property, owners need to be especially vigilant when it comes to trespassers. The following are the principal methods to prevent anyone from acquiring an easement over an owner's property:

1. Consent: Consent is an absolute defense to anyone acquiring a prescriptive easement. However, the consent must be given within the first five years of usage, and of course, the sooner

the better. In order that there is no dispute, the consent should be in writing and personally delivered to the trespasser. It is also helpful that the trespasser acknowledge receipt of the letter.

2. Physical Exclusion: The erection of a fence, wall or other barrier that physically excludes the occupant within the first five years of use will prevent an easement by prescription. Incidentally, if the trespasser acquires a prescriptive easement, but is thereafter barred from using the land for a period of five years (such as by the erection of a fence), the prescriptive easement is extinguished.

3. Posting of Signs: No use by any person, no matter how long continued, shall ever ripen into an easement by prescription if the owner of the property posts at each entrance to the property, or at intervals of not more than 200 feet along the boundary, a sign reading as follows: "Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code." Occasionally, you might see this type of language printed on a plaque which is embedded in the sidewalk outside commercial stores. When the sidewalk is privately owned, the purpose of the plaque is to prevent the general public from acquiring a prescriptive easement along it.

4. Recordation of Permission: An additional method to prevent the acquisition of a prescriptive easement is for the landowner to record a notice giving express permission to the general public to use the owner's land. The text of the language which must be recorded is contained in Civil Code Section 813.

Conclusion

Concepts of acquiring easements by prescription arose at least as early as the twelfth and thirteenth centuries in England. The "common law," as it was then called, has been carried forward for hundreds of years and it is now firmly rooted in California's real estate laws.

The philosophy underlying prescriptive easements is that property owners should remain attentive to their property, lest they be subject to loss of the rights incident to ownership. In California, hundreds of lawsuits are filed each year in which trespassers or neighbors seek to establish right of usage on a property owner's land. Owners should promptly seek advice from competent real estate counsel any time they are aware that anyone is using their land without the owner's permission.

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The foregoing discussion is intended solely as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

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