

FEATURE ARTICLE

ENCROACHERS BEWARE: THE SUN IS SETTING ON THE WILD WEST DOCTRINE OF ADVERSE POSSESSION

By Matthew Henderson and Christian Carrigan

The venerable common law doctrines of adverse possession and prescriptive easements find new expressions and iterations in the modern California landscape dominated by common interest developments and suburban sprawl. In stark contrast to the image of squatters putting shacks and vegetable gardens on isolated plots in the hinterlands, modern cases involving these doctrines invariably involve adjoining homeowners and backyard litigation. Courts called upon to apply these centuries-old legal principles to the modern realm of the suburb and subdivision have had to cover some new ground, so to speak, and the results have been rather intriguing. Based on the knotty analytical threads of case law, statute, and legal principle, courts are resorting more and more to reverse and result-oriented analyses to reach the “right” outcome.

Result-Oriented Judicial Reasoning in Adverse Possession

Two recent Court of Appeal decisions illustrate the trend toward result-oriented judicial reasoning, and the doctrinal limits of adverse possession and prescriptive easements, with interesting results. *Harrison v. Welch*, 116 Cal.App.4th 1084 (2004) (*Harrison*) and *Kapner v. Meadowlark Ranch Ass’n*, 116 Cal. App.4th 1182 (2004) (*Kapner*) present the classic sets of facts with which courts are faced when deciding claims for adverse possession and exclusive use prescriptive easements—improvements put in by a landowner that encroach on an adjoining parcel. The cases also have similar results in which the encroachers lose out.

Harrison v. Welch—Adverse Possession or Prescriptive Easement?

In *Harrison*, the Third District affirmed judgment in favor of plaintiff landowner, upon whose lot the defendant had constructed a woodshed and landscaping improvements. The plaintiff bought its property some seven years after the improvements had gone in, and brought suit to quiet title shortly after conducting a survey that revealed the encroachment. The defendant asserted the statute of limitations as a defense, and filed a cross-complaint on theories of adverse possession, prescriptive easement, and “balancing of the hardships.”

The appellate decision does not address the adverse possession issue, although it could have been cursorily disposed of by noting that the defendant had not paid property taxes on the property at issue and, accordingly, under Code of Civil Procedure § 325, she could not have gained title to the property by adverse possession. What the court in *Harrison* did address was the defendant’s alternative allegation that she had obtained an exclusive prescriptive easement to use the plaintiff’s property. The Third District followed the dominant judicial trend, as laid down in cases such as *Raab v. Casper*, 51 Cal.App.3d 866 (1975) (*Raab*) and *Silacci v. Abramson*, 45 Cal. App.4th 558 (1996) (*Silacci*). Courts have generally not responded well to arguments that a claimant has established an exclusive right to use the property of another, and even to exclude the record title owner from using it. Judicial hostility toward *exclusive easements* in general is demonstrated by *Pasadena v. California-Michigan Land & Water Co.*, 17 Cal.2d

The opinions expressed in attributed articles in *California Land Use Law & Policy Reporter* belong solely to the contributors and do not necessarily represent the opinions of Argent Communications Group or the editors of *California Land Use Law & Policy Reporter*.

576 (1941), in which the court declined to find that an express easement was exclusive, opining that “an exclusive easement is an unusual interest in land; it has been said to amount almost to a conveyance of the fee.”

Courts dislike exclusive easements, whether prescriptive or otherwise, because they are the functional equivalent of a fee. As the *Raab* court reasoned, “An exclusive interest labeled ‘easement’ may be so comprehensive as to supply the equivalent of an estate, i.e., ownership.” Logically, exclusive easements tend to blur the distinction between the fee, which is an ownership interest, and an easement, which is a mere right to use. As aptly observed by the Sixth District Court of Appeal in *Silacci*:

To permit Abramson to acquire possession of Silacci’s land, and to call the acquisition an exclusive prescriptive easement, perverts the classical distinction in real property law between ownership and use.”

Whether this distinction between use and ownership is grounded on principled reasoning, or is merely a means to an end (i.e., the denial of prescriptive rights in land) is debatable. Nevertheless, the distinction provides courts with a basis (both methodological and result-oriented) to deny exclusive prescriptive easements, which are essentially the functional equivalent of adverse possession without the tax payment requirement. In *Raab* and *Silacci*, the Third and Sixth Districts have essentially held that there can be no exclusive use prescriptive easements in the context of a backyard boundary dispute.

The increasingly lonely exception to *Silacci* and *Raab* is the Fourth District’s *Otay Water District v. Beckwith*, 1 Cal.App.4th 1041 (1991), in which the court upheld the trial court’s ruling that the district had established an exclusive prescriptive easement for a water district reservoir. Not surprisingly, the court in *Harrison* found closer and more persuasive analogues in *Silacci* and *Raab* than it did in *Otay*. After all, *Otay* involved strong public policy interests, such as governmental interests in water quality.

The Statute of Limitations Issue

Another doctrinal clash in these types of cases is illustrated by the statute of limitations issue raised in *Harrison*. The court ruled that the applicable limita-

tions period was that for the recovery of property, which is five years, as set forth in Code of Civil Procedure §§ 318 and 321. The trial court had applied the three-year period for trespass set forth in § 338. But the truly interesting aspect of the court’s analysis was its conclusion that until an encroacher’s use actually ripens into adverse possession or a prescriptive easement, the statute of limitations does not begin to run!

[U]nless and until the encroacher’s use of the property ripens into title by adverse possession or a valid prescriptive easement, the legal title holder’s right to bring an action to recover his or her property from the encroacher *never* expires.

Harrison’s somewhat counterintuitive conclusion on this point is driven by the ever-present underlying premise in California law that a defendant’s use of property cannot ripen into adverse possession if the claimant has never paid property taxes on it. To grant title or exclusive use to a claimant without her having met this statutory requirement would be to effectively do away with it. Thus, the reasoning on the statute of limitations issue in *Harrison* begins with the conclusion: the defendant cannot have attained the status of an adverse possessor. Everything else in the decision, from the prescriptive easement analysis to the statute of limitations discussion, flows from this “premise.” The *Harrison* court wrote:

[I]t follows that because Welch’s encroachment on the Harrisons’ property never ripened into either title by adverse possession or a prescriptive easement... the limitations period for the Harrisons to bring an action to recover their property from Welch had not expired when they filed their complaint in December 2001, even though Welch had been encroaching on their property for more than seven years.

Viewed from this result-oriented perspective, the *Harrison* decision makes sense. But, what the court did not address was the practical result of its ruling: there is effectively no statute of limitations for the recovery of real property unless and until the encroacher begins to pay property taxes. It is an interesting question as to whether this principle, which upon reflection seems sound, will be applied even in extreme

cases of possession lasting more than thirty or even 40 years. Perhaps another equitable doctrine—*laches*—will step into the gap, making *Harrison's* rather sharp delineations more pliable and unpredictable.

Kapner v. Meadowlark Ranch Ass'n

If there was any risk that *Harrison* would be viewed as an “outlier” decision on these issues, *Kapner* has probably removed it. In *Kapner*, a decision out of the Second District, the plaintiff purchased an unimproved parcel that adjoined a dedicated roadway. He then constructed a house, driveway, gate and fence on his parcel, but some of the improvements encroached on the roadway. This fact did not become apparent until a survey conducted 14 years later by the defendant homeowner’s association, which was charged with operating and maintaining the road. The defendant tried to have the plaintiff sign an encroachment agreement which would permit the encroachments to remain until the need for their removal arose, at which point he would have to pay for their removal.

The landowner refused to sign the encroachment agreement, and instead filed suit to quiet title and for declaratory relief. The defendant homeowner’s association cross-complained for injunctive and declaratory relief. The trial court found in favor of the defendant, and ordered the landowner to either sign the encroachment agreement or remove the encroachments.

The landowner appealed, contending that the trial court had erred in denying him a prescriptive easement to the portion of the roadway upon which his improvements encroached. As in *Harrison*, the court found this unpersuasive. In fact, the court in *Kapner* was even more explicit in its rejection of the prescriptive easement doctrine as a substitute for adverse possession, opining “The law does not allow parties who have possessed land to ignore the statutory requirement for paying taxes by claiming a prescriptive easement.”

The landowner also sought an equitable easement under *Hirshfield v. Schwartz*, 91 Cal.App.4th 749 (2001). The argument is essentially the same as the “balancing of the hardships” equitable argument the defendant made in *Harrison*, which the court in that case dismissed in a footnote. The *Kapner* court gave this argument an equally frosty reception. It simply declined to apply the doctrine, holding that it was obligated to recognize the distinction between ease-

ments and ownership interests.

The *Kapner* court also addressed the statute of limitations issue, but did so simply by noting that the plaintiff had failed to establish the requirements for adverse possession, and thus the defendant could not be precluded from seeking possession of its property. The court’s summary treatment of this issue reveals, to a certain extent, the inverted nature of its analysis: the plaintiff has not established adverse possession, therefore the statute cannot have run. (Of course, the more usual mode of “start-to-finish” reasoning would be that the statute has not run, therefore the plaintiff has not established adverse possession.) The similarity of the two courts’ “reverse reasoning” is astonishing.

Harrison and *Kapner* demonstrate that the doctrines of adverse possession and prescriptive easement will generally be unavailing to encroachers in backyard boundary disputes. However, there are alternative remedies, one of which is the good faith improver statute. Under Code of Civil Procedure §§ 871.1 *et seq.*, a “good faith improver” is one who makes an improvement to land in good faith and under the mistaken belief that he or she owns it. The improver may bring an action for relief, and the court is empowered to adjust the rights, equities, and interests of the parties under § 871.5 in furtherance of “substantial justice.”

Stuck Between the Rock of Taxes and the Hard Place of Good Faith Improving

One problem with this scheme is that the improver must act in good faith, but his or her negligence will be taken into account in a court’s evaluation of the element of good faith. (Code Civ. Proc., § 871.3, subd. (b); *Raab* at p. 872.) There is an inherent tension, if not outright contradiction, in these principles. “Good faith” means without hostile intent, *i.e.*, under a mistake. But almost by definition such a mistake must be in some way negligent. Moreover, as stated in *Raab*, if the improver obtains notice of the true owner, his or her good faith goes by the board: “[C]ontinuation of the offending construction in defiance of the injured owner’s opposition is inconsistent with good faith.”

The statute thus seems to “stack the deck” against the would-be good faith improver from the get go. This is particularly true when contrasted with adverse possession, which requires the possessor to have a

hostile intent to possess property as against the true owner. An encroacher can therefore lose on adverse possession because of lack of payment of property taxes, and lose on the good faith improver statute because his or her occupation was either too negligent or not undertaken in good faith. The encroacher can thus be stuck between the rock of property taxes and the hard place of good faith, and lose out on any type of relief.

Insofar as the good faith improver statute may permit a type of private eminent domain, constraints on its application may be wholly appropriate. Of course, other common law doctrines such as nuisance law can operate as a kind of private eminent domain, so this objection may not be wholly appropriate. Any time conflicting interests come up in the context of a court's equitable balancing to determine property rights, there will be winners and losers. If the improver acts in utmost good faith and with minimal negligence, he or she likely should receive some relief under the statute.

Equitable Easements Weigh In

The wild card in this poker hand of legal doctrines is the so-called equitable easement. As suggested by *Harrison* and *Kapner*, this doctrine simply comes down to a court exercising its equitable powers to balance the equities between the parties in fashioning injunctive relief. But, as *Kapner's* apparent rejection of the equitable easement suggests, if a party is unable to establish adverse possession, a prescriptive easement, or relief under the good faith improver statute, a court may be right to question the viability of this equitable remedy. The claim should be considered a last-ditch effort on the encroacher's part, and asserted with little optimism.

Matthew Henderson is a litigation associate in the Walnut Creek office of Miller, Starr & Regalia, specializing in title insurance matters as well as general commercial litigation.

Christian Carrigan, a longtime member of the *California Land Use Law and Policy Reporter's* Editorial Board, is a litigation associate in the Walnut Creek office of Miller, Starr & Regalia specializing in land use and environmental litigation.

Conclusion and Implications

The doctrines discussed here do not neatly separate themselves into individual categories. They overlap and entangle. The adverse possession requirement of payment of property taxes has no doubt led simultaneously to the argument for the exclusive prescriptive easement and its virtual extinction. Elements such as "good faith," "hostility," and "negligence" lie along a continuum, and what may seem favorable for a claim of adverse possession may torpedo another under the good faith improver statute. This, no doubt, is one reason why courts in this area of law seem to begin from an ending point and work backwards from the result. As the case law strongly suggests, and perhaps rightly so, the ending point from which a court's reasoning is likely to flow most often favors the record title holder. Encroachers beware!

Calling land use and boundary disputes in California common is a healthy dose of understatement and, given the state's population and development dynamics, encroachment issues are proliferating. Whereas the courts of appeal may have been reluctant in the past to issue published opinions on these fact-intensive squabbles over a few feet of backyard, the proliferation of such litigation may be causing them to change their minds. *Harrison* and *Kapner* may be harbingers of a wave of decisional law designed to provide guidance to frustrated homeowners and practitioners, and to cut down on the number of these cases coming up through the trial courts in the first instance, and on appeal. If true, subsequent decisions are even more likely to be result-driven, and courts more willing to turn a blind eye even to sympathetic encroachers. After all, equity does have its limits.