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ARTICLE

TEN YEARS AFTER *SILACCI*, *MEHDIZADEH* AND *SCRUBY*, NEIGHBORS IN CALIFORNIA ARE STILL BEHAVING LIKE THE "HATFIELDS AND MCCOYS"

By Lewis J. Soffer and David E. Harris*

The Hatfields and McCoys carried on their neighborhood dispute with lethal weapons. Today's feuding neighbors use weapons not quite so lethal, but far more expensive–lawsuits. This article discusses two areas of easement law in which the courts have virtually invited neighbors to sue each other.

It has been a decade since the courts of appeal radically changed California easement law governing both prescriptive easements and express, non-exclusive easements. Under prior law, (1) a party could establish the elements of an easement by prescription based upon encroachments amounting to exclusive use of his neighbor's property, even though that party could not obtain fee title through adverse possession, because he or she had not paid property taxes for the prescriptive period; and (2) the owner of a servient tenement could not construct any encroachments within an expressly granted, non-exclusive easement of a defined width. While it is safe to say that neither of these is a correct statement of current law, it is far more difficult to discern what the current law is, and how to apply it.

In 1996, two decisions—*Mehdizadeh v. Mincer*[1] and *Silacci v. Abramson*[2]–held that it was inequitable and illogical to allow an easement to be established by prescription that gave all the benefits of ownership to one who was not the holder of the fee, and that absent payment of proper-

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ty taxes, a party could not obtain an exclusive easement by prescription, at least not in a typical residential boundary dispute. In another reversal of earlier case law, the court in *Scruby v. Vintage Grapevine, Inc*.[3] held that the owner of a servient tenement could encroach into an expressly granted, non-exclusive easement of defined dimensions, provided the encroachment did not unreasonably interfere with the dominant tenement holder's use of the easement.

These decisions seemed to obliterate what had previously been "bright line" rules. Very few published decisions have addressed these issues further in the past decade, so that the legal and practical application of these decisions is far from settled. Though reasonable minds may differ as to whether the prior law was more equitable or logical than the current law, it is apparent that the prior law had the benefit of relative certainty. Courts and practitioners must now struggle to resolve disputes that often depend on factual determinations as to what use is allowable or reasonable.

EASEMENTS BY PRESCRIPTION—CAN YOU GET ONE, AND WHAT CAN YOU GET?

Prescriptive easement disputes often begin something like this: A growing family owns a small ranch house, and needs another bedroom. Rather than pay what it takes to buy the identical house with one more bedroom, they decide to remodel. They begin the process of applying for a building permit, and are told that they need to survey the lot. That is when they discover that the 30 year old backyard fence is not on the actual property line. Instead, it either adds square footage to the family's lot, or fences them out of a part of their property. Perhaps this is a locale where floor area ratio dictates the maximum house size based on a formula driven by lot size. Or the fence location affects setback requirements, dictating what sort of remodeling, if any, will be allowed. Sometimes, one neighbor or the other realizes that the existence of the encroachment will have to be disclosed whenever either property is sold, impacting on value. Someone contacts an attorney, who must try to divine what rights, if any, the encroaching party has acquired.

It has long been the law in California that the erroneous fence location cannot convey title via adverse possession unless the user paid the taxes on the disputed property for the prescriptive period.[4] Since real property taxes are generally assessed based upon the legal description of the parcel, the best legal theory available to the encroaching party who has not paid the taxes is that a prescriptive easement has been established.

"To establish the elements of a prescriptive easement, the claimant must prove use of the property, for the statutory period of five years, which use has been (1) open and notorious; (2) continuous and uninterrupted; (3) hostile to the true owner; and (4) under claim of right." "Claim of right"[5] means only that the user does not have the owner's permission.[6]

Even after *Mehdizadeh* and *Silacci,* a non-exclusive easement by prescription can still be established through non-exclusive use of another's property; e.g., by using another's driveway for ingress and egress.[7] The question remains whether one can obtain an easement by prescription by showing exclusive (or nearly exclusive) use of another's property for five years.

DOES THE EXCLUSIVE ADVERSE USER GET A NON-EXCLUSIVE EASEMENT?

In 1975, a court of appeal held that encroaching landscaping, driveway, and utility lines could not create an exclusive easement by prescription:

> An exclusive interest labeled 'easement' may be so comprehensive as to supply the equivalent of an estate, i.e., ownership. In determining whether a conveyance creates an easement or estate, it is important to observe the extent to which the conveyance limits the uses available to the grantor; an estate entitles the owner to the exclusive occupation of a portion of the earth's surface.[8]

The appellate court reversed the grant of an exclusive easement, directing the trial court on remand to "give separate consideration to the yard and landscaping as distinguished from the easements for driveway and utility lines, suggesting that exclusive use could give rise to a non-exclusive easement."[9] In *Otay Water Dist. v. Beckwith*, another appellate court held that plaintiff water district had established an exclusive easement by prescription to maintain a reservoir on the defendant's property.[10]

In *Silacci,* which involved a typical backyard boundary dispute, the trial court granted plaintiffs an exclusive easement over approximately 1600 square feet of defendants' property that plaintiffs had enclosed and used for many years. Similarly, in *Mehdizadeh*, the trial court granted an exclusive easement over a 10 foot strip that had been fenced in for years. In both, the appellate courts reversed, holding that plaintiffs' exclusive "right to 'use' looks more like 'occupancy,' possession, and ownership."[11] *Silacci* and *Mehdizadeh* both distinguished *Otay*, stating that case "must be limited to its difficult and peculiar facts," namely the need to keep a public drinking water reservoir safe from contamination.[12] These courts felt that interference with the socially important duty of a utility to provide an essential service was different from a simple backyard dispute.[13]

Both *Mehdizadeh* and *Silacci* were based on the premise that it is illogical and inequitable to give an encroaching party the effective equivalent of title based on prescriptive use, when actual transfer of legal title is prohibited. These decisions did not hold that no easement could be created, but rather held that an exclusive easement could not be created. One inference that might be drawn from both decisions is that the exclusive user can establish a "non-exclusive" easement by prescription. One subsequent decision, however, held that encroaching landscaping which did not physically exclude the servient tenement owners nevertheless constituted what would have been an exclusive easement by prescription, and upheld the

trial court's refusal to grant any easement by prescription. The court rejected plaintiffs' argument that defendants could use the disputed portion for picnicking and other activities because no evidence in the record supported that contention.[14]

In *Hirshfield v. Schwartz*, the court observed that "[s]ince the scope of a prescriptive easement is determined by its historical use, and since exclusive easements, while rare, are possible, we believe the holdings of *Silacci* and *Mehdizadeh* may be overbroad. We need not reach that issue, however, and assume for purposes of our discussion that they accurately state the law regarding adverse possession and prescriptive easements."[15] In *Hirshfield*, several structures (including part of a swimming pool, a block wall, and an extensive garden of rare and exotic plants) encroached on the neighbor's property. The fee owner sought to regain use of the property, claiming a need for access and a desire to build a greenhouse. The trial court fashioned an "equitable" easement which allowed the encroaching party to maintain exclusive use of the disputed portion of the property, but only so long as the encroaching party continued to reside on the dominant estate, and it required the encroacher to pay an appraised value for those areas affected by the encroachments.[16] The appellate court affirmed, sidestepping *Silacci* and *Mehdizadeh* by pointing out that the unique "equitable interest" created was not a prescriptive easement.[17] The idea that brand new property interests may simply be devised in equity to solve problems as they arise utterly destroys the prospect of predictable outcomes under comparable, but different, fact scenarios.

More recently, another court denied a prescriptive easement to a property owner who constructed a driveway, gate, and perimeter fence on property belonging to a homeowner's association. Declining to follow the *Hirshfield* "equitable interest" theory, the court held that because the encroaching party had "enclosed and possessed the land in question," his use of the land "was not in the nature of an easement."[18] That court believed that it was "required to observe the traditional distinction between easements and possessory interests in order to foster certainty in land titles,"[19] and it therefore affirmed the trial court's order requiring removal of the encroachments. Still another court held that plaintiff could not acquire a prescriptive easement over trails he had used recreationally, holding, inter alia, that to grant the easement would deprive the owner of all use and grant the user the equivalent of adverse possession.[20]

Thus, some of the cases seem to indicate that no prescriptive easement, exclusive or non-exclusive, can be established by use that is equivalent to possession. This reasoning leads to the irony that a party who only partially uses another's property acquires greater rights than a party who uses the property completely. One who utilizes a strip of the neighbor's property for ingress and egress may establish an easement by prescription, but if that same person fences the area and excludes the owner entirely, no prescriptive rights at all may result.

Assuming a non-exclusive easement by prescription can be created, application of that doctrine is problematic. Can the adverse user argue that although he or she cannot fence off the disputed property, neither can the fee owner? Must the "no man's land" be shared, and if so, how? Are the parties equally responsible for the repair and maintenance of the easement area? Does *Scruby*, which holds that where there is an express non-exclusive easement, the servient tenement can utilize the easement area as long as he or she does not unreasonably interfere with the dominant tenement's use, apply to and control the parties' respective uses of the prescriptive easement area?

Finally, the requirement that one cannot establish adverse possession (or an exclusive easement by prescription) absent payment of property taxes does not necessarily foreclose acquisition of exclusive rights, because the user of an enclosed encroachment may argue that he or she has been paying property taxes on the disputed piece. Though the Supreme Court held that "each coterminous owner is deemed to have paid the taxes according to his deed," *Ernie v. Trinity Lutheran Church*,[21] the user may argue that the *Ernie* case predated Proposition 13, under which property taxes are "to be assessed at fair market value."[22] Can the adverse user argue that the price of his home, and thus the property taxes, were based on the apparent boundary, and not that described in any deed or subdivision map? In other words, since one would presumably pay less for a given property had they known the actual boundary line was really ten feet inside the fence, does one pay property taxes on the disputed portion in a post-Proposition 13 acquisition? It is unclear whether such an argument would be accepted by the courts.

Most disputes of this nature may resolve relatively early in the litigation process, especially if the value of the land in question does not justify litigation, by the grant of property in fee, a lot line adjustment, or the grant of an easement or a license, to accommodate needed use. The practitioner should take care in these instances to make sure that any such conveyance does not constitute: (1) a violation of applicable setback requirements or minimum lot sizes; (2) a violation of state or local subdivision requirements; or (3) a conveyance that will trigger the due on sale clause in a promissory note or deed of trust held by the grantor's lender.

SCRUBY, AND THE FEE OWNER'S RIGHT TO BLOCK PART OF AN EASEMENT

In *Scruby v. Vintage Grapevine, Inc.*,[23] the First District Court of Appeal declared that the owner of land encumbered by an expressly-granted non-exclusive access easement benefiting his neighbor's parcel could block portions of that easement by constructing permanent improvements within the easement area, so long as what remained of the easement allowed adequate access to that neighboring parcel, given its then-current use. In that case, the permanent improvements comprised grapevines and supporting structures, and water tanks mounted on substantial concrete

pads.[24] In another case, the obstructions might be a child's swing set mounted in concrete, a permanent retaining wall, or a commercial building. Under the logic of *Scruby,* no permanent improvement, regardless of its scale, is prohibited. The servient tenement owner may block any portion of an expressly-granted easement for ingress and egress (let alone one acquired by prescription), so long as what remains of the easement affords the owner of the benefited parcel "reasonable" access. The court phrased its decision as though allowing construction of "reasonable" obstructions within the easement area was merely an application of existing law. To the contrary, *Scruby* changed well-established rules regarding granted access easements, introducing uncertainty where formerly the rules had been clear.

It might be supposed that a rule of "reasonableness" such as this might lead to some friction between neighbors in our ever more crowded state, especially given the price of real estate in the state's urban areas and posh residential neighborhoods. In fact, for practitioners "in the trenches," *Scruby* issues arise constantly. What is the right advice? "Do what's reasonable under the circumstances. That is the only standard under California law."

If indeed *Scruby* left the issue of permanent improvements within an easement in a muddle, hasn't subsequent case law clarified the situation? Interestingly, given that a decade has passed, the answer to that question is no. An on-line inquiry reveals that as of April 2006 *Scruby* had been mentioned in only seven published decisions in California, and in 30 unpublished, uncitable cases. Before one even reads the cases, this pattern suggests that *Scruby*-type disputes erupt regularly, but that the resolution of such disputes is fact driven and situational, so that any appellate review is unlikely to warrant publication. An actual reading of the cases partially confirms that thesis, but it must also be said that the holding of *Scruby* has rarely been mentioned, and the case is more frequently quoted for such non-controversial propositions as "An easement is a restricted right to a specific, limited, definable use or activity upon another's property, which must be less than the right of ownership"[25] and, "in construing an easement, the rules applicable to the construction of deeds generally apply."[26] The result of all this is that little pressure has built up to catalyze a meaningful critique of *Scruby,* by either the courts or the academics. Neighbor disputes proliferate, encouraged because outcomes are unpredictable, and because every property owner naturally sees his own behavior as "reasonable," and his neighbor's as an outrage. The remaining sections of this article will examine the reasoning of the *Scruby* decision, and suggest an alternative approach to the problem.[27]

THE DICHOTOMY BETWEEN "EXCLUSIVE" AND "NON-EXCLUSIVE" EASEMENTS

The court of appeal began its analysis of the Scrubys' position by creating a convenient, but inaccurate, "strawman": "Scruby's principal argument, which serves as a springboard for their remaining arguments, is that the court erred in construing the easement to give them a mere roadway of reasonable and convenient access to their residence and that *the correct interpretation would have allowed them the right to exclusive use of the entire specifically described easement area.*"[28] Not only was this not the Scrubys' "principal argument," but it is an argument that the Scrubys never made, and expressly disclaimed.

What the Scrubys actually argued is accurately, if incompletely, summarized in the very next two sentences of the *Scruby* opinion: "Scruby emphasizes the grant gives them '[a] nonexclusive easement, 52 feet in width, for road and utility purposes.' Therefore, Scruby argues, they have 'the *right, as a matter of law*, to use every portion of their 52 foot wide easement, and the 100 foot cul-de-sac, free of interference by [Grapevine]." As this language reflects, the Scrubys at all times acknowledged that they were the owners of a nonexclusive easement, and that the owner of the servient tenement (the encumbered parcel) was entitled to make any use of any part of the easement area that did not interfere with their reasonable use of the described easement area. As an example, the servient owner might engage in temporary storage of materials, temporary parking of vehicles, or the odd game of touch football within the easement area, without unreasonably interfering with the dominant owner's right of access. The Scrubys argued, however, that the owner of the servient tenement could not construct improvements that constituted permanent obstructions, *excluding the Scrubys or their successors completely from a portion of the easement area*.[29]

The distinction between the dominant tenement owner claiming a right to exclude the owner of the servient estate from making any use at all of that portion of his own property encumbered by the easement (the "exclusive easement" argument attributed to the Scrubys) and the dominant owner claiming that the servient owner may make any non-interfering use of all parts of the easement area, but may not completely block use of any portion of the easement (Scrubys' actual argument) is fundamental. There are parallels to be drawn between this distinction and the courts' holdings in *Mehdizadeh* and *Silacci*, where prescriptive rights are categorized as either constituting the acquisition of non-exclusive right of use (prescriptive easement) or amounting to the purported acquisition of exclusive rights of use, comparable to ownership of fee title (adverse possession). The difference is that *Scruby* dealt with an expressly-granted, specifically described easement, while *Medizadeh* and *Silacci* dealt with prescriptive rights.

As *Silacci* and *Mehdizadeh* observed, "An exclusive easement is…a very unusual interest in land…An easement, after all, is merely the right to use the land of another for a specific purpose—most often, the right to cross the land of another…An easement, however, is not an ownership interest, and certainly does not amount to a fee simple estate."[30] In the instance of an expressly-granted easement, an intention to convey exclusive use rights is not imputed to the owner of the servient tenement in the absence of evidence of a clear intent to do so.[31] Had the Scrubys argued that theirs was an exclusive easement, this rule might indeed have been determinative, but they did not.

SCRUBY USED "CONTRACT INTERPRETATION" TO UNDO ESTABLISHED PRECEDENT

The *Scruby* decision characterized another argument by the appellants: "As Scruby emphasizes, when the width of an easement is definitely fixed by the grant or reservation creating the same, its use may be interpreted as commensurate with the entire width thereof."[32] Actually, the Scrubys had done more than merely cite the authorities listed by the court as supporting this statement. They had quoted directly from those cases language unambiguously stating the rule of law as it had existed since at least 1910: "Where the way over the surface of the ground is one of expressly defined width, it is held that *the owner of the easement has the right, free of interference by the owner of the servient estate, to use the land to the limits of the defined width even if the result is to give him a wider way than necessary.*"[33] That is a clear statement of pre-*Scruby* law, forbidding obstruction of any part of an expressly-granted, specifically-defined, non-exclusive access easement.[34] In the face of that statement, how was *Scruby* decided as it was?

First, as just noted, the court simply mischaracterized existing precedent, as though the well-established rule against permanent obstruction of any part of a specifically-described access easement were a matter of case by case "interpretation" of individual grants of easements. Second, the court discovered an ambiguity in the deeds by two sets of grantors of the Scrubys' easement. The decision states that "[t]he language of the easement…provides a 'nonexclusive easement, 52 feet in width, for road and utility purposes.'" This is said to create ambiguity, in that the document "does not specifically describe the intended roadway as 52 feet in width ending in a 100 foot cul-de-sac."[35] It was undisputed that both the grants of easement to the Scrubys had contained these words: "A non-exclusive easement, 52 feet in width, for road and utility purposes, as shown on [a recorded survey map]." The map showed the cul-de-sac, whose 100 foot diameter was wider than 52 feet. Had the trial court found this to be an ambiguity, it might well have determined, as a matter of fact, that only a portion of the cul-de-sac was included in the easement. It might then have determined whether or not the obstructions constructed by the winery lay

within the easement or outside it. But no party had raised this ambiguity argument in the trial court, no such fact finding occurred, and this was not among the issues briefed by the parties.

The court ignored the fact that both grants of easement to Mr. & Mrs. Scruby specified the width of the easement as 52 feet, instead construing the deeds "as granting Scruby [only] the right of ingress and egress to the property."[36] It adopted the trial court's finding that "[the easement's] dimensions were far greater than those contemplated or necessary for access to a single parcel, and were indeed far greater than that actually employed by the dominant tenement over the history of its use." Thus, the appellate court utilized its discovery of ambiguity as to where within the 100 foot-diameter cul-de-sac the 52 foot wide access easement was located to justify its decision that the specification of width should be altogether ignored and a standard of "necessary" access should be substituted.

Next, the court relied on two cases for the proposition that construction of permanent and complete barriers to use of portions of an expressly granted access easement could be "reasonable" on the part of the servient owner, observing that "…[t]he specification of width and location of surface rights-of-way does not always determine the extent of the burden imposed on the servient land …"[37] Unfortunately, the case *Scruby* quoted was one in which a *prescriptive* easement was found to have been established, the trial court fixed its width at 30 feet based on evidence of historic use of only 10 to 20 feet, and the appellate court affirmed, observing that the extra ten feet may have been added to the easement's width "due to the peculiar condition of the terrain,…to prevent the remaining 20 foot strip of roadway from washing out."[38] That earlier case, allowing the courts flexibility in determining the width of a *prescriptive* easement, cannot reasonably be read as in conflict with the established rule prohibiting obstruction of any part of an expressly-granted easement of specified width. That case in turn relied on an even earlier Supreme Court decision, which distinguished easements for the laying of water pipes from right-of-way easements, and acknowledged that in the instance of rights-of-way, obstructions are not allowed.[39]

As the clincher, *Scruby* discussed *Heath v. Kettenhofen*,[40] "a case brought to our attention at oral argument [despite its having been decided thirty years earlier] which was supplementally briefed by the parties." *Heath* had indeed rejected the argument of the holders of an access easement that they had "an absolute right to use the easement to the full extent of its width, free of any interference by the owner of the servient estate," and affirmed the trial court's decision that the owner of the servient tenement "was entitled to use portions of the described easement area for uses such as parking vehicles, so long as those uses did not unreasonably interfere with plaintiffs' use."[41] As was pointed out in the supplemental briefing, all the non-interfering uses by the owner of the servient estate in *Heath* had been transitory, and that case did not involve the erection of

any fixed obstructions within the easement area. This crucial difference is not mentioned in the *Scruby* decision.

Concluding its *tour de force*, the *Scruby* court held that the evidence supported the trial court's determination that the Scrubys had not been granted the right to exclusive use of each and every square inch of the easement area (the argument the Scrubys never made), and that the winery had not unreasonably interfered with the Scruby's use of the easement.[42]

THE *SCRUBY* RULE OF NO PRO TANTO EXTINGUISHMENT

An obscure but significant point about the *Scruby* decision is buried in a footnote. After the decision of the court of appeal was first announced, the Scrubys filed a petition for rehearing. Their principal argument was that the decision as issued conflicted with long-established precedent that improvements erected within an easement[43] area by the owner of the servient tenement, if allowed to remain in place for the prescriptive period, would result in pro tanto extinguishment of the easement. By ruling that the Scrubys could not force the removal of the obstructions constructed by the winery, it appeared that the court was forcing the Scrubys to submit to such a pro tanto extinguishment.

The court of appeal denied the Scrubys' petition for a rehearing, but modified its decision, attempting to rectify the problem just described. The court added the following, by way of a footnote to its decision:

> No pro tanto extinguishment of the granted easement results from this decision[,] which determines the Grapevine's current use of a portion of the easement does not interfere with Scruby's right of ingress and egress to their property as presently developed.[44]

No logic or legal rationale is suggested for the assertion made in the footnote, nor does the *Scruby* court make any effort to distinguish the cases that establish the rule of pro tanto extinction of easements. This makes it very difficult to apply the *Scruby* rule of no-pro-tanto-extinguishment in subsequent cases. A hypothetical may illustrate this problem. Taking the *Scruby* court at its word, the servient owner builds a factory that blocks an unused half of a specifically-described, non-exclusive easement for road and utility purposes. Twenty years go by, and the area becomes urbanized. The owner (or a new owner) of the dominant estate submits a subdivision application, or an application for a permit to build a hotel, or an office building, showing an intent to use the entire width of the granted easement. Does the *Scruby* footnote mean that neighbor's existing factory gets torn down, or has the owner of the dominant estate lost half of his easement, and with it his entire ability to develop his property? Nothing in *Scruby* suggests how a dispute like this should be resolved.[45]

UNCERTAINTIES ENGENDERED BY *SCRUBY*, AND A MODEST PROPOSAL

Scruby invites litigation, in two ways. First, it says that the degree to which an owner of a servient tenement can block an access easement benefiting a dominant estate depends upon the "reasonable" needs of both parties, and that this presents an issue of fact.[46] This means that the servient owner's initial construction of improvements blocking portions of the access easement must be evaluated by litigation, and that disposition by summary judgment will not be possible. It also means that any material change or addition to those obstructions will present a new balance of interests, potentially sparking another round of litigation. Second, *Scruby* acknowledges that the reasonable needs of the servient and dominant tenement owners may change over time, as uses of those two properties change, and as land use in the area changes. Therefore, even if the nature of the obstructions does not change over time, a new lawsuit may be justified by any change in the use of either parcel. As the Scrubys argued, it can be said that the *Scruby* decision not only allows, but requires the courts periodically to rewrite expressly-granted access easements on an ad hoc basis, as circumstances and land use change over time.

It must be admitted that the *Scruby* decision has some grounding in public policy. As was doubtless true in that case, it is frequently true that an expressly granted and specifically-described access easement is, for historical or other reasons, wider than necessary for adequate access to the dominant tenement. Under the pre-*Scruby* rule, the servient owner was virtually precluded from making the highest and best use of the portion of his property encumbered by an access easement. From the perspective of an economist, this resulted in inefficiencies. We believe that such inefficiencies are less troubling than the uncertainties created by *Scruby*, and suggest the following alternatives, which could be enacted as legislation, but are more likely to be developed by thoughtful consideration of these issues in future cases:

1. A rule could be established that where the owner of the servient tenement constructs an obstruction within an access easement, the owner of the dominant estate may acknowledge that this does not interfere unreasonably with use of the easement, and thereby both prevent pro-tanto extinguishment and reserve the right to require later removal of the obstruction, if use of the easement reasonably requires this. This in part merely confirms existing law that the giving of permission negates the acquisition of prescriptive rights,[47] but this proposal would also alter the burden of proof in the event that the owner of the dominant tenement later seeks injunctive relief requiring the removal of the obstruction, in that regardless of the hardship such removal might cause to the owner of the servient estate, it would be acknowledged that that person had himself caused the hardship to exist. In the injunction action the court would balance the needs of the two respective parties, ***as though the obstruction had never been constructed***.

2. Alternatively, a rule could be created which adopts the *Scruby* footnote, and states expressly that whenever the owner of a servient tenement constructs an obstruction within a specifically-described, expressly granted or reserved access easement, that person does so essentially at his or her own risk, in that the maintenance of the obstruction can never ripen into a prescriptive right, or cause pro-tanto extinguishment of the easement. This proposal is similar to the previous one, but would not require the dominant owner to be aware of the issue, and to give notice of permission.

3. Shifting the burden slightly, a rule could be adopted that allows the owner of the servient tenement to achieve pro-tanto extinguishment of the easement, but only if that person gives a prescribed written notice to the owner of the dominant tenement stating the intent to do so, and advising the dominant owner that an action to enjoin must be brought within five years.

CONCLUSION

With respect to prescriptive easements, *Mehdizadeh*, *Silacci* and their progeny have left unresolved whether a neighbor who fences out the legal owner can thereby acquire a non-exclusive easement by prescription, so that he must remove the fence, but can continue the uses (e.g., landscaping) within the disputed area, or whether no prescriptive rights whatever are created. *Scruby* seems to invite continuous litigation between neighboring owners as to what is the "reasonable" use of a granted access easement, in light of changing uses of both dominant and servient owners, and as development changes land uses in the area over time. That decision also leaves up in the air the question whether or not the obstructions it allows to be constructed within an easement will result in pro tanto extinguishment of the easement.

These reversals of previously established rules have encouraged aggressive and combative behavior between neighbors, and the litigation that grows out of that behavior, because outcomes that once were once predictable are now murky. While the courts may be sympathetic to the plight of those who appear to have "lost" property rights unfairly, because a neighbor has fenced off part of their yard (*Mehdizadeh* and *Silacci*), or because a granted access easement is "wider than necessary" (*Scruby*), the solution is not ad hoc rulemaking that destroys predictability.

NOTES

1. *Mehdizadeh v. Mincer, 46 Cal. App. 4th 1296, 54 Cal. Rptr. 2d 284 (2d Dist. 1996), as modified on denial of reh'g, (July 24, 1996)*.
2. *Silacci v. Abramson, 45 Cal. App. 4th 558, 53 Cal. Rptr. 2d 37 (6th Dist. 1996)*.
3. *Scruby v. Vintage Grapevine, Inc., 37 Cal. App. 4th 697, 43 Cal. Rptr. 2d 810 (1st Dist. 1995), as modified on denial of reh'g, (Sept. 6, 1995)*.
4. Cal. Code Civ. Proc. § 325; *California Maryland Funding, Inc. v. Lowe, 37 Cal. App. 4th 1798, 1803, 44 Cal. Rptr. 2d 784 (2d Dist. 1995)*.

5. *Mehdizadeh, 46 Cal. App. 4th at 1305*; *Harrison v. Welch, 116 Cal. App. 4th 1084, 11 Cal. Rptr. 3d 92 (3d Dist. 2004)*.
6. *Felgenhauer v. Soni, 121 Cal. App. 4th 445, 450, 17 Cal. Rptr. 3d 135 (2d Dist. 2004)*.
7. *Felgenhauer, 121 Cal. App. 4th at 450*.
8. *Raab v. Casper, 51 Cal. App. 3d 866, 876, 124 Cal. Rptr. 590 (3d Dist. 1975)*.
9. *Raab, 51 Cal. App. 3d at 877*.
10. *Otay Water Dist. v. Beckwith, 1 Cal. App. 4th 1041, 1047, 3 Cal. Rptr. 2d 223 (4th Dist. 1991)*, holding that "while an exclusive easement 'is an unusual interest in land' [citation], where, as here, the use during the statutory period was exclusive, a court may properly determine the future use of the prescriptive easement may continue to be exclusive."
11. *Mehdizadeh, 46 Cal. App. 4th at 1305-1306*.
12. *Silacci, 45 Cal. App. 4th at 564*.
13. *Mehdizadeh, 46 Cal. App. 4th at 1306*.
14. *Harrison v. Welch, 116 Cal. App. 4th 1084, 1094, 11 Cal. Rptr. 3d 92 (3d Dist. 2004)*.
15. *Hirshfield v. Schwartz, 91 Cal. App. 4th 749, 769, 110 Cal. Rptr. 2d 861 (2d Dist. 2001)*.
16. *Hirshfield, 91 Cal. App. 4th at 754-757*.
17. *Hirshfield, 91 Cal. App. 4th at 766-767*.
18. *Kapner v. Meadowlark Ranch Ass'n, 116 Cal. App. 4th 1182, 1186, 11 Cal. Rptr. 3d 138 (2d Dist. 2004)*.
19.*Kapner, 116 Cal. App. 4th at 1187*.
20. *Bustillos v. Murphy, 96 Cal. App. 4th 1277, 1281, 117 Cal. Rptr. 2d 895 (4th Dist. 2002)*.
21. *Ernie v. Trinity Lutheran Church, 51 Cal. 2d 702, 709, 336 P.2d 525 (1959)*.
22. *Mola Development Corp. v. Orange County Assessment Appeals Bd., 80 Cal. App. 4th 309, 316, 95 Cal. Rptr. 2d 546 (4th Dist. 2000)*.
23. *37 Cal. App. 4th 697, 43 Cal. Rptr. 2d 810 (1st Dist. 1995)*.
24. *Scruby v. Vintage Grapevine Inc., 37 Cal. App. 4th 697, 43 Cal. Rptr. 2d 810 (1st Dist. 1995)*..
25. *Schwager v. Anderson, 2006 WL 848364 (6th Dist. 2006), unpublished/noncitable*; *Pacific Gas & Elec. Co. v. Balhorn, 2004 WL 2786027 (1st Dist. 2004), unpublished/noncitable*; both quoting *Scruby, 37 Cal. App. 4th at 702*.
26. *Schwager v. Anderson, 2006 WL 848364 (6th Dist. 2006), unpublished/noncitable*; *Pacific Gas & Elec. Co. v. Balhorn, 2004 WL 2786027 (1st Dist. 2004), unpublished/noncitable*. In those few cases where a trial court has literally weighed the needs of the dominant tenement owner against those of the servient owner, the substantial evidence standard is applied, and without exception the trial court's decision is affirmed. (See *Lanaro v. Mason, 2005 WL 2304969 (1st Dist. 2005), at 6, unpublished/noncitable*.)
27. In the interest of full disclosure, the author of this portion of this article freely concedes that his view of *Scruby* may be tainted by an infusion of "sour grapes," since he served as appellate counsel for Mr. and Mrs. Scruby. Nonetheless, that perspective has the benefit of affording the reader insights into the case that are not otherwise available.
28. *Scruby, 37 Cal. App. 4th at 703*, italics added. In one non-citable case, appellant argued that under *Scruby* "[a]n easement owner does not have the right to use the full width of the grant of an easement when it is not required for access to their property, and the owner of the servient tenement may obstruct portions of the granted easement that do not interfere with the reasonable use of the road." The court accepted this as a fair characterization of the *Scruby* holding, but distinguished the matter before it, because it involved an express reservation of an exclusive private roadway and public utility easement. (*Embrey v. Kruse, 2003 WL 21367947 (3d Dist. 2003), unpublished/noncitable*.) Based on the reasoning of *Scruby*, which missed the point that prior law had not allowed the construction of obstructions within a non-exclusive access easement, this was a valid distinction.

29. See, e.g., *Atchison, T. & S. F. Ry. Co. v. Abar, 275 Cal. App. 2d 456, 463-464, 79 Cal. Rptr. 807 (1st Dist. 1969)*, in which the court affirmed an injunction against the servient owner's interference with a railroad's access to its right-of-way, but reversed to the extent the injunction would have afforded exclusive use to the dominant estate, and prohibited even non-interfering use by the servient owners.
30. *Silacci, 45 Cal. App. 4th at 564*; quoted in *Mehdizadeh, 46 Cal. App. 4th at 1306*.
31. *City of Pasadena v. California-Michigan Land & Water Co., 17 Cal. 2d 576, 578-579, 110 P.2d 983, 133 A.L.R. 1186 (1941)*; 6 Miller & Starr, *Law of California Real Estate*, § 15:65 [n. 3].
32. Italics added.
33. *Tarr v. Watkins, 180 Cal. App. 2d 362, 366, 4 Cal. Rptr. 293 (2d Dist. 1960)*, (citing *Ballard v. Titus, 157 Cal. 673, 681, 110 P. 118 (1910))*. See also *Haley v. Los Angeles County Flood Control Dist., 172 Cal. App. 2d 285, 289-290, 342 P.2d 476 (2d Dist. 1959)*; *Winslow v. City of Vallejo, 148 Cal. 723, 726, 84 P. 191 (1906)*; *Greiner v. Kirkpatrick, 109 Cal. App. 2d 798, 802, 241 P.2d 564 (1st Dist. 1952)*; *City of Pasadena v. California-Michigan Land & Water Co., 17 Cal. 2d 576, 589-590, 110 P.2d 983, 133 A.L.R. 1186 (1941)*. Cf. *Cummins v. Levy, 116 Cal. App. 2d 610, 253 P.2d 975 (2d Dist. 1953)* (where a grant of easement does not define width, width is to be that which is suitable and convenient for ordinary uses of passage).
34. Other pre-*Scruby* case law established that "Once the location of an easement has been finally established, whether by express terms of the grant or by use and acquiescence, it cannot be substantially changed without the consent of both parties. (*Winslow v. City of Vallejo, 148 Cal. 723, 84 P. 191 (1906)*; see *Hannah v. Pogue, 23 Cal. 2d 849, 854, 147 P.2d 572 (1944)*; cf. *Ward v. City of Monrovia, 16 Cal. 2d 815, 821, 108 P.2d 425 (1940)*.) And the grantor has no right either to hinder the grantee in his use of the way or to compel him to accept another location, even though a new location may be just as convenient. (See 17 Am. Jur. p. 989; *Allen v. San Jose Land & Water Co., 92 Cal. 138, 140-141, 28 P. 215 (1891)*; cf. *Hannah v. Pogue*, 23 Cal.2d 849, 855.)" (*Tarr v. Watkins, 180 Cal. App. 2d 362, 365-366, 4 Cal. Rptr. 293 (2d Dist. 1960)*, in turn quoting from *Youngstown Steel Products Co. of Cal. v. City of Los Angeles, 38 Cal. 2d 407, 410-411, 240 P.2d 977 (1952)*.) See also *Oliver v. Agasse, 132 Cal. 297, 298-299, 64 P. 401 (1901)* (owner of servient tenement may not require any alteration in location, mode and manner of the use of easement, though such alteration would be less burdensome and more convenient to servient estate). In *Wilson v. Abrams, 1 Cal. App. 3d 1030, 82 Cal. Rptr. 272 (2d Dist. 1969)*, the court affirmed a declaration by the trial court that a service station could not be built within a non-exclusive parking lot easement, including that court's excluding as irrelevant all extrinsic evidence purporting to show that the servient owner's proposed use would be reasonable, because the parking lot was bigger than necessary.
35. *Scruby, 37 Cal. App. 4th at 705*.
36. *Scruby, 37 Cal. App. 4th at 705*. Presumably, this is intended to mean that only "reasonable" ingress and egress, somewhere within the easement area, had been granted.
37. *Scruby, 37 Cal. App. 4th at 704*, quoting *Gaut v. Farmer, 215 Cal. App. 2d 278, 282, 30 Cal. Rptr. 94 (4th Dist. 1963)*, in turn citing *City of Pasadena v. California-Michigan Land & Water Co., 17 Cal. 2d 576, 110 P.2d 983, 133 A.L.R. 1186 (1941)*.
38. *Gaut v. Farmer, 215 Cal. App. 2d 278, 282, 30 Cal. Rptr. 94 (4th Dist. 1963)*.
39. *City of Pasadena v. California-Michigan Land & Water Co., 17 Cal. 2d 576, 580, 110 P.2d 983, 133 A.L.R. 1186 (1941)*.
40. *Heath v. Kettenhofen, 236 Cal. App. 2d 197, 45 Cal. Rptr. 778 (1st Dist. 1965)*.
41. *Scruby, 37 Cal. App. 4th at 705*.
42. *Scruby, 37 Cal. App. 4th at 706*.
43. See *Glatts v. Henson, 31 Cal. 2d 368, 370-371, 188 P.2d 745 (1948)*; *Ross v. Lawrence, 219 Cal. App. 2d 229, 232-233, 33 Cal. Rptr. 135 (4th Dist. 1963)*; *Masin v. La Marche, 136 Cal. App. 3d 687, 693, 186 Cal. Rptr. 619 (2d Dist. 1982)*.
44. *Scruby, 37 Cal. App. 4th at 706 n.2*.

45. See *Hirshfield v. Schwartz, 91 Cal. App. 4th 749, 110 Cal. Rptr. 2d 861 (2d Dist. 2001)*, for a description of the kind of ad hoc solutions a court might devise, in the exercise of its equity powers. See also *City of Pasadena v. California-Michigan Land & Water Co., 17 Cal. 2d 576, 110 P.2d 983, 133* A.L.R. *1186 (1941)* involving an express grant of a non-exclusive easement for installing and maintaining water pipes and mains. In that context, the Supreme Court affirmed a judgment allowing the owner of the servient tenement to grant another easement for installation of other pipes within the same easement area, so long as these did not constitute an unreasonable interference with use of the earlier-granted easement. The court distinguished cases relied upon by the easement owner, "which hold that a surface right of way of defined width gives the easement holder the absolute right to occupy the surface to that width whenever he chooses. These cases depend upon the theory that the easement granted is completely and clearly defined because the width and location of the right of way are specified in the grant. (Citations.) They do not necessarily require a similar conclusion where the easement is for the limited purpose of laying underground water pipes …" (*City of Pasadena, 17 Cal. 2d at 580*.) Having decided that the owner of the servient estate could therefore allow installation of other pipes within the easement area, the *Pasadena* court said, "It is possible that the city may, at some future time, be faced with the necessity of expanding or changing its present system [at which point] the presence of defendant's pipes may seriously hamper the reasonable use of the city's prior easement…But if, in the reasonable use of its easement, the city requires the space occupied by the pipes of the defendant, its paramount right must prevail." (*City of Pasadena, 17 Cal. 2d at 582*.) Thus, although *Pasadena* does not support the holding of *Scruby*, and distinguishes its facts from those in access easement cases, it at least suggests that the *Scruby* footnote is correct, and that where a servient owner constructs "reasonable" obstructions within a specifically-described access easement no pro-tanto extinguishment will occur. Therefore, if the use of the dominant tenement changes so as to require the removal of those obstructions, they must be removed. Having destroyed the predictability of the rule of pro-tanto extinguishment, *Scruby* thus holds the promise of unpleasant surprises for owners of servient tenements as well as dominant estates.
46. *Scruby, 37 Cal. App. 4th at 706*. See also *City of Pasadena, 17 Cal. 2d at 579*; *City of Los Angeles v. Howard, 244 Cal. App. 2d 538, 543, 53 Cal. Rptr. 274 (2d Dist. 1966)*; *Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park, 45 Cal. App. 3d 519, 528, 119 Cal. Rptr. 559 (1st Dist. 1975)*. [Note: these are generally public utility easement cases, not access easement cases.]
47. See, e.g., *Clarke v. Clarke, 133 Cal. 667, 668-671, 66 P. 10 (1901)*; *Lynch v. Glass, 44 Cal. App. 3d 943, 950-951, 119 Cal. Rptr. 139 (1st Dist. 1975)*; *Case v. Uridge, 180 Cal. App. 2d 1, 6-8, 4 Cal. Rptr. 85 (4th Dist. 1960)*.

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