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Roger Bernhardt

Defending Encroachments

What do you do when your client telephones to tell you that her neighbor has just informed her that he had a survey made and it showed that a long-standing improvement that she had always believed was located entirely on her property in fact encroaches on his land? Can she do anything to keep it there, despite the encroachment? There are several doctrines designed to give some relief to owners in this predicament, but three cases reported in this issue clearly weaken and narrow that help. Rather than proceed case by case, I will go at matters doctrine by doctrine.

Duration of Encroachments

Three Years: Permanent Encroachments Under CCP §338

One way to protect an encroachment is by showing that it is permanent and has existed for more than three years. That should bring it under the limitations period of CCP §338(b), which covers “[a]n action for trespass upon or injury to real property.”

Miller & Starr state this as a straightforward rule (6 Miller & Starr, California Real Estate §14.14 (3d ed 2000)), and it is commonly cited as such by our appellate courts (see *Field-Escandon v DeMann* (1988) 204 CA3d 228, 251 CR 49); but that is not how two cases reported in this issue view it. First, *Harrison v Welch* (2004) 116 CA4th 1084, 11 CR3d 92, reported on p , declares that this view reflects a “flawed” reading of an old supreme court decision. According to Harrison, seeking to remove a permanent encroachment from land is really an attempt to recover the land itself, and therefore comes under the five-year statutes for those kind of actions, not the three years of CCP §338. Second, according to *Kapner v Meadowlark Ranch Ass’n* (2004) 116 CA4th 1182, 11 CR3d 138, reported on p no time period applies when the encroachment is on a way shared by others, rather than just a neighbor’s land, because the lack of any exclusive possession in such a case means there is no trespass that would trigger the statute.

Harrison and *Kapner* raise the question: If the three-year period did not apply in those cases, what kind of lawsuits are subject to it? An owner seeking to remove an encroachment is inevitably also seeking to recover possession of the land the encroachment occupies. Can the three-year statute be saved by limiting its application to actions for monetary rather than injunctive relief? While this may sound silly, the silliness is really intrinsic to the statutes themselves, which create overlapping three- and five-year periods for the same wrong. No distinction is going to make much sense, and now we have cases pro and con on whether three years is enough or too little—hardly a firm ground for basing legal advice about commencing litigation.

Five Years: Ejectment or Adverse Possession Under CCP §§318, 323, 325

Under CCP §318, an action for the recovery of possession of real property can only be brought by someone who possessed the property within five years of filing suit; so, if the offending

structure has existed for at least five years, can your client claim that the duration alone is enough to protect it? *Harrison v Welch* also rejects that argument, ruling that this five-year statute on ejectment cannot be separated from its companion five-year statutes for adverse possession (CCP §§323 and 325). Your client must show not only five years of possession, but five years of possession during which the judicial and statutory standards for adverse possession were also met. For example, the encroachment had to be open and notorious (a judicial requirement; see, e.g., *Kunza v Gaskell* (1979) 91 CA3d 201, 210, 154 CR 101), as well as protected by a substantial enclosure or cultivated and improved (a statutory requirement; see CCP §325). The mere passage of five years, alone, gets your client nowhere.

We can't blame the courts for being silly here. There is simply no way to reconcile one statute that says five years of dispossessing is enough (CCP §318) with two others that say five years of possessing is enough only if additional requirements are also met (CCP §§323 and 325). Unlike the three-year/five-year difference, the outcome in this case is clear—five years, alone, never wins; despite the language of CCP §318, there are simply no circumstances where that section will apply.

Adverse Possession: Tax Payments Requirement

Theoretically, if an encroachment survives long enough, it can become invulnerable to attack under CCP §325, as a protected adverse possession. Your client has to show that her encroachment was open and notorious, continuous, uninterrupted, hostile, and under a claim of title; most of which can be generally satisfied by the mere existence of the encroachment itself. (Everybody can see it, it's always there, and she has always believed that it belongs to her.) But CCP §325 goes on to require her to “have paid all the taxes, State, county, or municipal, which have been levied and assessed upon such land”—and this requirement is a killer.

In 1948, Justice Traynor held that an occupant of the wrong lot could establish adverse possession despite having paid taxes on the lot next door, since both he and the assessor had mistakenly assumed that the house he lived in was on the lot that he owned; the legal description on the tax assessment rolls was not controlling for CCP §325 purposes. *Sorensen v Costa* (1948) 32 C2d 453, 196 P2d 900. That holding should have meant that an owner of improved property, whose improvements stretch beyond her lot line onto the vacant parcel next door, should also be able to satisfy the tax payment requirement of CCP §325 if the lot next door continued to be assessed as vacant land and her own lot assessed as improved. Since *Sorensen*, however, the supreme court has rejected that common sense assumption and required some “direct evidence” that the encroaching improvements were considered in the assessment. See *Gilardi v Hallam* (1981) 30 C3d 317, 327, 178 CR 624. From the language in *Gilardi*, it appears to me that the *Sorensen* presumption applies only in parcel mix-up cases, i.e., when each owner's house is entirely on her neighbor's lot, and not when there are partial incursions that arise because of misunderstood lot lines.

The tax requirement in encroachment cases is unlikely to be satisfied. Michael Slattery at the San Francisco City Attorney's Office told me that our assessor's office would not know how to generate a bill to the encroacher in such a case and would, instead, send a supplemental bill to the next door neighbor, as record owner, if an assessor actually saw the improvement. (He did call to my attention Rev & T C §610, which provides that a second person may add her name to the tax roll as an assessee, for adverse possession purposes; but he, like me, suspects that the provision applies only when the adverse possessor is occupying an entire parcel belonging to

someone else, not just infringing on a part of it. He also pointed out Rev & T C §2188.2, allowing separate assessments for landowners and improvers, but opined that it would not enable the owner of an infringing building to pay taxes on just that part of her neighbor's land.)

The combined effect of our tax rules and case holdings is to rule out adverse possession protection in all encroachment cases. Only a possessor who sits on an entirely wrong lot and pays the taxes properly assessed to it can be protected by the statute (and perhaps also persons claiming adverse possession under color of title under CCP §323 (“claiming a title founded upon a written instrument, or a judgment or decree”), rather than CCP §325 (“not founded upon a written instrument, judgment, or decree”); §323 has no similar tax payment requirement).

This difficulty cannot be blamed on the statute; it is strictly the result of some judicial rule making. The legislature may have been at fault initially for adding a completely unrelated tax payment requirement to adverse possession law at the behest of the railroads 150 years ago, but it was the judiciary that construed that requirement so as to inhibit the statute from accomplishing its most beneficial purpose—legitimizing long-standing improvements that unwittingly encroached.

Prescriptive Easements

Unlike adverse possession, the requirements for prescriptive easements do not include payment of taxes (primarily because we have no statutory codification of this old common law concept). However, the encroaching defendant in *Harrison v Welch*, *supra*, was not allowed to claim a prescriptive easement for her woodshed and landscaping because, according to the court, those easements would have been exclusive, and therefore possessory rather than usufructuary (*i.e.*, pertaining to the right to use another's property) interests. That meant the easements had to qualify under the adverse possession statutes—where they were doomed to fail because of the tax payment requirement.

Excluding exclusive interests from the category of prescriptive easements is a fairly new doctrine, originating with *Raab v Casper* (1975) 51 CA3d 866, 124 CR 590. No statute mandates such a distinction. Despite noting that “the difference between prescriptive use and adverse possession is sometimes obscure” (51 CA3d at 876), the *Raab* court then made a hard and fast distinction between them and outlawed the protection of prescription for any heavy uses, such as encroachments, which came close to amounting to possessory interests.

Thus, encroachments lose either way: They fail as prescriptive easements because their exclusivity makes them possessory, and they fail as possessory interests because they are not separately assessed by the taxing authorities. Owners of these interests are in trouble, and time is not on their side.

Agreed Boundaries

In *Tremper v Quinones* (2004) 115 CA4th 944, 9 CR3d 672, reported at p **Error! Bookmark not defined.**, the owner of a 180-acre parcel encroached 660 feet, planting cacti and making other improvements on the unimproved 170-acre parcel of his neighbor. One of his defenses appeared to be that there was an agreed boundary between the parcels; given the courts' hostile treatment of encroachments under the prescriptive easement doctrine, it is not surprising that the trial court rejected the agreed boundary contention here. There originally was an unqualified rule that agreements regarding boundaries can be inferred “from the long-standing acceptance of a fence as a boundary” (*Ernie v Trinity Lutheran Church* (1959) 51 C2d 702, 708, 336 P2d 525);

that rule, however, has become confined to cases in which the true boundary cannot be ascertained from the records (*Bryant v Blevins* (1994) 9 C4th 47, 55, 36 CR2d 86). Modern surveying technology makes that a most unlikely situation. See Bernhardt, *Deeds on the Ground or Words in the Deed: Bryant v Blevins*, 18 CEB RPLR 141 (Apr. 1995).

It may be that the agreed boundary doctrine will be applied only when there is proof of an actual agreement; and producing that evidence will become even more difficult as the years go by and the original neighbors move away or die off, since such agreements are usually oral. (One can hardly expect lay people to have put their boundary line agreements in writing when the reason for resorting to an oral agreement in the first place was their inability to understand the written boundary descriptions in their deeds. Just what were they supposed to say in this new writing?) That means that the older the encroachment, the less likely it is to gain protection under agreed-boundary law.

Good Faith Improvements

Finally, if all the above claims to defend the encroachment fail, can your client gain some relief as a good faith improver? In *Tremper v Quinones, supra*, the offending cactus farmer was allowed to remove his improvements, as CC §1013.5 provides. (In some cases, however, it may be impractical to remove the improvements; CCP §741 provides for leaving the improvement in place and giving the good faith improver an offset for the enhanced value of the land improved. But there is often no enhancement for an encroaching woodshed, and the offset applies only when the neighbor seeks damages rather than removal—which is the neighbor’s call, not the encroacher’s.)

Thus, an encroacher not only lacks the option of paying for the removal of the encroachment, she also may be unable to even retrieve it. As fixtures, improvements to a neighbor’s property belong to the neighbor. See CC §1013. (For example, in *Harrison v Welch, supra*, the trial court properly held that Harrison now owned the trees that Welch had planted on his land.) You can’t remove what now belongs to your neighbor just because you originally put it there (unless you are a tenant and it constitutes a trade fixture).

Civil Code of Procedure §871.5 permits a trial court to effect an “adjustment of the rights, equities, and interests of the good faith improver [and] the owner of the land . . . as is consistent with substantial justice. . . .” I take this to include the possibility of forcing the neighbor to sell the disputed land to the encroacher. But the right to such relief is discretionary and therefore quite uncertain. (And, as *Tremper* shows, the encroacher, even when she wins, has to pay attorney fees, as well all removal damages if she is allowed to take the improvement back). At best, an innocent improver confronts a large expenditure to correct her mistake.

None of the Above

None of the encroachers in the cases discussed above were intentional land thieves. Indeed, they almost never are. They are usually owners who made improvements that they wrongly believed were within their own property lines, or are purchasers who assumed that what they saw was what they were buying until a neighbor’s survey proved them wrong. With effective adverse possession and prescription laws, people can generally purchase property according to what they see, and assume that the long-standing walls and fences represent legal boundaries. However, as the doctrines that protect such expectations are increasingly weakened by hostile court decisions, the need for surveys increases correspondingly.

Clients have always been well advised by their attorneys to pay for a survey before making improvements close to the lot lines. And now, perhaps, they should also be advised to pay for a survey even when purchasing the property in the first place, unless they are really sure that the fences, walls, improvements, and even landscaping, are nowhere near the boundary lines that those incomprehensible words in their deeds describe.