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## Posting property and prescriptive easements: Aaron v Dunham, 2006

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## **Posting property and prescriptive easements:**

*Aaron v Dunham, 2006*

**Roger Bernhardt**

**Posting of CC §1008 permission-to-pass signs by lessee, who was not landowner's authorized agent, was ineffective to insulate land from neighbor's prescriptive easement claim based on open, notorious, continuous, and adverse use of road running across land by neighbor's predecessor.**

*Aaron v Dunham* (2006) 137 CA4th 1244, 41 CR3d 32

In 2000, the Aarons purchased real property adjoining property owned by the Dunhams. The Aaron property was served by a steep driveway, difficult to use and maintain, use of which had been discontinued by previous owners because more convenient access existed via a private road across the Dunham property (Texaco Road). The Texaco Road was built by lessee Texaco Inc. (Texaco) in 1982 to provide access to gas wells on neighboring property. For nearly 20 years, occupants of the Aaron property had made unimpeded use of the Texaco Road. The Fullertons, who bought the property in 1989 and sold it to the Aarons, used the road without requesting permission to do so. In 1992, Texaco posted on the Dunham property CC §1008 permission-to-pass signs. In 1999, the Dunhams posted their own §1008 signs.

The Aarons sued to establish their right to a prescriptive easement across the Dunham property, based on their predecessors' use of the road. The jury found that adverse, open, and uninterrupted use of the Texaco Road had been made at least from 1990–1995. The trial court ruled that Texaco's §1008 signs were not effective because they were not posted by the owner of the property and granted the Aarons a prescriptive easement.

The court of appeal affirmed. A party claiming a prescriptive easement must show use of the property that has been open, notorious, continuous, and adverse for an uninterrupted period of five years. *Warsaw v Chicago Metallic Ceilings, Inc.* (1984) 35 C3d 564, 570, 199 CR 773. Adverse use means only that the owner has not consented to the use by lease or license. Section 1008 provides a means to insulate land from prescriptive claims. It provides:

No use by any person or persons, no matter how long continued, of any land, shall ever ripen into an easement by prescription, if the owner of such property posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows: "Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code."

A claim of prescriptive easement could not be based on the Fullertons' use, which continued for no more than three years before Texaco posted its §1008 signs, if the Texaco signs were effective for their statutory purpose. The court concluded that the Texaco signs did not prevent the Fullertons from acquiring prescriptive rights because they were not posted by the owner or an authorized agent, as required by §1008. The statute specifically states that a prescriptive easement cannot be obtained if the property owner posts an appropriate sign. Here, a lessee posted the sign, and the sign was labeled with the name of the lessee, not the owner. This was not a case where the literal language of a statute should be disregarded to avoid absurd results or to

give effect to the manifest purposes of the statute. The function of a §1008 sign is to give notice to the public that permissive use of the property has been granted. Because the owner of the property is presumptively the sole person or entity with legal authority to grant such permission, it is reasonable to require that the sign have been posted by the owner.

No principle of law or lease provision supported the Dunhams' contention that it was Texaco's duty as lessee to post the §1008 signs. Assuming, without deciding, that §1008 extends to signs posted at the direction of the landowner, no evidence suggested that Texaco acted as an agent for, or with the awareness of, the owners when it posted the signs.

The Fullertons' use of the Texaco Road was adverse because it was without express permission of the owners. Continuous use over a long period of time constitutes communication of the claim of right to the owner of the servient tenement. Accordingly, the Fullertons acquired a prescriptive easement to which the Aarons succeeded.

***THE EDITOR'S TAKE:*** In the context of prescriptive easements, the presumption of hostility or adverse use that applies absent the landowner's express consent probably works better for society than would a contrary presumption. The latter would require us to inform our neighbors—even though they never asked—that we are using their property because we think we have a right to do so and not because they ever gave us permission (for example, if our titles or boundary lines were in error, thus forcing us to rely on prescription or adverse possession to hold on to what we always thought was ours). For the most part, we can expect our neighbors (and ourselves, when we are on the receiving end) to do the talking when they or we believe that the other is trespassing.

While that works fine in most cases, it can't apply to those cases where the activity started out with express consent from the neighbor. Obviously, permissive use or possession alone should not create prescriptive rights—otherwise, all tenants in time would become owners. A use or possession commenced permissively triggers the statute of limitations only when that use changes from permissive to adverse.

An “ouster” is the easiest way for possession to go from permissive to adverse: The occupant simply declares to the owner that he no longer needs her permission to be where he is. But, unlike the original presumption, such an ouster is not presumed—it must be shown to have been made explicitly by the occupant or user to the owner, to make her aware that her clock has started running. That is a clear rule, and most neighbors should not be surprised by it. Equally clear is the outcome in the converse situation: If the owner advises the user or occupant that her original permission is withdrawn, continued use by him is obviously (not just presumptively) hostile, and the clock will be turned on by such further use.

What is not so clear is what presumption or rule to apply to situations when possession or use started out permissively, but there was a change of personnel thereafter. If either the original owner or the original user has transferred her or his property, does the presumption of permissiveness continue? Does it depend on what the grantor told the grantee? If nobody says anything about it—to either his or her own successor or to her or his neighbor—is the ongoing use adverse or permissive?

This decision seems to hold that a permissive activity is converted into a hostile one automatically the moment the actor (*i.e.*, the user or dominant tenant) or use changes, thus forcing the neighboring servient tenant either to object or to restate her consent if she wants to keep the clock from starting. Personally, I do not believe that that consequence necessarily follows from the original principle of presumed hostility in the absence of consent; an undiscussed possession that was commenced in silence may be different from one that began with an initial permission.

But since, on the other hand, I would not necessarily be more comfortable with a reverse rule, *i.e.*, one that always presumed that permissiveness continues despite changes of title or use, I hope there may be another way out. The opinion gratuitously mentions enough “equitable” considerations—*i.e.*, facts that really don’t have any real effect on the question of legal prescription—as to make it plausible to think they may, in fact, have trumped the presumption that was stated as controlling.

We would probably be better off in these cases without presumptions either way, treating the question as one of fact (and equity). After all, what is so bad about letting the good guys win, even if the law is slightly against them?—*Roger Bernhardt*