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Easements--Interruption of Adverse User

Howard R. Benson

value whatever; it was simply a menace, a potential danger. Therefore, the court should *not* have dismissed consideration of active misconduct.

The California cases have not purported to make any changes in the common law rule on this subject. In rejecting the strict liability imposed on parents by the civil law,[13] the courts have not granted immunity from the traditional operations of the law of negligence. As to the test of negligence, the courts have only pointed out that entrusting a minor child with some utilitarian object is not active misconduct in itself, and thus the parent must be shown to have been under some duty to act, the passive omission of which is active misconduct in its legal consequences.

Had the court in the *Ellis* case measured the facts in the complaint against the test for active misconduct, they might well have concluded that, under all the circumstances, the act of the parents in sanctioning the possession of a tool of idle destruction in the hands of their reckless son did make the injury to Billy (as the *Buelke* case phrases it) "possible, and probable." In failing to do so the District Court of Appeals does not act in conformance to the decisions of the Supreme Court of California, as they purport to do; rather, by misapplying the recognized rules they have introduced a new, hybridized test of liability which can be raised as an umbrella over the heads of erring parents.

Alex B. Yakutis

EASEMENTS. INTERRUPTION OF ADVERSE USER.

In a recent Connecticut case,[1] the plaintiff was held to have acquired an easement by prescription. This was so in spite of the fact that throughout the statutory period[2] the defendant attempted to prevent plaintiff's use of his driveway by making oral protestations to the plaintiff and by erecting physical barriers to block the use. The plaintiff ignored the oral protestations and continually tore down the physical obstructions. At no time was plaintiff's use of the driveway brought to a halt.

The court based its decision upon the failure of the defendant to employ the means prescribed by statute for the prevention of the acquisition of a prescriptive right.[3]

The statute, or at least its interpretation by this court, is in derogation of common law. As a general statement, the common law relative to the acquisition of prescriptive rights is well settled, except on one point: what constitutes an interruption of the use. Here the authorities in this country are split.

132, 239 Pac. 1056 (1925), Rocca v. Stemmetz, 61 Cal.App. 102, 214 Pac. 257 (1923), Ormston v. Lane, 90 Cal.App. 481, 266 Pac. 304 (1928).

[13] The civil law and common law rules collided head-on in Hagerty v. Powers. The only case cited by the unsuccessful appellant was from Louisiana where the civil law prevailed. It could be said that the Supreme Court of California based its decision more on rejecting the civil law rule than on examining the facts alleged in the light of the common law.

On one other occasion these opposing theories were contrasted. In Hudson v. Von Hamm, 85 Cal.App. 323, 259 Pac. 374 (1927), action against a parent was based on a tort committed by his children while they were in the Territory of Hawaii, where the civil law rule is followed. The court said: "Where the father is entirely free from participation in the wrong, the statutes and the general policy of the law in California are in absolute conflict "

[1] South Norwalk Lodge, No. 709, Benevolent & Protective Order of Elks, Inc. v. Hats, Inc., 140 Conn. 370, 100 A.2d 735 (1953).

[2] CONN. GEN. STATS. 1949, § 7130 (15 years).

[3] CONN. GEN. STATS. 1949, § 7131.

One view is that oral protestations alone, unaccompanied by the use of any physical obstruction, are sufficient. A verbal act of protest on the premises in which the easement is claimed negates the owner's acquiescence and interrupts the use. Consequently, the essential basis of acquiring a prescriptive right is absent.[4]

The other view holds that a verbal act on the premises over which an easement is claimed does not disprove acquiescence by the owner, unless it is accompanied by an overt act. However, such an overt act must, in fact, obstruct the use of the alleged easement to such an extent that if the easement had existed, the obstruction would have constituted an act in the nature of trespass against the owner of the easement.[5]

The Connecticut court, in basing its decision on this statute, has apparently excluded both of these common law views. In effect, the court is saying that the only way to rebut the fact of acquiescence is for the servient owner to give notice, in writing, and to record such notice.

In view of the maxim "Statutes in derogation of the common law, which are not remedial, should be strictly construed," it would be valuable to examine the statute and analyze it in light of the common law. The statute in question reads:

> "The owner of land over which such way or easement is claimed or used *may* give notice *in writing* to the person claiming or using the privilege of his intention to dispute such right of way or other easement and to prevent the other party from acquiring such right; and such notice, being served and recorded as provided in Sections 7132 and 7133, shall be deemed an interruption of such use and shall prevent the acquiring of a right thereto by the continuance of the use for any length of time thereafter." (Emphasis added.)

On its face, this statute does not purport to exclude or amend the common law remedies. Nor does it indicate, if a change of theories as to acquiescence is intended, just what is being changed. The statute merely states that the owner "may" give notice. This language appears in no way imperative, and in no way indicates it was intended to be in derogation of the common law. On the other hand, it does seem to show that it was merely intended to add to the common law, by giving the landowner an *additional* method of preventing the gaining of a prescriptive right.

The statute continues, ". . shall be deemed an interruption of such use and shall prevent the acquiring of right thereto *by the continuance of the use for any length of time thereafter.*" (Emphasis added.) This language again appears to give the landowner, by his initial recording of the requisite notice, the power to prevent the acquiring of a prescriptive right *indefinitely*. Thus the wording would indicate an intent on the part of the legislature to make it more difficult, rather than easier, to gain a prescriptive right. Following this line of reasoning, the statute would seem merely to give the servient owner an *additional* way to stop the acquisition

[4] Eels v. Chesapeake & O. R. Co., 49 W.Va. 65, 38 S.E. 479 (1901), Chicago & N.W.R. Co., v. Hoag, 90 Ill. 339 (1878), Powell v. Bagg, 8 Gray 441, 69 Am.Dec. 262 (1857), Andries v. Detroit, G.H. & M.R. Co., 105 Mich. 557, 63 N.W 526 (1895), Ingraham v. Hough, 46 N.C. 39 (1853), Nichols v. Ayer, 7 Leigh 546 (1836), Field v. Brown, 24 Gratt. 74 (1873), Reid v. Garnett, 101 Va. 47, 43 S.E. 182 (1903), Gadreault v. Hillman, 317 Mass. 656, 59 N.E.2d 477 (1945).

[5] Lehigh Valley R. Co. v. McFarlan, 43 N.J.L. 605 (1881), Morris Canal & Baking Co. v. Diamond Mills Paper Co., 71 N.J.Eq. 481, 64 Atl. 746 (1906), Okeson v. Patterson, 29 Pa. 22 (1857), Ferrell v. Ferrell, 1 Baxt. (Tenn.) 329 (1872); Kimball v. Ladd, 42 Vt. 749 (1870), Lownox v. Sullivan, 40 Conn. 26, 16 Am.Rep. 10 (1873).

of an easement by prescription, and was not intended to deprive him of his common law remedies. In the interpretation of the statute, the language should not have been construed as excluding, but rather as expanding the common law.

In an early Maine case,[6] where an identically worded statute was involved, the court, in interpreting the statute, held that it expanded, not limited, the common law In that case, the defendant had been using a right of way over the plaintiff's land for more than the prescriptive period, openly, notoriously, and under a claim of right. The only attempt on the part of the plaintiff to prevent such use was the writing of a letter, which was unrecorded, to the defendant, stating that the defendant had no right to the use and demanding the defendant cease. The statute provided, expressly,[7] that an easement may be interrupted by a notice in writing served and recorded. The court held there was an interruption, regardless of the fact that the statute had not been complied with, stating that the statutory method was not exclusive.

In the one other reported case where the Connecticut statute was applied,[8] there was no attempt on the part of the servient owner to prohibit or obstruct such use. The plaintiff there claimed an easement over the defendant's abutting property She had used the right of way openly, notoriously and under a claim of right or license for the full statutory period. The court, holding for the plaintiff, said:

> "Not only is it expressly found that no resort was had to statutory procedure to interrupt it, *but there is no finding that either the defendant or any of his predecessors in title ever forbade or objected to this use, or did anything which stopped or interrupted it* until the installation of the chain after the use had continued for more than 15 years." (Emphasis added.)

This was an earlier decision by the same court which decided the major case. The same statute was the basis for the court's allowance of the prescriptive right. But the court in the former case indicated by its dicta that if there had been efforts to forbid or object to the use, or if acts had been undertaken to stop or interrupt the use, the necessary acquiescence would not have been present.

It must be remembered that at common law a landowner is not required to battle successfully for his rights.[9] It is enough that he assert them seasonably to the other party by an overt act. Such an assertion interrupts the would-be dominant owner's impression of acquiescence and shows that the acquiescence was not a fact. The presumption of right or lost grant arises from the long acquiescence of the party, and does not arise where the enjoyment is contested.[10] It is strange indeed that a grant is to be presumed even though the landowner continually contests the right of the user to pass through his property In this respect the decision seems clearly contrary to the average landowner's concept of "the law" as well as to common law principles of fairness and justice.

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[6] Dartnell v. Bidwell, 115 Me. 227, 98 Atl. 743 (1916).
[7] ME. REV. STAT. c. 107, § 12 (1915).
[8] Aksomitas v. South End Realty Co., 136 Conn. 277, 70 A.2d 552 (1949).
[9] Brayden v. N.Y. N.H. & H. R. Co., 172 Mass. 225, 51 N.E. 1081 (1898).
[10] Nichols v. Aylor, 7 Leigh (Va.) 546 (1836).