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Real Property: Prescriptive Easement as the Subject of a "Taking" Under the Fifth Amendment

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PRESCRIPTIVE EASEMENTS AS THE SUBJECT OF A 'TAKING' UNDER THE FIFTH AMENDMENT

The plaintiff was an irrigation district organized under the laws of the State of California. In 1932 and each year thereafter, the plaintiff constructed a diversion dam about three or four feet high across the Bear River by scraping up gravel on either side and placing it across the river. This dam would raise the level of the water to the point where it would flow into canals on each side of the river. Each fall, after the irrigation season, the plaintiff would cut the temporary dam and allow the winter floods to wash it away. This process was repeated each year. Plaintiff did not own any lands at this point on either side of the river and none of the owners of the lands had ever formally granted any easement or other interest to the plaintiff authorizing it to build such a diversion dam. The plaintiff operated under a claim of right based upon a vague assumption, and its actions were open and notorious, although no formal notice of the asserted easement was given to anyone. The plaintiff claimed that by the annual construction and use of the diversion dam from 1932 to 1943 it had acquired a prescriptive right or easement for such purposes under the laws of California. Beginning in September, 1942, United States Government contractors began removing gravel for Army use from the river bed below the plaintiff's diversion dam. Eighty thousand tons of gravel were removed from points between one hundred and sixteen hundred feet below the dam. The plaintiff claimed that by removing the gravel in this manner the defendant, the United States Government, had caused the stream bed to be lowered to such an extent that the plaintiff could no longer divert water by means of the small gravel dam, and this action amounted to a taking by the defendant of the plaintiff's valuable right or easement. Plaintiff sued for $51,156.81, the cost of a new concrete dam built on the site, plus an allowance for maintenance. *Held:* plaintiff had acquired a prescriptive right as claimed, but there was no taking within the meaning of the Fifth Amendment of the prescriptive easement thus acquired. *Camp Far West Irrigation District v. United States,* 68 F. Supp. 908 (Court of Claims, 1946).

The question as to whether the plaintiff had acquired a prescriptive right to construct and maintain the annual diversion dams was settled without too much trouble. Originally, the courts adopted a fiction that a grant of the right would be presumed if it had been exercised for a period of twenty years, this doctrine of a lost grant being in reality prescription, under another name. In this country however, the courts have generally followed the analogy of the statute of limitations applicable to actions for recovery of land, with the

effect that one who has exercised as of right a user in another's land for the statutory period is regarded as having a right of user to that extent, the length of the period of prescription changing as the statutory period is changed. The presumption of a grant is in effect a positive rule of law, and evidence that no grant was made would be inadmissible. In other words, it is conclusively presumed from the landowner's acquiescence for the statutory period in the other's user of his land, he having the right and power to stop such user, that it is a rightful user.[1]

Section 325 of the Code of Civil Procedure of California, requiring an adverse possession for a period of five years in order to acquire title to real estate, has been construed by the courts of California as being applicable to rights by prescription as well. The elements required to make out such an adverse possession under the Code are: (1) the possession must be by actual occupation, open and notorious, not clandestine; (2) it must be hostile to the owner's title; (3) it must be held under a claim of title, exclusive of any other right, as one's own; (4) it must be continuous and uninterrupted for a period of five years prior to the commencement of the action.[2] Thus, clear and satisfactory evidence that a right has been exercised for more than five years openly, notoriously, visibly, continuously, and without protest, opposition or denial of right to do so creates a prima facie title to the easement by prescription.

Since it is the recognition of a right in the landowner to put an end to the user which deprives the user of the element of adverseness, and such recognition is in its nature an affirmative fact, the burden of proof in reference thereto is properly on the landowner; that is, in the absence of evidence to the contrary, the user of another's land is ordinarily presumed to be adverse.[3]

It was early held in Wisconsin that when a person claiming an easement by adverse user introduced evidence to show that the use of the way had in fact been made, it would be presumed that such use was adverse unless it was affirmatively shown by the owner of the land to be a permissive use under contract or other agreement. The plaintiff need not have a specific intent to deprive the owner of the property, but merely the intent to use the property without regard to the owner's rights.[4] Actual knowledge on the owner's part need not be shown, it being sufficient that the user is so visible and

[1] Tiffany, The Law of Real Property, 3rd Ed., Vol. IV, Sec. 1191, (1939).
[2] Thomas v. England, 71 Cal. 456, 12 P. 491 (1886); Fleming v. Howard, 150 Cal. 28, 87 P. 908 (1906); Wallace v. Whitmore, 47 Cal. App. 2d 369, 117 P. 2d 926 (1941).
[3] Tiffany, The Law of Real Property, 3rd Ed., Vol. IV, Sec. 1196a, (1939).
[4] Maloney, "Easements—Prescription by Adverse User," 9 Wisc. L. Rev. 107 (1933).

notorious that, in the exercise of due diligence, he would learn thereof.[5]

The periodic absence of use of the claimed easement by plaintiff during the winter months in the case at bar was held not to affect its acquisition of a prescriptive easement. An omission to use when not needed does not disprove a continuity of use, shown by using it when needed.[6]

An easement involves primarily the privilege of doing a certain class of acts on, or to the detriment of, another's land; or a right against another that he refrain from doing a certain class of acts on or in connection with his own land. Thus, easements (as distinguished from natural rights) may be of two kinds: affirmative easements which authorize the doing of acts which, if no easement existed, would give rise to a right of action, or in other words involve the creation of a privilege; and negative easements which do not authorize the doing of an act by the person entitled to the easement but merely preclude the owner of the land subject to the easement from doing the act which, if no easement existed, he would be entitled to do.[7] In the instant case the plaintiff claimed both an affirmative easement to build the dam, and also a negative easement which precluded the landowners from removing amounts of gravel from below the diversion dam which would damage the dam.

Under a case involving a negative easement, it is impossible for the required cause of action to accrue in favor of the alleged servient owner to prevent the privileged acts. Because of this, there is a compelling logical reason that prevents the acquisition of negative easements by prescription.[8]

The expression "natural rights" as distinguished from the term "easements" is used to describe the different phases of the general right in a landowner freely to enjoy the use of his land in its natural condition, without interference by his neighbors.[9]

The court decided that the removal of gravel by the defendant could not be construed as a taking of the plaintiff's natural rights. The court stated:

> "Even if plaintiff had been the owner in fee of the land upon which the diversion dam was erected, the removal of gravel from the stream bed some hundreds of feet downstream would not violate any natural right of plaintiff in the dam

[5] Abbott v. Pond, 142 Cal. 393, 76 P. 60 (1904); Bernstein v. Dodik, 129 Cal. App. 454, 18 P. 2d 983 (1933).
[6] Hesperia Land & Water Co. v. Rogers, 83 Cal. 10, 23 P. 196, 17 Am.St.Rep. 209 (1890).
[7] Tiffany, The Law of Real Property, 3rd Ed., Vol. III, Sec. 756, (1939).
[8] Cook, "Legal Analysis in the Law of Prescriptive Easements," 15 So. Cal. L. Rev. 44 at 59 (1941).
[9] Tiffany, The Law of Real Property, 3rd Ed., Vol. III, Sec. 714-715 and 757, (1939).

> site recognized by law. The evidence as to the plaintiff's prescriptive user of the land . . . would not warrant a finding that plaintiff had by this same user succeeded to such supposed natural right of said parties (the landowners) in the land made servient to the diversion dam easement, as a basis for claiming that this natural right had been taken."

The right claimed was that there was a natural right in the owner of an upper portion of a stream bed that the downstream owner should not so use his portion of the stream as to increase the normal erosion and lowering of the upper stream bed. Actually, the prescriptive right claimed here was an easement in gross, which exists where there is no dominant tenement. It is little more than an irrevocable license.[10]

The court went on to say that when legal consideration is given to the plaintiff's rights against the United States for the consequent damage to the dam resulting from the removal of the gravel downstream, a principle other than that obtaining between private parties comes into play. In such a case the Constitution provides that private property shall not be taken without just compensation; but a distinction has been made between damage and taking, and that distinction must be observed in applying the constitutional provisions.[11] The application of this doctrine by the Supreme Court is shown by two lines of decisions as based on the factual situation involved. One set of decisions makes a strict construction of, and the other takes a liberal view of, the term "taking" in the Fifth Amendment.

In *Bedford v. United States,*[12] the plaintiff's lands were damaged by the overflow and erosion resulting from the building of Government flood control works on the Mississippi River above the plaintiff's land. The court held that such government action was not a taking of private property for public use within the Fifth Amendment. It was said that the damages, if they could be assigned to the works at all, were but an incidental consequence of them. In *Gibson v. United States,*[13] the plaintiff's landing on a river was rendered useless as the result of Government works in connection with navigation improvements. The court held that no right to claim damages was thereby given. In another case involving indirect damage to the plaintiff's property,[14] it was said that acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its

[10] Zollmann, Tiffany on Real Property, Sec. 525, p. 530, (1940).
[11] Bedford v. United States, 192 U.S. 217 at 224, 24 S. Ct. 238, 48 L.Ed. 414 (1903).
[12] Ibid.
[13] Gibson v. United States, 166 U.S. 269, 41 L.Ed. 996, 17 S.Ct. 578 (1896).
[14] Transportation Co. v. Chicago, 99 U.S. 635, 25 L.Ed. 336 (1878).

use, are universally held not be a taking within the meaning of the constitutional provision.

In a recent case, *United States v. Willow River Power Co.*,[15] the court stated that an owner of a dam and hydroelectric plant on a navigable stream was not entitled to compensation for a reduction in the generating capacity of the plant, which resulted from an authorized improvement that raised the level of the water of the stream above ordinary high-level mark. Even where damages resulted from an unforeseen flooding of plaintiff's soda lakes following construction and operation of a government irrigation project, it was held that as no intentional taking of plaintiff's property could be implied, the government was not liable ex contractu even assuming such causal relation.[16]

The constitutional guaranty requires compensation only where property is actually taken, and not where it is merely damaged, or otherwise diminished in value, or its use restricted.[17]

The liberal construction of "taking" is illustrated in the early case of *Pumpelly v. Green Bay Co.*,[18] where it was decided that the permanent flooding of private property would be regarded as a taking. The court stated:

> "It is not necessary that property should be absolutely taken, in the narrowest sense of the word, to bring the case within the protection of the constitutional provision; but there may be such serious interruption to the common and necessary use of property as will be equivalent to taking, within the meaning of the statute. The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand or other material, or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as, by the constitutional provisions, demands compensation."

Later, in 1902, the case of *United States v. Lynah*[19] held that the turning of a valuable rice plantation into an irreclaimable and valueless bog, as the result of an improvement in navigation by the United States Government, is a taking of the land, within the meaning of the Fifth Amendment. Again, in *United States v. Cress*,[20] the court stated that where the Federal Government by means of a lock and dam raised the water above the natural level so that the plaintiff's lands were subjected permanently to periodical overflows

[15] United States v. Willow River Power Co., 324 U.S. 499, 65 S. Ct. 761 (1945).
[16] Horstmann v. United States, 257 U.S. 138, 42 S. Ct. 58, 66 L.Ed. 171 (1921).
[17] Vol. 20, Corpus Juris, Sec. 138, p. 669 (1920); "Eminent Domain—Damage Without Taking," 32 Cal. L. Rev. 91 (1944); "Constitutional Law—Eminent Domain," 18 N. C. L. Rev. 43 (1939).
[18] Pumpelly v. Green Bay Company, 13 Wall. 166, 20 L.Ed. 557 (1872).
[19] United States v. Lynah, 188 U.S. 445, 23 S. Ct. 349, 47 L.Ed. 539 (1902).
[20] United States v. Cress, 243 U.S. 316, 37 St. Ct. 380, 61 L.Ed. 746 (1916).

which substantially injured, though not destroyed, their value, there was a partial taking of the property and the United States was therefore liable to compensate the owner to the extent of the injury.

The case at bar was distinguished from the above cases on the ground that there was in those cases a direct physical invasion and appropriation which was absent here.

> ". . . the removal of gravel, involved no direct encroachment on plaintiff's diversion dam, quite aside from the question whether the ultimate consequence of its act may have impaired its use as it then existed. The conception of what constitutes an invasion and appropriation of the private owner's domain is broadened, but the necessity of a taking is adhered to, and the appropriation or taking upon which the right to compensation is made dependent is an intentional appropriation of the private party's property, even though the property conceived to be taken is of an incorporeal nature."

Where land is merely damaged by the impairment of its use or value as an incidental consequence of the lawful exercise of power by the government, there is no taking.[21] There must be some implication of a promise to make the compensation required where there is an intentional taking of private property for public use.

In answer to the plaintiff's claim that a negative easement had been acquired as against the servient landowners which withdrew their right to use the gravel in the river bed below its dam, the court stated that the findings would not support such a conclusion. The decision concludes with the observation that although the removal of gravel by the defendant may have brought about in substantial part the necessity to replace the dam in 1943, even without that contributing factor the stream bed would have ultimately washed and eroded to such a depth that plaintiff would have found the gravel dam ineffective.

As early as 1859, Sedgwick argued that this limitation of the term 'taking' to the actual physical appropriation of property or a divesting of title is too narrow a construction to answer the purposes of justice.[22]

Considerations of policy should control. If from the standpoint of policy it is desirable that a citizen have compensation, there should be no hesitation in awarding it to him.[23] It would seem more equitable to allow compensation for such damage caused by the government,

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[21] Vansant v. United States, 75 Ct. Cl. 562 at 567; Jackson v. United States, 230 U.S. 1 (1912); Mills v. United States, 46 F. 738 (1891); Tempel v. United States, 248 U.S. 121 (1918); United States v. Commodore Park, 324 U.S. 386 (1944).

[22] Sedgwick, "Statutory and Constitutional Law," p. 519 (1857).

[23] Cormack, "Legal Concepts in Cases of Eminent Domain," 41 Yale L.J. 221 (1931).

thus implementing a constitutional policy that the burden of the destruction of the individual's valuable property interests for the public good should not rest upon him alone.[24]

The statement made by Justice Miller in *Pumpelly v. Green Bay Co.* seems to express this view especially well.[25]

> "It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which had received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject to total destruction without making any compensation, because in the narrowest sense of that word it has not been taken for the public use."

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[24] "Eminent Domain—When Is Property Taken," 52 Harv. L.Rev. 1176 at 1177 (1939); Portsmouth v. United States, 260 U.S. 327 (1922); United States v. Welch, 217 U.S. 333, 28 L.R.A., (N.S.) 385 (1909).

[25] Pumpelly v. Green Bay Company, 13 Wall. 166, 20 L.Ed. 557 (1872).