Real Estate Special Feature

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Are prescriptive and implied easements in jeopardy?

By William V. Hovey

After reading the Land Court decision in *Houghton v. Johnson*, I agreed to file an amicus brief on the petitioner's appeal to the Appeals Court. That court was so unimpressed with my submission that it mentioned my name in the decision, but not any of my arguments. See *Houghton v. Johnson*, 71 Mass. App. Ct. 825, 887 N.E.2nd 1073.

In *Houghton*, the Appeals Court attempted to rewrite the law of prescriptive easements, which most conveyancers thought they knew.

Salient facts in prescriptive easement case

(1) The beach users and their predecessors in title used all of Kingsbury Beach, including the so-called beach area, on a daily, seasonal basis for a period ranging from 62 to 21 years;

(2) Each beach user used the beach area without permission for all manner of usual beach purposes, including walking, sunbathing, picnicking, playing games, watching the sunset, collecting seashells, building sandcastles and bonfires, and placing boats and beach items such as towels and chairs;

(3) For the 48 years she owned the beach area, the landowner's predecessor in title, Jane T. Liberatore, spent on average only seven to 10 days each summer at Kingsbury Beach, and she rented the cottage for the rest of the summer season;

(4) Liberatore never gave anyone express or implied permission to use the beach area, nor did she ask anyone to leave the beach area during the entire 48 years of her ownership;

(5) Liberatore only exercised control over the dunes inland of the snow fence;

(6) Liberatore never exercised any control over the beach area;

(7) Of the 59 beach users, 38 of them never met Liberatore; and

(8) Only four of the claimants were longtime friends of Liberatore, but their use of the beach area was independent of the parties' relationship.

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Holding in prescriptive easement case

As I read the decision, the Appeals Court is now requiring the following elements to support a claim for a prescriptive easement, i.e., (a) separate and exclusive use and (b) the true owner of the land in question having been given explicit notice of the adverse use.

In support of the first new requirement of separate and exclusive use, the Appeals Court quotes *Kilburn v. Adams*, 48 Mass. 33, 39 (1843). However, *Kilburn* presented a unique set of facts that I believe render it inapplicable.

In *Kilburn*, the claimant's predecessor in title regularly traversed a certain way to reach the Groton Academy. The predecessor was a trustee of the academy who owed a fiduciary duty to preserve its assets.

The Appeals Court's reliance on *Kilburn* to alter the definition of easement by prescription threatens to throw property law into disarray.

The *Kilburn* court held that the claimant, who was tacking with his predecessor's use, had not obtained a prescriptive easement over the right of way through land owned by Groton Academy, even though the use was open, notorious and for the requisite period.

The *Kilburn* court explained that the use of the way was not sufficiently adverse to give rise to prescriptive rights because the predecessor's use could "not be so readily deemed adverse, as those of a stranger having no rights in the estate, and charged with no duty, growing out of his fiduciary relation, to protect and preserve it."

It therefore seems illogical to utilize *Kilburn* to create a new heightened standard of "separate and exclusive use" for prescriptive easements for use of a beach. The *Kilburn* exception does not derive from "the difficulty in overseeing or monitoring the use of open and unenclosed land" as the Appeals Court here contended. The *Kilburn* holding was based primarily on the relationship between the parties, rather than on the unenclosed nature of the land.

In *Houghton*, there was no fiduciary relationship between the parties. Therefore, the claimants' non-exclusive use of the beach area was sufficiently adverse to warrant a finding of an easement by prescription. Accordingly, the Appeals Court's reliance on *Kilburn* to alter the definition of easement by prescription threatens to throw property law into disarray.

As to the requirement that the landowner have actual knowledge of an explicit claim of right, until this decision there has never been a requirement that the true owner be given explicit notice of adverse use. See *Ottavia v. Savarese*, 338 Mass. 330, (1959) ("Where the used has acted, without license or permission of the true owner, in a manner inconsistent with the true owner's rights, the acts alone … may be sufficient to put the true owner on notice of the nonpermissive use."); see also *Kendall v. Selvaggio*, 413 Mass. 619, 624 (1992); *Flynn v. Korsack*, 343 Mass. 15, 18-19 (1961); *Bills v. Nunno*, 4 Mass. App. Ct. 279, 284 (1976).

As the Supreme Judicial Court stated in 2003: "An adverse possessor has no burden to reveal his intentions to the true owner absent a special relationship between the parties, as, for example, between a licensor and licensee, where a repudiation of the earlier relationship is necessary to establish a claim of adverse possession." *Lawrence v. Town of Con-*

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cord, 439 Mass. 416, 424.

And the SJC has rejected a requirement of actual knowledge of the adverse use because it "would deprive the principle of prescription of much of its value in quieting controversy and giving sanctions to long continued usages." *Id.* at 422; quoting *Foot v. Bauma*, 333 Mass. 214, 217-218 (1955).

The central inquiry should focus on the conduct underlying the prescriptive easement, not the parties' state of mind, i.e., whether the claimant has used the land in the same manner as would the average landowner. "[T]he alleged requirements of claim of title and of hostility of possession mean only that the possessor must use and enjoy the property continuously for the required period as the average owner would use it, without the consent of the true owner and therefore in actual hostility to him irrespective of the possessor's actual state of mind or intent." *Ottavia*, 338 Mass. at 333, quoting American Law of Property, §15.4, at 776-777 (1952); *Kendall*, 413 Mass. at 624 (mental attitude irrelevant where acts import an adverse character to the use of the land).

The beach users' use of the beach area for walking, sunbathing, picnicking, playing games, watching the sunset, collecting seashells, building sandcastles and bonfires, and placing boats and beach items such as towels and chairs constituted usual beach activities as that phrase is understood on Cape Cod. *Klink v. Valovcin*, Land Court Misc. Case No. 265039, 19 (1993); aff'd 38 Mass. App. Ct. 1125 (1995), further appellate rev. denied, 421 Mass. 1105 (1995). No more was required, particularly at the summary judgment stage.

In addition, the Appeals Court incorrectly held that the beach users' use of all of Kingsbury Beach, and not solely the beach area, precludes a finding that they obtained a prescriptive easement.

But the use described in the claimants' affidavits demonstrated that use of the beach area was anything but sporadic and was consistent with the normal use of an expanse of sandy beach bordering the ocean and thereby enhances the prescriptive easement claim. See *La Chance v. Rubashe*, 301 Mass. 488, 490 (1938) (nature and extent of use necessary to establish prescriptive rights varies with character of the land, the purpose for which the land is adapted, and uses to which the land has been put).

Another aspect of prescriptive easement law, i.e., the effect of the failure of the landowner or any of her predecessors in title to record a notice to prevent the acquisition of easement rights under M.G.L.A.c. 187, §3, was not addressed by the Appeals Court.

As stated in 28 Mass. Prac. §8.12.7: "A statutory notice to prevent the acquisition of a right of way or other easement will interrupt the prescriptive easement period for at least 20 years but will not affect a claim of fee simple ownership by adverse possession. Notice must be posted by a sheriff for at least six consecutive days and then the notice and sheriff's service recorded within 90 days; personal service on suspect persons may also be made but such service is not required. *Failure to give this statutory notice can be considered by the court as evidence in support of a prescriptive easement:* 'It does not appear that the petitioner or his predecessors in title ever posted any notice on the land, as provided in M.G.L.A. c. 187, §3, and similar statutes in effect prior thereto for the purpose of preventing the acquirement of an easement over the land.' The recording of the served notice appears to have the effect of binding all persons. A person attempting to establish a prescriptive easement should search the record title of the owner of the land over which such easement is sought to ascertain if a statutory notice had been recorded within the last 20 years."

Failure to use M.G.L.A.c. 187, §3, was cited more recently in *Brown v. Sneider*, 9 Mass. App. Ct. 329, 400 N.E.2d 1322 (1980): "Where the statutory notice has not been employed, interruption of the prescriptive use requires that the landowner's rights must at least be asserted to the other party by some unequivocal, overt act which, if the easement existed, would be a cause of action.' A temporary obstruction, especially if it is constructed by someone other than the landowner and not brought to the attention of the party engaging in the adverse use, will not interrupt the running of the twenty-year prescriptive period.' A brief temporary obstruction constructed by the landowner, without either statutory notice under M.G.L.A. c. 187, §3 or the knowledge of the party claiming an easement, has been held insufficient to interrupt the prescriptive period.'" [Citations omitted.]

Additional issues in prescriptive easement case

And then there is the proposition that if a person is granted an express easement by a beach owner to use a road to the beach, doesn't that person acquire an implied easement to use the beach for usual beach purposes? Otherwise, what is the purpose or value of an easement to get to a beach if the easement holder can only go to, but not cross over, the edge of the beach?

It is well-established that easements can be created by implication and by estoppel in order to do justice in a particular situation. See 28 Mass. Prac., Chapter 8. Such easements are necessary to the enjoyment of the land or an interest in the land conveyed to the grantee, which were not expressed or otherwise included in the granting instrument.

A quasi-easement is created when a parcel is divided and a severed portion is conveyed without a specific right, such as a utility line or a driveway, which is essential to the enjoyment of the severed parcel. See 28 Mass. Prac. §8.15 citing *Jasper v. Worcester Spinning & Finishing Co.*, 318 Mass. 752, 64 N.E.2d 89 (1945). See also *Cummings v. Franco*, 335 Mass. 639, 141 N.E.2d 514 (1957) (two houses on one lot with the water, electric and telephone lines coming from the street to the front house and then running from the front to the rear house. On the sale of the rear portion of the land containing the rear house to a third party, with no mention in the deed to water, electric or telephone lines, a quasi-easement for such lines was created). See also *Flax v. Smith*, 20 Mass. App. Ct. 149, 479 N.E.2d 183 (1985).

Similarly, when a parcel of land on a private way is conveyed without an express access easement over private ways leading to a public way, the law implies an easement for access over such private ways to the nearest public way. See 28 Mass. Prac. §§8.16 and 8.17, citing *Farnsworth v. Taylor*, 75 Mass. (9 Gray) 162 (1857). *Murphy v. Mart Realty of Brockton, Inc.*, 348 Mass. 675, 205 N.E.2d 222 (1965); *Casella v. Sneirson*, 325 Mass. 85, 89 N.E.2d 8 (1949); *Patterson v. Simonds*, 324 Mass. 344, 86 N.E.2d 630 (1949); *Oldfield v. Smith*, 304 Mass. 590, 24 N.E.2d 544 (1939); *Downey v. H.P. Hood Sons*, 203 Mass. 4, 89 N.E. 24 (1909).

Such an easement is known as an easement by estoppel by plan reference or by deed description, although it, too, could be considered an implied easement.

Applying these concepts to the back lot owners or "right of way" appellants, it seems axiomatic that the grantor of such rights of way did not intend for the grantees to travel down the road described in the easement and then stop at the edge of the beach owned by the grantor. That grantor clearly intended for those "right of way" grantees to access the entire area of the beach owned by such grantor.

Accordingly, I believe the "right of way" appellants acquired an implied easement to use the grantor's beach by estoppel for usual beach purposes.

Conclusion

But what of the position statement of the Appeals Court in *Burke v. Toothaker*, 1 Mass. App. Ct. 234, 295 N.E.2d 184 (1973), in which that court said: "This is an 'intermediate appellate court' and we do not regard it as one of our functions to alter established rules of law governing principles of substantive liability."

Doesn't *Burke* also apply to the rules of law governing easements? MLW