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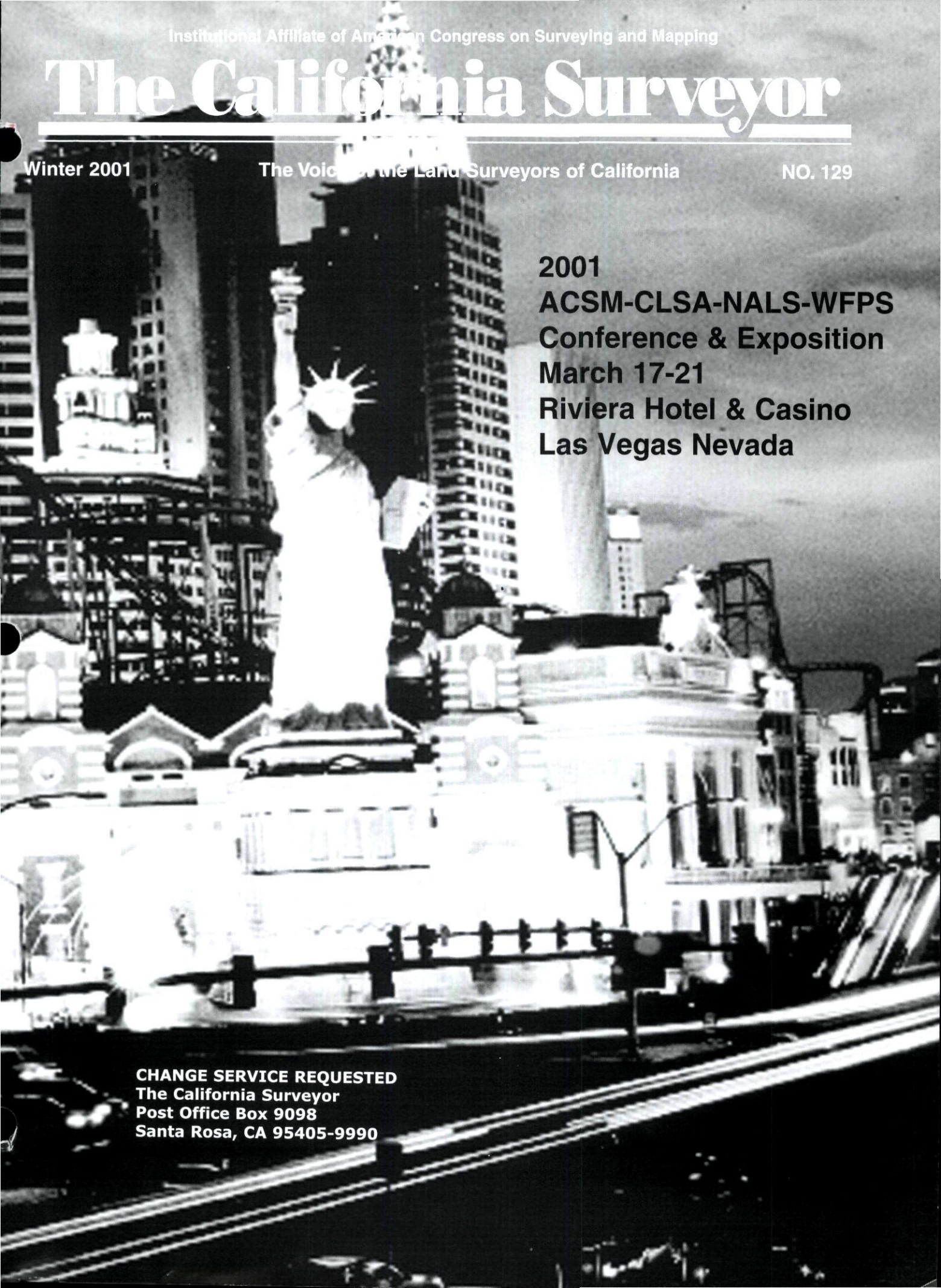

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"Recognizing that the true merit of a profession is determined by the value of its services to society, the California Land Surveyors Association does hereby dedicate itself to the promotion and protection of the profession of land surveying as a social and economic influence vital to the welfare of society, community, and state."

"The purpose of this organization is to promote the common good and welfare of its members in their activities in the profession of land surveying, to promote and maintain the highest possible standards of professional ethics and practices, to promote professional uniformity, to promote public faith and dependence in the Land Surveyors and their work."

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Opinions expressed by the editor or individual writers are not necessarily endorsed by the California Land Surveyors Association Officers or its Board of Directors. Original articles may be reprinted with due credit given to the source and written notification to the California Land Surveyors Association.

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On The Cover

Photo of the Las Vegas strip; the site of the ACSM/CLSA/NALS/WFPS 2001 Conference to be held March 17-21 at the Riviera Casino Hotel.

From the Editor

By: Phil Danskin, PLS

Oops!

Must have had my "Fall back, Spring ahead" mnemonics off a tad? The Fall issue mentioned a Marin County Record of Survey, as a first metric map in that County. Wouldn't you know, a faithful reader pulled the map up on his microfiche and told me the map was not "truly a metric map - the scale was one-inch equals thirty feet!" Now that was just enough to deflate my metric-proponent-editorial a bit. Live and learn.

The other "oops" from your editor, was the sequence where the issuance of licenses occurred. In the Summer issue of the *California Surveyor*, I wrote, *"Since 1951, the CLSA roster indicates sequential licensing numbers have never been pulled and sent into oblivion."* Actually-Pinocchio-some have been sent to oblivion . . . Licenses 2148 through 2199 and 4000 were not issued! Whew, I'm glad I got that off my chest.

More on Metrics

Wow! The Feds must have read the recent metric editorial in the *California Surveyor!* Has anyone heard about the upcoming Federal Communications Commission requirements? Haven't? Here, "To allow 911 dispatchers to quickly locate callers, the Federal Communications Commission has required that by October 2001 all wireless service providers have the capability to pinpoint their users' locations within 328 feet . . ." (San Francisco Chronicle 23 October 2000). Hey, metricians! Does 328 feet ring any bells?! (One-hundred meters for the metric-challenged). Oh, the power of the press. I feel like William Randolph Hearst, save, the castle, babes and gold toilets!

Not only have the Feds caught wind of metrics, so has the Securities and Exchange Commission! "Under pressure from Congress . . . all stocks on all markets must be **decimalized** not later than April 9," (San Francisco Chronicle 26 September 2000). No more fractions. Isn't that metric?!

Help!

I received a request from our South Dakota cousins, asking if we wouldn't mind running the advertisement shown on page 18. They are selling bronze belt buckles, with proceeds going toward preserving the Initial Point of the Black Hills Meridian. Sounds great I thought. The gang in South Dakota is proud to promote their profession, and to aid in important preservation. What's wrong with that?

Then, a light went on, I recall past debate regarding the public's perception of our profession and the Great Baseball Cap Debate. Does wearing a "surveyor's" belt buckle give an unprofessional appearance? (If you saw this editor beside his total-station - plumber's-crack and all, you'd wished he was wearing one of those belt buckles.)

Personally, I believe anyone who wears *any* hat *indoors*, without some sort of medical condition, (mental or otherwise), is not only not professional, but plain-arse uncivilized . . . Don sunglasses to the mix and the appearance is that of down right "shady!" (unless they were a member of CLSA's Gary Oakie performers. Hint. Hint. Vegas 2001!)

Frank McCourt Suggests: "Cover Your Arse!"

When a potential client requests your services, are you always thinking to yourself, "how could I get sued for doing this?" Recently I had what appeared as a very simple Lot Line Adjustment, whereby all parties were interested in moving their common boundaries. The current metes and bounds conveyances were reviewed and assessor parcel numbers identified to the conveyances. Low and behold . . . one of the owners appears to have multiple parcels. (Not applicable in Napa County).

What was previously a simple task, now requires "professionalism" to kick in to explain that parcels may "extinguished" if the Lot Line Adjustment proceeded as per their request. The difference between the professional and otherwise is the ability to show our clients the virtual land-mines to their request. Chills went up my spine, when I realized that I could have missed finding these potential Certificates of Compliance of parcels! Can you imagine the difference in "value"of having a three-hector parcel and another five-hector parcel - versus *one* eight-hector parcel?!

Does Anyone Want Some Money?

Membership does have its rewards .... I just received my refund check from CNA, (professional liability insurer), which almost paid my annual NSPS dues - *just because* I *am* an NSPS member! Again, if you are not a member, it can literally *pay* to be one!

❖

Who Is Training Your Surveyors?

By: Lynn D. Lantz, PLS

The thirty years I have been around and involved with various types of surveying such as construction and property, public and private, many things have changed. A couple of things have been on my mind for a while: the subject of rates and wages and the training of our replacements and assistants. In the past ten to fifteen years nearly all the three-man crews have gone by the wayside in the private sector. Technology has given us the ability to measure things with only two, and now, only one person. I see no use in listing all of the technical stuff that you are probably more familiar with than am I. Also, for the sake of simplicity, I will use the masculine gender pronouns to convey this message but am fully aware that the women working in these positions are subject to the same lack of training and guidance.

The cost of labor has, gone up in many areas much faster and higher than the revenue, and thus the rodman is history. Is that a good idea? Are you comfortable with the people doing your field surveys? Do they know a section corner from a guy wire anchor? Who showed them the difference? Was it you? If not, then how do you know what they know? If the point is not in a range box with a monument record to guide them to it and an intersection with street sign to get them in the general area how do you know what they are tying down and measuring from? Oh, you say that you hired them from the company across town that has been doing that type of surveying for years so they have trained them. Well, if you won't accept that company's pin and cap without checking it out thoroughly why trust them to have trained the person that may have set that pin and cap?

Maybe the college of vo-tech trained your new instrument person that is mighty supportive to hire from their student placement centers and take the non-experienced gunner. You may have saved over $1.50 per hour to get someone who can turn angles and set up an instrument in less than seven minutes, and only if the ground is level. Can he read plans? Can he figure out where to start a job if the party chief is sick and if the job is critical and must be done right now? Does he know what a plumb bob is for, and how to use one? Can he really run the instruments you have without giving you hours of grief in solving those traverse problems and topo code questions? I am certain he could not "throw" a chain, if he could even read one. This person is going to be a party chief someday if the right job does not come along first and, with its better money or benefits, lures him away.

We here in the Denver area are once again in the situation surveyors. This happens in periodic spurts most anywhere I suspect. The strange thing is that rates stay nearly the same during these boom cycles, and

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Letters to the Editor

■ METRIC SYSTEM

Thank you very much for a copy of your Spring 2000 issue of the *California Surveyor*. I enjoyed your humorous article entitled "Change, anyone?" I'm glad that you're keeping the metric issue alive. As a former European, it has always amazed me how conservative Americans can be. Everybody knows that the USA is the most progressive country in the world. Who would have thought that the tradition-conscious English and Canadians would adopt the metric system long before America. There must be a love/hate affaire, especially with surveyors, towards the metric system. We all know, it's so much simpler than the acre-feet tradition. Perhaps, we hate to give up our little professional secret. Not many Americans know how many square feet are in an acre of land. In the past, I have made what I call the Rockport test. When some friends in Rockport, all land owners, were challenging the metric system, I had them write down what they thought how many square feet were in an acre. The written answers of about a dozen friends ranged from 40 to 40,000 square feet. Not one got it right! This little bit of knowledge made us very important and allows us to make simple calculations look complicated.

Oh well, one of these days we all will see the light. Keep up the good fight. As an editor you have an opportunity to preach the metric gospel to your readers. Good luck and best wishes!

Gunther Greulich, PLS, PE

■ CALIFORNIA/NEVADA

Mr. Wilusz's excellent and informative article about the California/Nevada boundary hassle: only one thing puzzles me; the cover illustration and the caption therefore, inside. What is "Oregon" doing on the face of the monument near Verdi, a few miles west of Reno? Does this simply mean (from the arrow above the word "Oregon") that "it's up thataway somewhere?" or have you re-opened the whole controversy and awarded Mt. Shasta, the Trinity Alps, most of the Mendocino Coast, and Paradise, yet, to the Oregonians?

Puzzled in Pacific Grove,
Del Rasmussen, PLS

I hope John's explanation (below) helps. --ed.

■ COVER PHOTO FALL 2000

Phil tells me there have been some questions about the photograph on the cover of the Fall 2000 California Surveyor. Seeing "Oregon" written on a piece of iron that I claimed to be near Verdi, NV has some folks wondering if I was lost. The questions are not surprising and I apologize for not providing a description of the markings on all sides of the monument. The north side reads "Oregon, 174 Miles, 44 Chains". The south side reads "1872, Longitude 120° west of Greenwich, A.W. Von Schmidt, Astronomer and Surveyor". The west and east sides read "California" and "Nevada" respectively. The date indicates that it was set in 1872 not 1873 as stated in description of photograph. This state boundary monument is in fact a line point that identifies its meridian as well as its distance from the northeast corner of California.

Other questions can be directed to me at johnpwilusz@hotmail.com, or 161 Brewery Lane #3, Auburn, CA 95603.

John P. Wilusz, PLS

Fences, Boundaries and Prescriptive Easements

By: Jeffrey A. Benz, Esq. & Robert E. Merritt, Esq.

Largely ignored until the problem becomes manifest, prescriptive easements can pose significant and unwanted risks in real estate transactions and furnish fodder for real estate disputes. Boundary lines between neighboring properties are especially fertile ground for prescriptive easement issues. For example, an encroaching fence or structure—whether placed intentionally or by mistake on another person's property—may give rise to claims of adverse possession and prescriptive easement, which, if successful, would dispossess an innocent owner of property and reward a trespasser with a windfall.

"[P]rescriptive easements can pose significant and unwanted risks in real estate transactions and furnish fodder for real estate disputes."

A prescriptive easement, while similar in many respects to a claim of adverse possession, is different in that it does not confer full ownership of, or title to, property. Rather, it is axiomatic that it bestows on the beneficiary a nonpossessory, limited property interest in another person's land that guarantees a right either to use such property or to prevent the property owner from making certain uses of the land. See *Mesnick v Caton* (1986) 183 CA3d 1248, 1261, 228 CR 779. Prescriptive easements do not emanate out of any agreement or document. An exception to the rule that property interests must be conveyed by an express grant or reservation, prescriptive easements lie completely outside the system of real property conveyance and recordation. They arise, rather, when the owner of the servient property, having actual or constructive knowledge of a trespasser's use of land, fails to prevent that use for the statutory prescription period. The problem of prescriptive easements is illustrated by the fact that standard California Land Title Association (CLTA) title insurance policies typically exclude prescriptive easements from coverage, squarely allocating the risk to the parties involved in the real estate transaction (if coverage is desired, the insured must purchase extended coverage, which is given only after the title company physically inspects the property). Furthermore, the lurking threat of a prescriptive easement can cast a shadow over a property owner's plans to develop his or her property. Consequently, prescriptive easements disrupt the certainty and predictability necessary to facilitate efficient real estate development and transactions.

This article explores the practical problems posed by prescriptive easements in a boundary line context by:

- Reviewing the history of prescriptive easements and the basic legal elements of a prescriptive easement claim;
- Describing the nature of the rights embodied in a prescriptive easement; and
- Observing that the trend of California case law disfavors easements by prescription when such claimed easements amount to claims of fee title.

Despite the trend, however, there is limited case law favoring exclusive easements; also, cases involving claims of right-of-way by prescription remain problematic. The authors conclude that, in light of growing urbanization, intensified land use, and an increasing emphasis on coordinated land use planning, it may be worth reexamining whether prescriptive easements are desirable or applicable. The authors note that discussion of related issues, such as the agreed boundary line doctrine and implied dedication claims, is beyond the scope of this article.

"[I]n light of growing urbanization, intensified land use, and an increasing emphasis on coordinated land use planning, it may be worth reexamining whether prescriptive easements are desirable or applicable."

Historical Doctrine Underlying Prescriptive Easements

The historical policy justifying easements by prescription is similar to the one underlying adverse possession: a desire to favor the use of land (in fact, the highest and best use of land) and to discourage property owners from sitting passively on their rights. In that related context of adverse possession, a California court of appeal wrote (*Finley v Yuba County Water Dist.* (1979) 99 CA3d 691, 696, 160 CR 423):

[I]ts underlying philosophy is basically that land use has historically been favored over disuse, and that therefore he who uses land is preferred in the law to he who does not, even though the latter is the rightful owner. Hence our laws of real property have sanctioned certain types of otherwise unlawful taking of

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Fences , Boundaries - Continued from page 9

land belonging to someone else, while, at the same time, our laws with respect to other types of property have generally taken a contrary course.

Other rationales include the goal of "reduc[ing] litigation and preserv[ing] the peace by protecting a possession that has been maintained for a statutorily deemed sufficient period of time." *Warsaw v Chicago Metallic Ceilings, Inc.* (1984) 35 C3d 564, 574, 199 CR 773.

These policy rationales may seem more relevant to the real property regime of many decades ago, when society was largely rural and agrarian, and property lines were not as well defined or definable as today. Current social conditions may lead one to wonder whether the policy favoring use over disuse is still relevant. In an increasingly congested society, it is rare that land is not being used at all; in fact, as urban sprawl becomes a politically charged watchword, open space and conservation easements become increasingly valued. Most land *is* being used; it is just a question of what use will be deemed superior. In this vein, prescriptive easements seem inconsistent with the growing modern emphasis on land use planning. As Justice Reynoso pointed out in his dissenting opinion in the *Warsaw* case, "modern society evidences a preference for planned use, not the ad hoc use of a trespasser." 35 C3d at 580.

"[T]he heart of a prescriptive easement is a trespass that, absent legal sanction, constitutes a legal wrong."

Furthermore, while there may have been some appeal, real or perceived, to a putative bright-line test that held out the prospect of settling property disputes without resort to the courts, anyone who does any research into this area will quickly be confronted by scores of cases in this area, new and old. The roll call of judicial decisions construing prescriptive claims belies the idea that litigation would be reduced. No doubt the potentially harsh outcome of prescriptive claims has encouraged high-stakes litigation (including actions by property owners to prevent a trespass from ripening into a prescriptive right) and clever legal and factual arguments to distinguish and shade legal precedents. Justice Reynoso observed—again in his dissent in *Warsaw*—that "[s]ociety should not be in the business of forcing an owner of land to bring suit when a trespass has occurred. Such a policy increases litigation." The context of a prescriptive easement becomes clearer when one remembers that the heart of a prescriptive easement is a trespass that, absent legal sanction,

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Who May Write Legal Descriptions?

Statutes of 1988; Chapter 817

An act to amend Section 8726 of, and to add Section 8726.2 to, the Business and Professions Code, relating to surveying.

The people of the State of California do enact as follows:

SECTION 1. Section 8726 of the Business and Professions Code is amended to read:

8726. A person, including any person employed by the state or by a city, county, or city and county within the state, practices land surveying within the meaning of this chapter who, either in a public or private capacity, does or offers to do any one or more of the following:

(a) Locates, relocates, establishes, reestablishes, or retraces the alignment or elevation for any of the fixed works embraced within the practice of civil engineering, as described in Section 6731.

(b) Determines the configuration or contour of the earth's surface, or the position of fixed objects thereon or related thereto, by means of measuring lines and angles, and applying the principles of mathematics or photogrammetry.

(c) Locates, relocates, establishes, reestablishes, or retraces any property line or boundary of any parcel of land, right-of-way, easement, or alignment of those lines or boundaries.

(d) Makes any survey for the subdivision or resubdivision of any tract of land. For the purposes of this subdivision, the term "subdivision" or "resubdivision" shall be defined to include, but not be limited to, the definition in the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code) or the Subdivided Lands Law (Chapter 1 (commencing with Section 11000) of Part 2 of Division 4 of this code).

(e) By the use of the principles of land surveying determines the position for any monument or reference point which marks a property line, boundary, or corner, or sets, resets, or replaces any monument or reference point.

(f) Geodetic or cadastral surveying. As used in this chapter, geodetic surveying means performing surveys, in which account is taken of the figure and size of the earth to determine or predetermine the horizontal or vertical positions of points, monuments, or stations for use in the practice of land surveying or for stating the position of geodetic control points, monuments, or stations by California Coordinate System coordinates.

(g) Determines the information shown or to be shown on any map or document prepared or furnished in connection with any one or more of the functions described in subdivisions (a), (b), (c), (d), (e), and (f).

(h) Indicates, in any capacity or in any manner, by the use of the title "land surveyor" or by any other title or by any other representation that he or she practices or offers to practice land surveying in any of its branches.

(i) Procures or offers to procure land surveying work for himself, herself, or others.

(j) Manages, or conducts as manager, proprietor, or agent, any place of business from which land surveying work is solicited, performed, or practiced.

(k) Coordinates the work of professional, technical, or special consultants in connection with the activities authorized by this chapter.

(l) Determines the information shown or to be shown within the description of any deed, trust deed, or other title document prepared for the purpose of describing the limit of real property in connection with any one or more of the functions described in subdivisions (a) to (f), inclusive.

(m) Creates, prepares, or modifies electronic or computerized data in the performance of the activities described in subdivisions (a), (b), (c), (d), (e), (f), (k), and (l).

Any department or agency of the state or any city, county, or city and county which has an unregistered person in responsible charge of land surveying work on January 1, 1986, shall be exempt from the requirement that the person be licensed as a land surveyor until the person currently in responsible charge is replaced.

The review, approval, or examination by a governmental entity of documents prepared or performed pursuant to this section shall be done by, or under the direct supervision of, a person authorized to practice land surveying.

SEC. 2 Section 8726.2 is added to the Business and Professions Code, to read:

8726.2. A licensed land surveyor may also perform land planning in connection with the land surveying activities authorized by this chapter.

SEC. 3. Nothing contained in this act is intended to restrict the ability of a local agency to use nonlicensed persons to perform administrative or business activities related to land surveying.

SEC.4. The amendment in Section 1 of this act is declaratory of existing law and is not intended to restrict the scope of practice of registered professional engineers within their respective scope of practice.

SEC.5. The amendment in Section 1 of this act is declaratory of existing law and is not intended to restrict the practice of persons licensed to practice law in California, nor is it intended to be applicable to persons licensed pursuant to part 6 (commencing with Section 12340) of Division 2 of the Insurance code, nor to persons licensed in pursuant to part 1 (commencing with Section 10000) of Division 4 of the Business and Profession Code, so long as those persons engage in the respective practice of their profession, but who may coordinate work pursuant to subdivision (k) of Section 8726 of the Business and Professions Code.

[Approved by Governor September 12, 1988. Filed with Secretary of State September 12, 1988.]

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Senior Surveyors' Corner

Sonoma County Chapter "Roasts" Bob Curtis, CLSA Past President

Bob Curtis
CLSA Past President
1970 & 1971

A surprise "Roast" of Bob Curtis (Past President CLSA 1970 & 1971) was held September 30, 2000 at the Camelot Room of the Equus Restaurant in Santa Rosa.

Joe Scherf
CLSA Past President
(1974 & 1975)

Master of Ceremonies
Gary O'Connor

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constitutes a legal wrong. A prescriptive easement, viewed from this perspective, runs contrary to equitable principles by, in effect, rewarding a wrongdoer. Against this backdrop, the question of whether these rationales still apply in a modern, largely urban social context seems a legitimate one. As the court wrote in *Finley v Yuba County Water Dist.* (1979) 99 CA3d 691, 696, 160 CR 423: "[I]t may even be asked whether the concept of adverse possession is as viable as it once was, or whether the concept always squares with modern ideals in a sophisticated, congested, peaceful society."

Legal Elements for a Prescriptive Easement

The party claiming a prescriptive easement must demonstrate that it has used the property in an open, notorious, hostile, and adverse manner for a continuous period of five years. *Warsaw v Chicago Metallic Ceilings, Inc.* (1984) 35 C3d 564, 570, 199 CR 773; CC §1007. This test for prescriptive easement is the same as that for adverse possession, except that adverse possession claims require proof that the claimant paid all property taxes on the disputed land for the prescriptive period; payment of property taxes is required to establish a prescriptive easement only if the easement has been separately assessed. *Gilardi v Hallam* (1981) 30 C3d 317, 322, 178 CR 624.

Proof of these elements presents questions of fact for determination by the trial court. *Mesnick v Caton* (1986) 183 CA3d 1248, 1260, 228 CR 779. The prescriptive easement test often hinges on whether or not an owner of real property has actual or constructive notice of an adverse use and has had sufficient time to prevent such use. *Field-Escandon v DeMann* (1988) 204 CA3d 228, 235, 251 CR 49; see also CC §19.

Although the burden of proof for each of these elements falls squarely on the prescriptive easement claimant, the claimant may benefit from a presumption if he or she can show continuous use of property over a long period without interference from the landowner. *Warsaw v Chicago Metallic Ceilings, Inc.* (1984) 35 C3d 564, 571, 199 CR 773; *Field-Escandon v DeMann, supra.* Once the presumption applies, the burden of proof then shifts to the owner to prove that the claimant's use was by express permission. Evidence of permissive use may be sufficient to negate a prescriptive easement.

It should be noted that California law provides a specific statutory safe harbor to protect against prescriptive easements. Under CC §1008, an owner may avert prescriptive claims by posting at each entrance to the property, or at intervals of 200 feet or less along the boundary of the property, a sign that substantially states: "Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code."

"[A]n owner may defeat a claim of prescriptive easement by interrupting the use that forms the basis for the claim during the prescriptive period."

Continuous and Uninterrupted Use

The degree of continuity of use that is required for a prescriptive easement depends on the nature and scope of the easement claimed. It is well established that daily use for the prescriptive period is not required; it is sufficient that the claimant uses it from time to time as the need arises. *Hesperia Land & Water Co. v Rogers* (1890) 83 C 10, 11, 23 P 196. If a right-of-way by prescription is at issue, the claimant must show a definite and certain line of travel for the statutory period of time. *Dooling v Dabel* (1947) 82 CA2d 417, 424, 186 P2d 183. Immaterial or occasional deviations from this line of travel will not be fatal to a prescriptive easement claim. *Warsaw v Chicago Metallic Ceilings, Inc.* (1984) 35 C3d 564, 571, 199 CR 773.

However, an owner may defeat a claim of prescriptive easement by interrupting the use that forms the basis for the claim during the prescriptive period. Such interruption may be achieved by initiating and prosecuting litigation challenging the claimant's use of the owner's property (*Welsher v Glickman* (1969) 272 CA2d 134, 137, 77 CR 141), or by physically interfering with the claimant's use (*Lapique v Morrison* (1915) 29 CA 136, 154 P 881). Oral protests are generally inadequate to cut off continuity of use. *Lord v Sanchez* (1955) 136 CA2d 704, 706, 289 P2d 41.

"[T]he claimant must show more than mere continuous use; the use must be so visible, open, and notorious as to be manifest upon visual inspection of the property."

Open and Notorious Use

To establish a prescriptive easement, the claimant must show more than mere continuous use; the use must be so visible, open, and notorious as to be manifest upon visual inspection of the property. The use, however, need not

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impart *actual* knowledge to the property owner as long as the use is so obvious that the owner may be deemed to have constructive knowledge of the use. *Connolly v McDermott* (1984) 162 CA3d 973, 977, 208 CR 796. Stated another way, the claimant must show that the landowner had "actual notice of circumstances sufficient to put a prudent man upon inquiry" as to the adverse use. *Field-Escandon v DeMann* (1988) 204 CA3d 228, 236, 251 CR 49 (quoting CC §19). The question of open and notorious use arises, for example, in cases involving claims of prescriptive easements for drainage, and underground sewer lines. *Field-Escandon, supra.*

Hostile, Adverse, and Under Claim of Right

Another required element for a prescriptive easement is that the claimant's use of the servient property be hostile and adverse to the rights of the owner. To be hostile and adverse, the use must be without the owner's permission and without any express or implied recognition of the owner's superior right. *Cleary v Trimble* (1964) 229 CA2d 1, 6, 39 CR 776. The element of hostile and adverse use is closely related to the element of open and notorious use, and, in fact, satisfaction of the latter element generally satisfies the former. Use will be deemed hostile if it is sufficiently open and notorious so as to impart actual or constructive knowledge to the owner of the adversity of the use.

"Another required element . . . is that the claimant's use of the servient property be hostile and adverse to the rights of the owner."

One complication arises when the claimant uses the subject property under a mistaken belief that he or she owns the property. In *Berry v Sbragia* (1978) 76 CA3d 876, 143 CR 318, a property owner built a fence that encroached on the neighbor's property, but believed that the fence was located either on his own property or on the property line. Reversing the trial court, the court of appeal determined that the claimant had no hostile intent to claim property that did not belong to him. Accordingly, the court held that a prescriptive easement could not be sustained. This aspect of *Berry*, however, was later disapproved in *Gilardi v Hallam* (1981) 30 C3d 317, 322, 178 CR 624, in which the California Supreme Court held squarely that "the requisite hostile possession and claim of right may be established when the occupancy or use occurred through mistake." Mistaken use will support a prescriptive claim unless the landowner can show by substantial evidence that the claimant "recognized the potential claim of the record owner and expressly or impliedly reflected intent to claim the disputed land only if record title was determined in [the claimant's] favor." 30 C3d at 326.

The Nature of Prescriptive Easement Rights

The scope of the rights embodied in a prescriptive easement depends on the nature and character of use underlying the prescriptive claim. *Mesnick v Caton* (1986) 183 CA3d 1248, 1261, 228 CR 779. The specific use allowed under a prescriptive easement is defined by the historical use during the statutory prescription period, and a later use cannot expand the scope of those use rights. *Twin Peaks Land Co. v Briggs* (1982) 130 CA3d 587, 181 CR 25. See also *Connolly v McDermott* (1984) 162 CA3d 973, 977, 208 CR 796.

"The specific use allowed under a prescriptive easement is defined by the historical use during the statutory prescription period, and a later use cannot expand the scope of those use rights."

The bundle of rights represented by a prescriptive easement necessarily encompasses fewer rights than the bundle involved with fee ownership. Thus, "[i]f a conveyance purported to transfer to A an unlimited use or enjoyment of Blackacre, it would be in effect a conveyance of ownership to A, not of an easement." *Raab v Casper* (1975) 51 CA3d 866, 877, 124 CR 590 (quoting 3 Powell on Real Property §405). A claim of prescriptive easement confers on the claimant only a right to use, or to prevent a use of, real property; but, as stated in *Silacci v Abramson* (1996) 45 CA4th 558, 562, 53 CR2d 37, "[e]very incident of ownership not inconsistent with the enjoyment of the easement is reserved to the owner of the servient tenement." Accordingly, for example, if a person used a neighbor's property as a driveway, any resulting prescriptive easement would confer on the claimant the right to use that area as a driveway—but not, say, the right to use the area to store tools or for drainage.

Prescriptive Easements in Fence, Encroachment, and Boundary Line Cases

Fence, encroachment, and boundary line cases often examine the nature of rights embodied in a prescriptive easement. A typical fact pattern might be something like this: A fence (or other structure) lies between two pieces of property; both neighbors initially believe that the fence lies directly on the property line dividing the two properties and use their land accordingly. A survey conducted in connection with a subsequent sale of one of the properties reveals that the fence in fact encroaches on the neighbor's property. The encroaching neighbor, who may have used

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the property for landscaping, is reluctant to face reality and hires a lawyer to come up with ways to legally protect his bonus strip of land.

In this scenario, California law seems clear: The claimant has acquired neither fee title by adverse possession nor a prescriptive easement over the disputed strip. Assuming that the encroaching neighbor has paid property taxes only on his or her assessed parcel, and not on the disputed strip of land, any adverse possession claim would necessarily fail. The prescriptive easement claim would similarly fail: Even though payment of taxes would not likely be required (assuming the putative easement has not been separately assessed), to the extent the prescriptive easement claim seeks the equivalent of fee ownership, the claim will be defeated.

Initially, it would appear that the mere erection and maintenance of a fence does not constitute the open and notorious adverse use required to support a prescriptive easement. See *Berry v Sbragia* (1978) 76 CA3d 876, 881, 143 CR 318. Although the presence of a fence is no doubt visible and "open," the fact that it encroaches is not readily apparent to the naked eye. If the mere presence of a fence were sufficient to give constructive notice of a potential encroachment, the law in effect would require homeowners to conduct surveys of their property—a bit of overkill for most residential transactions. Furthermore, the mere existence of an encroaching fence does not prove that the defendant made any actual use of the disputed property. In *Mesnick v Caton* (1986) 183 CA3d 1248, 1261, 228 CR 779, the court held that a lack of use not only bars a prescriptive easement, but also would render such an easement unenforceable. Where there was no use to define the scope of the use right, the easement would be a hollow right.

"[T]he weight of California authority is to reject prescriptive easement claims when the underlying use in effect dispossesses the owner."

Furthermore, a prescriptive easement cannot amount to an award of fee ownership. Three cases discussed below in more detail—*Raab v Casper*; *Mehdizadeh v Mincer*; and *Silacci v Abramson*—outline the prevailing trend in

California law. In each case, the appellate court reversed the trial court's ruling in favor of a prescriptive easement and held that, to the extent the claimant was seeking an exclusive easement, the claimant was attempting to obtain that which amounted to fee ownership—but which is legally obtainable only by an adverse possession claim. In *Mehdizadeh v Mincer* (1996) 46 CA4th 1296, 1300, 54 CR2d 284, the court said: "We hold that when a claimant cannot satisfy the requirements for adverse possession, the claimant may not receive a prescriptive easement which extends so far that it becomes the equivalent of a fee interest and dispossesses the record title owners of part of their property." Although these cases may have been decided differently if different uses were at issue, the weight of California authority is to reject prescriptive easement claims when the underlying use in effect dispossesses the owner.

Raab v Casper

In *Raab v Casper* (1975) 51 CA3d 866, 124 CR 590, defendants built a cabin entirely on one portion of plaintiff's land, and, to the south, a home, one-third of which (driveway, utility lines, yard, and landscaping) encroached on plaintiffs' land. Plaintiffs sued, claiming trespass and seeking both damages and a mandatory injunction. The trial court granted defendants a prescriptive easement "for the maintenance of lawn, fences, shrubs and fruit trees, and landscaping" around defendants' house. 51 CA3d at 877. The appellate court, however, found that the terms of this easement in effect granted defendants unlimited use of the disputed area, far in excess of the rights afforded by an easement (51 CA3d at 877):

> Defendants doubtless did not intend plaintiffs, owners of the nominal servient tenement, to picnic, camp or dig a well in their yard. They doubtless did not intend to own a house on one side of the boundary with an unmarketable yard on the other. The findings and judgment were designed to exclude plaintiffs from defendants' domestic establishment, employing the nomenclature of easement but designed to create the practical equivalent of an estate.

The court reversed, directing the lower court to consider the yard and landscaping separately from the easement for the driveway and utility lines, implying that the driveway and utility lines would support a claim of prescriptive easement. 51 CA3d at 878.

Mehdizadeh v Mincer

In *Mehdizadeh v Mincer* (1996) 46 CA4th 1296, 54 CR2d 284, after discovering that a previous owner had built a fence ten feet inside the true property line,

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defendants erected a new fence along the true boundary. Plaintiff sued, claiming a prescriptive easement and seeking an injunction requiring the defendants to remove the new fence. The evidence showed that plaintiff had occasionally taken care of the trees and shrubs in the disputed zone, and that sprinklers installed in the area were connected to his water supply. Additionally, it was found that plaintiff "enjoyed the view of the disputed property" and that his dog used the land. 46 CA4th at 1301.

The trial court found in favor of plaintiff, granting him a prescriptive easement allowing use of the disputed property for purposes of landscaping and recreation, but restricting him from building, keeping, or maintaining any structures on the strip of land, except for fences and a retaining wall. The dispossessed property owner was allowed rights to light, air, and privacy. The appellate court held that the contours of the prescriptive easement would (46 CA4th at 1305):

> *divest the [owners] of nearly all rights that owners* customarily have in residential property. A fence will bar the [owners'] access to the property, and they cannot build on, cultivate, or otherwise use it. [Claimant] cannot build on it either, but otherwise his right to "use" looks more like "occupancy," possession and ownership.

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The court concluded that, when the scope of the prescriptive easement approached that of an exclusive easement, which is tantamount to a fee interest, the prescriptive easement would be improper if there was no express intention to convey such an easement. See *City of Pasadena v California-Michigan Land & Water Co.* (1941) 17 C2d 576, 578, 110 P23d 983.

Silacci v Abramson

In *Silacci v Abramson* (1996) 45 CA4th 558, 564, 53 CR2d 37, plaintiffs sought a declaration that they owned some 1600 square feet of property fenced in and used as a backyard by neighboring defendants. Defendants cross-complained to quiet title to a prescriptive easement. The trial court held for defendants, finding they had used the disputed area exclusively during the prescriptive period, and granted them an exclusive prescriptive easement to the backyard area.

The court of appeal reversed. Again drawing the distinction between the rights of fee ownership and those of an easement, the court wrote (45 CA4th at 564):

> An easement . . . is not an ownership interest, and certainly does not amount to a fee simple estate. To permit [defendants] to acquire possession of [plaintiffs'] land, and to call the acquisition an exclusive prescriptive easement, perverts the classical distinction in real property law between ownership and use.

However, one case, *Otay Water Dist. v Beckwith* (1991) 1 CA4th 1041, 3 CR2d 223, is difficult to reconcile with *Raab*, *Mehdizadeh,* and *Silacci*. In *Otay,* a water district bought certain property and, due to an error in the legal description, the grant deed included three additional parcels not owned by the seller. Shortly after the purchase, the district constructed a reservoir on a portion of the additional parcels it did not actually own. In 1972, defendant purchased property adjacent to the district's property, including the land on which the reservoir was located. In 1984, the water district discovered the error in the legal description, and in 1989 brought an action to quiet title to a prescriptive easement.

The court of appeal affirmed the lower court's award of an exclusive prescriptive easement in favor of the district. Although it recognized that an exclusive easement is an "unusual interest in land," the court emphasized that

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"where, as here, the use during the statutory period was exclusive, a court may properly determine [that] the future use of the prescriptive easement may continue to be exclusive." 1 CA4th at 1047. Defendant argued, to no avail, that the exclusive easement was the equivalent of a fee estate, and that the only way the district could obtain such an estate was by adverse possession. The district apparently did not attempt to show that it had paid taxes on the disputed property during the statutory period, and so could not have prevailed on an adverse possession claim. Disposing of defendant's argument with little discussion, the court concluded that the prescriptive easement for reservoir purposes, which at face value would seem to exclude most if not all of the owner's uses of his land, was "significantly less than a fee title." The court found that the easement was consistent with historical use, limited the district's use to reservoir purposes only, and required the district not to increase any burden placed on the servient estate. The court also dismissed defendant's inverse condemnation claim on statute of limitation grounds, finding that defendant should have been aware of the existence of the reservoir on his property when he bought the property in 1972, not just in 1989 when the district filed its action.

The *Otay* court's ruling is difficult to reconcile with the other cases, and can be explained by the strong public interest involved in maintaining a reservoir for public water supply. It may also be that the court was less than sympathetic to the defendant because he arguably sat on his rights for 17 years. Nevertheless, the question arises whether the defendant property owner was entitled to compensation. It may be that the court was disinclined to award compensation under theories other than inverse condemnation when it had already ruled against this claim. Furthermore, as a technical matter, once the *Otay* court found in favor of a prescriptive easement, there was no obligation to order compensation. Once a prescriptive right is obtained, claimants have acquired rights "sufficient against all" and "there is no basis in law or equity for requiring them to compensate defendant for the fair market value of the easement so acquired." *Warsaw v Chicago Metallic Ceilings, Inc.* (1984) 35 C3d 564, 574, 199 CR 773.

This begs the question, however, of whether the prescriptive easement was proper in the first place. At first blush, an exclusive easement for reservoir purposes would seem to convey full fee ownership rights because the reservoir's presence left the actual owner with very few rights of possession or use. The owner could not build on the land, and in fact was restrained by the trial court from making recreational uses of the reservoir, for fear of contaminating the public water supply. It is hard to imagine what uses might remain to the owner in this case. Again, as the *Raab* court stated (quoting Powell on Real Property), where the "conveyance purported to transfer to A an unlimited use or enjoyment of Blackacre, it would be in effect a conveyance of ownership to A, not of an easement." Accordingly, the finding of a prescriptive easement in this case is open to question.

Encroachments: The Common Law and the Good Faith Improver Statute

An alternative approach to the dispute in *Otay Water Dist. v Beckwith* (1991) 1 CA4th 1041, 3 CR2d 223, with an arguably better analysis and outcome, would have been to consider the *Otay* facts in light of encroachment cases under either the common law (*Brown Derby Hollywood Corp. v Hatton* (1964) 61 C2d 855, 40 CR 848; *Christensen v Tucker* (1952) 114 CA2d 554, 250 P2d 660) or under the good faith improver statute (CCP §§871.1–871.7).

"Under the common law, when an innocently created encroachment does not irreparably injure the encroached plaintiff and the cost of its removal outweighs the inconvenience it poses, a court may order that the encroachment remain, but that the aggrieved party be awarded damages."

Under the common law, when an innocently created encroachment does not irreparably injure the encroached plaintiff and the cost of its removal outweighs the inconvenience it poses, a court may order that the encroachment remain, but that the aggrieved party be awarded damages for the loss of its property. *Christensen v Tucker* (1952) 114 CA2d 554, 559, 250 P2d 660. In a case surprisingly similar to *Otay* (*Ukhtomski v Tioga Mut. Water Co.* (1936) 12 CA2d 726, 55 P2d 1251), a water company constructed a concrete reservoir to supply water to 500 people, but mistakenly encroached on about 0.15 acre of neighboring property. The neighbor sued for trespass and sought a permanent injunction to prohibit the water company from using and maintaining the reservoir. The trial court awarded damages to plaintiff, but denied his request for an injunction and granted defendant an easement for reservoir use. In affirming the lower court, the court of appeal wrote: "It being shown that the injury suffered by such encroachment is small and the harm to be suffered by compelling its removal great, the courts have uniformly refused to issue an injunction, leaving the complaining party to his action for damages." 12 CA2d at 728. The court also noted that granting the injunction would deprive 500 people of their water supply, and cited this as

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an additional factor in its implicit balancing of the hardships. Although the landowner in this case was in essence dispossessed of his property, he was compensated for such dispossession.

"[I]n the good faith improver statute . . . , a person who makes an improvement to land in good faith and under the mistaken belief that he or she is the owner may seek judicial relief for the encroaching improvement."

The common law has, in essence, been codified—albeit with some differences—in the good faith improver statute. Under this statute, a person who makes an improvement to land in good faith and under the mistaken belief that he or she is the owner may seek judicial relief for the encroaching improvement. In deciding whether the improver is entitled to relief, the court will examine the improver's degree of negligence. The court is empowered to adjust the parties' positions in a way consistent with "substantial justice under the circumstances." *Raab v Casper* (1975) 51 CA3d 866, 872, 124 CR 590 (quoting CCP §871.3). Any remedy awarded should not impose pecuniary loss on the landowner, but also should avoid unjustly enriching the owner. In fashioning relief, courts will consider the owner's plans for the land. Courts can (1) order that the improvements vest in the owner upon payment to the improver of the value of the improvements; or (2) quiet title to the land in the improver and order the improver to pay the landowner for the value of the unimproved land. See CCP §871.5, Legislative Committee Comment—Assembly (1968 Enactment). Under either the common law encroachment cases or the good faith improver statute, the encroaching reservoir in *Otay* could have been allowed to remain upon payment of compensation to the owner.

Conclusion

Given that the *Otay* case is probably at one extreme of the continuum of prescriptive easement and boundary cases, it appears that California courts disfavor prescriptive easements when the essential issue concerns the rights of full fee ownership, and not mere easements of use. In the rare encroachment case, the common law and the good faith improver statute give courts adequate authority to order, at worst (for the encroachee), compensation for any dispossession.

This is not to say, however, that property owners need not worry about prescriptive easement claims along property borders. Prescriptive claims can have vitality when there is an active, ongoing use of the easement; a prime example is the use of a strip of land along a property line as a right-of-way or driveway. For example, in *Bennett v Lew* (1984) 151 CA3d 1177, 199 CR 241, plaintiff was able to quiet title to a prescriptive access easement over his neighbor's adjoining driveway. The evidence showed that several people used defendant's driveway for access to the rear of plaintiff's premises because cars were regularly parked in plaintiff's driveway; defendant was also required to remove a fence built to separate the two driveways. In *Dooley's Hardware Mart v Trigg* (1969) 270 CA2d 337, 75 CR 745, a claimant obtained a prescriptive easement to use a one-foot strip of a neighbor's lot for driveway purposes, although claimant's adverse possession claims were rejected.

"[I]t is open to debate whether the prescriptive easement doctrine will continue to serve valid or useful purposes in many modern California real estate cases."

Although California courts have generally limited the applicability of prescriptive easements in fence, encroachment, and boundary cases, and have been hostile to claims of exclusive easements, the *Otay* case and the right-of-way cases suggest that prescriptive easement claims require careful analysis and strict scrutiny. Furthermore, the mere threat of prescriptive easements clouds the integrity of real property titles. Given the evolution of modern society toward greater intensity of land use and the growing emphasis on land use planning and discouraging litigation, it is open to debate whether the prescriptive easement doctrine will continue to serve valid or useful purposes in many modern California real estate cases.

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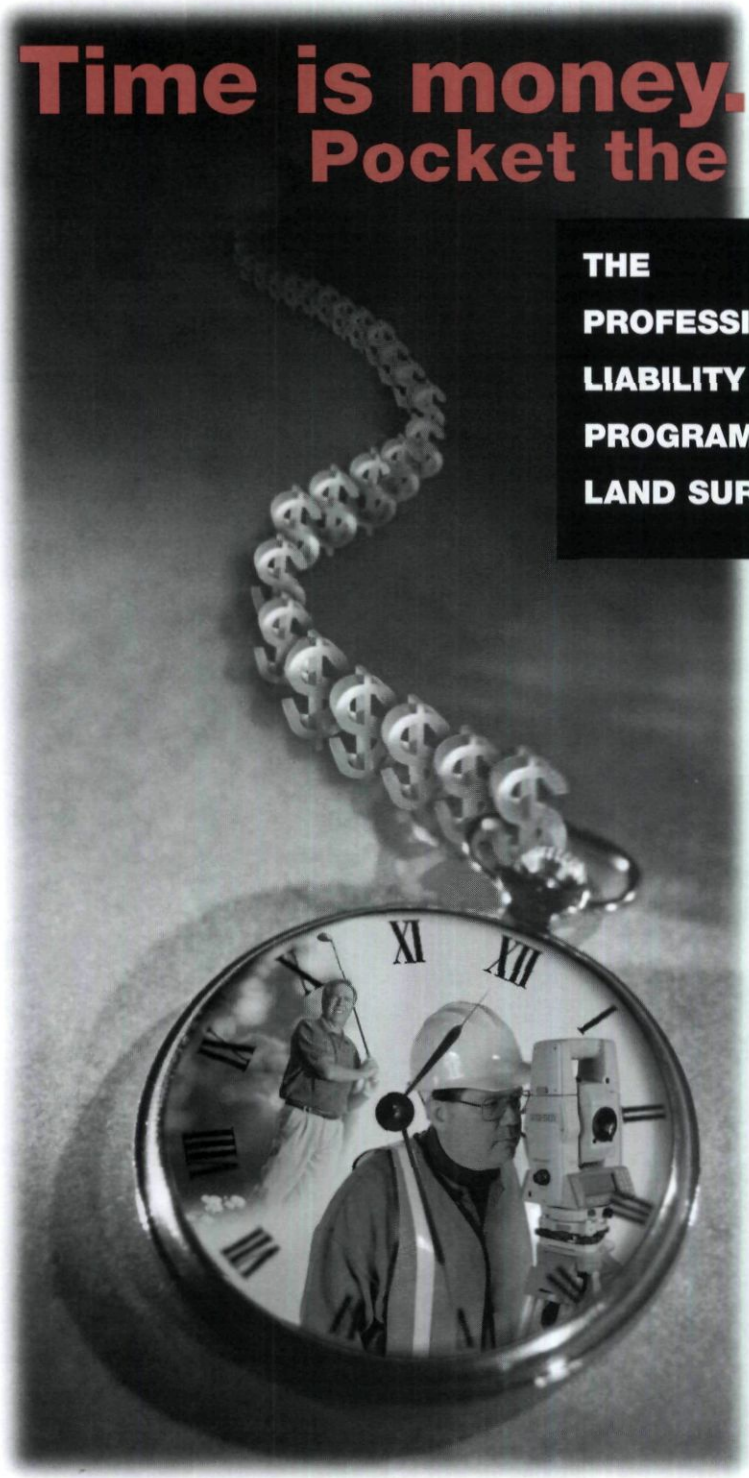

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Who Is Training Your Surveyors - Continued from page 7

the jobs get done with personnel that sometimes have less skill and much less supervision and training.

Why are not the survey companies putting the law of supply and demand into practice and raising their rates so that they in turn, they can offer higher wages and benefits and draw the experienced persons to them? Would not the quality and quantity of work certainly be of some benefit? Is the reason you do not use a three-man crew because the client dictates to you how to run your business? Does that client worry about who will do his surveying in five or ten years when there are half- enough skilled survey personnel around? If I knew all the answers, it would not be necessary to ask you. Do you know?

Perhaps I have missed something here. The boom and bust cycles have come and gone and surveyors have lost ground economically everytime. What is the deal? Is this the reason for saying "you can't sue a surveyor 'cause he ain't got nothin?" We survey properties for 10 percent or less of what the realtor gets for selling it; we enjoy the liability for the rest of our lives and into our estates while the realtor walks away with a nice piece of change. What, if anything, do you see wrong with this picture? Is that the inheritance you or other surveyors want to leave for your successors? Is this the principle you want to continue working under, no matter how much you could use the increased income to support your own family or improve the working environment of your office and field persons?

Did I get side tracked? Well, I don't think so. The fees you are charging and, if you're lucky, collecting are too little to improve the training and development of your staff. The rodmen or students would benefit tremendously from an apprenticeship position. The more-experienced surveyors working for you would be able to train them better if they were able to work side-by-side rather than at opposite ends of a total station and data collector. As a party chief in this position, I can tell you how frustrating it is to have to answer for the mistakes of the "green gunner," when I cannot read his mind or watch over his shoulders until I have confidence in him. The rodman could learn where to take shots where you want them taken and know what a stone with chisel marks looks like. Ten or fifteen years from now these young trainees could have a better background than you, and your confidence of a job well done would be more of a reality. This would offer greater protection for the survey profession from government intervention regarding legislation and licensure.

Continued on page 26

Who Is Training Your Surveyors - Continued from page 25

Obviously, your home is worth more today than 20 years ago. The one I bought new in the 70's is now selling for nearly four times as much as then. Has your income increased four times? If so, you are still behind with inflation and higher taxes. Has your fee schedule increased four times? I don't think so. Has your opportunity to be involved in litigation increased? I am sure the insurance company thinks so and has raised your rates accordingly. Perhaps also four times as much. If a 75-cent cup of hot coffee spilled by the customer can translate into a million-dollar lawsuit, your business may be worth more than you ever thought possible.

Through the years, measuring and gathering data has become easier and faster, and would make one think profits are at all time highs, especially with field crews cut by 30 to 50 percent. The money should be pouring into your accounts. What do you mean this is not true? You have not had a rate increase since when? The dollar is worth 10 or 20 percent of what it was then. How much does your working spouse have to earn to support your survey business?

In summary, I suggest we put surveying back into the status of professionalism and not car sales. You consider raising your fees when the market allows, the gas stations do it weekly and gouge the heck out of your budget. With this done, you can afford to put out a better product. You can sign it and worry less at the same time, take pride in the job — not just in being your own boss — especially if you are annually on the verge of bankruptcy. You can take on a rodman or two in the summer, help train the student with on-the-job-training and make them a more valuable asset. Next year, when you need that new gunner or additional crew, you might just know someone that could step in and do the work. When the old duffers quit coming to work, you need to trust those greenhorns to your section breakdowns or that six-lane structure you were low bidder on. Can you? Start looking down that highway you are building and quit undercutting each others' bids (and your own throats) to get just one more project. If you charge a fair market price and do a good job, volume won't be as much a factor, and your ulcers can heal. Perhaps you started your business with some of your past employers' clients, and you had to cut your rate to win them over, or maybe you are an employer who had an employee leave, only to take your clients with them for the same reason. In either case, I encourage you to wake up and get off the "poor me" charts and into the black.

As seen in Colorado's Side Shots, *May 1997*; The Arizona Surveyor, *September 1997*; and The Georgia Land Surveyor, *May/June 1998*; and The Section Corner.

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The Museum of Surveying in Lansing, MI is the only museum in the United States (and possibly the world) dedicated solely to the profession, history, and technology of surveying. Its unique collection of historic artifacts related to surveying contains everything from chains, solar compasses, and original bearing trees to astronomical theodolites, aerial surveying cameras, and a circular dividing engine used to scribe verniers on a compass face. Visitors are able to view instruments used by William Austin Burt, Deputy Surveyor and inventor of the solar compass and the typographer (typewriter.) The Bausch & Lomb display houses surveyors' instruments made by the optical company, which has not produced this line of product since America entered World War I.

The Museum of Surveying is also the home of an active reenactment group, which travels throughout the region displaying artifacts and recreating the job of the original surveyors. This mobile museum, and the volunteers who support it are able to reach many more individuals who would otherwise not be able to visit the Museum. In another outreach program, the Museum of Surveying has been working in connection with the Virtual Museum of Surveying on the internet at www.surveyhistory.org. Virtual visitors can view surveying instruments from collections across the country, date their own instruments, and contact many groups such as the Museum of Surveying and the Surveyors Historical Society.

If you would like information regarding visits to the Museum of Surveying, our museum store, or research capabilities, please contact the Director at (517) 484-6605 or museumofsurvey@acd.net.

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Here's Some Important Information About CLSA

The goal of the California Land Surveyors Association is to promote and enhance the profession of surveying, to promote the common good and welfare of its members, to promote and maintain the highest possible standards of professional ethics and practice, and to elevate the public's understanding of our profession. CLSA represents all Land Surveyors, whether they are employees or proprietors, whether in public or the private sector.

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■ LOCAL: Your local chapter represents you in local issues. Through your chapter representative to the State Board of Directors, the individual member can direct the course CLSA will take. ■ STATE: The Surveyor is represented at the state level through an active legislative program, legislative advocate, and liaison with the State Board of Registration. ■ REGIONAL: CLSA is an active member of the Western Federation of Professional Surveyors. This Federation is composed of associations throughout the western United States and addresses regional issues. ■ NATIONAL: Through institutional affiliation with the National Society of Professional Surveyors and the American Congress on Surveying and Mapping, CLSA is represented at the national level.

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CLSA presents annual conferences which provide technical and business programs, as well as exhibits of the latest in surveying and computing technology. Seminars and workshops are presented to assist in continuing education. CLSA publishes the California Surveyor magazine and the CLSA NEWS to keep the membership abreast of changing legislation, legal opinions, and other items which affect our profession.

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