Some Case Precedents Affirming the Position of Timber Cove Tail Supporters

Danielson v Sykes (1910) 157 Cal. 686,

In Danielson v. Sykes, a map had been recorded of a subdivision. It showed an alleyway on the opposite side of the street from plaintiff's lot. The alleyway provided a more direct access for plaintiff to a beach and railway.

The defendant had received a conveyance from the developer of a lot adjoining the alleyway facing plaintiff's lot and of the property underlying the alleyway itself. Defendant then fenced the alley and plaintiff sued.

The court held that it was "a thoroughly established proposition in this state that when one . . . sells . . . lots by reference to a map which exhibits the lots and streets as they lie with relation to each other, the purchasers of such lots have a private easement in the streets opposite their respective lots, for ingress and egress and for any use . . . and that this private easement is entirely independent of the fact of dedication to public use, and is a private appurtenance to the lots, of which the owners cannot be divested . . . ." (Id. at p. 689.)

The court held that "when a lot conveyed by a deed is described by reference to a map, such map becomes a part of the deed." (Id. at p. 690.)

The California Supreme Court declared:
"When a lot conveyed by a deed is described by reference to a map, such map becomes a part of the deed. If the map exhibits streets and alleys, it necessarily implies or expresses a design that such passageways shall be used in connection with the lots, and for the convenience of the owners in going from each lot to any and all the other lots in the tract so laid off." (Id., at p. 690.)
The Danielson court held that "when one lays out a tract of land onto lots and streets and sells the lots by reference to a map which exhibits the lots and streets as they lie with relation to each other," the purchasers of the lots have a private easement to use the streets "in connection with the lots and for the convenience of the owners in going from each lot to any and all the other lots in the tract so laid out." (Id., at pp. 690-691.)

Court of Appeal, Fourth District, Division 2, California.

Tract Development Services, Inc, v Keppler (1988) 199 Cal. App. 3d 1374, 245 Cal. Rptr. 118.

Introduction
Defendants John and Leona Kepler have appealed from a judgment in favor of plaintiff Tract Development which declared that Tract Development was entitled to an easement over the

Keplers' property and which also awarded Tract Development $12,550 in damages for interference with Tract Development's easement.

Facts

In 1980, the Keplers purchased some real property near Corona, in what is known as the Temescal Gardens Subdivision. The Keplers' property consists of 12 lots plus a portion of two other lots, an alley referred to as Lot T, and the property in question, which is a twenty-foot-wide strip of land running along the eastern edge of the Keplers' lots:

This strip of land corresponds to the western half of a forty foot right-of-way known as Diplomat Avenue. Diplomat Avenue was one of the streets shown on the Temescal Gardens subdivision map recorded in 1924. The portion of Diplomat Avenue in question was never developed or used as a right-of-way. The lots purchased by the Keplers were located in the northeast corner of Temescal Gardens, and represented a small portion of the entire subdivision:

In 1984, Tract Development purchased a number of lots to the east of the Keplers' property: The property included the eastern half of Diplomat Avenue. Tract Development was aware of the existence of the streets outlined by the subdivision map, and began grading Diplomat Avenue as part of its plan to build homes on the lots it had just purchased.

Thereafter, Daryl Stark, Tract Development's Chief Executive Officer, noticed Mr. Kepler erecting a fence down the middle of Diplomat Avenue. He asked Mr. Kepler to honor the easement as shown on the subdivision map and to relocate his fence, but Mr. Kepler did not do so, and Tract Development thereupon instituted this action.

Judgment was entered in favor of Tract Development, and the Keplers now appeal, contending that the easement purportedly confirmed by the judgment no longer exists, either because (1) Tract Development did not acquire the easement when it purchased its property because it did not purchase with reference to the subdivision deed or because the easement had been excepted by the terms of an earlier deed, or (2) it was extinguished by common ownership of the dominant and servient tenements resulting in a merger of the two, or (3) it was abandoned, or (4) it was terminated by prescription.1

In support of these contentions, the Keplers have set out a careful recitation of the chain of title to establish the common ownership of the dominant and servient tenements, and have also set out the evidence purportedly showing abandonment or termination by prescription. Rather than set forth these facts at length here, the relevant evidence will be discussed in connection with each of the points raised by their appeal.

Discussion

As above noted, the property in question is located in a subdivision, and it is uncontroverted that the initial deeds from the subdivision's creator referred to the subdivision map on which were delineated a network of streets, including Diplomat Avenue.

"It is a thoroughly established proposition in this state that when one lays out a tract of land into lots and streets and sells the lots by reference to a map which exhibits the lots and streets as they lie with relation to each other, the purchasers of such lots have a private easement in the streets opposite their respective lots, for ingress and egress and for any use proper to a private way, and that this private easement is entirely independent of the fact of dedication to public use, and is a private appurtenance to the lots, of which the owners cannot be divested except by due process of law. " (Danielson v. Sykes (1910) 157 Cal. 686, 689, 109 P. 87.)

"When a lot conveyed by a deed is described by reference to a map, such map becomes a part of the deed. If the map exhibits streets and alleys it necessarily implies or expresses a design that such passageway shall be used in connection with the lots and for the convenience of the owners in going from each lot to any and all the other lots in the tract so laid off. The making and filing of such a plat duly signed and acknowledged by the owner, . is equivalent to a declaration that such right is attached to each lot as an appurtenance. A subsequent deed for one of the lots, referring to the map for the description, carries such appurtenance as incident to the lot." (Id., at p. 690, 109 P. 87; see also Hocking v. Title Ins. & Trust Co. (1951) 37 Cal.2d 644, 650, 234 P.2d 625 ("It is established law in this state that the title to such a lot embraces an easement to use all of the streets disclosed on the subdivision map.") and Petitpierre v. Maguire (1909) 155 Cal. 242, 246–247, 100 P. 690.) This rule applies regardless of whether the city or county has ever accepted the right-of-ways laid out in the map, and whether or not the right-of-ways have ever been opened or used as streets or highways. (Petitpierre v. Maguire, supra, 155 Cal. at p. 248, 100 P. 690.) Furthermore, the right to an easement created in this manner cannot be lost by mere nonuse, nor because the easement is not necessary for access to the dominant tenement. (Id., at p. 250, 100 P. 690.)

The Keplers argue, for several reasons, that this rule does not apply to the facts presented here. First, they assert that Tract Development did not purchase its property with reference to the subdivision map. Although the early deeds in the Tract Development chain of title referred to the subdivision map, deeds recorded after 1965, including the deed to Tract Development, referred to a record of survey rather than to the subdivision map. Accordingly, the Keplers urge, Tract Development may not rely on the above cases whose outcomes purportedly depended on the fact that the subsequent deeds by which the plaintiffs held title made specific reference to a subdivision map.

Although it is true that the cases noted above hold that a deed which refers to the subdivision map for description "carries such appurtenance as incident to the lot" (Danielson v. Sykes, supra, 157 Cal. at p. 690, 109 P. 87), the converse premise, that a deed which does not refer to the map for description does not carry the appurtenance as incident to the lot, does not necessarily follow. In point of fact, Civil Code section 1084 provides, "The transfer of a thing transfers also all its incidents, unless expressly excepted; ." and Civil Code section 1104 specifically provides that "[a] transfer of real property passess all easements attached thereto, ." (See also Conaway v. Toogood (1916) 172 Cal. 706, 712, 158 P. 200 ("The defendants call attention to the fact that the way to the west was not mentioned in any of the various mesne conveyances through which the

claimants trace their title, . It is contended, therefore, that the claimants cannot take advantage of the right of way gained by their predecessors. But the rule is well established in this state that an easement as a right of way is incident to the land and passes with it unless expressly excepted by the terms of the deed. [Citations]"), and Lemos v. Farmin (1932) 128 Cal.App. 195, 199, 17 P.2d 148, to the same effect.) In other words, once such easements for rights-of-way have been created by initial reference to a subdivision map, they pass without subsequent reference unless they are specifically excepted, and we believe that the language in Danielson v. Sykes which might arguably appear to require subsequent reference in order for such easements to pass was simply a less than felicitous choice of expression.

The Keplers' next argument is that the easement over the relevant portion of Diplomat Avenue was expressly excepted when, in 1956, Elvin and Ruth Downs, the then owners of Blocks C (the equivalent of the property now owned by the Keplers) and D and E (the equivalent of the property now owned by Tract Development) transferred Blocks D and E to Ernest and Bonnie Bill by a deed which referred to Diplomat Avenue "as now abandoned." In connection with this statement in the Downs-to-Bills deed, we note that in 1936, the Downs' predecessor in interest, A.J. Davis, had petitioned the board of supervisors to abandon portions of several streets in the subdivision, including the portion of Diplomat Avenue involved here, and that the board of supervisors had passed a resolution to this effect.

Unfortunately for the Keplers, the reference to Diplomat Avenue in the Downs-to-Bills deed "as now abandoned" is not the equivalent of an express exception of the easement here. As stated in Danielson v. Sykes, supra, the initial reference to the subdivision map created a private easement entirely independent of the fact of dedication to public use. The abandonment by the board of supervisors could not have the effect of extinguishing this private easement (see Anderson v. Citizens Sav. etc. Co. (1921) 185 Cal. 386, 393–396, 197 P. 113), nor did the reference to Diplomat Avenue "as now abandoned" evidence an unambiguous intent on the part of the Downs to except the private easement from the grant to the Bills.

The Keplers also urge that the easement was extinguished by the common ownership of the dominant and servient tenements which resulted in a merger. (Civil Code, §§ 805, 811(1).) This common ownership purportedly occurred when both Davis and the Downs owned fee title to all of blocks C, D and E.

As is apparent from the diagrams which precede this part of our opinion, Blocks C, D and E made up but a small portion of the Temescal Garden subdivision. The issue therefore is whether, in a case involving a network of streets laid out in connection with a subdivision, anything less than the entire subdivision can be said to be either the dominant or servient tenement for purposes of merger. This issue requires a brief discussion of some of the fundamentals of the law related to easements.

An easement is an incorporeal interest in the land of another which gives its owner the right to use another's property. (Moylan v. Dykes (1986) 181 Cal.App.3d 561, 568, 226 Cal.Rptr. 673.)

The land to which the easement attaches is called the dominant tenement; the land on which the burden is imposed is called the servient tenement. (Civ.Code, § 803; id.)
Here, each owner in the subdivision has the right to use every other owner's property to travel both within and through the subdivision. **The easement enjoyed by each owner, which consists of the entire network of streets set out in the subdivision map, is not only appurtenant to that owner's particular lot, but is appurtenant to every lot in the subdivision, (see Moylan v. Dykes, supra, 181 Cal.App.3d 561, 573, 226 Cal.Rptr. 673), and conversely every lot in the subdivision is burdened by every other lot owner's right the use it.** (See id.) In other words, each owner enjoys an easement which is not simply an easement over an abutting owner's land, but which is an easement over the land of non-abutting owners; the whole of the subdivision is in essence the servient tenement to each lot, and each lot is servient to every other lot. This being so, there can be no merger unless there is common ownership of the entire subdivision; such common ownership never occurred.

The Keplers next urge that the easement was abandoned. However, the evidence submitted by the Keplers to show that the prior owners (Davis, the Downs and the Bills) intended to abandon the private easement—that trees were planted on the avenue, or that the Downs and the Bills obtained a grant of easement to use another portion of Diplomat—was not exclusively susceptible to that interpretation; an easement created by grant is not lost by mere nonuse, no matter how long, and may be lost by abandonment only when the intention to abandon clearly appears. (Haley v. L.A. County Flood Control Dist. (1959) 172 Cal.App.2d 285, 290–291, 342 P.2d 476.)

Additional Cases Supporting our Position in Favor of Timber Cove Trails

Petitpierre v Maguire (1909) 155 Cal. 242, 246-247 [100 P. 690]

Danielson v Sykes (1910) 157 Cal. 686,

Tract Development Services, Inc, v Keppler (1988) 199 Cal. App. 3d 1374, 245 Cal. Rptr. 118.

Prescott v. Edwards (1897) 117 Cal. 298, 30

Banning v. Kreiter, (1908) 153 Cal. 33, 36

Smith v. Smith (1913), 21 Cal. App. 378 [131 P. 890]

Syers v. Dodd (1932), 120 Cal App 444 8 P.2d 157

Hocking v Title Ins. & Trust Co. (1951 37 Cal. 2d 644, 650 [234 P.2d 625, 40 A.L.R. 2d 1238]

Day v. Robison (1955)[Civ. No. 16181. First Dist., Div. Two.