# PROPERTY LAW

## *Title by Adverse Possession in California*

by Karen Frostrom, Column Editor

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Until two years ago, adverse possession was a topic that existed only in law schools – not in modern society. Indeed, the leading cases discussing adverse possession also tend to contain discussions of the husband's dominance over his wife's property, which discussions thankfully are absent from current legal decisions. However, with the advent of massive foreclosures and the reality that the bank-owned properties will likely lie vacant for lengthy periods of time, urban lore has given tongue to the possibility that families driven out of their homes are squatting in bank-owned properties, seeking to successfully obtain adverse possession of those properties.

In the wake of those rumors, without any actual connection thereto, the Third Appellate District of California decided *Nielsen v. Gibson* (October 13, 2009) No. C059291, 2009 WL 3261675, finding that adverse possession had been established because the owner could have – assuming she regained her cognitive abilities and traveled from another country – but did not, discover the squatters. Hmm, how often do banks physically inspect the properties that have been foreclosed?

The crux of the *Neilsen v. Gibson* court's decision is how open and notorious the possession must be. In *Nielsen, supra,* the property owner (Gayl) lived in Ireland and, at the time possession began until her death, was considered incompetent and a ward of the court. She was not legally capable of entering into any transaction related to the Placer County property. Wishing to dispose of the property so that they could join their daughter in Ireland, without obtaining her consent, her parents executed a deed in favor of the purchasers, the Nielsens. After that "purchase," the Nielsens lived full time on the property.

When Gayl died in 2003, the executor of her estate challenged the validity of the Nielsen "purchase" of the property. It was undisputed that Gayl had no actual knowledge that the Nielsens were living on the property. The issue was whether the Nielsens' use of the property had been so open and notorious that ***constructive*** knowledge should be presumed. The court stated that case law existed to support both arguments. Based upon the following analysis, I disagree. The only case to eliminate the notice requirement completely is *Nielsen v. Gibson*.

In 1872, the California Supreme Court decided *Thompson v. Pioche* (1872) 44 Cal. 508. Although

far from a paragon of clarity, the Supreme Court held that when land is taken by adverse possession, it does so "upon the ground either that the real owner, by his ***laches*** in enforcing his rights, has forfeited the protection of the law or else upon the ground that by allowing another to constantly trespass upon his rights he has ***acquiesced*** in such trespass." *Id.* at 510 (emphasis added). Both options require some conscious action on the part of the landowner. Neither provide for constructive adverse possession. In 1885, the California Supreme Court clarified that ***actual*** or at least ***inquiry*** knowledge was in fact the standard: "The owner ***must have knowledge*** of the adverse entry or such information as puts him upon inquiry" *Mauldin v. Cox* (1885) 67 Cal. 387, 394 (emphasis added). While the *Nielsen* court acknowledges these cases, it nonetheless found that Gayl could have absolutely no ***actual*** or even ***inquiry*** knowledge and still lose her property through adverse possession. It based that unprecedented decision, in this author's opinion, on two irrelevant appellate court cases, neither of which purported to overrule the California Supreme Court.

In *Myran v. Smith* (1931) 117 Cal.App. 355, Smith partially fenced and occasionally used a property owned by Myran. When Myran filed a quiet title action, the court found that Smith had not been open and notorious in his possession of the land. The *Myran* court did not even address the extent to which Myran had actual or inquiry knowledge because it did not reach that issue. Smith lost his claim to title by adverse possession due to lack of hostile conduct. As such, it is difficult to perceive the *Myran* decision as providing the basis for a wholesale change in law.

In *Wood v. Davidson* (1944) 62 Cal.App.2d 885, the litigants were neighbors with adjoining land from 1931 until 1939, when the action was filed. When the Davidsons purchased their land in 1931, there was a spring on the land that was in bad condition due to trampling by livestock. As such, at the time of purchase, the spring did not flow in any natural direction and resembled a swamp. The Davidsons cleared the stream and dug a ditch to direct the water onto their farmland, using nearly all of the water for irrigation. At trial, it was proven that if the spring had been returned to its natural condition, it would have flowed across the Davidsons' land and onto the Wood property. Because of the Davidson diversion, however, the Woods did not get any water from the spring. The court found in favor of the Davidsons, applying the following standard:

> We do not mean to hold that a right may not be gained by an upper riparian holder by prescription, but it must be clearly shown either that ***actual notice*** of the adverse claim of such owner has been brought home to the other party or that the ***circumstances are such***, as for instance the use of all of the water of the creek, that ***such party must be presumed to have known*** of the adverse claim.

*Wood v. Davidson, supra*, 62 Cal.App.2d at 890 (emphasis added). This is the exact standard that was used in *Mauldin.* It requires either ***actual*** notice or ***inquiry*** notice. It is not difficult to conclude that an adjacent property owner should know that no water is flowing to his property from a spring in time to make a timely challenge to the water diversion. It is far more difficult to take that assumption and hold that a legally incompetent person residing in another country thousands of miles away from the property with absolutely no hint of a problem has constructive knowledge of an adverse claim to her land.

Rational or not, unless the holding changes at the California Supreme Court level, we are stuck with the new law created by *Nielsen*. One can imagine the facts being as follows: Bank forecloses on home. Squatters take up residence, paying the taxes, using the front door, conducting open maintenance and holding block parties. The bank is so overwhelmed with foreclosures that five years pass without it noticing the squatters. Squatters move to quiet title. Under prior law, without more facts, the squatters would have lost. The bank would have to be actually on notice of the squatting or at least on inquiry notice that something untoward was happening. Under *Nielsen*, applied directly, the bank will lose because under *Nielsen* the notice requirement has been completely eradicated. So long as the possession is open and notorious, the party in possession wins, regardless of what the owner knew or did not know. Application of this new standard should frighten property owners. As the vast majority of adverse possession litigation concerns easements, owners may find their properties suddenly encumbered with obligations to other property owners that they never anticipated. Or maybe I'm just crying doomsday. Time will tell.