University of Miami Law Review

Volume 29 | Number 1 Article 12

10-1-1974

Customary Use of Florida Beaches

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CUSTOMARY USE OF FLORIDA BEACHES

Petitioner, McMillan and Wright, Inc., applied for and received a building permit from co-petitioner, City of Daytona Beach, authorizing the construction of an observation tower. The tower was to be located on a beach south of and adjacent to an existing pier owned by McMillian and Wright, Inc. It was to be operated as a part of the pier's recreation facilities. After test borings and other arrangements had been made, but before construction of the tower had commenced, the respondent Tona-Rama, Inc., a rival tower owner, instituted an action for declaratory judgment as to ownership of the land and for injunctive relief restraining McMillan and Wright, Inc. from acting in furtherance of the construction plans.[1] Application for temporary injunction was denied and the tower was completed during pendency of the litigation. Summary judgment in favor of respondents was granted by the trial court which found that the public had acquired a prescriptive right to use the land as a bathing beach, thoroughfare, recreation area and playground.[2] McMillan and Wright, Inc. was directed to remove the tower and to restore the land to its natural condition within ninety days. The District Court of Appeal, First District, affirmed the judgment of the trial court and certified the case to the Supreme Court of Florida as one involving a question of great public interest under the Florida Constitution.[3] The Supreme Court of Florida *held,* quashed and remanded: Where public use of a private beach is reasonable and has continued for many years without dispute or interruption, the public may gain the right to continue to use the beach through custom. Under such limitation, a land owner may make such use of the property as is not inconsistent with the public's right. *City of Daytona Beach v. Tona-Rama, Inc.,* 294 So. 2d 73 (Fla. 1974).

The question of the public's right to use privately owned beaches for recreation had not been considered by the Supreme Court of Florida for almost thirty years.[4] While recognizing that a recreational easement could in theory be acquired through adverse public use, earlier decisions had held uniformly against the existence of such an easement.[5] In *Miami Beach v. Miami Beach Improvement Co.*[6] and

1. The interest of both the State of Florida, intervenor in the suit, and the Florida Board of Trustees of the Internal Improvement Fund, co-respondent, were represented by the Attorney General's office.

2. Use of the beach in question by the public had been so extensive that the city had policed the area to preserve order and had also provided sanitation, lifeguards and other services. Although the city had collected taxes on the property from McMillan and Wright, Inc., the record title holder for sixty-five years, respondents argued that due to the long continued public use, the land had become a public highway and beach, and that no lawful authority for the tower's construction could have emanated from the City of Daytona Beach.

3. FLA. CONST. art. V, § 3(b)(3).

4. Miami Beach v. Undercliff Realty & Inv. Co., 21 So. 2d 783 (Fla. 1945).

5. *Id.*; Miami Beach v. Miami Beach Imp. Co., 14 So. 2d 172 (Fla. 1943).

6. 14 So. 2d 172 (Fla. 1943).

Miami Beach v. Undercliff Realty & Investment Co.,[7] the public's right to continue to use the beach was claimed on the bases of prescription and implied dedication. Both theories require that the public use be adverse.[8] Because the element of adverseness was absent in these two cases, the claims failed.

In *Undercliff*, the court explained that the upland owner's failure to prevent or object to the use of his beach by many persons for recreation, did not prove that the use was adverse or under claim of right.[9] The judicial attitude toward the public's claim of the right to use private beaches can be ascertained from the holding in *Undercliff*; the court dismissed the claim with prejudice and perpetually enjoined the public from using or claiming to be entitled to use the beach in question.

In *Downing v. Bird*,[10] the Supreme Court of Florida stated that acquisition of rights in the property of another based on possession or use was to be restricted, and doubts as to the creation of such rights were to be resolved in favor of the owner.[11] Speaking of prescription in particular, the *Downing* court said: "[T]he burden is on the claimant to prove that the use . . . is adverse. This essential element as well as all others must be proved by clear and positive proof, and cannot be established by loose, uncertain testimony which necessitates resort to mere conjecture."[12]

In other states, however, the level of proof necessary to establish a prescriptive right or public dedication has been lowered in those cases involving privately owned beaches. In *Gion v. City of Santa Cruz*,[13] the Supreme Court of California held that if the land in question is a beach or shoreline, claimants need only show that the land was used as a public recreation area and that persons had used the property in the belief that the public had a right to such use. No separate finding of adverseness is needed where it is found that the public used the land in this manner for longer than the prescriptive period.[14]

Under certain circumstances, courts have found the required adverseness even though the land owner had granted permission to some members of the public to use the beach. A Texas court stated in *Seaway Co. v. Attorney General*: "If the nature of the use is such as to show the owner that the users are claiming under a right independent

7. 21 So. 2d 783 (Fla. 1945) [hereinafter referred to as *Undercliff*].

8. J.C. Vereen & Sons, Inc. v. Houser, 123 Fla. 641, 167 So. 45 (1936); 23 AM. JUR. 2d *Dedication* § 29 (1955); 10 FLA. JUR. *Dedication* § 13 (1956).

9. 21 So. 2d at 786 (Fla. 1945).

10. 100 So. 2d 57 (Fla. 1958) [hereinafter referred to as *Downing*].

11. *Id.* at 65.

12. *Id.* at 64.

13. 84 Cal. Rptr. 162, 465 P.2d 50 (1950).

14. The prescriptive period in California is five years. CALIF. CODE OF CIV. PRO. § 325 (West 1967). In Florida, the period necessary for prescription remains set at the more traditional twenty years. J.C. Vereen & Sons, Inc. v. Houser, 123 Fla. 641, 167 So. 2d 45 (1936).

of any permission from him, there is the requisite adverseness."[15] Similarly, the Supreme Court of New Hampshire found a public right to use a church-owned beach that had been used both by persons with, and persons without, permission.[16] The use by the public was said to have been such that the owners knew or should have known that the public was acting under a claim of right without regard to the owners' consent.

In *Tona-Rama,* witnesses attested to a degree of public use which in California, Texas or New Hampshire might have supported respondents' claim that a prescriptive easement had been acquired.[17] Nevertheless, the strong precedent of *Undercliff* and *Downing* with regard to the necessary proof as to the existence of a prescriptive easement was not overcome. For most of the Florida decisions dealing with claims against another's property based on use, strict standards for proof of adverseness have been maintained.

The *Tona-Rama* decision cites *Downing* as support for identifying the elements of prescription. There must be both a specified period of actual, continuous, and uninterrupted use that is adverse under claim of right, and actual or imputed knowledge on the part of the owner of both the use and adverse claim.[18] " '*[T]he use . . . must be inconsistent with the owner's use and enjoyment of his lands and must not be a permissive use,* for the use must be such that the owner has a right to a legal action to stop it, such as an action for trespass or ejectment.' "[19]

According to *Downing,* there is a presumption that the use of the alleged prescriptive easement has been permissive, although, this presumption can be rebutted by the claimant.[20] However, for its own statement of the presumption, the *Tona-Rama* court refers to the much earlier case of *J. C. Vereen and Sons v. Houser*[21] which speaks of an *irrebuttable* presumption. Both *Vereen* and *Tona-Rama* state that the use must be *exclusive* and inconsistent with the owner's right to use and enjoyment of the land, or the use will be presumed permissive and, therefore, will *never* ripen into an easement.[22] The *Tona-Rama* court reasoned that since the corporation operated the pier as a recreation center and tourist attraction, it welcomed the presence of those who used the surrounding beach. Because the public's use was in

15. Seaway Co. v. Attorney General, 375 S.W.2d 923, 938 (Texas Civ. App. 1964).

16. Elmers v. Rogers, 106 N.H. 512, 214 A.2d 750 (1965).

17. As per the attorney general's brief at 8 and 9, one resident of Daytona Beach testified that the authority by which he had used the beach was "as a citizen and being public property." R. 348. Another said that he "definitely" felt he had a "right to use the beach;" that "it was the customary thing to do;" and that "everyone did." R. 321. Similar testimony was given by other witnesses.

18. 294 So. 2d at 76, *quoting* Downing v. Bird, 100 So. 2d 57 (Fla. 1958).

19. *Id.* (emphasis added by citing court).

20. *Id.*

21. J.C. Vereen & Sons, Inc. v. Houser, 123 Fla. 641, 167 So. 45 (1936).

22. *Id.* at 645, 167 So. at 47; 294 So. 2d at 76.

furtherance of, and not against the interest of the owner, no easement by prescription could be gained.[23]

Although no prescriptive easement was found to exist, the public's right to recreational use of the beach was not left unprotected. The court applied the doctrine of "custom" which may be used to confirm the public's right without the necessity of proving adverse use. The customary right found by the *Tona-Rama* court was based on ancient and reasonable use of the beach which had continued without interruption and dispute. Although the Supreme Court of Florida had previously used the doctrine of custom to determine property rights,[24] it had never before used it to establish public rights in private property.

Whether the public right is a prescriptive or a customary one, the owner may make any use of the property which is consistent with the public's use and not calculated to interfere with it. In this case, the court believed that the construction of the sky tower was consistent with general recreational use by the public. The fact that the tower's base covers approximately only 225 to 230 of the 15,300 square feet to which McMillan and Wright, Inc. held record title was emphasized, as was the investment of over $125,000 in the tower's construction. Thus, the tower was allowed to stand.[25]

From the facts presented, the court could reasonably have concluded that the public's prior use of the beach for recreation had not been inconsistent with the owner's use and enjoyment of the property. Based on *Downing,* this would have been sufficient to defeat the claim of a prescriptive easement. It seems curious, therefore, that the court referred to *Vereen* and raised the additional requirement that the adverse use must also be exclusive. In *Downing,* the Supreme Court of Florida had specifically negated any such requirement. The court distinguished prescription from adverse possession by saying: "[T]o acquire title the possession must be exclusive, while with a prescriptive right the use may be in common with the owner, or the public."[26]

Further evidence of either judicial confusion or an overturning, *sub silentio,* of Downing's distinctions between prescription and adverse possession can be found in this case. The *Tona-Rama* opinion states: "[N]either the trial court, nor the District Court, reached the other requirement for prescription to be properly effective—adverse *possession* inconsistent with the owner's use and enjoyment of the land."[27] This clearly conflicts with the same court's statement in *Downing.* "In acquiring title by adverse possession, there must of course be 'possession.' In acquiring a prescriptive right this element is

23. 294 So. 2d at 77-78.
24. Loeffler v. Roe, 69 So. 2d 331 (Fla. 1953).
25. 294 So. 2d at 73.
26. Downing v. Bird, 100 So. 2d 57, 65 (Fla. 1958).
27. 294 So. 2d at 77 (emphasis added).

use of the privilege *without actual possession.*"[28] To require that a claimant to a prescriptive easement establish exclusive adverse possession, rather than non-exclusive adverse use of the property in which the easement is claimed is a new and startling development.

In considering the impact of *Daytona v. Tona-Rama,* two distinctions between prescription and custom must be examined. Of primary importance is the nature of the use required for each. Consent of the owner to the use, which would destroy the adverseness necessary to establish prescription, is not similarly effective to defeat a right based on custom. With the application of custom to claims of a public easement in private ocean-front property, beach owners have lost as a defense the fact that they had granted permission for past public use.

A second significant difference between prescription and custom is the required duration of the use involved. The requirement for prescription is use for exactly twenty years.[29] For custom, the test is imprecise—ancient use continuing from time immemorial.[30] The issues of what duration of public use will be considered ancient and what range of uses will be considered consistent with a public easement must still be resolved. The answers may be given soon as pressures from a growing population with competing demands on the beaches increase the frequency of these cases.

PATRICIA IRELAND

NO REQUIREMENT TO PROVIDE COUNSEL FOR INDIGENTS ON DISCRETIONARY APPEALS

Respondent Moffitt, an indigent represented by court-appointed counsel, was convicted twice of forgery in two North Carolina counties. Both convictions were affirmed on first appeals of right to the North Carolina Court of Appeals.[1] In one case the State refused to provide counsel for the discretionary appeal to the state supreme court; in the other, respondent was represented by a public defender and the Supreme Court of North Carolina denied certiorari.[2] Respondent

28. Downing v. Bird, 100 So. 2d 57, 65 (Fla. 1958) (emphasis added).

29. J.C. Vereen & Sons, Inc. v. Houser, 123 Fla. 641, 167 So. 45 (1936).

30. 1 W. BLACKSTONE COMMENTARIES 75-78. In State *ex rel.* Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969), the public use of the beach was admitted to have continued for more than sixty years. The court's opinion traced the use of the dry sand areas from the aboriginal inhabitants through the first European settlers to the present day residents. Testimony cited in the Attorney General's brief established public use of the beach for at least fifty-two years.

1. State v. Moffitt, 9 N.C. App. 694, 177 S.E.2d 324 (1970) (this was the conviction in Mecklenburg County); State v. Moffitt, 11 N.C. App. 337, 181 S.E.2d 184 (1971) (this was the conviction from Guilford County).

2. State v. Moffitt, 279 N.C. 396, 183 S.E.2d 247 (1971).