Daily Development for Thursday, December 20, 2012
*Martin v. Van Bergen & Agreed Boundries (2012)*

Guest Editor: Roger Bernhardt
Professor of Law
Golden Gate University

***Martin v. Van Bergen*** (2012) 209 CA4th 84

In *Martin v. Van Bergen* (2012) 209 CA4th 84, one owners' orchard encroached over the official boundary line separating it from, unless they could demonstrate that the old fence between the parcels constituted an agreed boundary, which the trial and appellate courts held they could not prove solely by showing previous acquiescence in it; proof of an actual agreement was necessary. Here follows a comment I made regretting that decision in the last California CEB Real Property Law Reporter (obviously I would prefer to have the fence alone prove the agreement if the original parties are no longer around):

**THE EDITOR'S TAKE:** This encroaching occupant lost his claim against his neighbors because he waited too long to assert it, the reverse of the normal outcome that time runs in favor of the occupier and against the paper title holder.

The fence that improperly separated these two parcels had been built and comfortably tolerated by the neighbors in 1947, 65 years ago. Adverse possession was not invoked by the Van Bergens, probably because they had doubts about meeting the property tax requirement of *Gilardi v. Hallam* (1981) 30 C3d 317, 178 CR 624, reported at 5 CEB RPLR 33 (Mar. 1982). Such a tax requirement is not one required by the doctrine of agreed boundaries, the theory actually employed at trial.

Had this case been brought 20 years earlier, say in 1992 rather than in 2012, I think that the Van Bergens (or their predecessors) would have prevailed. At that time, the rule as laid down by our supreme court in *Ernie v. Trinity Lutheran Church* (1959) 51 C2d 702, 707, 336 P2d 525, was as follows:

> The doctrine requires that there be an uncertainty as to the true boundary line, an agreement between the coterminous owners fixing the line, and acceptance and acquiescence in the line so fixed for a period equal to the statute of limitations or under such circumstances that substantial loss would be caused by a change of its position. It is not required that the true location be absolutely unascertainable, that an accurate survey from the calls in the deed is possible, or that the uncertainty should appear from the deeds. The line may be founded on a mistake.

More importantly, the court may infer that there was an agreement between the coterminous owners ensuing from uncertainty or a dispute, from the long-standing acceptance of a fence as a boundary between their lands.? 51 C2d at 708. Thus, back in 1992, a fence that had been accepted by its neighbors since 1947 (45 years) probably constituted sufficient proof of an enforceable agreed boundary between the neighbors (especially if we time travel and add in the fact of three later inconsistent surveys in support of the uncertainty element).

But after *Ernie*, our supreme court switched positions. In *Bryant v. Blevins* (1994) 9 C4th 47, 55, 36 CR2d 86, reported at 18 CEB RPLR 105 (Mar. 1995), it decided that "deference to the sanctity of true and accurate legal descriptions" was more important, so that inferring an agreement just from long acceptance of the fence was improper "where available legal records provided a reasonable basis for fixing the boundary." That meant that the Van Bergens could no longer simply show that the fence had always been there; instead, they had to prove that an actual agreement was made 65 years earlier between the predecessor owners, who were probably all dead by now, a consequence I bemoaned in my April 1995 *Midcourse Corrections* column, *Deeds on the Ground or Words in the Deed*, 18 CEB RPLR 141 (see http://www.rogerbernhardt.com/index.php/ceb-columns/82-april-1995-deeds-on-the-ground-or-words-in-the-deed-bryant-v-blevins), because it appears so inconsistent with the ordinary expectation of purchasers that what they are seeing is what they will get. That assumption went obsolete in 1994. Thus, the Van Bergens lost, in 2012, the property that they probably would have gained had the lawsuit occurred in 1992 instead.

Two years ago, in *Stop the Beach Renourishment, Inc. v Florida Dep't of Envt'l Protection* (2010) ___ US ___, 177 L Ed 2d 184, 130 S Ct 2592, four Justices of the United States Supreme Court ruled that changing a rule could constitute a taking of property, even if it was just a rule of common law that was being altered:

> If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.... It is no more essential that judges be free to overrule prior cases that establish property entitlements than that state legislators be free to revise pre-existing statutes that confer property entitlements, or agency-heads pre-existing regulations that do so.

177 L Ed 2d at 197, 204. In a Midcourse Corrections column written at that time, *How Scary Is* Stop the Beach Renourishment, 33 CEB RPLR 137 (Sept. 2010), I speculated as to how that principle might apply to landlords affected by the changes our courts have made in creating the doctrine of implied warranty of habitability, to neighbors affected by the revisions to the rules of running covenants, to riparians as new doctrines of water law and public beach access were imposed on them, or to lenders as the one-

action rule was stretched to cover more and more loan arrangements. Now, I should add adjacent owners who thought they could still rely on their long-standing fences as enforceable boundaries.