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Interruption of Use: A Prescription for Prescription

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COMMENTARY

INTERRUPTION OF USE: A PRESCRIPTION FOR PRESCRIPTION

The little-understood, common law doctrine of prescription may deprive landowners of the right to alter the use of their property. After twenty years of public use a landowner may find he cannot block pathways across his land,[1] close a private road,[2] or prevent access to his beach-front property.[3] He may not stop neighbors from parking cars on his land[4] or the public from hunting[5] or making other use of his property.[6] Commercial landowners might suffer even greater consequences. Private roads used by the public, which pass through apartment complexes, shopping centers, and other business areas, may become irrevocably vested in the public.[7]

The effect of a prescriptive easement is settled in the law. If the landowner tries to close off his former land, he is subject to civil and criminal penalties.[8] If the landowner conveys land subject to a prescriptive easement, he might, depending on the nature of the easement,[9] breach the covenant against encumbrances contained in a general warranty deed. Although a reservation in the deed would eliminate this problem the grantor, at the time of the conveyance, is often unaware of the prescriptive easement, since it is usually asserted only when an alteration of the use is attempted. If the

1. *E.g.*, Dyer v. Thurston, 32 Mich. App. 341, 188 N.W.2d 633 (1971).

2. *E.g.*, Johnson v. Faulk, 470 S.W.2d 144 (Tex. App. 1971).

3. *E.g.*, Spiegle v. Beach Haven, 116 N.J. Super. 148, 281 A.2d 377 (1971).

4. *E.g.*, Ashley v. Waite, 33 Mich. App. 420, 190 N.W.2d 370 (1971).

5. *E.g.*, Confederated Salish & Kootenai Tribes of Flathead Reservation v. Vulles, 437 F.2d 177 (9th Cir. 1971).

6. The public has acquired other rights through prescription, such as the right to appropriate water in excess of the natural right, to dam, pollute, or change a stream, to take seaweed or fish from another's land, or to attach a sign to another's building. However, rights cannot be acquired by prescription when the owner of the land is incapable of preventing their use, as in the case of percolating water or easements for air and light (ancient lights). 4 H. TIFFANY, THE LAW OF REAL PROPERTY §1194 (3d ed. 1939). Prescription also has application in national and international situations. The boundary between Virginia and Tennessee was altered by prescription, Virginia v. Tennessee, 148 U.S. 503, 522 (1893), and several European boundaries, in order to preserve peace, have been established with reference to it. W. HALL, INTERNATIONAL LAW 143-44 (8th ed. 1924). This type of prescription should be distinguished from extinctive prescription. *See, e.g.*, Italy (Gentini) v. Venezuela, Mixed Claims Commission, 1903, Ralston, Venezuelan Arbitrations of 1903, 720, 724-30 (1904).

7. *See* Comment, *The Law and Private Streets*, 5 ST. LOUIS U.L.J. 588, 589 (1959).

8. For example, Florida Statutes, §339.31 (1971) provides: "Whoever obstructs any public road or established highway by fencing across or into the same, or by willfully causing any other obstruction in or to such road or highway, or any part thereof, shall be guilty of a misdemeanor of the second degree . . . and the judgment of the court shall also be that the obstruction is removed."

9. A covenant against encumbrances is broken on delivery of the deed, if an encumbrance on the land then exists. The vendee's knowledge of an encumbrance, such as a highway or some other visible easement, does not take such encumbrance out of the operation of the covenant. 7 G. THOMPSON, REAL PROPERTY §3186 (repl. 1962). *But see* 1 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS §15.08 (1971).

purchaser suffers loss, his attorney may be subject to a negligence suit for failing to discover the prescriptive easement just as when he fails to discover adverse possessors.[10]

The property owner's economic loss may be substantial. In contrast to eminent domain, no compensation is provided for loss resulting from prescription. The reduction of the parcel's value is likely to be greater than the value of the prescriptive easement itself. Construction may be limited to smaller parcels of land and the resale value of two smaller pieces of property will often be less than the value of the original tract. Furthermore, the borders of the easement may have to comply with greenbelt and setback requirements.[11]

The wise landowner may escape these consequences by avoiding the creation of a prescriptive easement. Although the common law provided several ways to accomplish this end,[12] the most effective is to interrupt the use of the land by the public.[13] Unfortunately, neither the Florida courts nor the legislature[14] have adequately defined what constitutes a sufficient interruption of the use and the decisions of other jurisdictions are in conflict. This commentary will examine the acquisition of prescriptive rights and their prevention by interruption of the use. Adequate knowledge of the area is essential to an attorney when development of property is planned, when a prescriptive right is asserted, and when land is conveyed.

Acquisition of a Prescriptive Right

A page of history is worth a volume of logic[15] in an analysis of the law of prescription. At common law a prescriptive right to an easement originally required enjoyment from time immemorial[16] and was based upon a presumption that at some time there had been a grant by deed.[17] In an effort to restrict within reasonable bounds the length of enjoyment that had to be proved, the courts adopted various statutory dates as the time at which legal memory was to begin.[18] The Statute of Westminster of 1275 used the year 1189 in connection with the bringing of Writs of Right of Recovery of Land. This statute was unrelated to prescription, but courts often selected 1189 as the date from which to measure legal memory.[19]

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10. *Cf.* 1 Florida Real Property Practice §9.28, at 357 (Fla. Bar Continuing Legal Educ. Practice Manual (2d ed. 1971)).

11. A. Rathkopf, The Law of Zoning and Planning ch. 34-11 n.28 (3d ed. 1969).

12. *See* text accompanying notes 29-33 *infra.*

13. *See* 1 R. Boyer, *supra* note 9, §23.03 (4) (c) (iv).

14. *Cf.* notes 24, 38, 48, 76 *infra* and accompanying text.

15. *See, e.g.,* Cozy Home Realty Co. v. Ralston, 214 Ind. 149, 152, 14 N.E.2d 917, 918-19 (1938).

16. "[D]uring the time whereof the memory of man runneth not to the contrary." Co. Litt. 114B; Rowles v. Mason, 2 Brownl. 192 (1612). Thus, during the reign of Elizabeth I enjoyment of land for thirty or forty years was insufficient to establish a prescriptive title. 7 W. Holdsworth, A History of English Law 345 (2d ed. 1937).

17. 7 W. Holdsworth note 16 *supra.*

18. G. Cheshire, The Modern Law of Real Property 484 (10th ed. 1967).

19. As a result, the first year of the reign of Richard I, 1189, replaced enjoyment from

The problems with a fixed date were obvious.[20] If it were shown that the use must have begun after 1189, a prescriptive claim at common law failed. To prevent injustice when enjoyment for a reasonable time was shown, judges in the eighteenth century began presuming that an actual grant had been made and later lost.[21] In 1786 Lord Mansfield declared that twenty years' use amounted to "such decisive presumption of a right by grant or otherwise that, unless contradicted or explained, the jury ought to believe it."[22]

England codified much of the common law of prescription in the Prescription Act of 1832.[23] However, legislation similar to this Act has generally not been adopted in American jurisdictions.[24] As a result, American courts employed the uncertain body of rules developed by the English courts.[25] The common law theory that prescriptive rights were based on a presumption of a prior grant has now been abandoned in some jurisdictions, including Florida, and the acquisition of these rights is treated as being similar to that of adverse possession.[26]

Title by adverse possession is established through exclusive possession, while a prescriptive right arises through use of the privilege without actual possession.[27] The nature of the right is the principal difference between

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time immemorial as the measuring rod. 7 W. HOLDSWORTH, *supra* note 16, at 343.

20. *See* G. CHESHIRE note 18 *supra.*

21. G. CHESHIRE, *supra* note 18, at 497. Thus, proof of twenty years use, unexplained, was presumptive evidence from which a jury could infer the truth of a plea. 7 W. HOLDSWORTH, *supra* note 16, at 348. An explanation for this change is that evidence of a valid beginning becomes increasingly difficult to procure with the passage of time. 2 AM. L. OF PROPERTY §8.44 (1952).

22. Nevertheless, this twenty-year period did not conclusively establish the right. 7 W. HOLDSWORTH, *supra* note 16, at 348.

23. *See* 2, 3 Will. 4, c. 71. Section 2 of the act changes the test from legal memory or the date 1189 to use without interruption for twenty years. All common law defenses were still available, but an easement enjoyed for forty years was absolute and indefensible unless written consent to the use had been given.

24. 2 AM. LAW OF PROPERTY, *supra* note 21, §8.51. *But see* N.D. CENT. CODE §24-07-01 (1970); ME. REV. STAT. ANN. §14-812 (1965). Many state courts have borrowed the time limitation of adverse possession. RESTATEMENT OF PROPERTY §460, comment *a* (1944). *Cf.* J.C. Vereen & Sons v. Houser, 123 Fla. 641, 648, 167 So. 45, 48 (1936). Also, some states have varied the common law rule by statute. *E.g.,* CAL. CIV. CODE ANN. §1008 (West Supp. 1971) (signs); MINN. STAT. ANN. §160.06 (1960) (15 years for trail or portage); PA. STAT. ANN. §68-411 (1965) (none through unenclosed woodland); R.I. GEN. LAWS ANN. §34-7-5 (1969 reenactment) (utility rights-of-way acquired by enjoyment).

25. An example of these rules is: "A litigant who relied on prescription at common law might succeed if he could show thirty or forty years use. On the other hand, a litigant who could show eighty or a hundred years use might fail, if, *e.g.,* unity of seisin were proved to have existed some two centuries ago." 7 W. HOLDSWORTH, *supra* note 16, at 349. Other common law doctrines, such as immemorial use and the arbitrary date, 1189, were obviously inappropriate for American jurisdictions. *See* Coolidge v. Learned, 25 Mass. (8 Pick.) 503, 507 (1829).

26. Downing v. Bird, 100 So. 2d 57, 64 (Fla. 1958); 3 J. ADKINS, FLORIDA REAL ESTATE LAW §82.04 (1960).

27. Downing v. Bird, 100 So. 2d 57, 65 (Fla. 1958).

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title acquired by adverse possession and a prescriptive right. The latter is an incorporeal hereditament in land based on the presumption of a prior grant, while the former is a corporeal right based on the abandonment of the land to the adverse possessor.[28]

Open, adverse, continuous, and uninterrupted use with the knowledge and acquiescence of the owner is required for prescription in Florida.[29] Use is "open" if a person makes repeated crossings whenever convenient;[30] it is "adverse" simply if it is not permissive.[31] It has been suggested that permissive use is similar to a revocable license such as permission to hunt, fish, or drive on land when the owner has the right to withdraw the permission at any time.[32] "Acquiescence" means that the owner has not effectively interrupted[33] or disputed the right of the other party to cross the property.

The leading Florida prescription case is *Downing v. Bird.*[34] The city had constructed an asphalt road on the owner's land without her consent and she sought its removal and damages. The city argued that the public had used the land without interruption for more than twenty years before the suit. While the owner had paid the taxes on the land for many years[35] the court held that the assessment and collection of taxes was not conclusive in forming the basis for an estoppel against the city, but was only one item to be considered with the other evidence.[36] The court upheld the city's contention even though it recognized that acquisition of rights by use alone should be restricted.[37] The result in *Downing* makes it necessary in a prescription case to allege and prove that the public had the continued and uninterrupted use of the plaintiff's land for a period of at least twenty years prior

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28. *Id.*

29. Hunt Land Holding Co. v. Schramm, 121 So. 2d 697, 700 (2d D.C.A. Fla. 1960). Boyer distinguishes these characteristics from adverse possession because the claimant is "not occupying or possessing the land but simply making a limited use thereof." 1 R. BOYER, *supra* note 9, §23.03 (c) (i).

30. Myers v. Berven, 166 Cal. 484, 489-90, 137 P. 260, 262 (1913). *See also* 1 R. BOYER, *supra* note 9, §23.03 (c) (ii).

31. 1 R. BOYER, *supra* note 9, §23.03 (c) (iii). The necessity of an adverse use in order to establish a highway by prescription in Florida was emphasized in Couture v. Dade County, 93 Fla. 342, 352, 112 So. 75, 79 (1927), in which the county sought to enjoin the defendants from obstructing a road alleged to be a public highway. Although the evidence was insufficient to support the contention that the right-of-way was acquired by purchase, condemnation, gift, or prescription, the court said "it is the adverse use and possession which establishes the highway." While this "mere use of a roadway does not alone establish its character as a public highway," it was nevertheless clearly noted that a public highway may be created by grant and acceptance or by prescription and usage. *See also* Daugherty v. Latham, 139 Fla. 477, 489, 190 So. 742, 747 (1939).

32. 1 R. BOYER, *supra* note 9, §23.03 (c) (iii).

33. *Id.* §23.03 (c) (vi).

34. 100 So. 2d 57 (Fla. 1958).

35. *Id.* at 60.

36. *Id.* at 61; *cf.* Levering v. Tarpon Springs, 92 So. 2d 638 (Fla. 1957); Trustees of Internal Improvement Fund v. Claughton, 86 So. 2d 775, 782 (Fla. 1956); Verh v. Morris, 410 Ill. 206, 207, 101 N.E.2d 566, 568 (1951); Lockey v. Bozeman, 42 Mont. 381, 394, 113 P. 286, 288 (1910).

37. 100 So. 2d 57, at 65, *citing* Irion v. Nelson, 207 Okla. 243, 249 P.2d 107 (1952).

to the barricading; that the identity of the use – its route, terminus, and width – remained constant during the period; and that the use was adverse or under claim of right.

METHODS OF INTERRUPTING THE USE

In all jurisdictions interruption of use is the prime and most effective method of preventing acquisition of a prescriptive right.[38] Once the use is interrupted the accumulated prescriptive period is nullified and must begin again. If the use is not interrupted the prescriptive period is fulfilled and the right to the easement vests in the public.[39]

Attempts to interrupt public use generally employ one of these methods: (1) erecting a fence or some other obstruction on the land, (2) posting signs or notices that the land is private, or (3) prosecuting a lawsuit through judgment. Each of these methods has met with varying degrees of success.

In ruling upon the legal efficacy of these various techniques of interruption, many courts have looked to the intent of the landowner. In these cases the owner must have intended the fence or other obstruction to interfere with public travel. Thus, erection of a fence has been held to be an insufficient interruption when it is solely for the convenience of the owner,[40] as when it is used to enclose livestock.[41] This reasoning has been criticized because a person who obstructs the way for his own convenience, even though without intent to interrupt, is showing that he asserts dominion and control over the property.[42]

Other courts have looked to the effect of the method chosen on the public use in order to determine the sufficiency of the technique. For example, if

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38. 1 R. BOYER, *supra* note 9, §23.03 (c) (iv). *See also* CONN. GEN. STAT. ANN. §47-38 (1958); ME. REV. STAT. ANN. §14-812 (1965); MINN. STAT. ANN. §160.06 (1960); R.I. GEN. LAWS ANN. §34-7-6 (1969 Reenactment).

39. *See* Couture v. Dade County, 93 Fla. 342, 352, 112 So. 75, 79 (1925). In Nelms v. Steelhammer, 225 Ark. 429, 433, 283 S.W.2d 118, 120 (1955), the public had at one time acquired a right by prescription, but acquiescence in the use of gates for eight to ten years destroyed any previously acquired prescriptive rights.

40. The interruption must be of the right to use the road and not of just the use. Hansen v. Green, 275 Ill. 221, 227, 113 N.E. 982, 984 (1916); Pitser v. McCreery, 172 Ind. 663, 673, 88 N.E. 303, 307 (1909). *Contra,* Jones v. Davis, 35 Wis. 376, 382 (1874).

41. Pitser v. McCreery, 172 Ind. 663, 668, 88 N.E. 303, 305 (1909). "[S]urely nothing can be more inconsistent with the purpose and object of a public highway than the right of any individual to fence it up or put bars across it. A highway, from its very nature, must be open and free for the passage of all persons, both by day and night, who may have occasion to travel over it. No one has a right to enclose it with gates and bars for the purpose of herding cattle at night; and where the owner of the soil does fence up a way, he evinces in the most unambiguous manner an intention to exclude the public from it." Jones v. Davis, 35 Wis. 376, 382 (1874).

42. *See, e.g.,* Stacey v. Miller, 14 Mo. 478, 479 (1851). If he were not properly asserting this control, the landowner might be subject to civil and criminal sanctions. This assertion of control can be distinguished from a similar obstruction of public roads, since a person cannot be arrested for obstruction of his own private property prior to the running of the prescriptive period. Bree v. Wheeler, 129 Cal. 145, 147, 61 P. 782, 783 (1900).

chains or wires across a road are taken down and not replaced[43] or if the obstructions, though not moved, do not impede the public, the use continues.[44] However, obstructions blocking passage completely and for extensive periods of time[45] do toll the use,[46] even if persons and animals can squeeze through.[47]

In general, signs designating land as private do not interrupt the use,[48] despite the owner's apparent intent to the contrary, when they do not hamper use of the property.[49] Public knowledge that the land is claimed to be private may therefore be irrelevant if people continue their use. But signs have been adequate when coupled with other means that actually did interrupt the use. Thus, fences with gates open to the public and notices advising that the land was private have on occasion sufficiently interrupted the use.[50]

Some courts have approached the sufficiency of the different techniques on the basis of notice. In these jurisdictions the mere placement of any obstacle across a way is sufficient notice that the public lacks the right to use the way even if it can pass.[51] As a result, a gate placed in a fence that crosses a highway indicates that passage is permissive and not of right.[52] Indeed, even sporadic erection of gates has been sufficient to interrupt use, since maintenance of gates "along a line of travel is not inconsistent with a private easement, but their presence is inconsistent with the existence of a public highway."[53] A few courts have not agreed that a fence with a gate is a sufficient interruption. These decisions note that the gates do not obstruct travelers,[54] especially when not intended for that purpose.[55] As a result, when gates neither extend across the route nor block public use there is no interruption of use.[56]

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43. Spindler v. Toomey, 232 Ind. 328, 331-32, 111 N.E.2d 715, 716 (1953).

44. Thorworth v. Scheets, 269 Ill. 573, 583-84, 110 N.E. 42, 46 (1915).

45. Since continuous use by the public must exist without interruption for the full 20-year period in order to make prescription apply, evidence showing that a road was cultivated and used to grow crops has been sufficient to prevent acquisition of title by the public to the land through prescription. *See* Blevins v. McCarty, 266 Ala. 297, 302, 96 So. 2d 437, 441 (1957).

46. Rolling v. Emrich, 122 Wis. 134, 136-37, 99 N.E. 464, 465 (1904).

47. Dalton v. Real Estate & Improvement Co., 201 Md. 34, 41, 92 A.2d 575, 589 (1952).

48. *See, e.g.*, Spindler v. Toomey, 232 Ind. 328, 111 N.E.2d 715 (1953). *But see* CAL. CIV. CODE ANN. §1008 (West Supp. 1971): "No use by any person or persons, no matter how long continued, of any land, shall ever ripen into an easement by prescription, if the owner of such property posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows: 'Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code.'"

49. Cozy Home Realty Co. v. Ralston, 214 Ind. 149, 152, 14 N.E.2d 917, 918-19 (1938).

50. Seattle v. Moeller, 72 Wash. 99, 102-03, 129 P. 884, 885 (1913).

51. Porter v. Huff, 162 Ark. 52, 54, 257 S.W. 393 (1924).

52. *Id.*

53. Bino v. Hurley, 14 Wis. 2d 101, 112, 109 N.W.2d 544, 549 (1961).

54. Bolger v. Foss, 65 Cal. 250, 252, 3 P. 871, 872 (1884).

55. Pitser v. McCreery, 172 Ind. 663, 668, 88 N.E. 303, 305 (1909).

56. Huggins v. Turner, 258 Ala. 7, 9, 60 So. 2d 909, 910 (1952). Also, sliding gates kept open except for the twenty-five days of a racing season do not interrupt the use. Southern

Pursuit of a lawsuit to judgment has been sufficient to interrupt the use,[57] presumably because the owner has acted seasonably to preserve his rights and thus informed the public that their passage is not tolerated.[58]

The extent of public reliance may be an unexpressed factor in judicial treatment of the varying techniques of interruption and may be a means to reconcile otherwise conflicting decisions. Accordingly, if the public has expended a substantial amount of money to improve the easement the court may be reluctant to grant relief to the landowner. For example, in *Downing v. Bird*[59] the court refused to order the removal of an asphalt road even though it had been constructed without the owner's consent. Furthermore, if the public foregoes opportunities to develop other routes of travel it often would be injured if an owner after many years were allowed to reassert dominion over the property.[60] Public reliance is encouraged if the owner fails to assert his rights or give the public notice sufficiently advising it that it is not traveling on the way as a matter of right. As a matter of policy the public right after constant use for a long time will be recognized as paramount to the private right.[61]

Public maintenance of a private road has also influenced courts in their determination of the sufficiency of various techniques. If a road is maintained as public by township authorities there is strong evidence that it is a public highway.[62] Evidence of assumption of control and jurisdiction for

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Maryland Agricultural Ass'n v. Meyer, 196 Md. 31, 35, 75 A.2d 89, 91 (1950); *cf.* Hoover v. Smith, 451 S.W.2d 877, 880 (Ark. 1970).

57. Rothman v. Interborough Rapid Transit Co., 155 App. Div. 192, 139 N.Y.S. 1041 (1st Dep't 1913); Workman v. Curran, 89 Pa. 226 (1879). *See also* 3 R. POWELL, REAL PROPERTY 413 (1968).

58. Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 476-77 (1897).

59. 100 So. 2d 57 (Fla. 1958).

60. *Cf.* 1 S. WILLISTON, CONTRACTS §140 (3d ed. 1957).

61. It was suggested by Justice Holmes that prescription, in its most profound sense, comports with "the nature of man's mind," since people regard property as their own after long use. Less fundamental justifications given by Holmes for a twenty-year period are the unavailability of evidence after a long time, the desirability of peace, and the policy of nonenforcement of abandoned rights. In this respect, prescription is similar to statutes of limitation. Holmes, *supra* note 58, at 476-77. Another factor may be a court's desire to ensure the maximum use of the land. Prescription limits the free alienation of property and allows greater use of land. Since prescription assures at least a minimal use of property by the public, modern natural law theories of land ownership based on economics rather than ethics, R. POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 114-215 (rev. ed. 1954), support its application, especially since free alienation is no longer asserted to be in the interest of economic progress. J. STONE, THE PROVINCE AND FUNCTION OF LAW 589 (1950). *Cf.* 1 R. POUND, JURISPRUDENCE 430-32 (1959). Prescription also accords with the assertion of socialists that labor (use) is the only moral title to economic reward. *See* H. LASKI, A GRAMMAR OF POLITICS 189-211 (3d ed. 1938).

62. Phillips v. Leininger, 280 Ill.. 132, 139, 117 N.E. 497, 499-500 (1917). In Lake County v. Gatch, 168 So. 2d 81 (2d D.C.A. Fla. 1964), the county had placed straw in ruts, put some clay on the surface, and resurfaced and graded the road; these actions were sufficient to establish dedication by prescription when coupled with twenty years use by the public. The width of a prescriptive easement includes shoulders and ditches needed and actually used because these are necessary for the support and maintenance of the

the requisite time[63] over a road by the government has at times aided acquisition of a prescriptive easement[64] while a lack of public maintenance may help prevent prescription.[65] The municipal repair of a road, combined with other factors, has led one court to overlook obstructions and find that a prescriptive right had vested.[66] While just maintenance work alone by a subdivision of a state is generally insufficient to make a road a public highway,[67] title to a way vests in the public by Florida statute when the road is constructed and worked by the public authorities for four years.[68]

Many jurisdictions have reached different results not only in regard to the sufficiency of the methods of interruption but also in regard to the required degree of interruption. Some states allow an interruption of only a few hours, other states insist that it be "substantial."[69] Courts have usually held that this interruption, when it results from the act of the landowner, differs from a voluntary cessation of use by the public. The latter does not prevent prescription. The interruption cannot be merely casual or recognize a right of passage,[70] but it may be almost negligible under the rationale of some courts. For example, the dripping of water upon a sidewalk during winter was found to interrupt the use of the sidewalk and prevent acquisition of rights to the sidewalk by prescription.[71]

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paved or traveled portion. Grenell v. Scott, 134 So. 2d 866, 869 (2d D.C.A. Fla. 1961). *See also* IND. ANN. STAT. §26-1807 (Burns 1949 Replacement); W. VA. CODE ANN. §17-1-3 (1966).

63. *E.g.*, IDAHO CODE ANN. §40-103 (1961) (5 years); MO. ANN. STAT. §228.190 (Vernon 1953) (10 years).

64. Board of County Comm'rs v. Patrick, 18 Wyo. 130, 138, 104 P. 531, 532 (1909).

65. Rolling v. Emrich, 122 Wis. 134, 136, 99 N.W. 464, 465 (1904).

66. Thorworth v. Scheets, 269 Ill. 573, 580, 110 N.E. 42, 45 (1915).

67. Martino v. Fleenor, 148 Colo. 136, 142, 365 P.2d 247, 250 (1961).

68. FLA. STAT. §337.31 (1) (1971) provides: "Whenever any road constructed by any of the several counties or incorporated municipalities or by the department shall have been maintained, kept in repair or worked continuously and uninterruptedly for a period of four years by any county, municipality, or by the department, either separately or jointly, such road shall be deemed to be dedicated to the public to the extent in width which has been actually worked for the period aforesaid, whether the same has ever been formally established as a public highway or not. Such dedication shall be conclusively presumed to vest in the particular county in which the road is located, if it be a county road, or in the particular municipality, if it be a municipal street or road, or in the state, if it be a road in the state highway system or state park road system, all right, title, easement and appurtenances therein and thereto, whether there be any record of conveyance, dedication or appropriation to the public use or not."

69. Note, *Interruption of the Adverse Enjoyment of Easements*, 20 HARV. L. REV. 317, 318 (1907). In *Verh v. Morris* the court stated: "[M]ere intermission is not interruption" and the barricading of a road for a day or a few days had no effect on prescriptive rights. 410 Ill. 206, 212, 101 N.E.2d 566, 570 (1951). This decision clearly conflicts with most cases because it requires the claimant to acquiesce in the interruption and thus to make the subsequent use merely permissive.

70. Shellhouse v. State, 110 Ind. 509, 511-12, 11 N.E. 484, 486 (1887).

71. Woodsville Fire Dist. v. Stahl, 80 N.H. 502, 504, 119 A. 123, 124 (1922).

CONCLUSION

Although Florida courts have not ruled upon the adequacy of the different methods of preventing prescription, either an actual, sustained, physical[72] interruption of use or a lawsuit pursued to judgment should be sufficient to alert the public to the private nature of land. Erection of a sign saying that land is private should not suffice in itself to interrupt the use, nor will any other device that merely puts the public on notice. A barrier should be erected and left in place long enough to stop public travel.[73] Although the amount of time varies from state to state, a twenty-four hour total cessation in urban areas should suffice.[74] In rural areas a longer time might be reasonably required. In addition, the public authorities should be instructed that all maintenance work will be performed by the landowner and public maintenance crews should be ordered to leave if seen performing work upon the land.[75]

Other states have simplified this task by legislation. For example, California has provided some relief for the landowner by allowing him to prevent the acquisition of a prescriptive right by recording a notice that states the public's use is by permission.[76] Until the Florida legislature acts, however, appropriate counselling must be given to ensure that property rights are protected against unforseen loss.[77]

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72. A verbal protest might be sufficient in some cases. *See* 1 R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS §23.03 (1971); Note *supra* note 69.

73. A landowner endangered by prescription might be wise to select a certain period each year to block his property, for example, the Fourth of July or Thanksgiving. In this way the approach of the holiday would remind him to close his land to the public. To advise the public of the purpose of the interruption, legal notices informing of the period that the land will be blocked should be run in the newspapers of general circulation. Proof of publication should be obtained at the time. Pictures of the barricades should be taken and affidavits of the photographers should be obtained. Off-duty policemen or security guards should be hired to enforce the barricade and advise the public that the road is blocked because it is private. These same persons will be available as witnesses in event of litigation. In their absence at court their affidavits would be useful.

74. *See* text accompanying note 39 *supra.*

75. Comment, *The Law and Private Streets,* 5 ST. LOUIS U.L.J. 588, 591-92 (1959).

76. CAL. CIV. CODE ANN. §813 (West Supp. 1971).

77. A fairer method for the landowner, especially when ignorant of the law of prescription, would be for the state to reimburse him for the land in a fashion similar to eminent domain.