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Darryl S. Cordle

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WARSAW v. CHICAGO METALLIC CEILINGS, INC.: COMPENSATION FOR PRESCRIPTIVE EASEMENTS

I. INTRODUCTION

In Warsaw v. Chicago Metallic Ceilings, Inc., the California Supreme Court held that the acquirer of a prescriptive easement need not compensate the underlying property owner for the easement’s reasonable value. This decision is significant because it deprives the underlying property owner of the right to use his property without any compensation for that deprivation. This Note examines whether, in the appropriate circumstances, the doctrines of prescription and adverse possession preclude the payment of compensation for a property right so acquired. In the course of the analysis, use of the court’s equitable power is considered. The analogous area of encroachment and nuisance are explored for guidance in forming a remedy; and, a “balancing of the relative hardships” approach is suggested. Additionally, the likelihood of legislative action is considered and possible legislation is proposed.

II. STATEMENT OF THE CASE

In 1972, Ernest E. Warsaw (plaintiff) and Chicago Metallic Ceilings, Inc. (defendant) purchased contiguous commercial lots in Vernon, California. The lots were purchased from a common owner and were unimproved at the time of the sale. Warsaw’s agreement with the seller stipulated that the seller construct a large commercial building on Warsaw’s lot, erected according to Warsaw’s specifications.

When completed, the building covered almost the entire Warsaw parcel. Warsaw constructed loading docks on the north side of the building to facilitate the loading and unloading of trucks. A forty-foot-wide driveway, which abutted and ran parallel to Chicago Metallic’s southern boundary, provided access to Warsaw’s loading docks.

Chicago Metallic’s building was considerably smaller than Warsaw’s building. Its southern wall was 150 feet from the southern boundary abutting Warsaw’s property. With the exception of this one building,

2. Id. at 569, 676 P.2d at 586, 199 Cal. Rptr. at 775. Warsaw purchased the southern parcel; Chicago Metallic purchased the northern lot. Id.
3. Id.
4. Id.
the remainder of Chicago Metallic's lot was unimproved.\(^5\)

The driveway on Warsaw's lot proved to be inadequate for the positioning and maneuvering of trucks using the loading docks.\(^6\) Drivers could not turn and position their trucks at the loading docks without driving onto Chicago Metallic's property. If the trucks were not allowed to use Chicago Metallic's property in this manner, it would destroy the commercial value of Warsaw's building.\(^7\)

Between 1972 and 1979, trucks delivering material to Warsaw used a portion of Chicago Metallic's property to enter, turn around, park and leave Warsaw's loading docks.\(^8\) During this time, Warsaw unsuccessfully attempted to acquire an easement from Chicago Metallic.\(^9\) During the original negotiations between the seller, Warsaw and Chicago Metallic, the creation of an easement over Chicago Metallic's property was considered and rejected.\(^10\)

In 1979, Chicago Metallic developed plans to build a warehouse on the southern portion of its property. This plan dictated construction on the portion of Chicago Metallic's land Warsaw used for maneuvering trucks. In preparing a foundation for construction, Chicago Metallic raised a dirt pad approximately five feet within its southern property line. This blocked Warsaw's use of Chicago Metallic's property. In response, Warsaw commenced an action for injunctive and declaratory relief.\(^11\)

Initially, the trial court denied Warsaw's request for a preliminary injunction to prevent Chicago Metallic from continuing construction. Subsequently, Chicago Metallic completed the warehouse on the contested area. After a trial on the merits, the trial court found that Warsaw had acquired a prescriptive easement\(^12\) which extended the depth of Chi-

\(^5\) Id.
\(^6\) Id. The court noted that the inadequacy of the driveway was apparent from the beginning of Warsaw's operation. Id.
\(^7\) Id.
\(^8\) Id. at 570, 676 P.2d at 586, 199 Cal. Rptr. at 775.
\(^9\) Id. Warsaw was also unsuccessful in his attempts to create mutual easements over his and Chicago Metallic's property. Id. at 570, 676 P.2d at 586-87, 199 Cal. Rptr. at 775-76.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id. The trial court found that an easement by implication was not created because the parties had considered and rejected the possibility of creating an easement during the original negotiations between the seller, Warsaw and Chicago Metallic. Because the parcels were unimproved at the time of the conveyance, there was no basis for an easement implied from prior existing use. Id. at 570, 676 P.2d at 586, 199 Cal. Rptr. at 775. See Van Sandt v. Royster, 148 Kan. 495, 502, 83 P.2d 698, 702 (1938) (easement implied from prior existing use when purchaser is charged with notice of existing use at time of purchase). Furthermore, there was no basis for an easement by necessity because the driveway on Warsaw's property provided ingress and egress. See R. CUNNINGHAM, THE LAW OF PROPERTY 447 (1984) (easement im-
Chicago Metallic's lot at a width of twenty-five feet. Furthermore, the court ordered Chicago Metallic to remove that portion of the warehouse which interfered with Warsaw's use of the newly declared easement.

The court of appeal affirmed the trial court's decision. Noting the hardship the decision caused Chicago Metallic, however, the court remanded the matter to the trial court to determine reasonable compensation, based on the fair market value of the property interest acquired, to be paid to Chicago Metallic by Warsaw.

The California Supreme Court agreed with the court of appeal's holding that Warsaw had acquired an easement, but reversed the court of appeal's decision regarding the payment of reasonable compensation.

III. REASONING OF THE COURT

The California Supreme Court affirmed the court of appeal's decision that a prescriptive easement was acquired because Warsaw's use of Chicago Metallic's property was open, notorious, continuous and adverse for the statutory period of five years. The supreme court, however, reversed the court of appeal's decision to award compensation for the

applied from necessity only when "the severance [of a parcel from the grantor's land] will more or less lock one of the parcels unless its owner is given implied access over the other parcel." See also Applegate v. Ota, 146 Cal. App. 3d 702, 714, 194 Cal. Rptr. 331, 338 (1984) (easement by necessity arises when grantor conveys land that is completely shut off from access to any road by grantor's remaining land).

13. Warsaw, 35 Cal. 3d at 574, 676 P.2d at 587, 199 Cal. Rptr. at 776. The easement covered 16,250 square feet of Chicago Metallic's property.

14. Id. The Warsaw court also dealt with the issue of whether Warsaw should contribute to the cost of removal of Chicago Metallic's warehouse, which had been completed during the course of the litigation. The court found that such a contribution would be inequitable because Warsaw had perfected a lawful easement before construction of the warehouse. Nevertheless, Chicago Metallic proceeded with construction of the warehouse with prior notice of Warsaw's claim. Id. at 576, 676 P.2d at 591, 199 Cal. Rptr. at 780.


16. Id. at 270, 188 Cal. Rptr. at 569. The claim for compensation was not briefed or argued before the court of appeal. That court raised the issue and ordered compensation sua sponte, stating "a court of equity is not limited in granting relief by the demands and offers of the parties themselves, but may fashion a decree which will do justice to all parties." Id. (citing Redke v. Silvertrust, 6 Cal. 3d 94, 490 P.2d 805, 98 Cal. Rptr. 293 (1971), cert. denied, 405 U.S. 1041 (1972)).

17. Warsaw, 35 Cal. 3d at 569, 676 P.2d at 586, 199 Cal. Rptr. at 775. The supreme court adopted the court of appeal opinion with respect to the acquisition of the easement. Id.

The majority found that there was "no basis in law or equity" to require the acquirer of a prescriptive easement to compensate the underlying property owner and that California Civil Code section 1007 insulated Warsaw from any liability. The majority concluded that payment of compensation in this case could defeat the underlying policies of prescription and adverse possession: the reduction of litigation and preservation of the peace by protecting possession. While recognizing that its decision might not square with "modern ideals in a sophisticated, congested, peaceful society," the majority concluded that because this method of acquiring title "remains on the books," any change must therefore come from the legislature.

The concurring opinion, written by Justice Grodin, questioned the policy considerations on which the majority opinion was based. Justice Grodin was unconvinced that the majority's decision would reduce litigation or protect possession in a modern, urban society. Because, however, he was persuaded that any changes in the prescriptive easement doctrine should come from the California legislature, rather than from

19. Id. at 574-75, 676 P.2d at 589-90, 199 Cal. Rptr. at 778-79. Justice Richardson wrote the majority opinion and was joined by Justices Mosk, Kaus and Broussard. Justice Grodin wrote a concurring opinion in which Chief Justice Bird joined. Justice Reynoso dissented in a separate opinion.

20. Id. at 574, 676 P.2d at 590, 199 Cal. Rptr. at 779.

21. CAL. CIV. CODE § 1007 (West 1982) provides:

Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all, but no possession by any person, firm or corporation no matter how long continued of any land, water, water right, easement, or other property whatsoever dedicated to a public use by a public utility, or dedicated to or owned by the state or public entity, shall ever ripen into any title, interest or right against the owner thereof.

22. Warsaw, 35 Cal. 3d at 574, 676 P.2d at 589, 199 Cal. Rptr. at 778.

23. Id., 676 P.2d at 590, 199 Cal. Rptr. at 779.

24. Id. at 575, 676 P.2d at 590, 199 Cal. Rptr. at 779 (quoting Finley v. Yuba County Water Dist., 99 Cal. App. 3d 691, 696-97, 160 Cal. Rptr. 423, 427 (1979)).

25. Id. at 576, 676 P.2d at 591, 199 Cal. Rptr. at 780 (Grodin, J., concurring).

26. Id. (Grodin, J., concurring). Justice Grodin stated that because the legislature had modified the "harsh application of the prescriptive easement doctrine" in 1965, further change in that area of the law should also come from the legislature. Id. at 576-77, 676 P.2d at 591, 199 Cal. Rptr. at 780 (Grodin, J., concurring). The modification to which Justice Grodin referred was the addition of CAL. CIV. CODE § 1008 (West 1982), which provides:

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 the control, of owner: Section 1008, Civil Code."

This section hardly seems to preclude an award of compensation in Warsaw, nor does it indicate that the legislature considered whether compensation would ever be appropriate. Furthermore, it does not indicate broad legislative attention to the law of prescription. Rather,
In a dissenting opinion, Justice Reynoso stressed the view that Civil Code section 1007 merely describes the title conferred by prescription; it does not determine whether a court may impose a condition for the protection of the easement.\(^\text{27}\) Noting that the practical result of the court’s decision was to take Chicago Metallic’s property without any compensation, Justice Reynoso argued that the court should have exercised its equity power to impose a condition for the protection of the easement,\(^\text{28}\) and that the appropriate condition in this case was the payment of reasonable compensation to Chicago Metallic.\(^\text{29}\) Justice Reynoso concluded that the majority’s decision would not reduce litigation and was not necessary to protect possession, and that, therefore, it did not further the policies underlying the doctrine of prescription.\(^\text{30}\)

### IV. Analysis

The majority in *Warsaw* took the position that despite the possibly outmoded nature of title by prescription, the California Civil Code continues to provide for this method of obtaining land.\(^\text{31}\) The court concluded that because Warsaw met the requirements of Civil Code section 1007 and Code of Civil Procedure section 321,\(^\text{32}\) Warsaw incurred no liability to Chicago Metallic.\(^\text{33}\) Finding no basis in equity to order compensation, the supreme court did not exercise its equitable power in this

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\(^{27}\) *Warsaw*, 35 Cal. 3d at 577, 676 P.2d at 591, 199 Cal. Rptr. at 780 (1984) (Reynoso, J., dissenting).  
\(^{28}\) Id. at 579, 676 P.2d at 593, 199 Cal. Rptr. at 782 (Reynoso, J., dissenting).  
\(^{29}\) Id. at 581, 676 P.2d at 594, 199 Cal. Rptr. at 783 (Reynoso, J., dissenting).  
\(^{30}\) Id. at 580, 676 P.2d at 593-94, 199 Cal. Rptr. at 782-83 (Reynoso, J., dissenting).  
\(^{32}\) CAL. CIV. PROC. CODE § 321 (West 1982) provides:  
In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear (sic) that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action.  
\(^{33}\) *Warsaw*, 35 Cal. 3d at 574-75, 676 P.2d at 589-90, 199 Cal. Rptr. at 778-79.
case. Instead, the court stated that "any decision to alter [the] system [of acquiring an interest in land by prescription] by requiring the payment of compensation clearly would be a matter for the Legislature." The court's refusal to exercise its equitable power in this case seems to rest on its interpretation of California Civil Code section 1007 as conclusively precluding any award of compensation. The majority determined that section 1007 retains the traditional policies underlying the common law doctrine of prescription: "'protecting' and 'stabilizing' a long and continuous use or possession as against the claims of an alleged 'owner' of the property." Therefore, the majority concluded that Chicago Metallic's "claim for damages or fair compensation for an alleged 'taking' must be rejected." The rationale seems to be that because this taking is contemplated by section 1007, the taking is not inequitable. This interpretation leaves the next move, if any, to the legislature.

For purposes of analysis, three issues must be considered: (1) whether California Civil Code section 1007 conclusively precludes an award of compensation; (2) whether the rationale underlying the law of prescription precludes an award of compensation; and (3) whether a court in equity has the authority to order that compensation be paid to the underlying property owner by the acquirer of a prescriptive easement.

A. A Statutory Scheme

California Civil Code section 1007 provides, in part: "Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all . . ." California Code of Civil Procedure section 321 sets a five-year period for acquisition of title by prescription. Because the adverse user's prescriptive title was "sufficient against all," the Warsaw court reasoned that there was no basis to incur liability to the underlying property owner. The court concluded, therefore, that Warsaw need not compensate

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34. Id.
35. Id. at 575, 676 P.2d at 590, 199 Cal. Rptr. at 779. The court also noted that the defendant made no argument that prescription is unconstitutional. Id.
36. Id.
37. Id.
38. See supra note 21 for text of pertinent part of CAL. CIV. CODE § 1007.
39. See supra note 32 for text of pertinent part of CAL. CIV. PROC. CODE § 321.
The supreme court’s reliance on California Civil Code section 1007 is questionable. Traditionally, that section has been interpreted as “merely fix[ing] the time in which a right by prescription shall be acquired, but . . . not alter[ing] the requisites which before the code were essential to the growth of a prescriptive right.” The statute appears to do nothing more than codify the common law of prescription. The supreme court stated that “the statutory procedure for acquiring an easement by prescription quite clearly retains the traditional common law rule that such an easement may be obtained without incurring any liability to the underlying property owner.” The court, however, cited neither authority nor reason for this “common law rule,” stating only that the underlying property owner’s claim for compensation “must be rejected.” If, as the supreme court contended, the statute retains this common law rule, the issue of compensation must be resolved by recourse to the common law of prescription and not by mere citation to section 1007.

B. Prescription at Common Law

A party claiming a prescriptive easement over the property of another must show that his use of the property was open, notorious, continuous and adverse for an uninterrupted period of five years. Application of this rule gave Warsaw a prescriptive easement over Chicago Metallic’s property. Thus, for the purpose of analysis, the existence of the easement is presumed.

At English common law the theoretical basis of prescription was the lost grant. “Its continuance has been justified because of its functional

41. Id. at 575, 676 P.2d at 590, 199 Cal. Rptr. at 779.
42. Thomas v. England, 71 Cal. 456, 458, 12 P. 491, 492 (1886). In Thomas, the plaintiff sought to establish a right of way over the defendant’s land and to enjoin the defendant from obstructing that right of way. Id. at 457, 12 P. at 491. The supreme court affirmed the trial court’s finding that the plaintiff’s right to pass over the defendant’s land was with the defendant’s implied permission. Id. at 460, 12 P. at 493. Notwithstanding § 1007, the plaintiff’s claim to a prescriptive easement was denied because his use of the land was not adverse to that of the defendant.
43. Warsaw, 35 Cal. 3d at 577-78, 676 P.2d at 592, 199 Cal. Rptr. at 781 (Reynoso, J., dissenting).
44. Id. at 574, 676 P.2d at 581, 199 Cal. Rptr. at 778.
45. Id. at 575, 676 P.2d at 590, 199 Cal. Rptr. at 779.
47. Id. at 570-73, 676 P.2d at 587-89, 199 Cal. Rptr. at 776-78.
48. Id. at 575, 676 P.2d at 590, 199 Cal. Rptr. at 779 (citing 3 R. POWELL, THE LAW OF
utility in helping to cause prompt termination of controversies before the possible loss of evidence and in stabilizing long continued property uses.”

The Warsaw court noted the analogous justification for adverse possession which “is not to reward the taker or punish the person dispossessed, but to reduce litigation and to preserve the peace by protecting possession that has been maintained for a statutorily deemed sufficient period of time.”

The supreme court in Warsaw concluded that compensating Chicago Metallic would defeat the goals which prescription is thought to further—protecting and stabilizing long continued use or possession. Neither goal, however, seems to be compromised by requiring Warsaw to pay for what he has acquired by prescription. Conditioning the protection on the payment of fair compensation to Chicago Metallic for the property right it has lost does not leave Warsaw’s long continued use unprotected since the prescriptive easement assures Warsaw’s continued use. Neither is the stability of Warsaw’s prescriptive title affected if he is required to pay the fair market value for the property right he has acquired.

It does not seem that an award of compensation in this case would have defeated the salutary goal of reducing litigation. Warsaw would not have been subjected to the repeated “claims of an alleged ‘owner’ of the property.” Moreover, even if compensation had been ordered in this case, the parties’ rights in the easement would have been conclusively established by the courts.

To be sure, denying Chicago Metallic any compensation may be contrary to the policies enunciated by the court, because such a result in effect operates to reward the taker and to punish the person dispossessed. Without compensation, Warsaw receives a windfall—the right to use Chicago Metallic’s property as a driveway at no cost to himself. Chicago

49. Warsaw, 35 Cal. 3d at 575, 676 P.2d at 590, 199 Cal. Rptr. at 779 (quoting 3 R. POWELL, THE LAW OF REAL PROPERTY § 413, 34-103 to 34-104 (1981)).

50. Id. (citing Finley v. Yuba County Water Dist., 99 Cal. App. 3d 691, 696-97, 160 Cal. Rptr. 423, 427 (1979)).

51. Id.

52. Id. Contrary to the majority’s fear that compensation in this case would subject Warsaw to multiple litigation from “alleged owners,” it seems clear that Chicago Metallic owns the underlying property.
Metallic is punished—it loses the right to use its own property and the value of its property is reduced by the value of the easement. Compensation would have lessened the reward and punishment aspects in this case, ameliorated Chicago Metallic's loss and merely required Warsaw to pay for its newly acquired property right. If, as the supreme court contends, reward and punishment are not the goals of prescription, it follows that compensation is not only permissible, but appropriate.

While neither adverse possession nor prescription compel the payment of compensation upon the creation of prescriptive title in the acquirer of a property right, it seems that neither doctrine, as applied to Warsaw, precludes such payment. Whether or not compensation had been ordered, the newly acquired property right would have remained protected. Additionally, an award of compensation is not likely to affect the amount of litigation because such procedures normally stem from the underlying property dispute. Perhaps the common law rule precluding liability should be reconsidered in light of the maxim, "[w]hen the reason of a rule ceases, so should the rule itself." The question remains, however, whether or not a court has the authority to order the acquirer to compensate the underlying property owner.

C. Equitable Power of the Court

"Equity . . . has its origin in the necessity for exceptions to the application of rules of law in those cases where the law, by reason of its universality, would create injustice in the affairs of men." In Warsaw, the declaration of a prescriptive easement without an award of compensation to the underlying property owner appears to be such an injustice. Warsaw's building was constructed by the seller to Warsaw's specifications. It was this design that created the need for Warsaw's trucks to use Chicago Metallic's property for maneuvering.

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53. Id.
54. CAL. CIV. CODE § 3510 (West 1982).
55. Estate of Vargas, 36 Cal. App. 3d 714, 718, 111 Cal. Rptr. 779, 781 (1974). In Vargas, the decedent had been a husband and father to two separate families, neither of which knew of the other's existence. The court equally divided the estate between the legal wife and the putative wife. The court noted that "[t]he laws of marital succession assume compliance with basic law (Civ. Code, § 3548) and do not provide for contingencies arising during the course of felonious activity. For this reason resort to equitable principles becomes particularly appropriate here." Id.
57. Appellant's (Chicago Metallic's) brief at page 11 stated: "Had Warsaw not designed into his building the need to use Chicago Metallic's property, this dispute never would have arisen. Without the compensation aspect of the Court of Appeals decision, Chicago Metallic
Moreover, as the court of appeal stated: “[The] conclusion that [Warsaw] had acquired a prescriptive easement cannot mask the fact that the result is a harsh one indeed.” The court continued: “A simple affirmance of the judgment would result in [Warsaw, an admitted trespasser,] acquiring practical possession of a sixteen thousand, two hundred fifty (16,250) square foot parcel free of charge.”

“Equity acts in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed.” Prescription and adverse possession evolved in an agrarian England hundreds of years ago. It was in this setting that any common law rule precluding liability to the underlying property owner developed. The present case, on the other hand, arose in a modern, urban and commercial setting. In its analogy to adverse possession, the supreme court noted that despite the fact that the doctrine may not “always [square] with modern ideals in a sophisticated, congested, and peaceful society,” title may be acquired by prescription because “this method of obtaining land remains on the books.” The court recognized the archaic nature of its decision, yet failed to exercise its equitable power to achieve the just goal that equity is uniquely suited to accomplish. In this case, compensation is certainly a remedy which would satisfy the needs of a progressive social condition and keep with modern notions of fairness and justice.

The fact that an award of compensation for a prescriptive easement is unprecedented, however, does not block a court’s use of its equitable

alone will have to pay the price of Warsaw’s mistake.” Evidence at trial showed that Warsaw’s design put his loading bays on the side of his building that faced Chicago Metallic’s property. Reporter’s Transcript at 202, lines 13-20. “[I]t was this very design which created the entire problem by rendering Warsaw’s principal loading bays virtually useless without taking space for truck maneuvering purposes from neighboring property belonging to Chicago.” Appellant’s brief at 11.

59. Id.
61. See 7 POWELL, REAL PROPERTY ¶ 1012 (1977) (noting the procedural aspects of adverse possession and tracing the history of statutes of limitations back to 1275).
62. Despite the court’s broad statement of the “common law rule” precluding liability to the underlying property owner, there is no citation to authority for such a rule. Moreover, no case has stated such a rule.
63. Warsaw, 35 Cal. 3d at 575, 676 P.2d at 590, 199 Cal. Rptr. at 779 (quoting Finley v. Yuba County Water Dist., 99 Cal. App. 3d 691, 696-97, 160 Cal. Rptr. 423, 429 (1979)).
64. Id.
65. Id.
“Equity need not wait upon precedent but will assert itself in those situations where right and justice would be defeated but for its intervention.”\(^6\) Moreover, “while sitting in its equitable capacity, a court may avail itself of powers broad and flexible and capable of being expanded to deal with novel cases and conditions.”\(^7\) The present case seems to be such a novel case or condition. By Warsaw's own admission, it was a willful trespasser, while Chicago Metallic—as the court of appeal indicated—“was at best accommodating, and at worst, negligent by failing to take affirmative action to block the trespass.”\(^8\)

**D. Encroachment Cases**

The nature of Warsaw's prescriptive right to use Chicago Metallic's property deprived Chicago Metallic of the right to use its property as planned\(^9\) and, therefore, reduced the value of its property. While the issue of compensation is without precedent, the analogous situation of encroachment is instructive. In encroachment cases, courts sitting in equity have dealt with the problem of creating an easement in favor of a party who builds a structure which “encroaches” onto the land of another. In these cases, where the encroacher's use of the land is adverse to that of the underlying property owner, courts demonstrate their broad and flexible powers of equity to fashion remedies that serve society's sense of justice.

Encroachment exists where one party builds a structure in such a way that part of that structure is on the land of another.\(^7\) Typically, the underlying property owner will seek a mandatory injunction compelling

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7. MacFarlane v. Peters, 103 Cal. App. 3d 627, 631, 163 Cal. Rptr. 655, 657 (1980). In MacFarlane, the court of appeal affirmed the trial court's exercise of its equitable power to reform a treasurer's deed and restore lots to a usable and salable form. The defendant, a purchaser at an assessment sale, bought 0.0000575 percent of an entire tract and chose a configuration of no use to himself except to prevent any use of the remaining property. This configuration was a continuous strip around the perimeter of the tract, with three equidistant strips running across the entire parcel from east to west. The buyer's only use for this configuration was to force the owner of the majority of the tract to negotiate with the buyer on his terms.
8. Warsaw, 139 Cal. App. 3d at 269, 188 Cal. Rptr. at 569.
9. Warsaw's use of the easement as a maneuvering area for trucks is incompatible with Chicago Metallic's use of the same area for a warehouse. Chicago Metallic would, however, still be entitled to use that property in any way which did not interfere with Warsaw's use of the easement.
70. D. Dobbs, Handbook on the Law of Remedies 355 (1973). Encroachment must be distinguished from situations where a structure is simply built on the wrong property. In the latter situation, the property owner rarely seeks removal of the structure; instead, the improver usually seeks compensation for the structure. Id. at 357.
the removal of the encroaching structure.\textsuperscript{71}

1. Balancing the relative hardships

Analysis in encroachment cases focuses on two concepts. First, courts maintain that no one should be permitted to take the property of another merely because he is willing to pay for it.\textsuperscript{72} Second, at the other extreme, courts recognize that the party procuring an injunction will be able to extort the builder of the structure if the court orders the removal of a substantial structure in order to protect an insignificant strip of land.\textsuperscript{73} Accordingly, courts have developed a "balancing of the relative hardships" approach.\textsuperscript{74} "Where the hardship is deemed sufficient to justify refusal of the injunction, the [encroacher], on payment of damages, acquires . . . an easement in the land on which the structure encroaches . . . ."\textsuperscript{75} In effect, a court in equity is awarding the right to use the property of another conditioned on the payment of compensation by the acquirer of that right.

The first California case granting an easement to an encroacher conditioned on the payment of damages to the underlying property owner was \textit{Ukhtomski v. Tioga Mutual Water Co.}\textsuperscript{76} In that case, the water company inadvertently constructed a concrete reservoir which encroached onto a small portion of the plaintiffs' land.\textsuperscript{77} The plaintiffs brought an action seeking both damages for the trespass to their land and an injunction restraining the water company from using the reservoir in the future. In affirming the trial court's denial of the injunction, the court of appeal observed: "It is our opinion that the court properly denied an injunction and assessed damages against the defendants to compensate plaintiffs for the injury sustained by defendants' continuing trespass."\textsuperscript{78} The court went on to grant the water company an easement "to protect them in the enjoyment of the use of the reservoir . . . for which they have been compelled to pay."\textsuperscript{79}

\textsuperscript{71} Id. at 355. \textsuperscript{72} Id. \textsuperscript{73} Id. \textsuperscript{74} Id. \textsuperscript{75} Id. at 356. In Christensen v. Tucker, 114 Cal. App. 2d 554, 250 P.2d 660 (1952), the court of appeal noted that the encroacher is adequately protected by an easement. Quieting title in the encroacher is neither necessary nor appropriate. If the encroaching structure is removed at some future time, the need for the encroachment expires and, therefore, the easement expires. \textit{Id.} at 563, 250 P.2d at 665. \textsuperscript{76} 12 Cal. App. 2d 726, 55 P.2d 1251 (1936). \textsuperscript{77} The encroachment was approximately 0.15 acres. \textit{Id.} at 727, 55 P.2d at 1251. \textsuperscript{78} Id. at 729, 55 P.2d at 1252. \textsuperscript{79} Id.
Implicit in the court's grant of an easement in favor of the water company was the condition that the water company pay damages to the underlying property owners.\(^80\) In balancing the relative hardships of the parties,\(^81\) the court noted the slight injury to the underlying property owners as compared to the water company's injury if barred from using the reservoir in the future.\(^82\) The relative hardship of the parties tipped the scales in favor of the water company.\(^83\) Consequently, the court ordered the water company to pay damages and declared an easement over the plaintiffs' property.\(^84\)

In \textit{Christensen v. Tucker},\(^85\) the court of appeal held that an injunction in favor of the underlying property owner should not be granted if the value of the encroaching structures far exceeds the value of the land occupied by those encroachments.\(^86\) The court remanded the case to determine whether or not the injury to the encroacher—if he were compelled to remove the encroaching structures from plaintiff's property—would greatly exceed the injury suffered by the plaintiff if the encroachment were allowed to remain.\(^87\)

In \textit{Miller v. Johnston},\(^88\) the plaintiffs were awarded an easement for ingress and egress to the plaintiffs' garage upon payment of compensation to the defendant. It was impractical to drive a vehicle without the easement because the plaintiffs' driveway encroached onto the defendant's land. The court noted that a denial of the easement would work a hardship on the encroachers which would have been greatly dispropor-
 tionate to any hardship suffered by the underlying property owner if access were continued.\textsuperscript{89}

2. Conditions for compensation through encroachment analysis

From the foregoing cases, it can be seen that the balancing of relative hardships approach to encroachment cases gives courts discretion to grant the underlying property owner an injunction compelling removal of the encroachment or to deny the injunction conditioned upon the payment of damages by the encroacher. In utilizing this discretion, courts have determined that certain conditions must be met in order to deny the underlying property owner injunctive relief.\textsuperscript{90} First, the encroachment must be innocent and not the result of a willful act.\textsuperscript{91} Second, where the underlying property owner will be irreparably injured by the encroachment, an injunction will issue regardless of the injury to the encroacher.\textsuperscript{92} Third, the hardship to the encroacher must be greatly disproportionate to that of the underlying property owner if the encroachment is allowed to continue.\textsuperscript{93}

\textit{a. no compensation for unwillful acts}

The first condition the courts impose concerns how the encroachment is treated. Courts will not deny an underlying property owner an injunction where the encroachment was the result of a willful act.\textsuperscript{94} Nor will the courts grant an easement to a knowing wrongdoer.\textsuperscript{95} Furthermore, where the encroacher is negligent, and that negligence is the cause of the encroachment, the encroacher is not entitled to invoke the balancing of relative hardships doctrine.\textsuperscript{96} If, however, the underlying property

\textsuperscript{89} Id. at 307, 75 Cal. Rptr. at 711. The Miller court noted that the plaintiffs were innocent of any wrongdoing and that the encroachment was not the result of any act or omission on their part. The underlying property owner would not suffer irreparable injury if the plaintiffs were allowed continued use of the encroachment area. Finally, the court noted the disproportionately great hardship to the plaintiffs if they were not allowed continued use of the area. \textit{Id. at 307-08}, 75 Cal. Rptr. at 711.


\textsuperscript{91} \textit{Miller}, 270 Cal. App. 2d at 306, 75 Cal. Rptr. at 710 (citing \textit{Christensen}, 114 Cal. App. 2d at 562-63, 250 P.2d at 665).

\textsuperscript{92} \textit{Id.} (citing \textit{Christensen}, 114 Cal. App. 2d at 562-63, 250 P.2d at 665).

\textsuperscript{93} \textit{Id.} (citing \textit{Christensen}, 114 Cal. App. 2d at 562-63, 250 P.2d at 665).

\textsuperscript{94} \textit{Christensen}, 114 Cal. App. 2d at 563, 250 P.2d at 665.

\textsuperscript{95} \textit{Id.} at 563-64, 250 P.2d at 665-66.

\textsuperscript{96} \textit{Id.} at 563, 250 P.2d at 665.
owner contributes to the situation by negligently allowing the encroacher to build an encroaching structure, "the trier of fact is entitled to weigh the hardships each may suffer, and the negligence of the one against the other."

b. removal of encroachment causing irreparable hardship

The second condition considers the nature and extent of the injury to the underlying property owner if the encroachment continues. If the encroachment causes irreparable injury to the underlying property owner, an injunction ordering its removal will be issued regardless of the injury to the encroacher.

c. disproportionate hardship

If, on the other hand, the encroachment does not work irreparable injury on the underlying property owner, the court will balance the relative hardships of the parties. Where this balance shows that the hardship to the encroacher is greater than that suffered by the underlying property owner, the encroacher will be granted an easement on the property of his neighbor. If, however, the balance favors the underlying property owner—that is, if he is compelled to remove the encroachment—that party's injury is greater than the injury to the encroacher; and an injunction will be issued compelling removal of the encroaching structure.

In sum, the encroacher has a discretionary right to an easement over his neighbor's property where the balance of relative hardships indicates that failure to acquire the easement will produce an unjust result. The Warsaw court, however, had no such discretion to declare an easement. Having met all of the common law and statutory requirements, Warsaw acquired an absolute right to prescriptive title. Thus, the question becomes whether the same factors the court considers in determining an encroacher's discretionary right to an easement are relevant to an inquiry into compensation where the right to prescriptive title is absolute.
E. Nuisance Cases

Within the context of a nuisance action brought to enjoin the operation of an otherwise lawful business, the Arizona Supreme Court has answered this question in the affirmative.105 Whereas encroachment arises from a trespass,106 nuisance refers to an unreasonable condition which substantially interferes with the use and enjoyment of one's property.107 Typically, the offended property owner will bring a nuisance action seeking to enjoin the offensive conduct of his neighbor.108 While the encroachment and private nuisance109 theories are not identical, both provide a discretionary right to relief. In each case the court balances the relative hardships of the parties and compares their relative fault before enjoining the offensive conduct.110 Public nuisance,111 on the other hand, is enjoinable as a matter of absolute right, sharing with prescription the unqualified right to relief once the legal elements of each are proved.112 The Arizona Supreme Court's resolution of the relationship between discretionary and absolute rights in Spur Industries, Inc. v. Del E. Webb Development Co.113 is helpful in defining the relationship between those rights within the context of prescription.

106. Trespass is generally defined as an intrusion that interferes with the exclusive possession of property. R. Cunningham, The Law of Property 411 (1984) defines trespass as an unexcused and knowing entry onto the land of another. Thus, both prescription, which arises from adverse use, and encroachment, which arises from a structure intruding onto the property of another, are initially trespasses.
107. Id. at 413-14. Traditionally, trespass dealt with physical intrusions while nuisance did not. Examples of nuisance are "intangible intrusions, such as noise, odor, or light alone." Wilson v. Interlake Steel Co., 32 Cal. 3d 229, 233, 649 P.2d 922, 924, 185 Cal. Rptr. 280, 282 (1982). However, clear distinctions are not always easily drawn. See Martin v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790 (1959), cert. denied, 362 U.S. 918 (1960), which held that gases and particulates containing fluoride compounds caused a trespass and not a nuisance. In Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979), the court allowed an action in trespass for lead pollution. The Borland court adopted the reasoning in Martin, and distinguished trespass from nuisance by the nature of the interest interfered with by the intrusion. The court held that "if the intrusion interferes with the right to exclusive possession of property, the law of trespass applies. If the intrusion is to the interest in use and enjoyment of property, the law of nuisance applies." Borland, 369 So. 2d at 529. The Borland court noted that "the remedies of trespass and nuisance are not necessarily mutually exclusive," id., and construed the Alabama nuisance statute as sufficiently comprehensive to find that "conduct which rises to the level of trespass to land, generally speaking, would support a nuisance action; the converse, however, is not necessarily true." Id. at 529 n.1.
108. Although the nuisance plaintiff may also seek damages, the preferred remedy is injunction. R. Cunningham, The Law of Property 417 (1984).
109. For a definition of private nuisance, see infra text accompanying note 115.
111. Id. See infra text accompanying note 116 for a definition of public nuisance.
112. See infra text accompanying notes 118-20.
The defendant, Spur, operated a cattle feedlot in an agricultural area far removed from any significant population. The plaintiff, Webb, a real estate development company, purchased land near the feedlot and began development of an extensive retirement community. The development eventually expanded to within 500 feet of the feedlot. Webb brought an action to enjoin the operation of the feedlot as a public nuisance alleging that the flies and odor from the feedlot caused an annoying and unhealthful condition for the residents of the retirement community.\textsuperscript{114}

In its analysis, the court first drew a distinction between private and public nuisance. Noting the difference to be one of degree, the court described private nuisance as "affecting a small number of persons in the enjoyment of private rights not common to the public."\textsuperscript{115} A public nuisance, on the other hand, affects a large number of persons in the enjoyment of those rights enjoyed by the community as a whole.\textsuperscript{116} The court noted that if this had been a private nuisance action, Spur would not be enjoined because of the slight injury to the individual residents.\textsuperscript{117}

The court held, however, that Spur's operation must be enjoined because a statute defined a public nuisance that is dangerous to the public health as "[a]ny condition . . . in populous areas which constitutes a breeding place for flies."\textsuperscript{118} Because public policy dictated that the only remedy for a public nuisance was an injunction, the court had no discretion not to enjoin Spur's operation.\textsuperscript{119} Because the "flies" and "populous areas"\textsuperscript{120} elements required to prove public nuisance were satisfied, and

\begin{itemize}
\item \textsuperscript{114} Id. at 179-82, 494 P.2d at 702-05.
\item \textsuperscript{115} Id. at 183, 494 P.2d at 705.
\item \textsuperscript{116} Id. at 183-84, 494 P.2d at 705-06. The Spur court noted that in an action for private nuisance, the residents at most would be entitled to damages and not injunctive relief. See also Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (damages may be the sole remedy in private nuisance case where court balances the relative hardships of the parties).
\item \textsuperscript{117} Id. at 184, 494 P.2d at 706. \textsc{Ariz. Rev. Stat. Ann.} § 36-601 (West 1974) provides:
\begin{enumerate}
\item The following conditions are specifically declared public nuisances dangerous to the public health:
\begin{enumerate}
\item Any condition or place in populous areas which constitutes a breeding place for flies, rodents, mosquitoes and other insects which are capable of carrying and transmitting disease-causing organisms to any person or persons.
\end{enumerate}
\end{enumerate}
\item \textsuperscript{118} Id. at 184, 494 P.2d at 706. \textsc{Ariz. Rev. Stat. Ann.} § 36-601(B)-(C) provides for the service of cease and desist orders and for hearings to determine whether or not the challenged practice violates state health laws. Section 36-601(C) deals with the failure of the person served to comply with the cease and desist order, and provides for "an action in the superior court of the county in which a violation has occurred, restraining and enjoining the person from engaging in further acts. The court shall proceed as in other actions for injunctions." \textit{Id.}
\item \textsuperscript{119} Spur, 108 Ariz. at 184, 494 P.2d at 706. The court noted that "before an otherwise
an injunction was a matter of absolute right when a public nuisance was found, it was irrelevant that Webb brought the "populous" to the area of the feedlot.

Although concerned with protecting the public interest, the court maintained that "courts of equity are concerned with protecting the operator of a lawful, albeit obnoxious, business from the result of a knowing and willful encroachment by others near his business." If this had been a private nuisance action brought only by Webb, the "coming to the nuisance" doctrine would have barred injunctive relief. On the other hand, if Spur had located within the foreseeable growth pattern of the city, the feedlot would have had to bear the cost of abating the nuisance to persons locating nearby. Thus, the court articulated a discretionary right to enjoin a private nuisance which considered the relative fault of the parties.

The court applied this discretion, not to the issuance of the injunction, but to determine whether Webb was required to indemnify Spur for the resulting injury. Noting that Spur was innocent of any wrongdoing, that it was required to close only because of the law's concern for the public welfare, and that Webb caused the injury by "coming to the nuisance," the court ordered Webb to indemnify Spur for any damages caused by the injunction. The court also considered the windfall to Webb, who had been able to purchase inexpensive rural property, build a community and then force an established and otherwise lawful business to leave. Hence, the Spur court allowed a defendant in a nuisance action the discretionary right to seek damages caused by the holder of an absolute right to enjoin a nuisance.

This absolute right to enjoin Spur's use of its own property is very similar to Warsaw's absolute right to a prescriptive easement over Chicago Metallic's property in the present case. Each right deprives the underlying property owner of the right to use its property. The Spur court's concern for the injury caused by the lawful exercise of this right

lawful (and necessary) business may be declared a public nuisance, there must be a 'populous' area in which people are injured." 

121. Id. at 184-85, 494 P.2d at 706-07. In discussing the "coming to the nuisance" defense in a nuisance action, the court noted that "courts have held that the residential landowner may not have relief if he knowingly came into a neighborhood reserved for industrial or agricultural endeavors and has been damaged thereby." Id. at 184-85, 494 P.2d at 706-07.

122. Id. at 185, 494 P.2d at 707.

123. Id. at 185-86, 494 P.2d at 707-08.

124. Id. at 185-85, 494 P.2d at 706-07.

125. Id. at 186, 494 P.2d at 708.

126. Id.
compelled it to vest the injured party with the discretionary right to damages for the injury caused by the injunction.\textsuperscript{127} This same concern for the injury caused by a "lawful taking" should have prompted the \textit{Warsaw} court to give the underlying property owner the discretionary right to damages for the injury caused by a court's declaration of a prescriptive right which results in a windfall for one party.

\section*{V. Proposed Remedies}

\subsection*{A. Balancing of the Relative Hardships}

A court's approach to resolving encroachment cases is premised on its discretion to declare an easement in favor of the encroacher. In exercising this discretion, courts have balanced the relative hardships to decide which party has the right to use certain property.\textsuperscript{128} In \textit{Warsaw}, there was no such discretion because Warsaw had established all of the elements necessary for prescriptive title.\textsuperscript{129} The court, however, should retain the discretion to compensate the underlying property owner for its injury.\textsuperscript{130} The discretionary analysis used in encroachment cases is well developed in case law and has provided guidance in reaching equitable results. It seems appropriate, therefore, that a similar discretionary analysis be applied to determine the propriety of compensation. That is, the court should balance the relative hardships of the parties to determine whether compensation should be paid by the acquirer of a prescriptive right.

First, the court should examine the parties' conduct that leads to the creation of the prescriptive right to determine relative fault.\textsuperscript{131} Because trespass is an essential element in prescription,\textsuperscript{132} the court should consider the conduct creating the need to trespass, and not focus on the wrongfulness of the trespass itself. In \textit{Warsaw}, the need to trespass was not innocent but was the result of Warsaw's willful act.\textsuperscript{133} Warsaw constructed a large building and placed its loading docks on the side of the building facing Chicago Metallic's property, knowing that this design left insufficient space for trucks to maneuver without trespassing on Chicago Metallic's property.\textsuperscript{134} Warsaw's awareness of this inadequacy is demon-

\begin{itemize}
\item \textsuperscript{127} See \textit{supra} text accompanying note 121.
\item \textsuperscript{128} See \textit{supra} notes 70-93 and accompanying text.
\item \textsuperscript{129} See \textit{supra} text accompanying notes 46-47.
\item \textsuperscript{130} See \textit{supra} notes 107-26 and accompanying text.
\item \textsuperscript{131} See \textit{supra} text accompanying notes 94-97.
\item \textsuperscript{132} See \textit{supra} text accompanying notes 46-47.
\item \textsuperscript{133} See \textit{supra} note 57.
\item \textsuperscript{134} \textit{Id.}.
\end{itemize}
strated by his unsuccessful attempts to acquire an easement during the original negotiations with the seller and Chicago Metallic.\textsuperscript{135}

Next, a court should consider the extent of the underlying property owner's injury that is caused by the declaration of a prescriptive right. In this case, Chicago Metallic is substantially and irreparably injured by Warsaw's easement.\textsuperscript{136} Warsaw's easement and Chicago Metallic's warehouse used the same area of Chicago Metallic's property and were therefore mutually exclusive. By granting Warsaw the use of Chicago Metallic's property to maneuver its trucks, Chicago Metallic is precluded from using the same property for its own commercial expansion. Furthermore, this restriction on the use of the property substantially decreases its commercial value.

Within the context of encroachment, these first two factors—the willfulness of the encroacher's conduct and the severity of the injury to the underlying property owner—preclude a balancing of the relative hardships and therefore preclude the encroacher from acquiring an easement. With prescriptive easements, however, these same two factors should compel the court to balance the relative hardships of the parties and should favor compensating the underlying property owner. If, on the other hand, these two factors are not present, the court need not balance the relative hardships to the parties and the acquirer of the prescriptive right need not compensate the underlying property owner.\textsuperscript{137}

In Warsaw, these first two factors were present and the court, therefore, should have balanced the relative hardships of the parties.\textsuperscript{138} The record reveals that if the easement had not been declared, the commercial value of Warsaw's building would have been destroyed.\textsuperscript{139} Because the existence of the easement is presumed, however, the relevant inquiry is into the relative hardships of the parties caused by payment or lack of payment of compensation. If compensation is not ordered, Warsaw receives a windfall—the right to use Chicago Metallic's property at no cost to himself and the right to exclude Chicago Metallic from the use of that same property.\textsuperscript{140} Chicago Metallic, on the other hand, is injured at least

\textsuperscript{135} See supra note 10.

\textsuperscript{136} See supra text accompanying notes 98-99.

\textsuperscript{137} Where the easement and the use by the underlying property owner are not mutually exclusive, the injury is less severe. For example, if Chicago Metallic also used the area in question to maneuver its vehicles, and neither Warsaw's nor Chicago Metallic's use was affected by the easement, the argument for compensation would lose much of its strength.

\textsuperscript{138} See supra text accompanying notes 100-02.


\textsuperscript{140} This windfall, or unjust enrichment, was also considered by the Spur court. See supra text accompanying note 126.
to the extent of Warsaw's gain—it is deprived of the use of its property without adequate compensation. If compensation is ordered, Warsaw would not be injured. He is merely required to pay for the property right he has acquired. While Chicago Metallic may view the loss of its property right as irreparable harm, it will receive the fair market value of the property right it has lost. Regardless of the decision as to compensation, Warsaw would not suffer any injury. In contrast, the hardship to Chicago Metallic would be great if there is no compensation. This hardship could be substantially reduced, however, by requiring Warsaw to compensate Chicago Metallic for its loss.

The foregoing analysis does not always require that one who acquires a prescriptive right over the land of another compensate the underlying property owner. It does require, however, a case by case analysis of the relative hardships to the parties. Such analysis would have avoided the manifestly unjust result in *Warsaw*.

### B. Legislative Action

It is arguable whether the legislature will act in this area given the unique facts of this case. It is unlikely that they would be repeated: A "willful trespasser" who created his need to trespass; an "innocent defendant" who, as a neighborly accommodation or through negligence, failed to prevent the trespass; and an easement that caused great hardship. Viewed from this perspective, it seems unlikely that this case will attract legislative attention.

On the other hand, the *Warsaw* decision conclusively foreclosed applying equitable principles to any case involving prescription or adverse possession. The court of appeal opinion stressed the flexible and expanding nature of equitable relief, equity's ability to fashion decrees which will do justice to all parties and equity's ability to meet the needs of a rapidly changing society. The court of appeal applied these principles to the specific facts before it and fashioned a remedy. By reversing the court of appeal, the supreme court forecloses equitable consideration in cases involving a party seeking compensation for an injury caused by creation of prescriptive title. This withdrawal, coupled with the manifestly unjust result in *Warsaw*, should compel the legislature to respond.

The relevant statute for prescriptive easements is California Civil

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141. *Warsaw*, 35 Cal. 3d at 574-75, 676 P.2d at 589-90, 199 Cal. Rptr. 778-79.
143. *Id.*
Code section 1007. This section describes the title acquired by prescription and it was relied on by the supreme court in Warsaw. Specifically, the court relied on the language, "title by prescription which is sufficient against all," to remove the issue of compensation from equitable consideration. To allow courts to consider equitable relief, the following amendment is proposed:

Upon the acquisition of prescriptive title, the court shall balance the relative hardships of the parties and, when the court concludes that the interests of justice so require, it shall order the payment of reasonable compensation to the party dispossessed, or make any other equitable order necessary to do justice to all of the parties before the court.

The effect of this amendment would be to subject prescriptive title to equitable considerations. "Interests of justice" is sufficiently broad to allow consideration of a wide range of inequitable results. "Compensation" is specified as one form of relief but is not made a limitation by including the phrase "any other equitable order necessary to do justice." Specific determinations of when relief is necessary and what form the relief should take are left to the discretion of the court and the well-developed principles of equity jurisprudence.

VI. CONCLUSION

The law concerning acquisition of property rights by prescription and adverse possession evolved in an agrarian society. Justice Grodin's concurring opinion in Warsaw noted the inability to justify the law of prescription in our modern society. "[H]ow, in today's urban society, litigation is reduced or the peace is preserved by allowing persons situated as are these plaintiffs to acquire rights in what is concededly the land of another without a cent of payment is beyond my comprehension." Legislative action may, or may not, be forthcoming. Until such time as the legislature chooses to act, however, courts must exercise their equitable power to avoid the manifestly unjust result reached in Warsaw.

Darryl S. Cordle

144. See supra note 21 for text of pertinent part of CAL. CIV. CODE § 1007.
145. Warsaw, 35 Cal. 3d at 574-75, 676 P.2d at 589-90, 199 Cal. Rptr. at 778-79.
146. Id.
148. Id.