

## RECURRENT NUISANCES AND STATUTES OF LIMITATION IN INVERSE CONDEMNATION ACTIONS

The right of a landowner to compensation in an inverse condemnation action may be as variable as the vagaries of the particular state statutory and constitutional scheme permit. When a cause of action does arise, the landowner's task is to keep his case within these provisions. If the inverse condemnation action is based on recurrent damage to real property, the claimant may find himself barred by the statute of limitations if the court decides that the cause of action accrued with earlier damage on which the statutory period has run.

In the Tennessee case of *Murphy v. Raleigh Utility District*,<sup>1</sup> a daily effluent from defendant's utility plant washed across plaintiff's land and caused severe erosion. Plaintiff alleged that the invasions had continued for several years and asked for an injunction and for damages. The court denied both remedies, holding that the one-year Statute of Limitations governing inverse condemnation actions<sup>2</sup> barred any relief. In the principal case, the result should have depended on the court's determination of when the recurring invasions resulted in such a substantial deprivation of property rights that there was a taking which gave rise to a cause of action for inverse condemnation. The court held that the recurrent invasions gave rise to only one cause of action based on the first taking, and not to successive causes of action with each subsequent invasion after the first taking, but the rationale for its opinion is not clear, and the court does not indicate when the plaintiff's property was first taken.

The answer to the question of when the "taking" occurs ordinarily determines when the Statute of Limitations begins to run. While the concept of a "taking" has received widely differing judicial interpretations, the view that a taking requires an actual physical expulsion, or at the other extreme, that it only requires an interference with a property right, has been largely discredited.<sup>3</sup> Most courts now hold

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1. 213 Tenn. 228, 373 S.W.2d 455 (1963).

2. Tenn. Code Ann. § 23-1424 (1955): The owner of land shall, in such cases, commence proceedings within twelve (12) months after the land has been actually taken possession of, and the work of the proposed internal improvement begun. . . .

3. See Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 Wis. L. Rev. 1 (1966).

that while there need be no actual physical expulsion, the interference with the property right must be substantial and usually permanent in character.<sup>4</sup> Variations among these views probably reflect the confusion between "property" as the right to use and dispose of land and the popular concept of "property" as the land itself. While either of these interests might conceivably be involved in a condemnation action, "property" as a right to use and dispose of land is probably a more useful concept in this context because in the inverse situation the land is not physically appropriated by the condemning authority.

*Murphy* does not indicate when the taking in that case occurred. If the majority view were followed, the cause of action arose with the first permanent impairment of the owner's right to use and dispose of his property. Physical damage to the property itself would then be required, especially since the complaint in *Murphy* was based on nuisance, and such an action requires substantial injury.<sup>5</sup> However, a finding of a taking was not crucial in *Murphy* because the court placed its decision on a construction of the Statute of Limitations and did not choose to reach the taking issue.

Was the court's decision the most desirable solution to the problem of recurring damage in inverse causes? There is considerable authority for the view that a cause of action resulting from a recurrent nuisance is barred only by the running of the statute against each invasion.<sup>6</sup> Perhaps the choice between this theory and the *Murphy* result should depend in some part upon the kind of relief sought. For example, in the *Murphy* case the plaintiff was denied both damages and injunctive relief to abate the nuisance, impliedly giving the defendant a prescriptive right to continue the nuisance. Probably for this reason some cases<sup>7</sup> have held that the Statute of Limitations cannot be pleaded to an action for injunctive relief against a nuisance. Similarly, other cases<sup>8</sup> would allow successive actions for damages when the defendant could have abated the nuisance at any time but did not do so.

While the rationale of the *Murphy* decision is not clearly disclosed by the opinion, the Tennessee supreme court by implication in that

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4. *East Coast Lumber Terminal v. Town of Babylon*, 174 F.2d 106 (2d Cir. 1949).

5. *Smith v. Erie R. Co.*, 134 Ohio 135, 16 N.E.2d 310 (1938).

6. *Anderson v. Town of Waynesville*, 203 N.C. 37, 164 S.E. 583 (1932).

7. *Vowinckel v. N. Clark & Sons*, 216 Cal. 156, 13 P.2d 733 (1932); *Barrow v. Gaillardanne*, 122 La. 558, 47 So. 891 (1908).

8. *Pinkerton v. Pritchard*, 71 Ariz. 117, 223 P.2d 933 (1950); *Burleyson v. Western and Atlantic R.R. Co.*, 91 Ga. App. 745, 87 S.E.2d 166 (1955).

## NOTES

decision and explicitly elsewhere<sup>9</sup> has recognized new causes of action for recurrent damage only when the damage was negligently caused and unanticipated. The recurrent damage in *Murphy* was characterized as intentional and apparent. Thus, in a case<sup>10</sup> in which a mountainside stream was negligently blocked by debris from defendant's pipeline operations and recurrently flooded plaintiff's property, the court held that the cause of action survived the bar of the one-year statute even though the first flooding occurred previous to one year before filing. The court emphasized that the later floodings were "unanticipated eventualities" from the plaintiff's point of view, but it is hard to extend that reasoning past the first or second floodings. This type of reasoning is not particularly valuable in cases of recurrent nuisance for the simple reason that it is not sufficiently oriented towards reaching just decisions in cases like *Murphy* in which the damage was not negligently caused.

Resolving the time barrier issues raised in the *Murphy* case is difficult, since a holding either way may be unjust to one or the other of the parties when considerable time has elapsed since the date of the first damage. One partial solution, which will help to avoid retroactive judicial determinations of the effect of the limitations statute, is simply to provide for a longer statutory period when the inverse action is based on recurring invasions of property. Otherwise, unless a court takes the relatively artificial approach of the *Murphy* opinion, it will have to deal with each case on the equities.

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9. *Donohue v. East Tennessee Natural Gas Co.*, 39 Tenn. App. 438, 284 S.W.2d 692 (1955).

10. *Id.*

