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Adverse Possession - Extension of Boundaries or Fences - Mistake as to Boundaries

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RECENT CASES

ADVERSE POSSESSION — EXTENSION OF BOUNDARIES OR FENCES — MISTAKE AS TO BOUNDARIES — Defendants had occupied and worked land up to a concrete wall and rockery since May 28, 1949. Their grantor, mother of one of the defendants, occupied and claimed the whole lot to the wall from 1926 to 1949. Plaintiff recognized the wall as the true boundary until a 1952 survey showed that the wall encroached on plaintiff's lot approximately nine inches for the length of the boundary. The supreme court *held,* that where real property is occupied continuously under intentional claim of right for the statutory period of ten years, to a barrier thought to be the true boundary, it is held adversely. *Niven v. Sheehan,* 278 P.2d 748 (Wash. 1955).

The rule that possession for the statutory period under claim of right[1] due to mistake ripens into title by adverse possession has been applied in other states with varying restrictions as to requirements of proof of hostile intent to hold against the true owner.[2] Courts requiring proof of hostile intent argue that without such intent the possessor holds the land in implied subordination to the true owner.[3] Consequently, there is a presumption that the claimant receives title to no more land than is actually his own unless he has a positive and intentional hostile claim against the property of his neighbor.[4] Therefore, in order to refute the presumption of subordination he must unequivocably claim all the land within the tract he fences, maintains and occupies.[5]

Courts that do not require a claimant to prove his intent to hold against a true owner reason that an enclosure and maintenance of a parcel by a claimant for the statutory period, believing the property to be his, is a holding intended to exclude all others including the true owner.[6] The claimant, not realizing his enclosure exceeds the limits of his deed, naturally defends the entire tract with uniform vigor.

Which class of claimants has the better right to protection from the courts: claimants entering and holding with a consicous disregard of any adverse rights, or claimants who mistakenly believe all the tract they hold is their own? Manifestly, the wrongful taker's rights should not be protected where those of an innocently mistaken holder would be unprotected.[7] The requirement of proof of intent protects wrongfully hostile claimants and those

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1. Peters v. Gilland, 186 S.W.2d 1019 (Tex .Civ. App. 1945) (claim of right is holding in belief that the land occupied belongs to the possessor); Young v. Newboro, 32 Wash.2d 141, 200 P.2d 975, 976 (1948) (dictum).

2. There are states holding that the claimant must prove his hostile intent. *E.g.,* Urschel v. Garcia, 164 S.W.2d 804 (Tex. Civ. App. 1942); Steinbruck v. Babb, 148 Kan. 688, 84 P.2d 907 (1938) (goes even further, requiring notice to the true owner of hostile intent). Certain states raise presumptions in favor of the true owner; for example, that occupation by anyone but the true owner is in subordination to the true owner. Winn v. Abeles, 25 Kan. 85, 10 Pac. 443 (1886); Morgan v. Jenson, 47 N.D. 137, 142, 181 N.W. 89, 90 (1921) (dictum). *Contra,* see Rountree v. Jackson, 242 Ala. 190, 4 So.2d 743, 746 (1941); Cooper v. Tarpley, 112 Ind. App. 1, 41 N.E.2d 640, 643 (1942). See 4 Tiffany, Real Property §1159 (3d ed. 1939) (on this topic generally).

3. Peterson v. Sucro, 101 F.2d 282, 287 (4th Cir. 1939) (dictum) (interpreting North Carolina law).

4. *Ibid.*

5. Guy v. Lancaster, 250 Ala. 226, 34 So.2d 10 (1948).

6. Stephens v. Clark, 211 N. C. 84, 189 S.E. 191, 195 (1937) (dictum).

7. See 4 Tiffany, Real Property §1144 (3d ed. 1939).

willing to perjure themselves as to their true intentions, and denies protection to honestly mistaken takers who testify in good faith.[8]

Generally, a claim must be supported by acts plainly indicating an intent to claim.[9] Among conditions which will negative an intent to claim in any jurisdiction are: an agreement that the mistaken boundary is temporary and not the true line;[10] or a disavowal of claim by an expression of willingness to return the property to the true owner.[11]

The Supreme Court of North Dakota has never decided whether a claimant to real property held as a result of a mistaken boundary must prove his hostile intent to acquire title.[12] Of course, the other requirements of adverse possession, *viz.*, that it be open, actual, notorious, exclusive, continuous and uninterrupted must concurrently exist with the claim of right.[13] A North Dakota statute further provides that the land occupied must be substantially enclosed or that it must be cultivated or improved.[14] The North Dakota Court has decided that the claimant, ". . . must unmistakably indicate an assertion of claim of exclusive ownership,"[15] and that, ". . . every reasonable intendment should be made in favor of the true owner."[16] Thus it appears that in North Dakota a mistaken adverse claimant would have to prove his hostile intent to claim.[17] It is submitted that both logic and reason support the contrary rule; therefore in claims of adverse possession due to mistake in boundaries hostility should be presumed.[18]

KIRK B. SMITH

AUTOMOBILES — CONDITIONAL SALES — VENDOR'S LIABILITY FOR TORTS OF VENDEE — Plaintiff insurance company issued a garage-liability policy to a conditional vendor, and thereafter brought an action for a declaration of nonliability in regard to an automobile collision caused by the negligence of a defendant, a conditional vendee. It was *held* that an automobile dealer who purchased a used automobile and resold it under a conditional sales contract was not an "owner" within the meaning of Iowa Owner's Responsibility Law,[1]

8. Despite logic favoring a presumption of hostility, many courts maintain that a possessor must prove his hostile intent to claim. Winn v. Abeles, 25 Kan. 85, 10 Pac. 433 (1886); Yatczak v. Cloon, 313 Mich. 854, 22 N.W.2d 113 (1949); Missouri City Coal Co. v. Walker, 188 S.W.2d 39 (Mo. 1945); *cf.*, Anson v. Tietze, 354 Mo. 553, 190 S.W.2d 193 (1945) (after claimant set forth a prima facia possessory case, it devolved upon the title holder to come forth with the evidence).

9. O'Brien v. Schultz, 278 P.2d 322 (Wash. 1954).

10. Beck v. Loveland, 37 Wash.2d 249, 222 P.2d 1066 (1950).

11. Bell v. Barrett, 76 S.W.2d 395 (Mo. 1934); O'Brien v. Schultz, 278, P.2d 322, 329 (Wash. 1954) (dictum).

12. But *see* Bernier v. Preckel, 60 N.D. 549, 555, 236 N.W. 243, 246 (1931) ("acquiesence" and "adverse possession" used synonomously); Patton, 3 Am. Law. Prop. §15.2.

13. Rovenko v. Bukovoy, 77 N. D. 741, 754, 45 N.W.2d 493, 499 (1950) (dictum).

14. N. D. Rev. Code §28-0111 (1943).

15. Enderlin Investmen Co. v. Nordhaugen, 18 N. D. 517, 524, 123 N.W. 390, 392 (1909) (dictum).

16. Rovenko v. Bukovoy, 77 N. D. 741, 753, 45 N.W.2d 493, 498 (1950) (dictum).

17. *But see* Bernier v. Preckel, 60 N. D. 549, 555, 236, N.W. 243, 246 (1931).

18. For a well reasoned discussion of statutory adverse possession, see Sullivan v. Groves, 42 S.D. 60. 172 N.W. 926 (1919) (note especially the concurring opinion of Whiting, J. at 930, and the similarity of New York Code of Civil Procedure §372 (1880), now New York Civil Practice Act §40 (1939). to N. D. Rev. Code §28-0111 (1943).

1. Iowa Code 1950, §321.1(36) "Owner means a person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee