

In The Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO
CASE No. 05CA008824

WILLIAM EVANICH, et al.
Appellees,

v.

STEVEN BRIDGE, et al.
Appellants.

REPLY BRIEF OF APPELLANTS
STEVEN and MARGARET BRIDGE

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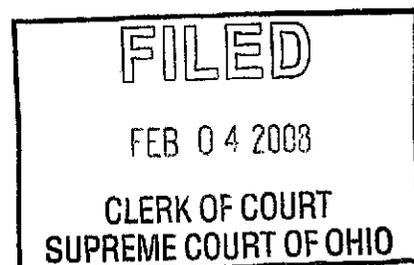


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I.

INTRODUCTION

The appellants, Steven and Margaret Bridge, and appellees, Roselyn and William Evanich, have a common starting point. Both Bridge and Evanich agree that a neighbor's mere possession of another's property is not enough to justify gaining title by adverse possession. And both concede that for possession to be adverse there must be intent by the possessor to claim title to the land he occupies.

The issue presented is the meaning and function of the phrase "intention to claim title". The phrase was first used by this court more than 150 years ago in *Lane v. Kennedy* (1861), 13 Ohio St. 42, to describe the character of possession that is adverse.

Is the phrase simply an equivalent of possession or does it have a meaning and significance apart from the adverse and hostile requirements necessary to establish title by the doctrine of adverse possession?

II.

ARGUMENT

The Role of Intent

Appellees say that intent has no real role to play. They argue that intent means no more than the outward or physical attributes of actual possession carried on by the claimant. They look to this court's decision in *Yetzer v. Thoman* (1866), 17 Ohio St.130 as having settled the matter.

Yetzer said that intention had no role when coming to a determination that the claimant's occupation was adverse. Rather, the court co-opted the Connecticut Supreme Court's language that "[T]he possession alone and the qualities immediately attached to it are (to be) regarded" to determine a successful adverse entry. Furthermore, in adopting

Connecticut's formulation, the *Yetzer* court in effect said that purposes, motives, guilt or innocence of the claimant have no relevancy. Adverse possession is to be determined by seeing what is on the ground.

The evolution to the use of objective evidence of "possession alone", like other rules of adverse possession, had its origin in England.

According to one commentator,¹ adverse possession in England arose at time when ownership was based on actual possession and not on the concept of title. Lengthy possession was perhaps the best evidence of ownership. But these concepts were reversed. In time, possession did not establish ownership: instead it served as tangible evidence of the occupant's entitlement to ownership.

Later, ownership was identified by title. The true title owner no longer was fixed to his lands but he was expected to inspect his lands and throw out trespassing occupants. The claimant's activities while in actual possession served as notice to the true owner, who, if he failed to act, lost his right of ownership.

The claimant need only show he used the land in a manner that would be expected of an owner of similar property. Actual possession and some sufficient activity over a required period served as constructive notice to the owner that he must take action or lose his land. Actual possession and activity also served to create an inference of an intent to claim title. Actual, exclusive possession creates a presumption that it is adverse and the claimant is not required to produce evidence of his intent.

According to the *Yetzer* Court the element of intent to claim title expressed in *Lane v. Kennedy* has no significance. It has been swallowed and made an analog of the adverse and hostile elements of the doctrine. The "adverse" requirement was to be

¹ John G. Sprankling, An Environmental Critique of Adverse Possession, 79 Cornell L. Rev. 816, 821-826.

measured only by objective conduct of actual possession and activity. The fact that the occupier never intended to be on another's property and that he took especial efforts for the precise purpose of staying within his on land mattered for nothing.

The reason given for not taking into account a person's intent is the idea that it would be too difficult for a court to determine what was going on in his mind when he entered the property. Looking at objective evidence would simplify the court's work. As part of his case, the courts would only require the claimant establish objective acts of ownership.

Courts routinely wrestle with determining intent. Contract law provides a ready example. Courts are often required to determine whether parties intended to enter into a contract. Coming to judgment about a person's intent is the everyday stuff of criminal law.

In any event, appellants are not suggesting that in order to make a successful case, the claimant has to prove his "bona fides" in coming onto the owner's property. Instead, if there is evidence that the claimant intended to keep to his own property it should be considered along with other evidence diluting the notion that his purpose was to own the land wherever it may have been and regardless of who owned it.

Accordingly to Sprankling the fixing of intent based on objective evidence of actual possession coupled with the assumption of an owner's constructive notice works well in agricultural settings where the owner-farmer would take note of another farmer planting on his acreage. But the assumption of constructive notice arising from the

activities of an occupier using land in a similar manner does not fit neatly with boundary line disputes between adjacent homeowners.² There are several reasons for this.

First, side-yard incursions are almost always minimal and unobtrusive. In addition, the claimant's use of the property in the same manner as the homeowner next door can not fairly be expected to bring home notice of the incursion to the owner. There is usually nothing suspect about adjoining neighbors doing weekend projects of putting decorative material, landscaping and similar improvements near property lines. But these ordinary side-yard boundary disputes are the most common application of adverse possession.³

Actual Possession and An Inference of Intent

This controversy came about, much like most adverse possessions, from mistakes caused by uncertainty over boundary lines.⁴ And most of these boundary incursions between neighbors are unintended. One commentator aptly describes these as the small-potatoes cases of adverse possession.⁵ They arise when neighbors take short cuts to determine the limits of their property. The mistake results in an unintended possession. The distinction between "bad faith" and "good faith" only describes the nature of the mistake. The issue still remains whether the claimant ever intended to claim title.

But an unintended, mistaken possession is precisely where positive evidence of intent plays a role. It provides substance about how and why the encroachment occurred. And whether the neighbor's purpose, as evidenced by his actions and declarations, was to remain within the true lines of his own property.

² Sprankling, at 826.

³ Id at Fn. 45, 46. See also, Richard Helmholz, *Adverse Possession and Subjective Intent*, 61 Wash. U.L. Q. 331, 340-41, fn 36-45

⁴ Richard A. Posner, *Economic Analysis of Law* 78 (2003)

⁵ Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 Geo. L. J. 2419, 2447.

Facts of actual exclusive possession and use create a presumption, an inference that the claimant intended to claim title. With the aid of this presumption he is not required to affirmatively prove his intent in order to successfully gain title to the owner's land. But positive proof of a lack of intent can be used to rebut the presumption. If not, then the presumption is one of law, is absolute and is non-rebuttable.

Uncontroverted evidence that the claimant always wanted to remain on his property and not enter the adjoining lot is important. Probative evidence of intent should be considered, if available, to take away the presumption in favor of the claimant that from objective conduct it is inferred that he possessed the land with "intent to claim title".

Appellants are not arguing that evidence of the claimant's intent should be another hurdle for him to overcome or that it is a necessary element in his case. Instead, appellants contend that evidence contrary to a presumed intent to claim title, if available, should be used like any other evidence. While it is not an element to be proven in order to establish adverse possession, there is no reason why it can not be considered by the fact finder when looking at all of the circumstances that gave rise to the controversy.

A Policy of Attributing Fault Could Facilitate Resolution of Neighborhood Boundary Disputes

The side yard encroachments can occur in several ways. A neighbor may have been simply indifferent about the extent of his lot. Or he may have been negligent in not taking available measures to determine the extent of his property.

On the other hand, there is the neighbor who, despite taking all measures to determine his lot lines and remain within them, nevertheless encroaches.

The distinction does matter.⁶ The neighbor who fails to obtain a survey, have a surveyor identify lot line pins, or doesn't even bother to go the recorder's office to see the plat map should not be rewarded with a slice of the neighbor owner's property. To do so would create a disincentive to the use of relatively low cost surveys and modern day recording procedures that give ready access to recorded description and maps.

The sanction of losing improvements and not gaining title by adverse possession would serve to encourage the use of legitimate techniques and discourage cavalier and haphazard actions that inevitably give rise to trouble. In other words, if the encroachment occurred through fault, the loss should be put to the claimant. If the claimant understands he may well lose, he'll be more apt to resolve and negotiate his differences.

There would be little concern about rewarding the so called 'bad faith' claimant, if such a person exists. The intentional taker obviously could not establish that he used any responsible measures that resulted in his mistaken possession. In any event, the "bad faith" actor would be expected to feign ignorance in order to seek cover by mimicking as a "good faith" claimant.

However, the neighbor who used all reasonable means, nevertheless, would not be penalized. Though not dealing with adverse possession, an example of lack of fault is illustrated in *Pahl v. Ribero*, (1961), 14 Cal. Rptr. 174; 193 Cal. App.2nd 154, where the defendant's building encroached because of lateral subsidence of the land. Another example is demonstrated in *Ramirez v. Mookini* (1962), 24 Cal. Rptr. 354; 207 Cal. App.2nd 42, an action involving an encroachment that occurred through the fault of a surveyor and not neighbor homeowner.

⁶ Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession* (1984) Northwestern Univ. L. Rev. 1122, fn 50. This discussion draws on Merrill.

The owner's sting of having to lose land may be less painful to him if it is established that it arose under circumstances beyond the neighbor's control. It may encourage him to negotiate with his neighbor.

Evanich was cavalier and culpably negligent when he embarked on his landscape project. According to him, he had earlier identified surveyor pins along his side lot line. However, after his lot had been rough graded, he could identify only one of the pins. He mistakenly assumed that a tomato stake served the place of the other survey pin. As a result, his "actual possession" of part of Bridge's lot was unintended.

Evanich's unintended possession occurred through his own fault for not having assured himself of the true placement of his lot line. His purpose or intention in running a string between the marker and tomato stake was to assure himself that his activities remained on his own lot. He could have taken the reasonable measure of having the surveyor come identify and replace the missing marker. Not having taken even minimal precautions, Evanich chose the peril of losing a portion of his landscaping material.

Policy Goals of Adverse Possession And Neighborhood Boundary Disputes

Appellees reiterate at length some of the purposes and goals used to justify the doctrine's notion of taking one's property without compensation. Treatment of these goals are outlined by Merrill and Strake.⁷

According to Jeffrey Stake, most of these justifications have lost any currency they may have had. The values of straightening up titles and reducing litigation seem to have been the most promising, but even they can be dismissed.

⁷ Merrill, Property Rules, Liability Rules and Adverse Possession, 79 Northwestern Univ. L. Rev. 1122, 1128-1133. And Jeffrey Stake, Uneasy Case for Adverse Possession, 89 Georgetown L. J. 2419.

Regarding reduction of litigation, the doctrine's requirement that a claimant establish a number of complex elements provides fertile ground for lawyers and invites protracted litigation. One scholar emphasized that the doctrine of adverse possession itself brings up unrecorded interests and results in a mechanism both for creating a continuing source for litigation over those interests as well a tool for clearing property of old claims.⁸

The reduction of stale claims can be better treated by the Marketable Title Act which provides for the clearing of title back a period of years in order to strip off competing interests. The availability and low cost of title insurance also provides security against clouds on titles.

The idea of granting title to a claimant because he has stood on the property and put it to use is a product of 19th century America's drive to develop all lands. It was a consequence of attaching much importance to using and improving a largely undeveloped country.

Now, emphasis is placed on preserving openness and non-use of land which is seen as a value to be observed. This is true with respect to preserving wild lands. See Sprankling, *An Environmental Critique* supra at p. 841-849 discussing the rise of the developmental model of adverse possession. And it is readily practiced in residential subdivisions throughout Ohio where owners spend money and many hours over their large, uninterrupted expanses of lawn between homes.

According to Jeffery Stake, the reduction of uncertainty over boundaries is the major benefit of the adverse possession doctrine. But it brings increased litigation at great

⁸ Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse possession*, Spring 2006 Northwestern Univ. L. Rev. This discussion is taken largely from Fennell's article.

cost with mixed results. Stake believes that abolishing the use of adverse possession would not create unmanageable costs to resolve the uncertain boundaries. The costs would be no more than that of an accurate survey. According to Stake, adverse possession was very important in quieting titles. “[B]ut it is a dull tool that generates uncertainties of its own and, on occasion, unfairly deprives the rightful owners of their title. The availability of title insurance, use of marketable title acts . . . and low cost surveys makes the doctrine superfluous and its elimination . . . would lead to even more careful recording of transactions.” Stake, *The Uneasy Case*, at pp.2446-2449.

Thomas Merrill in his article on adverse possession observes that the doctrine serves to deter owners from ignoring making use of their properties in such a manner so as to gain effective notice an encroaching use. This may work well in an agricultural setting where farmers can be expected to walk their lands and discover an occupier who is truly engaging in a productive use by growing crops on the farmer’s land.

But it fails when applied to the urban homeowner. Most encroachments in this setting are minimal, almost to the point of not being detectable without a survey. Besides, the homeowner would not likely take notice of an adjoining owner doing the neighborly thing of placing landscaping about his property. Furthermore, the owner would have to constantly monitor his property and run to his lot line at the first notice of his neighbor’s approach. This is plain fanciful.

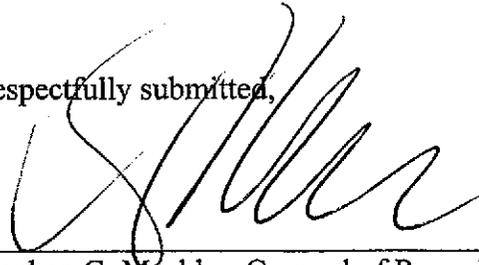
Possession of land by itself takes nothing from the owner. In order that possession can result in loss by the owner, it must be adverse. In order to be adverse, possession must be done with an intent to claim title to the land. Actual, exclusive, continuing possession and use provides an inference that the claimant held the property with an intent to claim title from the owner. This presumption allows the claimant to avoid putting on affirmative evidence of intent. But it is a presumption of fact, not law. It can be rebutted with positive evidence, if available, that the claimant had a contrary intent, that is, an intent to remain on his own land and hold to the true boundary.

The appellees believe that actual possession is conclusive evidence of intent. If that is true then it is no longer necessary to prove “adverse” and “hostile” possession in order to move a boundary line. Proof of any act of actual possession would be sufficient.

Under their view, there would be no need to refer to plat maps and recorded surveys of lots which clearly identify boundaries. Instead, if we see an amorphous line that meanders through bushes and beds of ivy interspersed with flat stone, coupled with some act of possession, that is enough to take away an owner’s property and create a new boundary line. The reason for putting the landscaping where it lay would have no probative value. The law would then be described as acquiring title by possession (or more appropriately, by unintentional possession) rather than of acquiring title by adverse possession.

Appellants ask that the judgment of the court of appeals be reversed and judgment entered for the appellants.

Respectfully submitted,



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