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Adverse Possession - Boundary Lines - Element of Hostility

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RECENT CASES

ADVERSE POSSESSION—BOUNDARY LINES ELEMENT OF HOSTILITY

Two tracts of land were formerly owned by defendant's father, the east six-acre tract was sold to his son-in-law, the plaintiff's father. The grantor paced off what he thought was his width of property and erected a fence which remained some thirty-five years. The fence was considered to be the boundary line until the defendant, after this dispute arose, conceded the survey line to be the true boundary line. The Supreme Court of Arkansas *held,* two justices dissenting, that the defendant's conduct did not affect his title, for it had vested many years before by adverse possession. The dissent was grounded on the subjective theory that there had not been the necessary requirement of hostility to vest title by adverse possession. *Tull v. Ashcraft,* 333 S.W.2d 490 (Ark. 1960).

In boundary line disputes generally, courts have held that an admission of the true boundary line will not divest an adverse possessor of title after the statutory period has run,[1] nor will submission to a survey to find the true boundary divest one of his adverse title.[2] It is the theory of some courts that the mutual recognition and acquiescence of a fence as a boundary make it the true one, after the running of the statutory period.[3] There are two theories applied by the courts in determining adverse possession cases with respect to boundaries. The older and minority views follows the subjective theory in which there must be actual notice given to the adjoining owner of an intention to hold adversely.[4] The majority of the courts follow the objective theory,[5] but do concede that the elements of adversity must be strictly construed and governed rigidly.[6] It is generally recognized under the objective

1. Stroud v. Snow, 168 Ark. 555, 54 S.W. 2d 693 (1932); Smith v. Vermont Marble Co., 99 Vt. 384, 133 Atl. 355 (1926); Mugass v. Smith, 33, Wash. 2d 429, 206 P. 2d 332 (1949).
2. Tabor v. Craft, 217 Ala. 276, 116 So. 132 (1928); Fatic v. Myer, 163 Ind. 401, 72 N.E. 142 (1904); Mann v. Schueling, 68 S.W. 292 (Tex. 1902).
3. Barbaree v. Flowere, 239 Ala. 510, 196 So. 111 (1940); Woll v. Costella, 59 Idaho 569, 85 P. 24 (1938); See Berneir v. Preckel, 60 N.D. 549, 236 N.W. 243 (1931).
4. See, **e. g.,** Johnson v. Szumowscz, 63 Wyo. 211, 179 P.2d 1012 (1947).
5. Wood v. Nelson, 358 P.2d 312 (Wash. 1961); see Bichler v. Ternes, 67 N.D. 618, 248 N.W. 185 (1933); see Lehnan v. Smith, 49 S.D. 556, 168 N.W. 857 (1918).
6. Meyers v. Canutt, 242 Iowa 692, 46 N.W.2d 72 (1951).

theory that such notice can be implied from unequivocal acts of ownership.[7] On the other hand, the courts following the subjective theory hold that there must be some real and tangible assertion of ownership,[8] rather than a mere quiet acquiescence, the apparent theory being one can gain no title which he has not asserted.

The basic concept of adverse possession involves acquisition of title by running of the Statute of Limitations as opposed to the true owners action of ejectment. North Dakota however, appears to follow the majority view and apply the objective theory that possession is presumed adverse and claim of title is to be inferred from the fact of possession.[9] The alleged requirements of claim of title and hostility of possession mean only that the possessor, or those holding under him, must use and enjoy the property continuously for the required period as the average owner would use it without the true owner's consent.[10] Possession meeting these requirements is in actual hostility to the true owner's rights irrespective of the possessors actual state of mind or intent.[11] The objective theory is the most practical. The conduct of the adverse party should govern and not the thoughts or reasons buried within his mind. The true owner, by a very limited vigilance, may protect his interest, and has an action in ejectment for a certain statutory period.

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ADVERSE POSSESSION — OIL AND GAS — ADVERSE POSSESSION OF OIL AND GAS ROYALTIES IN NORTH DAKOTA. One Skarda owned land in North Dakota. In 1934 he mortgaged the property to the land Bank Commissioner, who later assigned the mortgage to the Federal Farm Mortgage Corpora-

7. Butler v. Hines, 101 Ark 409, 142 S.W. 509 (1912); Bird v. Stark, 66 Mich. 654, 33 N.W. 754 (1887); Krumm v. Pillard, 104 Neb. 335, 177 N.W. 171 (1920).

8. Evert v. Turner, 784 Iowa 1253, 169 N.W. 625 (1918); Hess v. Riedler, 117 Ala. 525, 23 So. 136 (1898); Foltz v. Brokhage, 151 Neb. 216, 36 N.W. 2d 768 (1949).

9. See N.D. Cent. Code § 28-01-04 (1961). "No action for the recovery of real property or for the possession thereof shall be maintained, unless the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within twenty years before the commencement of such action." N.D. Cent. Code § 28-01-11 (1961).

10. See Haney v. Breeden, 100 Va. 781, 42 S.E. 916 (1902), "while the intension to claim title must be manifested, it need not be expressed."

11. Carpenter v. Coles, 75 Minn. 9, 77 N.W. 424 (1898) "This adverse intent to oust the owner and possess for himself may be generally evidenced by the character of the possession and the acts of ownership of the occupant."