



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 11 | Number 1

Article 19

12-1-1932

Real Property -- Adverse Possession of Separate Interests in Land

W. E. Anglin

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

W. E. Anglin, *Real Property -- Adverse Possession of Separate Interests in Land*, 11 N.C. L. REV. 105 (1932).

Available at: <http://scholarship.law.unc.edu/nclr/vol11/iss1/19>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

In North Carolina, while previously no situation has arisen comparable to the principal case, the court has strongly inclined towards upholding and enforcing the public duty of the utility to serve all similarly situated on equal terms.²⁴ Was the plaintiff in the principal case "similarly situated?" It has further been held that the company may refuse to serve those who will not comply with its reasonable rules and regulations.²⁵ Was not the requirement for an additional deposit "reasonable" under the circumstances?

It would seem that the court has displayed extraordinary solicitude for the subscriber. The decision is partly justified by the requirement of payment in advance, but how is the company to protect itself against nonpayment of additional charges, such as long distance calls?

CECILE L. PILTZ.

Real Property—Adverse Possession of Separate Interests in Land.

The plaintiff occupied land by adverse possession under color of title for the statutory period. The defendant claimed the timber growing on the land, basing his claim on a recorded timber deed given prior to the time the plaintiff took possession of the land. *Held*: The adverse possession of the land did not conclude the prior lessee of the timber upon the land.¹

Under both the common law and the Georgia Code "the right of the owner of lands extends downward and upward indefinitely."² Yet, there may be ownership in fee of several distinct interests in connection with a single tract of land. One person may own the surface of the land, another the buildings, another the timber growing on the land, and still another the minerals beneath the surface.³ Therefore, one having title to the surface may have valid claims as-

²⁴ *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319 (1898); *Clinton-Dunn Telephone Co. v. Carolina Tel. & Tel. Co.*, 159 N. C. 8, 74 S. E. 636 (1912); *S. & S. Ry. Co. & N. C. Pub. Service Co. v. So. Pr. Co.*, 180 N. C. 422, 105 S. E. 28 (1920).

²⁵ *Woodley v. Carolina Tel. & Tel. Co.*, 163 N. C. 284, 79 S. E. 598 (1913).

¹ *McNeill v. Daniel*, 164 S. E. 187 (Ga. 1932).

² 2 BL. COMM. 18; GA. CODE ANN. (Michie, 1926) §3617.

³ *Fox v. Pearl River Lumber Co.*, 80 Miss. 1, 31 So. 583 (1902); *Walters v. Sheffield*, 78 Fla. 505, 78 So. 539 (1918).

served against him for the timber growing on the surface,⁴ and for minerals beneath the surface.⁵

Timber may be severed from the surface by deed, and an estate in fee, a corporeal hereditament, created therein.⁶ In that event, possession of the surface by an adverse claimant is not necessarily adverse to the owner of the timber.⁷ For the limitation to run against the timber owner, there must be such possession of the timber evidenced by acts of ownership and control as would amount to a separate adverse claim to the timber.⁸

Analogous cases are found where the title to mineral rights has been severed from the title to the surface, and the adverse possessor of the surface claims title to the minerals. In such cases the courts hold that the adverse possessor must take actual possession of the minerals by operating mines, before the limitation will run against the mineral owner.⁹ A recent case in Kentucky holds that where minerals are severed from the surface by conveyance, the surface owner holds possession of the minerals in trust for the mineral owner, and no limitation can run against the latter.¹⁰ But Louisiana takes the view that deeds conveying mineral rights convey only "real rights" in the nature of servitude, which may be lost by non-use for ten years to the possessor of the surface who gets title to the minerals by prescription.¹¹

⁴ *Southwestern Lumber Co. of N. J. v. Evans*, 275 S. W. 1078 (Tex. Civ. App. 1925); *Prince v. Frost-Johnson Lumber Co.*, 250 S. W. 785 (Tex. Civ. App. 1923).

⁵ *Claybrooke v. Barns*, 180 Ark. 678, 22 S. W. (2d) 390, 67 A. L. R. 1436 (1929); *Kentucky Block Cannel Coal Co. v. Seawell*, 249 F. 840, 1 A. L. R. 556 (C. C. A. 6th, 1918); *Green v. West Texas Coal Mining and Developing Co.*, 225 S. W. 548 (Tex. Civ. App. 1920).

⁶ *Florence, Phillips and Co. v. Newsome*, 26 Ga. App. 501, 106 S. E. 619 (1921); *Lodwick Lumber Co. v. Taylor*, 100 Tex. 270, 98 S. W. 238 (1906); *Magnetic Ore Co. v. Marbury Lumber Co.*, 104 Ala. 465, 16 So. 632, 27 L. R. A. 434 (1894); *Walters v. Sheffield*, *supra* note 3.

⁷ *Southwestern Lumber Co. of N. J. v. Evans*, *supra* note 4. *Cf.* *Prewitt v. Bull*, 234 Ky. 18, 27 S. W. (2d) 399 (1930); and *Prince v. Frost-Johnson Lumber Co.*, *supra* note 4, where possession of land by owners thereof was held not adverse possession of timber belonging to others.

⁸ *Southwestern Lumber Co. of N. J. v. Evans*, *supra* note 4. The dissenting judge in the principal case, while not raising the question of the severability of the land and timber interests, felt that there had been sufficient adverse possession both of the land and the timber to warrant a different result.

⁹ *Claybrooke v. Barns*; *Kentucky Block Cannel Coal Co. v. Seawell*, both *supra* note 5.

¹⁰ *Franklin Fluorspar Co. v. Hosick*, 239 Ky. 453, 39 S. W. (2d) 665 (1931).

¹¹ *Louisiana Petroleum Co. v. Broussard*, 172 La. 613, 135 So. 1 (1931); *La Del Oil Properties Inc. v. Magnolia Petroleum Co.*, 169 La. 1137, 126 So. 684 (1930). See LA. REV. CIV. CODE (Merrick, 1925) arts. 3529, 3546.

The result in the instant case is apparently correct, but the rationale of the decision is not clear. The court gives no reason for its decision other than to say dogmatically that "such occupancy (by the possessor of the land) is consistent with, and not as a matter of law adverse to, the possession of the prior lessee." It is believed that the same result could have been reached on the basis of other decisions: First, the timber case, mentioned above,¹² in which the lease was held to create a separate interest in fee in the timber against which adverse possession of the land alone would not be effective; and, second, by reasoning from analogy to the mineral cases.¹³

W. E. ANGLIN.

Res Judicata—Judgment in Ejectment Suit as Res Judicata Preventing Restitution of Land.

A judgment of interpleader, construing a will, gave *B* a right to rents and profits accruing from a certain tract of land. While an appeal was pending *B* brought an action in ejectment against *A*, who was in possession of the tract, and recovered. *A* did not appeal. The original judgment of interpleader was reversed on appeal, the court construing the will in favor of *A*. *A* now brings an action in ejectment to regain possession of the land. *Held*: The first judgment in ejectment not having been appealed from is *res judicata* as to the question of the title to the land (Cardozo, Brandeis, and Stone, JJ., dissenting).¹

The majority of the court explains its decision upon the ground that the original suit in equity for rents and profits and the first suit in ejectment were separate and unrelated suits. Therefore, the reversal of the original judgment did not give grounds for restitution as to the lands in the ejectment suit. The minority contends that the first action in ejectment was dependent upon the interpleader judgment, and that this second suit in ejectment is in effect a suit for restitution to which the plaintiff is entitled.

If the construction placed upon the will by the interpleader judgment—that the title to the land in question was in *B*—is conclusive until reversed, then the first ejectment judgment was dependent upon the interpleader judgment. The general rule is that where a judg-

¹² Southwestern Lumber Co. of N. J. v. Evans, *supra* note 4.

¹³ Claybrooke v. Barns; Kentucky Block Cannel Coal Co. v. Seawell, both *supra* note 5.

¹ Reed v. Allen, 286 U. S. 191, 52 Sup. Ct. 532, 76 L. ed. 749 (1932). This case has been commented upon in (1932) 88 U. OF PA. L. REV. 77.