



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 31 | Number 4

Article 8

6-1-1953

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Earle Gene Ramsey

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Recommended Citation

Earle G. Ramsey, *Deeds -- Adverse Possession -- Tacking -- Strip of Land not Included in Deed*, 31 N.C. L. REV. 478 (1953).

Available at: <http://scholarship.law.unc.edu/nclr/vol31/iss4/8>

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pay the expenses of litigation in order to recover that amount fraudulently taken from him, while a cheat is permitted to go unpunished.

In view of the purpose for which punitive damages are assessed, and the fact that the plaintiff has a right to be made whole, it appears that the courts of California and the District of Columbia have adopted the best view, which more nearly meets the purposes of damages in tort actions. These jurisdictions apply the "out of pocket" rule for the measure of damages,¹⁹ and authorize the submission of the issue of punitive damages to the jury where the plaintiff's evidence tends to show actionable fraud.²⁰ By applying this rule the sum wrongfully obtained will be returned to the plaintiff, and the jury may, in its discretion, punish the defendant to the degree that the facts of each case warrant. And by virtue of this punishment, the plaintiff may receive the expenses he incurred in litigation.

From the propositions discussed above, it is concluded that where the "out of pocket" rule is not applied and punitive damages are not allowable upon showing actionable fraud, the perpetrator in too many cases has nothing to lose by his fraud. He stands the chance of making a dishonest profit if his scheme is successful, but in no event can he lose by his misconduct. The unfairness of such a result is vividly illustrated by the principal case. Would it not, then, be advisable for every state to adopt statutes similar to those in California?²¹

DURWARD S. JONES

Deeds—Adverse Possession—Tacking—Strip of Land not Included in Deed

For twenty years or more the successive occupants of two adjoining tracts of land have been satisfied that the correct boundary between their lands is a certain ditch, line, fence or hedgerow. Then deeds are consulted, a physical survey is run, and one landowner realizes that he is in possession of a strip of land not included in his deed, nor in the deeds of his predecessors. Convinced that the land is rightfully his, he claims title by adverse possession, only to be told that he has not held

¹⁹ CAL. CIV. CODE § 3343 (1949), *Jacobs v. Levin*, 58 Cal. App. 2d 913, 137 P. 2d 500 (1943); *Horning v. Ferguson*, 52 A. 2d 116 (D. C. Munic. Ct. App. 1947).

²⁰ CAL. CIV. CODE § 3294 (1949), *Thompson v. Modern School of Business & Correspondence*, 183 Cal. 112, 190 Pac. 451 (1920); *District Motor Co. v. Rodill*, 88 A. 2d 489 (D. C. Munic. Ct. App. 1952).

²¹ The California Statute providing for the use of the "out of pocket" rule states, "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction." CAL. CIV. CODE § 3343 (1949). The California Statute authorizing the assessment of punitive damages is set out in note 14 *supra*. CAL. CIV. CODE § 3294 (1949).

the land long enough in his own right to satisfy the twenty year statutory period in effect where land is held adversely without a deed.¹ He must therefore attempt to show the requisite twenty years of adverse possession by tacking to his own the adverse possession of his predecessors. The leading case on this point in North Carolina is *Jennings v. White*,² where plaintiff and his two predecessors in possession, *A* and *B*, occupied an entire lot, but under deeds in which the description omitted the southwest corner. Plaintiff sought to establish title to this corner by adverse possession, but in order to show the twenty years of adverse possession required to ripen title where the land is held without color of title, plaintiff had to tack to his own the adverse possession of *A* and *B*. Plaintiff lost, the court holding that as a general rule possession could not be tacked to make out title by adverse possession when the deed under which the last occupant claims title does not include the land in dispute. This holding was based on plaintiff's failure to show any privity in respect to the disputed corner between himself and his predecessors in possession, the court declaring that in order to create such privity there must have existed as between each successive holder a relation such as ancestor and heir, grantor and grantee, or deviser and devisee. Here the court found no such relationship in respect to the controverted corner, but indicated instead that *A*, who took from the plaintiff's remote grantor, was a tenant at will of the remote grantor. Since *A* was only a tenant at will, his successors, *B* and the plaintiff, presumably could hold no greater estate in the omitted strip of land than a tenancy at will.³

In keeping with the rule as laid down in *Jennings v. White*,⁴ the North Carolina court in succeeding cases⁵ has consistently refused to allow a grantee to tack to his own the adverse possession of his grantor of a strip of land not within the description of the deed. A slight modification occurred in the recent case of *Newkirk v. Porter*,⁶ where it was stated by way of dictum that a grantee who went into physical possession of the strip not covered in the deed would become an adverse possessor in his own right⁷ and not a tenant at will of his grantor,

¹ N. C. GEN. STAT. § 1-40 (1943).

² 139 N. C. 23, 51 S. E. 799 (1905).

³ In labeling *A*'s possession a tenancy at will, the court apparently was interpreting the statute of frauds as allowing only a tenancy at will in this type of situation.

⁴ 139 N. C. 23, 51 S. E. 799 (1905).

⁵ *Newkirk v. Porter*, 237 N. C. 115, 74 S. E. 2d 235 (1953); *Locklear v. Oxendine*, 233 N. C. 710, 65 S. E. 2d 673 (1951); *Simmons v. Lee*, 230 N. C. 216, 53 S. E. 2d 79 (1949); *Ramsey v. Ramsey*, 229 N. C. 270, 49 S. E. 2d 476 (1948); *Boyce v. White*, 227 N. C. 640, 44 S. E. 2d 49 (1947).

⁶ 237 N. C. 115, 74 S. E. 2d 235 (1953).

⁷ This dictum is in accord with the holding in *Blackstock v. Cole*, 51 N. C. 560 (1859), the only North Carolina case in point prior to *Jennings v. White*, 139 N. C. 23, 51 S. E. 799 (1905).

but tacking of the preceding adverse possessions of the non-included strip nevertheless would not be allowed.

Unlike North Carolina, most jurisdictions⁸ hold that, while the deed alone will not constitute the necessary privity as to the strip not included in the deed, an express transfer of possession, or of possession and claim, by grantor to grantee, is sufficient privity to ground the tacking of their adverse possessions as to the strip not covered in the deed.⁹ These courts apparently find that an express transfer of possession exists when the grantor indicates to the grantee boundaries which include both the land described in the deed and the omitted strip and then puts him in possession of both.¹⁰ The North Carolina court, on the other hand, by not commenting on the circumstances surrounding the transfer,¹¹ has indicated that it gives no weight to the words and actions of the parties at the time of the transfer. In none of the cases where tacking of a strip not included in the deed was attempted has our court determined that an express oral transfer of possession would constitute sufficient privity.

The court in its decisions¹² has continually emphasized that in North Carolina the privity sufficient to permit tacking of the non-

⁸ Note, 17 A. L. R. 2d 1131 (1951).

⁹ St. Louis S. W. R. R. v. Mulhey, 100 Ark. 71, 139 S. W. 643 (1911); Smith v. Chapin, 31 Conn. 530 (1863); Dubois v. Karazin, 315 Mich. 598, 24 N. W. 2d 414 (1946); Vandell v. St. Martin, 42 Minn. 163, 44 N. W. 525 (1889); Crowder v. Neal, 100 Miss. 730, 57 So. 1 (1911); Alukenis v. Kashulines, 96 N. H. 107, 70 A 2d 202 (1950); Helmich v. Davenport, 174 Iowa 558, 156 N. W. 736 (1916).

In these cases the transfer of possession was made by an express declaration of transfer, or the practical equivalent thereof. In the last case tacking was allowed even though successive deeds expressly excluded the controversial strip.

¹⁰ St. Louis S. W. R. R. v. Mulhey, 100 Ark. 71, 139 S. W. 643 (1911), where grantor represented as his own all the land within an inclosure and put grantee into possession thereof; Gregory v. Thorrez, 277 Mich. 197, 269 N. W. 142 (1936), where grantor put grantee into possession of entire tract, indicating hedge as correct southern boundary, and hedge later turned out to be seven feet south of correct boundary; Rembert v. Edmondson, 99 Tenn. 15, 41 S. W. 935 (1897), when grantor conveyed to grantee all her interest in an adjacent strip which both parties knew was not included in the description in the deed. Shuttles v. Butcher, 1 S. W. 2d 661 (Tex. 1927), here fences on one side of tract were located a few feet over onto the adjoining lot, and grantor represented as his own everything that was under fence.

¹¹ The only instance where the court might be construed as having commented on such circumstances appears in Jennings v. White, 139 N. C. 23, 51 S. E. 799 (1905), when it was stated that if the grantor put the grantee into possession of the entire lot, including the portion not covered in the deed, the grantee in respect to that portion became the grantor's tenant at will. The court might have been speaking hypothetically for the facts as reported do not affirmatively indicate an express transfer.

¹² Newkirk v. Porter 237 N. C. 115, 74 S. E. 2d 235 (1953); Locklear v. Oxendine, 233 N. C. 710, 65 S. E. 2d 673 (1951); Simmons v. Lee, 230 N. C. 216, 53 S. E. 2d 79 (1949); Ramsey v. Ramsey, 229 N. C. 270, 49 S. E. 2d 476 (1948); Boyce v. White, 227 N. C. 640, 44 S. E. 2d 49 (1947); Jennings v. White, 139 N. C. 23, 51 S. E. 799 (1905); Blackstock v. Cole, 51 N. C. 560 (1859).

included strip can be created only through a paper writing describing the strip or by descent.

That an anomalous situation exists under the North Carolina rule of *Jennings v. White*¹³ can be illustrated as follows: Suppose *X*, owning no other land in the vicinity, adversely holds Blackacre, a small strip, without any deed. In order to establish title to Blackacre by adverse possession, *X* can tack to his own the prior adverse possession of his predecessor in possession, since an express parol transfer by his predecessor creates sufficient privity.¹⁴ Conversely, suppose *X* has purchased a tract consisting of Whiteacre plus Blackacre, but he and his grantor claim under a deed which does not include Blackacre in its description. *X* cannot tack in order to establish ownership to Blackacre by adverse possession, even though he and his grantor hold under a deed which at the time of purchase they both thought included Blackacre in its description; for in this case apparently the express oral transfer of possession does not create sufficient privity.¹⁵ It would appear, then, that while a grantee who in good faith purchases a tract of land, a strip of which is not covered by his deed, cannot tack to his own the adverse possession of his grantor to that strip, one who has purchased nothing and has no deed but who has been put into adverse possession of this same strip can tack to his own the adverse possession of his predecessor and establish his title to the strip.

Since, in the very recent decision of *Newkirk v. Porter*,¹⁶ the court has reiterated the harsh rule laid down in *Jennings v. White*,¹⁷ it would seem futile to try to establish title by adverse possession to a strip of land not included in the deed when it is necessary to tack in order to show an adverse holding for the twenty years statutory period. It should be noted, however, that in a Michigan case¹⁸ involving title to a strip of land not included in his deed, while the court did not allow the defendant to tack successive adverse possessions to the strip, he prevailed on the theory of acquiescence. The court declared that where successive parties had accepted a line as the correct boundary and on both sides had used up to the line and no further for a long period of years, each party is estopped to deny the accepted line as the true line. This theory of acquiescence might be tried in North Carolina, for our

¹³ 139 N. C. 23, 51 S. E. 799 (1905).

¹⁴ *Vanderbilt v. Chapman*, 172 N. C. 809, 812, 90 S. E. 993, 995 (1916) where Justice Hoke stated, "In order to establish title by adverse occupation there must be continuity of possession for the requisite statutory period, and, in case of successive occupants, there must be some recognized connection between them. This connection may be effected by deed or will or other writing, or it may be shown by parol."

¹⁵ See cases listed in note 11, *supra*.

¹⁶ 237 N. C. 115, 74 S. E. 2d 235 (1953).

¹⁷ 139 N. C. 23, 51 S. E. 799 (1905).

¹⁸ *Hanlon v. Ten Hove*, 235 Mich. 227, 209 N. W. 169 (1926).

Court approved the doctrine in a previous case where a strip of land not covered in the deed was the subject of the controversy.¹⁰

EARLE GENE RAMSEY

Divorce—Alimony—Permanent Alimony Incident to Absolute Divorce

The recent case of *Feldman v. Feldman*,¹ following close on the heels of *Livingston v. Livingston*² and involving the same procedural question, once again explains the status of North Carolina law on the subject of permanent alimony as an incident to an absolute divorce decree. The plaintiff, husband, instituted an action for absolute divorce on the grounds of two years' separation. Subsequent to the filing of the complaint but prior to the decree for absolute divorce, the parties made an agreement whereby the plaintiff was to pay the defendant a monthly sum for the support of herself and the child of the marriage. This agreement was entered as a consent order. Thereafter a decree for absolute divorce was granted. Some years later the plaintiff ceased to make the monthly payments. The defendant, after notice, moved that the plaintiff be adjudged in contempt of court and the plaintiff moved to strike the consent order. Upon hearing the plaintiff's motion, the lower court relying on *Livingston v. Livingston, supra*, ruled that the consent order was inoperative as an order of the court. The Supreme Court in affirming the decision points out that the consent order (permanent alimony) was not reduced to a court judgment or decree before the commencement of the suit for absolute divorce and consequently did not come within the protective provision of G. S. 50-11.³

"In Roman Catholic times, that is, until the reign of Henry VIII, marriage was regarded by the church as a sacrament, and as therefore indissoluble. This being the view of the canon law, it was applied by the ecclesiastical court in England, which had jurisdiction over matri-

¹⁰ In *Hanstein v. Ferrell*, 149 N. C. 240, 62 S. E. 1070 (1908), ownership of a narrow strip between two city lots was in question. The plaintiff and his predecessors in title and the defendant had both acquiesced in a boundary line formed by a common trench caused by water dripping from the eaves of two wooden buildings formerly on the premises. The court held that recognition of, and acquiescence in a line as the true boundary line of one's land, not induced by mistake, and contained through a considerable period of time, affords strong, if not conclusive, evidence that the line so recognized is the true line.

¹ 236 N. C. 731, 73 S. E. 2d 865 (1952). In the even later case of *Merritt v. Merritt*, 237 N. C. 271, 74 S. E. 2d 529 (1953), the same procedural point was raised. There the husband and wife had consented to the continuance of a separation agreement for alimony after the absolute divorce which was then in suit. The court citing the principal case held the alimony liability was contractual only and could not be enforced by contempt as it had been decreed incident to the absolute divorce rather than prior to the commencement of the said suit.

² 235 N. C. 515, 70 S. E. 2d 480 (1952).

³ N. C. GEN. STAT. § 50-11 (1949, recompiled 1950).