



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 33 | Number 4

Article 10

6-1-1955

Adverse Possession -- Intent as a Requisite in Mistaken Boundary Cases

Robert C. Bryan

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



Part of the [Law Commons](#)

Recommended Citation

Robert C. Bryan, *Adverse Possession -- Intent as a Requisite in Mistaken Boundary Cases*, 33 N.C. L. REV. 632 (1955).

Available at: <http://scholarship.law.unc.edu/nclr/vol33/iss4/10>

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.

lation on the subject.²⁵ And, as was noted by the Virginia court in the *Chesapeake and Ohio* case, attempts by Congressmen and Senators to amend the section to make it inoperative in those states which have the "Right to Work" laws were defeated by large majorities.²⁶

The conclusion is rather inevitable that the patent intent of Congress was that the 1951 amendment should prevail over any state laws to the contrary. The trend of decisions surveyed here has been to recognize that conclusion and to apply the amendment in spite of laws of the state prohibiting union shop agreements. Whether to permit union shop contracts, and how to regulate them, is a problem to which neither the states nor Congress have found a clear-cut, definitive solution, and the states and Congress have taken varying positions with respect to it over a period of years. Undoubtedly there will be further legislation on the subject in the future.²⁷ Until there is further legislation, the 1951 amendment is the law of the land, and state "Right to Work" laws in conflict must yield to the Congressional Act.²⁸

JAMES ALBERT HOUSE, JR.

Adverse Possession—Intent as a Requisite in Mistaken Boundary Cases

In a recent Texas case,¹ the court, in denying defendant's claim of title by adverse possession, reaffirmed the Texas rule as regards the intent necessary to acquire title by adverse possession in cases where there

²⁵ "It will be noted that the proposed paragraph eleventh would authorize agreements notwithstanding the laws of any state. For the following reasons, among others, it is the view of the committee, that if, as a matter of national policy such agreements are to be permitted in the railroad industries it would be wholly impracticable and unworkable for the various states to regulate such agreements. Railroads and airlines are direct instrumentalities of interstate commerce; the Railway Labor Act requires collective bargaining on a system-wide basis; agreements are uniformly negotiated for an entire railroad system and regulates the rates of pay, rules of working conditions of employees in many states, the duties of many employees require the constant crossing of state lines; many seniority districts under labor agreements extend across state lines, and in the exercise of their seniority rights employees are frequently required to move from one state to another." H. R. REP. No. 2811, 81st Cong., 2d Sess. 5 (1950).

The Senate Committee report stated that there was no disagreement that the right of unions generally in industry to enter into union shop contracts should be extended to labor organizations subject to the Railway Labor Act; but three members of the Committee reserved the right to introduce and support amendments on the floor, premised on asserted differences between the provisions of the amendment and corresponding provisions of Taft-Hartley. The majority felt that the terms of the two Acts were substantially the same, and "such differences as exist are warranted either by experience or by special conditions existing among employees of our railroads and airlines." SEN. REP. No. 2262., 2d Sess. 3 (1950).

²⁶ See 96 CONG. REC. 536 (1951).

²⁷ For varying state and federal legislation on the subject, see MATTHEWS, LABOR RELATIONS AND THE LAW 475 *et seq.* (Boston: Little, Brown and Co., 1953).

²⁸ See discussion of *Allen v. Southern Ry.*, 114 F. Supp. 72 (W. D. N. C. 1953), note 7 *supra*.

¹ *Orlando v. Moore*, 274 S. W. 2d 86 (Tex. Civ. App. 1954).

is a mistake in the boundary line between two adjacent landowners. The court said:

"Where one of two adjacent landowners extends his fence, through mere inadvertence or ignorance of the location of the true boundary line, so as to embrace within his enclosure lands belonging to his neighbor, with no intent of claiming such extended area, but with intent of claiming adversely only to the true boundary line, wherever it may be, his possession of such extended area is not adverse or hostile to the true owner."²

The courts are in sharp disagreement as to the requisite intent necessary to acquire title through adverse possession. The purpose here is to compare the several rules applied, with particular emphasis on North Carolina decisions, in order to arrive at the most practical solution to this frequently occurring problem of boundary disputes.

The leading case of *French v. Pearce*³ laid down the rule that the visible possession, with intent to possess, is the controlling factor. Whether the possession is with intent to disseize the owner or is merely under a mistake of ownership is immaterial. So long as the possessor holds the land as his own, he may acquire the fee through adverse possession. This view seems to be followed in the majority of jurisdictions.⁴

A second view, as stated in the early Iowa case of *Grube v. Wells*,⁵ requires the possession to be consciously hostile before a possessor may acquire title by adverse possession. Under this view, unless the possessor knows that he is holding adversely and intends to do so, his posses-

² *Id.* at 89.

³ 8 Conn. 439, 21 Am. Dec. 680 (1831).

⁴ *Milstead v. Devine*, 254 Ala. 442, 48 So. 2d 530 (1950); *Park v. Powers*, 2 Cal. 2d 590, 42 P. 2d 75 (1935); *Vade v. Suhler*, 118 Colo. 236, 195 P. 2d 390 (1921); *Searles v. DeLadson*, 81 Conn. 133, 70 Atl. 589 (1890); *Manuel v. Barley Mill Road Home*, 104 A. 2d 908 (Del. 1954); *Bridges v. Brackett*, 205 Ga. 637, 54 S. E. 2d 642 (1949); *Calkins v. Kausouros*, 72 Idaho 150, 237 P. 2d 1053 (1951); *Cooper v. Tarpley*, 112 Ind. App. 1, 41 N. E. 2d 640 (1942); *Sattler v. Pellichino*, 71 So. 2d 689 (La. 1954); *Hub Bel Air v. Hirsch*, 203 Md. 637, 102 A. 2d 550 (1954); *Locks and Canals v. Nashua and L. R. Co.*, 104 Mass. 1 (1870); *May v. Maurer*, 339 Mich. 115, 62 N. W. 2d 455 (1954); *Fredericksen v. Henke*, 167 Minn. 356, 209 N. W. 257 (1926); *Alexander v. Hyland*, 214 Miss. 348, 58 So. 2d 826 (1952); *State ex rel. Edie v. Sharn*, 348 Mo. 119, 152 S. W. 2d 174 (1941); *Carman v. Hewitt*, 105 N. Y. S. 2d 239 (Sup. Ct. 1951); *Hallowell v. Borchers*, 150 Neb. 322, 34 N. W. 2d 404 (1948); *Yetzer v. Thoman*, 17 Ohio St. 130, 91 Am. Dec. 122 (1866); *Johnson v. Whelan*, 186 Okla. 511, 98 P. 2d 1103 (1940); *Liberto v. Steele*, 188 Tenn. 529, 221 S. W. 2d 701 (1949); *Menzer v. Tracy*, 247 Wis. 245, 19 N. W. 2d 257 (1945); *Rock Springs v. Sturm*, 39 Wyo. 494, 273 Pac. 908 (1929). In *Patterson v. Wilmont*, 245 S. W. 2d 116, 121 (Mo. 1952), the court said: "It is not necessary that he intend to take away from the owner something which he knows belongs to another, or even that he be indifferent as to the facts of the legal title. It is the intent to possess, and not the intent to take irrespective of his right which governs."

⁵ 34 Iowa 148 (1871).

sion cannot be adverse. This view has been repudiated in Iowa⁶ and seems to be virtually abandoned as a rule of law.⁷

A third view, as laid down by *Preble v. Maine Central R. R.*,⁸ is that if the party occupies to a fence beyond his boundary, believing it to be the true line, but with no intent to claim title if it be ascertained that the fence was on his neighbor's land, he cannot acquire title by adverse possession. The reason given is that the requisite intent to claim title exists only upon the condition that the fence be on the true boundary line. If, however, his intent is to claim title whether it shall eventually be found to be the correct boundary or not, then the possession is adverse. This is the view followed in the principal case⁹ and in many jurisdictions.¹⁰

The North Carolina decisions appear to be inconsistent as to the rule to be applied in mistaken boundary cases. The case of *Locklear v. Savage*,¹¹ a frequently cited case in the field of adverse possession, lays down the rule as to the requirements necessary to hold adversely: The possession must be actual, open, decided, and as notorious as the property will admit, indicating an assertion of exclusive ownership and an intent to exercise dominion over it against all claimants. It is readily apparent that this definition of adverse possession could be interpreted to include cases of mistaken boundary where the possessor thought the land was his and exercised dominion over it. However, the cases have not so held.

The North Carolina Supreme Court has defined the requisite intent as being "the intent to claim, against the true owner, which renders the entry and possession adverse."¹² This language seems to indicate that it is necessary that the person holding the land have knowledge that it is not his land in order for him to hold adversely. This interpretation was followed in *Price v. Whisnant*,¹³ where the court said that if the

⁶ The *Grube* case was expressly overruled by *Lawrence v. Washburn*, 119 Iowa 109, 93 N. W. 73 (1903).

⁷ See, however, *Price v. Whisnant*, 236 N. C. 381, 72 S. E. 2d 851 (1952) and *Westland Realty Corp. v. Griffin*, 151 Va. 1005, 145 S. E. 718 (1928), where the courts seemed to apply the rule of the *Grube* case.

⁸ 85 Me. 260 (1893).

⁹ *Orlando v. Moore*, 274 S. W. 2d 86 (Tex. Civ. App. 1954).

¹⁰ *Tanner v. Dobbins*, 255 Ala. 671, 53 So. 2d 549 (1951); *Davis v. Wright*, 220 Ark. 743, 249 S. W. 2d 979 (1952); *Shaw v. Williams*, 50 So. 2d 125 (Fla. 1951); *Patrick v. Cheney*, 226 Iowa 853, 285 N. W. 855 (1939); *Wilson v. Pum Ze*, 167 Kan. 31, 204 P. 2d 723 (1949); *Traylor v. West*, 255 S. W. 2d 612 (Ky. 1953); *Landry v. Giguere*, 127 Me. 264, 143 Atl. 1 (1928); *Warner v. Noble*, 286 Mich. 654, 282 N. W. 855 (1939); *Northern Pacific Ry. v. Cash*, 67 Mont. 585, 216 Pac. 782 (1923); *Gibson v. Dudley*, 233 N. C. 255, 63 S. E. 2d 630 (1951); *Newton v. McKeel*, 142 Ore. 674, 21 P. 2d 206 (1933); *Bettack v. Conachen*, 235 Wis. 559, 294 N. W. 57 (1940).

¹¹ 159 N. C. 236, 74 S. E. 347 (1912).

¹² *Vanderbilt v. Chapman*, 175 N. C. 11, 13, 94 S. E. 703, 704 (1918); *Parker v. Banks*, 79 N. C. 480, 485 (1878).

¹³ 236 N. C. 381, 72 S. E. 2d 851 (1952).

possessor thought his deed covered the disputed area, his possession was not adverse, but a claim of rightful ownership. This is the view of the *Grube* case.

In *Gibson v. Dudley*,¹⁴ plaintiff took possession of a driveway on the side of his lot, thinking the driveway belonged to him. He used the driveway for the requisite time to acquire title by adverse possession. The court, however, denied his claim, and said that it was not one of adverse possession, but of rightful ownership. The fact that plaintiff thought the driveway was his own prevented him from acquiring it by adverse possession. This case would also seem to be an example of the *Grube* view.¹⁵

Only one year prior to the *Gibson* case, the North Carolina Supreme Court upheld a claim of adverse possession for the defendant, although she testified that it was never her intention of claiming anything except what she owned.¹⁶ This case would tend to support the view of the *French* case.

But to confuse the picture even further in North Carolina, the court has quoted with approval the doctrine of the *Preble* case to the effect that "where the occupation of the land is by a mere mistake, and with no intention on the part of the occupant to claim as his own land which does not belong to him, but he intends to claim only to the true line, wherever it may be, the holding is not adverse."¹⁷ In this case, plaintiff testified that he had no intention of holding any land which did not belong to him; but the court held that there was adverse possession because plaintiff asserted the boundary to be at a certain place and claimed it as his own, even if there was a mistake. It appears that here the court applied the *Preble* view.

A discussion of the North Carolina decisions would not be complete without a brief mention of the firmly established doctrine to the effect that if there is but a "slight encroachment" and the jury finds the encroachment to be inadvertently or unintentionally made, and that the purpose was to run the fence on the true line, the possession of the small extra strip is permissive, and not adverse.¹⁸ One North Carolina

¹⁴ 233 N. C. 255, 63 S. E. 2d 630 (1951).

¹⁵ The court said, however, that when the plaintiff first went into possession, he was claiming and intended to claim, only that which he had purchased. *Id.* at 257, 63 S. E. 2d at 631.

¹⁶ *Whiteheart v. Grubbs*, 232 N. C. 236, 60 S. E. 2d 101 (1950). This case may be distinguished on the ground that there was a lappage question and the defendant was claiming adverse possession of land which her deed actually included.

¹⁷ *Dawson v. Abbott*, 184 N. C. 192, 195, 114 S. E. 15, 16 (1922). Quoted from 1 *Cyc.*, *Adverse Possession* § VI(E) (1901).

¹⁸ *Waldo v. Wilson*, 173 N. C. 689, 92 S. E. 693 (1917); *Blue Ridge Land Co. v. Floyd*, 171 N. C. 543, 88 S. E. 862 (1916); *Currie v. Gilchrist*, 147 N. C. 648, 61 S. E. 581 (1908); *McLean v. Smith*, 106 N. C. 172, 11 S. E. 184 (1890); *King v. Wells*, 94 N. C. 344 (1886); *Gilchrist v. McLaughlin*, 29 N. C. 310 (1847);

case held that an encroachment of twenty-five yards is of sufficient notoriety to be adverse.¹⁹

Adverse possession statutes "rest on a wise public policy, which regards litigation with disfavor and aims at the repose of conditions which the parties have suffered to remain unquestioned long enough to indicate their acquiescence therein."²⁰ This public policy can best be realized by allowing one who has held the land for the statutory period to acquire the fee thereto.

To rely on an intent to dispossess, as is required by the view of *Grube v. Wells*,²¹ would necessarily reward dishonesty, whereas the honest, mistaken possessor would be penalized.

It is submitted that the view of *Preble v. Maine Central R. R.*,²² which is followed in the principal case, is too theoretical to be workable. "Neither the courts nor anyone else can tell or conjecture what the party might have intended to do in the event he discovered later that he had been mistaken as to the true line."²³ The possibility of the land belonging to someone else probably never occurs to the possessor in mistake cases, and therefore the test fails. It would seem that the intent, if acquired at all in cases under this test, is acquired after the possessor has learned of his mistake and consulted his lawyer.

Mistaken belief of the possessor should be immaterial, and the courts should allow what actually happened to govern.²⁴ The best view in mistaken boundary cases is the view as laid down in *French v. Pearce*,²⁵ that is, that visible possession, regardless of whether it be under a mistaken belief of ownership, will constitute adverse possession.

Under the view of the *French* case, here advocated, one holding for the requisite time would not lose the land by innocently stating at the trial that he did not intend to take what was not his. Nor would it be necessary to speculate as to what intent, if any, was in the mind of the possessor when he took possession, many years previously.

Bynum v. Carter, 26 N. C. 310 (1844) (The court, by way of dictum at page 314, said: "We admit there may be cases in which the possession may be of so minute a part of the disputed land as not to amount to an ouster of the owner, being regarded, rather, as an inadvertent encroachment without a claim of right, or as permissive and not adverse. But in such cases, the conclusion does not arise from the supposition that the owner was actually ignorant of the fact of the possession or of its extent, but that the other party did not intend to usurp a possession beyond the boundaries to which he had a good title."); *Green v. Harmon*, 15 N. C. 158 (1833).

¹⁹ *Mode v. Long*, 64 N. C. 433 (1870).

²⁰ 1 AM. JUR., *Adverse Possession* § 4 at p. 794 (1936).

²¹ 34 Iowa 148 (1871).

²² 85 Me. 260 (1893).

²³ *Bayhouse v. Urquides*, 17 Idaho 286, 295, 105 Pac. 1066, 1068 (1909).

²⁴ See Note, 3 VAND. L. REV. 337 (1950), where the writer approved the view urged here.

²⁵ 8 Conn. 439, 21 Am. Dec. 680 (1831).

Finally, adoption of the *French* view would tranmute the seemingly irreconcilable rules existing in North Carolina today into one practicable, easy-to-apply rule, which gives effect to the policy behind the doctrine of adverse possession.²⁶

ROBERT C. BRYAN.

Workmen's Compensation—Employer's Goodwill

In the recent case *Guest v. Brenner Iron & Metal Co.*,¹ plaintiff employee was sent out on the road to change two flat tires on one of defendant's trucks. After replacing the old tubes, it became necessary to obtain air to inflate the tires, so plaintiff drove along the highway until he found a service station open. He asked and received permission from the man in charge to use the air hose. Before he inflated the first tire, plaintiff was asked to assist in pushing off the stalled car of a customer of the station. Plaintiff acceded to this request and, while pushing, was struck and injured by an approaching car.

The North Carolina Industrial Commission awarded compensation on the ground that there was an injury arising out of and in the course of the employment.² The supreme court affirmed the award, rejecting the contentions that the plaintiff had deviated from the course of his employment, and that the hazard was not peculiar to the employment.³ The main reasons given for the holding were that the response of the plaintiff was natural and reasonable; that he had reasonable grounds to believe that his acts were incidental to his employment and beneficial to his employer; and that if the employer had been present he would have instructed the employee to render the assistance. Under the circumstances, the aid received from the service station and the aid given by plaintiff were said to be so closely interwoven that the injury

²⁶ For excellent discussions on the problem here presented, see: *Johnson v. Whelan*, 186 Okla. 511, 98 P. 2d 1103 (1940), and *Rock Springs v. Sturm*, 39 Wyo. 494, 273 Pac. 908 (1929) with annotation in 97 A. L. R. 14 (1935).

¹ 241 N. C. 448, 85 S. E. 2d 596 (1955).

² The term "arising out of" refers to the cause or origin of the accident, and "in the course of" refers to the time, place, and circumstances under which the accident occurred. *Taylor v. Wake Forest*, 228 N. C. 346, 45 S. E. 2d 387 (1947); *Wilson v. Mooresville*, 222 N. C. 283, 22 S. E. 2d 907 (1942); *Ashley v. F-W Chevrolet Co.*, 222 N. C. 25, 21 S. E. 2d 834 (1942). See also Note, 10 N. C. L. Rev. 373 (1932).

³ If the risk involved is one to which all others in the general area are subjected, as distinguished from a hazard peculiar to the employee's work, the resulting injury is not compensable. *Bryan v. T. A. Loving Co.*, 222 N. C. 724, 24 S. E. 2d 751 (1943); *Plemmons v. White's Service*, 213 N. C. 148, 195 S. E. 370 (1938). The court in the present case said, "Plaintiff, while pushing the car onto and along the highway, subjected himself to a hazard not common to all others in the neighborhood but peculiar to the task in which he was engaged." *Guest v. Brenner Iron & Metal Co.*, 241 N. C. 448, 454, 85 S. E. 2d 596, 601 (1955).