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Adverse Possession-Title to Cavern Claimed and Held Under Mistake

ADVERSE POSSESSION—TITLE TO CAVERN CLAIMED AND HELD UNDER MISTAKE.—Appellee sued appellant to quiet title to certain land, part of a cavern held by appellant and located under land owned by appellee. In 1883 appellant's predecessor in title discovered on his own land the entrance to the cavern since known as Marengo Cave. The cave was explored, its existence widely publicized, and complete possession taken by the discoverer who exhibited it upon payment of an admission fee. Possession was taken of the entire cave under the mistaken belief that the entire cave was under land owned by the discoverer. Appellant, to whom the property was conveyed in 1900, continued to hold exclusive and notorious possession under the same mistake. Continuously from the time of discovery until this suit, appellant and his predecessor in title operated the cave, advertised it, and made various improvements. Appellee purchased the adjoining tract of land in 1908, but made no claim of title to any part of the cavern until 1929 when this controversy arose. A survey ordered by

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of 1913, 38 Stat. at L. 168, the Revenue Act of 1916, 39 Stat. at L. 759, and the Revenue Act of 1917, 40 Stat. at L. 303.

13 Dissenting opinion of Mr. Justice Roberts in the instant case, 57 S. Ct. at 502.

the trial court definitely established the fact that a portion of the cave is located under appellee's land. The trial court decided in favor of appellee, and appellant appealed. The Appellate Court reversed the case on the ground that appellant had acquired title to the property in controversy by adverse possession for the prescribed statutory period of twenty years.[1]

The court said that a cavern is susceptible of ownership separate and distinct from that of the surface and that there is no reason why adverse possession of a cave will not sever such ownership and vest title to the cavern in the possessor thereof. The court stated that in this state when an owner of land by mistake as to the boundary line of his own land takes actual, visible and exclusive possession of another's land and holds it as his own for the statutory period, he thereby acquires title as against the true owner. It was further held that the Indiana Adverse Possession Act of 1927[2] was not here applicable for the reason that it could not operate to destroy a title acquired prior to its enactment.

Obviously the claim of appellant in the first instance rests on the proposition that there may be a constructive severance of ownership between the surface and the underlying cavern and that such severance may be effected by adverse possession. Although there is no previous Indiana case involving a set of facts exactly in point, it seems settled by analagous cases that there may be such a severance; and that, although such severance usually results from a grant or conveyance of the underlying interest, adverse possession for the prescribed statutory period presupposes a grant, and is equally effective.[3] The scope of this separate property right includes, not only the usual incidents of ownership of realty, but the right to maintain the ground beneath the cavern and the supporting vault above.[4]

The cases in Indiana list five indispensable elements of adverse possession:[5]

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[1] Marengo Cave Co. v. Ross (1937 Ind. App.), 7 N. E. (2d) 59.

[2] Sec. 3-1314 Burns '33. "Hereafter in any suit to establish title to lands or real estate, no possession thereof shall be deemed adverse to the owner in such manner as to establish title or rights in and to such land or real estate unless such adverse possessor or claimant shall have paid and discharged all taxes and special assessments of every nature falling due on such land or real estate during the period he claims to have possessed the same adversely: Provided, however, That nothing in this act shall relieve any adverse possessor or claimant from proving all the elements of title by adverse possession now required by law." No adequate discussion of this statute is found in the cases. For commentaries, pro and con, see: 4 Ind. L. J. 112, 4 Ind. L. J. 321.

[3] McBeth v. Wetnight (1914), 57 Ind. App. 47, 106 N. E. 407; Cox et ux. v. Colossal Cavern Co. (Ky., 1925), 276 S. W 540; Nelson v. Fleming (1877), 56 Ind. 310; Collett v. Board (1888), 119 Ind. 27, 21 N. E. 329; Moore v. Hinkle (1898), 151 Ind. 343, 50 N. E. 822; Worthley v. Burbanks (1896), 146 Ind. 534, 45 N. E. 779; Webb v. Rhodes (1901), 28 Ind. App. 393, 61 N. E. 735, Hoffman v. Zollman (1911), 49 App. 664, 97 N. E. 1015, 1 A. L. R. 556; 98 A. L. R. 536; 13 A. L. R. 369; 93 A. L. R. 1224; 67 A. L. R. 1436.

[4] Cox et ux. v. Colossal Cavern Co. (Ky., 1925), 276 S. W 540.

[5] Abel v. Love (1924), 81 Ind. App. 328, 143 N. E. 515, Lake Erie, etc. v. Wynn (1920), 73 Ind. App. 266, 127 N. E. 163, Law v. Smith (1853), 4 Ind. 56, Peck v. Louisville N. A. & C. R. Co. (1885), 101 Ind. 36, May v. Dobbins (1906), 166 Ind. 331, 77 N. E. 353, Vandalia R. Co. v. Wheeler (1914), 181 Ind. 424, 103 N. E. 1069; Vandalia R. Co. v. Clay County (1914), 181 Ind. 704, 103 N. E. 1071; Willette v. Gifford (1910), 46 Ind. App. 185, 93 N. E. 186; White v. Board (1928), 87 Ind. App. 536, 162 N. E. 61; Roots v. Beck (1886), 109 Ind. 471, 9 N. E. 698.

(1) it must be hostile and under claim of right; (2) it must be actual, (3) it must be open and notorious; (4) it must be exclusive; and (5) it must be continuous for the statutory period of twenty years. From a consideration of the uncontradicted evidence in this case, and the Indiana decisions on adverse possession this case is in accord with the present state of the law, although extending to a factual situation not before passed on by the court. Appellant and his predecessor in ownership have been in continuous and exclusive physical possession of the property since the discovery of the cave and during that time have operated it, excluding therefrom persons except those paying an admission fee, and in general exercising all the rights and functions of an owner of realty. There has been no break in such possession. As appellant has been in possession for more than the statutory period no question of tacking arises. However, there is privity of title between appellant and the discoverer and had such been necessary he would have been able to add to the term of his possession that of his predecessor in order to make out the statutory period.[6] The possession in this case was clearly open and notorious. The existence of the cave, its location, and the fact that appellant claimed and operated it have been widely advertised. Such possession was visible to anyone complying with the condition of an admission fee—visible almost to the full practical extent to which possession of property of this type may be visible. There was no secrecy or concealment from the owner of the surface of the claim or the possession.

Slightly greater difficulty arises relative to the questions of whether or not the land was held under proper claim of right, and the effect of appellant's mistaken belief as to the true ownership. It now seems settled, however, that where possession is held under such a mistake, it is sufficient if there is a claim of the property and not merely a claim of all the adverse possessor is the true owner of, and such mistake does not prevent the holding from being adverse.[7] Nor is the adverse possessor required to show any open declaration of a claim of right. All the essential elements of adverse possession may be shown by positive acts of ownership inconsistent with the title and possession of the true owner, the burden in such case being on him to overcome the presumption that title has been acquired by such adverse possession.[8] In the light of this rule it is immaterial whether entry was made and possession held under a mistaken belief of ownership or with a deliberate intent to disseize the true owner. Without deciding the exact weight and significance of the cases[9] holding the possession, acts of ownership, and user must be consistent with the character and type of property,

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[6] Doe ex. Dem. Harlan v. Brown (1853), 4 Ind. 143, McEntire v. Brown 1867), 28 Ind. 347; Philbin v. Carr (1920), 75 Ind. App. 560, 129 N. E. 19; 46 A. L. R. 785.

[7] Dyer v. Eldridge (1893), 136 Ind. 654, 36 N. E. 522; Pittsburgh, etc., Co. v. Stickley (1900), 155 Ind. 312, 58 N. E. 192; Webb v. Rhodes (1901), 28 Ind. App. 393, 61 N. E. 735, Rennert v. Shrik (1904), 163 Ind. 542, 72 N. E. 546, Cravens v. Cravens (1914), 181 Ind. 553, 103 N. E. 333; Logsdon v. Dingg (1904), 32 Ind. App. 158, 69 N. E. 409.

[8] Rennert v. Shirk (1904), 163 Ind. 542, 72 N. E. 546; Vandalia R. R. Co. v. Wheeler (1914), 181 Ind. 424, 103 N. E. 1069; Hitt et al. v. Carr (1916), 62 Ind. App. 80, 109 N. E. 456; Dyer v. Eldridge (1893), 136 Ind. 654, 36 N. E. 654; 97 A. L. R. 1.

[9] Moore v. Hinkle (1898), 151 Ind. 343, 50 N. E. 822; Worthley v. Burbanks (1897), 146 Ind. 534, 45 N. E. 779; Folley v. Thomas (1910), 46 App. 559, 93 N. E. 181.

it seems clear that the possession and acts of ownership were consistent with the nature of the property, and such as one claiming ownership thereof would naturally employ. It is now settled that color of title is not a requisite of adverse possession.[10]

As a survey acquiesced in by the adverse possessor will not affect a title previously acquired under the law of adverse possession it is obvious that the survey ordered by the trial court could not affect appellant's title acquired prior to such time.[11]

W. K. H.

SALES—CANNED FOODS—IMPLIED WARRANTY.—Plaintiff's wife purchased at one of the retail stores of the defendant, a jar of preserves. Plaintiff was eating the preserves when he bit into something soft and gummy which, upon examination, proved to be part of a mouse. He thereupon became nauseated and vomited several times. This continued for some time thereafter and he was wholly disabled from doing any work for a time and partly disabled for some time thereafter. Plaintiff sued in assumpsit based on an implied warranty of merchantability. Held, defendant is not liable because the injury suffered by plaintiff was the result of mental shock and the physical consequences thereof, and he was not injured physically from the preserves or any foreign substance contained therein. Lower court verdict for $400 damages reversed, and judgment entered for defendant.[1]

As the court points out in this case, when a wife buys necessaries for her family and her husband, a primary presumption arises that the wife is acting as agent for her husband, as the duty to pay for the necessaries rests on him. The wife's separate estate will not be bound for debts contracted by her while acting as such agent or messenger unless the evidence convinces the jury that the wife was acting in her own right independent of her husband, but the husband will be bound.[2] Thus, plaintiff has the right to sue on the warranty.

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[10] Root v. Beck (1886), 109 Ind. 472, 9 N. E. 698, Cravens v. Cravens (1914), 181 Ind. 553, 103 N. E. 333, Logsdon v. Dingg (1904), 32 Ind. App. 158, 69 N. E. 409; Bowman v. Guiblis (1866), 26 Ind. 419; Hargis v. Congressional Twp. (1867), 29 Ind. 70; Stole v. Portsmouth (1885), 106 Ind. 435, 7 N. E. 379; May v. Dobbins (1906), 166 Ind. 331, 77 N. E. 353.

[11] Cleveland, etc., Co. v. Obenchain (1886), 107 Ind. 591, 9 N. E. 624, Riggs v. Riley (1887), 113 Ind. 208, 15 N. E. 253, Davis v. Waggoner (1908), 42 Ind. App. 115, 83 N. E. 381, Fatic v. Myer (1904), 163 Ind. 401, 72 N. E. 142; Rosenmeier v. Mahrenhold (1912), 179 Ind. 467, 101 N. E. 721, Wood v. Kuper (1898), 150 Ind. 622, 50 N. E. 755, Helton v. Fastnow (1904), 33 Ind. App. 288, 71 N. E. 230; Spacy v. Evans (1898), 152 Ind. 431, 52 N. E. 605.

[1] Young v. Great Atlantic & Pacific Tea Co. (1936), 15 F Supp. 1018.

[2] Dublino v. Natale (1935), 118 Pa. Super Ct. 301, 304, 179 A. 821, 822.

Also see Guarenire et ux. v. Bessemer Lumber Co. (1935), 214 Ala. 8, 106 So. 49 (Husband's liability under wife's contract to pay for building materials); Woodruff v. Perrotti et ux. (1923), 99 Conn. 639, 122 A. 452 (Wife employed atty. to defend husband), Vaughan v. Mansfield (1918), 229 Mass. 352, 118 N. E. 652 (Wife pledged husband's credit for medical services), B. Altman & Co. v. Rosenfeld (1917), 162 N. Y. S. 678, 98 Misc. Rep. 236 (Wife bought coat on husband's credit), Stevens v. Hush (1919), 176 N. Y. S. 602, 107 Misc. Rep. 353 (Wife contracted for room and board at hotel), Evenson v. Nelson (1918), 39 N. D. 523, 168 N. W 36 (Wife left to manage farm and pledged husband's credit), Gore et al. v. Whiteville Lumber Co. (1918), 110 S. C. 478, 96 S. E. 683 (Where husband leaves wife in possession of land she can