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ADVERSE POSSESSION - REQUIREMENTS FOR OBTAINING TITLE TO A CAVE BY ADVERSE POSSESSION

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RECENT DECISIONS

ADVERSE POSSESSION — REQUIREMENTS FOR OBTAINING TITLE TO A CAVE BY ADVERSE POSSESSION — Plaintiff and defendant were owners of adjoining properties. On defendant's land was located the only opening to a cavern, which a remote grantor of defendant discovered in 1893. Since that time, defendant and its immediate and remote grantors have improved the cave for visitors, and conducted persons through it upon the payment of an admission price. With wide publicity, this has continued for almost fifty years. Plaintiff first visited the cave in 1895, paying an admission fee for the privilege, and has visited it several times since. A part of said cave extended under real estate owned by plaintiff, but this fact was not ascertained until a survey was made in 1932. Defendant, and its grantors, thought that all the cave was under land belonging to them. Plaintiff brought action to quiet title to the part of the cavern under his land. *Held*, defendant did not acquire title to the part of the cave beneath plaintiff's land by adverse possession. *Marengo Cave Co. v. Ross*, 212 Ind. 624, 10 N. E. (2d) 917 (1937).

In Indiana the doctrine prevails that when an owner of land, by mistake as to the true 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.¹ The appellate court was of the opinion that this rule was applicable to the present situation.² But the supreme court denied the similarity of situation for the stated reason that in this case the defendant's possession was not open and visible. The precise question presented here does not seem to have arisen before. The closest analogy suggesting itself is in mineral cases. There the authorities are agreed that land may be divided horizontally into two or more ownerships, the surface belonging to one person, and a stratum below the surface to another.³ And where there has been a severance, possession of the surface will not give title by adverse possession to the subsurface, and vice versa.⁴ Where there has not been a severance, the possession of the minerals, even by continuous mining, cannot operate to give title by

¹ *Rennert v. Shirk*, 163 Ind. 542, 72 N. E. 546 (1904), and cases cited therein.

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

³ 1 *TIFFANY, REAL PROPERTY*, § 252 (1920); *Stoughton v. Leigh*, 1 Taunt. 402, 127 Eng. Rep. 889 (1808); *Wilkinson v. Proud*, 10 Mees. & W. 33, 152 Eng. Rep. 704 (1843); *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. 293, 22 A. 1035 (1891); *Lee v. Bumgardner*, 86 Va. 315, 10 S. E. 3 (1889); *Kincaid v. McGowan*, 88 Ky. 91, 4 S. W. 802 (1887); *Sloan v. Lawrence Furnace Co.*, 29 Ohio St. 568 (1876); *Snoddy v. Bolen*, 122 Mo. 479, 24 S. W. 142 (1893); *Brand v. Consolidated Coal Co.*, 219 Ill. 543, 76 N. E. 849 (1906); *Cox v. Colossal Cavern Co.*, 210 Ky. 612, 276 S. W. 540 (1925). See also 35 *MICH. L. REV.* 1190 (1937).

⁴ *RICKETTS, AMERICAN MINING LAW*, § 1122 (1931); *COSTIGAN, MINING LAW*, § 153 (1908); 1 *BARRINGER and ADAMS, THE LAW OF MINES AND MINING IN THE UNITED STATES* 568 (1900); *Catlin Coal Co. v. Lloyd*, 176 Ill. 275, 52 N. E. 144 (1898); *Algonquin Coal Co. v. Northern Coal & Iron Co.*, 162 Pa. 114, 29 A. 402 (1894); *Armstrong v. Caldwell*, 53 Pa. 284 (1866); *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436 (1860).

adverse possession unless the possession was open, visible, and notorious.⁵ In a novel case such as here presented, it would seem peculiarly necessary to consider the purpose of the statute of limitations. Some authorities have expressed the purpose as being to prevent the making of illegal claims after the evidence necessary to defeat them has been lost, barring the former owner by reason of his demerit rather than any supposed merit in the wrongful possessor.⁶ But other authorities, including the Indiana Supreme Court itself, have declared the philosophy of the statute to be the protection of long-asserted ownership.⁷ This view would seem to favor defendant, and when questions of policy are also considered such result seems eminently reasonable. Although plaintiff did not know defendant was trespassing, and could not have discovered this fact except by a survey, yet the possession of defendant was as open and as visible as it could have been under the circumstances, and rather than do anything to conceal his possession, defendant had widely publicized it. Defendant's occupation of the cave does not interfere with plaintiff's enjoyment of the surface, and nothing appears to show that plaintiff would be able to make either a present or future use of the cavern.⁸ It is suggested that considerations of policy overwhelmingly support defendant, particularly in a court committed to the doctrine that the statute of limitations is designed to protect long-asserted ownership. Nor is it clear that the court's distinction of this case from the ordinary mistaken-boundary case is a valid one. The court differentiates the two by pointing out that here plaintiff could not determine that defendant was trespassing upon his land except by a survey. It is submitted that the same fact must be true in the majority of cases where a party claims title up to a mistaken boundary line by adverse possession, and that there really is no fundamental difference between rather frequent mistaken-boundary cases and the present one.

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⁵ COSTIGAN, *MINING LAW*, § 153 (1908); *Pierce v. Barney*, 209 Pa. 132, 58 A. 152 (1904); *Pardee v. Murray*, 4 Mont. 234, 2 P. 16 (1882). In these cases, however, there is this important distinguishing feature: the plaintiff had never been down in the defendant's mine, and had no knowledge of its extent.

⁶ 2 TIFFANY, *REAL PROPERTY*, § 500 (1920), and cases cited therein.

⁷ *Craven v. Craven*, 181 Ind. 553 at 560, 105 N. E. 41 (1914): "The intention [of the statute of limitations] is not to punish one who neglects to assert his right, but to protect those who maintained the possession of land for the time specified by the statute under claim of right or color of title." *McIver v. Ragan*, 2 Wheat. (15 U.S.) 25, 4 L. Ed. 175 (1817); LANGDELL, *EQUITY PLEADING*, § 121 (1883); and see, Ballantine, "Title by Adverse Possession," 32 HARV. L. REV. 135 (1918).

⁸ For an interesting discussion of the question as to whether plaintiff ever did own that part of the cave under his land, see 4 UNIV. CHI. L. REV. 680 at 682 (1937), where the writer says: "Considerations of policy dictate that the person who owns land should have no claim of ownership to a cave which lies so far beneath his land that he cannot reasonably expect to reach and use it. By analogy to air law, his only right should be that the laws be not so used as to interfere unreasonably with his enjoyment of the surface."