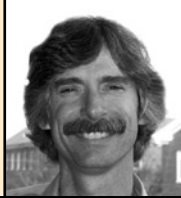


Reconnaissance



By Gary Kent, LS

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The Living Law

At a legislative hearing a few years ago, a registered land surveyor testified that continuing education for surveyors was unnecessary because surveying had not changed in hundreds of years. Of course, the dramatic changes resulting from technological advancements pose a serious challenge to his statement, but he also showed an ignorance as to the role that common law plays in surveying.

A couple of recent cases in the Midwest demonstrate how the law evolves – even in what some might think is the relatively static area of boundary law.

In its June 20, 2005 opinion in *Fraleley v. Minger* (Cause No. 69SO1-0308-CV-387), the Indiana Supreme Court turned 150 years of case law on adverse possession on its head and clarified the court's heretofore hazy stance on the statutory requirement of payment of taxes as a requirement. The case is particularly interesting because in its opinion, the court included an exhaustive history of the doctrine of adverse possession starting with the Norman Conquest in 1066 and running through the 1851 Indiana Constitution to the most recent Indiana Appellate Court cases.

The Indiana Supreme Court has addressed adverse possession only four times since 1955. In a case that year – *Echterling v. Kalwatis*, 235 Ind. 141, 126 N.E.2d 573 (Ind. 1955) – the court seemingly opened a large loophole in the statutory requirement (enacted in 1927) that real estate taxes must be paid on the contested land in order to successfully claim that land by adverse possession.

In *Echterling*, the court noted that “complete legal descriptions of real estate are

not present on the tax duplicates issued by county or city treasurers” and that they are “usually sketchy and inaccurate.” As a result, the court concluded that when the claimant has paid taxes in accordance with his or her own tax duplicate, even though that duplicate did not expressly contain the disputed strip, adverse possession could be claimed.

This construction of the statute had never been overruled or even reconsidered by the Indiana Supreme Court until *Fraleley*. In the intervening years, however, a number of Indiana Court of Appeals rul-

loophole) “substantial compliance” will be considered where “the adverse claimant has a reasonable and good faith belief that the claimant is paying the taxes during the period of adverse possession.”

Even more significantly than settling (to an extent) the issue of payment of taxes, the court in *Fraleley* revisited the required elements of adverse possession.

Although the exact formulation applied by Indiana courts has varied over the years, the common law elements have generally fallen in the realm of (1) actual; (2) visible; (3) open and notorious; (4)

“...recent cases in the Midwest demonstrate how boundary law evolves...”

ings – even as recently as 1995 – followed and expanded on this interpretation.

In a 1979 case – *Kline v. Kramer*, 179 Ind.App. 592, 600, 3867 N.E.2d 982,989 – the Court of Appeals went so far as to state that the law simply did not apply because, it said, the legislature’s actual intent in enacting the statute was not that the taxes expressly be paid, but rather to assure that adequate notice was given to the written title holder.

In *Fraleley*, the Supreme Court tackled this issue head-on and decided that the legislature actually meant what it said in 1927 and that, although the legislature had never reacted to *Echterling* by amending the statute, its intent was clear. The statute must be complied with, except that (leaving yet another

exclusive; (5) under claim of ownership; (6) hostile; and (7) continuous for the statutory period of 10 years (*Penn Central Transportation Co. v. Martin*, 170 Ind. App. 519, 353 N.E.2d 474 [1976]). In other cases, “visible” and “hostile” were eliminated in favor of “adverse,” and “claim of right” was substituted for “claim of ownership.”

In an 1897 case – *Worthy v. Burbanks*, 146 Ind. 534, 45 N.E. 779 – the court listed the “five indispensable elements” as “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.” Other cases have given similar but varying versions of these elements.

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After considering all of this, the Court in *Frale* stated the following (bold emphasis added):

“Synthesizing and rephrasing these varying expressions to reflect a simplified articulation of the common set of shared concerns and the essence of the common law doctrine, we hold that the doctrine of adverse possession entitles a person without title to obtain ownership to a parcel of land upon clear and convincing proof of control, intent, notice and duration, as follows:

(1) Control - the claimant must exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land (reflecting the former elements of “actual,” and in some ways “exclusive,” possession);

(2) Intent - the claimant must demonstrate intent to claim full ownership of the tract superior to the rights of all others, particularly the legal owner (reflecting the former elements of “claim of right,” “exclusive,” “hostile” and “adverse”);

(3) Notice - the claimant’s actions with respect to the land must be sufficient to give actual or constructive notice to the legal owner of the claimant’s intent and exclusive control (reflecting the former “visible,” “open,” “notorious,” and in some ways the “hostile” elements); and,

(4) Duration - the claimant must satisfy each of these elements continuously for the required period of time (reflecting the former “continuous” element).”

Having outlined these new elements, the Court concluded that the Mingers did, in fact, meet them by clear and convincing evidence. However, in accordance with its new interpretation of the payment of taxes statute, it ruled that the Mingers had not intended to pay, or even believed that they were paying, the real estate taxes due on the contested property, so their claim of adverse possession was rejected.

A second case, from the Supreme Court of Iowa – *Heer v. Thola*, Case No. 109/98-2282 (2000) – deals with the doctrine of acquiescence.

Among the issues in the case was, in the Court’s words, “...when an establishment of title through acquiescence takes place. Is it when all of the underlying requirements, including the lapse of ten years, are met, as the Heers argue? Or is it when a court decrees it to be so, as Thola argues.”

The relevant portion of section 650.14 of the Iowa statutes reads as follows:

“If it is found that the boundaries and corners alleged to have been recognized and acquiesced in for ten years have been so recognized and acquiesced in, such recognized boundaries and corners shall be permanently established.”

The court held that this statute “suggests judicial intervention is a requirement for establishing title by acquiescence” and ruled,

“Based on the wording of section 650.14 and these policy considerations, we hold that the establishment of title by acquiescence is effective only on a finding by the court that the requirements for acquiescence have been met. This finding must also establish a definite line. De Viney, 243 Iowa at 1394,

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55 N.W.2d at 481. This is so even if the prerequisites for title by acquiescence have been in existence for some time, as in this case.”

“We conclude that plaintiffs’ claim of title by acquiescence could not have been established under chapter 650 prior to a court’s finding of the necessary elements of such a claim.”

This ruling is in contrast to previous understanding on this issue, which is that title by unwritten rights is obtained upon the meeting of all the necessary elements for the statutory period of time. Court action merely confirms that title has passed and is necessary for the claimant to obtain marketable title to the area.

These two court cases clearly demonstrate that the common law on which boundary surveying is based changes and evolves over time. It is incumbent on surveyors to be familiar with the weight of authority regarding boundary-related issues in the states in which they practice, and to stay up-to-date on contemporary court rulings. 