

MORE ON ADVERSE POSSESSION: A REJOINDER TO PROFESSOR HELMHOLZ

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In 1983 the *Washington University Law Quarterly* published an article by Professor R.H. Helmholtz¹ in which he came to the following conclusions:

(1) the accrual of a cause of action against the adverse claimant and in favor of the true owner is irrelevant in adverse possession cases;²

(2) in determining whether an adverse claimant has satisfied the "claim of right" requirement "the bulk of the recent cases requires . . . [a] formulation of the [adverse possession] rule [that recognizes] the relevance of the subjective intent of the possessor in determining whether or not he may validly acquire title by the passage of the statutory period" of limitation;³

(3) although the cases "do not show that the adverse possessor must plead and prove that he [actually] acted in good faith,"⁴ the judges "have treated the possessor's actual belief that the property belonged to him as a positive and relevant factor";⁵ and

(4) [w]here the possessor knows that he is trespassing, valid title does not accrue to him simply by the passage of years"⁶ because the courts feel "that it is wrong to allow someone who has acted in bad faith to profit thereby."⁷

I read Professor Helmholtz's 1983 article with interest and was initially inclined to accept his conclusions at face value. Later, however, I began to have doubts, and I therefore undertook to read all the cases cited by Professor Helmholtz in support of his principal arguments. My reading of these cases persuaded me that, by and large, they do not support Pro-

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1. Helmholtz, *Adverse Possession and Subjective Intent*, 61 WASH. U.L.Q. 331 (1983).

2. *Id.* at 334-36.

3. *Id.* at 332.

4. *Id.*

5. *Id.* at 338-39.

6. *Id.* at 347.

7. *Id.*

fessor Helmholz's conclusions, especially his conclusion that the courts, on moral or ethical grounds, "regularly prefer the claims of an honest man over those of a dishonest man,"⁸ treating "good faith" as a significant positive factor and "bad faith" as a disqualifying factor in adverse possession cases.⁹ My reply to Professor Helmholz's initial article, criticizing his conclusions therein, was recently published in the *Washington University Law Quarterly*,¹⁰ together with an extended response by Professor Helmholz.¹¹ In this rejoinder, I propose to deal briefly with some of the issues raised by Professor Helmholz's response.

I. THE CASES SURVEYED BY PROFESSOR HELMHOLZ

A. *The Alleged "Over-abundance" of Adverse Possession Cases During the Survey Period*

Professor Helmholz began his initial article by stating that "[t]he relevant [adverse possession] cases are abundant," indeed "over-abundant,"¹² hence, he said, he decided to look carefully at these "relevant" adverse possession cases to determine whether they resulted from "uncertainty in the law and consequent litigation" generated by judicial adherence to an "ethically based notion" that "there is something wrong in permitting a knowing trespasser to gain good title."¹³ Because his article disclosed that there were only about one hundred relevant adverse possession cases, I thought it was fair to ask whether that many cases, decided by appellate courts in all fifty state jurisdictions over an eighteen-year period, could accurately be termed "over-abundant." I tentatively concluded that the answer was "no." I am now firmly persuaded by Professor Helmholz's illustrative statistics on appellate cases decided in Michigan and Texas in 1984¹⁴ that the answer is "no." I would not characterize the one hundred or so relevant adverse possession cases decided during the 1966-1983 period as over-abundant in comparison to the total of 9,100 cases decided by Michigan's appellate courts in 1984 and the

8. *Id.* at 358.

9. *Id.* at 357.

10. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. U.L.Q. 1 (1986) [hereinafter cited as *Reply*].

11. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U.L.Q. 65 (1986) [hereinafter cited as *Response*].

12. Helmholz, *supra* note 1, at 333.

13. *Id.*

14. *Response*, *supra* note 11, at 101.

9,043 cases decided by the Texas appellate courts in 1983.¹⁵

B. Professor Helmholtz's Reliance on Intermediate Appellate Court Opinions

In his *Response*,¹⁶ Professor Helmholtz vigorously took me to task for noting briefly, at the beginning of my *Reply*,¹⁷ that almost half the cases he cited in his original article as direct support for his conclusions were decided by intermediate courts and thus have only limited significance as precedents, and for noting that the opinions of many intermediate court panels should be viewed with some skepticism in light of the varying quality of these panels.¹⁸ I did not, however, say that one should "pay no attention" to the opinions of intermediate appellate courts and, in fact, gave careful attention to such opinions throughout the main body of my *Reply*. Nevertheless, my brief comment with respect to the large number of intermediate appellate court opinions relied on by Professor Helmholtz elicited almost three pages of justification in his *Response*.¹⁹ One of Professor Helmholtz's main arguments is that only a minority of the cases decided by intermediate appellate courts are reviewed by higher courts, so that "the intermediate courts are the courts of last resort for the great majority of cases."²⁰ There is some force in this argument. But I suppose Professor Helmholtz would concede that, if intermediate appellate courts are really misconstruing or ignoring settled legal rules established by courts of last resort, the latter probably will exercise their discretionary review power to correct the errors of the intermediate courts.²¹ Indeed, a quick survey of the Texas Supreme Court and Texas Court of Appeals cases decided during 1985²² reveals that, out of a total of 133

15. *Id.* Professor Helmholtz did not distinguish the total numbers of cases from the cases disposed of with written opinions. Only the latter are significant in assessing trends in the law. From 1966 through 1983, the Michigan Supreme Court and the Michigan Court of Appeals handed down only 34,458 opinions in civil cases. See 1966-1983 MICH. OFF. ST. CT. AD. REP. But even 34,458 opinions in the 1966-1983 period dwarfs the 100 or so relevant adverse possession opinions from all jurisdictions included in Professor Helmholtz's survey.

16. *Response*, *supra* note 11, at 99-102.

17. *Reply*, *supra* note 10, at 2.

18. *Id.* at 2 n.6.

19. *Response*, *supra* note 11, at 99-102.

20. *Id.* at 101.

21. *E.g.*, the erroneous holding, in *Hansen v. National Bank of Albany Park*, 59 Ill. App. 3d 877, 879, 365 N.E.2d 363, 367 (1978), that bad faith possession is not under claim of right was quickly corrected in *Joiner v. Janssen*, 85 Ill. 2d 74, 80, 421 N.E.2d 170, 173 (1981).

22. This survey was made by checking the tables of Texas appellate opinions reported in the appropriate volumes of *West's Southwest (Second) Reporter*. The present Texas Court of Appeals

decisions of the supreme court that reviewed decisions of the court of appeals in civil cases, the supreme court reversed the court of appeals in eighty-seven cases, modified the court of appeals' decisions in two instances, and affirmed in only forty-four instances. The batting average of the courts of appeals (about .330) would be excellent for a baseball player, but is not very good for an intermediate appellate court.²³

II. THE RELEVANCE OF ACCRUAL OF A CAUSE OF ACTION

I devoted a substantial part of my *Reply* to an argument that the "positive requirements of adverse possession," stated in some form in almost every appellate opinion dealing with adverse possession, are primarily judicial criteria for determining whether an adverse claimant's conduct was such as to give the true owner, throughout the statutory limitation period, a cause of action for recovery of possession of his land.²⁴ I did so because Professor Helmholz asserted in his original article that, with one exception, the accrual of a cause of action in ejectment is irrelevant.²⁵ Professor Helmholz's main support for this statement was his observation that "recent cases on adverse possession seldom approach the subject by asking when a cause of action accrued against the possessor."²⁶ He further asserted that to approach some recent cases "by asking about the availability of ejectment [against the possessor] is to invite laughter."²⁷ In his *Response*, however, he explained that he did not really mean that "the moment the statute starts to run is literally without sig-

was called the Texas Court of Civil Appeals prior to September 1, 1981. The court of appeals has jurisdiction over criminal as well as civil appeals, unlike its predecessor. In making my survey of 1985 appellate opinions, I counted only appeals in civil cases.

23. An additional point: Professor Helmholz seems to find fault with my *Reply* for not criticizing his "weighing intermediate [appellate] court opinions equally, not with those of the supreme courts, but with those of the trial courts," asserting that I "obviously could have thought of this criticism" and that failure to do so "is one indication [that I am] less interested in the realities of the law of adverse possession than in upholding the theoretically 'correct' rule." *Response, supra* note 11, at 101-02. I want to assure Professor Helmholz that I did consider saying something about the desirability of surveying the results reached by trial courts in adverse possession cases if some feasible way to do so could be worked out. But I decided against saying anything on that score because I thought it would be unfair to criticize Professor Helmholz for not undertaking a well-nigh impossible task that I myself would not be willing to attempt.

24. *Reply, supra* note 10, at 3-5.

25. Helmholz, *supra* note 1, at 334-335. The only exception, according to Professor Helmholz, is in "cases involving future interests, disabilities, and, to a lesser extent, cotenancies." *Id.* at 335.

26. *Id.* at 334.

27. *Id.* at 335.

nificance,"²⁸ as indeed he was surely compelled to do by those cases where the duration of the adverse claimant's possession is the crucial issue. I shall not repeat here the reasons for my belief that the primary function of the positive requirements of adverse possession is to assure that an adverse claimant's conduct was such as to give the true owner a continuing cause of action for recovery of possession.²⁹ But I am puzzled by Professor Helmholz's criticism of this belief on the ground that it is inconsistent with the views expressed in the *American Law of Property*,³⁰ for I did not purport to espouse those views in my *Reply*. I remain convinced that a wrongful possession sufficient to create a cause of action for recovery of possession continuing for the full statutory limitation period can be accurately defined by reference to the positive elements of adverse possession set out in the cases. And I remain unconvinced that reference to those positive elements shows that the courts no longer distinguish between adverse possession and prescription.³¹

The only positive requirement of adverse possession that causes any real difficulty is the requirement that an adverse claimant's possession must be under "claim of right" and—to the extent that "claim of right" is subsumed therein—the requirement that the claimant's possession must be "hostile."³²

28. *Response*, *supra* note 11, at 78.

29. *See Reply*, *supra* note 10, at 9-16.

30. *Response*, *supra* note 11, at 77-78. Indeed, I would have expected commendation rather than criticism, because Professor Helmholz is very critical of the treatment of adverse possession in the *American Law of Property*.

31. *See* discussion of the distinction between adverse possession and prescription in *Reply*, *supra* note 10, at 6-8. In his original article, Professor Helmholz said that the distinction has been blurred in some states by "prescriptive title statutes, which define the means of acquiring title by adverse possession" and "typically spell out the five affirmative requirements for prescriptive title, restating the required length of possession found in that statute of limitations." Helmholz, *supra* note 1, at 334-35. This is quite inaccurate. Professor Helmholz apparently refers to the statutes derived from the New York Revised Statutes of 1828, which define "possession" for purposes of adverse possession, *see e.g.*, N.Y. REAL PROP. ACTS. LAW §§ 512-522 (Consol. 1981), and also require that the possession be "under claim of title, exclusive of any other right." *See, e.g.*, N.Y. REAL PROP. ACTS. LAW §§ 511, 521 (Consol. 1981). But none of these statutes purports to vest title in the adverse claimant when the former owner's right to recover possession is barred, and only one uses the term "prescription" or "prescriptive title." Although a few American statutes do provide expressly for vesting of title in the adverse claimant at the end of the limitation period—*see Reply*, *supra* note 10, at 5 n.11—only the Georgia statute mentions the affirmative requirements of adverse possession, and only the Oklahoma statute uses the term "prescriptive title." All of the title-vesting statutes make it clear that the title vested in the adverse possessor is based on the barring of the former owner's right to recover possession by the expiration of the limitation period.

32. The minimal meaning of hostile is wrongful, because none of the other affirmative requirements of adverse possession can be construed to mean wrongful.

III. CLAIM OF RIGHT AND SUBJECTIVE INTENT

At several points in his *Response*, Professor Helmholz erroneously asserted that I adhere to the "pure possession" theory of adverse possession set forth in the *American Law of Property*. In my *Reply* to his original article, I clearly stated that, by the latter part of the nineteenth century, most American courts had adopted the claim of right requirement,³³ and I recognized that this permitted judicial consideration of an adverse claimant's "subjective intent."³⁴ But I noted that "the 'claim of right' requirement has little practical significance in ordinary adverse possession cases [because] those 'acts of ownership' required to establish the adverse claimant's 'actual, open, notorious, hostile, and exclusive' possession . . . will also be sufficient to create a rebuttable presumption that the adverse claimant has a 'claim of right.'"³⁵ I am perplexed by Professor Helmholz's criticism of the quoted statement, for I cited ample authority to support it,³⁶ and Professor Helmholz conceded in his original article that "[i]n a great many adverse possession cases, there is simply no [direct] evidence of the possessor's intent."³⁷

In his *Response* Professor Helmholz also criticized my statement about the limited significance of the claim of right requirement on the ground that it is inconsistent with my later statement that the number of adverse possession cases decided in the 1966-1983 period, "is the result of the continuing confusion of the courts as to the meaning of the 'claim of right' requirement."³⁸ But he failed to note that I also stated in my *Reply*:

[t]he substantial amount of adverse possession litigation in recent years may also reflect the fact that it is often difficult to determine . . . whether the adverse claimant's acts amounted to 'actual possession' or only to a series of separate trespasses; whether the claimant's possession was 'permissive' and therefore not 'adverse' at its inception and, if so, whether the claimant's later conduct converted [his] possession into an 'adverse' possession; and whether the claimant's conduct subsequently converted a possession that was prima facie 'adverse' . . . into a 'permissive' possession.³⁹

If I were to rewrite the conclusion to my *Response* today, I would

33. *Reply*, *supra* note 10, at 16-17.

34. *Id.* at 22.

35. *Id.* at 17-18 (footnotes omitted).

36. *Id.* at nn.58-62.

37. Helmholz, *supra* note 1, at 357.

38. *Response*, *supra* note 11, at 79 (quoting *Reply*, *supra* note 10, at 59).

39. *Reply*, *supra* note 10, at 61 (footnotes omitted).

place more emphasis on the latter difficulties, but I still think that continuing confusion as to the meaning of claim of right has characterized American adverse possession cases since the claim of right requirement was generally adopted in the second half of the nineteenth century.⁴⁰ Such confusion is clearly the basis of the conflicting and confused opinions as to the effect of an "honest mistake" in cases involving boundary disputes between adjoining landowners.⁴¹

Professor Helmholz further criticized my treatment of the claim of right requirement on the ground that I have confused the prescriptive with the descriptive and have therefore been "unwilling to look at what terms like 'claim of right' have meant in the actual case law."⁴² This is a serious criticism that requires us to take another look at the cases cited by Professor Helmholz to support his conclusions with respect to claim of right and subjective intent, which he thinks is primarily a question of good faith or bad faith on the part of the adverse claimant.

IV. THE RELEVANCE OF GOOD FAITH AND BAD FAITH

With respect to the relevance of an adverse claimant's good faith or bad faith, I believe that most American courts adhere to the position adopted by the highest court of New York in *Humbert v. Trinity Church*⁴³—that the required claim of title may exist whether the adverse claimant acted in good faith or in bad faith, because what is required is "the intent to claim at all, right or wrong, with or without knowledge that another had title."⁴⁴ But the terms good faith and bad faith require

40. I agree, of course, with Professor Helmholz's statement that the cases he cited in his original article "sometimes involve *both* objective questions of the sufficiency of physical occupation and subjective questions of the occupant's state of mind." *Response, supra* note 11, at 73. But there are actually very few cases of that sort. One good example is *Miller v. Fitzpatrick*, discussed *infra* text accompanying notes 59-64. Unfortunately, however, Professor Helmholz got the result of that case reversed in his original article and then, in his *Response*, when attempting to correct his error, he compounded the error by stating that "the ultimate holding of the case had nothing to do with the problem of subjective intent." *Response, supra* note 11, at 85. As the discussion *infra* text accompanying notes 59-64 indicates, this is also quite erroneous.

41. A good example of this confusion is *Van Valkenburgh v. Lutz*, 304 N.Y. 95, 106 N.E.2d 28, *reh'g denied*, 304 N.Y. 590, 107 N.E.2d 82 (1952) (discussed in *Reply, supra* note 10, at 60-61). For an older example of judicial confusion see *Abbott v. Abbott*, 51 Me. 575, 584 (1863), where the court said: "Mere occupation, by inadvertence, or mistake, without any *intention to claim title*, may not be a disseizin; as where a fence is erroneously erected not on the dividing line. But if, in such case, there is an *intention to claim title* to the land occupied, though the line is fixed by mistake, it is a disseizin."

42. *Response, supra* note 11, at 80.

43. 24 Wend. 587 (N.Y. 1840).

44. *Id.* at 611.

definition. For the purposes of this *Rejoinder*, I will accept the definitions set out in Professor Helmholz's *Response*—" 'good faith' means that the claimant believed that the land belonged to him. 'Bad faith' means the opposite"⁴⁵—although I think these definitions conceal important distinctions.⁴⁶

A. *Good Faith Possession*

Leaving aside cases where an adverse claimant seeks the benefit of a shorter statutory limitation period or of the "constructive possession" doctrine,⁴⁷ the first group of cases cited by Professor Helmholz in support of his conclusion that good faith is a positive factor in adverse possession consists of cases where courts have recently applied the Connecticut "mistaken boundary" rule—cases where one landowner claims to have acquired title to land beyond his "paper boundary" because he possessed it for the statutory period in the honest but mistaken belief that he owned the land.⁴⁸ These cases reject the Maine rule, which denies that possession taken and held in the honest but mistaken belief that the disputed land belongs to the adverse claimant can be deemed to be hostile and under claim of right precisely because of the claimant's good faith.⁴⁹ But, as I noted in my *Reply*, nothing in any of the cases adopting Connecticut rule suggests that an adverse claimant acting in good faith is deemed to stand higher in the eye of the law than an adverse claimant who knows that he does not own the disputed strip and intends to maintain his wrongful possession as long as possible.⁵⁰ Indeed, all the cases adopting or applying the Connecticut rule assume that possession by an adverse claimant of the latter type is under claim of right and therefore adverse to the true owner; these cases simply hold that the requisite claim of right also exists when the possession is held in good faith

45. *Response*, *supra* note 11, at 69.

46. The definition of bad faith, for example, does not distinguish between one who has the intent to acquire title by adverse possession to land he possesses but knows he does not own and one who, without any intent to acquire title by adverse possession, possesses land he knows he does not own; and it also fails to characterize a possessor who, unsure whether he owns a disputed tract of land, intends to maintain his possession as long as possible, whether it is lawful or unlawful.

47. See discussion of these cases in Helmholz, *supra* note 1, at 337; *Reply*, *supra* note 10, at 23-25.

48. Helmholz, *supra* note 1, at 339-41.

49. Both the Connecticut rule and the Maine rule can be traced back to the early or middle part of the nineteenth century. The Connecticut rule originated in *French v. Pearce*, 8 Conn. 439 (1831); the Maine rule goes back at least to *Lincoln v. Edgecomb*, 31 Me. 345 (1850).

50. *Reply*, *supra* note 10, at 28-29.

pursuant to an honest but mistaken belief that the disputed strip belongs to the adverse claimant.⁵¹ This was made very clear in the original Connecticut case, *French v. Pearce*,⁵² from which the appellation "Connecticut rule" is derived, and it is made equally clear in the leading recent case of *Mannillo v. Gorski*,⁵³ on which Professor Helmholz mainly relied for his conclusion that good faith is a plus factor in adverse possession cases. In addition, *French*, *Mannillo*, and the many other cases following the Connecticut rule not only recognize that both good faith and bad faith are consistent with a claim of right, but also adopt an objective theory of adverse possession in holding that the subjective intent of an adverse claimant is irrelevant in boundary-mistake cases.

On the other hand, in the many jurisdictions that still adhere to the Maine rule, possession of a strip of land beyond the possessor's paper boundary is not deemed to be under claim of right and is thus not adverse unless the possessor's intent is "to claim title to all land within a certain boundary on the face of the earth, whether it shall eventually be found to be the correct one or not."⁵⁴ The Maine rule is thus based on the subjective-intent theory championed by Professor Helmholz, but it actually rewards the adverse claimant who either knows that his possession extends beyond his true boundary or does not care whether his possession is, in fact, wrongful. In both cases, I would describe him as holding in bad faith. The reader is left to wonder why Professor Helmholz did not acknowledge that the Connecticut rule cases are inconsistent with his views about both bad faith and subjective intent, while the Maine rule cases, though inconsistent with his views on either good faith or bad faith, are perfectly consistent with his views about subjective intent.

Professor Helmholz's original article cited cases other than mistaken-

51. *Id.* at 26-29.

52. 8 Conn. 439 (1831).

53. 54 N.J. 378, 386, 255 A.2d 258, 262 (1969), where the court said:

Whether or not the entry is caused by mistake or intent, the same result eventuates—the true owner is ousted from possession. . . . Accordingly we discard the requirement that the entry and continued possession must be accompanied by a knowing intentional hostility and hold that any entry and possession for the required time which is exclusive, continuous, uninterrupted, visible and notorious, even though under mistaken claim of title, is sufficient to support a claim of title by adverse possession.

54. *Preble v. Maine Cent. R.R.*, 85 Me. 260, 265, 27 A. 149, 150 (1893). The court explained further that "in case of occupancy by mistake beyond a line capable of being ascertained, this intention to claim title . . . must appear to be absolute and not conditional; otherwise the possession will not be deemed adverse to the true owner." *Id.*

boundary cases where, he asserted, "despite the absence of any necessity," courts noted the "existence and the relevance of good faith."⁵⁵ In some of these cases, however, the courts were simply concerned with making it clear that hostility is "a term of art and does not imply ill will," or that "[f]or possession to be hostile . . . no spirit of animosity or hostility is required,"⁵⁶ or that (in Professor Helmholz's words) "[t]he hostility requirement is consistent with belief on the part of the adverse possessor that the title is rightfully his."⁵⁷ It is clear that these cases do not support Professor Helmholz's argument that good faith is a positive factor in adverse possession; they merely show that either good faith or bad faith may be consistent with a claim of right.

Most of the other cited cases also fail to support Professor Helmholz's argument,⁵⁸ although some contain language that, taken out of context, may appear to do so. In my *Reply*, I noted *Miller v. Fitzpatrick*,⁵⁹ *Butler v. Hanson*,⁶⁰ and *Reeves v. Metropolitan Trust Co.*⁶¹ as cases where Professor Helmholz's quotation of short snippets from the opinions seemed to me to be seriously misleading. In his *Response*, Professor Helmholz admits that there was error in his use of *Miller*, since the court actually held *against* the adverse claimant, but he seems to derive some comfort from an assertion that "the ultimate holding of the case had nothing to do with the problem of subjective intent"⁶² because the court held that acts like "the mowing of lawn, [and] cutting of weeds . . . evidence a casual and incomplete use of the premises" and "hence were insufficient to constitute [the] 'actual' possession that would give sufficient notice of an adverse claim to the record owner."⁶³ Perhaps I should simply accept Professor Helmholz's admission of error as to the *Miller* holding, but I am again bothered by his having quoted in his *Response* only a snippet from the passage in which the court stated its *ratio decidendi*. When this passage is read in its entirety,⁶⁴ it becomes clear that the court based its decision on both the absence of evidence of the adverse claimant's subjec-

55. Helmholz, *supra* note 1, at 337.

56. *Id.* at 337 (at text accompanying nn.24, 25).

57. *Id.* (at text accompanying n.25).

58. See *Reply*, *supra* note 10, at 29. n.101.

59. 418 S.W.2d 884 (Tex. Civ. App. 1967), *quoted in* Helmholz, *supra* note 1, at 341.

60. 455 S.W.2d 942 (Tex. Civ. App. 1970), *quoted in* Helmholz, *supra* note 1, at 341.

61. 254 Ark. 1002, 498 S.W.2d 2 (1973), *quoted in* Helmholz, *supra* note 1, at 338.

62. *Response*, *supra* note 11, at 85.

63. *Id.*

64. 418 S.W.2d at 888-90.

tive intent to hold any of the true owner's land adversely to him and on the insufficiency of the adverse claimant's conduct to establish an actual, open and notorious possession. *And the primary reason for concluding that the adverse claimant lacked hostile intent was that it was shown that he honestly believed that the disputed land belonged to him. The subjective intent required by the Miller court as a basis for acquisition of title by adverse possession was actually a bad faith intent to acquire what the claimant knew did not belong to him. Thus Miller v. Fitzpatrick not only fails to provide support for Professor Helmholz's argument as to the relevance of good faith but actually supports an argument that good faith may prevent the adverse claimant from acquiring title by adverse possession.*

A careful reading of *Butler v. Hansen*⁶⁵ indicates that the principal issue on appeal was whether there was at least some evidence of adverse possession to support the jury's verdict in favor of the adverse claimant. The court held that there was, taking into account evidence that the disputed tract was used and occupied for thirty or forty years by the adverse claimant and his predecessors, that the disputed tract was separated from adjacent land of the record owner by a fence rebuilt and maintained by the adverse claimant, and that the general reputation in the community was that the adverse claimant owned the disputed tract.⁶⁶ The *Butler* opinion contains no mention whatever of good faith or honest mistake, and it is not clear that the adverse claimant did, in fact, possess in good faith. His testimony can certainly be construed to mean that he claimed all that was inside his fence even though it was "in Section 3," which he knew he did not own.⁶⁷ Hence I see no basis for citing *Butler* as a case where the adverse claimant's good faith was taken into account by the court in deciding the case in his favor. I will postpone my discussion of *Reeves v. Metropolitan Trust Co.*⁶⁸ until I take up the relevance of bad faith possession, because the force of Professor Helmholz's reading of *Reeves* is based almost entirely on the juxtaposition of the court's holding that the adverse claimants acquired title to a tract they honestly believed they owned with its holding that they did not acquire title to a tract they admittedly knew they did not own.

65. 455 S.W.2d 942 (Tex. Civ. App. 1970).

66. *Id.* at 945.

67. *See* 455 S.W.2d at 944-45.

68. *See supra* note 61.

B. *Bad Faith Possession*

In my opinion, the cases cited by Professor Helmholz provide almost no support for his conclusion that “[w]here the possessor knows that he is trespassing valid title does not accrue to him simply by the passage of years”⁶⁹ because the courts feel “that it is wrong to allow someone who has acted in bad faith to profit thereby.”⁷⁰ The reasons for my opinion are stated at length in my *Reply* and will not be repeated here in any detail. But I do wish to deal with several issues raised by Professor Helmholz’s *Response*.

In his original article Professor Helmholz cited a number of cases for the general proposition that the courts have refused “to reward the bad faith possessor” by describing his possession “as somehow less than sufficient to acquire title.”⁷¹ He then went on to say, with respect to the adverse claimant’s conduct, that:

A pejorative description can be fastened onto it [the adverse claimant’s possession]. It may be described as “scrambling possession” or “provisional and contingent” occupancy. It may be called “naked possession” or “mere occupancy.” It can be said to stand no higher than “squatter’s rights” . . .

The invocation of such terms somehow seems sufficient itself to permit the judge to deny title to the dishonest possessor.⁷²

In light of this language I was amazed to find Professor Helmholz assert, in his *Response*, that in his original article he “used no language”⁷³ suggesting that he thinks such cases involve “disingenuous”⁷⁴ conduct or “subterfuge”⁷⁵ on the part of the courts. I think his words speak for themselves on this point. I was also surprised that he raised the question: “Does the evidence show that American judges have been dishonest in deciding adverse possession cases?”⁷⁶ I made it very clear in my *Reply* that I answer that question in the negative because I think the stated *ratio decidendi* in the cases cited by Professor Helmholz is the real *ratio decidendi*.

A similar observation can be made with respect to the cases in which, according to Professor Helmholz, the courts have refused “to allow the

69. Helmholz, *supra* note 1, at 347.

70. *Id.*

71. *Id.* at 342.

72. *Id.* at 342-43. The cases are cited in nn.47-51.

73. *Response, supra* note 11, at 96.

74. *Id.* at 95.

75. *Id.* at 96.

76. *Id.* at 95.

possession of a person who knows that he is trespassing on the land of another to ripen into title" by characterizing "the knowing trespasser's possession as permissive, although there is no affirmative evidence of the record owner's having consented to it."⁷⁷ If one were to accept this statement at face value, Professor Helmholz again attributes to the courts a disingenuous unwillingness to reveal the true basis of their decisions. But, as with the cases said to characterize the adverse claimant's possession is somehow less than sufficient to acquire title by attaching a pejorative description, a careful analysis of the permissive possession cases shows that, in most of them, express permission was given to the adverse claimant by the true owner, and that in the other cases it is clear that tacit permission was given.⁷⁸ Apparently Professor Helmholz rejected the idea that the true owner's permission may be actual although tacit. I think he is clearly wrong on this point, because tacit consent is usually treated as equivalent to express consent in other areas of the law. Moreover, in two of the cases he cited in his *Reply*,⁷⁹ Professor Helmholz ignored the fact that the adverse claimant's possession was found to be permissive because the adverse claimant was a grantor who retained possession of the land in dispute, and the true owner was the grantee of the land. As Professor Helmholz recognized in his original article, it is well-settled that a grantor's retained possession is deemed to be permissive rather than adverse vis-a-vis his grantee.⁸⁰ And in two of the cases cited by Professor Helmholz⁸¹ there were alternative grounds for the decision: (1) that the adverse claimant never had actual possession of the land in dispute; and (2) that if he had possession, it was permissive.

A word should also be said about the cases Professor Helmholz cited in his original article to support his assertion that the courts regularly hold that evidence showing the possessor knew enough of the true state of the title to offer money to the record owner is fatal to the possessor's claim.⁸² As I pointed out in my *Reply*,⁸³ some of these cases did not

77. Helmholz, *supra* note 1, at 343.

78. *Reply*, *supra* note 10, at 40 nn.149, 150.

79. *Id.* at 41 n.152.

80. Helmholz, *supra* note 1, at 351-53.

81. *Courtney v. Boykin*, 356 So. 2d 162, 165 (Ala. 1978) ("[r]are and widely separated acts . . . constitute mere transitory trespasses"); *Runnels v. Whitfield*, 593 S.W.2d 388, 390 (Tex. Civ. App. 1979) ("the land was not enclosed . . . and it is well settled that an adverse claimant who relies only upon cattle grazing as evidence of adverse use must show that the land in dispute was designedly enclosed"). See also *Shishilla v. Edmonson*, 61 Ill. App. 3d 187, 377 N.E.2d 1115 (1978) (adverse claimant never had "exclusive" possession of disputed strip).

82. Helmholz, *supra* note 1, at 345-46.

involve an offer to pay money, and some involved an actual money payment or a genuine offer to buy land and/or some other acknowledgement of the true owner's superior title. In other cases the adverse claimant's possession was clearly rightful because the true owner either gave express permission or was a co-tenant who was never excluded by the adverse claimant.⁸⁴ In the only case cited by Professor Helmholz as holding that a mere offer to compromise a disputed claim will prevent acquisition of title by adverse possession, the adverse claimant actually paid rent to the true owner.⁸⁵ None of the cited cases really supports Professor Helmholz's assertion that any offer to pay money to the true owner is fatal to the adverse claimant's case.

Most of the cases cited by Professor Helmholz to support his assertion that proof of bad faith has usually been held to be fatal to a claim of title by adverse possession without judicial resort to any special characterization of the claimant's possession⁸⁶ do not, in fact, support his assertion, but simply hold against the adverse claimant either on the ground that he failed to prove one or more of the positive elements of adverse possession other than claim of right, or on the ground that he failed to prove a claim of right because his possession was permissive or because the claimant in some way acknowledged the true owner's superior title.⁸⁷ In none of these cases did the courts need to discuss the possible relevance of bad faith, and in none of these cases did the courts characterize the adverse claimant as having acted in bad faith. In all these cases, I think the courts meant what they said rather than what Professor Helmholz reads into their opinions.

Special attention should be directed to two of the cases cited by Professor Helmholz in support of his conclusion that proof of the adverse claimant's bad faith is fatal to his case because it shows he had no claim of right. These cases are *Barnes v. Milligan*⁸⁸ and *Reeves v. Metropolitan*

83. *Reply, supra* note 10, at 41-44.

84. *See* cases cited, *id.* at 41-43 nn.159-65.

85. *Ayers v. Day & Night Fuel Co.*, 451 P.2d 579 (Alaska 1969) (\$200 payment constituted rent at the rate of \$50 per month).

86. Helmholz, *supra* note 1, at 344-45.

87. *See Reply, supra* note 10, at 34-36. *Hoppe v. Sauter*, 416 S.W.2d 912 (Tex. Civ. App. 1967) is miscited, as Professor Helmholz admits in his *Response, supra* note 11, at 87 n.93. *Hoppe* actually held that title by adverse possession was acquired by a claimant who admitted he did not own the land but asserted that he "was claiming it by limitation." *Baker v. Benedict*, 92 N.M. 283, 587 P.2d 430 (1978), is also miscited, because it was decided under a statute expressly requiring both color of title and good faith.

88. 200 Neb. 450, 264 N.W.2d 186 (1978).

*Trust Co.*⁸⁹

*Barnes v. Milligan*⁹⁰ was cited in Professor Helmholz's original article⁹¹ for the proposition that "a clear majority of recent cases" refuse to find adverse possession "where knowing trespass on the part of the possessor has been shown." But a careful reading of *Barnes* reveals that the adverse claimant failed to establish title by adverse possession, not because he lacked a claim of right or because he acted in bad faith, but because he could satisfy the statutory limitation period only by tacking his own possession to that of his predecessors, who were found to have lacked a claim of right because they had repeatedly acknowledged the title of the true owner.⁹² Nothing in the "Barnes" opinion suggests that the adverse claimant's possession after he received a quitclaim deed from his predecessor and took possession of the disputed tract was not under claim of right, despite the fact that he clearly took possession with knowledge that his grantor was not the owner.⁹³

*Reeves v. Metropolitan Trust Co.*⁹⁴ is rather similar to *Barnes v. Milligan*, although *Reeves* did not involve a tacking problem. *Reeves* involved two adjoining parcels of land.⁹⁵ The court held that the adverse claimant had acquired title by adverse possession to the first parcel but not to the second. Although the court characterized the claimant's possession of

89. 254 Ark. 1002, 498 S.W.2d 2 (1973).

90. *Supra* note 88.

91. Helmholz, *supra* note 1, at 345 n.62. See also *Response, supra* note 11, at 92.

92. See 200 Neb. at 453, 457-59, 264 N.W.2d at 189, 191-92, where the court explained that (1) a fence marking the extent of asserted adverse possessions "was placed where it was merely as a matter of convenience" by the claimant's predecessors; (2) when the fence was built, the then occupant of the disputed tract declared that "he could pay 'the old lady' [the true owner] . . . rent just like anybody else;" (3) "in at least one earlier instance" unsolicited rent was paid to the owner of another tract also included within the fence; and (4) before the then occupants of the land signed a contract to sell adjoining land they owned to the adverse claimant, "they expressly disclaimed ownership, including any claim of title by adverse possession," of the disputed tract.

93. Indeed, the *Barnes* opinion suggests that he might have acquired title, despite his lack of good faith, had he possessed the land for the full statutory period. See 200 Neb. at 457, 264 N.W.2d at 191 ("The evidence in this case would permit the trial court to find that the possession of the . . . by the Stansbie and Engel Company, its successor, . . . and its grantees *until the time of occupation by Milligan* was not hostile.") (Emphasis added.) Clearly the court thought Milligan's possession was "hostile," noting that Milligan apparently insisted on getting a quitclaim deed to the land in dispute "to lay a clear ground for a claim of adverse possession." See 200 Neb. at 459, 264 N.W.2d at 192.

94. *Supra* note 89.

95. This is Professor Helmholz's characterization. See Helmholz, *supra* note 1, at 338. The adverse claim actually covered a single tract adjacent to land owned by the claimants, but the court dealt separately with a part of the tract enclosed by a hedge planted by the claimants ("parcel 1") and a part of the tract lying outside the hedge ("parcel 2").

the first parcel as "in good faith,"⁹⁶ its attention was directed to the issues presented on appeal—whether the claimant's possession should be deemed permissive and whether it was sufficiently open and notorious.⁹⁷ Only the juxtaposition of the words good faith and the court's statement that the claimant "admits candidly that he knew the [second price] did not belong to him"⁹⁸ suggest the explanation advanced by Professor Helmholz: "The distinction in treatment of the two parcels . . . depended on the existence of an honest mistake about the first parcel, as against a knowing trespass on the second."⁹⁹ But this is too simplistic a reading of *Reeves*. I think the key to the second holding is the court's statement that the adverse claimants "testified that they did not mean to claim any land that they did not own."¹⁰⁰ This statement was omitted from the quotation from *Reeves* included in Professor Helmholz's original article. My reading of *Reeves*, in light of this statement, is that the court decided against the adverse claimants because they did not assert any claim of right at all, not because they knew they did not own the land. This reading of *Reeves* is borne out by an inspection of the two cases¹⁰¹ cited by the court in support of its holding as to the second parcel in *Reeves*. Neither of those cases provides any support for Professor Helmholz's assertion that bad faith was the key to the holding as to the second parcel in *Reeves*.¹⁰²

Because Professor Helmholz did not, in his original article, tell the reader enough about the *Reeves* case to permit an informed conclusion about the grounds for the court's decision, and because he also failed to

96. 254 Ark. at 1003, 498 S.W.2d at 3.

97. *Id.* at 1003, 498 S.W.2d at 3.

98. *Id.* at 1003, 498 S.W.2d at 4.

99. Helmholz, *supra* note 1, at 338.

100. 254 Ark. at 1003, 498 S.W.2d at 4.

101. *Conway v. Shuck*, 203 Ark. 559, 157 S.W.2d 777 (1942); *Shirey v. Whitlow*, 80 Ark. 444, 97 S.W.2d 444 (1906).

102. *Conway v. Shuck*, *supra* note 101, contains *dictum* that "a 'squatter' can never gain prescriptive title to land" because "he makes no claim against the true owner and his possession is, therefore, not adverse," but the court *held* only that the adverse claimant could not raise the question whether the land (an island) was really located in Tennessee. If the land was really located in Tennessee, a grant from Arkansas to plaintiffs would have been invalid, and the claimant could show no title from either Arkansas or Tennessee. 203 Ark. at 562, 157 S.W.2d at 778 (quoting *Mayor of Rosyth v. Hooks*, 182 Ga. 78, 184 S.E. 724 (1936)).

In *Shirey v. Whitlow*, *supra* note 101, the opinion begins by stating the Maine rule requiring a deliberately wrongful holding to acquire title to land beyond the claimant's paper boundary, but the rest of the opinion deals with the legal effect of the claimant's "acknowledgement" of the true owner's superior title either before or after the statutory limitation period has apparently expired.

mention the two cases relied on by the *Reeves* court to support its holding as to the second parcel of land, I termed his characterization of the case “both inaccurate and misleading” in my *Reply*.¹⁰³ I still think my characterization is accurate.¹⁰⁴

One final point about the relevance of bad faith possession. As I pointed out in my *Reply*, Professor Helmholz, in his original article, conceded that in a substantial number of the cases he surveyed the courts held that an adverse claimant acquired title by adverse possession despite the fact that he “knew, or should have known, that the land in question belonged to someone else.”¹⁰⁵ In fact, there are many more such cases than there are cases (among those cited by Professor Helmholz) that might possibly be deemed to support his views about the relevance of bad faith. And I am still of the opinion that these “bad faith” cases cannot be explained by Professor Helmholz’s theory that the adverse claimant for some reason had equities on his side that outweighed his bad faith.¹⁰⁶

C. *Objective Standards and Ethical Values*

The main thrust of both Professor Helmholz’s original article and his *Response* is that, in the cases he surveyed, the courts were moved by ethical concerns that led them to award title by adverse possession to good faith claimants and not to award title by adverse possession to bad faith claimants. I do not think the cases surveyed by Professor Helmholz support this conclusion. When we look at the cases adopting or applying the Connecticut rule on the effect of mistake in boundary disputes, it is clear that the courts are not moved by ethical concerns, for the essence of the Connecticut rule is that wrongful possession will create a cause of action whether it is based on good faith or bad faith. In most of the cases in which, according to Professor Helmholz, the courts have refused to allow bad faith claimants to acquire title by adverse possession, it is clear

103. *Reply*, *supra* note 10, at 31.

104. Please note, however, that I did not use the term “egregious” with respect to his characterization of *Reeves*, as Professor Helmholz erroneously stated in his *Response*. See *Response*, *supra* note 11, at 87. However, I do think that Professor Helmholz’s reading of *Brylinski v. Cooper*, 95 N.M. 580, 624 P.2d 522 (1981)—see Helmholz, *supra* note 1, at 351—is not only inaccurate and misleading but is “egregiously” so. See *Reply*, *supra* note 10, at 48.

105. Helmholz, *supra* note 1, at 348-49 nn.73-76.

106. *Id.* at 349. Professor Helmholz also sought, in his original article, to explain appellate decisions in so-called “special situations” that are inconsistent with his conclusions as to the relevance of good faith and bad faith on the ground that favorable decisions in favor of bad faith claimants are a result of counterbalancing equities. In my *Reply*, I explained why I disagree. See *Reply*, *supra* note 10, at 49-58.

that the courts are generally not moved by ethical concerns. As Professor Helmholz conceded in his original article, the courts "admit the possibility of a truly hostile claimant [i.e., one who deliberately seeks to acquire title by adverse possession] acquiring valid title."¹⁰⁷ Thus, for example, in *Hoppe v. Sauter*¹⁰⁸ (which Professor Helmholz miscited in his original article as a case where bad faith was fatal to the adverse possessor's claim of title by adverse possession) the adverse claimant was held to have acquired title where he knew that he did not own the disputed tract (comprising about thirty acres) but took possession in order to acquire title "by limitation."¹⁰⁹ On the other hand, when it appears that the adverse claimant (or his predecessor, where tacking is required) asserted no claim of right at all, the courts have sometimes refused to allow the bad faith claimants to acquire title, as the court did in *Reeves v. Metropolitan Trust Co.*¹¹⁰ Yet adverse claimants who deliberately seek to acquire title by adverse possession would seem ethically inferior to those who candidly admit that they knew the land did not belong to them and also admit "they did not mean to claim any land and that they did not own."¹¹¹ There is certainly no ethical basis to prefer the former to the latter.

If courts are really moved by ethical concerns in adverse possession cases, one is certainly entitled to ask why they almost never forthrightly state those concerns and hold that possession in bad faith is inconsistent with a claim of right and therefore cannot lead to acquisition of title by adverse possession. The only explanation offered by Professor Helmholz is that this would be contrary to hornbook law.¹¹² But Professor Helmholz himself has noted "[t]he rarity with which American courts have cited the *American Law of Property's* treatment" of adverse possession and asserted that the courts "do not conceive that they owe obedience to the 'pure possession' view of adverse possession."¹¹³ The courts, in fact, seldom cite either a hornbook or a treatise in support of their holdings on adverse possession. So the failure of the courts to state explicitly that they are applying an ethical standard that precludes the award of title to an adverse possessor is inexplicable if, indeed, that is what they are do-

107. See Helmholz, *supra* note 1, at 347.

108. 416 S.W.2d 912 (Tex. Civ. App. 1967).

109. *Id.* at 914.

110. 254 Ark. 1002, 498 S.W.2d 2 (1973).

111. *Id.* at 1003, 498 S.W.2d at 4.

112. Helmholz, *supra* note 1, at 342.

113. *Response, supra* note 11, at 96.

ing. But I do not think that is what they are doing. I think they are doing exactly what they say they are doing—refusing to award title to an adverse claimant because he failed to satisfy all the “positive requirements” for an adverse possession.

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