

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

GREGORY J. WILKE and VICKI L. WILKE, husband and wife,
Plaintiffs,

vs.

NIELS C. McDERMOTT and VIRGINIA McDERMOTT, husband and wife; STATE OF NEBRASKA, GAME AND PARKS COMMISSION OF THE COUNTY OF LANCASTER, STATE OF NEBRASKA; and ALL PERSONS WHO CLAIM OR APPARENTLY HAVE AN ADVERSE INTEREST IN THE W¹/₂NE¹/₄, SECTION 27, T32N, R22W OF THE 6TH P.M. BROWN COUNTY, NEBRASKA, real names unknown,

Defendants.

Case No. CI00-58

DECREE

DATE OF TRIAL: November 6, 2001.

DATE OF RENDITION: November 7, 2001.

DATE OF ENTRY: See clerk's file stamp date.

APPEARANCES:

For plaintiffs: L.J. Karel with Gregory J. Wilke and without Vicki L. Wilke.

For defendants:

McDermott: John R. Brownell with Niels C. McDermott and without Virginia McDermott.

State: Lynn A. Melson, Assistant Attorney General, with Mark Brohman, Administrator, Administration Division, Game and Parks Commission.

Unknown: No appearance.

SUBJECT OF DECREE: Decision on the merits following trial to the court in equity.

PROCEEDINGS: See journal entry rendered November 7, 2001.

FINDINGS:

The court finds and concludes that:

1. The plaintiffs, Gregory J. Wilke and Vicki L. Wilke (“Wilke”), seek to quiet title to a tract of real estate consisting of approximately 30.51 acres, either under a theory of adverse possession or claiming mutual recognition and acquiescence in a boundary fence. The defendant State of Nebraska, Game and Parks Commission (“the State”), is the current titleholder of record to the disputed tract. The State, in its counterclaim, seeks to quiet title in the State, damages for trespass, and an injunction to prohibit future interference.

2. The defendants, Niels C. McDermott and Virginia McDermott (“McDermott”), are the predecessors in title to the State. The court sustained McDermott’s demurrer to the plaintiffs’ petition by interlocutory order, but did not dismiss the petition as against McDermott. Although the plaintiffs were granted leave to file an amended petition, they have failed to do so and are deemed to have elected to stand upon the petition as against McDermott. Thereafter, the State asserted a cross-petition against McDermott, which was bifurcated for separate trial depending upon the outcome of this trial.

3. The title to the disputed tract was held in the Nelson family for many years. It was apparently owned by Andrew Nelson, Virginia McDermott’s grandfather, at one time. Chester “Chet” Nelson, Virginia McDermott’s father, operated the Nelson farm and ranch property for many years. At some point, the Nelson ranch property was transferred to Chet Nelson and Niels C. McDermott, in some form of joint ownership or partnership. In November of 1987, Nelson’s interest was conveyed to McDermott. In January of 1991, McDermott conveyed the Northeast Quarter of Section 27, including the disputed tract, together with other real estate, to the State. The State has since considered the Northeast Quarter of Section 27 as part of the Bobcat Wildlife Management Area.

4. Lyle “Jack” Jones and Dorothy Jones (“Jones”) owned the West Half of Section 27, together with other property in the area, for many years. In July of 1996, Jones conveyed the West Half of Section 27 (excepting a tract in the South Half of the South Half of Section 27 that has no relationship to the present controversy) to Wilke.

5. The basic facts are quite simple. These properties approach the south side of Plum Creek. Most of the disputed area consists of very steep canyon land, generally unsuitable for commercial ranching use. The canyons run northwest-southeast, with two canyons coming generally from Plum Creek across

the Northwest Quarter of Section 27 and ending in the southwest part of the Northeast Quarter of Section 27. While cattle could, once gaining access to the canyons, graze the canyon bottoms, the entire tract provides very little grazing opportunity and would perhaps support one animal unit. For many years, a fence has existed along an irregular path around the southeast end of the two canyons and then generally paralleling one of the canyons to the northwest. The portion of the Northeast Quarter of Section 27 south and west of the fence comprises the disputed property.

6. Wilke contends that either Jones acquired the disputed property by adverse possession or alternatively that Jones and Nelson mutually recognized and acquiesced in the fence as a common property boundary. Wilke claims ownership of the disputed tract as Jones' successor.

7. The title to real estate cannot be acquired by adverse possession while the title is in the state. *State v. Cheyenne Cty*, 123 Neb. 1, 241 N.W.2d 747 (1932); *Vogel v. Bartels*, 1 Neb. App. 1113, 510 N.W.2d 529 (1993). Thus, this court's inquiry focuses on the time prior to the 1991 conveyance to the State.

8. The Supreme Court has frequently restated the applicable principles of law.

a. A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the statutory period of 10 years. *The Rush Creek Land & Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998). Title cannot be acquired without simultaneous and continuous existence of each element of adverse possession for the required period. *Id.* Where both parties have used the property in dispute, there can be no exclusive possession on the part of one party. *Id.*

b. To gain title by adverse possession against a true owner, acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. *Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981). The sufficiency of possession depends upon the character of the land and the use that can reasonably be made of it. *Id.* When a fence is constructed as a boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the claimant gains title to such land by adverse possession. *Id.*

c. One who claims title by adverse possession must prove the elements of adverse possession by a preponderance of the evidence. *Pettis v. Lozier*, 205 Neb. 802, 290 N.W.2d 215 (1980). However, once a person proves uninterrupted and open use for the necessary prescriptive period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right and that presumption prevails until it is overcome by a preponderance of the evidence. *Fischer v. Grinsbergs*, 198 Neb. 329, 252 N.W.2d 619 (1977). A permissive use is not adverse, and cannot ripen into adverse possession. *Id.*

d. The element of a “claim of ownership” or “hostility” has, in Nebraska law, always been required. *Barnes v. Milligan*, 200 Neb. 450, 264 N.W.2d 186 (1978). Usually the “hostility” or “claim of ownership” is evidenced by the nature of the possession, and, in the absence of contrary evidence, that is sufficient to sustain the burden to claim adverse title. *Id.* Of course, nonhostility can be shown even where the nature of the possession is sufficient to give notice of hostility. *Id.* The warning loses its significance if the evidence shows that hostility is not present, because then one of the elements of adverse possession is missing. *Id.* Further, a long line of cases makes it evident that intent has always been an element in Nebraska. *Id.* The intent may be either actual or presumed, or inferred from the circumstances. *Id.* In most cases it is inferred from the circumstances. *Id.* The intent, even though mistaken, is sufficient as where the claimant occupies to the wrong line believing it to be the true line and even though he does not intend to claim more than that described in the deed. *Id.* However, where the claimant was under no misapprehension as to where the true line was and did not intend the fence as a boundary line fence, the occupancy does not ripen into title. The court in *Barnes* concluded that the fence was placed where it was merely as a matter of convenience, at least in part because any fence erected on the true line would have been constructed over very rough land.

9. The court concludes that the testimony of Lyle Jones shows that he knew the fence was not on the half-section line described in the deed whereby he acquired the property. Moreover, on cross examination by the State, Jones stated unequivocally that he had bought what he recorded, which was the land on which he paid real estate taxes. His recorded deed clearly excludes the disputed tract. That omission in and of itself is not fatal, but in the event of omission it is necessary for the claimants to establish privity of possession by competent evidence that they and their predecessors actually occupied the disputed

parcel for the full 10-year statutory period. *Rentschler v. Walnofer*, 203 Neb. 84, 277 N.W.2d 548 (1979). The testimony of Lyle Jones shows a cooperative placement of a fence for convenience, and prior to 1992, no assertion of any claim of right or ownership to the disputed tract.

10. Wilke and McDermott each testified that no economic justification could be made for construction of the fence on the true line through the canyons. Indeed, had the property continued in private ownership it is difficult to conceive of this dispute arising. Only the State, with its relatively unlimited resources, could engage in the expensive process of placing a fence on the true line under these circumstances. No individual rancher could justify any such expense, and reasonable ranchers in the Sandhills have fenced for convenience for many, many decades without any suggestion of hostile occupation of the irregular tracts. Jones knew that he did not own the irregular tract in the Northeast Quarter of Section 27, knew that he was not paying taxes on that tract, knew that the use was permissive because of the reason for construction of the fence at that location, and never attempted to make any such assertion against Nelson or McDermott. Indeed, such an assertion, given the cooperative relations between ranchers and neighbors, would have been unthinkable. Only the cold reality of the arrival of the State on the local scene prompted any such thoughts or behavior. And of course, by then it was too late.

11. The contract between Wilke and Jones whereby Wilke acquired this property expressly states that “[b]uyers acknowledge that the fences are not necessarily on the property lines.” Exhibit 1. Wilke attempted to place an additional gloss or spin to that simple declaration, which this court rejects. Exhibit 1 expressly states that the sales agent was acting for Jones as seller. The inclusion of the specific language and the preparation of the offer by the seller’s agent speaks persuasively of the seller’s knowledge and intent. Jones knew that the fence was not on the true line, knew that Jones was not the owner of the disputed tract, and took an affirmative step to demonstrate the absence of any contrary representations to Wilke.

12. The testimony of the State’s witnesses satisfactorily explains the placement of “property boundary” signs by the State along the fence line, and dispels any claims that the State acquiesced in the fence as a boundary or in some way recognized a limitation of its ownership of the entire quarter section.

13. When the State arrived on the scene and commenced its preparation to fence the true boundary, for the first time Jones entertained the notion that the fence was a boundary fence. The letter

from Jones to the State requested a “written understanding” concerning the fence. Exhibit 6. The State issued no such acknowledgment, and the testimony of the State’s personnel persuasively shows that they responded to the contrary.

14. Wilke refers to favorable language in the deposition testimony of Chet Nelson. This court entirely rejects and disregards the attempt by McDermott to adduce nonexpert evidence regarding the competence or reliability of Nelson as a witness. However, the examination of the deposition transcript reveals a situation in which favorable testimony can be found on both sides of the same question, frequently at the same time or within a few pages, frequent contradictions between testimony, almost constant display of inability to understand the questions or to respond coherently, and general signs of unreliability. This court declines to selectively quote a snippet of Nelson’s deposition, where the entire deposition casts considerable doubt that he understood many of the questions and that he responded accurately or reliably.

15. The court accepts McDermott’s testimony that he and family members made occasional use of the property for recreational purposes. Such use, while not extensive, is sufficient to demonstrate some reasonable use of the property. Consequently, the use by Jones was not exclusive.

16. An owner of property does not recognize and acquiesce in the ownership by an adjoining landowner of any part of his property merely because he does not construct his fence on his property line. *Foos v. Reuter*, 180 Neb. 301, 142 N.W.2d 552 (1966). If Wilke were to prevail in asserting a claim of ownership under these circumstances, fencing for convenience in the Nebraska Sandhills would be a risky enterprise.

17. The greater weight of the evidence shows the nonexistence of the required elements of adverse possession. This was a fence of convenience, and not a fence intended by either party as the true boundary.

18. Wilke also claims that the doctrine of recognition and acquiescence support the plaintiffs’ claim. That doctrine is separate and distinct from the theory of adverse possession. *Spilinek v. Spilinek*, 215 Neb. 35, 337 N.W.2d 122 (1983). The court recognizes that under the former there must be an assent, by words, conduct, or silence, in a line as the boundary. *Id.* The doctrine involves more than a mere establishment of a line by one party and the taking of possession by him; it involves the idea that the

other party, with knowledge of the line so established and the possession taken, assents thereto as the boundary. *Id.* This court finds the evidence of such assent lacking and unpersuasive.

19. As the evidence fails to support the plaintiffs' claim, the plaintiffs' petition must be dismissed with prejudice as to the State. The petition should now also be dismissed with prejudice as to McDermott.

20. The court must also consider the State's counterclaim against Wilke.

21. An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. *Harders v. Odvody*, 261 Neb. 887, ___ N.W.2d ___ (2001). Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Id.* Where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted. *Id.*

22. As the plaintiffs were not the owners of the disputed property, they possessed no legal right to trespass or to authorize the removal of timber. The evidence shows that the defendant State of Nebraska, Game and Parks Commission, is the record owner of the property and is entitled to the relief requested that title be quieted in the State, for nominal damages for trespass, and for injunctive relief.

23. Because the plaintiffs' claim is decided favorably to the State, the State's cross-petition against McDermott is moot and should be dismissed as such.

24. The State is entitled to its taxable costs against the plaintiffs. The State and McDermott should each be required to bear such party's own respective costs.

DECREE: IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. Judgment is hereby entered in favor of the defendant, State of Nebraska, Game and Parks Commission, and against the plaintiffs, Gregory J. Wilke and Vicki L. Wilke, dismissing the plaintiffs' petition with prejudice to future action.

2. Pursuant to the court's prior interlocutory order sustaining the demurrer of the defendants, Niels C. McDermott and Virginia McDermott, to the plaintiffs' petition and the plaintiffs having elected not to file an amended petition, judgment is entered in favor of the said defendants and against the plaintiffs dismissing the plaintiffs' petition with prejudice to future action.

3. Judgment is entered on the counterclaim of the defendant, State of Nebraska, Game and Parks Commission, in favor of the defendant and against the plaintiffs, as follows:

a. The title of the said defendant to the Northeast Quarter (NE¹/₄) of Section 27, Township 32 North, Range 22 West of the 6th P.M. in Brown County, Nebraska, is quieted and confirmed in the said defendant as against each of the plaintiffs and against all persons having or claiming any interest in said real estate through any one or more of the plaintiffs, and each of them is hereby enjoined forever from asserting any claim or interest in said real estate or any portion thereof; and,

b. Nominal damages in the amount of \$1.00 for trespass; and,

c. The plaintiffs are permanently restrained and enjoined from trespassing upon the said property of the said defendant or any portion thereof; and,

d. Costs of \$356.90, representing amounts incurred and paid by the defendant are taxed against the plaintiffs, in addition to costs incurred and paid by the plaintiffs.

4. The cross-petition of the defendant, State of Nebraska, Game and Parks Commission, against the defendants, Niels C. McDermott and Virginia McDermott, is dismissed as moot. Each party shall bear such party's own respective costs.

Signed at **Ainsworth**, Nebraska, on **November 7, 2001**;
DEEMED ENTERED upon file stamp date by court clerk.
If checked, the court clerk shall:

- : Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
- : Note the decision on the trial docket as: [date of filing] **Signed "Decree" entered**
Done on _____, 20____ by _____.
- : Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20____ by _____.
- : Enter judgment on the judgment record.
Done on _____, 20____ by _____.

BY THE COURT:

William B. Cassel
District Judge

Mailed to: