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Adverse possession and easements! estoppel: foundations and projections: open and notorious, necessity of

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NOTES AND COMMENT

Adverse possession and easements: estoppel: foundations and projections: open and notorious, necessity of.

In the case of *Broadway-Wisconsin Inv. Co.* v. *Sentinel Company*[1] an important point of property law was settled. The point at issue was whether the defendant had acquired title by adverse possession to the premises in controversy occupied for more than thirty years by the footings and overhanging cornices and moldings of its building. The piers of the defendant's building at one corner rested upon and projected into the property acquired by the plaintiff to the extent of more than three feet. The tops of these piers were about three feet below the surface of the soil and were not visible on ordinary examination of the surface. The evidence disclosed that the nature of their projection into the adjoining property was visible at the time the building was erected because of the extent of the opening, but there was no evidence that their presence was observable after the original construction. The premises onto which these subsurface projections extended were occupied in part by a large downtown building. At the point of encroachment the surface of the ground was vacant, although nothing indicated any adverse possession below the surface of the ground.

As for the overhanging projections, there was an ornamental terra cota cornice extending thirteen inches over the property line at a point approximately twenty feet from the top of the building near the eighth story, and a six-inch projection extending about three feet from the corner of the building, at the third floor level, over the property line and onto plaintiff's close.

The findings of the case on this phase were similar to those in the *Ogden* v. *Straus Building Corporation* case[2] which had previously arisen in the same county—Milwaukee. Similarly the decision of the Wisconsin Supreme Court in that case was held to rule in the present on the question of the nature of the possession required to give a good right against the owner thereof. The court in the instant case disposed of the contentions set out above as follows:

> It is contended here that the court erred in holding that the defendant had not acquired by adverse possession and estoppel the right to maintain its encroaching footings and its cornices and moldings. The trial court was clearly right in holding as it did, for the reason that *such possession* as the defendant had of the plaintiff's premises *was neither open nor notorious.* [Citing *Ogden* v. *Straus Building Corporation, supra,* and *Illinois Steel Co.* v. *Tamms.*]

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[1] 212 N.W. 646 (Wis.), decided March 8, 1927.

[2] 187 Wis. 232, 202 N.W. 34.

[3] 154 Wis. 340, 141 N.W. 1011.

An owner of land is not required, in order to prevent a trespasser from acquiring title thereto, to explore beneath the surface or to ascertain at his peril whether or not an encroachment eighty or 100 feet above the surface does or does not overhang his property. There may be cases, of course, as eaves of buildings and the like, where possession is open and notorious and the rule applies, but cases of that kind have no application to the facts here.

A point at issue was whether sections 330.02, 330.08, and 330.09 of the Wisconsin Statutes state the maximum exclusive limits of possession to give title by adverse holding. They state nothing with reference to openness and notoriety of the adverse possession. Herein the Supreme Court reaffirmed the old rule that the possession must be *open and notorious* to be adverse, and decided that the evidence presented did not fulfill the requisites of good adverse possession.

The briefs of the parties and those in the Ogden case, *supra,* cover the Wisconsin cases on the points at issue and collateral questions. They set forth cases illustrating the facts necessary to show good adverse possession of similar structures, and cases where the facts have been held to be insufficient. H. W. I.

Constitutional Law: Invalidity of Negro Suffrage Restriction in Primary Elections.—Another effort of one of our sister states of the south to curb the influence of the negro has been thwarted by the Supreme Court of United States.

Texas, in 1923, passed a statute by the words of which "in no event shall a negro be eligible to participate in a Democratic party primary election held in the state of Texas," etc. In the instant case *Nixon* v. *Herndon,*[1] the defendants were members of an election board, and the plaintiff was a negro, otherwise a qualified voter, who was denied the right to vote at the Democratic party primary election in 1924. The defendants' refusal was on the strength of the statute above quoted. Plaintiff contested the constitutionality of the statute as a direct infringement of his rights under the fourteenth and fifteenth amendments. The court gave no extended opinion in sustaining plaintiff's contention; rather, it declared in unequivocal terms that "it seems hard to imagine a more direct and obvious infringement of the fourteenth amendment" as it was a direct discrimination against the negro by denying him the equal protection of the law. Satisfied that the fourteenth amendment standing alone was sufficient to declare the statute unconstitutional, the contention that the fifteenth amendment was violated was not considered.

The result reached is one which may well be indorsed by one desirous of a just interpretation of our constitution and its amendments. The case, however, brings to mind the question: Upon what theory did the legislature of the state of Texas hope that the enactment would be upheld? The statute, as may be noted, was not couched in such a manner as to effect an illegal discrimination without such discrimination being evident on its face.[2] Again it could hardly have been anticipated that

[1] 47 Sup. Court Rep. Advance sheet, Mar. 15, 1927, page 446.

[2] For contrast, see 189 U.S. 475.