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court stated that prior to the adoption of the Federal Rules it would have been without discretion to remit the forfeiture; that under the Rules, though the default was willful, it would exercise its discretion and remit $300 out of the $500 forfeited.

The trend which the law has taken indicates that today, tests such as "willful, non-willful, act of the obligee, or act of the law" should have no place in the law in deciding the cases which arise. The test should be, as provided by the Federal Rules, whether or not the trial court, in the exercise of its sound discretion, finds that justice requires an enforcement of the forfeiture. The discretion of the trial court is a sound discretion "with regard to what is right and equitable under the circumstances and the law."[33] All courts generally hold that the decision of the trial court will not be disturbed on appeal, unless the exercise of discretion was arbitrary or willful,[34] an abuse of discretion,[35] a flagrant abuse of discretion,[36] or the case is an exceptional one.[37]

There are no cases in Wyoming in which relief from a forfeiture of bail was in issue. The Wyoming statutes[38] regarding forfeiture and relief from forfeiture of bail are identical to those of Nebraska. In a recent case[39] the Nebraska Court held that after final judgment on a forfeited bail bond, the trial court can remit or reduce this judgment only after the accused has been arrested and surrendered to the proper court for trial. Thus, where the principal was in prison in another state, no relief from the forfeiture could be granted at that time. When the Wyoming Supreme Court some day construes the Wyoming Statutes on relief from forfeiture of bail it should follow the new Federal Rules, and should in no way feel bound by decisions of other courts rendered previous to 1946.

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THE CLAIM OF RIGHT ELEMENT IN ADVERSE POSSESSION IN WYOMING

The Wyoming statute of limitations regarding recovery of real property provides:

> "An action for the recovery of the title or possession of lands, tenements or hereditaments can only be brought within ten (10) years after the cause of such action accrues."[1]

33. United States v. Davis, supra note 31.
34. Ibid.
35. White et al. v. State, supra note 12.
36. State v. Jimas, supra note 25; State v. Van Wagner, supra note 29.
37. State v. Shell, 242 Iowa 260, 445 N.W.2d 851 (1951).
38. Wyo. Comp. Stat. 1945, secs. 10-416 to 10-419.
39. State ex rel. Smith v. Western Surety Co., supra note 2.

1. Wyo. Comp. Stat. 1945, sec. 3-501. Sec. 3-502 of the Statutes provides: "Any person entitled to bring an action for the recovery of real property, who may be under any legal disability when the cause of action accrues, may bring his action within ten (10) years after the disability is removed."

The effect of this statute is to cut off or extinguish the title of a land owner or person claiming title to land who would've had the right to bring an action to recover the land[2] against a person who has been in possession for ten years after the former claimant's cause of action accrued, and to create in the latter possessor a full, new and distinct title.[3] It follows that the person in possession, or adverse claimant, must be subject to the statutory action for recovery of the land by the true owner, and that the true owner must fail to bring this action within the ten year period from the date that his cause of action accures before the possessor-claimant can acquire title by adverse possession.[4]

Certain elements or requirements have been made for adverse possession by the courts. In an early case, the Supreme Court of Wyoming defined adverse possession and its elements as follows:

> "Adverse possession as applied to real estate is described as an actual, visible, and exclusive appropriation of land, commenced and continued under a claim of right, with the intent to assert such claim against the true owner, and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action . . . (T) he possession must be hostile and under claim of right; it must be actual, open, notorious, exclusive and continuous."[5]

This is a typical definition of adverse possession and its elements.[6] If a particular set of facts relied on to establish adverse possession is lacking in any one or more of these elements, no title can be acquired by adverse possession. In other words, the statute of limitations will not run unless all these elements are present.

The Court[7] laid down this definition, but has not paused in its decisions to pay much attention to these elements, with the exception of the claim of right element which the Court has emphasized. Since emphasis has been given to claim of right, the purpose of this note is to make an attempt at analyzing how the Court has handled this element.

Only a mere handful of cases has been decided in Wyoming on the question of adverse possession. In two cases, *City of Rock Springs v. Sturm*[8]

Sec. 3-519 of the Statutes provides: "If when a cause of action accrues against a person he is out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the state or abscond or conceal himself, the time of his absence or concealment shall not be computed as a part of the period within which the action must be brought."

The effect of these latter two statutes (i.e., secs. 3-502 and 3-519) will not be considered in this note.

2. Presumably an action in the nature of ejectment.
3. See Stryker v. Rasch, 57 Wyo. 34, 112 P.2d 570, *rehearing denied*, 113 P.2d 963, 136 A.L.R. 770 (1941).
4. Cf. 3 American Law of Property, Title by Adverse Possession, sec. 15.2.
5. Bryant v. Cadle, 18 Wyo. 64, 86, 104 Pac. 23, 27, 106 Pac. 687 (1910).
6. 1 Am. Jur. 864.
7. Hereafter the Wyoming Supreme Court will be referred to also as "Court."
8. 39 Wyo. 494, 273 Pac. 908, 97 A.L.R. 1 (1929).

and *Bruch v. Benedict*,[9] the Court went to considerable length in talking about claim of right, and it will, therefore, be necessary to analyze these two cases in some detail in their emphasis on claim of right.

City of Rock Springs v. Sturm[10] was an ejectment action involving a mistake in the boundary of Sturm's lot which he had acquired by deed. According to plat filed in 1891, the east boundary line of Lot 15, Block 1 (Sturm's lot) was the west meander line of Bitter Creek. The plat also showed distances of the lot lines. Between 1891 and 1903, the channel of Bitter Creek changed about 80 feet eastward, almost doubling the apparent length of the lot. Sturm bought lot in 1906 from Union Pacific Coal Co., and the vendor's surveyors told him that the sidelines of the lot extended back to the creek. He built a fence along the west meander line of the creek at the back of his supposed lot and erected a building in the center of this mistaken portion of ground, and planted grass and trees and made some other improvements. The value of these improvements was several thousand dollars. About 1922, his vendor wanted him to pay ground rental on the disputed ground, but Sturm refused. The property was generally known in the community as Sturm's property. The Court held, affirming the trial court, that Sturm had acquired title to the whole portion of ground by adverse possession, and devoted much if its discussion to the claim of right element, laying down the following propositions:

(a) In the United States there is generally the presumption that possession is in subservience to the true owner's title—i.e., that it is permissive.

(b) In order to rebut this presumption, there must be an intention by the person in possession to claim the land as his own—claim of right. This intention may be manifested by words or acts, but most courts hold that intention is best shown by acts. If the possessor-claimant actually occupies the land, uses and improves it as if he were really the true owner, these acts will raise a presumption that the claimant is the true owner, and, unless rebutted, will establish the fact of a claim of right.

(c) This second presumption is also presumably rebuttable. The Court pointed out that the intention with which possession is taken is the controlling factor in determining its adverse character, and stated that the intention to claim must be manifested by a rational person; that an insane person cannot initiate adverse possession.[11] Accordingly, the claim of right presumption could be rebutted by showing claimant's insanity.[12]

9. 62 Wyo. 213, 165 P.2d 561 (1946).
10. 39 Wyo. 494, 273 Pac. 908, 97 A.L.R. 1 (1929).
11. Evidently, the rationale is that an insane person is incapable of forming intent.
12. Other ways of rebutting this claim of right presumption would be to prove that the possessor-claimant told the true owner he wasn't trying to acquire title, and conceded the true owner's title—in other words, express disclaimer this will be discussed subsequently in the text of the note. Abandonment of the premises would also be sufficient to rebut the presumption. To constitute abandonment "sufficient to destroy the continuity of the adverse claimant's possession, there must be an intention to relinquish the claim of ownership as well as the act of relinquishment of possession or enjoyment, and mere temporary absence from the property is not sufficient." Bruch v. Benedict, 62 Wyo. 213, 237, 165 P.2d 561, 574 (1946).

It would seem to follow that there must be a conscious intent to claim as owner. However, this intent would not have to be a wrongful intent. The Court stated that in a situation where a person holds a portion of land by mistake, not knowing of the mistake, he isn't likely to have the intention to correct it when it's discovered. Also, he is not claiming consciously against the true owner, because in his own mind there is no thought of mistake, and he considers the land his own. If it were necessary for him to claim from someone else, the Court thought htat he would first have to discover the mistake and then hold with something akin to felonious intent. This idea was disapproved by the Court.

What about testimony that is apparently inconsistent with claimant's acts during his period of possession? Defendant Sturm had testified that he claimed only to the true boundary, but also that the thought the true boundry included the land he had held under mistake. The Court did not give any weight to this testimony, indicating that it's tricky. The Court compared this testimony to the situation where a theif subsequently disclaims any intention to steal, and said that actions speak louder than words. While not holding that it wouldn't give any weight to evidence that a person claimed only to the true boundary, the opinion said this type of testimony is dangerous and should only be considered in connection with acts of possession.

There was no decision in the *Sturm* case on the question of whether the alleged adverse possession had to be in good faith, the Court holding that Sturm had certainly acted in good faith. The Court pointed out that in most jurisdictions good faith wasn't necessary, but cited an earlier Wyoming case, *Bolln v. Colorado & S. Ry. Co.*,[13] which has held that there must be god faith claim of right.

Bruch v. Benedict[14] was a quiet title action in which the plaintiff alleged that she and her predecessors had been in possession since 1928, when the land, origanlly owned by defendant's father had been conveyed by tax deed to one Baughn.[15] Baughn was informed[16] that his title was defective[17] and had formed the intention in 1930 to give the property back if the true owner appeared and paid him what he (Baughn) had paid for the property. This intention remained uncommunicated, and shortly after forming it, Baughn put a mortgage on the property. The Court upheld the claim of adverse possession. The reasoning in regard to claim of right is as follows: Baughn's intention to give up the land was never communicated to anyone, he mortgaged the property about the time he formed this

13. 23 Wyo. 395, 152 Pac. 486 (1915)
14. 62 Wyo. 213, 165 P.2d 561 (1946).
15. Defendant's father had died in 1924, and there was no showing of what had happened to the estate. The taxes for 1924 weren't paid, and sale for unpaid 1924 taxes resulted in certificate being issued to one Gibson who assigned to Baughn.
16. The report of the case does not say who told this to Baughn.
17. Actually, the description clause of the tax deed contained no description of the real estate conveyed, but just the date of sale.

intention, and the Court wouldn't assume that he intended to defraud the mortgagee; besides, the former owner never redeemed by paying him off, and Baughn remained on the property until 1934.

Looking at the facts of the *Bruch* case, and the reasoning set out in the preceding paragraph, it would seem that even though Baughn had formed an intention to give up the land, the fact that he kept it to himself and continued to make like the owner of the land would be evidence of good faith. The opinion doesn't expressly use the term "good faith." But the Court seemed to be assuming Baughn's good faith when Chief Justice Blume said that he wouldn't presume that Baughn would execute a mortgage intending to defraud the mortgagee.

Furthermore, many cases and texts are cited by the Court which stand for the propostion that a person is not barred from claiming adverse possession by statements made to third persons that he doesn't own the property. Strong dictum from an Ohio case is quoted which says that a claimant's offer to buy the land from the true owner, that claimant's acknowledgment of the title being in someone else and that he did not own the land will not be enough to stop the statute of limitations running.[18] After citing and quoting numerous decisions and texts, the Court abruptly concluded:

> "Taking all the facts into consideration we do not believe, without necessarily approving all the authorities above mentioned, that the so-called intention of Baughn should be considered seriously."[19]

It is submitted that, even in view of this statement, from all the authorities cited and quoted an implication can be drawn that an intent to claim against the true owner is not necessary in Wyoming. Moreover, there is the implication that any acknowledgment by claimant to persons besides the true owner that he concedes the owner's title would not toll the limitation statute, and that only an express disclaimer of adverse holding made to the true owner would stop the statute from running.[20] Finally, it would appear that the Court may have intended impliedly to do away with the requirement of good faith laid down by the *Bolln* case.[21] But the opinion *in Bruch v. Benedict never mentioned the Bolln decision or good faith.*

In conclusion, it is submitted that *City of Rock Springs v. Sturm* and *Bruch v. Benedict* while differing as to factual situations, are reconcilable

18. McAllister v. Hartzell, 60 Ohio St. 69, 53 N.E. 715 (1899). (It should be remembered that Ohio was the state of origin of the Wyoming statute of limitations.)
19. Bruch v. Benedict, 62 Wyo. 213, 237, 165 P.2d 561, 569 (1946).
20. This is based on estoppel. The idea is that the owner is lulled into a feeling of security by the express disclaimer. Cf. 3 American Law of Property, Adverse Possession, sec. 15.4.
21. Bolln v. Colorado & S. Ry. Co., 23 Wyo. 395, 152 Pac. 486 (1915).
In Bruch v. Benedict, 62 Wyo. 213, 165 P.2d 561 (1946), the Court quoted the following statement from another Ohio case, Crossman v. Foster, 44 Ohio App. 78, 183 N.E. 925 (1932): "It has been held that a statement by the adverse possessor that the property does not belong to him, does not interrupt the claimant's adverse possession in the face of his open, notorious possession and use of the property."

and stand for practiclaly the same propositions in regard to claim of right:

(a) That the intention to claim title necessary to rebut the initial presumption of subservient holding and to raise the presumption of claim of right is to be determined chiefly from acts—e.g., occupation and exercise of acts of ownership on the land, such as erecting buildings, putting up a fence around the property, irrigating the soil, planting crops, paying taxes, executing a mortgage.

(b) Actions speak louder than words. Unless there is insanity, express disclaimer of adverse holding made to the true owner, proof of permissive holding, or abandonment of the premises, it will be pretty hard to rebut the claim of right of presumption. Testimony like Sturm's that he claimed only to the true boundary when he had done acts of ownership, and testimony like Baughn's that he had a secret intention to give the property back upon the happening of a certain condition (appearance and payment by the former owner) will not be given much weight by the Court.[22]

(c) Although a conscious intent to claim as owner is necessary, this doesn't have to be wrongful intent and doesn't have to be intent to claim against the true owner.

(d) In the *Sturm case,* good faith was present by express statement of the Court, and in the *Bruch* case, good faith was implied. It is arguable that from the numerous authorities mentioned in the *Bruch* case to the effect that good faith may not be necessary, that the Court impliedly overruled the *Bolln* decision. Moreover, both the *Sturm* and *Bruch* cases say that color of title is not necessary. In the *Bruch* case, the Court mentioned that claim of right was sufficient to initiate adverse possession[23] and that color of title—for example, a void tax deed—was merely evidence tending to support the allegation of claim of right. Since color of title is not a requisite to adverse possession and claim of right, it would appear that a person having no instrument of conveyance, and under no mistake as to who owened land, could by occupation and acts of ownership initiate a claim of right.

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22. Cf. also Bryant v. Cadle, 18 Wyo. 64, 104 Pac. 23, 106 Pac. 687 (1910), where landowner Scrutchfield had deserted his wife and family in about 1889. In 1891, Mrs. Scrutchfield got divorce, but it doesn't appear how the husband's property was distributed. The court had appointed revceier for the property, but in 1893 Mrs. Scrutchfield took over control and afterwards executed several mortgages in compliance with court orders, though the mortgages didn't recite this and actually appeared to make her out as absolute owner. She executed warranty deed later to grantee, and the deed failed to recite that she was acting in compliance with orders of court, and it appeared again that she was the absolute owner. Defendant got title through mesne conveyances. In action of ejectment brought by administrator of Scrtuchfield, plaintiff contended that because Mrs. Scrutchfield had always referred to the land as belonging to Scrutchfield, that she was admitting the latter's superior title and rights to the land, and that there was no claim of right. The Court, reversing trial court, rejected this argument and held that Mrs. Scrutchfield and the subsequent grantees had established claim of right and adverse possession.

23. Citing City of Rock Springs v. Sturm, 39 Wyo. 494, 273 Pac. 908, 97 A.L.R. 1 (1929).