

It was pressed upon us in argument, that in the absence of a fence there was no sufficient evidence to bar the plaintiff's right to recover this piece of land.

It is quite settled that a statutable possession by a fence, supposed for many years to be correct, but now proved to be erroneous, does not confer any right to have such fence continued in the same direction to the prejudice of the true owner.

It seems also settled that where a squatter or tortfeasor has enclosed for over the statutable period a portion of, another man's land, he shall not by isolated acts of trespass, or user of the unenclosed portion, defeat the true owner's right.

But I do not think that it can be laid down, as a defined proposition of law, that title by possession can only be made out where the claimant can prove that he had actually enclosed the land by fences for the statutable period.

No man is to lose his land by the constructive possession of another: the possession should be actual and to the exclusion of the true owner. The evidence to support such a necessary possession may be varied in degree. The best and most significant evidence would be, of course, the enclosure of the land claimed, and juries should be carefully warned not to accept occasional acts of trespass, &c., as a continuous possession. Judges, when they try cases without the aid of a jury, rarely err in the direction of defeating the true owner's claim by insufficient evidence of possession under the statute.

It is urged that there is a recognized distinction as to evidence of possession in the case of a mere trespasser, and that of a person occupying a lot of land under a title supposed at first to be good, but turning out to be defective.

I do not think the defendant in the present case can be fairly likened to the former class.

I believe from the evidence here that for a long series of years the Smith line was supposed to be the true boundary, and any occupation or use by defendant of this woodland