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ADVERSE POSSESSION

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THERE is a familiar saying which has attained almost to the dignity of a proverb, to the effect that "possession is nine points of the law." No attempt has been made to determine the origin of this expression, but there is at least a strong possibility that it was coined at some stage of a dispute between a person claiming a record title to property and another claiming a title based on occupancy of the property. The expression itself would seem to indicate that there was some feeling that actual occupancy of property conferred certain proprietary rights which might prove a sounder basis for a title claim than a mere record of title without possession of the property.

Under the old English common law, transfer of title to real property, or real estate as it is commonly known, was accomplished by a process known as "livery of seizin." The grantor of the title would act a fictitious delivery of the land itself by handing or delivering to the grantee a stick of wood, a handful of ground, a branch of a tree, or a stone taken from the land which was the subject of the conveyance. After such physical delivery the grantee was said to be "seized" of the title, or, otherwise stated, it was said that "seizin" was in the grantee. Later the fiction of a physical delivery of the property itself was abandoned and title was conveyed by a formal written instrument wherein the property was particularly described and the grantor named the grantee and the terms upon and subject

* Chairman, Railroad Commission of Wisconsin.

to which the title was conveyed. This form of conveyance was called a "deed". Thereafter Parliament adopted a law called the "Statute of Frauds" which provided, in effect, that any conveyance of title to real estate must be by writing executed by the grantor. Similar statutes have been adopted in Wisconsin and other states in this country. In addition the statutes of this state, and of some others, set forth certain requirements with respect to form, execution, and acknowledgement which must be complied with to entitle a deed to record in the office of the register of deeds of the county wherein the land is situated. Such recording is necessary to charge innocent third parties with notice of the record title which the grantee acquires by such conveyance.¹

Thus, our law has developed to a point where an owner of real property can convey his title voluntarily only through the means of a written instrument of a special form properly executed. But, though he may not himself convey title by other means, he may be deprived of his title without the formalities mentioned. Thus, he may have his property, real or personal, taken from him and sold to satisfy a judgment against him. In case of his death, title to his property will pass to his heirs by operation of the law of descent. Or he may be deprived of his real estate by what is known in the law as "adverse possession". The terms "user" or "prescription" are often used interchangeably with adverse possession. The efforts of the courts to determine when title to property has been lost to the owner of record and acquired by an adverse possessor has resulted in the growth of a great body of law which is commonly referred to as the law of adverse possession.

One who has a perfect record title to real property is presumed to be in possession thereof. Such presumption of possession is co-extensive with the right and continues until the owner is ousted by the adverse possession of another.

ACQUISITION OF TITLE TO PRIVATE LANDS BY PRIVATE PERSONS.

Adverse possession then, as the term itself implies, is necessarily a possession not held under the legal proprietor, or by his consent, either directly or indirectly, but on the contrary it is a possession by which he is ousted from the land.² A possession which is rightful and not an invasion of the rights of another is never adverse. The statutes of the state where the property is situated provide the period of time requisites concerning the character of the possession. The effect of

¹ Ch. 235, *Wisconsin Statutes*, 1929.

² *Ryan vs. Schwartz*, 94 Wis., 403; 69 N. W., 178.

such statutes is uniformly that the adverse possession must exist under a claim of right or under color of title for the whole period prescribed, and must be actual, continuous, open, visible, notorious, and hostile to the true owner's title and to the world at large.

Good faith on the part of the person making entry upon the land is not essential to render such entry and the possession held under it adverse. It is a sufficient "claim of title" that the entry of the desissor is hostile to the world and that he intends to so hold it for the statutory period of limitation. When all the statutory requirements have been met, the result is two-fold: First, the title of the record holder is cut off and his right to bring an action for recovery of the property is cut off. This result is founded in a sound public policy which does not aim to punish one who fails to assert his rights, but rather to protect one who has maintained the possession of the land for the time specified by the statute, under claim of right or color of title, and adverse possession for the statutory period raises a presumption of valid title.

Throughout this discussion it will be necessary to refer to the terms, "color of title" and "claim of right", and to have an understanding of what each includes. A possession under "color of title" is a possession flowing from rights conferred by some written instrument or judgment, which by itself is insufficient to pass title, due to some inherent infirmity. Thus, a deed from a grantor who has an imperfect title, or a deed which is not properly witnessed and acknowledged, a tax deed defective because of jurisdictional errors, or a judgment rendered without jurisdiction in the court, all would constitute "color of title".

A "claim of right" consists of assertion of ownership of property adverse to the title of the holder of the record title. Such assertion need not include a formal declaration of ownership, but the performance of acts indicating ownership and excluding the legal owner are sufficient.³

The distinction between possession under color of title and under claim of right is important because the length of time required under each for the adverse possession to ripen into legal title is different. Thus, in Wisconsin the requirement necessary to bar the holder of the legal title is ten years adverse possession under color of title, and twenty years adverse possession under claim of right. There is a further distinction as to what constitutes possession in each case.

³ *Illinois Steel Co. vs. Budisz*, 106 Wis., 499; 81 N.W., 1027; *Allis vs. Field*, 89 Wis., 327; 62 N.W., 85; *Furlong vs. Garrett*, 44 Wis., 111; *Meade vs. Gilfoyle*, 64 Wis., 18; *Ovig vs. Morrison*, 142 Wis., 243; *Bourne vs. Wiele*, 159 Wis., 340; *La Crosse vs. Cameron*, 80 Fed., 264.

Thus, the legislature has provided in Section 330.07 of the statutes that where a claim is based on color of title the land shall be deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved;
2. Where it has been protected by a substantial enclosure;
3. Where, although not enclosed, it has been used for the supply of fuel, or of fencing timber for the purpose of husbandry, or for the ordinary use of the occupant;
4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not enclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved or cultivated.

In this statute the state has quite definitely expressed what will constitute possession or occupancy for ten years where the claim of ownership is based on color of title. The statute with respect to title which is based on claim of right, or as to otherwise expressed assertion of ownership, is quite as definite but is more restricted. Thus, it is provided in section 330.09 that in such case land shall be deemed to have been possessed and occupied in the following cases only:

1. When it has been protected by a substantial enclosure;
2. When it has been usually cultivated or improved.

It is further provided that only the premises actually occupied shall be deemed to have been held adversely. So, contrary to the rule where claim is based on "color of title", if only part of a known farm is actually occupied, only that part will be deemed the subject of adverse possession.

While the statutes referred to in a measure define what is occupancy, their language is too general to be reliable as the sole guide in determining whether their requirements are met. Thus, what might be usual cultivation in one case may prove insufficient in another; what is actually an improvement of one parcel of land may not be with respect to another. As a result, it becomes necessary in every case that examination be made of the character of the land, the custom of the vicinity with respect to cultivation or improvement, and all other circumstances surrounding the holding.⁴

⁴ *Wilson vs. Henry*, 40 Wis., 594; *Stephenson vs. Wilson*, 37 Wis., 482; 50 Wis., 95; *Green Bay & M. Canal Co. vs. Tehulah Paper Co.*, 140 Wis., 417; 122 N.W., 1062; *Illinois Steel Co. vs. Bilot*, 109 Wis., 418; 84 N.W., 855; *Clithers vs. Fenner*, 122 Wis., 356; 99 N.W., 1027; *Illinois Steel Co. vs. Jeka*, 123 Wis., 419; 101 N.W., 99; *Dupont vs. Davis*, 35 Wis., 631; *Pepper vs. O'Dowd*, 39 Wis., 538.

The foregoing statutory quotations and remarks following have dealt chiefly with the question of what is actual possession. As stated before, the fact of actual possession is not enough; the requirements as to actual possession set forth in the statutes might all be performed by a tenant or a licensee, and such performance would not ripen into a title by adverse possession. In addition to being actual, the occupancy must be open, notorious, hostile, and continuous. It may be well to consider what is required to meet the demands of these terms.

While it is certain that possession must be open and notorious, these adjectives do not entirely express the thought to be conveyed. A more correct statement of the rules is as follows: In order to make good a claim of adverse holding, either the true owner must have actual knowledge of the hostile claim, or the possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the true owner is invaded intentionally and with a purpose to assert a claim of title adversely to his, or so patent that the owner could not be deceived, and such that if he remains in ignorance it is his own fault. As one court has said, "The claimant must exercise such acts of ownership as are sufficient to hoist his flag over the lands so that all may observe it". A clandestine entry or possession will not set the statute in motion, but if the claimant's possession is open and notorious, it is sufficient whether the true owner actually knows the facts or not. In such a case the law presumes notice to the true owner in the absence of evidence that inquiries by the true owner, prosecuted with due diligence, did not disclose such possession.⁵ Under local statutes in some states, it is necessary to give the true owner actual notice of adverse claim. This is true in Alabama, Kentucky, and Michigan, but such statutes are in derogation of the common law and are contrary to the general rule. Where such statutes apply, it is not necessary for the possession to be open and notorious, as these characteristics are deemed essential to give notice, and necessity for them is removed by the requirement that actual notice be given.

The holding must be "exclusive". By this it is meant simply that the intruder must show an exclusive dominion over the land and an appropriation of it to his own use. It is essential that his possession shall amount to an ouster of the true owner, because in the absence of ouster the legal title draws to itself the constructive possession of the property.⁶

Also, the possession must be hostile. Ordinarily the word "hostile"

⁵ *Kurz vs. Miller*, 89 Wis., 426; 62 N.W., 182; *Stevens vs. Brooks*, 24 Wis., 326; *Lampman vs. Van Alstine*, 94 Wis., 417; 69 N.W., 171; *Perkins vs. Perkins*, 173 Wis., 421; 180 N.W., 334.

⁶ *McCourt vs. Eckstein*, 22 Wis., 153.

is defined as "showing ill will and malevolence, or a desire to thwart and injure". That definition does not correctly state the necessary character of the occupancy, for there need be no ill will, malevolence, or desire to injure anyone. The term "independent" would more clearly describe the required character of the holding. Hostile is used to convey the thought that the holding must be of a nature which will exclude the claims of the world and in addition will constitute a denial of the owner's legal title.⁷

The foregoing consideration has led to some repetition, due to the fact that the meaning given to the different terms has been such as to render them almost synonymous in some cases. Nevertheless, it has been thought best to consider each of them briefly, as courts customarily use all of them to describe the requisites of an adverse possession. In addition to the characteristics already considered, the holding must be continuous and uninterrupted for the full statutory period. The moment the possession is broken it ceases to be effectual, because as soon and as often as a break occurs, the law restores the constructive possession of the owner. In this connection it must be borne in mind that possession is not to be confused with residence.⁸ It is true in considering continuity, as in considering other characteristics, that where it is apparent to men of ordinary prudence that the claimant is asserting and exercising ownership over the property, his possession is sufficient.⁹

While the adverse possession must be continuously maintained for the entire required period, it is not necessary that it be maintained by the same person. Continuity may be just as effectively shown by the successive possession of several persons, between whom the requisite legal relationship, or as it is termed, privity, exists.¹⁰ This joining of successive possessions, is called "tacking." All that is necessary to privity between successive occupants of property and in regard thereto, is that one receive his possession from the other directly or by an operation of law, as by descent, will, grant, or other transfer of possession.¹¹ Thus, sufficient privity exists between an ancestor and his heirs and the grantees of such heirs. It has been held that privity existed between husband and wife, vendor and vendee, and grantor

⁷ *Ryan vs. Schwartz*, 94 Wis., 403; 69 N.W., 178.

⁸ *Hittlesey vs. Hoppenyan*, 72 Wis., 140; 39 N.W., 355 *Hemmy vs. Dunn*, 125 Wis., 275; 103 N.W., 1095.

⁹ *Illinois Steel Co. vs. Jeka*, 123 Wis., 419; 101 N.W., 399.

¹⁰ *Illinois Steel Co. vs. Paczocha*, 139 Wis., 23; 119 N.W., 550; *Progress Blue Ribbon Farms vs. Harter*, 147 Wis., 133; 132 N.W., 895.

¹¹ *Mortenson vs. Murphy*, 153 Wis., 389; 141 N.W. 273; *Illinois Steel Co. vs. Budsisz*, 106 Wis., 499; 81 N.W., 1027.

and grantee, providing always that there has been no intervening break between the successive possessions. The continuity of the original adverse possession may be effected by a conveyance or understanding, the purpose of which is to transfer to another the rights and the possession of the adverse claimant, when accompanied by an actual delivery of the possession. Such transfer need not be by an instrument in writing, for the law's requirement of continuous adverse possession for the full statutory period may be accomplished as well by an oral agreement or understanding, under which the actual possession of the premises is delivered, as by a written conveyance.¹² But where privity does not exist, there can be no "tacking" of possession, and several successive possessions lacking privity will not ripen into title.¹³ Entries of this character, when not continuous for the required period of time, are merely a series of independent trespasses and will not deprive the true owner of title, for the law restores possession to him on discontinuance of the possession of each of such trespassers.

Any substantial interruption of the possession of an adverse claimant will destroy its continuity. If, after the adverse holding has begun, a claimant recognizes another as the owner, or recognizes another title as superior to his own, such recognition will constitute a sufficient interruption to take him out of the statute.¹⁴ Payment of rent for the use of the property would defeat a claim against the one to whom rent was paid. However, the fact that an adverse claimant acknowledges a superior right in one person does not preclude him from holding adversely as to all others. An abandonment by the adverse possessor with intention to relinquish his claim, would restore possession to the legal owner. The same result would follow from a legal entry upon the land during the limitation and such entry may be made by the legal owner, his tenant, agent, or his heirs following his death, and such entry must be open and accompanied by assertion of claim to the land or by some act evidencing ownership. In spite of such entry, if the adverse occupant remains in possession thereafter, the statute will begin to run anew and such possession will have the effect of a new disseisin. An action at law or in equity by the lawful owner to recover possession has the same effect as the physical entry and will stay the running of the statute as of the date when the action is commenced, even though the adverse claimant remains in possession during the pendency of the action.¹⁵ But the continuity of the possession is not interrupted by the adverse claimant's act in purchasing or bargaining for

¹² *Allis vs. Field*, 89 Wis., 27; 632 N.W., 85.

¹³ *Childs vs. Nelson*, 69 Wis., 125.

¹⁴ *Illinois Steel Co. vs. Budsisz*, 115 Wis., 68; 90 N.W., 1019.

¹⁵ *Illinois Steel Co. vs. Kohnke*, 151 Wis. 410; 138 N.W., 995.

an outstanding title. An act of this character admits, and admits only, that the occupant deems it worth while to get rid of or acquire the outstanding title, and united to the one under which he has been holding, it does not prove, and standing alone it does not even tend to prove, a change in the character of the possession or the recognition of a title paramount.¹⁶

Up to this point this discussion has dealt entirely with the matter of acquisition of title to private property by a private person. It is to be noted that the public also may procure an interest in privately owned real estate, and a private person may acquire title to publicly owned property.

ACQUISITION OF A PUBLIC HIGHWAY BY PRESCRIPTION. The most common example of the acquisition of private property by the public is found with respect to highways. As a preliminary to the above consideration, the methods of transfer of record title to property were discussed. As a preliminary here, it may be mentioned that the statutes carefully provide a method whereby land may be condemned for highway purposes or may be dedicated to the use of the public for highways, and further specifies the manner in which such proceedings shall be made matters of public record. When the statutes have been fully complied with, the public has acquired highway rights as unimpeachable as a perfect record title to real estate. But the state has gone further and recognizes that such rights may flow to the public by adverse possession and makes a distinction with respect thereto which is comparable to the distinction between claim of title under "color of title" and under "claim of right" in the statutes referred to above.

Subsection (1) of section 80.01 of the statutes provides in substance, that where highways have been laid out by the competent authorities and a certificate of such proceedings has been properly recorded and any portion of such highway has been opened and worked for a term of three years, such highway shall be deemed to be a legal highway even though the law shall not have been fully complied with in laying it out. It is further declared that making an order for laying out the highway and filing the order, or certified copy thereof, in the office of the clerk of the town in which such road is situated, is a sufficient recording. Thus, by analogy, the proceedings for laying out the highway, although imperfect in themselves, constitute a color of title which ripens into a valid highway right, by adverse possession, upon recording and three years' user.

Subsection (2) of the same statute provides, with certain excep-

¹⁶ *Clithers vs. Fenner*, 122 Wis., 356; 99 N.W., 1027.

tions, that all roads not recorded which shall have been used and worked as public highways for ten years or more shall be deemed public highways. Here the right accrues by the adverse user for the period stated and is analogous to a title gained by adverse possession under a claim of right. The section excepts from its provisions roads and bridges built upon the bottoms and sloughs of the Mississippi River in this state by citizens or municipalities of other states, providing they shall not become legal highways unless they are legally laid out by the supervisors of the town in which they are situated. Nor shall any grant of lands for highway purposes which had not become a legal highway prior to July 1, 1913, become effective until accepted by the town and a resolution of such acceptance has been filed and recorded in the office of the town clerk. It has been held in *Nuthals vs. Green Bay*, 162 Wis., 434, that this section does not abrogate the common law rule of this state that a highway may be created by adverse user alone for a period of twenty years.

PRESCRIPTIVE RIGHT TO FLOW LANDS BY MILL OR FLOODING DAMS.

Under section 330.18, subsection (3), statutes, an absolute right to flow lands will exist after such lands have been flooded uninterruptedly, continuously, openly, notoriously, and adversely for a period of ten years "by reason of the construction or maintenance of any mill dam". Subsection (5) of the foregoing section provides:

An action for the recovery of damages for flowing lands when such lands shall have been flowed by reason of the construction or maintenance of any flooding dam or other dams constructed, used or maintained for the purpose of facilitating the driving or handling of saw logs on the Chippewa, Menomonee, or Eau Claire rivers or any tributary of either of them, provided that in cases where the ten years have already expired, the parties shall have six months from and after the passage and publication hereof within which an action may be brought.

The words "any mill dam" in subsection (3), above do not relate merely to dams across non-navigable streams authorized by the so-called Mill Dam Act, section 31.31-31-33, statutes, but include a dam built across a navigable stream for the purpose of creating power to operate mills.¹⁷ Independently of the statute a prescriptive right will arise as against the owners of such lands after twenty years of adverse flooding.

When a dam has been constructed without legislative permission, it constitutes a public nuisance and may be abated at the suit of the state or any citizen thereof by express provision of the water power law, Chapter 31, statutes.

¹⁷ *Green Bay & M. C. Co. vs. Tehulah Co.*, 140 Wis., 417.

No right to maintain a public nuisance can arise by prescription and therefore a dam which is unlawful to begin with can never become lawful by mere lapse of time.

A dam built to a greater height than authorized by the permit or legislative charter is an unlawful structure as to such excessive height as against the state or the public, but the fact that a dam is an unlawful structure does not prevent the acquirement by prescription of the right to maintain such a dam as against individual owners of land above the dam.

The mill dam act authorizes the owner of a damsite on an navigable stream to erect a dam and to flood the lands of upper riparian owners. The only remedy of such upper riparians is to bring an action for damages in a court of law as provided in section 31.33, statutes (mill dam) act. This section provides that no damages suffered more than three years before the commencement of an action shall be recovered for the flooding of lands by a mill dam. In other words, the person whose lands have been flooded may bring his action at any time within ten years after the commencement of such flooding, but he is limited to recover damages for three years previous to the commencement of the action.

DAM UNDER THE CRANBERRY LAW, SECTIONS 9F.JE-TF-VV, STATUTES An owner of lands adapted to the growth of cranberries may construct drains or ditches on the land of another and may flood the land of another by reason of a dam erected for the growth of cranberries and thereby become liable to such other for all damages incurred.

The damages under the statute are assessed by arbitrators. The statute does not limit the time in which the proceedings for damages may be brought and hence Section 330.02, statutes, being a restatement of the common law rule applies. Section 330.02 reads as follows:

No action for the recovery of real property or the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within twenty years before the commencement of such action.

PRESCRIPTIVE RIGHTS AGAINST THE UNITED STATES AND THE STATE OF WISCONSIN. It will be well to consider very briefly some exceptions to the general rules discussed herein. In the absence of legislation providing otherwise, the statute of limitation does not run against the government. Therefore, title to public lands cannot be acquired by adverse possession as against the United States; as a gen-

eral rule the same is true as to the several states. However, the rule has been changed by statute in some states, including Wisconsin. Section 330.28 provides that title to real property belonging to the state may be acquired by adverse possession if such possession has continued uninterruptedly for more than forty years. The requirements with respect to the character of the possession are the same against the state as against a private party, but the limitation period is increased from twenty years to forty years. This statute may cover a case, which serves as an illustration of the statement above, that a private party may acquire public property by adverse possession.

ADVERSE POSSESSION BY TENANT. A tenant's right to acquire title by adverse possession as against a landlord is restricted by section 330.11. It is provided that whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord until the expiration of ten years from the termination of the tenancy, and if there is no written lease, until the expiration of ten years from the time of the last payment of rent. From the language of this section, such presumption seems to be conclusive, and it appears that the tenant is precluded from showing that his holding within such ten-year period was in fact adverse.

TELEGRAPH, TELEPHONE AND ELECTRIC WIRES. The maintenance of telegraph, telephone, or electric wires or cables will not be considered adverse and no prescriptive rights will result from such maintenance under the provisions of section 330.12.

PERSONS UNDER DISABILITY. The legislature has recognized that certain persons are legally incompetent to protect their rights against an adverse possession, and section 330.14 was enacted for their protection. The statute recognizes as incompetent a person who, at the time his title accrued or descended to him, was either

- (a) Under 21 years of age;
- (b) Insane;
- (c) Imprisoned on a criminal charge for a term less than life.

As against said persons possession for a period of time fixed in the adverse possession statutes will not divest title, and an action for recovery of the land may be brought after the time limited and within five years after the disability shall cease or after the death of the person entitled, who shall die under such disability.

The discussion has attempted to present a brief outline of the law of adverse possession and it should be considered as an outline rather

than an exhaustive treatment of the subject. The purpose has not been to state the law applicable to particular situations, but rather to emphasize the importance of the subject. An attorney who renders a title opinion usually excepts from his opinion, and does not attempt to pass on the rights of the parties in possession of the premises considered. This is done because counsel recognizes that such parties may have rights which may seriously impair an apparently clear record title, and further, that the extent of such adverse rights can only be determined by investigation of the facts of each case. The same caution should be observed by any person in any way concerned in the determination of the ownership of real estate, and this consideration has aimed to briefly sketch various factors to be considered in exercising caution and in reaching a determination.