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## Title by Adverse Possession

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TITLE BY ADVERSE POSSESSION.

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T H E S I S.

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George Meade Emory,  
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Title by Adverse Possession.

When a person is in possession of real property, apparently exercising over it the rights of ownership, the law presumes him to be its lawful owner, until evidence arises which negatives this presumption. This principle is enunciated by Blackstone (2 Sharsw. Bl., 196), and by many of the earlier New York cases.

The law provides that when possession has continued for a certain length of time and in a manner prescribed by law, that the title to the property becomes vested indefeasibly in him who has fulfilled the conditions so prescribed, as against the whole world, not excepting the true owner.

The manner in which this possessory right, existing by virtue of the presumption of law referred to by Blackstone, may be ripened into an estate, although the entry may be a tortious one, is made definite and certain in the statute-books of the different States, which, taken together with the judicial interpretations of these statutes, form that portion of the law usually consider-

ed under the head of Title by Adverse Possession.

The purpose of the law in allowing a title beginning with mere possession to be perfected from such a beginning, is to afford a safeguard from those hardships and inconveniences certain to arise, were it permitted to assert rights slept in long after that limit which the law places to the time allowed for their enforcement has passed.

It would be unjust and would result in the instability of property rights, were owners of land required, after the time limited by the statute, to produce evidence of a valid holding, when such evidence might be difficult or even impossible to procure.

The statute of limitations is so intimately connected with the subject of title by adverse possession, that a brief inquiry into its history and objects may be permissible.

The first statute of limitations was enacted in the reign of King James I., and was a substitute for a statute of King Henry VIII., passed, as says Lord Coke, "with a view to impose vigilance upon him that was to bring his action."

That portion of the statute providing the time with-

in which an action must be brought for the recovery of real property, goes upon the supposition that one holding a valid title to real estate will not refrain during the time limited from enforcing it against one holding possession in derogation of the true title. One of the court, in *La Trombois v. Jackson*, 8 Cowen, 589, in remarking upon the statute of limitations, says: "But for the intervention of the statute, there would be no end to the revival of dormant and antiquated titles."

It was a familiar saying that the statute of limitations presumes the payment of a debt or the fulfilment of an obligation after a certain time has elapsed from the accruing of the right to enforce such payment or fulfilment. This idea in regard to the statute is not entitled to the respect with which it was formerly treated, the courts now sustaining the theory that the statute is one of repose, taking away the remedy for enforcement of the right on grounds of public policy. (*McCarthy v. White*, 8 Am. Dec., 754.)

Considering that part of the statute of limitations which deals with the length of time in which an action must be brought to recover real property, it was formerly the theory of the law that a conveyance had been giv-

en to the party in possession. This presumption of a grant seems to have been one of those legal fictions, so dear to common law judges, but seems to have been of no particular importance, since, when the possession could be accounted for consistently with the true title, no presumption of a grant was allowed to arise. At the present time the presumption of a grant does not enter into the law of adverse possession. It is generally held, with that good sense that is growing more and more to be a characteristic of modern judicial decisions, that the right to enforce the true title is barred on the grounds of policy given above. The statute not only bars the remedy but confers as secure a title as could be given by grant. (*Sherman v. Kane*, 86 N. Y., 57). This estate obtained is always a fee.

It must be understood that any abandonment of the possession before the completion of the full period limited in the statute will prevent the statute from taking effect, (52 Me., 46), and this as well where the discontinuance of the possession results from a re-entry by the original owners as where it is the consequence of abandonment by the disseisor. (*Pedrick v. Searll*, 5 Searg. & R., 240).

The possession may be completed by the successive holdings, for the full time, by persons, in priority, whether of descent or purchase, with each other. (Doe v. Campbell, 10 Johns., 471).

The relation of priority between successive holders, it is held in Smith v. Chapin, 31 Conn., 530, may be shown to have existed by virtue of a parol contract. The case was one in which the property, to which a title by adverse possession was sought to be established, had been by mistake omitted from a written agreement between the parties ; the court allowed evidence of a parol agreement to be given, showing the intention to include in the instrument the property in question, and was sustained on appeal.

An adverse possession must commence with a wrongful changing of the possession of the property from the true owner to the party beginning such wrongful possession. This tortious shifting of the possession from one party to the other is called disseisin. Mr. Preston thus defines the term : "It is the ouster of the rightful owner of the seisin. It is the commencement of a new title--- After a disseisin the person by whom the disseisin is committed has the seisin or estate and the person on whom

the injury is committed has only the right or title of entry."

To constitute such a disseisin as will change the possession from the true owner to the disseisor, the possession following the disseisin must be of such a nature as to be wholly inconsistent with the possession of the former owner. As the court says in the case of Worcester v. Lord, 56 Me., 265 : "The possession must be hostile and adverse in its character, importing a denial of the owner's title in the property claimed ; otherwise, however open, notorious, constant and long continued it may be, the owner's action will not be barred." From this it follows, that in order to create such a disseisin as will shift the title from the true owner, the disseisor must enter in his own name. If there is any proof to show that he has entered, recognizing in any way, by his acts or by his words, the superior title of the true owner, or that of any other person, there can be no disseisin. From this rule of law two others naturally follow.

The first of them is : Since the possession must be of such a nature, that by implication the title of the true owner must be denied, as well as that of every one



besides the disseisor, his possession must be exclusive.

The second is : Such a disseisin as will shift the title from the true owner to the disseisor must have been made under some claim of title, otherwise the inference would be a clear one, from the fact that no title was asserted in the disseisor either by his acts or by his express representations, that the possession is subordinate to the ownership of some person other than the disseisor.

The principle that the entry must be made under some claim of right or title, is one that has its reason in the very nature of an adverse possession, and in New York the rule was enunciated as early as 1806, in the case of *Brandt v. Ogden*, 1 Johns. Rep., 157. Spencer, J., in the opinion, stated that in order to bar the recovery of a plaintiff who has title, by a possession in the defendant, strict proof has always been required, not only that the first possession was taken under a claim hostile to the real owner but that such hostility has existed on the part of the succeeding tenants.

With reference to the characteristics of an adverse possession such as will bar the title of the true owner, the cases generally hold that it must be an actual, vis-

ible, notorious, distinct and hostile possession and that it must be under some claim of title. The language of the different cases, in describing the essential characteristics of an adverse possession, though sometimes apparently conflicting, seem to create in the mind the same general impression as to what elements must be present in order to constitute a valid adverse possession.

In the case of *Cahill v. Palmer*, 45 N. Y., at p. 584, the court refers to the fundamental qualities of an adverse possession in these words : "When the possession is actual, exclusive, open and notorious under a claim of title adverse to any and all others for the time prescribed by statute, such possession establishes a title."

In *Hawk v. Luseman*, 6 Searg. & R., 21, the court said, in reviewing a judgment founded on an instruction to the jury, that an uninterrupted possession of lands for the time limited by statute would give a title by adverse possession : "The act of limitations does not prevent an entry of the owner of the land and the bringing of an ejectment at any time, unless there has been an actual, continued, visible, notorious, distinct and hostile possession for the time limited in the statute."

In the case of \_\_\_\_\_ v. Proprietors of Canals

and Locks, 5 Metc., at p. 33, the court holds : "Adverse possession without right, constitutes a disseisin, provided the possession be notorious and exclusive",- the word disseisin being here employed in the sense of such an ouster of the true owner as will be a good beginning of an adverse possession.

In the case of *Turney v. Chamberlain*, 15 Ill., 271, it is laid down as well settled law : "To constitute an adverse possession, sufficient to defeat the right of action of the party who has the legal title, the possession must be hostile in its inception, and so continue for a period of twenty years. It must be an actual, visible and exclusive possession, acquired and retained under a claim of title inconsistent with that of the true owner."

The rule in *Cahill v. Palmer*, 45 N. Y., 484, has been acted upon and affirmed in New York as late as 1888, in the case of *Buttery v. Rome, Watertown & Ogdensburg R. R. Co.*, 14 N. Y. S. R., 131, where the court specify as the ingredients of a good title by adverse possession, the following : "The possession must be under a claim of title, evinced by acts open, notorious and consistent only with such claim, exclusive of every other right, and

continuous."

From these general statements of the same thing, it is possible to formulate certain principles which will express more fully the nature of an adverse possession.

An eminent authority on the law of real property, Mr. Washburn, has classified the tests to be applied in judging of the validity of a title by adverse possession, by suggesting that the chief things to be considered are: First, the actual occupancy, its notoriety and capability of being clearly defined: Second, its continuity, hostility and exclusiveness during the whole period limited by the statute: Third, the intention with which the entry was made and the possession begun.

In some of the states it is provided in the statute limiting the time within which an action may be brought, that those commencing a possession under a claim of title based upon a written instrument may be in constructive possession of the whole tract described in such a written instrument, although the actual occupation extends to but a very insignificant portion of the whole tract; while on the other hand, a person entering under a claim of right not based upon a deed or other color of title is generally allowed to assert a title by adverse

possession to so much of the tract as has been occupied actually by him.

A fair sample of such a statute is that of New York, which enacts : "Where the occupant, or those under whom he claims, entered into possession of the premises under claim of title, founded upon a written instrument as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and there has been a continued occupation for more than twenty years, the property is deemed to have been held adversely."

C. C. Pro., Sec. 369.

The next section of the statute provides that one so claiming to hold under a deed, judgment or decree, is deemed to hold property adversely when it has been usually cultivated or improved, when it has been substantially enclosed, and, even if not cultivated or enclosed, it has been used for supplying fuel, fencing, husbandry, or ordinarily by the occupant. A known farm or lot, partly occupied in actuality, is deemed to be adversely held, when entry has been made under color of title.

On the other hand the statute provides that where a claim of right, not founded upon a written instrument, is made, adverse possession is deemed to arise with ref-

erence to that property alone, which is either substantially enclosed or cultivated to the extent of what is usual in that section of the State where the land is situated.

Under that section of the statute allowing constructive possession to arise in favor of one claiming under a written instrument, it has been held that where such a constructive possession is sought to be established over a parcel of land, part of which is in the actual possession of the claimant, that the unoccupied portion must be in subservience to or actually connected with the occupied part.

The language of the statute in requiring the constructive possession to be of a "known farm or lot" would seem sufficiently clear on this point.

In the case of *Thompson v. Burhans*, 79 N. Y., 93, the plaintiff sought to establish his title to certain lands, part of which adjoining lands in actual occupation, but unenclosed, and not part of any "known lot or farm", were admittedly wild and in a state of nature. The plaintiff had cut timber from this portion of the tract, and had, on hearing of an intention to contest his title, built thereon a log cabin and stayed there

for a few weeks. The court held that no such possession was shown as entitled him to a recovery.

In order that the case may be brought within the sections relating to constructive possession, the deed or other written instrument must include in the description the whole of the premises claimed. This is held in Jackson ex dem. ---- Gilliland v. Woodruff, \_\_\_\_\_, and the reason given is that unless the premises are described in the deed, it cannot be ascertained how far the claim extends. There is, in fact, in such a case to that part of the premises not covered in the description, and can be no valid possession without it.

The words "substantial enclosure" were held to mean, in the case of Bolton v. Schriver, 49 Jones & Spencer, \_\_\_ to be such an enclosure as to give notice to the world that the property was claimed exclusively, the court intimating that its sufficiency would vary greatly with the situation of the property.

As distinguished from the constructive occupation of land claimed under a deed or written instrument, a much greater degree of use of the land is required in order to constitute a valid possession where the claim made is not under color of title. This has been brief-

ly stated above. In *Miller v. Downing*, 54 N. Y., 631, the plaintiff did, it is true, claim under color of title, but did not seek to establish a constructive possession of any part of the lot, and an actual occupation was a necessary element of his case. The acts of having erected a wood-pile upon his premises for the space of two years, and of having buried potatoes upon them for six years, were held insufficient to establish a title in him.

The possession must be commenced under such circumstances as will either proclaim to the true owner explicitly that his property is claimed adversely to him, or will by their hostility, openness and general notoriety raise a presumption that notice has been received by him.

An early Massachusetts case states a proposition from which the above stated rule may be deduced. "It is presumed that any entry is permissive until the contrary is made to appear." That is to say, that it must be proven, to establish a title by adverse possession, that the entry was not by consent of, and in subservience to the title of, the true owner.

That the possession must be continuous throughout the period prescribed by the statute of limitations,



and that it must be exclusive of all other claims to the property, has already been briefly touched upon in a former part of this essay.

The requirements of hostility to the true title and of exclusiveness of claim seem to be so allied with each other that the definition of one seems to be also a description of the other.

It is a rule, deep-rooted in the law of adverse possession, that the possession, in order to be adverse, must be hostile to the true owner in its inception. This rule is closely connected with that making it necessary that the possession of the claimant should be notorious. To allow a claimant to gain an adverse possession of land, while apparently acknowledging, by his acquiescence therein, the superior authority of the true owner, and exhibiting none of the indicia of ownership, would be to open the way to fraud of a kind difficult to expose.

To avoid injustice and wrong of this sort, this rule demanding hostility and exclusiveness has always been recognized as one of the cardinal requirements of a title by adverse possession. Chief Justice Marshall, delivering the opinion in the case of *Kirk v. Smith*, 9 Wheat., 241-288, said : "It would shock that sense of

right which must be equally felt by legislators and judges, if a possession which was permissive and entirely consistent with the title of another should silently bar the title.----- Such a construction would make the statute of limitations a statute for the encouragement of fraud, a statute to enable one man to steal the title of another by professing to hold under it. No laws admit of such a construction."

The possession, therefore, of a cestui que trust, a tenant against a lessor, or of one tenant in common as against that of another, is always presumed to be in subordination to that of the true owner, since the law presumes that where an entry is made not under a claim of title hostile to that of the true owner, such entry is under and in subservience to the true title. (Jackson v. Thomas, 16 Johns., 292.)

A possession thus rightfully begun can never initiate a right that may be perfected into a title, unless some express disclaimer of the relationship is made or such continued, open and notorious acts are done as will be presumed to inform the true owner and the world that the occupant claims to hold in his own right. (Zeller's Lessee v. Eckert, 4 Howard, U. S., 289.)

To illustrate the extent to which a trustee may repudiate his trust and his powers and duties under it, in the case of Zeller's Lessee v. Eckert, supra, the court upheld a verdict based on the charge of the trial judge, "that a trustee of any description may disavow and disclaim his trust though it is in the utmost bad faith or in violation of his express agreement, from which time his possession of lands becomes adverse.----- It matters not whether the trust began by the voluntary act of the trustee or the law made him a trustee against his will as the result of his situation or conduct." The charge of the trial court is to be found in Tyler on Ejectments, at p. 877, and is not found in full in the volume of reports.

Whether the Supreme Court can be held to have affirmed such a doctrine as that the trustee in a trust raised by implication of law out of a situation arising from his own fraud, may disclaim such a trust and begin an adverse possession of its subject matters, is extremely doubtful. The court say expressly that they consider some of the criticisms of the charge by appellant's counsel are justified, but that considering the main ground upon which the case was given to the jury, the

appellate court has no right to interfere. Judge Nelson, in the course of the opinion, states that the only difference between cases in which the relationship of privity arises and those in which it does not, is in the greater accuracy of proof required to prove an adverse possession under the former circumstances.

Parallel with the rule just discussed, is that requiring the possession to be exclusive in the claimant of a title by adverse possession. It has been said already that the general doctrine is that the possession will not be deemed to be adverse, unless the claim made asserts the title to be in the occupant, exclusive of any other right in any other person. (*Livingston v. Peru Iron Co.*, 9 Wend., 511.)

In addition to the necessity of hostility, notoriety and exclusiveness, there must be present a continuity of possession for the whole period prescribed by the statute. One of the chief facts required as an element of a title by adverse possession being the ouster of the true owner, when this is continued for the whole period limited by statute, a satisfactory degree of continuity is obtained.

The possession need not be continued by the same occupant, as has been stated, but where it is so fulfil-

led by succeeding occupants privity must exist between them.

It is universally the doctrine of the courts that where the entry is not made under some claim of title, no adverse possession can arise ; for were the entry made without an assertion of right in the party entering, both the presumption of law and the common sense interpretation of the proceeding would be that the possession of the land was merely in subservience to the title of the true owner.

The presumption of law that makes the actual occupant of land the owner until the contrary appears, will, it has been stated, be destroyed by the lack of evidence of a claim of title. The quo animo, - the intent with which a possession is taken has been said to be one of the tests by which a title by adverse possession is judged. The claim under which entry was made furnishes the best evidence of the intention with which the land was taken.

There seems to be no doubt that it is wholly immaterial whether or not the title of which claim is made is a valid or invalid one.

A claim made under an instrument which is entirely

void as a conveyance in se will be sufficient to commence an adverse possession.

In *Hilton v. Bender*, 2 Hun, 1, a defendant, sued in ejectment, claimed under a tax deed, given upon an assessment sale, and it was held that a possession so begun was such as would ripen in twenty years into a perfect title.

As to whether it is necessary that good faith should exist on the part of the occupant in making his entry, it has been held in the case of *Humbert v. Trinity Church*, that where a claim was founded upon an instrument, fraudulently procured by the defendants to be made indefinite as to the boundaries, with the intent of encroaching over them upon the adjoining land, and where the facts had been fraudulently concealed from the true owners of the land invaded, for many years, that, nevertheless, such bad faith in making the claim did not invalidate the title by adverse possession. Ignorance by a plaintiff of his wrong, even though caused by fraud, is not material, and the court so held in the same case, the reason being, that fraud is not one of the bars which prevent the running of the statute and are named in it.

Statutes exist in most of the states which declare

void deeds by owners of land conveying property held adversely by others than the true owner. They are generally modelled after an ancient statute of Henry VIII., stated by Coke to be for "the avoiding of maintenance, suppressing of right and stirring up of suits."

In one or two of the states, notably Massachusetts, it has been held that this ancient statute is a part of the common law and that champertous conveyances are void even when there is no local statute so declaring them.

In the case of *Crary v. Goodman*, 22 N. Y., 170, the distinction between the objects of the statutes of champerty and of limitations was pointed out by the court. The former, it says, is not, like the latter, a mere statute of repose, intended to prescribe a limit to controversies, but to prevent the transfer of disputed titles. The case was one where possession was taken by mistaken encroachment over a boundary line. The court said that though the adverse possession was sufficient to have barred the real owner from ejecting the occupant, yet that a deed of the premises would not be avoided, since a specific claim was shown by the language of the statute to be necessary for that purpose.

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