

THE LAW OF PROPERTY

SUPPLEMENTAL READINGS

Class 19

Professor Robert T. Farley, JD/LLM

barbri

Review

New York State Bar Review - 2007

Outlines:

PERSONAL PROPERTY

REAL PROPERTY

CONSTITUTIONAL LAW

NEW YORK TRUSTS

NEW YORK WILLS

66. REAL PROPERTY

V. ADVERSE POSSESSION

G. IN GENERAL

Title to real property may be acquired by adverse possession. (Easements may also be acquired by prescription.) Gaining title by adverse possession results from the operation of the statute of limitations for trespass to real property. If an owner does not, within the statutory period, take legal action to eject a possessor who claims adversely to the owner, the owner is thereafter barred from bringing suit for ejectment. Moreover, title to the property vests in the possessor.

H. REQUIREMENTS

1. Running of Statute

The statute of limitations begins to run when the claimant goes adversely into possession of the true owner's land (*i.e.*, the point at which the true owner could first bring suit). The filing of suit by the true owner is not sufficient to stop the period from running; the suit must be pursued to judgment. However, if the true owner files suit before the statutory period (*e.g.*, 20 years) runs out and the judgment is rendered after the statutory period, the judgment will relate back to the time that the complaint was filed.

2. Open and Notorious Possession

Possession is open and notorious when it is the kind of use the usual owner would make of the land. The adverse possessor's occupation must be **sufficiently apparent** to put the true owner on **notice** that a trespass is occurring. If, *e.g.*, Water Company ran a pipe under Owner's land and there was no indication of the pipe's existence from the surface of the land, Water Company could not gain title by adverse possession because there was nothing to put Owner on notice of the trespass.

Example: A's use of B's farmland for an occasional family picnic will not satisfy the open and notorious requirement because picnicking is not necessarily an act consistent with the ownership of farmland.

3. Actual and Exclusive Possession

a. Actual Possession Gives Notice

Like the open and notorious requirement, the requirement of actual possession is designed to give the true owner notice that a trespass is occurring. It is also designed to give her notice of the *extent* of the adverse possessor's claim. As a general rule, the adverse possessor will gain title only to the land that she actually occupies.

1) Constructive Possession of Part

Actual possession of a portion of a unitary tract of land is sufficient adverse possession as to give title to the whole of the tract of land after the statutory period, as long as there is a *reasonable proportion* between the portion actually possessed and the whole of the unitary tract, and the possessor has color of title (i.e., a document purporting to give him title) to the whole tract. Usually, the proportion will be held reasonable if possession of the portion was sufficient to put the owner or community on notice of the fact of possession.

b. Exclusive Possession—No Sharing with Owner

"Exclusive" merely means that the possessor is not sharing with the true owner or the public at large. This requirement does not prevent two or more individuals from working *together* to obtain title by adverse possession. If they do so, they will obtain the title as tenants in common.

Example: A and B are next door neighbors. They decide to plant a vegetable garden on the vacant lot behind both of their homes. A and B share expenses and profits from the garden. If all other elements for adverse possession are present, at the end of the statutory period, A and B will own the lot as tenants in common.

4. Continuous Possession

The adverse claimant's possession must be continuous throughout the statutory period. Continuous possession requires only the degree of occupancy and use that the average owner would make of the property.

a. Intermittent Periods of Occupancy Not Sufficient

Intermittent periods of occupancy generally are not sufficient. However, constant use by the claimant is not required so long as the possession is of the type that the usual owner would make of the property. For example, the fact that the adverse possessor is using the land for the intermittent grazing of cattle will probably not defeat continuity if the land is *normally* used in this manner.

b. Tacking Permitted

There need not be continuous possession by the same person. Ordinarily, an adverse possessor can take advantage of the periods of adverse possession by her predecessor. Separate periods of adverse possession may be "tacked" together to make up the full statutory period with the result that the final adverse possessor gets title, provided there is privity between the successive adverse holders.

1) "Privity"

Privity is satisfied if the subsequent possessor takes by descent, by devise, or by deed purporting to convey title. Tacking is not permitted where one adverse claimant ousts a preceding adverse claimant or where one adverse claimant abandons and a new adverse claimant then goes into possession.

2) Formalities on Transfer

Even an oral transfer of possession is sufficient to satisfy the privity requirement.

Example: A received a deed describing Blackacre, but by mistake built a house on an adjacent parcel, Whiteacre. A, after pointing the house out to B and orally agreeing to sell the house and land to her, conveyed to B, by a deed copied from her own deed, describing the property as Blackacre. The true owner of Whiteacre argues that there was no privity between A and B because the deed made no reference to Whiteacre, the land actually possessed. Nonetheless, the agreed oral transfer of actual possession is sufficient to permit tacking.

68. REAL PROPERTY

5. Hostile

The possessor's occupation of the property must be hostile (adverse). This means merely that the possessor does *not have the true owner's permission* to be on the land. It does not mean anger or animosity. The state of mind of the adverse possessor is irrelevant. By the large majority view, it does not matter whether the possessor believes she is on her own land, knows she is trespassing on someone else's land, or has no idea of who owns the land.

a. If Possession Starts Permissively—Must Communicate Hostility

If the possessor enters with permission of the true owner (e.g., under a lease or license), the possession does not become adverse until the possessor makes clear to the true owner the fact that she is claiming "hostilely." This can be done by explicit notification, by refusing to permit the true owner to come onto the land, or by other acts inconsistent with the original permission.

b. Co-Tenants—Ouster Required

Possession by one co-tenant is not ordinarily adverse to her co-tenants because each co-tenant has a right to the possession of all the property. Thus, sole possession or use by one co-tenant is not adverse, unless there is a clear repudiation of the co-tenancy; e.g., one co-tenant ousts the others or makes an explicit declaration that he is claiming exclusive dominion over the property.

c. If Grantor Stays in Possession—Permission Presumed

If a grantor remains in possession of land after her conveyance, she is presumed to be there with the permission of her grantee. Only the grantor's open repudiation of the conveyance will start the limitation period running against the grantee. Likewise, if the tenant remains in possession after the expiration of her lease, she is presumed to have the permission of the landlord.

d. Compare—Boundary Line Agreements

There is a separate but related doctrine that may be helpful here. It operates where a boundary line (usually a fence) is fixed by agreement of the adjoining landowners, but later turns out not to be the "true" line. Most courts will fix ownership *as per the agreed line*, provided it is shown that: (i) there was original *uncertainty* as to the true line; (ii) the agreed line was *established* (i.e., agreed upon); and (iii) there has been *lengthy acquiescence* in the agreed line by the adjoining owners and/or their successors.

1) Establishment Requirement

The establishment requirement can be implied by acquiescence. A past dispute is not necessary to show uncertainty, although it can be good evidence of it. But a showing of original uncertainty is required; otherwise, in a court's view, a parol transfer of land would result.

6. Payment of Property Taxes Generally Not Required

Only a minority of states require the adverse possessor to pay taxes on the property. However, in all states, payment of property taxes is good evidence of a claim of right.

C. DISABILITY

1. Effect of Disabilities—Statute Tolled

The statute of limitations does not begin to run for adverse possession (or easements by prescription) if the true owner was under some disability to sue *when the cause of action first accrued* (i.e., the inception of the adverse possession). Typical disabilities are: minority, imprisonment, and insanity.

Example: O, the true owner, is five years old when A goes into adverse possession. The statute will not begin to run until O reaches the age of majority.

Compare: O, the true owner, is declared insane six months after A begins using a pathway adversely. The statute is *not* tolled because O's disability arose *after* the statute began to run.

2. No Tacking of Disabilities

Only a disability of the *owner* existing at the time the cause of action arose is considered. Thus, disabilities of successors in interest or subsequent additional disabilities of the owner have no effect on the statute.

Examples: 1) O is a minor at the time A goes into adverse possession of O's land. One year before O reaches the age of majority, O is declared insane. The statute is not tolled by reason of O's insanity (a subsequent disability). Thus, the statute begins to run from the date O reaches the age of majority, whether she is then sane or insane.

2) O, the true owner, is insane when A begins an adverse use. Ten years later, O dies intestate and the land goes to her heir, H, who is then 10 years old. The statute of limitations begins to run upon O's death and is not tolled by H's minority. H's minority is a "supervening" disability and cannot be tacked to O's.

3. Maximum Tolling Periods

In some states, the maximum tolling period is 20 years; thus, the maximum period of the statute of limitations would be the regular statute of limitations period plus the maximum 20-year tolling period.

D. ADVERSE POSSESSION AND FUTURE INTERESTS

The statute of limitations does not run against the holder of a future interest (e.g., a remainder) until that interest becomes possessory. Until the prior present estate terminates, the holder of the future interest has no right to possession, and thus no cause of action against a wrongful possessor.

Examples: 1) A devises Blackacre to B for life and then to C. Thereafter, X goes into possession and possesses adversely for the statutory period. X has acquired B's life estate by adverse possession, but has not acquired any interests against C. Of course, if following B's death, X or her successor stays in possession for the statutory period, X will have acquired C's rights also.

2) X enters into adverse possession of Blackacre. Four years later, A devises Blackacre to B for life and then to C. X continues her adverse possession for seven more years. The statute of limitations is 10 years. In this case, X has acquired the whole title by adverse possession. An adverse possession begun against the owner of the fee simple absolute cannot be interrupted by a subsequent division of the estate.

1. Possibility of Reverter—Statute of Limitations Runs on Happening of Event

In a conveyance "to A for so long as" some event occurs or fails to occur, on the happening of the event the fee simple determinable automatically comes to an end and the grantor (or his successors) is entitled to present possession. At that point, the grantor has a cause of action to recover possession of the property. If he does not bring the action within the period specified by the applicable statute of limitations (and if A or her successors have the requisite open, notorious, continuous, and adverse possession), his action will be barred.

2. Right of Entry—Happening of Event Does Not Trigger Statute of Limitations

In the case of a right of entry, on the happening of the stated event the grantor (or his successors) has only a right to reenter the property, a power to terminate the grantee's estate. Until the grantor asserts his right of entry, no cause of action arises because the grantee's continued possession of the land is proper: her fee simple estate has not been terminated. Thus (in most states), the statute of limitations does not operate to bar assertion of a right of entry even though the condition triggering the right of entry has been breached.

a. Grantor Must Act Within Reasonable Time to Avoid Laches

However, to avoid the title problems that might otherwise be presented, most courts hold that the holder of the right of entry must bring his action within a reasonable time after the event occurs. If he fails to do so, his action is barred by laches. As for what constitutes a reasonable time, many courts look to the statute of limitations governing actions for possession of real property.

E. EFFECT OF COVENANTS IN TRUE OWNER'S DEED

The exact nature of the title obtained depends on the possessor's activities on the land. For example, assume there is a recorded restrictive covenant limiting use of the land to a single-family residence. If the possessor uses the land in violation of that covenant for the limitations period, she takes title free of the covenant. But if she complies with the covenant, she takes title subject to it, and it remains enforceable against her (at least in an equitable action).

70. REAL PROPERTY

F. LAND THAT CANNOT BE ADVERSELY POSSESSED

The statute of limitations does not run against government-owned land (federal, state, or local) or land registered under a Torrens system.

CONCISE
HORNBOOKS

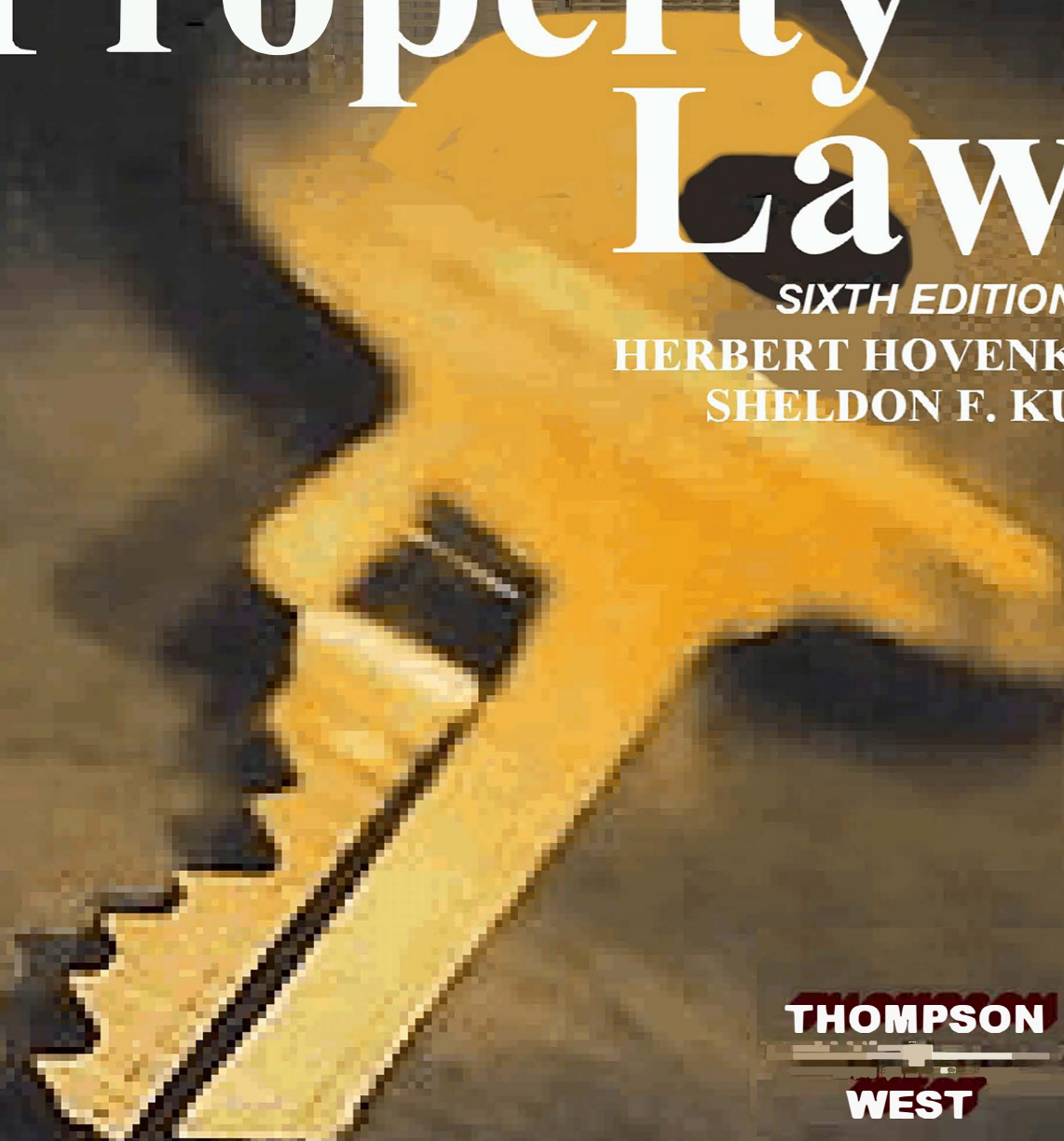


PRINCIPLES OF

Property Law

SIXTH EDITION

HERBERT HOVENKAMP
SHELDON F. KURTZ



THOMPSON

WEST

**PRINCIPLES
OF
PROPERTY LAW**
Sixth Edition

By

Herbert Hovenkamp

*Ben V. & Dorothy Willie Professor of Law
University of Iowa*

Sheldon F. Kurtz

*Percy Bordwell Professor of Law and Professor of Surgery
University of Iowa*

CONCISE HORNBOOK SERIES®

THOMSON

WEST

Chapter 4

RIGHTS OF POSSESSORS OF LAND, INCLUDING AD- VERSE POSSESSION

Table of Sections

Sec.

- 4.1 Possession and Prior Possession.
- 4.2 The Concept of Adverse Possession.
- 4.3 The Five Elements of Adverse Possession.
- 4.4 Burden of Proof.
- 4.5 Nature of Title Acquired by Adverse Possession.
- 4.6 When Statute of Limitation Begins to Run.
- 4.7 Tacking.
- 4.8 Effect of Disabilities.
- 4.9 Constructive Adverse Possession.
- 4.10 Rightful Possession Becoming an Adverse Possession.
- 4.11 Whose Interests Are Affected.
- 4.12 Innocent Improver Doctrine.
- 4.13 Adverse Possession of Chattels.

SUMMARY

§ 4.1 Possession and Prior Possession

1. The possession of real property consists of dominion and control over the property with the intent to exclude others.

2. In order to constitute possession, the acts of dominion and control must reasonably correspond to the size of the tract, its condition and appropriate use. The act must be of a character that usually accompany the ownership of similarly situated land. In other words, the acts must be consistent with how a reasonable owner of similar land might have used it.

3. In controversies concerning possession, it is normally the function of the jury to determine what the physical acts of dominion and control were, and then to determine whether those acts constituted possession in accordance with the legal standard set by the court.

4. The prior possessor of real property has title against the whole world except the rightful owner. As with personal property, the "rightful owner" may be merely a prior peaceful possessor.

5. Generally a possessory interest in real property can be conveyed by deed or devised by will. If the possessor dies without a will, the land passes to the possessor's heirs.

6. A prior possessor sues to recover possession from another person who is in possession of the land. This is sometimes called an action in ejectment. The defendant in this action cannot defeat the plaintiff's claim merely by showing that a third party has a title superior to the plaintiff's title unless the defendant's rights derive from that third party.¹

7. A possessor is entitled to recover damages from a wrongdoer. Courts are divided whether the amount of damages is limited to the value of the possessor's interest or the value of the land. If land is condemned, the possessor may be entitled to receive compensation for the value of the condemned land.

§ 4.2 The Concept of Adverse Possession

1. The doctrine of adverse possession is based on statutes of limitation for recovery of real property. Statutes of limitation operate to bar one's right to recover real property held adversely by another for a specified period of time. These statutes also vest the adverse possessor with as perfect title as if there had been a conveyance by deed. However, this title is not a matter of public record until a court determines that title has been acquired by adverse possession and the court's judgment is entered on the public records. Common statutes of limitation to recover the possession of real property are 5, 10, 15 or 20 years. The purposes of such statutes of limitation are to suppress dormant claims, to quiet titles, to require diligence on the part of the owner and penalize those who sit on their rights too long, and to reward the economic activities of a possessor who is utilizing land more efficiently than the true owner is. Many cases with similar facts but divergent results can be explained by considering which of these policies weighed more heavily in the decision making process.

Statutes vary considerably as to such matters as adverse possession under color of title and not under color of title, types of disability and the effect of a disability in specific instances, and whether or not the statute of limitation may run against governmental entities.

1. See *Tapscott v. Cobbs*, 52 Va. (11 Gratt.) 172 (1854). The action of ejectment is available even though the plaintiff is not the absolute owner of the land but a mere prior possessor.

§ 4.3 The Five Elements of Adverse Possession

1. In order to acquire a title to real property by adverse possession, the possession throughout the statutory period must be:

- a. actual;
- b. open, visible and notorious (meaning, not secret or clandestine but occupying as an owner would occupy for all the world to see if the owner cared to look);
- c. exclusive (meaning sole physical occupancy or occupancy by another with the permission of the person claiming a title by adverse possession);
- d. continuous and peaceable (meaning without abatement, abandonment or suspension in occupancy by the claimant, and also without interruption by either physical eviction or action in court. In other words there must be an unbroken continuity of possession for the statutory period); and
- e. hostile and under claim of right (meaning that the possession is held against the whole world including the true owner; that the possessor claims to be the owner whether or not there is any justification for her claim, or whether or not there is "color of title" being a paper or other instrument that does not qualify as an effective legal conveyance but that the claimant may believe is effective).²

Possession under a mistaken belief that one is the owner of the land can be adverse under the majority view. Likewise, good faith on the part of the adverse possessor is generally deemed immaterial. Thus, the possessor can prevail with no rightful claim at all if the above five elements exist.

2. The five elements must coexist to enable one to acquire title by adverse possession.

3. Whether each of these elements exists is primarily a question of fact.

§ 4.4 Burden of Proof

The burden of proof to establish a title by adverse possession is on the adverse possessor. Generally, this burden can be met by a preponderance of the evidence or, as some courts say, by "clear and positive evidence." Most courts say that possession is presumed to be in subordination and not adverse to the legal owner.

² In some jurisdictions, however, color of title may be required or, if present, may operate to reduce the time necessary to acquire a title by adverse possession. See Mich. Comp. Laws Ann. § 600.5801 (1987). Color of title may also be used to acquire constructive adverse possession.

§ 4.5 Nature of Title Acquired by Adverse Possession

1. Once a title is acquired by adverse possession, the quality of that title is the same as a title acquired by deed, will or intestate succession. Such a title is good as against the whole world. Of course, to have that title reflected as a matter of public record, it is necessary for it to be reflected in a court judgement. Thus, the possessor might initiate a "quiet title" action to establish the acquisition of title by adverse possession.

2. An adverse possessor cannot acquire a larger estate or interest in the land than that which was claimed throughout the entire period of his adverse possession. For example, if the possessor has claimed only a life estate she can mature title only to a life estate. Likewise, the possessor can acquire no greater title than the person who had the cause of action had during the period of possession. Thus, if the only person who had the right to sue the possessor had a mere life estate, then at the end of the statutory period the possessor acquires only a life estate.

3. A title acquired by adverse possession relates back to the time of the possessor's entry when the true owner's cause of action accrued. Thus, once the title is acquired, the true owner can have no other causes of action against the possessor for acts relating to the land on which the statute has not yet run. For example, if A possesses Blackacre and cuts its timber for the statutory ten year period, once A has acquired title by adverse possession the true owner loses any action for the taking of the timber during the period of A's possession before the statute had run. By contrast, if the true owner had asserted her right before the full running of the statute, she could have had an action for the wrongful taking of the timber as well as the recovery of the land.

4. The title acquired by adverse possession is an original title and not derived from the dispossessed owner. Thus, the adverse possessor takes the title and estate free of all claims which could have been asserted against the former owner during the statutory period.

§ 4.6 When Statute of Limitation Begins to Run

The statutory period on adverse possession begins to run when a cause of action for possession accrues against the adverse possessor.³ The time when a cause of action accrues depends upon the facts in a particular case. Typically, the cause accrues and the statute begins to run when a possessor without right enters into clearly visible possession of another's land claiming adversely.

3. Generally, the statute of limitation does not run against the holder of a future interest in existence at the time the adverse possession begins because the holder of the future interest is not presently entitled to possession.

§ 4.7 Tacking

1. The period of adverse possession of one possessor can be tacked to the period of adverse possession of another possessor if the possessors are in privity with each other. Privity exists when the possession is passed from one to the other by deed, will, descent, written contract, oral contract, mere oral consent or permission. A mere parol transfer, however, is not sufficient for tacking periods of constructive adverse possession where color of title is required.

2. If the occupants are in privity with each other, the period within which a cause of action can be brought by one person is tacked to the period the cause of action can be brought by another.

3. Tacking also occurs for those entitled to bring a cause of action against an adverse possessor who are in privity with each other. Privity exists when the right to bring a cause of action passes from one to another by deed, will, descent, written contract, oral contract, mere oral consent or permission.

§ 4.8 Effect of Disabilities

1. If the person with the cause of action is under a disability at the time the cause of action against the adverse possessor accrues, most states extend the time to bring the cause of action to some period beyond the removal of the disability. While state laws differ, disabilities typically include minority, legal incompetence, and imprisonment. State laws must be carefully scrutinized to determine what extension is available.

2. Under some but not all statutes, the protection which is afforded by a disability is wholly personal to the disabled person and is not available to anyone who may be a successor, either as heir, devisee or purchaser. In some states, the protection afforded by a disability ends at death but the personal representative of the estate of the person who had the cause of action is granted a fixed time in which to bring the cause of action against the adverse possessor.

3. The running of the statute on adverse possession is not affected by either an intervening or a supervening disability. Thus the disability must exist when the cause of action first begins.

4. There is no tacking of disabilities, whether of successive disabilities in the same owner or of disabilities in successive owners.

5. If the original owner has two or more disabilities at the time the cause of action accrues, the owner may take advantage of the disability which lasts the longest.

§ 4.9 Constructive Adverse Possession

1. Constructive adverse possession applies only when the adverse possessor enters under color of title. Color of title means a writing which the adverse possessor may believe conveys a good title but really is so defective that it cannot operate as a conveyance.

Constructive possession is a fiction by which an actual possession of a portion of land is extended to include the remaining area of the tract encompassed within the instrument or decree constituting color of title. For constructive adverse possession there must be an actual possession by the claimant of at least a part of the land. The amount of land that can be constructively possessed must be reasonable in size.

2. While the recording statutes have no application to title by adverse possession, some states require the recording of the instrument upon which the claim is based in order to satisfy the requirements of adverse possession under color of title.

§ 4.10 Rightful Possession Becoming an Adverse Possession

Certain relationships, such as that of co-tenants,⁴ give rise to a presumption or inference that the possession of one of the parties is with the permission of, and in subordination to, the rights of the other party or parties. However, if the possessor makes an open disclaimer or repudiation of the title or rights of the other parties, and knowledge of such disclaimer is brought home to them or such disclaimer or repudiation is otherwise implied by law, and the possession and disclaimer is continued for the statutory period, then title will vest in the possessor in derogation of the rights of the others.

§ 4.11 Whose Interests Are Affected

1. The adverse possessor's title does not affect the interest of any person unless that person had a cause of action because of the adverse possession. Thus if there is a severance of the surface and sub-surface when adverse possession starts, adverse possession of the surface does not give a cause of action to the owner of coal under the surface. Similarly, if at the time adverse possession begins the estate is divided into present and future interests, adverse possession of the parcel does not give rise to a cause of action in favor of the reversioner or remainderman. In these two instances the adverse possessor would gain title only to the surface

4. Co-tenants are persons who are concurrently entitled to the possession of real estate. Co-tenants may be tenants in common, joint tenants with right of survivorship, or tenants by the entirety.

in the first situation, and only to a possessory interest in the second.

2. An adverse possession that begins when the title is unified is not affected solely by a subsequent division of the title. Thus, if after adverse possession starts, the rightful owner separates the mineral estate, or creates possessory and future interests, the adverse possession continues to run against all parties, with the adverse possessor ultimately getting a fee simple absolute in the whole unless the owner of the sub-surface starts mining operations or otherwise ousts the adverse possessor, or unless the owners of the future interests effectively assert their titles, which may require filing a law suit.

§ 4.12 Innocent Improver Doctrine

1. Under the doctrine of annexation, improvements to real estate made by a wrongdoer belong to the owner of the real estate.

2. However, where the improvements were made by one who mistakenly believed that he or she owned the land on which the improvements were made, principles of unjust enrichment could compel a court of equity to refuse to quiet title in the improvement in the landowner, absent payment of fair consideration to the "good faith" innocent improver.

§ 4.13 Adverse Possession of Chattels

1. Generally, a thief cannot acquire or transfer title to stolen personal property, even to an innocent purchaser.

2. But title to personal property can be lost by adverse possession. Typically statutes of limitation for adverse possession of chattels run from two to six years.

3. At common law, the statute of limitation began to run when possession became hostile, actual, open, exclusive and continuous, rather than at that point that the goods were stolen or the true owner discovered their location. More recently, it has been held that the statute should begin to run when the true owner discovers or should have discovered the whereabouts of the stolen property.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 4.1 Possession and Prior Possession

PROBLEM 4.1: Blackacre is a large peninsula containing about 1,000 acres, surrounded on three sides by a creek, a bay, and a marsh. S repaired an ancient stone wall which crossed the mouth of the peninsula at S's own expense. S also erected a

gate and a gatekeeper's hut. By these actions S controlled land access to Blackacre. S used the peninsula to graze horses. S later deeded the land to R. R continued to use the land for grazing live stock. D entered the land and R brought an action for ejectment. During the pendency of the action, R died and P, as administrator of R's estate, was substituted as plaintiff. During the trial the court charged the jury as follows:

If the jury is satisfied from the evidence that S entered upon Blackacre in the year 1850, and is further satisfied that S then made a complete enclosure of the same, and that such enclosure was sufficient to turn and protect stock, and that S actually used this enclosure for such purpose up to the time of the alleged conveyance to R, and that S deeded the same to R, and that the land was subsequently used by R for pasturage, and that the land was suitable for pasturage; and that D entered without any claim of right and subsequent to the completion of said enclosure, and while the said land was being so used by said S prior, and, by said R, after said conveyance, you will find for the plaintiff against such defendant, provided such defendant was occupying the premises at the time of the commencement of this suit.

After a judgment for the plaintiff, defendant appealed, assigning the above instruction as error. Should the judgment be reversed for improper instruction?⁶

Applicable Law: Possession of real property requires acts of dominion and control with an intent to possess and exclude others. It is normally the function of the jury to determine what physical acts of dominion and control were exercised and then to apply the legal standard set by the court as to what acts are sufficient to constitute possession.

Answer and Analysis

Yes. The general principle is that the acts of dominion and control which establish possession must correspond in a reasonable degree with the size of the tract, its condition and appropriate use. The acts must be such as usually accompany the ownership of similar land. The jury decides whether or not the acts relied upon by the plaintiff establish possession, considering the size of the

5. *Bradshaw v. Ashley*, 180 U.S. 59, 21 S.Ct. 297, 45 L.Ed. 423 (1901), restating the rule in ejectment "that the plaintiff must recover upon the strength of his own title and not upon the weakness of the title of the defendant" and held where the plaintiff proved he was

in the actual, undisturbed, and quiet possession of the premises, and the defendant thereupon entered and ousted him, the presumption of title arises from the possession, and, unless the defendant proves a better title in himself, the defendant must himself be ousted.

tract, its particular condition and appropriate use. Under the instruction given, the court invaded the province of the jury by instructing it that certain acts were sufficient to constitute possession. The court should have permitted the jury to decide whether such acts of dominion and control which it found to have taken place were sufficient to comply with legal standards of possession as set forth by the court.

This problem, like the next one, involves a conflict between two possessors. In neither case is the plaintiff claiming a title, other than by some right acquired through possession. Each problem raises the question of what is necessary to constitute possession. The task is to distinguish between a series of trespasses and possession. This is normally the function of the jury under proper guidance from the court. Unless none of the facts is in dispute, and the results are so clear that reasonable minds cannot differ, the jury should determine what the physical facts are, and then apply the standard given by the court. Because the court, instead of the jury, in effect decided that certain acts constituted possession, the judgment should be reversed and a new trial ordered.

PROBLEM 4.2: O was the owner of Blackacre in fee simple.⁶

He went on a hunting expedition to Africa. While O was gone A took possession of Blackacre and claimed it as if the owner. Later, A died intestate. P was A's only heir. Prior to P's taking actual possession of Blackacre, D took possession. P sues to recover the possession of Blackacre from D who defends on the basis that O is the rightful owner of Blackacre. May P recover possession of Blackacre from D?⁷

Applicable Law: (a) Prior possession is good against the whole world except the rightful owner. (b) A possessory interest in land descends from the possessor to the heir. (c) A prior possessor, even though having no absolute title, can maintain an action in ejectment. (d) A defendant in an ejectment action cannot set up the right of a third person as a defense. (e) A plaintiff in ejectment must rely on the strength of his own title,

6. Generally land that is owned in fee simple gives the owner an estate or interest of potentially infinite duration. Since the owner cannot live that long, the estate or interest continues in the owner's successors because the estate or interest is alienable, devisable, and descendible. An estate in fee simple absolute is the "highest and best" estate (ownership interest) recognized by the common law. Other forms of fee simple estates include the fee simple determinable and the fee simple on condition subsequent. See Ch. 5.

7. *Tapscott v. Cobbs*, 52 Va. (11 Grat.) 172 (1854). Accord, *Bradshaw v. Ashley*, 180 U.S. 59, 21 S.Ct. 297, 45 L.Ed. 423 (1901) (plaintiff who was in prior possession was ousted by defendant even though defendant showed that unrelated third party had titled to the land; plaintiff's prior possession creates presumption of title and defendant cannot defeat plaintiff by showing title in another).

but as against a wrongdoer, prior possession is sufficient. This is no more than a recognition that as against a wrongdoer, prior possession is the equivalent of a good title.

Answer and Analysis

Yes. O is not a party to this lawsuit. Rather, the suit is strictly between two possessors. In such a suit the general rule is that prior possession is good against the whole world except the rightful owner. Furthermore, a possessory interest in land descends from the possessor to the possessor's heir if the possessor dies intestate or to the devisee under the possessor's will if the possessor disposes of the possessory interest in the will. Lastly, a defendant in ejectment cannot set up the right of a third person (*jus tertii*) as a defense.

As between A and D, A is the prior possessor. Upon A's death intestate, A's possessory interest descends to P. P acquires whatever rights A had in the land including the right to possession. This right is sufficient to create the fiction that P is in constructive possession, if not actual possession, of the land at the time D enters. This constructive possession is prior to D's actual possession.⁸ P, having prior possession which gives P rights against the whole world except the rightful owner, can eject D. Further, D cannot set up the *jus tertii* (the right of a third person) in defense unless D can show that D is holding under the real owner, O, (in which case D is really asserting a superior right) or D can show that P never did have prior possession by showing that O possessed Blackacre continuously right down to the instant when D took possession (in which case D is disputing P's claim of prior possession). Since neither of these propositions is true, the general rule applies and D has no defense. Of course, O, the real owner, can eject P or D.

A similar rule applies if D had merely trespassed upon the land and caused damage. In this case, P could sue D for the amount of damages to the land. D cannot reduce P's damages to the value of P's possessory interest by showing a superior title in O, for the same reasons that D could not defeat P's right to possession. As against the wrongdoer, P's prior possession is as good as an absolute title.⁹

8. If the rule were otherwise, then upon the death of any mere possessor there would be a scramble for the land rather than an orderly descent to a person claiming under the prior, but now deceased, possessor.

9. See, *Rogers v. Atlantic, G & P Co.*, 213 N.Y. 246, 107 N.E. 661 (1915). Con-

tra, *Zimmerman v. Shreeve*, 59 Md. 357 (1883), where an action was brought by a tenant for life against a trespasser who cut timber, the court held that the measure of damages should have been restricted to the injury done to the estate of the plaintiff by the trespass of the defendant, in this case the possessory

There is another way to analyze the facts and reach the same conclusion. It is commonly asserted that the plaintiff in ejectment must recover on the strength of his own title and not on the weakness of the defendant's title. As a corollary, however, it also is sometimes stated that the defendant can effectively defend by showing that the title is not in the plaintiff but in a third person. However, an exception to that rule exists when the plaintiff is relying not on title as showing a right to possession but simply on his or her rights as a prior peaceful possessor. Under this rationale, the *jus tertii* defense is unavailable as against a prior peaceful possession. The cases generally agree, regardless of how the *jus tertii* rule is stated.

The rationale stated in the first paragraph above is the better approach and is not inconsistent with the rule that the plaintiff in ejectment must recover on the strength of his own title. As against a wrongdoer or trespasser, the prior peaceful possession of a plaintiff in ejectment is a sufficient and superior title. In ejectment, the question at issue is the right to possession, and peaceful possession is a protected interest.

§ 4.2 The Concept of Adverse Possession

PROBLEM 4.3: O was the true owner of Blackacre. A took possession of the land as an adverse possessor. While A was in adverse possession, O conveyed all of O's rights in Blackacre to B. Before A had possessed the land for the statutory period to acquire a title by adverse possession, B sues A in ejectment. May B recover?

Applicable Law: The owner of land in the possession of an adverse possessor can convey title to that land. The grantee will have the right to eject the adverse possessor who has not been in possession long enough to acquire a title by adverse possession.

interest of the tenant in the timber, and not include any injury done to the estate of the remainder.

In *Winchester v. City of Stevens Point*, 58 Wis. 350, 17 N.W. 3 (1883) the defendant municipality defeated the plaintiff-possessor's suit for damages resulting from negligent flooding caused by defendant. Plaintiff pleaded but failed to prove an absolute title. The effect of the holding was to limit plaintiff to damages for the loss of the possessory interest. This result might have been based upon an unstated concern: that if a true owner ever appeared and full damages

had been paid to plaintiff, the municipality would have to pay again. However, under the *Winkfield* doctrine, the municipality having paid plaintiff in full could have had a defense in any action by a true owner. *The Winkfield*, [1902] P. 42 (1901); Comment, Bailment: the *Winkfield* Doctrine, 34 Cornell L.Q. 615 (1949). See also *Berger v. 34th Street Garage*, 274 App.Div. 414, 84 N.Y.S.2d 348 (1st Dept. 1948) (bailee can recover full value of goods from negligent third party who then has a defense if he is later sued by the bailor).

Answer and Analysis

B can recover possession from A. At early common law there were two reasons why B should not recover. First, A was in possession and claiming a freehold interest in the land. Therefore, A was seised¹⁰ of the land and no one but A could transfer the fee in the land because there had to be livery of seisin. This was the only way by which a freehold could be transferred. Since O was not seized of the land and had only a right of re-entry, O could not convey the land to B by livery of seisin. Therefore, the early common law judges held that O's deed conveyed no interest to B. Second, O had only a right of re-entry which was a "chose in action." Choses in action were not transferable. Transactions involving these were considered contrary to public policy. Thus, the early common law judges had to hold that O's deed did not transfer to B the chose in action which O held to eject A. The most that it could do was to permit or empower B to sue in O's name to eject A. These are the historical reasons for concluding that B cannot sue A for possession.

Today these reasons are completely obsolete and O is free to convey all of his rights in Blackacre to B, even if those rights include a running cause of action against A for possession. Thus, B can maintain an ejectment action against A.¹¹

§ 4.3 *The Five Elements of Adverse Possession*

PROBLEM 4.4: T owned Blackacre which consisted of a block of land in City K with paved streets on all four sides. T built a church on Blackacre and gave Y Church Corporation (Y) permission to occupy Blackacre for church purposes. This was done for many years.

T died leaving an invalid will devising Blackacre to Y. Thus, as a matter of law, T's estate passed to his heir, H. Nonetheless, following T's death, Y continued to occupy and use the church building in all respects as it had before T's death, conducting services in the building and parking cars around the church building, thus covering the entire block on Sunday. All this was done, however, under the devise in the invalid will.

10. The concept of seisin at the early common law contemplated the coupling of a possessory interest with the obligation to perform certain feudal incidences of tenure to one's overlord. For example, if a person was seised of land, that person was possessed of the land but was also obliged to contribute mon-

ey to ransom an overlord who had been captured by his enemies.

While the word "seisin" continues to find expression in both statutes and cases in the United States, today, it generally means little more than possession.

11. See generally, Powell on Real Property ¶ 882.

H wrote several letters to Y advising it that T's will was invalid and insisted that Y cease using Blackacre for church purposes. In these letter H stated that if Y continued to occupy the property despite H's objections, it did so with H's permission. Y did not answer H's letters and following T's death continued to use the property for church purposes for a period longer than the statute on adverse possession. H sues Y in ejectment. May H recover notwithstanding Y's defense of title by adverse possession?

Applicable Law: A person can acquire title by adverse possession if the person's possession is (a) actual, (b) open and notorious, (c) exclusive, (d) continuous and peaceable, and (e) hostile and under claim of right for the entire statutory period.

Answer and Analysis

H cannot recover if Y's possession was (a) actual, (b) exclusive, (c) open and notorious, (d) continuous and peaceable, and (e) hostile and under claim of right for the entire statutory period. These five elements are discussed in order. If Y, however, fails to satisfy all five elements, then H can recover. The burden of proof to establish a title by adverse possession is on the possessor.

(a) Actual and exclusive possession requires only that the property be occupied and used as the average owner of similar property would occupy and use it¹² and not necessarily that it be occupied every minute of the day and night.¹³ Y seems to have occupied Blackacre during its Sunday services and presumably during perhaps one or two evenings of the week as churches usually do. This is fairly typical occupancy for a church. No facts indicate the property was being used by an other person. If, then, Y occupied and used the property as a church and no one else shared such possession, then the church's possession was actual and exclusive.¹⁴

12. *Jarvis v. Gillespie*, 155 Vt. 633, 587 A.2d 981 (1991) (adverse possessor must act towards land as an average owner would taking into account the nature of the land).

13. *Shilts v. Young*, 567 P.2d 769 (Alaska 1977) (person who flew over property, occupied it one day per year, and walked around the boundaries did not establish sufficient possession); *ITT Rayonier, Inc. v. Bell*, 112 Wash.2d 754, 774 P.2d 6 (1989) (houseboat owner who (1) moored his boat to land; (2) partially constructed and then abandoned a sauna; and (3) failed to object when others moored their boats there as well, did not establish sufficient possession to acquire land by adverse possession).

In some jurisdictions statutes may require specific acts of possession. For example, in *Van Valkenburgh v. Lutz*, 304 N.Y. 95, 106 N.E.2d 28 (1952), the possessor lost because he did not substantially enclose or cultivate the premises as required by local statutes.

If T occupies land with the permission of A, T's possession can be attributed to A for purposes of A asserting a title by adverse possession against the true owner. See, *Taffinder v. Thomas*, 119 R.I. 545, 381 A.2d 519 (1977).

14. In *Nevells v. Carter*, 122 Me. 81, 119 A. 62 (1922) the court held that an owner's son acquired title by adverse possession even as against the owner

The concept of actual use does not mean the property must be put to the highest and best use. Thus, suppose the church had been located on the lot adjacent to Blackacre and Y used Blackacre solely for parking cars. That use could be viewed as sufficient actual use. It would not be necessary to successfully claim a title by adverse possession that the possessor have actually built structures on the property.¹⁵ There are numerous cases in which the actuality requirement is satisfied even though no structures were built on the property and the adverse use consisted of acts such as cultivation, grazing, and the like.

There is some dispute whether the exclusivity requirement can be satisfied if the adverse possessor and persons, other than the owner with the cause of action for possession, use the property. For example, suppose the church was located on land adjacent to Blackacre on the east and used Blackacre as a parking lot only on Sundays and Tuesdays. However, B, the owner of land adjacent to Blackacre on the west, without O's or Y's permission, occasionally used Blackacre when changing the oil in his RV. Here, Y uses the lot but so does B. While all courts agree that at a minimum the exclusivity requirement is not met if the owner and the adverse possessor both use the property,¹⁶ they are divided whether the exclusivity requirement can be satisfied if two possessors independently use the property. The better view, at least when seen through the eyes of courts favorably disposed to the concept of adverse possession, is yes, since O failed to sue for possession in a timely manner and Y used the property as a reasonable owner might do.¹⁷

(b) Apparently Y continued to use the church property in the same manner it did when T was alive. It seems, therefore, that its possession was open and notorious, visible to everyone in the neighborhood including T's heir, H. The concept of openness, however, does not require that the holder of the cause of action actually have witnessed the adverse use. Rather, the element is met so long as a reasonably diligent owner, had he or she taken the opportunity to look, could have ascertained that the property was being adversely possessed.

(c) The facts seem to say specifically that Y "continued" to use the church as a church for the statutory period unless H's acts of

who invalidly conveyed the property to the son and resided on the property with the son. The court concluded that the owner's occupation was with the permission of the son. Therefore, the son met the exclusivity requirement.

15. See *Jarvis v. Gillespie*, *supra* note 12; *Houston v. United States Gyp-*

sum Company, 652 F.2d 467 (5th Cir. 1981).

16. But see *Nevells v. Carter*, *supra* note 14.

17. See *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974).

writing letters to Y Church constituted an interruption. An occupancy of property is continuous and peaceable if it is not interrupted either by physical eviction by another or by the bringing of an action in court for possession of the property. The interruption must be of a kind that had the occupant been the true owner, the act of interruption would have given him a cause of action. The writing of letters by H to Y would not, had Y been the title holder, given it a cause of action against H. Thus, there was no interruption of the possession as a matter of law. Under these facts, Y's possession was continuous and peaceable. The fact that Y did not use the property daily is irrelevant since its intermittent use during the week is entirely consistent with how a church corporation would occupy the land.¹⁸ On the other hand, if the nature of the possession warranted actual possession on a daily basis, a break in the continuity of that possession would result in a cessation of the statute of limitation and any further possession would result in the statute running anew at least, if during the break period, the land was used by the true owner.¹⁹ The continuity requirement is satisfied, however, even though the possessor goes on vacation if that would be consistent with how the true owner would have used the land.

The purpose of the actual, open, exclusive, and continuous requirements is to assure that an inquiring absentee owner would be able to ascertain that someone was possessing his or her land. It is not important that the owner have had actual knowledge of an adverse possession, but only that the owner could have discovered the possession had he or she taken the opportunity to inquire. On the other hand, where an owner has actual knowledge of an adverse claim and fails to timely sue, courts may be more liberal when looking at facts for the purpose of considering whether the possession was actual and open.²⁰

(d) If Y Church's corporate mind was to the effect that it was possessing and using Blackacre as the devisee in T's will, whether justified or otherwise, then it was possessing and using Blackacre in its role as owner and not in subordination to any other title or

18. Similarly, if the nature of the land is to encourage seasonal rather than constant use, seasonal use is sufficient to satisfy the requirements of adverse possession. See, e.g., *Howard v. Kunto*, 3 Wash.App. 393, 477 P.2d 210 (1970) (summer occupancy sufficient to establish "continuous" element of adverse possession since summer occupancy was consistent with how a true owner would have used resort property).

19. See *Mendonca v. Cities Service Oil Co.*, 354 Mass. 323, 237 N.E.2d 16

(1968) (three cessations of use by a gas station of a 24' strip of land and the use of that land by the true owner broke the continuity of the possessor's use).

20. See *Houston v. United States Gypsum Company*, *supra* note 15. (While facts of possession were close, owner's attorney had provided possessor with map showing location of property line and evidencing wrongful possession prior to the running of the statute)

owner. It was occupying and holding Blackacre against the whole world, including T's heir, H. Accordingly, Y's possession would be hostile and under claim of right.²¹

The hostility requirement has often proved the most difficult for the courts to apply. One important question is whether the test of hostility is objective or subjective. The better test is the objective test. That test is "whether . . . the claimant acted toward the land as if he owned it. [The claimant's] beliefs as to the true legal ownership of the land, [the claimant's] good faith or bad faith in entering into possession, (i.e., whether he claimed a legal right to enter, or avowed himself a wrongdoer), all are irrelevant."²² The notion that a claim of adverse possession can be defeated merely because the possessor lacked the requisite intent seems wholly inconsistent with the underlying operation of the statute of limitation as it affects the acquisition of title by adverse possession. If A enters O's land and remains in actual, open, exclusive and continuous possession throughout the statutory period and a court were to conclude that O is still entitled to possession because A lacked the requisite intent even though A has been in such possession more than the statutory period, the effect of that judgment is that the statute did not run against O. But if the statute did not run against O then it must not have commenced to run when A entered the land, a conclusion that is preposterous since it suggests that upon A's entry O had no cause of action for possession. Probably, courts that use a lack of the requisite intent to conclude that an otherwise adverse possession does not ripen into title do so because of an inherent dislike of the concept of adverse possession and a repugnance to the notion that a true owner can lose his or her title as a result of the actions of an interloper.²³

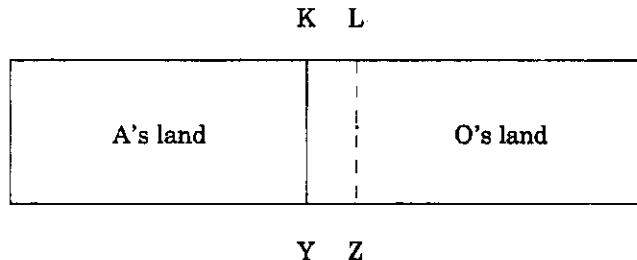
21. The "hostility" requirement is not met if the possessor enters with the permission of the true owner. For example, if a landlord leases property to a tenant, possession of the tenant is not adverse to the landlord because tenant entered with landlord's permission.

Sometimes one who enters *rightfully* remains *wrongfully*. For example, a tenant who remains in possession beyond the term fixed in the lease is a wrongdoer. In this case the landlord may elect to treat the tenant as a holdover or as a wrongdoer (see Ch. 9). If a court were to conclude that the landlord elected to treat the tenant as a wrongdoer and then failed to sue in ejectment prior to the running of the statutory period, the tenant might acquire a title by adverse possession assuming the four other elements were satisfied.

22. *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974) (where a claim of adverse possession was made by a 71-year-old Alaskan Tlingit Indian whose possession of property was permissive, the court held his possession was sufficiently hostile under an objective test of hostility); *Patterson v. Reigle*, 4 Pa. 201 (1846) (affirming title by adverse possession even where the plaintiffs declared that they intended "to leave when the real owner came," but where the statute of limitation expired prior to the owner's appearance).

23. See also Helmholz, *Adverse Possession and Subjective Intent*, 61 Wash. Univ. L. Q. 331 (1986); Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 Wash. Univ. L. Q. 1 (1986); Helmholz,

PROBLEM 4.5: O owned Blackacre, which was the northeast quarter of a given section of land. A was the owner of the northwest quarter of the same section. These quarter sections had a common boundary line one half mile long determined by the points K and Y, O's land being to the east and A's land being to the west of such line.



By an honest mistake A placed his boundary line fence on a line exactly 6' to the east of the line KY and occupied the strip KLZY strip on O's land for the statutory period. O then had a survey made and discovered that A had wrongfully occupied that strip. A refused to surrender possession of the strip, claiming title by adverse possession. O sued to eject A. At the trial A testified, "I occupied that strip of land because I thought it was mine but I never intended to take the land of anyone else." Following A's testimony, the court directed a verdict for O. Was the court correct?

Applicable Law: One important element of adverse possession is that the possession be hostile and under claim of right. In other words the possessor must have the state of mind to claim against the interest of the true owner. This intention may be proved either by objective acts or by testimony of the adverse possessor as to his subjective intention. Under the better view a possession is adverse although the occupant wrongfully believes that the land is his. In other words, if the actions of the possessor are inconsistent with the rights of the true owner, those actions are sufficient indicia of a hostile intent. There is another view: that the possessor must claim land he or she knows is not his; if the possessor mistakenly believes the land is his or hers and has no intent to claim what is not his or hers, the possessor lacks the requisite hostile intent.²⁴

More on Subjective Intent: A Response to Professor Cunningham, *id.*

24. There are also cases in which the adverse possessor must have a good faith belief that the adversely possessed

land was his or her. Absent this good faith belief, title cannot be acquired by adverse possession. See, e.g., *Carpenter v. Ruperto*, 315 N.W.2d 782 (Iowa 1982);

Answer and Analysis

In most jurisdictions the court would be incorrect²⁵ although there is a minority view.²⁶ A possessed the disputed strip honestly, but mistakenly, believing she was in possession of her own land. There is no question that A occupied and used the land as an owner. A's possession was (a) actual, (b) exclusive, (c) open and notorious, and (d) continuous for the statutory period. But did A have the requisite hostility?

Some courts hold that the possessor does not hold adversely unless he intends to hold against the whole world, including the rightful owner, but the really significant fact is that the possessor holds against, and not under or in subordination to, the rights of the legal owner.²⁷ Under this view the holding is adverse.

A minority of courts following the more subjective test of adverse possession hold that when A testified she did not intend to claim any land but her own, that testimony evidenced that A lacked the requisite hostile intent to claim against O. In many cases of this type the principal issue may be more a question of evidence than of property law. Testimony of the purely subjective intent of the adverse possessor may be circumspect since there is ample motive for coloring the actual intent. The whole case can succeed or fail on a single yes or no to a question as to whether the claimant intended to claim the land irrespective of whether or not it was his. Further, this so-called "Maine" rule creates a heavy incentive to commit perjury, if a (properly briefed) possessor knows that her testimony that she did not intend to claim what was not hers will result in a judgment for the true owner. The Maine rule penalizes the honest, yet mistaken possession, but rewards the possessor who knowingly claims what she knows is not hers. Thus, the view expressed by the Connecticut court is believed the sounder position:

Price v. Whisnant, 236 N.C. 381, 72 S.E.2d 851 (1952).

25. French v. Pearce, 8 Conn. 439 (1831) (where the owner of land bordering on the land of another, through a mere mistake of the place of the dividing line, occupied and possessed as his own a portion of land beyond that line for more than 15 years, there was adverse possession sufficient to establish a title in the possessor because the occupation was presumptive evidence of the true boundary, and the motive of the possessor in taking and retaining possession was immaterial in determining the adverse character of the possession).

26. Preble v. Maine Cent. R. Co., 85 Me. 260, 27 A. 149 (1893) (where a

person by mistake occupied for 20 years land not covered by deed, without any intention to claim title to land beyond his actual boundary, title by adverse possession to land beyond the true line was not established because there was no hostile intent to claim title, which is "an indispensable element of adverse possession....").

27. Maas v. Burdetzke, 93 Minn. 295, 101 N.W. 182 (1904). A possessor holds against a true owner even though the possessor realizes that if the true owner sues for possession prior to the running of the statute of limitation the true owner will prevail. Patterson v. Reigle, note 22.

The possession alone, and the qualities immediately attached to it, are regarded. No intimation is there as to the motive of the possessor. If he intends a wrongful disseisin, his actual possession for fifteen years, gives him a title; or if he occupies what he believes to be his own, a similar possession gives him a title. Into the recesses of his mind, his motives or purposes, his guilt or innocence, no inquiry is made. It is for this obvious reason: that it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, and not the remote views or belief of the possessor.²⁸

Many mistaken boundary line cases involve very small encroachments. For example, A and B may be neighbors and A's garage or driveway may encroach on B's land by 3 inches. In such cases it is difficult or impossible to ascertain whether there have been any encroachments without a costly survey. The difficulty with applying the Connecticut rule in these situations is that facts of possession may not have been sufficiently stark to put the true owner on notice that someone was in wrongful possession of his or her land. Recently one court which had adhered to the Maine rule abandoned that rule in favor of the Connecticut rule. However, the court recognized the unfairness to true owners that could result in applying the Connecticut rule to small encroachments. Therefore, it concluded that:

Generally, where possession of land is clear and unequivocal and to such an extent as to be immediately visible, the owner must be presumed to have knowledge of the adverse occupancy . . .

However, when the encroachment of an adjoining owner is of a small area and the fact of an intrusion is not clearly and self-evidently apparent to the naked eye but requires an on-site survey for certain disclosure as in urban sections where the division line is only infrequently delineated by any monuments, natural or artificial, such a presumption is fallacious and unjustified. . . . Accordingly, we hereby hold that no presumption of knowledge arises from a minor encroachment along a common boundary. In such a case, only where the true owner has actual knowledge thereof may it be said that the possession is open and notorious.²⁹

28. *French v. Pearce*, note 25 at 443. See also: *Norgard v. Busher*, 220 Or. 297, 349 P.2d 490 (1960) ("possession under a mistaken belief of ownership satisfies the element of hostility of adverseness in the application of the doctrine of adverse possession."); *Schertz v. Rundles*, 48 Ill.App.3d 672, 6 Ill.Dec.

674, 363 N.E.2d 203 (1977) (possession under mistake may be adverse).

29. *Mannillo v. Gorski*, 54 N.J. 378, 388-89, 255 A.2d 258, 263-64 (1969). See also *Penn v. Ivey*, 615 P.2d 1 (Alaska 1980) (property owner who built fence and admitted he did not know where the true line was and suspected

In this type of case, as well as others, where the possessor loses by failing to establish satisfaction of all five elements to acquire a title by adverse possession, there is the possibility of potential unjust enrichment by the true owner where the possessor had improved the property whose possession reverts back to the true owner. At common law, either the improvement inured to the true owner's benefit or the adverse possessor was obligated to remove it. Under the so-called "innocent improver" doctrine, however, either the adverse possessor is entitled to compensation for the value of the improvement or the true owner is required to deed the property on which the improvement was mistakenly made to the possessor.³⁰ Typically, the possessor must have made an "honest mistake" or otherwise be a person whom the courts believe is entitled to equitable relief from the common-law rule.

§ 4.5 *Nature of Title Acquired by Adverse Possession*

PROBLEM 4.6: O owned Blackacre. A took possession of Blackacre and held it adversely for more than the statutory period. Thereafter O regained possession of the property and after being in possession for about a month, conveyed it to B who traced the record title and found it to be a perfect chain of title down to O. B had no actual notice or knowledge of A's claim and, of course, nothing on the record disclosed A's title acquired by adverse possession. Immediately after B purchased Blackacre and took possession, A sued B in ejectment. May A succeed?

Applicable Law: Once the adverse possessor has complied with all the requirements for adverse possession for the statutory period, the possessor's title is good against all the world. The recording statutes have no application to a title matured by adverse possession. Thus, the fact that A's title is not a matter of public record does not bar A's claim.

Answer and Analysis

A may successfully sue B in ejectment. This set of facts involves two questions: (a) what is the effect of A's adverse possession for the statutory period and (b) assuming B to be a bona fide purchaser, may B rely on the record of title as against an adverse possessor? A title acquired by adverse possession is good against all the world. It is not merely a defensive weapon if the possessor is sued for possession. It is a substantive title as valid as though the possessor had received the title by deed from O. Further, the title

he might be encroaching, nevertheless acquired property by adverse possession, for fence gave constructive notice to neighbor of an adverse claim).

30. See generally, *Somerville v. Jacobs*, 153 W.Va. 613, 170 S.E.2d 805 (1969).

relates back to the time of entry and will support an action to recover the land. Thus, A can eject any possessor from Blackacre who does not derive title through A or who does not take title from A by adverse possession.

Even though B facially appears to be a bona fide purchaser who relied on the record, the recording acts have no application to a title acquired by adverse possession. Thus, A prevails notwithstanding that B had no actual knowledge or notice of A's claim because A was not in possession, the records showed O to be the record title holder, and O was in actual possession.

Although a title acquired by adverse possession is as good as an original title, it is not a marketable title until such time as the possessor has the title acquired by adverse possession evidenced by some publicly recorded document.

The title acquired by the adverse possessor relates back to the time of the possessor's initial entry on the property. Thus any other causes of action the true owner had against the possessor resulting from the adverse possession are also extinguished. For example, the possessor, during the period of adverse possession, may have cut trees from the property giving the true owner a damage action. This action also is extinguished if that action is not brought before the running of the statute of limitations on the adverse possession claim.

§ 4.6 *When Statute of Limitation Begins to Run*

PROBLEM 4.7: In 1970 O, who owned Blackacre, conveyed it to B for life. The deed further provided that upon B's death Blackacre should pass to C. In 1975, A wrongfully entered into possession of Blackacre and remained in possession for the statutory period. B then died and C immediately sues A in ejectment. May C recover?

Applicable Law: An adverse possessor cannot mature title against a remainderman because the remainderman has no cause of action against the adverse possessor until the death of the life tenant.

Answer and Analysis

C can recover Blackacre from A. At the time A entered Blackacre, B had a life estate and C had a vested remainder. Since only B was entitled to possession at the time A entered, A trespassed only on B's right of possession, not on the possession of C. Indeed, C had no right to possess Blackacre until B's death. Therefore, C had no cause of action against A and no statutory period began to run against C. At the end of the statutory period A acquired only B's life estate by adverse possession, which estate ended when B died.

This rule also evidences the principle that the adverse possessor can only acquire that title which the person with a cause of action had. C had no right to possess Blackacre until B died and not until then did C have a cause of action for possession as against A. In order for A to acquire a fee simple title to Blackacre, A will have to adversely possess Blackacre for another statutory period beginning at B's death when C's cause of action against A first accrues. While these rules are onerous to the adverse possessor, they arise because of a concern that it is otherwise inappropriate to penalize C who had no cause of action for possession while B was living. However, a better rule might be to allow A to acquire a title by adverse possession as against both B and C as a result of his possessing the property only during B's lifetime and then allowing C to have a cause of action for waste as against B or B's estate.

If A had entered Blackacre prior to 1970 such that O had a running cause of action against A at the time of the conveyance to B for life, with remainder to C, A would acquire title by adverse possession at the end of the statutory period following the date of actual entry. In this case both B and C would have a cause of action against A passing to them from O at the time of the conveyance of the life estate and remainder interest.

§ 4.7 Tacking

PROBLEM 4.8: O owned Blackacre. In a jurisdiction where the statutory period to recover the possession of real property was 20 years, A went into adverse possession of Blackacre and remained in possession for 5 years. A then died intestate. H was A's sole heir. H took possession of Blackacre, remained in possession for the next 3 years and then conveyed Blackacre to M. M remained in possession of Blackacre for 2 years and then died. Under M's will Blackacre was bequeathed to P who took possession of Blackacre for 5 years and then orally conveyed the premises to X. X possessed the premises for 3 years and leased it to L for one year. When the lease was terminated X re-possessioned Blackacre. Two weeks later X joined the United States Army. Before leaving for military service, X called D and advised him to take over Blackacre and make the most of it and that X would make no further claim to it. D took possession at X's suggestion and remained in possession for 2 months when D was called to another state on account of her father's serious illness. She went and stayed with her father for 3 months and then returned to Blackacre and remained in possession for more than 3 years. D then called O and said to him: "O, I have decided to abandon Blackacre. It is yours if you want it." D then moved off Blackacre with no intent to return. Who owns Blackacre?

Applicable Law: An adverse possessor can abandon his interest in the land at any time before the statute has fully run. However, in common with record title holders of land, an adverse possessor cannot abandon his interest in the land after the statute has run and the possessor has acquired title to the land.

The interest of one adverse possessor may be tacked to that of another if there is privity between the two. Privity exists between adverse possessors if the interest of one is apparently passed to the other by descent, deed, will, written contract, oral contract, oral gift or by mere oral permission. In general, the passing of the interest need not be legally valid, but it must have some validity in the minds of the parties.

Answer and Analysis

D owns the land. One can abandon an adverse possession which has not yet matured title. But one cannot abandon a fee simple title acquired by conveyance or adverse possession. In this case, assuming that the possession of each occupant was adverse, D had acquired the fee simple to Blackacre and could not abandon it, even to the original owner, O.

This problem involves the issue of "tacking" one adverse possession to another. This can be done provided there is privity between the adverse possessors. Privity exists when the possessory interest of an adverse possessor is passed from one to another by descent, deed, will, agreement oral or written, by oral gift or by mere permission. Thus the descent from A to H, the deed from H to M, the devise from M to P, the oral transfer from P to X, the lease from X to L, and the mere permission from X to D to take possession from X, each constituted privity and permitted the tacking of the adverse possession of each to that of his successor to make up the total period of adverse possession. The periods consisting of 5 years for A, 3 years for H, 2 years for M, 5 years for P, 3 years for X, 1 year for L, 2 more weeks for X, and D's subsequent possession of more than 3 years make up successively more than the 20 year period.

Two questions remain. Did the lease to L break the continuity of possession? Did D's three months visit to her father break the continuity of possession. X's lease to L meant nothing more than that L's possession was the possession of his landlord X for the purpose of adverse possession. Thus, during that year X was still legally in possession as against the owner, O.

D's three months visit to her father's bedside had no effect in the absence of her intention to abandon her possession of Blackacre and no such intention appears. She appears still to be occupying the

property as an owner, since owners often are required to be temporarily absent from their property. These adverse possessions, when tacked to each other making more than the 20 year period required by the statute, make D the owner of Blackacre.

§ 4.8 *Effect of Disabilities*

PROBLEM 4.9: O, age 5, owned Blackacre in 1980 when A took possession adversely. The statute of limitation was 20 years with an added provision that, if the person entitled to bring the cause of action for possession was under a disability at the time the cause of action accrued, such person would have 10 years after the removal of the disability in which to bring the action.³¹ How long must A continue in adverse possession against O to acquire a title by adverse possession?

Applicable Law: An adverse possessor cannot claim the benefit of the running of the statute of limitation until the statute of limitation has run against the owner of the property who had a cause of action of possession. All state statutes toll the running of the statute if the person entitled to bring the cause of action at the time it accrues is under a disability. Tolling the statute is inconsistent with one of the two policies underlying the doctrine of adverse possession: to reward the possessor for the possessor's utilization of the property. On the other hand, tolling is justified on the ground that it is inappropriate to penalize persons with a disability who fail to bring their cause of action within the statutory period.³²

Answer and Analysis

A acquires title in the year 2003 if the age of majority is eighteen³³ and if A continues in actual, open, exclusive, continuous and hostile possession for the next 23 years. O was under a disability at the time of the accrual of the cause of action. Disabilities that arise after the cause of action accrues do not result in any tolling of the statute whether the disability is acquired by the owner at the time of entry or the cause of action passes to another

31. The disability cases in this chapter, except as may be otherwise indicated, are based on a statute which is similar to the following:

... but if a person entitled to bring such action, at the time the cause thereof accrues, is within the age of _____ years, or of unsound mind, or imprisoned, such person, after the expiration of _____ years from the time the cause of action accrues, may bring such action within _____ years after such disability is removed.

32. This argument ignores the fact that persons under a disability are likely to have someone available to represent their interests. For example, minors who own real property are likely to have conservators who are in a position to bring the cause of action for possession.

33. The age of majority is a matter of state law, and commonly varies from eighteen to twenty-one.

who is under a disability. O's disability ceases when O reaches 18 or dies before that time. Assuming O reaches age 18 in 1993, O must bring the action for possession within the next ten years. If O fails to bring the action before 2003, A will acquire a title by adverse possession. If O had not been under a disability in 1980 when O's cause of action accrued, A could have acquired a title by adverse possession in the year 2000.

Suppose O had been 15 in 1980 when A entered. In this case O's disability would end in 1983. Since ten years thereafter is within the initial twenty year period within which to bring a cause of action, A does not acquire a title by adverse possession prior to the year 2000. In other words, a disability can operate to extend the statute beyond the time when it otherwise would have run; it never shortens the time of possession to acquire title by adverse possession even though the disability and the extension period end before the regular statute has run.

The conditions or status constituting a disability depend on the terms of the statute. Common disabilities are minority, legal insanity (non compos mentis) and imprisonment. While at one time, there may have been good justification for extending the statutory period to take account of disabilities, that practice today is open to question if the person with a disability can be represented by a conservator who can initiate a suit against the possessor on the person's behalf.

PROBLEM 4.10: O, age 5, owned Blackacre in 1980 when A entered and took possession adversely. O died in 1992 and Blackacre passed by descent to O's sole heir, H who sued A in 2001 in ejectment to oust A from possession of Blackacre. The statute of limitation on adverse possession in the jurisdiction was 20 years, with an added 10 years after the removal of any disability which existed at the time of the accrual of the cause of action. May H eject A?

Applicable Law: The defense of disability under many statutes is wholly personal to the person who is under a disability at the time of the accrual of the cause of action but may be taken advantage of by the person's estate or successor. A successor to the holder of the initial cause of action, however, cannot claim the benefit of a disability which the successor has. Similarly, an intervening disability of the person who initially had a cause of action in most jurisdictions will not stop the running of the statute, which means there is no tacking of disabilities.

Answer and Analysis

H may eject A because H sued within 10 years after O's disability ended. If O had not died, O's disability would have ended

in 1993 and O (or O's estate or successor of the estate) would have until 2003 to bring a suit for possession. In this problem, O died at age 17 in 1992. Death terminates disabilities. Thus O's successor (who can take advantage of the extension on the intestate's disability) has until 2002 to bring suit. Since H sued in 2001, the suit was timely.

Suppose O was age 10 when A entered and O's disability ended in 1988. In this case O would have had until 2000 to sue A. If O died in between 1988 and 2000 and H was under a disability, that disability would not have resulted in any extension in the running of the statute of limitation for two reasons. First, the defense of disability is personal to the person under disability at the time of the accrual of the cause of action. Second, no intervening disability tolls the running of the statute of limitation. Applying the first principle to the facts discloses that O and O alone can take advantage of the 10 year extended period.³⁴ If the law were otherwise, then a series of intervening disabilities would prolong for an indefinite period the time during which an adverse possessor would have to hold. Of course, if a statute provided for such protection of intervening disabilities, the statute would be applied according to its terms.

PROBLEM 4.11: O, age 2, owned Blackacre in 1980 at the time A entered and took possession adversely. When O was 5 years of age O was injured in an automobile accident which rendered O mentally incompetent. The statute of limitation provided for a period of 20 years but with an added provision of 10 years after the disability was removed for one who was under a disability at the time of the accrual of the cause of action. When could A acquire a title by adverse possession?

Applicable Law: A supervening disability will not toll the running of the statute. Supervening disabilities refer to more than one disability in the same person whereas intervening disabilities refer to disabilities in different persons. There is no tacking of either intervening or supervening disabilities.

Answer and Analysis

A could acquire a title by adverse possession by 2006. O must bring the action to recover possession of Blackacre before he is 28 years of age if the age of majority is 18. O was under one disability, that of minority, when the cause of action accrued. A disability added later to the one existing at the time of the accrual of the cause of action and affecting the same person is a supervening

³⁴ Of course, since O is under a disability O may have to be represented by a guardian or other representative.

disability. A supervening disability does not stop or affect the running of the statute of limitation. The only disability which provides additional time is the one existing when the cause of action accrues against the wrongdoer. Thus, the disability of insanity or mental incompetency has no effect and O must bring his action within ten years after the minority disability is removed: before O's twenty-eighth birthday.

If O had been both mentally incompetent and a minor when A took possession, O would have ten years after the removal of the longer of the two disabilities to bring his action against A.

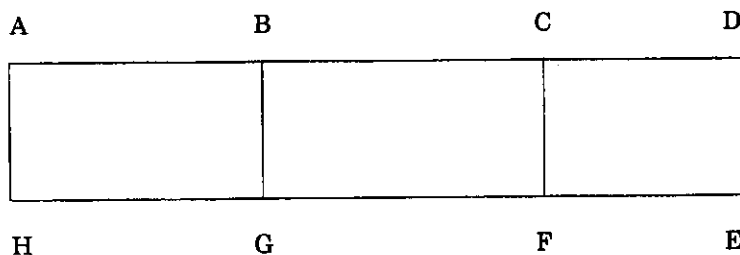
§ 4.9 Constructive Adverse Possession

PROBLEM 4.12: O was the owner of Blackacre, a tract 300' wide and 1,500' long containing approximately 10 acres. O died intestate. X mistakenly thought he was O's sole heir. In fact, H was O's sole heir.

X executed a deed to all of Blackacre to A in fee simple. Under X's deed A took actual possession of the east end of Blackacre comprising an area of 300' by 500'. A built a small house on this property and fenced it. This area is marked "CDEF" on the map below.

Y claimed to own all of Blackacre under an alleged will left by O under which alleged will Y took possession of the west end of Blackacre comprising an area 300' by 500'. This alleged will was invalid and gave Y no title. Y built a small house on this portion of Blackacre and fenced it. This area is marked "ABGH" on the map below.

Between the two areas occupied and claimed by A and Y respectively, was an area 300' by 500' which was the center part of Blackacre. This area is marked "BCFG" on the map below. From this center tract a third person, W, cut a tree. All of these areas are depicted on the following map:



Does either A or Y have a cause of action against W?

Applicable Law: A person who enters under the authority of a written instrument but takes actual possession of only a

portion of the entire area described in that instrument may claim the remainder of the area described in that instrument constructively, if reasonable in size. This is known as constructive adverse possession. Constructive adverse possession must be based on paper title, called color of title, founded on a written instrument. A later constructive adverse possession cannot oust a former constructive adverse possession.

Answer and Analysis

A has a cause of action against W. Y does not have a cause of action against W. It is obvious that upon O's death the title to Blackacre descended to H. This title gave H constructive possession of all of Blackacre.

When A entered Blackacre A trespassed upon H's possession. A entered under a deed which was inoperative for lack of any interest in the property held by the grantor, X. Under a claim based on mere occupancy an adverse possessor can claim no greater area than that which is actually occupied. But under color of title an adverse possessor can claim both the property that is actually occupied as well as the balance of the adjacent property that is described in the instrument that purports to convey title, which is the "color of title" (X's deed in this case), provided this additional area is a "reasonable appendage" to the area actually occupied. Under the doctrine of constructive adverse possession, assuming the obvious, that A's possession is adverse, A took actual possession of the east $3\frac{1}{3}$ acres of Blackacre and took constructive adverse possession of the rest of the tract which was only $6\frac{2}{3}$ acres. This small tract is clearly a "reasonable appendage" to that part that was actually occupied. No definite limitation can be laid down as to the extent of one's constructive adverse possession. This depends on the facts of each case.

When Y took actual possession of the west end of Blackacre covering 300' by 500' and fenced the same, Y ousted A of A's constructive adverse possession of that area. But who possesses the center area from which W cut the tree? The answer is that a subsequent constructive adverse possession cannot oust a former constructive adverse possession. Thus, A's prior constructive adverse possession takes priority over Y's later constructive adverse possession and A not Y constructively possesses the center area of $3\frac{1}{3}$ acres from which W took the tree. W trespassed upon A's land and A, not Y, can recover damages from W.³⁵

35. See *Ralph v. Bayley*, 11 Vt. 521 (1839), where the defendant had actual possession of part of a lot and constructive possession of the whole lot, and the plaintiff chopped timber on that part of

the lot in which the defendant had constructive possession while himself claiming constructive possession. The court held that a subsequent constructive pos-

Could A have recovered possession of the westerly portion of Blackacre actually possessed by Y for less than the statutory period on the theory that as the prior constructive adverse possessor A's rights are superior to Y's rights in that land? If A's color of title was sufficient to create a reasonable belief in A's mind that A owned all of Blackacre, it would be inappropriate to penalize A for failure to take actual possession of all of Blackacre which would be the result if Y's rights are superior to A's rights. On the other hand, as between A and Y, the underlying concepts of protecting possessors tends to favor Y. However, if A has sufficient color of title such that, if the true owner (H) were to sue after the running of the statute, a court would conclude that A acquired title by constructive adverse possession, it is hard to hold that color of title insufficient for A to prevail against Y in a suit for possession prior to the running of the statute of limitation. Therefore, it is likely that in a suit between A and Y, A would prevail. If, on the other hand, Y possessed that portion for more than the statutory period, Y would acquire a title to that portion as against all others, including A, by adverse possession.

Of course, any analysis of the respective rights of A and Y would require more information concerning the nature of their respective color of title. For example, if A had only a wild deed³⁶ but Y claims under the invalid will, a court might conclude that A's claim should be denied. This may be precisely what would happen if the true owner (H) sued A for possession of BCFG after the running of the statute since A's alleged color of title is not sufficiently colorable to sustain a claim for constructive adverse possession.

As noted, to claim constructive adverse possession, the portion of the property not actually possessed must be adjacent to the portion that is actually occupied and both parcels must have the same owner. Suppose O owned three distinct tracts of land, numbered Tracts 1, 2 and 3 and A entered Tract 1 under color of title by an instrument describing Tracts 1 and 3. If Tracts 1 and 3 are separated by Tract 2, A cannot acquire title to Tract 3 by constructive adverse possession. Likewise, if A entered Tract 1 and the deed described adjacent Tracts 2 and 3 but these tracts were owned by O-1 rather than O, A would only acquire title by adverse possession to Tract 1 which A actually possessed. A would not have constructively possessed Tracts 2 and 3 because these tracts were owned by

session cannot defeat a prior constructive possession.

36. A wild deed is a deed from a grantor who has no title or colorable claim to the property described in the

deed. For example, if O conveyed the Brooklyn Bridge to B, that would be a wild deed. Likewise, if O owns Blackacre and Y conveys Blackacre to A, that would be a wild deed. See Ch. 17.

O-1 who had no cause of action for possession against A because A possessed no property owned by O-1.

§ 4.11 *Whose Interests Are Affected*

PROBLEM 4.13: O owned Blackacre in fee simple. O conveyed all the coal beneath Blackacre to B. O gave a mortgage on Blackacre to C, and conveyed to D a right to install and maintain a pipeline through Blackacre three feet beneath the surface. D installed the pipes. A went into adverse possession of Blackacre and held it during the entire statutory period. A sues O, B, C and D to quiet title to Blackacre. Should A succeed as to any of these defendants?

Applicable Law: Title by adverse possession is acquired by a statute of limitation running against a person with a cause of action for possession. Only persons with a possessory interest have a cause of action against an adverse possessor.

Answer and Analysis

A should succeed as against O. A should not succeed as to B, C or D. Prior to the running of the statute of limitation and while A was an adverse possessor, A had title to the surface of Blackacre against the whole world except O. When the statutory period had run, A acquired title against O and O's rights were terminated. Thus, as against O, A has a right to Blackacre.

But did A's adverse possession of the surface of Blackacre give B, C or D a cause of action against A? No. There is no inconsistency between the existence of B's ownership of the coal under the surface and A's occupancy of the surface, nor between the lien of C's mortgage and A's occupancy of the surface, nor between the existence of O's easement involving pipes under the surface and A's occupancy of the surface. If no cause of action accrued in their favor, then no statute of limitation could run against them. Had B's ownership of coal involved surface rights with which A had interfered, had C reduced his mortgage by decree to a right to possess Blackacre before A took possession, or had D's easement involved the use of the surface of the ground and A interfered with such use, then A's adverse possession would have given each of them a cause of action and their respective rights would have been cut off by A's matured title by adverse possession. The test would seem to be whether or not the adverse possession gives the person claiming an interest a cause of action at the time the adverse possession commences.

§ 4.12 *Innocent Improver Doctrine***PROBLEM 4:14:**

1	2	3	4	5	6
---	---	---	---	---	---

A owned lots 1-3; O owned lots 4-6. A built a building on lot 4 mistakenly believing that it was lot 3. Prior to the running of the statute of limitation, O called A and told A that under the doctrine of annexation³⁷ O was entitled to Lot 4 as well as the building A mistakenly built on Lot 4. Prior to O filing a suit in ejectment, A brought a suit in equity to seek either the value of the building from O or an order compelling O to convey Lot 4 to A upon A paying O fair consideration for the property. Can A prevail?³⁸

Applicable Law: Under the doctrine of annexation, improvements to real estate made by a wrongdoer belong to the owner of the real estate. However, where the improvements were made by one who mistakenly believed that he or she owned the land on which the improvements were made, principles of unjust enrichment could compel a court of equity to refuse to quiet title to the improvement in the landowner absent payment of fair consideration to the "good faith" innocent improver.

Answer and Analysis

If A can establish that A acted in good faith when A erected the building on the wrong lot, either A will be allowed compensation for the value of the building or can compel the true owner of the land on which the building was mistakenly built to convey the land to A upon payment to the true owner of an amount equal to its fair market value unimproved. These alternative remedies are provided A so long as A acted under a reasonable mistake of fact and in good faith. While the building was wrongfully erected by A on O's land, if the building were to pass to O, under the doctrine of annexation O would be unjustly enriched. This is known as the "innocent improver" doctrine.

Of course, if A can compel O to convey Lot 4 to A, then O is forced against O's will to convey the title to A. This amounts to a

37. Under this doctrine, improvements made by a wrongdoer belong to the landowner. See generally, 2 Tiffany, Real Property, § 625.

38. *Somerville v. Jacobs*, 153 W.Va. 613, 170 S.E.2d 805 (1969) (where the plaintiffs, through a reasonable mistake

in fact and in good faith, erected a building on land owned by the defendant, they were entitled to recover the value of the building or could purchase the land for the value of the land minus the building).

condemnation of property by a private party—something that many courts find distasteful.³⁹ Thus, it is not accepted in all states.

§ 4.13 *Adverse Possession of Chattels*

PROBLEM 4.15: O owned a painting that had been stolen from O's home. O failed to report the theft to the police. For five years O actively searched for the painting but when the search proved unsuccessful, she abandoned it. Twelve years later (17 years after the theft), O learned that the painting had been sold by S to P. S, however, claims that the painting had been in S's family for over 25 years and that throughout that entire period had been claimed to be owned by S's father and then by S. O sues to recover the painting from P. P moves to dismiss on the grounds that if the painting had been stolen, the statute of limitation had expired and that S and S's predecessors had acquired a title by adverse possession to the painting. Should the motion be granted?

Applicable Law: Generally, a thief cannot acquire or transfer title to stolen personal property, even to an innocent purchaser. On the other hand, title to personal property can be lost by adverse possession. Typically statutes of limitation run from two to six years. At common law, the statute of limitation began to run at that time that the possession became hostile, actual, open, exclusive and continuous, rather than at that point in time that the goods were stolen or the true owner discovered their location. More recently, it has been held that the statute should begin to run when the true owner discovers or should have discovered the whereabouts of the stolen property.

Answer and Analysis

Under the common law, it appears the motion should be granted, assuming that for more than the requisite statutory period S and S's predecessor's possession was hostile, actual, exclusive and continuous.

This rule has recently been subject to criticism. Unlike real property, personal property is movable. This makes it difficult for a true owner, who is otherwise diligent, to easily determine who is adverse, or whether someone is claiming title adversely. It also makes it easier for a possessor to conceal the property. Thus, the penalty theory for permitting the acquisition of title by adverse possession is not so easily applied when the subject of the adverse claim is personalty rather than realty.

39. The innocent improver doctrine also is reflected in some state statutes. See Iowa Code ch. 560 (occupying claimants).

The common law as to when the statute runs ignored the diligence of the true owner who actively sought to ascertain the whereabouts of the lost property under what might be difficult circumstances. It is probably for this reason that at least the New Jersey court rejected the common law rule in favor of applying a so-called "discovery rule."⁴⁰

If the true owner is to benefit from the discovery rule, the court should consider the following issues: (1) whether the true owner used due diligence to recover the stolen property at the time it was stolen and thereafter; (2) whether at the time the property was stolen there was an effective method to alert the marketplace that the property had been stolen; and (3) whether the lost property was subject to any form of registration that could put the world on notice of ownership claims. Because personal property can be easily concealed, use of the discovery rule rather than the common law rule makes it easier for true owners to protect their rights so long as they use due diligence in seeking to ascertain the whereabouts of the lost property. Under this rule, so long as the search continues the statute does not begin to run.⁴¹ The statute starts to run when the true owner actually knows or reasonably should know that she has a cause of action, and knows the identity of the possessor.⁴²

Under the discovery rule, the true owner has the burden of proving that she has acted with the appropriate due diligence.⁴³ Diligent pursuit⁴⁴ prevents the statute of limitation from running against the true owner.

Other courts have rejected both the common-law rule and the discovery rule in favor of the demand and refusal rule. Under this rule, the statute of limitations runs from the time the true owner demands that the chattel be returned and the possessor refuses. Furthermore, the true owner is not penalized for failing to use reasonable diligence to recover the chattel although lack of dili-

40. *O'Keefe v. Snyder*, 83 N.J. 478, 416 A.2d 862 (1980).

41. Subsequent transfers of the personal property can affect the application of the discovery rule since each transfer complicates the ability of the true owner in ascertaining the whereabouts of the personal property.

42. *O'Keefe*, note 40

43. Ordinarily the burden is on the possessor to establish that the five elements to acquire a title by adverse possession have been met.

44. In *O'Keefe*, note 40, the court noted that the meaning of diligence would vary depending upon the nature

of the personal property and its value. As the court noted, for example, if the lost property is jewelry of moderate value, merely reporting the loss to the police may be sufficient, whereas for an art work of greater value more might be required. But see, *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 569 N.E.2d 426 (1991) rejecting the discovery rule in favor of the rule that as against a bona fide purchaser the statute begins to run when the true owner makes demand and the person in possession refuses to return the goods.

gence, while not affecting the time with the cause of action accrues, could give the possessor the equitable defense of laches.⁴⁵ This rule gives the most protection to the true owners and was adopted in New York apparently as the most desirable rule to protect art owners.

45. *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 569 N.E.2d 426 (1991).