Rooted in Stone:

the Development of Adverse Possession in 20 Eastern States and the District of Columbia

Kristopher M. Kline

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"Man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life."

Excerpt from a letter written by Oliver Wendell Holmes to William James (April 1, 1907) in "The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters and Judicial Opinions" 417-18 (Max Lerner ed., 1943).

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Introduction

The doctrine of adverse possession has a particular fascination for me, but interest in this topic goes far beyond the surveying profession. Attorneys, employees of government agencies and the general public all become enthusiastic when squatters' rights or trespass are mentioned. Many surveyors and attorneys have a good working knowledge of the basic principles involved, but beyond these building blocks exists a broad range of complex, confusing, and sometimes contradictory precedent that is unique to every jurisdiction.

The acquisition of land by prescription has many characterizations – some more fanciful than enlightening. It provides a means by which a "persistent 'have-not' may become a 'have'." It is a doctrine of ancient vintage and somewhat amorphous scope. Some have called it "Strange and wonderful," or a process "to make bad title good." Each of these short definitions underlines the unique nature of the constellation of principles that we call adverse possession.

At first glance, this doctrine seems completely contrary to any reasonable legal theory, since it seems to reward theft and penalize the innocent in favor of the guilty. One ancient English legal axiom states: For true it is, that neither fraud nor might, Can make a title where there wanteth right. ***Altham's Case,* 8 Coke Rep. 150b, 153b, 77 *Eng. Rep.* 701, 707 (1610)**. It would appear that the doctrine of adverse possession constitutes the inevitable exception to this principle.

The courts have not always been consistent in the application of various aspects of this doctrine even within a single state. It is also possible to see the development of the principles of adverse possession with the passage of time, changes in land use, and changes in broader aspects of society. Common law varies significantly between states, and additional variations occur as a result of various statutes enacted by individual state legislatures. This book attempts to show the development of relevant statutory and common law in each state presented and to showcase interpretations placed on statute by those cases brought before the court.

In researching common and statutory law for this book, I have tried where possible to emphasize cases that either set or follow established precedent. However, some opinions that have been superseded by statutory authority or overturned by later cases are included to illustrate contentious issues. These contrary opinions are clearly indicated as such, and the chronological presentation of opinions allows the reader to develop a feel for the strength of the current positions on various elements of the doctrine in each state. Of course, additional changes are almost inevitable considering the history of the doctrine to date.

While specific points are exhaustively discussed in case law of certain jurisdictions, the attentive reader will notice that the various chapters do not devote equal space to all aspects of the doctrine. This is often due to a paucity of opinion regarding some aspects of adverse possession in a given state and a plethora of common law on other issues. In addition, where a rule enjoys monolithic consensus within a state (or among multiple jurisdictions) frequent repetition of the same principle would serve little purpose.

Although basic illustrations of common law principles are cited for every state studied, each chapter focuses on the most contentious issues in that state. These selections were made because of the frequency with which they appear in court records, inconsistencies in various rulings, and the space that the justices of that state devote to discussing them. Certain broadly contested principles receive what might seem at first glance to be disproportionate attention in order to allow the reader to compare opinions from various states. While no one could pretend that additional research would not reveal more intriguing details, this book attempts to cover as many significant issues as space allows.

It is an unfortunate truth that no book of this type will ever be truly complete, but one West Virginia opinion leaps to the defense of any lapses. To state that the doctrine of adverse possession is firmly established in our law is a mere truism and, yet, when one attempts an orderly assessment of the doctrine through the cases, it is at best an arduous task. **Somon v. Murphy Fabrication Co.: 160 W. Va. 84; 232 S.E.2d 524 (1977).**

Three additional “bookkeeping” notes regarding quotations should be mentioned. To improve readability and as a result of space constraints, internal citations are generally omitted within quotations. Only where they serve to demonstrate the diversity of source material or in some way act as an aid to understanding are they included. Long quotations are highlighted in red to distinguish them from general commentary, while shorter phrases drawn from court opinions are enclosed in quotation marks.

This book does not use the standard footnote format found in most books of this type – rather, each citation is included at the beginning of the opinion currently under consideration. This is a planned departure from custom, since the citations and quotations are perhaps the most indispensable portions of this book. While I should perhaps apologize for variation, it also stems from my frustrating attempts to pick through and find sources in footnotes, which were sometimes found on different pages and printed in tiny fonts.

While many readers will feel justified in limiting their attention to Chapter 1 and those subsequent chapters in which they have a personal interest, I strongly recommend reviewing all the jurisdictions included in this book. Each state has something new to teach us. Each jurisdiction develops its own unique twist on adverse possession doctrine, which brings us a bit closer to a complete understanding of the concepts involved.

There is also a strong temptation to skip the early history lesson and get right to the more modern rulings in each jurisdiction. A goal of this book is to provide a sense of the progression of the doctrine in each state, but another important consideration is the relative strength of the more current rulings. This can best be accomplished by providing a historical framework for adverse possession and by including the occasional ruling that may run contrary to established common law.

Chapter 1 – History and Background.

It is not much of a stretch to describe adverse possession as being as old as the hills. Some authorities have postulated that the concept is as old as mankind itself. Consider: When someone possesses anything for a long period of time and uses it regularly, that individual will come to rely on the continued presence of that possession, and will commonly resent and contest any later attempt to tear it away. In modern times, it is a rare person who has not heard the old maxim "possession is nine-tenths of the law."

The roots of modern adverse possession doctrine extend back nearly 4,000 years. In Babylon circa 1720 BCE, a 1st dynasty document known as the *Code of Hammurabi* described various aspects of prescriptive claims and the mis-use of land. Also included in this document are several articles regarding punishment for those who failed to use land in a profitable manner and reward for those who were diligent in their cropland use. For example, one modern translation for article 30 of the Code of Hammurabi states: If a chieftain or a man leave his house, garden, and field and hires it out, and someone else takes possession of his house, garden, and field and uses it for three years: if the first owner return and claims his house, garden, and field, it shall not be given to him, but he who has taken possession of it and used it shall continue to use it. This may be the earliest known written example of the concept that would come to be known as the statute of limitations.

This bit of early history is more significant to a modern study of adverse possession than it seems at first glance. Because this concept pre-dates Christianity, there is a noticeable lack of any recognition of "Christian forgiveness," which forms the basis of some portions of modern legal theory. Adverse possession favors the strong and harks back to a time when "an eye for an eye" exemplified the prevalent attitudes of justice.

This same concept reappears centuries later as a cornerstone of Roman law in which the concept of adverse possession can be positively linked to the Italian term *usucapione*. (This term remains as the modern Italian translation of "adverse possession" in current Italian Code.) Although written circa 450 B.C.E., the *Twelve Tables* dealt with many issues still familiar today. One edict required an individual to appear before a magistrate if summoned; others dealt with tree removal, payment of debts, and road maintenance.

Our interest centers primarily on Table VI, which stated: "Usucapio of movable things requires one year's possession for its completion; but usucapio of an estate and buildings two years." Thus we see not only the early development of adverse possession, but

also possible origins of modern distinctions between real and personal property. Ancient Roman law also describes the twin concept of the *corpus* and *animus* of possession (literally "body" and "soul"). The animus (or intent) of possession remains one of the most contentious issues in many American jurisdictions.

Unsurprisingly, these concepts spread into the surrounding city states of what would later become the Italian peninsula. One specific example is recorded in an early Italian document (circa 960 A.D.) known as the *"Placito di Capua."* This may be translated to read…*"I know that those lands, within the borders that enclose them, were owned for thirty years by the party of St. Benedict's."* This proclamation was apparently made to allow the Benedictine monks to reclaim their lands from squatters who had occupied the monastery after a Saracen attack scattered the inhabitants. While the required time for an adverse claim to be considered legitimate has certainly fluctuated over the centuries, the 30-year requirement was recurring and still appears in the modern statutory requirements of a few states.

The concept of adverse possession arrived in England with the Norman Conquest of 1066. The subsequent development of the doctrine and of the statute of limitations in English common law is still the subject of discussion in modern American court opinions. One recent ruling notes that the only available remedy in medieval times for one whose property had been unlawfully entered by a trespasser was force of arms. The court went on to observe: Fortunately, the days of ejection by force (*vi et armis*) are largely behind us… **Smith v. Tippett: 569 A.2d 1186 D.C. App. (1990).** When considering the frequency and ferocity of litigation of adverse possession claims in this country – as will be seen in several of the cases quoted in ensuing chapters – this statement is debatable.

Seisin and disseisin are terms that often crop up when dealing with prescriptive claims, particularly in those opinions written during the formative phases of our nation. *Black's Law Dictionary* defines "seisin" as "possession of a freehold estate in land." Dating back to the 14th century, this term has long been considered a synonym for "ownership." Disseizin (or disseisin) is defined by *Black's* as "the act of wrongfully depriving someone of the freehold possession of property."

Early English statutes of limitations enjoy a long and twisted history. The earliest versions required the claim be proved to have existed since "before the time of memory," which was generally defined as the date of the crowning of a previous monarch. Although this method of limiting claims persisted for several hundred years, it was ultimately proved to be unworkable as the years lengthened

Chapter 6 Massachusetts

Relevant Statutes:

ALM GL ch. 260, § 31 – Actions by the commonwealth 20 years
ALM GL ch. 81, § 22 – No prescription against state highways
ALM GL ch. 260, § 21 – Statute of limitations – 20 years
ALM GL ch. 7, § 40E – No adverse possession against commonwealth
ALM GL ch. 132, § 36A – Repealed Jan. 1, 2003
ALM GL ch. 185, § 53 – No adverse claims of registered lands

Early Massachusetts adverse possession doctrine provides a wealth of clear examples describing many of the principles later incorporated into case law across the country. Several early opinions from this state later became index cases for nearby states, and specific phrasing from Massachusetts decisions is common in other jurisdictions.

Of specific interest in this state is the strength and consistency with which the courts defend the majority rule in supporting adverse claims in cases of mistaken belief. Numerous rulings on this subject reinforce the premise that actions on the ground are the central issue. In Massachusetts, neither family relationships nor statements by the claimant that appear contrary to adverse use have proved to be insurmountable obstacles.

The state's case law also includes several significant opinions regarding the effect of a survey on an adverse possession claim. *Proprietors of the Kennebeck Purchase v. Springer* (discussed below) represents the earliest known discussion of this principle in American common law.

Proprietors of the Kennebeck Purchase v. Springer: 4 Mass. 416 (1808) is one of the earliest relevant Massachusetts opinions on record, but it is still cited in current adverse possession case law. One portion of this landmark opinion that is not still relevant today: The Statute of 1786, Chapter 13 (in force at that time) required 30 years to perfect an adverse possession claim, as opposed to the now-recognized 20 year period.

Although the term "color of title" does not appear in this opinion, *Kennebeck Purchase* notes that an individual who enters onto the lands of another may do so while "claiming a right and title" or "without claim of right or title." In the former situation, the claim: shall extend to the whole parcel, to which he has a right; for, in this case, an entry on part is an entry on the whole. In the latter scenario, the claimant must oust the true owner, and "his seisin

cannot extend further than his actual exclusive occupation." This opinion also notes that where the claim is to an uncultivated tract, the claimant must exercise acts of sufficient notoriety that the true owner may be presumed to know of the possession.

Kennebeck Purchase is also one of the earliest significant cases describing the effect of a survey on the tolling of an adverse possession claim. Springer had apparently hired a surveyor to "run round" the lot, and he mowed grass on the disputed parcel from time to time, but the court ruled: that the running round the land by a surveyor, and marking the lines, by the direction of one who claims no title to the land, is not such an exclusive occupation of the land, as can amount to an ouster or disseisin of the demandants. Neither can the occasional cutting of the grass on the meadow. This ruling emphasizes a point frequently lost in later opinions dealing with this subject: The surveyor may be on the land, but does not claim ownership and has no title interest in the land being surveyed.

Two years later, **Boston Mill Corporation v. Bulfinch: 6 Mass. 229 (1810)** is another early benchmark case for Massachusetts and is one of the more frequently quoted opinions in case law from other states. In this example, Bulfinch was the owner of an adjoining upland tract, and he had constructed two buildings over a mudflat adjoining a mill pond belonging to Boston Mill Corporation. These structures were supported above the water surface by piles driven into the soil, but it was not possible for boats to pass beneath the buildings. A 5-foot-wide gap between the buildings occasionally was used by Bulfinch to access the water, but this gap was often blocked by boards fastened between the buildings.

One major question facing the court was whether or not this use constituted a disseisin of the land under the buildings. The court states: We have none of us any doubt that such an occupation, open and visible as it was, and almost the only one which, under the circumstances of the subject of occupation, could have existed, is a disseisin. It was independent and notorious, and a complete prevention of the rights of ownership of the demandants. They claim and demand the *land;* but there has been no time, during this adverse possession, that they could or attempted to use it. Water flowed round the piles and under the buildings. This was no prevention of the occupation of those who owned the buildings; but that occupation was an absolute prevention of any use of the demandants, and a complete exclusion of their possession.

The vacant space between the buildings was considered appurtenant to the structures and was also awarded to Bulfinch. However, it is important to emphasize the limited uses to which this

Chapter 8 New Jersey

Relevant Statutes:

N.J. Stat. § 2A 14-6&7 – 20-year statute of limitations
N.J. Stat. § 2A14-8 – Adverse claims against the state
N.J. Stat. § 2A 14-14 – Claims concerning void wills
N.J. Stat. § 2A 14-22 – Tolling of the statute of limitations
N.J. Stat. § 2A 14-30 – Adverse possession for 30 years cultivated, 60 years woodlands, and uncultivated tracts
N.J. Stat. § 2A 14-31 – Adverse possession 30 years with color of title
N.J. Stat. §2A 14-32 – Minors and those with disabilities
N.J. Stat. §2A 14-33 – Prescriptive rights for wires and cables
N.J. Stat. §2A 14-33 – Prescriptive easement for utility lines
N.J. Stat. § 2A:62-1 – By persons in peaceable possession

Of all the states included in this book, New Jersey has the unfortunate privilege of holding the record for the longest-running misinterpretation of its own statutes regarding adverse possession of any state included in this book. Conflicting decisions regarding the length of time required to perfect a claim appear in court decisions throughout the 20th century. While this confusion appears to have finally been resolved (see *J. & M. Land Co. v. First Union National Bank (2001)),* it would be no surprise to see future complications arise due to these long-running misconceptions.

On a more positive note, decisions from this state include an informative discussion of the difference between procedural and substantive statutes and their effect on adverse claims. This jurisdiction also provides an example in which land is taken and then re-taken by adverse possession. In an interesting decision, the New Jersey court considers creek diversion and adverse claims to an entire stream.

One of the earliest opinions concerning adverse possession in this state is **Tucker v. White: 1 N.J.L. 111 (1791).** This may also be one of the earliest cases to promote the concept of proving adverse use based on actions rather than on the inner thought of the claimant. (See discussion of the majority rule, Chapter 1.)

When considering methods by which an adverse claim may be shown, this court states: A priority of possession, within the limits of an established government, or a possession for a series of years, accompanied with marks of exclusive property, (and without these marks no possession can give a title,) is, and ought to be, uniformly recognized as one means of acquiring an exclusive property. The

right founded, however, on possession only, must be deduced from a known, visible, adverse possession and use, not a mere paper or unknown claim. It is the interest of all governments to put an end to controversies, particularly when real estate is the subject matter of dispute, and a continued and uninterrupted possession furnishes a strong presumption of title in the possessor, and of acquiescence on the part of every other person.

This is also one of the earliest cases found to support the premise that "what can be taken by adverse possession can be taken again by the same principle." In this example, "A" built a house on an island and used it for more than 20 years. He moved away some years before his death, having perfected an adverse possession claim on the island.

At this point, "B" moved to the island and built a house and improvements, and he along with his heirs possessed the land for more than 20 years, perfecting yet another title. Remember that 20 years was the minimum time requirement under common law at this point in history.

Finally, *Tucker v. White* briefly considers claims against the state: A non-exclusive possession has no legal operation, and can confer no legal title, especially against the right of the crown.

Clark v. Lane: 2 N.J.L. 397 (1807) raises an uncomfortable scenario when the parent and guardian of an underage child claimed adverse possession against the child. Judge Pennington ruled that in this situation, the possession of the guardian is presumed to be on behalf of the child. However, the claimant won title to a portion of the disputed tract because it was not included in the lands that passed to the child upon the death of the grandfather. This scenario is somewhat analogous to the presumed permissive possession by a tenant on behalf of the landlord.

Campbell v. Smith: 8 N.J.L. 140 (1825) includes several interesting items, especially the consideration of the diversion of a waterway from its original course.

In this example, a mill owner diverted the entirety of a stream into a completely new channel and deprived the downstream owners of their reasonable right to the stream. The court observes: The right to the natural flow of water, like other rights of property, like the right to the soil over which it flows like the freehold of which it is part like the land through which, it pursues its natural course, may be lost by efflux of time. Statutes of limitations are held to apply to all "lands, tenements, or hereditaments."

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