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ADVERSE POSSESSION

By FREDERICK B. HELM, A.B., LL.B.*

The purpose of this article is to state the law of Wisconsin pertaining to the acquisition of title to real property by adverse possession. Upon this subject there is a great diversity of opinion for the reason that it presents some of the most doubtful questions known to the law. In most states, statutes of limitation operate to cut off one's right to bring an action for the recovery of real property which has been in the adverse possession of another for a specified time and vest title in the disseizor. Wise public policy has dictated these legislative enactments. The intention is not to punish one who has neglected to assert his rights but to protect those who have maintained the possession of land for the time specified by the particular statute, under claim of right of color of title.[1]

In view of the importance of these statutes of limitation it is fitting and proper to review the statutory law of Wisconsin upon the subject of disseizion—adverse possession. In Wisconsin there are two periods of limitation. Under Section (4211, 4212, 4215), Wisconsin Statutes, the adverse holder claims under color of title and the period of limitation under such circumstances is ten years. Under Sec. 4211, Wisconsin Statutes, the period of limitation is twenty years when claim of title is not founded upon any written instrument, judgment or decree of any competent court.

Our Wisconsin legislature has enacted the Statutes which follow:

I. ADVERSE POSSESSION, DEFINITION, SECTION 4212

For the purpose of constituting an adverse possession by any person claiming a title founded upon some written instrument or some judgment, land shall be deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.
3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber for the purpose of husbandry or for the ordinary use of the occupant.

[1] *Jasperson vs. Scharnikon*, 150 Fed. 571.

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4. Where a known farm or a single lot has been partly improved the portion of such farm or lot that may have been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved or cultivated.

II. Extent of Possession not Founded on Written Judgment, etc., Section 4213

When there has been an actual continued occupation of any premises under a claim of title, exclusive of any other right, but not founded upon any written instrument or any judgment or decree, the premises so actually occupied, and no other, shall be deemed to be held adversely.

III. Adverse Possession, What Is, Section 4214

For the purpose of constituting an adverse possession by a person claiming title, not founded upon some written instrument or any judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only:

1. When it has been protected by a substantial inclosure.
2. When it has been usually cultivated and improved.

IV. Action Barred by Adverse Possession, When, Section 4215

An adverse possession of ten years under Sections 4211 and 4212 or of twenty years under Sections 4213 and 4214 shall constitute a bar to an action for the recovery of such real estate so held adversely or of the possession thereof.

V. Presumption on Adverse Holding Under Conveyance or Judgment, Section 4211

Where the occupant or those under whom he claims entered into possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises in question, or upon the judgment of some competent court, and that there has been a continual occupation and possession of the premises included in such instrument or judgment or of some part of such premises under such claim for ten years, the premises so included shall be deemed to have been held adversely; except that when the premises so included consist of a tract divided into lots, the possession

of one lot shall not be deemed the possesion of any other lot of the same tract.

WISCONSIN'S LIBERALITY OF CONSTRUCTION

As to what constitutes adverse possession in the states of the United States there is a wide diversity of opinion. In Wisconsin there is a great liberality of construction. The first requisite is that the owner must be out of possession. The second requisite is that the one who claims adverse possession must have exclusive possession of the property. Such possession must be open and notorious, that the world may know and see that the adverse claimant is in possession. The holding must be continuous and it must be with an intention of claim possession. In Wisconsin the occupancy must be open, notorious and exclusive and the occupancy need not be hostile nor with the intent to take the title from the owner.

REQUISITES OF ADVERSE POSSESSION
HOSTILE INTENTION

The rule as announced in the early Wisconsin cases was as follows: "To constitute adverse possession there must be the fact of possession and hostile intention—the intention to usurp possession; and, if there be possession of land by one not the true owner, the presumption of law is that such possession is in accord or comity with; and subservience to, the true title and legal possession of the owner."[2]

And then our Supreme Court in the case of *Meyer vs. Hope*, 101 Wis. 23 said that hostile intention might be inferred in these words: "Although adverse possession must be clearly and satisfactorily proven, yet a hostile entry at the beginning may properly be inferred from evidence of continuous, exclusive, and notorious possession for twenty years, when unexplained as to its commencement."

This was indeed a courageous step for any court to take in view of the fact that most of the states at that time and of to-day announce the following general rule as the law of adverse possession.

"Adverse possession is not to be made out by inference, but by

[2] The cases which support this doctrine are as follows: *Avers vs. Reidel*, 84 Wis. 283; *Dhein vs. Beuscher*, 83 Wis. 316; *Schwallback vs. C. M. & St. Paul Ry. Co.*, 69 Wis. 298; *Hacker vs. Horlemus*, 74 Wis. 21; *Harvey vs. Tyler*, 3 Wall 349.

clear and positive proof. Possession must be with such circumstances as are capable in their nature of notifying to mankind that he is upon the land claiming it as his own, in person or tenant—it must be visible, open, exclusive. It must be hostile in its inception and continue, notorious and not secret."[3]

And in 1 R. C. L. 703 the general rule is stated: "It is unanimously agreed that to be adverse, the possession of the disseizor must be hostile not only as against the true owner, but as against the world, excepting only the Government."

But our Supreme Court dared to take a step farther and the case of *Illinois Steel Co. vs. Paczocha*, 139 Wis. 23 distinctly declared that a hostile intention was not necessary when it said: "When the physical fact of possession has existed for the statutory period the law supplies the hostility and adversary intention, subject only to the qualification that such possession was not in fact derivative from and subordinate to the true title."

In Wisconsin, therefore, it appears that the definition of the word "hostile" given by the lexicographer: viz., "showing ill will and malevolence, or a desire to thwart and injure," does not correctly state the character of the occupancy necessary to create adverse possession, for there need be no ill will, malevolence or desire to injure anyone, and the element of hostility in that sense is not necessarily involved. It means only that one in possession of lands claims the exclusive right thereto.

Actual Possession

One claiming land adversely must, in order that his claim may be effective as against the owner, be in actual possession thereof, for without such occupancy, the law assumes the possession to be in the owner of the legal title.[4] The necessity for actual possession was clearly announced by Siebecker J. in his decision of *Mumbrue vs. Larsen*, 160 Wis. at 480, when he said: "The evidence of adverse possession fails to show that the land in dispute was in actual and visible possession and occupancy by persons who asserted a hostile, continuous, and exclusive possession thereof to the exclusion of the true owner."

[3] *McClellan vs. Kellog*, 17 Ill. 498; *Blumer vs. Iowa R. Land Co.*, 129 Ia. 32, 105 N. W. 342; *Maas vs. Burdetzke*, 93 Minn. 295, 101 N. W. 182; *Clemens vs. Runckel*, 34 Mo. 41; *Smith vs. Jones*, 103 Tex. 632, 132 S. W. 469.

[4] I R. C. L. 693.

Possession Must Be Exclusive

The claimant's possession must be such as to indicate his exclusive ownership of the property.[5] In stating what constitutes an adverse possession all the authorities agree that it must be exclusive, that is, the claimant must hold possession of the land for himself and not for another.[6]

Timlin J. in *Illinois Steel Company vs. Taurms,* in 154 Wis. at page 343, says: "The possession must be exclusive of that of the true owner. The adverse possession must be such as to furnish the true owner means of knowing of such adverse claim. Ordinarily mere open possession without his consent will do so." Citing *Lampman vs. Van Alstyne,* 94 Wis. 417, *Kurz vs. Miller,* 89 Wis. 426.

Possession Must Be Open and Notorious

The disseizor must unfurl his flag on the land and keep it flying so that the owner may see, if he will, that the enemy has invaded his domains, and planted the standard of conquest.[7] The words "open and notorious possession," as applied to the adverse holding of land by another, means that the disseizor's claim must be evidenced by such acts and conduct as are sufficient to put a man of ordinary prudence on notice of the fact that the land in question is held by the claimant as his own.[8] The disseizor must intend to hold the land for himself and that intention must be made manifest by his acts.[9] A disseizin, or ouster, in fact is defined to be the wrongful putting out of him that is actually seized of the freehold.[10]

Possession Must Be Continuous

In the leading case of *Illinois Steel Company vs. Budzisz* in 106 Wis. 499, Marshall J. has written an able opinion on the necessity for continuous possession. The author quotes from that most eminent jurist.

"Actual, hostile, exclusive occupancy of land, completely dispossessing the true owner without any presumption or claim of

[5] I R. C. L. 693; *Lins vs. Seefeld,* 126 Wis. 610.

[6] I R. C. L. 701.

[7] I R. C. L. 693.

[8] I R. C. L. 700.

[9] Ibid.

[10] I R. C. L. 702.

right will ripen into title under Sec. 4207 *if continued* for the requisite period."

"Such an occupancy of land does not, before the expiration of the period within which the owner may reclaim possession, constitute any estate or interest in the land, nor is the substitution of another occupant to continue the dispossession of the true owner, the transfer of any such estate or interest in the land within the meaning of Sec. 2302."

"Successive possessions may be tacked together as to form a continuous and uninterrupted possession for the essential period of time. There must be a privity existing between the parties transferring the possession."

"Such possession may begin in parol without deed or writing and may be transferred from one occupant to another by parol bargain and sale accompanied by delivery. All that the law requires is continuity of possession where it is actual and this continuity and connection may be effected by any conveyance or understanding which has for its object a transfer of the rights of the possessor or of his possession when accompanied by an actual delivery of the possession."

"Good faith by the adverse claimant as to his right at the instant of entry, or during the limitation period, is not necessary because the statute by its terms only requires actual, continuous, exclusive possession under such circumstances as to wholly dispossess the true owner both actually and constructively."

"Actual, continuous, exclusive possession for the statutory period, unexplained, displaces the presumptions in favor of the true owner and creates a presumption of fact that such possession, and the commencement of it, were characterized by all the requisites of title by adverse possession and that the title of the adverse claimant is perfect, the statute provides."

"By judicial construction, now a rule of property, the statute does not apply unless the exclusion of the owner from possession has been during the whole period by a single hostile possession, exercised either by one or more persons acting together, or by possessions in succession connected by privity between the actors."

"A transfer to connect successive possessions in conformity to Sec. 2302 is not an essential to the privity necessary to continue the mere dispossessed condition of the true owner."

"The calls of a deed, when title by adverse possession is

claimed, limit the right as a matter of law. (a) Where the ten year statute relating exclusively to claims of title founded in written instruments is relied only. (b) As to the extent which actual possession of a part will draw to it constructive possession of the whole. (c) To extent of which title can be claimed by adverse possession under the instrument itself."

"The calls of the deed limit the right as a presumption of fact; where a person is in possession of lands outside of but adjacent to and together with lands within the calls of his deed, also where the person being so circumstanced by written instrument conveys the lands within which such calls to another and surrenders to such other possession of the whole."

"The first presumption last above-named yields to clear, relevant evidence showing that the possession outside the calls of the deed was not characterized by any recognition of the true ownership whether that occur by mistake of boundaries or distinct hostile intention. The second of such presumptions yields to clear evidence that the premises were taken from a predecessor in possession as part of the property purchased and that the two possessions so intentionally united were physically united by the successor going into possession at or before the time his predecessor went out of possession."

THE ENTRY AND INTENTION

To constitute adverse possession, entry must be made with defined claim of title and of possession continued while the statute runs; and, after entry such claim cannot be enlarged unless by acts equivalent to a new entry and new claim of adverse possession.[11] Mere words, unaccompanied by acts of ownership will not amount to an adverse user.[12]

Whether an entry by one person upon the lands of another without any agreement is an ouster of the legal possession arising from the title or is in subordination to such title depends upon the intention with which the entry is made and is usually a question of fact for the jury.[13]

It is apparent, therefore, that claimant must make entry with a clear, distinct and unequivocal intent to claim title.

[11] *Pepper vs. O'Dowd,* 39 Wis. at page 548.

[12] *The Fox River Flour Company vs. Kelly,* 70 Wis. 288.

[13] *Richetson vs. Galligan,* 89 Wis. at page 399; *Jansen vs. Huerth,* 143 Wis. 363.

The Adverse Possession Must Run for the Statutory Period

In order for an adverse claimant to obtain title by adverse possession the occupation of the land in question must be actually continued for the statutory period without interruption.[14]

The Matter of Good Faith

Our Supreme Court in an early Wisconsin case, *Woodward vs. McReynolds,* 2 Pin 268 announced this doctrine:

"Adverse possession, in order to be effective, must consist of an occupancy of the lands in good faith, and under the belief that the claimant has a good title; and an adverse possession, which is not characterized with good faith and honesty, is a mere sham, and cannot avail as against the true owner or his grantee. The *quo animo,* with which possession is commenced or continued is the test to decide whether the possession is adverse."

The doctrine of this case was, however, overruled by the Court at a later date in these words:

"In order to obtain title by adverse possession, whether founded upon claim merely, or upon color of title, and whether simply *possessio pedis,* or, in addition, a constructive possession coextensive with the premises described in the written instrument constituting the color of title,—good faith in the entry and occupancy is not essential; an entry by the disseizor hostile to all the world, an intention to hold the land as his own, and an actual holding of it for the statutory period being sufficient."[15]

And then in these clear and unequivocal terms the doctrine was later announced:

"Actual occupancy of land to the exclusion of the true owner, regardless of whether in good faith or bad faith, whether by mistake of boundaries or with intent to claim the land with full knowledge that the claim is wrongful, satisfies the calls of the statute. Such adverse possession of part of a tract under color of title, with intent to claim the whole, in legal effect, extends the boundaries of the tract, and such actual possession beyond such boundaries, operates to the same effect upon the title of any other claimant, except that the twenty year statute applies instead of the ten year statute.[16]

[14] *Hemmy vs. Dunn,* 125 Wis. at page 279.

[15] Marshall T. in *Lampman vs. Alstyne,* 94 Wis. 429; also so held in *McCann vs. Welsh,* 106 Wis. 147. Also *Northwestern Ry. Co. vs. Groh,* 85 Wis. 645; *Steinberg vs. Salzman,* 139 Wis. at p. 124.

[16] Marshall J. in *Ovig vs. Morrison,* 142 Wis. at page 247. Supported

PERMISSIVE ADVERSE POSSESSION

Mere permissive possession is never a basis for the statute of limitations.[17] In the very recent case of *Perkins vs. Perkins,* 173 Wis. 421 it was held: "Continued possession of premises after entry by permission of the true owners is not adverse to such owners so as to defeat their title until after the possessor has asserted a claim of title to the land in such a way as to bring his claim to the notice of the owners."[18]

And in *Weisner vs. Jager,* 175 Wis. 281, that where an easement of way was claimed because of the mere use by pedestrians for more than twenty years of a well-defined path across the plaintiff's premises, the mere fact that the user continued for that period did not raise the presumption of adverse hostile user. A permissive user, no matter how long continued, cannot ripen into an easement by prescription.

The evidence disclosed that for many years there existed a pathway extending from defendant's residence and summer cottages along the lake shore across plaintiff's property to a general store and amusement grounds, and the defendants, their families, tenants, and guests, without the express consent of the plaintiffs or their predecessors but with their knowledge and acquiesence, were accustomed to use, without consenting or asserting a right to do so, the path of pleasure or business and the court held that the user of plaintiff's premises was permissive and not adverse.

But, "Permissive possession may ripen into an adverse possession by declaration or acts or both. 2 Corp. Jur. 124, Secs. 210, 133; *Bartlett vs. Secor,* 56 Wis. 520; *Meyer vs. Hope,* 101 Wis. 123. A continuous, and exclusive possession of land for over twenty years raises the presumption that possession is adverse and throws the burden of proof upon the true owner to show that it was permissive."[19]

The doctrine of permissive possession was perhaps best stated in *Meyer vs. Hope, Supra;* "Permissive possession no matter how long continued does not make title."

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by: *Ill. Steel Co. vs. Budzisz,* 106 Wis. 499, 511; *Pitman vs. Hill,* 117 Wis. 318; *Clithero vs. Fenney,* 122 Wis. 356; *Off vs. Henricks,* 124 Wis. 440; *Ill. Steel Co. vs. Bilot,* 109 Wis. 418; *Bishop vs. Bleyer,* 105 Wis. 330; *Wilson vs. Stork,* 171 Wis. 561.

[17] *Ryan vs. Schwatz,* 94 Wis. 411; *Allen vs. Ellis,* 125 Wis. at page 574; *Schmoldt vs. Loper,* 174 Wis. 152.

[18] *Perkins vs. Perkins,* 173 Wis. 421.

[19] Vinie J. in *Hahn vs. Keith,* 170 Wis. at page 527.

Effect of Failure to Pay Taxes

The fact in an action to quiet title by adverse possession that the claimant failed to pay taxes upon the land adversely held is to be considered in judging the character of his possession but it is by no means conclusive.[20]

Proof Necessary to Establish an Adverse Possession

The facts essential to adverse possession must be established by clear and satisfactory evidence, the presumptions being in favor of the true owner till facts are so established indicating continued disseizin of such owner for the full period necessary to divest him of title. The foregoing rule is not satisfied by mere general statements of witnesses not based on facts conclusively established rendering adverse possession not within reasonable probabilities.[21]

Evidence of adverse possession is always to be construed strictly, and every presumption is to be made in favor of the true owner. The burden of establishing it is on him who asserts it and it is not to be made out by inference or presumption, but by clear and positive proof.[22]

What constitutes adverse possession is for the court to determine, but the facts which establish it are for the jury, and the question of the character of the possession is generally submitted to them.[23]

While possession, occupation, and improvements for several years, with the knowledge of the true owner, may be *prima facie* evidence of adverse possession, yet they are not conclusive and may be explained and rebutted by proof of facts showing that the possession was not in fact adverse.[24]

Evidence of adverse possession must be clear and positive, and should be strictly construed, and every reasonable presumption made in favor of the true owner; but whether or not the facts

[20] *Hamachek vs. Duvall,* 135 Wis. 108.

[21] *Illinois Steel Co. vs. Budzisz,* 115 Wis. 68; *Jansen vs. Huerth,* 143 Wis. 363.

[22] *Snydor vs. Palmer,* 29 Wis. 252; *Wilson vs. Henry,* 35 Wis. 245; *Hacker vs. Horlemus,* 74 Wis. 21; *Dhein vs. Beuscher,* 83 Wis. 325; *Ayers vs. Reidell,* 84 Wis. 283; *Graeven vs. Dieves,* 68 Wis. 317; *Fairfield vs. Barrette,* 73 Wis. 468; *Meyer vs. Hojre,* 101 Wis. 129.

[23] *Gross vs. Woodward,* 90 N. Y. 638.

[24] *Ayers vs. Reidell,* 84 Wis. 283; *Jansen vs. Huerth,* 143 Wis. 363; *Worcester vs. Lord,* 56 Me. 265.

exist to make the possession adverse so as to ripen into a title under the statutes of limitation is a question for the jury under proper intructions, and their finding will not be disturbed when there is evidence to support it.[25]

EFFECT OF CONVEYANCE BY ONE IN ADVERSE POSSESSION

The question often arises as to the effect of a conveyance of the land by the adverse holder before the period of limitation has run. May the successive holder, the transferee, "tack" on the adverse possession of his predecessors and acquire title by adverse possession by holding the land adversely for the unexplained portion of the period of limitation? In the case of *Illinois Steel Co. vs. Budzisz,* 106 Wis. 499, this question was answered in the affirmative, the court saying that under such statute the true owner may be excluded from possession during the whole period of limitation by possession in succession connected by privity between the actors.

"Privity denotes merely a succession of relationships to the same thing, whether created by deed, or by other act; or by operation of law. If one, by agreement, surrender his possession to another and the acts of the parties are such that the two possessions actually connect, the latter commencing at or before the former ends, leaving no interval for the constructive possession of the true owner to intervene, such two possessions are blended into one, and the limitation period on the right of such owner to reclaim the land is thereby continued, because by the statute, as construed, the only essential to such continuity is that the dispossession of the true owner be actually continued."

ADVERSE POSSESSION AGAINST THE GOVERNMENT

No title can be obtained by adverse possession for twenty years to land held by the state in any capacity.[26] There can be no adverse possession of lands belonging to the government.[27]

ADVERSE POSSESSION MAY BE BROKEN UP
RE-ENTRY

If an owner of land be disseized thereof by another; any notorious re-entry by the former in person or by his authorized

[25] *Lampman vs. Van Alstyne,* 94 Wis. 418.
[26] *Illinois Steel Co. vs. Bilot,* 109 Wis. 418. Cf. Section 4229. *Klinkert vs. Racine,* 177 Wis. 200 (municipal corporation).
[27] *Whitney vs. Gunderson,* 31 Wis. 359; *Knight vs. Leary,* 54 Wis. 459.

agent for the purpose of dispossessing the disseizor, will effectively interrupt and put an end to the latter's adverse possession, regardless of the length of time the interruption continues. That which actually breaks the continuity of adverse possession ends it for all purposes. The disseizin of the true owner may, by a fresh disseizin, start a new period of adverse possession, but cannot thereby obtain any benefit whatever from prior possession.

The essentials of an entry effective to break an adverse possession will vary according to the character of the premises involved. A re-entry of a mere casual or secret character will not interrupt an adverse possession. The re-entry, to have that effect must be *animo clamandi* and either known to the occupant or characterized by sets or circumstances from which knowledge on his part would be reasonably inferred.

If an adverse occupant of land attorns to the true owner the disseinzin of the latter is thereby interrupted.

Entry by the true owner, upon premises not physically occupied adversely so as to permit physical disturbance thereof, the premises being marsh or overflowed land not inclosed and having no artificial objects thereon maintained by the adverse occupant, susceptible of physical, visible interference, and a survey of the premises, stakes being located to indicate the boundaries thereof, and exploring and traversing the premises from day to day for a considerable period of time, *animo clamandi,* so as to reasonably charge the adverse occupant with knowledge that his possession is challenged and that an opportunity exists for him to vindicate the same if he desires, is sufficient to break the continuity of the disseizin.[28]

Any interruption or discontinuance of adverse possession, before it has continued for the statutory period, restores the seizin and possession to the rightful owner.[29]

Cole C. J. in *The St. Croix Land & Lumber Co. vs. Ritchie,* 78 Wis. at page 496 says: "The acts of occupancy necessary to interrupt the running of the statute must be something more than occasional and temporary instrusions upon the land. They should be open and notorious, and continue unbroken for a sufficient time to give notice to the persons interested that a claim of right is intended by them. In *Finn vs. Wisconsin Ry. Land Co.,* 72

[28] *Illinois Steel Co. vs. Budzisz,* 115 Wis. 68.
[29] *Allis vs. Field,* 89 Wis. 327..

Wis. 548, it is said by Justice Lyon that the true rule undoubtedly is that, if the plaintiff actually and exclusively occupied the land in hostility to the defendant's title, and subjected the same to their will and dominion by actual and appropriate use, according to its locality, quality, and character, the evidence of such occupancy being tangible and visible to a person going upon and examining the lands, such occupancy and use would constitute adverse possession. The cutting of timber occasionally on some of the forty acre tracts or the mowing of an acre or two of marsh lands, or the foraging of cattle upon the lands, would not necessarily interrupt the running of the statute upon the tax deed."

And Timlin J. in *Zellmer vs. Martin,* in 157 Wis. at page 344 says: "Defendant's adverse possession must be exclusive of the true owner, not necessarily exclusive at all times of temporary entries upon the lands by third persons not under claim of title. Defendant's continuity of possession was not interrupted by occasional trespasses caused by the straying in upon the wood-lot from the highway of the cattle of other persons claiming no title to the land, nor even by such occasional and unintentional trespasses by cattle of the plaintiff straying in from the highway."[30]

EFFECT OF TEMPORARY ABSENCES BY THE ADVERSE CLAIMANT

It is an elementary rule that where adverse possession of land has once been fully established, occasional absences or intervals of there being no person residing on the premises, such circumstances not being of a character to evidence abandonment, and there being no actual interruption by re-entry of the person originally dispossessed, do not change the nature of the adverse possession.

Marshall J. made this statement in the case of *Ovig vs. Morrison,* 142 Wis. 243, "Absence from the premises for a short interval may be immaterial, the true owner not asserting any right thereto in the meantime, there being a return to the same by the disseizor and further acts by him consistent with the first invasion, clearly indicating a continuance thereof."[31]

NOTICE

To hold that the defendants must give notice of their adverse holding to one of whose claims they were in utter ignorance,

[30] *Citing Illinois Steel Co. vs. Tamma,* 154 Wis. 340.

[31] *Illinois Steel Company vs. Jeka,* 123 Wis. 430.

and whose rights they had never acknowledged by word or deed, would be absurd.[32]

Privity of Possession a Necessity

The privity between successive occupants required by our statute of limitations is privity merely of that physical possession, and is not dependent on any claim, or attempted transfer of any other interest or title in the land.[33]

Construction of the Statutes

"The statute does not purport to enumerate all the conditions which may constitute adverse possession. It is affirmative only. *Wilson vs. Henry*, 40 Wis. 594. This is true of Section 4214 as well as Sec. 4212. A continuous disseizin of the true owner for twenty years bars his right of action to recover real property or the possession thereof."[34]

Presumptions Favor True Owners

"All reasonable presumptions are to be made in favor of the true owners, including the presumption that actual possession is subordinate to the right of the true owner, subject, however, to the limitation that actual, continuous, exclusive possession for the statutory period, unexplained displaces a presumption in favor of the true owner and creates a presumption of fact that such possession, and the commencement of it, were characterized by all the requisites of title by adverse possession."[35]

Adverse Possession Under Color of Title

The elements of actual possession necessary to draw to it constructive possession, when an adverse claim to real estate is founded on color of title under Sec. 4211 Stats. 1898 are the same as actual occupancy under Sec. 4213, as construed by Sec. 4214, though the evidence deemed sufficient to establish occupancy un-

[32] *Roberts vs. Decker*, 120 Wis. 115.

[33] *Illinois Steel Co. vs. Paczocha*, 139 Wis. 23; *Bishop vs. Bishop*, 105 Wis. 330; *Illinois Steel Co. vs. Budzisz*, 106 Wis. 499; *Illinois Steel Co. vs. Jeka*, 119 Wis. 122; *Illinois Steel Co. vs. Budzisz*, 119 Wis. 580; *Clithero vs. Fenner*, 122 Wis. 356; *Closuit vs. John Arpin L. Co.*, 130 Wis. 258.

[34] Timlin J. in *Zellmer vs. Martin*, 157 Wis. at page 344.

[35] Rosenberry J. in *Perkins vs. Perkins*, 173 Wis. at page 426. Citing also *Meyer vs. Hope*, 101 Wis. 123; *Illinois Steel Co. vs. Budzisz*, 106 Wis. 499.

der the latter sections may not be so deemed under the former, the circumstancs of color of title being of itself significant as to the nature of the possession.

The only substantial difference between adverse possession under Sec. 4211 and such possession under Sec. 4214 is that under the former actual possession is extended by construction to the limits of the land described in the paper conveyance or judgment constituting the basis of color of title, while under the latter the adverse claim is limited by the actual adverse occupancy.

When unexplained actual occupancy for the requisite length of time has been clearly established, either under Sec. 4211 or Secs. 4213 or 4214 the presumption of seizin in the true owner within such time disappears, and the presumption that the requisites of adverse possession have been complied with by the occupant under Sec. 4210.[36]

THE TEST OF WHETHER OR NOT A POSSESSION IS ADVERSE

The sole test of adverse holding under the statute on the subject of title by adverse possession is whether the true owner is actually disseized for the statutory period.[37]

In commenting on this particular point in that opinion Marshall J. said: "It is obvious that the only sensible, safe and really equitable rule is to make the physical characteristics of possession, excluding all other persons, the sole test of adverse possession, and so it was written into the Code."

THE PRESUMPTION OF ADVERSE POSSESSION

Actual, continuous, exclusive possession of land by a person and his privies in estate for twenty years, unexplained, creates a presumption of fact that such possession and its commencement were characterized by all the requisites of title by adverse possession, and that the title of the adverse claimant is perfect.[38]

[36] *Illinois Steel Co. vs. Bilot,* 109 Wis. 418; *Bonne vs. Wiel,* 159 Wis. 340; *Zuleger vs. Zeh,* 160 Wis. 600.

[37] *Ovig vs. Morrison,* 142 Wis. 243.

[38] *Illinois Steel Co. vs. Jeka,* 119 Wis. 122; *Hamacheck vs. Duvall,* 135 Wis. 108; *Bishop vs. Bleyer,* 105 Wis. 330; *Off vs. Heinricks,* 124 Wis. 440; *Illinois Steel Co. vs. Budzisz,* 106 Wis. 499; *Carmondy vs. Mulrooney,* 87 Wis. 552; *Wilkins vs. Nicholai,* 99 Wis. 178; *Wollman vs. Ruehle,* 100 Wis. 31; *Meyer vs. Hope,* 101 Wis. 123; *Wollman vs. Ruehle,* 104 Wis. 603; *Closuit vs. John Arpin Lumber Co.,* 130 Wis. 258; *Klooz vs.*

WHAT MAKES A POSSESSION ADVERSE

The true doctrine, recognized by all courts and text writers was declared by the U. S. Supreme Court in Ewing's *Lessee vs. Burnett,* 71 Pet. 41, 52, speaking by Mr. Justice Baldwin as follows:

"To constitute an adverse possession there need not be a fence, building or other improvement and it suffices for the purpose that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by statute. So much depends upon the nature and situation of the property, the uses to which it can be applied or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule in all cases. But it may safely be said that where acts of ownership have been done upon the land, which from their nature indicate a notorious claim of property in it, and are continued sufficiently long with the knowledge of an adverse claimant without interruption or an adverse entry by him; such acts are evidence of an ouster of a former owner and an actual adverse possession against him, provided the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held. Neither actual occupation, cultivation nor residence are necessary where the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right and he would not exercise over property which he did not claim."

In *Illinois Steel Co. vs. Bilot,* 109 Wis. 445 the court discusses what acts would constitute adverse possession and in that brilliant opinion the court says:

"An inclosure having no purpose of physical exclusion of outside interferences—a mere furrow turned with a plow around the land (*Sage vs. Marosick,* 69 Minn. 167) or a line marked by cutting away the brush (*Worthley vs. Burbanks,* 146 Ind. 534) or a fence opened so as to admit outside disturbers (*Sauers vs.*

Hood, 150 Wis. 208; *Ovig vs. Morrison,* 142 Wis. 243; *Zuleger vs. Zeh,* 160 Wis. 600; *Bader vs. Zeise,* 44 Wis. 96; *Reitler vs. Lindstrom,* 126 Wis. 565; *Illinois Steel Co. vs. Paczocha,* 139 Wis. 23; *Progress Blue Ribbon Farms vs. Harter,* 147 Wis. 136; *Lampman vs. Van Alstyne,* 94 Wis. 418; *Gilman vs. Brown,* 115 Wis. 1; *Dreger vs. Budde,* 133 Wis. 516; *Zellmer vs. Martin,* 115 Wis. 68; *Wilson vs. Stork,* 171 Wis. 561.

Giddings, 90 Mich. 50) may be sufficient under the circumstances to indicate, as a matter of fact, the boundaries of the adverse claim; and such boundaries may be evidenced satisfactorily to a jury by any means reasonably calculated to clearly suggest the same or suggest inquiry in regard thereto that would probably readily and clearly lead to a discovery of the truth. It is not necessary that such indications be sufficient to evidence constantly, by mere observation and without inquiry, the precise extent of an apparent hostile occupancy. If the claimant 'raises his flag and keeps it up' so to speak, sufficiently to attract the attention of the true owner to the situation; in view of the circumstances of the invasion, as a hostile claim of title, knowledge of such owner may be presumed as a fact, on the general principle that what a person ought to know under the circumstances may be held to be within his knowledge regardless of the actual fact."

In a discussion of the same subject in *Cobb vs. Davenport,* 32 N. J. Law 369, it was in effect said that the title to premises may be obtained by continuous, exclusive, notorious, hostile appropriation thereof for the mere purpose of hunting, hawking or fishing."

No particular kind of inclosure, nor any inclosure, is required to establish adverse possession as a matter of fact under Sec. 4214; but if such an inclosure is relied upon to establish such possession as a matter of law, it must be of a substantial character, though not necessarily artificial, so as to be effective as a protection against outside interference in adapting the premises to some suitable use. If a usual improvement is relied upon to establish adverse possession, an inclosure of any character, partly or wholly marking the boundary claimed, or any other method of clearly defining such boundary, accompanied with circumstances satisfactory to a jury to establish the essential facts, is sufficient.

A usual improvement, within the meaning of Sec. 4214, does not require improvement of the land in value but any actual use thereof to which it is adopted and to which the owner or one claiming to be the owner might reasonably devote it. Occupation of a locality for a burial lot, or some other purpose, that would partially or wholly destroy its value, may be effective as an improvement as any other, according to the circumstances. There must be a usual improvement; where that is relied upon, is a matter of law; what is such an improvement is a matter of fact.

Continued, exclusive, notorious use of premises covered by water for the purpose of hunting and fishing, with other circumstances, may establish adverse possession so as to carry a case to the jury; under proper instructions, to say whether there was such an occupancy as to constitute disseizin of the true owner.

Actual occupancy of premises so as to indicate at every instant of time, by mere observation, the extent of the hostile use, is not necessary to satisfy Sec. 4214. It need be only such continuous, exclusive, hostile use as in the judgment of the jury under all the circumstances, is sufficient to notify the true owner, actually or constructively of his rights and the actual extent thereof.[39]

Marshall J. in *Illinois Steel Co. vs. Jeka,* 123 Wis. at page 427 says: "What acts are necessary to notify the true owner of land of a hostile invasion thereof; and what are necessary to indicate the territorial limits of such invasion thereof; and what are necessary, if disseizin shall have once been effected, to efficiently indicate continuance thereof necessarily varies with the size of the premises claimed, the location thereof, the character of the same and a great variety of circumstances. Hence, generally, whether the essentials of adverse possession are satisfied or not by a given state of circumstances must be determined by the verdict of a jury under proper instructions."

And then the court quotes from the leading case in the state of California, *Brumagim vs. Brandshaw,* 39 Cal. 24-45. "The general principle which underlies this class of cases is, that the acts of dominion must be adapted to the particular land, its condition, locality and appropriate use. The philosophy of the rule is, that by such acts the party proclaims to the public that he asserts an exclusive ownership over the land, and the acts which he performs are in harmony with his claim of title. Hence, they must be such as to give notice to the public; or in the language of Justice Baldwin, in *Wolf vs. Baldwin,* 19 Cal. 313 it must be an open, unequivocal, actual possession—notorious, apparent, uninterrupted and exclusive, carrying with it the marks and evidence of ownership."

The Court also said in that case: "The elucidation and application of the principle thus stated in *Illinois Steel Co. vs. Bilot,* 109 Wis. 418, leaves no very good reason for going astray under the delusion that adverse possession without an inclosure must

[39] *Illinois Steel Co. vs. Bilot,* 109 Wis. 418.

necessarily be characterized by a physical, constant, visible occupancy by improvement of every part of the premises—that the hostile invader must actually lay his hands, so to speak, upon the entire territory and keep them there as plainly indicating the extent and character of the occupancy as if such premises were covered by a mantle."

In *Booth vs. Small,* 25 Iowa 177 the Court said: "Possession of land is the holding of an exclusive exercise of dominion over it. It is evident that this is not and cannot be uniform in every case, and that there may be degrees in the exclusiveness even of the exercise of ownership. The owner cannot occupy, literally, the whole tract, he cannot have an actual *pedis possessio* of all, nor hold it in the grasp of his hand. His possession must be indicated by other acts. The usual one is that of inclosure. But this cannot always be done, yet he may hold possession, in fact, of uninclosed land by the exercise of such acts of ownership over it as are necessary to enjoy the ordinary use of which it is capable and acquire the profits it yields in its present condition. Such acts being continued and uninterrupted will amount to actual possession."

Marshall J. in the case of *Illinois Steel Co. vs. Jeka,* in 123 Wis. at page 427, says: "The adverse claimant having 'raised his flag' so to speak, on the premises by commencing the preparation thereof for a residence lot, absence therefrom thereafter for any period of time, short of such as to indicate abandonment of such purpose, would not, as a matter of law break the disseizin. The standard of the invader being once efficiently planted by some physical change in the surface of the land, sufficient to disseize the true owner, it might under such circumstances be relied on to preserve such condition for a reasonable length of time."

The mere presence of surveyors locating points upon an island in a city, some of them upon the premises in suit, which consisted of a lot fenced and occupied as a residence and garden, and the failure of the occupant to protest against the entry upon his premises, do not conclusively show a disseizin of the occupant, breaking the continuity of his adverse possession, especially where the acts of the surveyors are not clearly shown to have come to his knowledge.[40]

What constitutes adverse possession is a question of law for

[40] *Illinois Steel Company vs. Paczocha,* 139 Wis. 34.

the court, and whether the necessary facts exist to establish it is a question of fact for the jury. In order to constitute adverse possession against the title of the true owner, the adverse claim must be sufficiently open and obvious, both as to the fact of possession and its really adverse character, to apprise the true owner, if in charge of the property and in the exercise of reasonable diligence, of the fact and of an intention to usurp possession of that which in law is his own. Secret or disconnected acts of an equivocal character, occurring at long intervals, will not suffice. The possession must be actual, open, continuous and under claim of right as against the true owned.[41]

General Summary of the Law of Adverse Possession

Adverse possession, then, as the term itself implies, is necessarily a possession not held under the legal proprietor, or by his consent, either directly or indirectly; but, on the contrary, it is a possession by which he is ousted from the land. Thus it has been stated that in order to determine whether a possession is adverse, it is only necessary to ascertain whether it can be considered as the constructive possession of the legal proprietor; if so, it is not adverse, if not, then it is adverse. I R. C. L. 686.

All the authorities agree that, in order to bar the true owner of land from recovering it from an occupant in adverse possession and claiming under ownership through the operation of the statute of limitations, the possession must have been, for the whole period prescribed by the statute, actual, open, visible, notorious, continuous and hostile to the true owner's title and to the world at large. It is also essential that the possession must have been under claim of right of color of title. I R. C. L. 616.

The test of adverse possession in Wisconsin is occupancy. In Wisconsin "actual, continuous, exclusive possession for the statutory period, unexplained, displaces the presumption in favor of the true owner, and creates a presumption of fact that such possession, and the commencement of it, were characterized by all the requisites of adverse possession, and that the title of the adverse claimant is perfect. The statute so provides.[42]

[41] *Kurz vs. Miller,* 89 Wis. 327; *Hemnis vs. Consol. W. P. & P. Co,* 173 Wis. 518; *Jansen vs. Huerth,* 143 Wis. 363.

[42] *Illinois Steel Co. vs. Budzisz,* 106 Wis. 499; *Illinois Steel Co. vs. Budzisz,* 126 Wis. 610.

In Wisconsin the hostile intent of the adverse claimant is not necessary in order to establish title by adverse possession. Good faith by the adverse claimant as to his right at the instant of entry, or during the limitation period, is not necessary. The essentials of adverse possession under the statutes are the same where the holding is under color of title as where the holding is not under color of title. The adverse holding must not be secret but must be open and notorious.[43]

In Wisconsin there are two periods of limitation. Under Secs. (4211, 4212, 4215) the adverse holder claims under color of title and the period of limitation under such circumstances is ten years. (Adverse possession under color of title simply means by virtue of some written instrument, purporting to be a conveyance of the land or a decree or judgment of a competent court.) Under Sec. 4211, the period of limitation is twenty years when claim of title is not founded upon any written instrument, judgment or decree of any competent court.

It is well established that there must be actual possession in order to constitute adverse possession. What is actual possession? Actual occupancy is clearly actual possession within the meaning of the statutes. But our legislature has gone farther and has provided (in Secs. 4212 and 4214) that cultivation, improvement or inclosure always constitutes adverse possession, and, if the occupant holds under color of title, a use for supply of fuel, or a partial improvement according to the custom of the surrounding country shall constitute adverse possession. There are specific conditions which the legislature of our state has declared shall constitute adverse possession, but it must be remembered that these are not all inclusive and that they do not enumerate all of the conditions which constitute adverse possession in this state.

The adverse holder must not recognize the rights of the true owner of the land; otherwise his possession is not exclusive. He must treat the premises as his property in a manner that the owner naturally would. If he recognizes the rights of the true owner to the property he cannot be an adverse holder. He must exercise dominion over the land. An adverse possession may be broken up by the re-entry of the true owner upon the premises adversely claimed and his assertion of title thereto.

[43] *Illinois Steel Co. vs. Budzisz,* 115 Wis. 68.