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Title by Adverse Possession in Tennessee

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One can hardly be certain of the text of the statute law in Tennessee. Any infirmity in the enactment of a statute is cured by its reenactment into the Code.[68] In case of conflict of the printed act with the enrolled act corresponding with the original manuscript act, the enrolled act is presumed to be the correct one.[69] A statute is invalid where it appears that it was vetoed by the governor and never passed over his veto even though it was published in the *Acts*.[70] On the other hand, an act properly passed and regularly approved does not become invalid by reason of a failure to publish in the *Acts*.[71]

HENRY N. WILLIAMS

TITLE BY ADVERSE POSSESSION IN TENNESSEE

With the modern use and development of land, it might seem that the law of adverse possession was taking its place along with the other museum pieces of the old English land law. But, as recent cases indicate, adverse possession is still important, particularly in boundary line disputes and in cases where land is held under color of title. It is the primary purpose of this Note to show how title to land is acquired by adverse possession under the statutory provisions of Tennessee.

I. HISTORICAL BACKGROUND

The acquisition of title to land by adverse possession is purely statutory in origin.[1] The first English statutes differed from present day statutes of limitation in that they did not set a definite period of time which would bar the disseised title holder, but named a certain year before which the disseisee could not allege seisin.[2] Later statutes set up the pattern for modern statutory limitations by providing that no entry could be made into any land

68. Regan v. Fentress County, 169 Tenn. 103, 83 S.W.2d 244 (1935).

69. Weaver v. Davidson County, 104 Tenn. 315, 59 S.W. 1105 (1909). The enrolled act is preserved in the office of the secretary of state.

70. International Trading Stamp Co. v. Memphis, 101 Tenn. 181, 47 S.W. 136 (1898).

71. Hancock County v. Hawkins County, 83 Tenn. 266 (1885). For discussion of a procedure whereby the possible questions of compliance with the constitutional requirements regulating the mechanics of legislative enactment may be speedily disposed of see Grant, *New Jersey's 'Popular Action' in Rem to Control Legislative Procedure*, 4 RUTGERS L. REV. 391 (1950).

1. For a general discussion, see 4 TIFFANY, REAL PROPERTY § 1133 (3d ed., 1939), and Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 137 (1918).

2. The last statute of this kind was said to be the Statute of Westminster I, 1275, 3 EDW. I, c. 39, providing that no seisin could be alleged by the title holder prior to the year 1189.

unless within twenty years after the right accrued.[3] Many American jurisdictions—for example, Tennessee whose legal genealogy here extends through the State of North Carolina to the old English statutes—have shortened this period where the land is held under color of title.[4]

The policy reason usually given for this legislation is the quieting of titles to land.[5] The preamble to the principal statute in Tennessee on adverse possession reads: "An Act for quieting the citizens of this state in their possessions, and to prevent litigation."[6] But it has also been suggested that the policy is to penalize the true owner who has slept on his right.[7] It seems more proper to say that this latter suggestion is only a result of the basic policy of quieting titles.

II. PRESCRIPTION DISTINGUISHED

Prescription by adverse user should be distinguished from acquisition of title to land by adverse possession. In contrast to the statutory origin of adverse possession, the doctrine of prescription is of common law origin, based upon a fiction adopted by the English judges that a grant or transfer of a nonpossessory right in the lands of another would be conclusively presumed if it had been exercised as a matter of right for a period of twenty years.[8] Prescription properly applies to nonpossessory or incorporeal rights, such as easements, while adverse possession is a means of acquiring a title to possessory interests.[9] Most American courts have adopted the rule that the period necessary to acquire rights by prescription is the same length of time required by the local statute of limitation for acquiring title to land by adverse possession.[10] Tennessee, however, although having a short statutory period for adverse possession, has retained the original twenty year period for prescription.[11]

3. 21 JAMES I, c. 16 (1623). This statute barred the right of entry, but not the writ of right. Thus the statute, 3 & 4 WILLIAM IV, c. 27, § 34 (1833), was enacted to extinguish all former title after twenty years.

4. See note 17 *infra.*

5. See Ballantine, *supra* note 1, at 135; NOTE, 15 VA. L. REV. 498 (1929).

6. Tenn. Pub. Acts 1819, c. 28. The preamble continued: "Whereas many disputes have arisen with regard to the proper construction of the statutes of limitation, and the time seems fast approaching when titles to land will become so perplexed, that no man will know, from whom to take or buy lands, for remedy whereof: . . . ." *Ibid.*

7. See 4 TIFFANY, REAL PROPERTY § 1134 (3d ed., 1939).

8. See Louisville & N. Ry. v. Hagan, 141 Ky. 20, 131 S.W. 1018 (1910); Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646, 650, 112 A.L.R. 536 (1937); 4 TIFFANY, *op. cit. supra* note 7, § 1191. These judges used the same length of time as required in the statute of 21 James I, c. 16 (1623) for gaining title by adverse possession. See note 3 *supra.* Most American courts consider this presumption conclusive. *E.g.,* Hester v. Sawyers, *supra;* 1 THOMPSON, REAL PROPERTY § 418 (2d ed. 1939).

9. 1 THOMPSON, REAL PROPERTY § 417 (2d ed. 1939).

10. *E.g.,* Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646, 112 A.L.R. 536 (1937); 1 THOMPSON, REAL PROPERTY § 416 (2d ed. 1939).

11. The leading case is Ferrell v. Ferrell, 60 Tenn. 329 (1872). Also see Morgan County v. Goans, 138 Tenn. 381, 198 S.W. 69 (1917); Louisville & N. Ry. v. Moss-

A few courts, in applying the same period used in the statute of limitation to that of prescription, have also attempted to transpose other statutory requirements and conditions of adverse possession.[12] But the analogy between adverse possession and prescription does not follow to this extent,[13] and confusion results from such promiscuous treatment.[14]

III. Periods of Limitation in Tennessee

In Tennessee, there are four distinct ways in which title to land may be acquired by adverse possession. Three of these are statutory: possession under recorded color of title, possession without the aid of recorded color of title, and possession under recorded color of title but unaffected by disabilities of the title holder. The fourth way is a common law method of continuous and uninterrupted possession from which the law presumes a grant.

A. *Seven Year Color of Title Statute*

Section 8582 of the Code provides that where land is held adversely for a period of seven years under color of title which purports to convey a fee, and such color of title has been recorded for the full seven years' adverse possession in the county where the land lies, the adverse claimant will acquire a title in fee to the land described in the color of title.[15] The Act

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man, 90 Tenn. 157, 16 S.W. 64 (1891); Fite v. Gassaway, 27 Tenn. App. 692, 184 S.W.2d 564 (M.S. 1944); *see* Long v. Mayberry, 96 Tenn. 378, 382, 36 S.W. 1040, 1041 (1896); Smelcer v. Rippetoe, 24 Tenn. App. 516, 520, 147 S.W.2d 109, 112 (E.S. 1940). *But cf.* Heiskell v. Cobb, 58 Tenn. 638 (1872), holding that adverse possession of more then seven years gave plaintiff a possessory title to protect his prescriptive right by injunction. This case was not referred to in Ferrell v. Ferrell, *supra*. *See* Bloomstein v. Clees Brothers, 3 Tenn. Ch. 433, 438 (1877) ("In this view, a right of way may, of course, be acquired by seven years' adverse possession by user, under our Statute of Limitations, which includes, in like manner, 'lands, tenements, and hereditaments' ").

12. For a collection of cases concerning the additional requirements of color of title and payment of taxes, see Note, 112 A.L.R. 545 (1938).

13. Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646, 112 A.L.R. 536 (1937) (the statutory requirement of holding adversely under color of title does not apply to prescription). *See* Ferguson v. Standley, 89 Mont. 489, 300 Pac. 245, 249 (1931), stating that "not all the requirements of adverse possession of land apply to the acquisition of an easement by prescription. . . . The occupancy which will ripen into a prescriptive right need be 'continuous' only in the sense that the claimant exercise his claimed right without interference at such times as he has need of the use, and it need not be 'exclusive' so long as the right does not depend upon a like right of others." *See* Ferrell v. Ferrell, 60 Tenn. 329, 334 (1872); Note, 32 Calif. L. Rev. 438, 441 (1944).

14. The tendency to confuse the two concepts has been noted in some Tennessee cases. Schooler v. Birge, 51 F. Supp. 610, 612 (M.D. Tenn. 1943); Heiskell v. Cobb, 58 Tenn. 638 (1872).

15. "Any person having had, by himself or those through whom he claims, seven years' adverse possession of any lands, tenements, or hereditaments, granted by this state or the State of North Carolina, holding by conveyance, devise, grant, or other assurance of title, purporting to convey an estate in fee, without any claim by action at law or in equity commenced within that time and effectually prosecuted against him, is vested with a good and indefeasible title in fee to the land described in his assurance of title. But no title shall be vested by virtue of such adverse possession, unless such conveyance, devise, grant, or other assurance of title shall have been recorded in the register's office

of 1819,[16] from which this section was codified, following the original North Carolina statute of 1715,[17] did not contain the requirement of recordation, but in 1895 this was added by special amendment.[18] Section 8583[19] bars the right, whereas section 8582 bars the remedy.[20] These sections give a "good and indefeasible title in fee" to the land described.[21] The title is good as a sword[22] as well as a shield.

The statute refers to lands "granted by this state or the State of North Carolina." Some of the early cases said that it must first be shown in setting up title under these sections that the land has been granted by this state or by North Carolina, since until the land has been so granted the statute can not attach or begin to run.[23] This grant could be proved as a fact, or it could be proved by a presumption of law based upon continuous and uninterrupted possession for a period of twenty years.[24] It seems that this requirement is obsolete today. Even under these early cases, it was not necessary to connect the adverse claimant's color of title with the grant from the state.[25]

There are two situations which are not expressly covered by these sections. Suppose that *A*, as required by section 8582, holds adversely under

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for the county or counties in which the land lies during the full term of said seven years' adverse possession." TENN. CODE ANN. § 8582 (Williams 1934).

Assurance of title, or color of title, as it is more commonly called, has been defined as a writing purporting upon its face to pass title to land, but which fails to do so, either from want of title in the person making it or defect in the mode of conveyance. See Southern Iron & Coal Co. v. Schwoon, 124 Tenn. 176, 203, 135 S.W. 785, 792 (1911). For examples of assurances of title within the meaning of this section, see Woods v. Richardson, 190 Tenn. 662, 231 S.W.2d 340 (1950); Wallace v. McPherson, 187 Tenn. 333, 214 S.W.2d 50 (1947); Brown v. Brown, 82 Tenn. 253 (1884) (defective devises); Smith v. Cross, 125 Tenn. 159, 140 S.W. 1060 (1911) (champertous deed); Southern Iron & Coal Co. v. Schwoon, 124 Tenn. 176, 135 S.W. 785 (1910) (void tax deed); Patton v. Dixon, 105 Tenn. 97, 58 S.W. 299 (1900) (chancery sale and decree, defective because of improper joinder of parties); Iron & Coal Co. v. Broyles, 95 Tenn. 612, 32 S.W. 761 (1895) (defective title by descent); York v. Bright, 23 Tenn. 312 (1843) (deed voidable because obtained by fraud).

16. Tenn. Pub. Acts 1819, c. 28, § 1.

17. N.C. Laws, 1715, c. 27, § 2.

18. Tenn. Pub. Acts 1895, c. 38. § 1. For the statutory history see Kittel v. Steger, 121 Tenn. 400, 117 S.W. 500 (1908).

19. "And on the other hand, any person, and those claiming under him, neglecting for the said term of seven years to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity, effectually prosecuted against the person in possession, under recorded assurance of title, as in the foregoing section, are forever barred." TENN. CODE ANN. § 8583 (Williams 1934).

20. Kittel v. Steger, 121 Tenn. 400, 117 S.W. 500 (1908).

21. TENN. CODE ANN. § 8582 (Williams 1934).

22. Title acquired under these sections will support actions for ejectment. Cannon v. Phillips, 34 Tenn. 211 (1854). There is a split of authority as to whether the adverse possessor can remove as a cloud the superior record title no longer enforceable. See Note, 78 A.L.R. 24, 110 (1932). In Tennessee, title perfected under these sections will support a bill to remove clouds from the title. See Patton v. Dixon, 105 Tenn. 97, 58 S.W. 299 (1900).

23. Cannon v. Phillips, 34 Tenn. 211 (1854).

24. *Ibid.*

25. Barton's Lessee v. Shall, 7 Tenn. 215 (1823); *see* Earnest v. Little River Land & Lumber Co., 109 Tenn. 427, 438, 75 S.W. 1122, 1125 (1902).

a recorded color of title purporting to convey a fee, while the true title gives *B* a life estate with a remainder over to *C*. As will be seen later,[26] *A*'s adverse possession can not run against the remainderman until the termination of the life estate. But if *A* holds for seven years, does he perfect a life estate for the life of *B*, which will be complete for purposes of bringing actions of ejectment,[27] or will he only acquire the peculiar defensive or possessory interest provided for in section 8584, hereinafter discussed?[28] Although section 8582 refers only to the vesting of a *fee* in the adverse claimant, it seems proper to conclude that there can likewise be a vesting of a *life estate* in the adverse claimant and that the interest is not the mere defensive or possessory title under other code sections.[29]

Reversing this situation, a more difficult problem is presented. Suppose that *A* holds land adversely for seven years under recorded color of title which purports to give him a life estate with a remainder over to *B*, and that *C* is the real owner in fee. Does *A* perfect a title to the life estate of sufficient quality to support actions of ejectment; or does *A* get only the possessory interest provided for in section 8584? Although section 8582 refers only to an assurance of title which purports to convey a fee, there seems to be no valid reason for not giving the benefit of this section to *A*, who holds under color of title which purports to convey to him a life estate. Then, if we say that *A* perfects the life estate and his interest is not merely possessory, does this possession inure to the benefit of those in remainder, perfecting their title also and cutting off the entire title of *C*? The case of *Brown v. Brown*[30] is directly in point here and seems to be the only case in which Tennessee has passed upon this question. Benjamin Brown died leaving a will devising part of his real estate to his wife for her life with a remainder in fee to defendants. The will was probated in common form. Later, in a contest upon the issue of undue influence, the will was adjudged to be invalid. The administrator brought suit to recover property in the hands of devisees and legatees. The statute of limitations was pleaded. It was held that the defendant remaindermen had good title

26. See note 70 *infra*.

27. In Tennessee, the complainant can not succeed in ejectment unless he is able to show both the legal title and the right to immediate possession. Brier Hill Collieries v. Gernt, 131 Tenn. 542, 175 S.W. 560 (1914); Hubbard v. Godfrey, 100 Tenn. 150, 47 S.W. 81 (1898) (showing that the law is otherwise in those states retaining the common law possessory action); *see* King v. Coleman, 98 Tenn. 561, 566, 40 S.W. 1082, 1084 (1897); Langford v. Love, 35 Tenn. 308, 312 (1855). And the defendant may successfully defend the suit by showing a better outstanding legal title in a third person. Crutsinger v. Catron, 29 Tenn. 24 (1848); *accord,* Campbell v. Campbell, 40 Tenn. 325 (1859).

28. See note 33 *infra*.

29. *Accord,* Guy v. Culberson, 164 Tenn. 509, 51 S.W.2d 500 (1932); Quarles v. Arthur, 33 Tenn. App. 291, 231 S.W.2d 589 (E.S. 1950).

30. 82 Tenn. 253 (1884).

within the meaning of section 8582. The court said: "The interests of the tenant for life and in remainder constitute one estate, the two, when added together, being equal to an estate in fee."[31] But there was a forceful dissent which said, concerning the interpretation of the section, that each estate must stand on its own possession.[32]

B. *The Seven-Year Defensive or Possessory Title Statute*

If the adverse claimant does not hold under an assurance of title, or having one, it is not recorded, section 8584[33] gives him, after seven years' adverse possession, what has been called by the courts a defensive or possessory title.[34] This defensive title must be specially pleaded,[35] whereas title acquired under the preceding sections need not be specially pleaded.[36] Though it does not expressly so provide, this section has been interpreted to mean that color of title is not necessary.[37] The law on this point is stated clearly in *Peoples v. Hagaman*[38]: "It is true we have two statutes of limitations of 7 years, one requiring a color of title and the other, the one here relied upon, based purely upon adverse possession without benefit of title." What is the effect of holding land under this section? The title is good as a defense to actions of ejectment.[39] Its possessory nature gives the adverse claimant the right to protect his interest by bringing actions of trespass, forcible entry and detainer, and in some cases by injunction,[40] but the rights obtained under this section are not sufficient to support actions for ejectment, which in Tennessee requires proof of a legal title.[41] Such an interest is not liable to execution;[42] nor is it alienable or descendable,[43] except in the sense that the prior possessions may be tacked.[44]

31. *Id.* at 255.

32. *Id.* at 259.

33. "No person or any one claiming under him, shall have any action, either at law or in equity, for any lands, tenements, or hereditaments, but within seven years after the right of action has accrued." TENN. CODE ANN. § 8584 (Williams 1934).

34. Kittel v. Steger, 121 Tenn. 400, 117 S.W. 500 (1908); Moffitt v. Meeks, 29 Tenn. App. 609, 199 S.W.2d 463 (M.S. 1946), 20 TENN. L. REV. 214 (1948); see Ferrell v. Ferrell, 60 Tenn. 329, 334 (1872).

35. Jones v. Mosley, 29 Tenn. App. 559, 198 S.W.2d 652 (M.S. 1946).

36. Southern Iron & Coal Co. v. Schwoon, 124 Tenn. 176, 135 S.W. 785 (1910).

37. Peoples v. Hagaman, 31 Tenn. App. 398, 215 S.W.2d 827 (E.S. 1948); Moffitt v. Meeks, 29 Tenn. App. 609, 199 S.W.2d 463 (M.S. 1946), 20 TENN. L. REV. 214 (1948).

38. 31 Tenn. App. 398, 402, 215 S.W.2d 827, 828 (E.S. 1948).

39. Kittel v. Steger, 121 Tenn. 400, 117 S.W. 500 (1908); Peoples v. Hagaman, *supra* note 38; *cf.* Erck v. Church, 87 Tenn. 575, 11 S.W. 794, 4 L.R.A. 641 (1889).

40. Liberto v. Steele, 188 Tenn. 529, 221 S.W.2d 701 (1949), 3 VAND. L. REV. 337 (1950).

41. See note 27 *supra.*

42. *See* Crutsinger v. Catron, 29 Tenn. 24, 30 (1848).

43. *Ibid.*

44. *See* Marr v. Gilliam, 41 Tenn. 488, 510 (1860).

What is the effect upon the adverse claimant's defensive title if he is dispossessed by the title holder or some third party? It would seem that the adverse claimant loses all his claims to the land the moment possession is lost or abandoned, inasmuch as this section only gives him a defense to court action.[45] But, as noted later,[46] if the adverse possession is continuous and uninterrupted for as long as twenty years, although not under color of title, the adverse claimant will get full title by the common law presumption of a grant.

C. *The Act of 1923*

Section 8586,[47] taken from the Act of 1923,[48] is supplemental to section 8582. It provides that where land has been held adversely for seven years under an assurance of title purporting to convey a fee which has been recorded for thirty years, the adverse claimant will acquire an indefeasible title in fee. Under this legislation, the adverse claim is not affected in any way by disabilities of the true owner,[49] and the title of the state is not exempt from the operation of the statute.[50] Under section 8582, title can not be acquired against persons under disability or against the state. In order to get the supplemental benefit of section 8586, the color of title must have been recorded for thirty years instcad of the seven years required by section 8582. This disallowance of disabilities is in accord with the basic policy of quieting titles.[51] There has been little litigation concerning the application of these sections,[52] and there are very few cases in which title has been set up by this means. The paucity of cases possibly indicates that the saving force of this legislation is not very widely appreciated.

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45. *See* Marr v. Gilliam, *supra* note 44, at 510; Crutsinger v. Catron, 29 Tenn. 24, 30 (1848).

46. See note 54 *infra.*

47. "Any person holding any real estate or land of any kind or any legal or equitable interest therein, and such person and those through whom he claims having been in adverse possession of same for seven years, where said real estate is held and claimed by him or those through whom he claims by a conveyance, devise, grant, a decree of a court of record, or other assurance of title purporting to convey an estate in fee, and such conveyance, devise, grant, or other assurance of title, has been recorded in the register's office of the county in which the land lies for a period of thirty years or more or such decree entered on the minutes of such court for a period of thirty years or more, is vested with an absolute and indefeasible title to such real estate or interest therein." TENN. CODE ANN. § 8586 (Williams 1934).

48. Tenn. Pub. Acts 1923, c. 90.

49. TENN. CODE ANN. § 8587 (Williams 1934).

50. *Ibid.*

51. See note 5 *supra.* See Ballantine, *Title by Adverse Possession,* 32 HARV. L. REV. 135, 145 (1918) where the author says: "The efficiency of the doctrine of adverse possession in quieting titles is greatly impaired by reason of two exceptions to the operation of the statute, *viz.,* that of disabilities and that of future estates."

52. Guy v. Culberson, 164 Tenn. 509, 51 S.W.2d 500 (1932) (sections inapplicable to remaindermen); Quarles v. Arthur, 33 Tenn. App. 291, 231 S.W.2d 589 (E.S. 1950).

D. *The Common Law Presumption of a Grant*

The courts of Tennessee, independently of the statutory limitations, and in analogy to the doctrine of prescription, have held that where one has remained in uninterrupted and continuous possession of the land for a period of twenty years, a grant or deed will be presumed.[53] So if the possessory claimant lacks recorded color of title and is not able to make out title under section 8582, he may still establish title by presumption of a grant.[54] A title so acquired is sufficient to support actions for ejectment.[55] Some older cases have indicated that the presumption is not conclusive like that in prescription,[56] and that it can be rebutted by showing that the issuance of the grant in a particular case was a legal impossibility.[57] Even though as a practical matter it would be nearly impossible to rebut the presumption, still these statements do not appear to be sound. The presumption of a grant is really not an evidentiary presumption but a rule of law which has been adopted to further the policy of quieting titles to land.

The case of *Ferguson v. Prince*[58] has pointed out two important differences between setting up title by presumption of a grant and perfecting title under section 8582. In that case a grantor transferred possession of land, part of which was described in the deed to the grantee and part of which was not described in the deed but which had been held adversely by the grantor. There was no evidence showing an intent on the part of the grantor to convey the part adversely held, but this part was used by the grantee in connection with that conveyed by the deed. The court held that no privity existed between grantor and grantee as to this part so as to make out title under section 8582,[59] but that title could be established on the theory of presumption of a grant. The court said that when presumption of a grant is relied upon it need not be shown that there was any legal privity between the successive occupants, the only requirement being the absence of any gap between the possessions.[60] This seems to be a loose

53. Ferguson v. Prince, 136 Tenn. 543, 190 S.W. 548 (1916); Williams v. Donell, 39 Tenn. 695 (1859); Cannon v. Phillips, 34 Tenn. 211 (1854); *accord,* Hanes v. Peck's Lessee, 8 Tenn. 228, 231 (1827); *see* Dunn v. Eaton, 92 Tenn. 743, 753, 23 S.W. 163, 165 (1893).

54. Ferguson v. Prince, *supra* note 53; Cannon v. Phillips, *supra* note 53.

55. Cannon v. Phillips, *supra* note 53.

56. See note 8 *supra.*

57. *See* Marr v. Gilliam, 41 Tenn. 488, 501 (1860); Williams v. Donell, 39 Tenn. 695, 698 (1859); Hanes v. Peck's Lessee, 8 Tenn. 228, 236 (1827).

58. 136 Tenn. 543, 190 S.W. 548 (1916).

59. Many courts, including those of Tennessee, have held that there must be some evidence that the grantor intended to transfer possession to the additional land. Ferguson v. Prince, 136 Tenn. 543, 190 S.W. 548 (1916); Erck v. Church, 87 Tenn. 575, 11 S.W. 794, 4 L.R.A. 641 (1889); *see* Peoples v. Hagaman, 31 Tenn. App. 398, 405, 215 S.W.2d 827, 830 (E.S. 1948). Perhaps it is better to say that privity should be inferred from the change in possession. See Note, 36 CORNELL L.Q. 769 (1951).

60. Ferguson v. Prince, *supra* note 59, at 556, 190 S.W. at 552.

statement and should not be extended beyond the facts of the case. The other difference noted in the case is the figuring of disabilities or ascertaining the time during which the true owner's rights and remedies are not affected by the running of time.[61]

E. *When Do the Limitation Periods Run?*

Generally, the statutory period of limitation starts to run at the time the cause of action accrues. However, the statute, as a general rule, will not begin to run against persons under a disability at the time the cause accrues until the removal of the disability. In Tennessee, the statute begins to run against persons under disability when the cause accrues, but section 8574[62] provides that a minor or a person of unsound mind shall have three years after removal of disability in which to bring his action, unless the statute as computed from the accrual of the cause gives a longer period. This three-year saving statute for minors and persons of unsound mind has no application when title is set up on the theory of presumption of a grant.[63] There the time during which the disability existed is subtracted from the total time of adverse possession.[64] As already observed,[65] when title is set up under section 8586, disabilities are disregarded even though existing at the time the eause accrued.

To illustrate these different computations, assume that *B* has held land adversely for six years, at which time *A,* the true owner, reaches 21. *B* continues in possession. When *A* reaches 23, he becomes of unsound mind, remaining in such a state for five years when he is adjudged sane. (1) If *B* is able to satisfy the requirements of either section 8582 (the color-of-title statute) or section 8584 (the defensive-title statute), *A*'s action would be barred after nine years of adverse possession, or when *A* reached 24. The three-year statute for minors and persons of unsound mind would apply to give *A* three years after removal of minority, since the disability existed when the cause of action accrued. The supervening disability of insanity is disregarded because it did not exist at the time the cause accrued. (2) If *B* attempts to set up title on the theory of presumption of a grant, *A*'s action would not be barred until 18 years after the

61. See notes 63, 64 *infra.*

62. "If the person entitled to commence an action is, at the time the cause of action accrued, either (1) within the age of twenty-one years, or (2) of unsound mind, such person, or his representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three years, and in that case within three years from the removal of such disability." TENN. CODE ANN. § 8574 (Williams 1934).

63. Ferguson v. Prince, 136 Tenn. 543, 190 S.W. 548 (1916).

64. Ferguson v. Prince, *supra* note 63; *see* Scruggs v. Baugh, 3 Tenn. App. 256, 263 (M.S. 1926).

65. See note 49 *supra.*

removal of the second disability of insanity. The six years of minority and the five years of insanity are counted out, and there must remain 20 years of adverse possession after this deduction before *A*'s action is barred and *B* gets full title. (3) If *B* is able to satisfy the requirements of section 8586 by holding under a color of title which has been recorded for thirty years, *A*'s action would be barred after a lapse of seven years or when *A* reached 22, all disabilities being disregarded.

The three-year period was intended as an additional grace period, and not intended to cut down the time fixed by the statute.[66] For example, assume that *B* has held land adversely for two years when *A*, the true owner, reaches 21. *B* continues in possession until *A* reaches 25 at which time *A* brings an action against *B*. *A* does not, in such a case, have to bring his action within three years after attaining his majority, but may do so within seven years after the accrual of the cause of action.[67]

The question of whether the statute should run against the remainderman before the falling in of the life estate has drawn considerable comment. It is generally said that since the remainderman has no cause of action until the termination of the life estate, the possession can not be adverse to him until the death of the life tenant.[68] But in some states, like Iowa and Nebraska, where the remainderman is given a remedy by statute to remove clouds on title, it is held that the statute begins to run against him at the same time as against the life tenant.[69] In Tennessee, the statute does not run against the remainderman until the termination of the life estate.[70] Nor does section 8586 affect the rights of the remainderman,[71] although it does cut off disabilities and the rights of the state.

IV. APPLICATION OF STATUTES

The courts, in applying the statutes of limitation pertaining to adverse possession, have said that in order to acquire title, the possession must be actual, open and notorious, hostile or adverse, exclusive and continuous for

66. Jackson v. Crutchfield, 111 Tenn. 394, 77 S.W. 776 (1903); *see* Patton v. Dixon, 105 Tenn. 97, 102, 58 S.W. 299, 300 (1900).

67. *Cf.* Jackson v. Crutchfield, *supra* note 66.

68. *E.g.*, Maxwell v. Hamel, 138 Neb. 49, 292 N.W. 38 (1940), 39 MICH. L. REV. 141. See Brittenum v. Cunningham, 310 Ky. 131, 220 S.W.2d 100 (1949), 3 VAND. L. REV. 334 (1950) for a rather novel holding that the statute runs first against the life tenant and after cutting off his rights then begins to run against the remainderman, although the life tenant is still living. The protection of the remainderman has been criticized. See Ballantine, *supra* note 51, at 145; Note, 22 MISS. L.J. 224 (1951).

69. 3 SIMES, FUTURE INTERESTS § 778 (1936).

70. Guy v. Culberson, 164 Tenn. 509, 51 S.W.2d 500 (1932); Quarles v. Arthur, 33 Tenn. App. 291, 231 S.W.2d 589 (E.S. 1950). *See* Dunn v. Eaton, 92 Tenn. 743, 752, 23 S.W. 163, 165 (1893).

71. Guy v. Culberson, *supra* note 70.

the statutory period.[72] In short, adverse possession requires the doing of acts on the land sufficiently pronounced to charge the owner that an adverse claim has been asserted.[73]

The element giving the courts the most difficulty is that of hostility.[74] There is no agreement, particularly in cases involving boundary line disputes, as to what kind of mental attitude satisfies this element. The typical boundary line dispute arises where *A,* mistaken as to the true boundary of his land, encroaches upon and encloses adjacent land belonging to *B.*[75] Can *A* acquire title to the disputed land if he took possession under the mistaken belief that he owned to the extent of the enclosure? Most courts, following what is known as the Connecticut rule,[76] have held that the court will not burden itself by looking into the possessory claimant's mind to see whether he intended to hold to the extent of the enclosure or only to the true boundary. This Connecticut rule is favored by the textwriters.[77] Other courts have practically reached the same result by holding, under what is known as the Missouri rule, that mistake is merely evidential, raising a presumption that the land was held adversely and hostile to the true owner.[78] On the other hand, the Iowa rule holds that title to such land cannot be acquired if taken under mistake, and permits inquiry into the possessor's mind to determine intent.[79] The Tennessee courts, following the Connecticut rule on the authority of the leading case of *Erck v. Church,*[80] have held that an actual, open and exclusive enclosure of the land in dispute, although taken and held by accident or mistake, is sufficient to vest title by

72. *See, e.g.,* Armstrong v. Morrill, 14 Wall 120, 145, 20 L. Ed. 765 (U.S. 1871); Cowan v. Hatcher, 59 S.W. 689, 691 (Tenn. Ch. App. 1900). Some few states by statute require in addition to these "common law" elements the payment of all taxes and assessments during the period of the adverse occupancy. See 2 C.J.S., *Adverse Possession* § 171 n.94 (1936). For a discussion on this requirement of the Indiana statute, see Gavit, *In Defense of the Indiana Adverse Possession Act of 1927,* 4 IND. L. J. 321 (1929).

73. It has been said that the adverse possessor "must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest." Willamette Real-Estate Co. v. Hendrix, 28 Ore. 485, 42 Pac. 514, 517 (1895).

74. See, generally, on hostility of possession, 4 TIFFANY, REAL PROPERTY §§ 1142 *et seq.* (3d ed. 1939); Sternberg, *The Element of Hostility in Adverse Possession,* 6 TEMPLE L.Q. 207 (1932).

75. For a compilation of cases on this subject, see Notes, 97 A.L.R. 14 (1935).

76. For an analysis of the various rules, see Sternberg, *supra* note 74.

77. Darling, *Adverse Possession in Boundary Cases,* 19 ORE. L. REV. 117 (1940); Sternberg, *supra* note 74; Notes, 26 KY. L.J. 248 (1938), 11 ROCKY MT. L. REV. 214 (1939), 3 VAND. L. REV. 337 (1950), 15 VA. L. REV. 498, 501 (1929), 4 WIS. L. REV. 41 (1926). See Note, 7 ORE. L. REV. 329 (1928), discussing the distinction taken by the Oregon courts between cases of "conscious doubt" as to the location of boundary and cases of "pure mistake" where the courts make an inquiry into the possessory claimant's mind.

78. See Sternberg, *supra* note 74, at 218.

79. See Bordwell, *Mistake and Adverse Possession,* 7 IOWA L. BULL. 129, 137 (1922), for a criticism of the rule in Iowa law.

80. 87 Tenn. 575, 11 S.W. 794, 4 L.R.A. 641 (1889).

adverse possession.[81] A possible way to help simplify the law on this point is first to see whether the original owner has a cause of action. If the enclosure is made under the permission, express or implied, of the original owner, then there would be no trepass which would give rise to a cause of action. The statute of limitation would not start running until demand was given to vacate the disputed strip. If the enclosure is made without the permission of the original owner, then a cause of action would exist and the possession should be considered adverse.

The courts have also said that the possession must be continuous for the statutory period;[82] if the continuity of possession is broken, a new statutory period will begin to run. The continuity may be broken in some states by re-entry of the true owner,[83] and in all the states the period may be broken by proper legal proceedings brought by the owner. Generally, the continuity can not be broken so that a new period will run until a final judgment is obtained in favor of the true owner. Mere commencement of the suit will suspend the statute only as far as that particular proceeding is concerned. A few states require, in addition to the final judgment, a change in possession.[84] Tennessee provides by statute that title may be acquired if no action is "commenced within that time and effectually prosecuted,"[85] which probably means that a final judgment must be obtained. But Tennessee, like many other states, also provides that if the suit is commenced within the prescribed time but dismissed without a final determination on the merits, or if a judgment, given in favor of a plaintiff, is arrested or reversed, then the plaintiff will have a period of one more year after such dismissal, arrest or reversal in which to bring another action, even though the limitation period expires in the meantime.[86]

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81. Liberto v. Steele, 188 Tenn. 529, 221 S.W.2d 701 (1949), 3 VAND. L. REV. 337 (1950); Williams v. Hewitt, 128 Tenn. 689, 164 S.W. 1198 (1913); Peoples v. Hagaman, 31 Tenn. App. 398, 215 S.W.2d 827 (E.S. 1948); *cf.* Gates v. Butler, 22 Tenn. 447 (1842). *But cf.* Buchanan v. Nixon, 163 Tenn. 364, 43 S.W.2d 380, 80 S.L.R. 151 (1931), setting up the tenuous distinction that when the boundary line fence is set up not by the possessory claimant but by the tenant of the true owner inside the true owner's boundary without intention of fixing a property line no title can be acquired by adverse possession. The court says that a contrary holding on the facts of the particular case would "discard the last vestige remaining of the essentiality of intent in the application of the doctrine of adverse possession." *Id.* at 371, 43 S.W.2d at 382. See Gibson v. Shuler, 29 Tenn. App. 166, 194 S.W.2d 865 (E.S. 1946), apparently following the Missouri rule, the presumption being used in the absence of positive or unambiguous circumstances.

82. See, generally, Taylor, *Continuity in Adverse Possession of Land*, 27 IOWA L. REV. 396 (1942).

83. *Id.* at 400.

84. *Id.* at 408.

85. TENN. CODE ANN. § 8582 (Williams 1934).

86. *Id.* § 8572.

V. Conclusion

The Tennessee courts have been unnecessarily burdened with the interpretation and application of ambiguous statutes; in consequence, the material to be found on adverse possession is voluminous and difficult to analyze. Yet the law on this subject seems to satisfy present day needs and is basically in accord with the policy of quieting titles. The method by which title may be acquired regardless of disabilities seems desirable. The seven-year defensive or possessory title statute, although peculiar in its nature, tends to encourage use and development of rural and mountainous lands. The presumption of a grant affords a way for one, having no color of title, to acquire more than a mere possessory interest. The rule in Tennessee that adverse possession cannot run against the remainderman before the termination of the life estate seems to be the better view. However, there does not appear to be any reason why the courts, in figuring the time during which the owner is not bound by the running of the statute because of disabilities, should make a different computation when title is set up by presumption of a grant than when it is set up under section 8582. Nor is any reason apparent why the court should dispense with privity in the former and require it in the latter. The law should not dispense with privity in either theory.

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