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KENTUCKY RULE AS TO TACKING INTERESTS IN ADVERSE POSSESSION

An adverse possession may ripen into title when such possession is open, notorious, exclusive, hostile, continuous and uninterrupted for the full statutory period of fifteen years in Kentucky.¹ It is not necessary that an adverse possession should be maintained for the statutory period by one person. However, before successive possessions can be tacked, there must exist a privity of estate or connection of title between the several occupants. This was early decided (1831) in the case of *Winn v. Wilhite*.² Chief Justice Robertson in delivering the opinion of the court said, "It is not necessary that it (possession) should have continued in one person, or in the same right. But it must have been adverse throughout, and when held by different persons, there must be some privity between them."

The entry of the succeeding occupant must be with the consent of his predecessor, evidenced by a conveyance or understanding the purpose of which is to transfer the rights and possession of the adverse claimant, or it must be by an act of law passing the estate from the latter to the former. The transfer must be accomplished by an actual delivery of possession. The moment the possession is broken it ceases to be effectual because, as soon and as often as a break occurs, the law restores the constructive possession of the owner.³ The cases of *McKee v. Morgan*⁴ and *Braxdale v. Speed*⁵ decided in 1817 are decisive on this point.

The court in the course of its opinion in the latter case said that the person claiming the title by adverse possession must show continued, uninterrupted possession for the statutory period, and that occasional acts of ownership as cutting of timber upon the land would not amount to such continued possession and occupancy.

In *Shannon v. Kinney*,⁶ a younger brother of the patentee, entered after the patentee had been killed by Indians and settled

¹ Kentucky Statutes, Sec. 2505.

² 5 J. J. Marsh. 521.

³ 3 A. K. Marsh. 365.

⁴ 1 A. K. Marsh. 62.

⁵ 1 A. K. Marsh. 105.

⁶ 1 A. K. Marsh. 3.

on the land claiming it as his own, and remained there twenty years, then surrendered the possession to the defendant, who had not had the land in possession for the required statutory period prior to the commencement of the suit. Under this state of facts the right of entry was tolled. "Nor can it, in the reason and nature of things, produce any difference whether the possession be held uniformly under one title or at different times under different titles, provided the claim of title be always adverse to that of the plaintiff, nor whether the same be held by the same or a succession of individuals provided the possession be a continued and uninterrupted one." And in *Bowles v. Sharp*,⁷ the question as to holding under color of title was answered by the Court of Appeals in the following language: "Nor is it necessary that an adverse possession should be held under color of title, in order to render it transferable; for a mere intruder, abator, or disseisor may transfer his possession."

In the late case of *Arthur v. Humble*⁸ the Court held that when a squatter on land removed therefrom, the same amounted to an abandonment of his possession, and whatever benefit accrued under it could not be seized upon by a stranger in title to him, nor be coupled by the stranger to his possession so that fifteen years of the two combined could oust the title of the true owner. In this instance there was no writing or memorandum of a conveyance from the squatter to the claimant; and in the absence of such, there could have been no sale of the squatter's "possession." Soon after the decision in this case, the Court of Appeals was called upon to render a decision in *White v. McNabb*⁹ involving, in addition to other points, the main point of contention that had been before the court in *Arthur v. Humble*. The appellees in an action of ejectment claimed a certain five acre tract of land on which there was a coal bank, and from which they had dug coal over a period of twenty years. The appellants had been in possession for five or six years prior to the commencement of the suit. In reversing the decision of the lower court, the Court of Appeals made use of the following language: "To acquire title in this manner (by adverse possession) the adverse possession must not only be actual, but so continued as to

⁷ 4 Bibb. 550.

⁸ 140 Ky. 56, 130 S. W. 958.

⁹ 140 Ky. 828, 131 S. W. 1021.

have furnished a cause of action every day during the whole period. Different and distinct periods of possession can not be added to constitute a bar." However, "Possession to toll a right of entry need not be continued in the same person nor under the same title for the whole time." *Riddle v. McBee*.¹⁰

In addition to the privity of estate that must of necessity exist between those persons holding successive possessions there is a further requirement. This is specially noted in *Hughes v. Owens*.¹¹ "It is not necessary only that the claimant should have been in adverse possession of the boundary for fifteen years, but that this possession was adverse, open and continuous to a well defined marked boundary."

The decision in the early case of *Winn v. Wilhite*, supra, has been generally followed. Quoting further from that case: "A trespasser without color of title can only count his own possession, and can not connect himself with any prior possessor." In the case of *Griffith v. Dicken*,¹² where the adverse possession set up by the defendant lacked two days of having run the statutory period, it was held that the right of entry was not tolled since the defendant, having entered as tenant when the land was vacant, could not connect his possession with any previous tenancy which had ceased when he entered. And in *Bell v. Fry*,¹³ the court held that the five or six years' adverse possession of the defendant could not be tacked to the sixteen years prior possession of squatters. The latter held under the legal title, and their possession inured to its benefit. The instant the squatters left, the law restored the constructive possession of the owner of the legal title.

In the case of *Beal v. Brooks*,¹⁴ where the defendant wished to tack his five years' possession to the seventeen years' possession of his ancestor, who was a vendee under an executory contract, the court in holding said that "... no man should be permitted to buy up the claim of the vendee of land holding under an executory contract; and by so doing, convert the

¹⁰ 4 Ky. L. R. 898.

¹¹ 29 Ky. L. R. 140, 92 S. W. 595.

¹² 4 Dana. 561.

¹³ 5 Dana. 341.

¹⁴ 7 J. J. Marsh. 232.

friendly possession subsisting between the vendor and vendee into a possession adverse to the vendor's rights."

In *Roark v. Reed*,¹⁵ the appellee, though unable to show a paper title to the land that he had bought at an execution sale ten years prior, was permitted to tack the thirty years adverse possession of his vendor to that of his own and thus establish his title.¹⁶ In *Mills v. Bodley*,¹⁷ there were conflicting patents, the complainant claiming under a valid junior patent. The ancestor had entered under the senior patent and died leaving his widow and children in possession. The complainant agreed not to disturb the widow. However, she did not acknowledge that the land belonged to the complainant. It was adjudged that the residence of the ancestor, and the continued occupancy of the widow could be tacked and of this the heirs could avail themselves. The court here remarked: "We are not disposed to admit that the widow had the right to convert the adverse possession into a friendly one, without their (the heirs') concurrence, so as to prevent them from relying on a lapse of time as a bar to relief against their title." The case of *Tippenhauer v. Tippenhauer*,¹⁸ decided in 1914, involved a similar question.

In the much cited case of *Botts v. Shields*,¹⁹ where the appellant entered upon the land in controversy under a claim adverse to both the junior and senior patentees, and later contracted with one of the junior patentee's heirs for the claim of the junior patentee, the court ruled that the contract ought not to be construed to convert the appellant into a tenant of the heirs, or give to the heirs the benefit of the original possession of the appellant, the same being adverse to their claim.

Actual possession on a part of the land not covered by a senior patent can not be tacked so as to cover the land included within the interfering patent without an actual occupancy of it. "The only way a title may be acquired by the patentee of the interfering patent to the land covered by the lap is by an actual occupancy of it, claiming it to well defined and marked

¹⁵ 148 Ky. 172, 146 S. W. 1.

¹⁶ See also *Jarboe v. McAtee*, 7 B. Mon. 279.

¹⁷ 4 T. B. Mon. 248.

¹⁸ 155 Ky. 639, 166 S. W. 225.

¹⁹ 3 Litt. 32.

boundaries continuously and adversely for the statutory period of fifteen years.'²⁰

Several cases have recently come before the Court of Appeals directly involving the question under discussion, and the opinions in these cases with the rules enunciated in the earlier cases have assisted in removing any doubt as to the present state of the law in Kentucky.

In *Big Blaine Oil & Gas Company v. Yates*,²¹ decided in 1918, was a case where the husband deserted his wife and children, and a tract of fifty acres of land was entered upon by the oldest son. This son held for five or six years, then sold to his mother, who remained upon the tract until her death. The court here held that the wife as transferee from an adverse holder could hold the land adversely to her husband, and that title would become perfect if the character of her occupancy was such as to be adverse, and it with that of her transferor completed the statutory period. While in *Sackett v. Jeffries*,²² decided in 1919, where there were several periods of a year or less when the appellant and his predecessors did not have the actual possession of the land in controversy, or any part thereof, during the period of fifteen years upon which he relied for the perfection of his title, the court said: "Possession must not only be actual but it must be open, notorious, continuous, adverse and peaceful for every hour of every day of the whole fifteen year period. . . . Different and distinct periods of possession can not be tacked to establish a bar so as to constitute title by adverse possession." In *Osborn v. Roberts*,²³ also decided in 1919, the defendants were not permitted to tack a prior possession of their father to an adverse possession of their own. They had entered the land in controversy in the absence of the plaintiff and raised two crops of corn, and claimed the land by adverse possession for the statutory period by a prior possession of their father. Here it is shown that whatever possession and claim of title the father had of the land were by written agreement relinquished by him to the plaintiff's vendor about seven years before the suit was filed, and following this re-

²⁰ 173 Ky. 220, 190 S. W. 1063.

²¹ 182 Ky. 45, 190 S. W. 1062.

²² 182 Ky. 696, 207 S. W. 454.

²³ 186 Ky. 160, 216 S. W. 359.

linquishment by their father, the land was not inclosed and grew up in bushes. The court held in this instance that there was a "break in continuity, within the statutory period."

It is readily seen from the decisions in the above cases, which decisions have been repeatedly followed by the highest court of many of our sister states, that the fundamental question of law involving the tacking of possessions in order to complete the statutory period of adverse possession, have been settled with a certainty that should leave little doubt as to the future holdings of the Court of Appeals.

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