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PRESCRIPTIVE RIGHTS AGAINST MUNICIPALITIES IN KENTUCKY

By HARLAND J. SCARBOROUGH

Before discussing the Kentucky decisions on this question it may be well to state that judicial judgments in this country are not in harmony upon the question as to whether the rights of municipalities or of the public may be lost by non-user and adverse possession. Also we should note that while some of the courts do not hold that the statutes of limitation are a bar to an action by a municipality, yet these same courts hold that non-user may continue so long, and consequently private rights may grow up of such a nature, as to create or to amount to an equitable estoppel or an estoppel in pais,1 which these courts will enforce as a matter of right or justice; while other courts have emphatically denied the applicability of such doctrine to public rights. By the great weight of authority, *nullum tempus accurrit regi* applies to the sovereign power, and the United States as well as the several states are not, without express provisions, bound by the statutes of limitations.

There is a pretty general agreement in the decisions that the statutes of limitations will run against the municipalities as to property held by them in their proprietary or private rights as distinct from their public or governmental capacity;2 but the general doctrine is that no title by adverse possession can be acquired against a city as to property which it holds for a public use, such, for example, as its streets. The ruling being that the city is the mere trustee for the public; that cities cannot authorize the erection of obstructions in the public streets; that unauthorized obstructions or structures thereon are public nuisances and that no length of time can, unless there be a limit by statute, legalize a public nuisance; that if this were not so public rights would be gradually frittered away, there being no one sufficiently interested to exercise the vigilance necessary to

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protect the public interest; since in many instances there would be a lack of public official watchfulness, and individuals would be too slightly interested to make objections, preferring rather to tolerate encroachment upon public property than to dispute the right of their neighbors.

In an Ohio decision Judge Minshall, C. J., said: "The general rule is that the statute of limitation does not apply as a bar to the rights of the public unless expressly named in the statutes, for the reason that the same active vigilance cannot be expected of it as is known to characterize that of a private person always jealous of his rights and prompt to repel any invasion of them." The earlier cases in Ohio which seem to have held a contrary doctrine may be put upon the ground of estoppel. Illinois allows estoppel in pais although it refuses to accept the doctrine that the statutes of limitations run against the city. The early decisions of West Virginia allowed the statutes of limitations to run against the city, but a later decision expressly overruled the doctrine and even went further and denied that equitable estoppel could be urged against the city. But while the foregoing is the general rule as applied in most states, the contrary rule is held in Arkansas, Kentucky, Michigan, and in a form modified by statutes in Massachusetts, Connecticut and New York. Up until 1873 the decisions in Kentucky show that the statutes of limitations may run against the municipality practically the same as against individuals. In the case of Rowan's Executors v. Town of Portland the question arose in the situation where the owner of land had recorded a plat of it, dedicating the same to the town of Portland on the Ohio river, later adversely occupied by it by constructing a wharf and charging toll for wharf privileges. The court held that he might thus gain title against the city by adverse possession. This decision announced the rule that had been followed in Kentucky until the legislature in 1873 passed the act providing that before possession of a street or alley shall be deemed adverse, the party

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4 Cincinnati v. First Presbyterian Church, 8 Oh. 299; Cincinnati v. Evans, 5 O. S. 594.
6 3 B. Mon. 232.
7 Ky. Statutes, 2546.
must give written notice to the municipal authorities that his holding is adverse. Other cases supporting the doctrine may be found in the note below.\(^8\) The case of *City of Henderson v. Yeaman, et al.*,\(^9\) was an action to quiet title to a strip of land appropriated by the plaintiff’s grantor to and claimed by the city of Henderson to have been dedicated as a street, if not a street at the time of the appropriation the right to claim it by adverse possession, and it was held that it was controlled by Kentucky Statutes, section 2505, providing that an action for the recovery of real property must be brought within fifteen years after the right to institute it first accrued to the plaintiff or to the person for whom he claims. The case holds that where a street was set apart and dedicated as a public way when the town was laid out, the fact that the city did not take actual physical possession of, or control or improve the street or that it was not used by the public, will not work an abandonment of the street or affect the city’s right to reclaim it against an adverse holder without some affirmative act by the city manifesting a purpose to abandon. In *Bosworth v. City of Mt. Sterling, supra*, it was held that the act of 1873, *supra*, required written notice from the person in possession of any street or alley to the town council that his possession is adverse in order to start the running of the statutes of limitations, applies to those in possession of any street at the time of its passage if the possession had not then ripened into title. A city cannot recover a strip of land enclosed and occupied by defendants for twenty years, during which time the city has paved in front of the strip and made no claim to it, thereby recognizing defendant’s title. It was held in *Hegan, et al. v. Pendennis Club, et al.*,\(^10\) that where an alley dedicated for the common use to lots abutting thereon had been adversely used by the owner of one of the lots for more than forty years, the right of the city and the other owner was barred by the statutes of limitations and that Kentucky Statutes, section 210, providing that all sales or convey-


\(^9\) 169 Ky. 503, 184 S. W. 378.

\(^10\) 23 Ky. L. R. 861, 84 S. W. 464.
ances of any lands of which any other person has adverse possession shall be null and void, does not apply to conveyances of private passways and easements though section 458 provides that the word "land" shall be construed to mean "land, tenements, hereditaments and all rights thereto and interest therein other than a chattel interest." Moody-Mitchell Lumber and Building Company v. City of Louisville,\textsuperscript{11} held that since plaintiff had not complied with statutes, section 2546, and predecessor in title had not held adversely that plaintiff's possession was not adverse. In Cornwall, et al. v. City of Louisville,\textsuperscript{12} a designated portion of land was ceded to a city for the use of a railroad company on a condition that no more land was to be taken for that purpose. Afterward the company instituted a proceeding under the statute to have additional land condemned, and it was held that while the right of eminent domain cannot be impaired by any private contract, the court should prescribe such terms as would insure to the property owner a just compensation for the land ceded under the contract. When a person has been permitted to remain in continuous adverse and active possession of a public street for more than thirty years the title vests absolutely in him.

In Home Laundry Company, et al. v. City of Louisville, et al.,\textsuperscript{13} involving the situation in which in 1851 the general council of a city adopted a resolution authorizing a mayor to give eight feet of the city land in the rear of the court house lot for public use provided the owners of property on the north side of such strip would dedicate eight feet for public use and provided the street was only to be used by pedestrians and not for wagons, carts and drays. The city as a private owner of property and the other abutting property owners thereupon executed a deed dedicating such strip as a street denominated "Court Place" with no provision that it was to be used by pedestrians only. There was no formal acceptance by ordinance of the general council, but the city as a governmental entity took charge and control of such place and improved it at the cost of the abutting owners, including the city, paved it as a sidewalk or passage and

\textsuperscript{11} 169 Ky. 237, 183 S. W. 481.
\textsuperscript{12} 87 Ky. 72, 7 S. W. 553.
\textsuperscript{13} 168 Ky. 499, 182 S. W. 645.
thereafter for many years its use was limited to pedestrians and neither the public nor abutting property owners used it as a carriage way. The court said that "It is, however, the law of this jurisdiction that a municipality or the public may acquire the right to the use of a street by adverse use, and having acquired the right to use the street may lose it by the adverse use of another. The municipality in its governmental capacity holds the street in the nature of a trustee for the public and the public may acquire easement in a street through the action of the municipal authorities for the benefit of the public, or by adverse use by the public for the statutory period. Upon the other hand, an individual may by adverse possession for the statutory period of lands dedicated to the public use, acquire title to them. . . . The principle allowing the acquisition in streets by adverse user of the public and the law of such easements by the public by adverse possession of another over the street dedicated to the public use remains unchanged except for the statutes of 1873, which provide that the statutes of limitations would not begin to run in favor of an individual against a town or city for the use or possession of a street until the party whose rights or interests to rely upon such adverse possession of it has given the authorities of the municipality notice of his intentions." The peculiar rights of an abutting property owner for the use of a street for ingress and egress to and from the property with teams and vehicles is a private right of his own and one not shared by the public with him, and the municipality does not hold such right as a trustee for him, hence, it is a right which he may lose by adverse use under circumstances which justify the enforcement of that doctrine, hence, when the municipality in 1853 accepted the dedication of ‘Court Place’ for public use as a street for pedestrians only, and was so taken control of by the municipal authorities and so constructed as to constitute notice to the public and to every one, that its use was limited to pedestrians as the street in the nature of a sidewalk and not the use of vehicles, the abutting property owners then had the right to enforce the conditions of the dedication and to require its construction in such a way that it could be used as an authorized

14 Ky. S., 1915, 2546.
street over which they could use vehicles. . . . The action of the municipality in constructing and holding the street as a sidewalk for pedestrians only and the use made of it by the public of such was open, visible, notorious, continuous and necessarily adverse and hostile to the claim of an easement by the abutting property owners to drive teams and vehicles over it. When a municipality through its officers and agents takes and holds lands for a street adversely to the rights of an owner in fee for the statutory period accompanied by the use of it by the public in the manner necessary to create an easement by prescription in the street, the title to its use as a street becomes fully vested in the public. The physical characteristics of such street and the manner of such construction of its use having been a notice to each succeeding abutting property owner to the use to which it was limited, one designing to acquire property on it could not have been misled as to the use which he could make of it and was estopped to complain that he was not permitted to use it for vehicles."

In *City of Franklin v. St. Mary’s Roman Catholic Church* the city had dedicated certain land to the use of a cemetery and had marked certain portions of same for the use of the Catholic church, and while the testimony was conflicting as to its being set apart for the Catholic church, the court held the evidence to establish title in the Catholic church gained by adverse possession of that certain portion of land claimed by it and that the failure to orally assert adverse title would not prevent acquisition of same, because acts and conduct and not conversation will establish adverse possession, although oral assertion of such title would be admissible; and it was therefore held that the church would be entitled to all such property as it gained title to by adverse possession even though, by reason of the small number of Catholics in the community, only a part thereof was or could be needed for burial purposes. Public property and lands belonging to a municipality may be acquired by adverse possession save as precluded by statute, and notwithstanding Kentucky Statutes, section 2546, limitations run against the right of a city to recover title to a portion of a cemetery held adversely, the term easement

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18 Ky. 161, 221 S. W. 503.
meaning the right in the land of another which cannot exist in favor of a person in lands which he himself owns, and does not include lands owned by a city for a cemetery.

Where notice of an adverse claim in and to a dedicated street has not been given since the incorporation of the town having the right to accept under deed of dedication, the statute of limitations did not run against the town.\footnote{\textit{Arn v. Chesapeake & Ohio Railway of Kentucky, et al.}, 171 Ky. 157.}

Municipal corporations may be looked upon as having a dual capacity, one public and one private, that is, a municipal corporation may act in its governmental capacity and it may act in its proprietary or private capacity. The true view would, therefore, seem to be that when a municipality acts in its governmental capacity, the statutes of limitations could not run against it. While on the other hand, if the municipality is acting with respect to property that it does not hold for a public use, but rather in its proprietary capacity, there is no reason why the statutes of limitations should not run against it in reference to this property the same as they run against a private individual. For example, there may be pleaded against a municipality the statutes of limitations in the case of actions on contract or tort, but such a corporation could not alien public streets or places, and mere laches on its part or on the part of that of its officers could not defeat the rights of the public by setting the statutes to running.

There are numerous cases where it has been held that municipalities or minor police subdivisions of the state are not subject to limitation laws in respect to streets and public highways; but streets and highways are not for the use of the inhabitants or any municipality or locality alone, but for the free and unobstructed use of the people of the state. Such rights are clearly distinguishable from the rights or interests of the inhabitants of a locality in property acquired for a merely local use, such as city offices, a library site, or the use of a fire department, where such property is held and used for strictly local purposes.

Generally there would be no difficulty in applying the statutes of limitations, but the difficulty comes in those border line
cases, as we may term them, that is, in those cases where it is hard to determine whether the municipality is acting in its governmental capacity or in its proprietary or private capacity. Once we have determined that it is acting within its governmental capacity, the problem is really solved. This difficulty is illustrated by the case of Brown v. Trustees of School.\(^\text{17}\)

Such circumstances in the situation as that private rights would be acquired and the city by its failure to act allowing these private rights to arise should be in justice and equity estopped to deny such private rights and although the statutes of limitations do not run in favor of the private individual against the city, yet the city would be prohibited from asserting the rights it once had. There is no danger in extending the principle thus far because the city's rights will not be cut off except in those exceptional cases where justice would demand it and the city has been lax in the allowing of such rights to be acquired by the private individual, and to do this would, in all cases, require the courts to decide whether in justice the city's rights have been terminated and not leaving it to mere lapse of time; by such the end of justice would be obtained.

\(^\text{11} \quad 224 \text{ III. 184.}\)