

Land law essay sample

Law



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INTRODUCTION

The phrase adverse possession is a convenient one. We are all familiar with it and the Land Registration Act 2002 continues to use it. Butterworths publish a book by that title. However, the word adverse has tended to confuse. It implies that the squatter should in some way be aggressive towards the paper owner of the property. The House of Lords has now made it abundantly clear that this is not so.

As will be explained below the test is simply: Has the trespasser possessed the land for the requisite period using the ordinary meaning of that word? The case is *J A Pye (Oxford) Ltd v Graham*. The judgment was given on 4 July 2002 and the main speech is that of Lord Browne-Wilkinson. Except where otherwise stated the quotations in this article are from his opinion. In real estate common law, adverse possession is a means of acquiring title to another's real property without compensation, by, as the name suggests, holding the property in a manner that conflicts with the true owner's rights.

Adverse possession requires the actual, visible, hostile, notorious, exclusive, and continuous possession of the property, and some jurisdictions further require the possession to be made under a claim of title or a claim of right. In simple terms, this means that those attempting to claim the property are occupying it exclusively and openly as if it were their own. Some jurisdictions permit accidental adverse possession as might occur with a surveying error. Generally, the openly hostile possession must be continuous without challenge or permission from the lawful owner, for a fixed statutory period in order to acquire title.

Where the property is of a type ordinarily only occupied during certain times, the adverse possessor may only need to be in exclusive, open, hostile possession during those successive useful periods. Fundamentally, adverse possession is an application of traditional statute of limitations. Once the cause of action for trespass arises, the landowner has a certain number of years to bring an action. Once that time has passed, the trespasser can no longer be evicted from the property, since the trespass action is time-barred. Adverse possession does not typically work against property owned by a government agency. It also fails to give any rights if the land is registered under a Torrens title registration system.

GENERAL DISCUSSION

Adverse possession is a means by which someone may acquire title to the land of another through certain acts over a defined period of time (Andrew J. Pain. 1992). Such acts must continue uninterrupted for the time period defined by state laws, which vary by state. In general, the acts of possession must be overt, hostile, exclusive, uninterrupted, and under a claim of right, etc., so as to give the owner or others claiming entitlement to possession notice and an opportunity to counter the adverse possession. Adverse Possession is squatting, basically, and it occurs in many countries. Adverse Possession is an interesting legal fiction.

This is the name given to a rule of law which said that if a person takes over a piece of land and remains in possession of it, excluding the real owner and others from it for 12 years, he acquires a right to the land. The concept is that land that is “ unused” does not benefit society, so if you are going to let

your land sit wastefully, when someone else could use it and “improve” it, then it benefits society for the person who will use and upgrade it, to have it. Of course this is legal fiction, because there would be no homeless people if this were easily applicable and enforceable. But the usual elements for adverse possession are exclusivity in the possession of the land, the possession of the property must be open and hostile to the owner, there is a time period of continuous occupancy that must be met before the title can be transferred, some states require you pay taxes on the land while adversely possessing it, etc.

Adverse possession is defined as every person in actual, open and notorious possession of lands or tenements under claim and colour of title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.

“Using” and “improving” property are the legal theories adverse possession are built upon. And those words are quite subjective (Stephen Jourdan. 2003). The legal definitions for land “improvements” for adverse possession tend to be a fence and a garden. American Indians roamed areas without fences and individual gardens, and lived off the land, thereby “using” it, but <https://assignbuster.com/land-law-essay-sample/>

not via fenced-in individualized portions, thus many argued they were not using their land, and thus it was fine, via adverse possession, for Europeans to steal American Indian land, placing the original inhabitants in a position of dependency.

Most often when a free people's land is fenced off and redirected by another, their culture is set askew from it. Sometimes this is intentional, such as the banning of native tongues and celebrations by the American government after its taking of American Indian lands. And to dispossess people of their dignity and rights, people are rounded up off their lands, and placed in concentration camps. In Seattle, during the WWII roundups of Japanese Americans, Pike Place Market farmers disappeared.

And their lands were taken by farmers in the area when they disappeared, and many people who were taken in that roundup never got their land back from the people who took their land while illegally rounded up. And now, the old internment camp is the Puyallup Fairgrounds. I kid you not. I have Asian American friends who were never allowed to go to the Puyallup Fair for that reason. It was too traumatic for their parents who were there as kids too, but not for a fair. For an unfair! With the claiming/taking of parts of the earth as one human's possession, or land ownership, comes class privilege and poverty. They follow hand in hand.

Adverse possession is sometime called "squatters' rights" (John E Keen. 1991). If the squatter abandons the property for a period, or if the rightful owner effectively removes the squatter's access even temporarily during the statutory time period, the "clock" usually begins running again. However,

one squatter may pass along continuous possession to another squatter, known as tacking, until the adverse possession period is complete. A lawful owner may also restart the clock by giving temporary permission for the occupation of the property, thus defeating the necessary continuous and hostile element. Evidence that a squatter paid rent to the owner would defeat adverse possession for that period.

Adverse possession is in some ways similar to homesteading. Like the adverse possessor, the homesteader may gain title to property by using the land and fulfilling certain other conditions. In homesteading, however, the possession of the property is not hostile; the land is either considered to have no legal owner or it is owned by the government. The government allows the homesteader to use the land with the expectation that the homesteader who fulfills the requirements necessary for the homestead will gain title to the property. The homestead principle and squatter's rights embody the most basic concept of property and ownership, which can be summed up by the adage "possession is nine-tenths of the law", in other words, "the person who uses the property owns it". The homestead principle and squatter's rights pre-date formal property laws and to a large degree modern property law is a formalization and expansion of these simple ideas.

The homestead principle is the idea that if no one is using or possessing property, the first person to claim it and use it consistently over a period of time owns the property. Squatter's rights embodies the idea that if one property owner neglects property and fails to use it, and a second person starts to tend and use the property, then after a certain period of time the first person's claim to the property is lost and ownership transfers to the

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second person, who is actually using the property. The legal principle of homesteading, then, is a formalization of the fundamental homestead principle in the same way that the right of adverse possession is a formalization of the fundamental and pre-existing principle of squatter's rights (D. V Chitale. 1981).

The essential ideas behind the homestead principle and squatter's rights hold generally for any type of item or property of which ownership can be asserted by simple use or possession. In modern law, homesteading and the right of adverse possession refer exclusively to real property. In the realm of personal property, the same impulse is summarized by the adage "finders keepers" and formalized by laws and conventions about abandoned property. In the realm of so-called intellectual property, until just a few hundred years ago all rights in a literary or artistic work remained in the hands of the person who physically possessed the work.

The creator of a work who wished to retain control of the work was required to maintain physical control of the work in the manner of a trade secret. As the idea of intellectual property developed, more and more rights are reserved for the creator or copyright holder, regardless of whether or not this person maintains physical control of the work or copies of it. Fewer and fewer rights are retained by physical possessor(s) of the work. Some rights do remain, however, and are codified in the notion of fair use and the doctrine of first sale.

Adverse possession is a method of acquiring title to another's real property without compensation through maintaining occupancy for a given number of

years and meeting certain other conditions (Charles C Callahan. 1961). The concept of adverse possession derives from common law, but over time the conditions in which it may be applied have been codified into both federal and state statutes.

Typically the law requires that the party claiming title simply use the property openly and publicly. This situation — called an encroachment — may arise when the owner of a neighbouring property builds a fence that extends past his property line but the rightful owner does nothing to contest the use of his property. By permitting the use through passivity, the original owner is legally assumed to have abandoned his rights.

There are a number of other variables involved. In many states, the party claiming adverse possession must pay property taxes on the land in question. Depending on the situation and the laws of the state, the length of time necessary to claim adverse possession may vary from a few years to a couple of decades or more. Usually public entities are required to maintain a longer period of possession than individuals are.

Though the law will inevitably seem a bad one to any landowner losing his property, its basis is both fair and commonsensical. Adverse possession laws were developed to protect any party who has used and maintained a property for an extended period, believing it to be his own, from being denied its use due to a misunderstanding or mechanical error in the definition of the original boundaries. Land owners who fear encroachment on their land should never allow the situation to continue unless they wish to forfeit the property.

If the encroachment is unintentional as when there is a simple misunderstanding over property lines due to a faulty survey of the property it may be possible to solve the problem by simply speaking with the other property owner and coming to an understanding. If a soft approach doesn't work, the next step is to investigate local statutes regarding encroachment. It may be necessary for the rightful owner to sue the encroacher for trespass in order to protect title to the land. To do that, it will be necessary not only to hire a lawyer, but also to have a new survey done of the land by a qualified surveyor who is able to offer expert testimony in court if necessary.

The consequence of adverse possession on part only of a parcel is that the location of the boundary demarcating the limits of the respective domains of two adjoining land parcels may be displaced (William F Walsh . 1939). If part parcel adverse possession effectively transfers ownership of a small portion of an abutting parcel, the boundaries are shifted consequent to long term occupation, and will prevail over the strict technical legal boundary. In a registered title land system the occupational boundary then prevails over the legal boundary as certified in the register notwithstanding that registered title schemes purport to confer conclusiveness upon register entries.

Alternatively, the registered proprietor's estate is not paramount where any part of the proprietor's parcel has been adversely occupied. Consequently the occupier has an interest in the proprietor's land that is not disclosed in the register. Inspection of the register and reliance upon the inspection is insufficient to ascertain the complete legal status of the particular land holding. Inspection with consequent reliance upon the register is the major function of a registered title scheme. Alternatively, if part parcel adverse

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possession is ineffective to transfer ownership of registered land, the technical legal boundary prevails over the occupational boundary despite the fact that it is not the boundary accepted by the parties involved as governing.

Both alternatives present a problem to the orderly conduct of the land market. Where occupations prevail, the prudent market participant takes precautions besides relying on inspection of the register. Where the legal boundary prevails, the participant seeks confirmation that the occupational and legal boundaries coincide. Another alternative utilised in some registered title jurisdictions empowers a court to transfer small sections to an adjoining landholder where a building or similar improvement is erected so that it encroaches upon the adjacent holding. This alternative was included within the ambit of the thesis as it developed. The aim of this research was the formulation of the best solution suitable for a registered land system with particular reference towards a uniform solution suitable for adoption in all Australian jurisdictions.

The existing systems utilising adverse possession and statutory encroachment were evaluated against three recent law cases that illustrate the workings of these systems including perceived shortcomings. These lawsuits serve as a test against which the existing systems are compared and evaluated and were also used to evaluate the proposed solution. The results suggest that adverse possession alone should not override the purpose of the register which is to fully disclose the proprietary interests in land parcels. It was concluded that a necessary step in acquiring title to land

through adverse possession involves the registration of the interest acquired.

Whereas the present modes of dealing with the boundary problem are adequate, it is concluded that the best mode is that of statutory encroachment because it best serves several competing interests. Adopting the proposed solution would involve change and compromise in some of the Australian jurisdictions, these being necessary to adopt a uniform scheme throughout Australia. The proposed solution has added benefits of removing illogicality from some of the present systems, eliminating encouragement for an off-register land market, and fosters an accurate public land register.

The rule stemmed from the principle that the real owner's right to take legal action to remove someone trespassing on their land does not last indefinitely, but runs out after 12 years. After that, the law will protect not the real owner but the person in possession of the land – that is, the person who is in control of it. The law has been criticised, and has now been modified considerably by the new Land Registration Act 2002. While it is still possible for a landowner to acquire land which is adjacent to his boundary and which he thought was his, acquiring land by adverse possession in other circumstances is much more difficult.

An important case on the current law has been heard by the House of Lords. The decision has clarified the precise conditions under which a person may acquire title to land by adverse possession. Adverse possession can apply to a dwelling, when squatters move in, or to a piece of land which is fenced off by the adjoining landowner, or to a hedge or wall. Protecting Your Property

deals with the subject generally, and *Private Roads: The Legal Framework* (3rd Ed) explains how it may be relevant in a private road.

CONCLUSION

Adverse possession is a powerful tool if used wisely, it can effectively be used as a tool for the near ‘free’ re-distribution of land. It can allow more certainty for those who have rightly or wrongly managed to extend their property or access. However the tool must be used rarely, or risk the right being taken away. The process should be undertaken immediately after the relevant period has been passed. Throughout the period of squatting evidence should be kept, documenting every stage of the lands occupation. One thing is very certain the new procedures will undoubtedly ensure that litigation lawyers will not go short of work, as many disputes will need to be settled through the courts. It will also potentially result in a specialised area of the law being established.

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