

THE TRANSIT

VOL. VII, 1899

ENGINEERING SOCIETY
UNIVERSITY OF IOWA

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TITLE BY POSSESSION

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(Class of 1884).

The subject of this article, although essentially one of law, possesses more than a passing interest to the surveyor, including, as it does, questions which he must often discuss with his clients. In substantiation of this assertion the valuable paper by Chief Justice Cooley, of the Supreme Court of Michigan, on the Judicial Functions of the Surveyor, may be quoted, in which, in speaking of the difficulties experienced in re-locating and re-establishing lost landmarks, it is said: "He, the surveyor, has no right to mislead, and he may rightfully express his opinion that an original monument was at one place, when at the same time he is satisfied that acquiescence has fixed the right of parties as if it were at another, * * * the farthest he has a right to go as an officer of the law is to express his opinion where the the monument should be, at the same time, that he imparts the information to those who employ him, and who might otherwise be misled, that the same authority that makes him an officer and entrusts him to make surveys, also allows parties to settle their own boundary lines, and considers acquiescence in a particular line or monument for any considerable period as strong, if not conclusive evidence of such settlement."

Justice Cooley further says: "The surveyor must inquire into all the facts, giving due prominence to the acts of parties

concerned, and always keeping in mind, first, that neither his opinion nor his survey can be conclusive upon the parties concerned, and second, that courts and juries may be required to follow after the surveyor, over the same ground, and that it is exceedingly desirable that he govern his action by the same lights and same rules that will govern theirs." Accordingly it is necessary, or at least highly desirable, that the surveyor should interest himself in those rules which do govern courts and juries in their possible review of his decisions, and his resulting field work as a surveyor.

It is needless to say that in the preparation of this paper the major portion of the work has been the gathering of "posies from other men's flowers," and if, perchance, the resulting bouquet may bring enjoyment to some, or to others instruction, the writer will feel amply repaid for his efforts.¹

Before attempting to discuss Title by Possession, it will be well to note what constitutes title.

According to Blackstone there are three gradations of title, "namely: *First*, mere possession without right; *secondly*, the right of possession, which may be enforced by action; *thirdly*, the absolute right of property without possession or the present right of possession; and a perfect title consists in the union of these three gradations. But such refinements serve rather to perplex, than inform the mind. The truth is that title means the same thing as ownership. A man may be in possession of a thing which he does not own; and he may own a thing of which he is not in possession. Possession, therefore, though it creates a presumption of ownership, and though it may ripen in time into actual ownership, is not of itself ownership. He who is in possession without right is liable to be dispossessed by him who has the right—and he who has the right without possession may acquire possession by recourse to the law. One of the elementary principles in the action of

¹ This paper was first written to be read before the Baconian Club of the State University of Iowa. The writing of it was suggested by one on the same subject by Judge Hooker, of the Supreme Court of Michigan, read before the Michigan Engineering Society in 1895, from which paper I have quoted freely. I also wish to acknowledge my obligations to Judge Samuel Hayes, Professor of Law in the State University of Iowa, for valuable suggestions, received from him, regarding the subject matter of the paper.

THE AUTHOR.

ejection is that the plaintiff must rely solely upon the strength of his own title and not upon the weakness of the defendant's title." See *McCarty v Rochel*, 85 Ia., 427. "The reason is that actual possession is *prima facie* evidence of title, and gives the occupant a right against every person who can not show, not simply a better, but a good title. If, however, the person in possession be a mere intruder, he is not permitted to question the validity of the plaintiff's title, unless the latter were a mere intruder; for any *shadow of right* in the plaintiff will be sufficient against the mere possession without a right. The first step, then, is for the plaintiff to exhibit a sufficient title; and until he does this, the defendant may rely simply on his possession without further proof. But when this is done the defendant must meet it by showing a better title, either in himself or some third person. It would seem, therefore, that the perfection of title consists in the union of possession with the right of possession; for where these meet in the same person he can not be rightfully dispossessed. In other words he is the *lawful present owner* of the property; and this is the whole of the matter. The question, then, is what constitutes legal ownership of property? and this is answered by describing the ways in which ownership may be acquired, and what is evidence of such acquisition. * * * * *

* * * * * There are five ways of acquiring title to property; namely: by occupancy, by marriage, by descent, by devise, and by purchase." (Walker's Am. Law, p. 356-7). In this paper the writer purposes dealing only with that method of acquisition known as occupancy, and only with realty acquired by occupancy, which is often treated of under the head of prescription.

"Where property of any description is without an owner it fairly belongs to the first person who takes possession. This is a dictate of the law of nature; and if ever there was a time when there was no such thing as exclusive individual property, occupancy may have given the first title. This, too, is the foundation of title by discovery. Consequently the whole American continent was parceled out among the various European nations according to the priority of discovery; the occupancy of the Aborigines not having been regarded as

sufficient to prevent the acquisition of title by discovery. At present, however, so small is the amount of property which has not a legal owner, that the right of acquiring property by occupancy is of less importance than formerly; still there are some cases in which this right is called into exercise. It is settled that if soil be formed from the sea or river, by gradual alluvion, it is the property of the adjacent owner. If an island be formed in an unnavigable river it belongs to the owner of the nearer bank; or if the middle line of the river passes through it, the portions on each side of the line belong to the respective owners of the adjacent banks. Again with regard to the use of air, water and light, as connected with the ownership of land, great weight is always given * * * to prior occupancy. The doctrine is that he who has made the first appropriation of either of these elements to a particular use is entitled to protection in the enjoyment of that use; but this doctrine is modified by so many considerations growing out of the increase of population and public policy, that it is difficult to lay down any precise rules on the subject. In the above cases the ownership is supposed to be vacant, and the right of appropriation originates in the law of nature. But we have two important statutes, the effect of which is to enable persons to acquire title by occupancy when the ownership was not vacant when the possession was taken. These are the statute of limitations, and the statute of occupying claimants."

"The statute of occupying claimants is intended to benefit those persons only who have taken possession of land, supposing they had an undoubted title, and in this confidence have made valuable improvements, which, by the common law, they would utterly lose on being evicted by a superior title."

"The act enumerates five classes of occupants whom it protects; namely: *first*, those who can show a plain and connected title either in law or equity, derived from the records of some public office; *secondly*, those who claim by descent, devise, deed, or title bond under the foregoing; *thirdly*, those who claim under a sale, or execution against either of the foregoing; *fourthly*, those who claim under a regular tax sale; *fifthly*, those who claim under a sale by executors, administrators, guardian or other persons, by order of court."

"If a person of either of these descriptions has occupied land without fraud or collusion, he cannot be evicted by any claimant having a superior title, until he has been fully paid for all lasting and valuable improvements made previous to the commencement of the suit, unless he refuse to pay the claimant the value of the land without improvements. The act proceeds upon the plain, equitable ground, that the improvements honestly made, ought in fairness, to belong to the occupant, and the land itself to the claimant. But as they cannot be separated the one must take both, the party taking both must pay the other the fair value of his share." (Walker's Am. Law, p. 360.) It is not within the scope of this paper to discuss the mode of ascertaining the respective claims of the two parties. Attention is simply called to this statute and its meaning, so that we may note the difference between it and the statute of limitations.

"Statutes of Limitation have been well denominated statutes of repose. They proceed upon the maxim that legal rights should be asserted within a reasonable time, and that the law should favor the vigilant and not the sluggish; but the common law fixed no precise time within which actions must be brought. This is everywhere done by statute; and such statutes are called statutes of limitation. They have been found to be highly expedient, that Courts of Chancery, though not always within their letter, have been uniformly governed by their spirit. All American statutes of limitation are much alike, being copies, more or less exact, of the same original; namely, the English statute of limitations. And the federal courts are uniformly governed by the statutes of limitation of the state where the cause of action accrued, and by the constructions thereof given by the courts of such state." (Walker's Am. Law, p. 651.)

In the case of *Tourtelotte v Pearce*, 42 N.-W., 915, Judge Maxwell, of the Nebraska Supreme Court, in speaking of the statute of limitations, said:

"The statute is one of repose, and it is safe to assume that any person who claims a title or interest in the land in opposition to that of the party in possession, will assert it within the time fixed by statute. The security of titles and welfare of

society are best promoted by closing the doors of the courts against stale claims, which, experience has shown, spring up at great distance of time, when important witnesses are dead, or material evidence is lost or destroyed. These stale claims in many cases are brought up for a trifle, or litigated as a speculation and without any real merit in them. The statute, therefore, was designed to protect the occupant in possession of land as owner, and make his title complete after ten years of such possession."

This statute of limitations provides in substance that no action of ejectment, or any other action for the recovery of the title or possession of real estate shall be maintained after the period of ten years after the cause of such action accrued. It is not within the scope of this paper to discuss the few exceptions to this arising from the disabilities of him who should bring action.

The object of this statute is to discourage negligence in the assertion of claims, and prevent the raking up of dormant titles; and the consequence of its enactment is, that if any person has been in exclusive *adverse* possession of land for the space of ten years, or the additional time allowed in case of disability, although he had no shadow of title at first, yet by the mere effect of occupancy for this length of time his title has become impregnable. But this occupancy must be what is termed *adverse*; that is, one which disclaims the title of the negligent owner; for if it be in subordination thereto, the limitation of the statute does not apply.

According to the common law title to land was said to exist "When a man shows that he and those under whom he claims have immemorially used to enjoy the lands that he claims." Early English statutes substituted a fixed and definite period for the term "immemorial usage" by providing that an uninterrupted enjoyment for sixty years should confer an absolute and indefeasible title to land.

Judge Hooker, of the Supreme Court of Michigan, in speaking of this subject, says: "In an old and well settled country, where the land is all reduced to possession and under cultivation, holdings adverse to the true owner for a long period would probably be few, while in a new and sparsely inhabited

country where much land is unoccupied and covered by forest, and possibly owned by persons living at a distance, such holdings may reasonably be expected to be more numerous."

The short period usual in this country—ten years in Iowa—where, from the nature of things, the owner of land would seem to require more protection against unwarranted appropriation, is in striking contrast to that of England, where, as already implied, the necessity for a long period of limitation would seem to be less.

This question of adverse possession is a question of fact for the jury under the instruction of the court. It must be exclusive of any other right; but it need not be under claim of *valid* title. To define the term negatively we may note that there are four classes of cases where the possession by another is not adverse to that of the owner.

First. When both parties claim under the same title as by the same descent, devise, or conveyance, the possession of one is not, of itself, adverse to the other, but requires some positive act or declaration to make it so.

Second. When the possession of one party is consistent with the title of the other, it is not of itself adverse, but requires other circumstances to make it so; as where a grantor remains in possession after conveyance, or where the beneficiary is in possession instead of the trustee, or the mortgagor after the execution of the mortgage; in all these cases the presumption is against adverse possession.

Third. Where the other party has never, in contemplation of law, been out of possession, the actual possession is not of itself adverse. Thus a tenant for years, at will or at sufferance, does not, unless by some positive demonstration, hold adversely to his landlord; and the possession of one tenant in common, unless there be an actual ouster, is the possession of all. See *Bader v Dyer* 106 Ia., 715.

Fourth. Where the possessor has once acknowledged the title of the other party, as by offering to purchase, paying rent, requesting a lease, and the like, the possession is not adverse; nor can it be rendered so by a subsequent denial; and this doctrine of acknowledgment extends even to the predecessors of him in possession.

With these explanations it may be laid down as a general rule that where neither party can show any other than a possessory title, the prior possession, however short, is the better one, unless the defendant has been in possession so long as to be protected by the statute of limitations; but against a regular paper title no possession short of the statutory period will avail, this being the term fixed for the acquirement of title; and the title thus acquired is so conclusive that a person out of possession may recover upon a prior possession, for the period of the statute, against a regular paper title with possession for a less period. But it is held that possession of government land before a patent has been issued, even for the statutory period, is not protected by the statute, because the statute does not run against the government.

This point, among others, was at issue in the case of *Jones v Hockman*, as reported in the 12th Iowa Supreme Court Reports, page 101. The case involved the ownership and possession of lands in Lee County. Jones had his title direct from the government. Hockman's grantors had acquired a settler's right 20 years previous to the time that action was brought, and this right had been transferred to him in a regular manner. The plaintiff brought action to recover possession of certain lands. The defendant plead the statute of limitations. A verdict and judgment was rendered for the defendant and plaintiff appealed. J. M. Beck and D. F. Miller were attorneys for the appellant. The following points are taken from the brief Mr. Beck presented to the Supreme Court:

"I. The Statute of Limitations is not available as a defense, unless the defendant has had the *actual adverse* possession of the premises in question for the time limited by the statute in which the action was commenced; *Wright v Keithler*, 7 la., 93; Angel on Lim., 467; 3 Cruise Dig. 467.

"II. What is meant by the term '*adverse possession*' and who are said to be in the '*adverse possession of lands*'?"

"(1) The term is a modern one, and its import and meaning may be better understood and explained by reference to English decisions upon the Statute of Limitations, and by considering the common law terms used in those decisions.

"(2) Who, under the English decisions, could have the benefit

of the Statute of Limitations? 'The Statute of Limitations does not bar a man but where there is an actual disseisin'; 3 Lord Raymond 830 (*Reading v Rawstern*). 'Disseisin is where a man enters into any lands or tenements, where his entry is not *congeable*, i. e. done with permission or leave, (Bouvier's L. Dic.) and ousts him who has the freehold'; 2 Bac. Abr. 678.

"(3) A disseisin is where one enters *intending* to usurp the possession and *oust another* of the freehold; Co. Litt. 153.

"(4) By the common law one was invested of a freehold by *livery of seisin*; he was divested of such estate by disseisin.

"(5) It will be remarked that the term disseisin does not apply to the possession of the lands only, nor does the term seisin apply to the possession only; they both apply to the title or tenure of the lands held by the tenant seised or one disseised. One put in possession of land as a tenant for years or at will would not receive that possession by the ceremony of livery of seisin; neither could it be said that one usurping his possession is a disseisor. Disseisin, then, is depriving the tenant of his tenure, and with that intent, usurping the possession—the setting up of a claim or title to the land and under that claim entering into the possession thereof.

"(6) In case of disseisin, then, the disseisor claimed title also; here was a contest of titles—an existence of *adverse claims*. The disseisor when in possession of the land, held it by or under his title, which was adverse to the disseised; his possession was held under his title, and, of course, was an adverse possession.

"(7) The first use of the term 'adverse possession,' I find, is in *Campbell v Wilson*, 3 East. 302, and it is applied there to a right of way which was enjoyed and possessed adversely as to the owner of the land for twenty years, which was held as an *evidence of a grant*. After this case, which is often quoted, the term seems almost entirely to have superseded the older and strictly technical word, 'disseisin.'

"(8) The two terms are almost synonymous, and the former, i. e. adverse possession, is most generally used in all cases I have consulted arising under the Statute of Limitations. The best definition of the terms I have seen are found in Angel on Limitations, page 473, and is in these words: "Disseisin and

adverse holding is an actual, visible and exclusive appropriation of land, *commenced* and continued under a claim of right.' This definition is sustained by cases hereinafter quoted.

"III. Entering upon land under *pretense* of title or under *claim* hostile to the true owner constitutes adverse possession. *Brandt ex dem. Wolton v Ogden*, 1 John., 155; *Jackson ex dem. Griswold v Bond*, 5 Ill., 230; *Jackson ex dem. Bonnel et al. v Sharp*, 9 Ill., 162; *Kenebeck Purchase v Springer*, 4 Mass., 416-418; *Boston Mill Corporation v Bulfinch*, 6 Ill., 229; *Kenebeck Purchase v Labaree*, 2 Greenl., 275.

"IV. Quiet possession of land is not adverseholding. *Pejepscot Proprietors v Nichols*, 1 Fairfield (10 Maine), p. 259. Angel on Limitations, 478.

"V. Squatters on land, claiming no interest in it, hold under the legal title and not adversely. *Bell v Fry et al.*, 5 Dana, 344-5.

"VI. Adverse possession can in no case exist unless there rests with the possession a claim on the part of the possessor of title or right. Whatever may be the length of time the land may be occupied, however quiet may have been the occupancy, whatever may have been the acts of ownership exercised, unless the possessor set up some claim of title or right he will not have adverse possession. *La Frambois v Jackson*, 8 Cow., 596; *Bradstreet v Huntington*, 5 Pet., 440; *Jackson v Wheat*, 18 John., 44; Angel on Lim., 476; *Jackson ex dem. Sparksman v Porter*, 1 Paine (C. C.), 467; *Ricard v Williams et al.*, 7 Wheat., 59. The *quo animo* is the test of the adverse possession—the intention to assert some claim or right to the land inconsistent with, and hostile to, the owner's title. Without this adverse claiming there can be no adverse holding. (See authorities last quoted.)

"VII. Another well understood principle of the law is applicable to the case at bar, namely: Every person is in the legal seisin of lands who has title thereto, and this seisin continues until he is ousted by one under claim of title, and so continues until an adverse possession is made out. *Jackson v Selleck*, 8 John., 270; *McIver v Regan*, 2 Wheat., 24; *Frambois v Jackson*, 8 Cow., 589; *United States v Arredondo*, 6 Pet., 742.

"VIII. His possession will give the defendant, then, no benefit of the Statute of Limitations, unless it was begun or taken and held under claim of title. If it begun as a trespass and is continued by permission or the negligence of the owner of the

soil, the legal seisin is by the law presumed never to have been disturbed, and the holder of the land is presumed to occupy it under the real owner. He is in fact a tenant holding the land at the pleasure of him in whom the fee rests. (See *Bell v Fry*, 5 Dana, 344-5, and authorities last quoted).

"IX. Possession, accompanied with a claim of ownership in fee, may be deemed *prima facie* evidence of such an estate. In such a case it is not the possession alone, but that it is accompanied with the claim of the fee, which gives this effect by construction of law to acts of the party. Possession *per se* is evidence of no more than the mere fact of present occupation by right. Hence the declarations of the party in possession are always admitted to show the extent and nature of the case; it must depend on these collateral circumstances to ascertain the extent of his interest. *Jackson ex dem. Sparksman v Porter*, 1 Paine (C. C.), 467; *Ricard v Williams et al*, 7 Wheat., 59.

* * * * *

"XI. Adverse possession must be *clearly and strictly proven*, for the presumption always is that the possession is in accordance with the regular title, *until* there is clear and positive evidence to the contrary. *Fete v Doe*, 1 Blackf., 129.

"XII. An offer to purchase the land by the one in possession will disprove his adverse holding. 1 Hilliard Real Prop., 86."

Judge Baldwin, in ruling on this case, said: "There must be *an adverse, actual possession*, in order to avail the defendant under his plea. To constitute an adverse possession there must be some claim or color of title under which the defendant has, in good faith, supposed he had a right to the property, and under which he continued in possession." It was shown that defendant's grantors did not claim the fee simple, but occupied under what was termed a "settler's right"; and the judgment of the lower court was reversed.

In the case of *Grube v Wells*, 34 Ia., 148, the ruling of the court is in perfect harmony with the principles noted in Mr. Beck's brief, and some additional points are also mentioned. In this case the plaintiff was the owner of lot 260 in the northern addition to the city of Burlington, and the defendant owned lot 1 in Wood's sub-division, which adjoined plaintiff's lot on the south. About twenty-five years prior to the time of bringing the action, the defendant's grantor inclosed lot 1, and

made other improvements upon it. The fence on the north was set about fifteen feet over the line upon lot 260, which was uninclosed, and remained in that condition for about twenty years. Defendant and her grantor had had actual possession and exercised rights of ownership over the strip of land in controversy since it was inclosed, but had never had any other right or color of title than such as resulted from the possession stated. They had held the land under the belief that it was covered by the deeds conveying to them lot 1, and were not informed otherwise, until within about one year prior to the time of the suit, when, upon an accurate survey having been made, the true line was established. There was no dispute about the other boundaries of lot 1, and the defendant's title and possession to the whole of it had never been questioned. Defendant had paid taxes continuously on lot 1, and plaintiff on lot 260.

In the district court judgment was rendered for the plaintiff. The defendant appealed. In the supreme court the judgment was affirmed. Chief Justice Beck made the following rulings:

"1. The Statute of Limitations is not available as a defense in an action of right, unless the defendant has held possession of the land for the statutory period, under color of title or claim of right. Mere possession is not sufficient.

"2. The *quo animo*, or intention in which the possession was taken and held by the defendant, is an essential consideration. It must be shown that he intended to hold in hostility to the true owner.

"3. The facts relied upon to constitute adverse possession cannot be presumed, but must, in all cases, be strictly proved.

"4. The claim of right must be as broad as the possession. It was accordingly held where defendant's claim was limited to a lot of a certain number, but his possessions extended to and covered a part of an adjacent lot embraced in his inclosure, that this did not amount to an adverse possession of the latter.

"5. A mere belief that the lot which defendant claimed extended to the limits of the inclosure is not equivalent to a claim of title or right, and therefore not sufficient to constitute adverse possession."

In order that possession may be legally interpreted as being

"adverse," each of several different elements must enter therein; some of these elements have already been mentioned; others are mentioned in the following extracts from rulings of our own supreme court:

"The possession of land which will impart notice of title thereto must be adverse, exclusive, open, unequivocal and notorious, and must be inconsistent with the claim of any other person. *Elliott v Lane*, 82 Ia., 484."

"Possession to be adverse must be actual, continuous, visible, notorious, distinct and hostile, and under claim of right or color of title. *Hempstead v Huffman*, 84 Ia., 398."

"Possession of land for five years claiming title adverse to the owner is not sufficient to constitute a defense to an action to quiet title. The possession must be exclusive, actual, open, notorious and under color of title or claim of right for ten years to be available. *Des Moines and Ft. Dodge Ry. Co. v Bullard*, 89 Ia., 749."

"The possession to be adverse must be actual, continued, visible, notorious, distinct and hostile, and commenced under claim or color of title; but actual residence on the land is not necessary to constitute such possession; any acts which are open and notorious, done under claim or color of title and continued for the necessary time, will justify the finding of adverse possession. *Robinson v Lake*, 14 Ia., 421. *Booth v Small*, 25 Ia., 177."

In a country where the land has been for a long time possessed and held by the settlers there would ordinarily be but little difficulty in determining whether the occupancy was such as to conform to the popular understanding of these terms, rendering it easy to ascertain whether it was such an occupancy that it could be properly said to amount to possession. But the conditions in this country have been and still are radically different from those in the mother country, and they have affected the law of this subject, which has been modified with a view to adapting it to altered conditions.

What then constitutes *actual* possession? Ordinarily this would seem to be easily determined, as in the case of a small farm under cultivation and all fenced. But consider the case of a woods pasture, remote from a dwelling, or of a marsh

where hay is annually cut, or upon which cattle graze. Suppose that a man should occasionally enter the aforementioned woods pasture and cut and haul therefrom loads of wood. Who could determine whether he was attempting to hold the land adversely, or whether his particular adverse possession was exercised on the wood only? Had he cut a considerable amount of wood and corded it up on the ground near by, such action might be construed as evidence of adverse holding. So in the case of the hay land, had he cut and stacked hay thereon, a similar presumption would naturally exist. But suppose his cattle had been grazing over the land in common with other cattle, and that the range included other lands; adverse possession could hardly arise against the true owner. There are several decisions bearing upon these and similar points, to some of which attention is here called.

"It is not necessary that the occupation should be such that a mere stranger passing by the land would know that some one was asserting title to and dominion over it. It is not necessary that the land be cleared or fenced or any building be placed upon it. *Langworthy v Myers*, 4 Ia., 18; *Booth v Small*, 25 Ia. 177."

"If a person enters upon a land under deed from another claiming to be the owner, and uses it thereafter as a wood lot appurtenant to his farm, in the usual and ordinary way, and exercises such acts of ownership over it as is necessary to enjoy such usual and ordinary use of a wood lot, such acts being continuous and uninterrupted would amount to actual possession, and such possession being under color of title and a claim of right, and exclusive, and held so openly and notoriously that the community would understand and recognize his claim of ownership, will be adverse; and if continued for ten years without interruption will bar the claim of the true owner. *Murray v Hudson and another*, 32 N.-W., 889."

"The defendant in an action for trespass upon wild land can not maintain his defense of the title by prescription, in the premises, by proving that for twenty years his cattle placed on his own land, adjoining the disputed premises, went upon the latter and used it, as well as his own land, as a pasture; that he repaired a road running through the disputed premises, which he used in going to and from his own land, and from

time to time during the twenty years had cut one or two cords of wood upon the disputed premises, and had allowed it to remain on the land. *Richmond Iron Works v Wadhams*, 9 N. E., 1."

Possession must be continued.

Little need be said upon this division of the subject. Actual uninterrupted possession may ripen into a perfect title; but if at any time during the statutory period an interval occurs in such actual possession, it is fatal. But possession is not broken by sale or transfer, provided the grantee takes possession when the grantor goes out; the grantor's possession inures in such cases to the benefit of the grantee.

"The term 'continued' may, however, mean intermittent, when the natural use to which the property is put is of an intermittent character. It is not necessary to actually occupy unbroken prairie land during the winter season in order that there may be adverse possession thereof. It is sufficient to occupy it during the proper season for grazing and making hay. *Dice v Brown*, 67 N.-W., 253."

"On the other hand, merely paying taxes upon wild lands and occasionally looking at them and showing them to others, held not such actual, visible, notorious, adverse possession as is necessary to enable a party to take advantage of the statute. *Brown v Rose*, 48 Ia., 231."

"Payment of taxes is mere evidence of a claim and its extent; it is not of itself adverse possession. *Sioux City and I. F. Town Lot, etc., Co. v Wilson*, 50 Ia., 422."

"A roving possession from one part of a tract of land to the other will not constitute adverse possession as to any part of the land which has not been held adversely for the statutory period. *Messer v Reginner*, 32 Ia., 312."

Seemingly somewhat at variance with this decision is the one in *Watters v Connelly*, 59 Ia., 217, which says: "Actual possession of a part of a tract is legal possession of the whole of the tract covered by the title under which the actual possession is taken, and possession of the part will impart notice of the claim to the whole tract;" (see also *Libbey v Young*, 103 Ia., 258) but the essential difference is that, in the second case, actual possession of a part is taken, while the claim of title is broad enough to cover the whole tract, whereas the roving possession

mentioned in the first case can not be construed as actual possession of a definite tract.

"A title being once obtained by reason of ten years' adverse holding, it is then unnecessary that the possession be maintained continuously thereafter. Where title is obtained by adverse possession, such title must be presumed to continue until it is divested in some manner recognized by law. It may be sold and conveyed, and the party against whom it has become perfect can do nothing to in any manner impair it. The party in whom such title has become perfect will be deemed to be in possession, and actual occupancy is not essential to its continuance. *Heinrichs v Terrell*, 65 Ia., 25."

The possession must be visible, distinct and notorious. The cases already referred to have pretty thoroughly indicated the character of the interpretations to be placed upon these terms. Of course, a clandestine or concealed occupancy will not avail, but the occupancy must be open to the observation of all, that is, it must be distinct and of a character inconsistent with a recognition of another title. It must be such as to involve plain evidence of dominion over land. A claim of possession, which is not so manifested as to be known and understood by others in the vicinity, could hardly be said to be visible, distinct and notorious.

"The acts relied on as showing actual possession must be such that, on the one hand, the fair inference is that they were done because the doer thereof claimed title or ownership in the premises, and, on the other hand, they must be such as would naturally lead any one interested in the land to understand that they were done by some one who was claiming title in the premises. *Merrill v Tobin*, 30 Fed., 738."

"The possession must be hostile, that is, it must be in the assertion of a right which is inconsistent with ownership by the plaintiff, one which does not recognize, but from its character disputes his rights to an entry and occupancy without asking the defendant's permission, or at least implying his consent; one that disregards the plaintiff and his title, and one which, from the acts committed, implies the assertion of dominion as contradistinguished from an intention to commit a trespass."

"A man may hunt or fish on his neighbor's land every day without intending to claim the land—or he may do it in such

a way (as by the erection of a permanent structure for the purpose of leaving his property there, asserting his ownership to others, denying the right of the true owner, etc.,) as to clearly indicate an adverse possession, rather than a trespass."

In the case of *McNamee v Moreland*, 26 Ia., 97, the court gave a ruling which practically touched and partially, at least, explains all of these terms. It said, "A party relying upon the bar of the statute of limitations, in an action for the recovery of real property, must show that he has held for the statutory period, not only by a possession actual, open and adverse, but that it has been maintained as a right resulting from an exclusive property in and dominion over the estate, and not subordinate to the will of another, or by an agreement with the true owner of the title."

Section No. 3004 of the revised code forbids, however, the admission of evidence of use of any easement for the purpose of establishing that the enjoyment of the use was under an adverse claim; that is, evidence other than that of use is required to establish the fact of adverse claim.

The section referred to reads: "In all actions hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession thereof, for the period of ten years, the use of the same shall not be admitted as evidence that the party claimed the easement as his right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof, and these provisions shall apply to public as well as private claims."

It will be well to note that this section refers to title of an easement, and not to the title or possession of real property. By easements are meant rights or privileges *relating* to the land of other persons; that is, certain rights and privileges connected with land, but belonging to different persons from the proprietors of the land. Public easements comprehend all such as are open and free to the enjoyment of every citizen; they apply chiefly to commons or parks, roads and rivers. Private easements comprehend all those which belong to par-

ticular individuals. They relate chiefly to the *use* of land, water, air and light.

"One of the most important private easements, and one most nearly allied to the discussion in hand, is the right of private way over another's ground. This right may arise in three ways: from contract, from prescriptions, or from necessity."

"The provisions of the section of the code referred to have no application to cases where the title by prescription had become perfected before the enactment of that statute. *McAllister v Pickup*, 84 Ia., 65."

It is in regard to establishing the title to these easements by adverse claim that section 3004 declares that the party against whom the claim is made shall have had express notice thereof. No notice of possession of corporeal property to the party against whom the possession is adverse is required; from the very nature of the case such notice is not necessary

In the case of *Close et al v Samm et al*, 27 Ia., 503, Judge Cole ruled that "To constitute adverse possession under which a title may be acquired, it is not necessary that such possession should be known to the other party. The title derived or forfeited by possession arises from the *fact* of the actual, adverse and continuous possession, and not from the *notice* of it to the adverse party. He must take notice of it at his peril." Similarly in *Teabout v Daniels*, 38 Ia., 158, "adverse possession must be open and notorious, and if so, the person against whom it is maintained is presumed, as a matter of fact, to know it."

We come now to a consideration of the terms color of title, claim of right, etc., which is probably one of the most difficult parts of the entire subject.

That some sort of a claim must exist in order to render effective an adverse holding is very apparent, judging from the language of the law and the court rulings, but the writer is not able to state exactly what is the maximum limit of the gauzy character of these claims, so that they may still retain their potency. "A mere possession without color of claim of an adverse title will not enable a defendant in an action of right to avail himself of the statute of limitations. *Jones v Hockman*, 12 Ia., 101." Also in *McNamee v Moreland*, 26 Ia., 97, it was ruled that: "It is a material and essential requisite of adverse

possession that the occupancy has been with the intention to claim title, and as disproving this intent, it is competent to show by the declarations of the occupant that he did not hold adversely."

In the case of *Montgomery Co. v James Severson et al*, 64 Ia., 326, these points seem to have been directly in issue, as a number of rulings were rendered thereon, as follows:

"It is not necessary for one relying upon the statute of limitations to show a legal title; a claim of right to the land is sufficient. And this claim need not be based upon a legal title or a paper title; it may rest in parol. A claim based upon an equity is sufficient." See *Hamilton et al v Wright*, 30 Ia., 480; also in this case, the following rulings were made:

"To constitute an adverse possession under our statute it is not necessary that the party must have taken and held possession under color of title. It is sufficient if such possession was taken and held under claim of title.

"The terms 'color of title' and 'claim of title' are not synonymous. To constitute the former, a paper title is requisite in the party claiming, but the latter may exist wholly in parol.

"To constitute color of title it is not requisite that the title under which the party claims should be a valid one, and it is immaterial whether its want of validity results from its original and inherent defects, or from matters transpiring subsequently, nor whether such want of validity is attributable to individual or judicial action."

Judge Beck, in discussing the case of the *C., R. I. & P. Ry. Co. v Alfree*, 64 Ia., 500, said: "A claim or color of title may be based upon void acts, proceedings and deeds. They may have in law no effect; yet being in the form which in the absence of matter invalidating them would render them of effect, they have the semblance of regularity, which is sufficient to support the pretense that they confer title or right. The term 'color' means 'semblance,' 'show,' 'pretense,' 'appearance,' and implies, in the language of law, that the thing to which it is applied has not the real character imputed to it. Hence to give 'color of title' in pleading is to allege a fictitious matter which gives the appearance of title, and is avoided by allegations setting up the real and valid title. * * * The term 'color of title,'

used to designate a claim of title, under which lands are held, that will support the defense based upon the statute of limitations, implies that the title thus described is not valid, but is claimed to be by the party holding under it. Invalid titles are not distinguished by the consideration of the sources and reasons of their invalidity. If a title fails to confer the rights of property upon the claimant it is invalid. If it be invalid because the grantor in the instrument had no title, or had no authority to convey the title, or for any other reason, it is void. In the case before us the tax deeds pretend to convey the title to the land in question. They fail to do so because the title of the land was in the United States."

The Court held in this case, "that a party claiming under a tax deed which was void for the reason that the title of the land was in the United States Government at the time of the levy on it, and therefore not taxable, constituted color of title, and might be pleaded as raising the bar of the statute of limitations."

"Deeds of conveyance, purporting to convey the land to the person in possession, are evidence of color of title, although they are informal and indefinite in description. It is not necessary that they be sufficient to convey the title. *Sater v Meadows*, 68 Ia., 507."

"But in order that an informal instrument shall constitute color of title it must appear that it was relied upon as the source of title. *Moore v Antill*, 53 Ia., 612."

"A tax deed, void on its face, is sufficient to give color of title. *Colvin v McCune*, 39 Ia., 502."

"A descent cast, or a devise, gives color of title, although the ancestor or devisor was a mere trespasser. *Hamilton v Wright*, 30 Ia., 480."

"A party claiming under a quit claim deed, though he is not regarded as a good faith purchaser, nevertheless has sufficient color of title to enable him to set up adverse possession. *Tremaine v Weatherby*, 58 Ia., 615."

"A quit claim deed from one claiming under a tax deed, though insufficient to pass a good title, gives one in possession under it color of title." Washburn on Real Property, vol. 3, p. 156.

In *Close v Samm*, 27 Ia., 503, Judge Cole ruled as follows: "To constitute color of title and adverse possession thereunder, it is not necessary that the party in possession should hold under a valid and perfect title. He may in good faith acquire a title by adverse possession to a strip of land which is, in fact, beyond his lines, as established by his deed or patent, and upon that of an adjacent owner." The Judge in illustrating the application of the above principle used the following hypothetical case: "A has a patent for the south half of a certain section of land and B for the north half of the same section. A in building a fence sets the same five rods, more or less, upon B's land, claiming, however, that it is the true line, and he maintains it there for the time requisite to bar an action. Now it is no answer to A's claim for B to say that the true line to which only A was authorized to go was below his fence, and therefore his patent could not afford him a color of title or claim above his true line. If it was a sufficient answer, then adverse possession, which required a color of title to make it available, could never bar an action. In other words, it is not necessary that the title of a party in possession of property shall be valid and perfect in order to enable him to rely upon the statute of limitations. In such case he has no need of the statute. It is only when he has gone beyond his legal right that the statute is of service to him. Of course he must *make the claim in good faith*, and not in wantonness."

We come now to a consideration of that portion of the subject which is more especially interesting to surveyors, that is, adverse possession growing out of mistakes in the location of boundary lines between adjacent properties.

In the case of *Burdick v Heivly*, 23 Ia., 511, the opinion was rendered that "One of the objects of the statute of limitations is to compose controversies growing out of mistakes and errors which tend to keep open, indefinitely, the settlement of titles and render them insecure and uncertain." In the same case another principle was announced which has been generally accepted, viz: "Where adjoining owners of real estate were at a loss to know where the dividing line was; which was, however, finally agreed upon, and a fence erected thereon at the mutual cost of both parties, followed by actual possession and claim

of ownership which was acquiesced in for more than ten years, it was held that these facts should be regarded as establishing the defense of the statute of limitations, although it appeared that the division line agreed upon was erroneous, and that the possession and claim of ownership was the result of this mistake."

Similarly in the case of *Heinrichs v Terrell*, 65 Ia., 25, "Where a division line is agreed upon by the persons owning adjoining real estate and possession is taken in accordance with such agreement, such possession must be considered as adverse from the time it was taken."

"Where parties have established a line and used it as a boundary, irrespective of the true line, the possession will be adverse, and after the lapse of the necessary period, conclusive upon the parties and their grantees. *Hiatt v Kirkpatrick*, 48 Ia., 78."

"If a party owning on one side of a division line has been in peaceable possession, and claimed up to the partition line, and cultivated it as his, claiming adversely to all the world for more than ten years, then his title to the strip of land on his side of such division line, which may not previously have belonged to him, becomes complete by adverse possession. *Brown v Bridges*, 31 Ia., 138."

"To constitute adverse possession the claim must be as broad as the possession, else the holder cannot be said to be holding under claim of right, hostile to the true owner. If the claim is of right to a fence, without regard to whether that fence is on the party line, it will be deemed hostile. *Dolittle v Bailey*, 85 Ia., 398."

"No formal claim of ownership to a fence is necessary on the part of one whose possession and ownership up to the fence are unquestioned, in order to make such possession adverse. *Fullmer v Beck*, 105 Ia., 517."

The courts, however, do not seem to recognize *mistakes* in boundary lines and claims based thereon, as the following decisions clearly indicate:

"An owner of land, who, through ignorance of the dividing line, includes a part of an adjoining tract within his inclosure, does not hold such portion by adverse possession so as to set

the statute of limitations in motion. *Skinner v Crawford*, 54 Ia., 119."

"Where the possession with reference to a boundary line is by reason of a mutual mistake as to the true line, such possession will not be deemed adverse, so as to give rise to a title by prescription. *Heinz v Cramer*, 84 Ia., 497."

"Where parties occupied under a mistaken belief that the line located between them was correct, and neither intended to claim more than the true amount, plaintiff did not hold excess adversely. *Kahl v Schmidt*, 107 Ia., 550."

"The occupation of a strip of land by reason of a mistake as to the true boundary line between adjoining owners will not constitute adverse possession thereof. *Mills v Penny*, 74 Ia., 172; *Goldsborough v Pidduck*, 87 Ia., 599."

"When possession to a line is claimed under the belief that it is the true line, such possession is not adverse if the line is, by mistake, not the true boundary. *Jordan v Ferree*, 70 N. W., 611."

"In case of mistake as to the boundary line, the possession of the party against whom the mistake exists will not be deemed adverse. Mere mistake does not make the possession one under claim of right. *Grube v Wells*, 34 Ia., 148; *Wacha v Brown*, 78 Ia., 432."

Coming now to a discussion of adverse possession of highways by individuals, and that of land for highway purposes by the public, we find conflicting authorities.

In *Davies v Huebner*, 45 Ia., 574, Judge Rothrock said: "It is claimed by the plaintiff that the statute of limitations does not run against the public or the state, and that the adverse possession for more than ten years does not extinguish the right. There is a want of harmony in the adjudicated cases upon this subject. Quite a number of cases declare that the public may lose their right to streets, roads and other public places by long continued adverse occupation. See Washburn on Easements and Servitudes, pp. 669-70, and authorities there cited."

"On the other hand, the Supreme Court of Pennsylvania and of other states have held that no adverse possession and use of a public highway by individuals, however long continued, will give title as against the state or the general public, as the statute of limitations does not run against them. *Com. v*

Albner, 1 Whart., Pa. 469-488; *Philadelphia v Railroad Company*, 58 Pa. St., 253; *Simmons v Cornell*, 1 Rhode Island, 519; *Jersey City v Morris Canal Company*, 1 Beasley N. J. 547."

"We believe the weight of authority is that the statute does not run against the general public because of the adverse possession of a highway established in the manner prescribed by law. Whether this rule should prevail in this state we do not determine; and yet we believe there are cases where the non-user has continued for such a length of time, and private rights of such a character have been acquired by long-continued adverse possession, and the consequent transfer of lands by purchase and sale, that justice demands that the public should be estopped from asserting the right to the highway.

"The first requisite to establish such estoppel should be that the adverse possession should continue for ten years, by analogy to the statute of limitations. Then it should be shown that there was a total abandonment of the road for at least the period of ten years."

"The claim of the public to the use of a strip of land as a highway may be lost by sufficiently long-continued adverse possession in good faith, without any notice of the claims of the public. *Smith v Gorrell*, 81 Ia., 218."

In *Davies v Huebner*, mentioned above, Judge Rothrock further ruled that "Where a highway has been established by the proper legal authority although never actually opened, mere non-user for a period of ten years, will not operate to defeat the right of the public therein, where there has been no adverse use of the land. *Barlow v C., R. I. & P. R. R.*, 29 Ia., 276; *Noll v The Dubuque, B. & M. R. R. Co.*, 32 Ia., 66. But where there has been an entire non-user of a highway for a period of thirty years, and half of the same in width had been inclosed, fenced and in open, notorious and adverse possession for more than ten years, it was held that the public would be estopped to claim any right in the part thus inclosed. The other half having been but recently inclosed the right of the public thereto had not been impaired."

However, to gain title by adverse possession against the public, all the elements which legally constitute adverse possession must be strictly adhered to.

"When a strip of land was recognized by the land-owner as a highway, by constructing bars at each end thereof for the use of the public, and by abstaining from cultivating the same, and was used for that purpose by the public, without objection, held that although it thus remained inclosed, the owner could not claim rights therein adversely to the public by reason of his possession. *Hempstead v Huffman*, 84 Ia., 398."

Seemingly opposed to this is the ruling in *Neff v Smith*, 91 Ia., 87: "The fact that one who claims to have had possession of a highway, adverse to the public, for such length of time as to have acquired adverse title, allowed the public to pass through his inclosed premises by letting down and putting up bars, will not defeat the claims of adverse possession." Note, however, that in *Hempstead v Huffman* the land owner recognized a strip of land as a highway, while in *Neff v Smith* the occupant of the land was holding it adversely to all the world, but permitting the public to pass over it.

"The maintenance of gates and bars across a travelled way indicates an absence of intention to dedicate the way to the public use. *State v Greene*, 41 Ia., 693."

"An adjoining owner can not acquire title by adverse possession to a portion of a highway. Being charged with knowledge of the width of the highway as fixed by law, his possession will not be under claim of right or color of title. *Rae v Miller*, 68 N.-W., 899."

It is thus apparent that some authorities rule that adverse possession may arise against the public, but not all are agreed on this point. Similarly there are some who maintain that the public can not hold adversely to a private individual, consequently that a road cannot be established by prescription, because prescription, as the term is ordinarily employed, presupposes a grant from the rightful owner, and the public can not take by grant. Angel on Highways, section 131, says: "But the correctness of this statement may be doubted, since, while it is true that the public as a general undesignated community may not in strictness take by grant, still, local officers and bodies may take for it as trustees. When a highway comes into existence, no matter how, it passes at once under control of such of the public representatives as the law designates."

Elliott in *Roads and Streets*, chap. VI, says: "It may possibly be true that the doctrine of prescription, in its strict and rigorous force, does not fully apply to roads and streets, but it is also true that highways may be created in a manner so nearly resembling the ordinary case of a title by prescription that it is safe to affirm that highways do exist by prescription. The supposition of the existence of a precedent grant" (see page 9, item 7) is a pure and useless fiction, and is not needed in any case to support the right conferred by adverse possession and user. * * * User of way under claim of right for twenty years will unquestionably confer an easement upon the public, whether there is or is not any direct or affirmative act from which an intent to set apart the way to the public can be inferred, while no dedication not resting wholly or in part on lapse of time can be established without some fact indicating an intention on the part of the owner to set apart the way to the public."

"A highway may exist in this state arising from dedication and prescription notwithstanding the provisions of the statute for the establishment of highways. *Mosier v Vincent*, 34 Ia., 478; *Baldwin v Herbst*, 54 Ia., 168."

"Prescription refers the right to the highway to the presumption that it was originally established pursuant to the law by the proper authority, while dedication refers to a contract either expressed or implied. Where there has been an attempt to establish a highway, but because of some defect the proceedings are not valid, the owner's rights would not be impaired, nor would any highway be created in case there had been no user of the way by the public, and no element of estoppel. If, however, the public acting on the claim supplied by such proceedings had used the way for the requisite period, then there would no doubt be a public way. This would be so even though the owner at the outset had opposed the establishment of the highway. In such a case, the right to the highway would be clearly referable to the claim or color of right furnished by the defective proceedings instituted for the laying out and opening of the road. If the right to the way depends solely upon user, then the width of the way and the extent of the servitude is measured by the character of the user, for the

easement can not be broader than the user. (See *Davis v Clinton*, 58 Ia., 389), but if there were defective proceedings, and the use was under color of the claim supplied by them, then the extent of the easement is to be measured by the claim exhibited by proceedings and by them intended to be established."

"As a general rule before a highway can be established by prescription, it must appear that the general public under a claim of right, and not by mere permission of the owner, used some defined way without interruption or substantial change for the statutory period. (See *State v. Green*, 41 Ia., 693). * * * Where the use is merely permissive and not adverse there is no basis on which a right of way by prescription can rest."

"The use by the public must be general and uninterrupted and under claim of right for a period equal to that for the limitations of real actions. *State v Tucker*, 36 Ia., 485; Washburn on Easements, pp. 121-122."

"Ten year's use of a highway by the public under claim of right, will bar the owner of the soil; *Keys v Tait*, 19 Ia., 123, at least in the absence of proof that the road was used by leave, favor, or mistake. *Onstott v Murray*, 22 Ia., 457.

"To establish a highway by prescription there must be an actual public use, general, uninterrupted and continued for ten years, under claim of right. *State v Greene*, 41 Ia., 693."

"While the public may acquire the right to a highway by virtue of adverse possession and use under claim of right, for the statutory period the same as an individual, the possession or use must nevertheless correspond and be commensurate with the claim of right. *State v Welpton*, 34 Ia., 144."

"Under particular circumstances held that the fact that a road on the line, claimed by defendant to be the line of the public highway, was worked and traveled by the defendant for twenty-five years without objections on the part of the plaintiff, and the further fact that plaintiff built and so maintained his fences as to indicate an intention not to claim any of the land so used as against the public, raised a strong presumption in favor of defendant's claim which was not overcome by the evidence; and held that even had no steps been taken to establish a highway on the land in question, in the manner provided by law, the court would be justified in finding that it had been

established by the acts of the plaintiff, and of the public, and by the lapse of time. *Sherman v Hastings*, 81 Ia., 372."

So where private roads are laid out on dividing lines each property owner may acquire an easement in the land of the other by prescription. See *McAllister v Pickup*, 84 Ia., 65. "Where a road was laid out upon a dividing line between the lands of the plaintiff and the defendant, and used by them and their grantors continuously, openly and notoriously for more than forty years, without the right to such use being disputed, and when the defendant after such period fenced up said road against the protest of the plaintiff, who asserted his right to use said road, held that an easement in said land of the defendant had been acquired by prescription."

In this connection it is well to note section 3006 of the Code of Iowa, 1897, which says: "No right of footway, except claimed in connection with right to pass with carriages, shall be acquired by prescription or adverse use for any length of time."

"The existence of a highway by prescription is generally proved by the parol evidence of witnesses that the road in question had been known and used as a highway or road common to all the people for the necessary period of prescription." Elliot on Roads and Streets, 138.

"To render parol testimony tending to establish a road by prescription admissible, it is not necessary that it should first be shown that there is no record showing the establishment of such road. *Mosier v Vincent*, 34 Ia., 478."

It has been held by some that the doctrine of adverse possession does not apply to municipal corporations, and that consequently no one can acquire title to a street by adverse occupation. It seems, however, that upon this point authorities are not agreed. The decisions of the highest courts of some of the states, notably California, Pennsylvania, New York, New Jersey, Rhode Island and Louisiana, seem to sustain the above idea, while the courts of most of the other states have held that the doctrine of adverse possession applies to municipal corporations the same as to individuals.

In the case of *The City of Pella v Scholte*, 24 Ia., 283, Chief Justice Dillon held that "Where the original proprietor of a town held open and visible possession of a square therein for

the statutory period for the limitation of real actions, claiming that he had never relinquished but still retained title thereto, that the right of the corporation to maintain an action for the recovery thereof was barred;" and stated "That while the Statute of Limitations will not run against the state or sovereignty, it may against a municipal corporation."

In the case of *Dudley v Trustees of Frankfort*, 12 Ky., 610, the plaintiff claimed the right to a part of the street by adverse occupancy. The court in the opinion said: "If a private citizen at any time encroach with his buildings and enclosures upon the public streets, the municipal authorities should in the exercise of proper vigilance and of their undoubted authority, interfere by the legal means provided in their charter to prevent such encroachments in due time, and thus preserve for the public use the squares, streets and alleys of the town in their original dimensions; but if a private individual or citizen has been permitted to remain in the continued adverse, actual possession of public grounds or of a public street, or of part of a street, as embraced within his inclosure or covered by his dwelling or other buildings for a period of twenty years or more, without interruption, such citizen will be vested thereby with the complete title to the ground actually occupied by him; and the title thus perfected by time will be just as available against a municipal corporation as it would be against an individual whose elder title and right of entry may be barred by a continued adverse possession of his land for twenty years."

In *City of Wheeling v Campbell*, 12 W. Va., 36, that court, after a complete and critical review of the conflicting authorities, said: "We see no reason why a municipal corporation should not be held to the same degree of diligence in guarding their streets and squares from encroachments as natural persons are in protecting their property from the adverse possession of others. We do see great reasons why no time should bar the sovereign power because the officers of the sovereign, whether king or state, have such various and onerous duties to perform that the rights of the sovereign may be neglected; and all the people of the kingdom or state are interested in having the rights of the sovereign preserved intact, and not subject to be impaired or lost by the neglect of officers. But the same

reason does not apply to a municipal corporation. A city or town is a compact community, with its city or town council, its committee on streets and alleys and its street commissioners, whose special duty it is to see that the streets, squares and alleys are kept in proper order and free from obstructions or encroachments, and if with all this machinery and power confined to so narrow a compass and the interests of the corporation to exercise it, the city authorities permit an individual to encroach upon the streets, alleys or squares of the city and hold, enjoy and occupy the same, claiming them as his own under his title without interruption or disturbance in that right, for the period described in the Statute of Limitations, the city not only does, but we think according to reason as well as authority ought to lose all right thereto." Quoted in *Meyer v City of Lincoln*, 33 Neb., 566. Judge Norval said in ruling on this case: "We are satisfied, upon principle as well as authority, that adverse possession by an abutting lot owner of a portion of a street in a city for the statutory period of limitations will give a complete title thereto to the occupant. To have that effect the possession must be actual, visible, exclusive and uninterrupted for the full period of ten years under a claim of right."

In harmony with this is the ruling in *Cambridge v Cook*, 66 N.-W., 884, which says: "A municipal corporation may be estopped by allowing land which has been dedicated for streets or alleys to be adversely occupied, from making any claim to have such street or alley opened." However, "Mere neglect to use the rights conferred on a municipal corporation by the dedication in a plat of ground for an alley will not estop the public from asserting its right thereto. *Taraldson v Lime Springs*, 92 Ia., 187."

"Nevertheless, mere occupation of land belonging to a city, with full knowledge of the occupant that he has no color of right thereto does not give any prescriptive right therein. *Twining v Burlington*, 68 Ia., 284."

In the *City of Waterloo v The Union Mill Co.*, 72 Ia., 437, Judge Beck drew distinctions as to the kind of cases in which the statute of limitations would and would not run. He ruled as follows:

"In our opinion the right of the plaintiff and of the public to

the use and occupancy of the street is not barred by the statute of limitations. The city is invested by the legislature with governmental powers, and holds the fee of the streets or an easement thereon in trust for the public; *Ogg v City of Lansing*, 35 Ia., 495; *Calwell v City of Boone*, 51 Ia., 687; *City of Clinton v Cedar Rapids & M. R. Ry Co.*, 24 Ia., 455. The city is but an instrument for the exercise of the authority of the state, and its municipal powers in establishing and maintaining a street are exercised in the discharge of governmental functions. The statute of limitations, therefore, will not run to defeat the exercise of its governmental authority. In cases wherein arose questions involving property or contracts which do not pertain to the exercise of their authority, the statute will run. *Davies v Huebner*, 45 Ia., 574; *City of Burlington v Burlington & M. R. Ry. Co.*, 41 Ia., 134. *City of Pella v Scholte*, 24 Ia., 283, Dill. Mun. Corp. § 675, and cases cited in notes."

If a title can be obtained by adverse possession which can be enjoyed indefinitely, or can be transferred by him who thus possesses it, what evidence has he of the right to transfer? May he have recorded evidence of his title, and what, in general, is the legal effect upon him who loses and upon him who gains by adverse possession? And to what extent may he who acquires title adversely rely upon this title?

Tiedeman on Real Property, sec. 716, says: "The Statute of Limitations not only protects the title acquired by adverse possession when it is assailed by plaintiff in an action of ejectment, but it may also be relied upon to vindicate his right to possession where he has been ousted, and he is forced to his action to recover possession."

In *Cramer v Clow*, 81 Ia., 255, it was held that "the title acquired by prescription through adverse possession is not merely defensive, but is for all practical purposes a title, and an action to quiet a title founded on such possession may be maintained."

Again in *Independent Dist. v Fagan*, 63 N. W., 456, "adverse possession of real estate for ten years, under a claim of absolute ownership creates a title by prescription, not merely for defensive but for all practical purposes, upon which an action to quiet the title may be maintained."

In *Tourtelotte v Pearce*, 42 N. W., 915, it was held that "a party who has been in the actual, open, notorious, exclusive, adverse possession of real estate for ten years thereby acquires an absolute title to such real estate and may maintain an action to have certain deeds, which are clouds upon the title, set aside and declared void and quiet his possession in the premises.

Judge Gantt in *Horbach v Miller*, 4 Neb. 47, quoting from *Graffius v Tottenham*, 1 W. & S., Pa. 488, stated the effect of the statute very clearly as follows: "The title of the original owner is unaffected and untrammelled till the last moment, and it is vested in the adverse occupant by the completion of the statutory bar; the transfer has relation to nothing which preceded it; the moment of conception is the instant of birth. Therefore the operation of the statute takes away the title of the owner and transfers it, in legal effect, to the adverse occupier; and one who purchases the written title of the owner buys a title which by operation of law was fairly vested in the adverse occupant."

Regarding the recording of titles acquired by the operation of the statute of limitations we could find nothing that is more to the point than what is given in *Schall et al v The Williams Valley Railway Company*, 35 Pa. St., 191. Judge Graham, of the Court of Common Pleas of Schuylkill County, said in his charge to the jury: "Title by the Statute of Limitations is peculiar in some respects; although it is as perfect and absolute as a legal conveyance, it is not susceptible of being recorded as a deed. Its record is upon the ground and in the knowledge and recollection of those living in the vicinity." Judge Woodward, of the Supreme Court, in ruling upon this case said: "Titles matured under the Statute of Limitations are not within the recording acts. However expedient it might be to require some public record of such titles to be kept, and however inconvenient it may be to purchasers to ascertain what titles of that sort are outstanding, still we have not as yet any legislation on the subject, and it is not competent for judicial decision to force upon them consequences drawn from the recording acts. * * * Purchasers should not content themselves with merely searching registries which were an invention consequent upon written titles, but they should make

themselves familiar with the history of the possession for the last one and twenty years¹ at least. And if they would be relieved of this necessity they must get the legislature to contrive a mode of putting this kind of title on the public records. Till that is done the courts will be obliged to give effect to such titles without regard to records."

Regarding the ethical status of the law I will quote from Judge Hooker of the Supreme Court of Michigan: "Depriving one who has a clear paper title of his lands upon no better grounds than an unlawful occupancy, is too much like defeating an honest debt on the grounds that the creditor has been unduly lenient, to entitle the recipient of the benefits arising from such a transaction to very much commendation. The doctrine is well settled, however, and doubtless is productive of good, indeed it is indispensable from a public standpoint, whether it can be said to conduce to common honesty or not."

Judge Horton of the Supreme Court of Pennsylvania in *Leeds v. Bender*, 6 W. & S., 318, in speaking of the statute of limitations said: "The statute is a most important and beneficial one; it was made to protect those who had no other protection—for cases where all evidence is lost. It gives as perfect a title, if not a more perfect, than any other known to our law. I have attended to the operation of the statute almost half a century, and I do not know any more beneficial, and, in its general operation, more just law."

In conclusion we wish to call attention to the ruling in the case of *Ivy v Young*, 129 Mo. 501, viz: "Adverse possession is the act of holding possession against one having a superior right or title, under a claim of right to do so, and to constitute it there must first be an ouster of the real owner followed by actual possession by the adverse claimant, and second an intention on the part of the latter to oust the real owner and possess for himself." Viewed in the light of the more specific and definite rulings hereinbefore quoted, it would seem that this is exclusive and inclusive enough, to be considered almost if not quite a perfect definition of the term 'adverse possession.'

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¹ The statutory period of limitation in Pennsylvania.

