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THE LAW OF ADVERSE POSSESSION IN WASHINGTON

WILLIAM B. STOEBUCK*

Adverse possession is an anomaly in the law in that it is a system whereby a legal right is obtained through conduct which must be wrongful. Essentially it consists of the nonpermissive occupation of another's land until a statute of limitations bars his right to recover it. Unlike the usual statute of limitations situation, in which only a remedy is barred, in adverse possession the occupant acquires an affirmative legal right, an original title in fee simple. Clearly such a strange and drastic doctrine must spring from strong necessity. Desire to reward the occupant or punish the lax owner should not be the motive, though some cases smack of this. The doctrine arose in law, not equity; so estoppel is not the explanation. Rather, it is suggested adverse possession rests on considerations of public policy: that title to land should not long be in doubt, that society will benefit from someone's making use of land the owner leaves idle, and that third persons who come to regard the occupant as owner may be protected. Of some force too must be the notion that mere possession, itself a rudimentary right in land, might metamorphose into a more formal right if long continued.

Modern adverse possession is the successor to disseisin at common law, and it is common to refer to the adverse possessor as "disseisor" and the dispossessed owner as "disseisee." Though seisin originally meant only possession,¹ by sometime before the reign of Henry II² it denoted a tenancy of freehold, carrying with it the incidents of feudal tenure.³ Not until the eighteenth century was seisin thought of as an abstract right of ownership in the modern sense of "title."⁴ A disseisin was a wrongful putting out of seisin, not merely a dispossessing, which might be rightful,⁵ and implied both an entry and an ouster from the freehold.⁶ It is generally said that a disseisin, no matter how long continued, could not give title,⁷ which is not surprising, considering that seisin was not abstract title. However, the common

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¹ HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW 21 (1927); 2 POLLOCK AND MATTLAND, HISTORY OF ENGLISH LAW 29 (1898).

² 1154-1189 A.D. See Taylor dem. Atkyns v. Horde, 1 Burr. 60 (1757).

³ 2 POLLOCK AND MATTLAND, *op. cit. supra* note 1, at 29-40.

⁴ HOLDSWORTH, *op. cit. supra* note 1, at 128.

⁵ COKE UPON LITTLETON, 153 b., n. 7.

⁶ *Id.* at 181 a.

⁷ 2 POLLOCK AND MATTLAND, *op. cit. supra* note 1, at 81.

law had limitation periods on all the actions for recovery of land, and, due to the nature of seisin, the barring of the right of the only one who could defeat the disseisor gave the latter a title of sorts.⁸ Moreover, it appears that, although the disseisor might not be seised in his own right, he could convey seisin.⁹

The English statutes of limitation varied a number of times through several centuries until the period for bringing all actions to recover land was set at twenty years in 1623.¹⁰ This was the statute in effect at the time of the American Revolution, and its twenty-year period is what American cases refer to as the common-law period.¹¹ The term "adverse possession" seems to have been first used in 1757 in the case of *Taylor dem. Atkyns v. Horde*.¹²

In Washington every adverse possession case will involve a statute. This is not to say that the quality of adverse possession is always regulated by statute but rather that the period for which adverse possession must be maintained to give title is governed by statute. It often simplifies one's thinking to regard adverse possession cases as involving questions from two separate areas of law: possession of real property and limitations on actions. Washington has three statutes governing adverse possession and another providing for the adverse acquisition of vacant land without possession. In addition, there are two other minor statutes which, while they are not concerned with adverse possession, are covered here because of a logical connection with that subject. This article is based upon cases involving the six statutes alluded to and attempts to cite every Washington case upon them. In addition, a section has been added on the subject of acquisition of easements by prescription, though the treatment does not purport to deal with all Washington cases. No coverage is given to prescriptive acquisition of water rights. Nor will anything be said concerning chattels except to note that Washington has stated one may get ownership of another's chattels by "adverse possession" of them for the three-year period of limitations on replevin.¹³

THE STATUTES

Ten-year statute. The principal adverse possession statute is RCW

⁸ *Ibid.*

⁹ *Taylor dem. Atkyns v. Horde*, 1 Burr. 60, 108 (1757).

¹⁰ Stat. 21 Jas. 1, c. 16.

¹¹ BUSWELL, *THE STATUTE OF LIMITATIONS AND ADVERSE POSSESSION* 14 (1889).

¹² 1 Burr. 60. Bordwell, *Seisin and Disseisin*, 34 HARV. L. REV. 592, 623 (1921).

¹³ *Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wn.2d 616, 157 P.2d 302 (1945); *Lovell v. Reid*, 34 Wn.2d 847, 210 P.2d 803 (1949) (dictum).

4.16.020,¹⁴ which simply provides that all actions for the recovery of title or possession to real property must be begun within ten years after the plaintiff was last seised or possessed of it. The first adverse possession case in the state held the statute was run only by "adverse possession" in the common-law sense,¹⁵ and this has never been doubted since. The court has numerous times recited definitions of adverse possession under the ten-year statute, the latest being: "'Possession, to be adverse, must be actual and uninterrupted, open and notorious, hostile, and exclusive, and under a claim made in good faith. . . .'"¹⁶ Usually the court uses "claim of right" instead of merely "claim,"¹⁷ and sometimes "claim of right or color of title."¹⁸ In one or two cases the court has even added, apparently for good measure, that adverse possession must be "adverse," in addition to the other elements. As a practical matter, however the phrase may vary from case to case, it should be regarded as only a somewhat redundant definition of "adverse," not as an original statement of law, and the practitioner ought not be alarmed by minor changes in wording.

Color-of-title statute. Probably the second most important statute is RCW 7.28.070, which provides that one who has adverse possession of land for seven successive years under color of title and who pays all taxes levied on this land during that time, believing in good faith that he has good title, becomes the owner of such land as is included within his colorable title.¹⁹ This statute, setting out the requirements

¹⁴ RCW 4.16.020—"The period prescribed in RCW 4.16.010 for the commencement of actions shall be as follows: Within ten years: Actions for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appears that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action."

¹⁵ *Balch v. Smith*, 4 Wash. 497, 499, 30 Pac. 648 (1892): "In our opinion our statute of limitations is like that of most of the other states, one of adverse possession. . . ."

¹⁶ *Slater v. Murphy*, 154 Wash. Dec. 250, 257, 339 P.2d 457 (1959), citing *Taylor v. Talmadge*, 45 Wn.2d 144, 273 P.2d 506 (1954), and *Scott v. Slater*, 42 Wn.2d 366, 255 P.2d 377 (1953).

¹⁷ See, for example, *Fisher v. Hagstrom*, 35 Wn.2d 632, 214 P.2d 654 (1950), or *Bowden-Gazzam Co. v. Hogan*, 22 Wn.2d 27, 154 P.2d 285 (1944).

¹⁸ Examples are *Skansi v. Novak*, 84 Wash. 39, 146 Pac. 160 (1915), and *Hesser v. Siepmann*, 35 Wash. 14, 76 Pac. 295 (1904). No case has required "color of title" under the ten-year statute, and it seems not to be the current vogue even to recite it as an alternative to "claim of right."

¹⁹ RCW 7.28.070—"Every person in actual, open and notorious possession of lands or tenements under claim and color 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."

of both the possession and limitations aspects, is a complete expression of a specialized form of adverse possession. As will appear later, "color of title," its outstanding feature, is a void paper title.

Connected-title statute. The third statute which can truly be called one of adverse possession is RCW 7.28.050.²⁰ It provides that there is a seven-year limitations period on the bringing of any action to recover land when the same is possessed adversely by one who has record title running back to a state or federal deed, to a tax sale, or to a state or federal judicial sale. Thus, the statute requires adverse possession for seven years under such record title and is intended to "validate" such titles if they are void because of some defect in the deed or sale or the proceedings leading up to them. It will be noted that neither payment of taxes nor good faith is required by this statute.

Vacant-land statute. RCW 7.28.080 is a curious statute in that it gives title to land to a person who, in good faith, has color of title to vacant land and who pays taxes on it for seven successive years, though he never sets foot upon it.²¹ This of course is not an adverse possession statute at all, since it lacks the basic requirement of possession. However, because it is a substitute for adverse possession, it must be considered a logical part of the law on that subject.

Vacation of unopened county roads. A statute having no particular connection with adverse possession is RCW 36.87.090, providing that county roads which are not opened for five years after being

²⁰ "That all actions brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual, open and notorious possession for seven successive years, having a connected title in law or equity deducible of record from this state or the United States, or from any public officer, or other person authorized by the laws of this state to sell such land for the nonpayment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid, but when the possessor shall acquire title after taking such possession, the limitation shall begin to run from the time of acquiring title."

²¹ RCW 7.28.080—"Every person having color of title made in good faith to vacant and unoccupied land, who shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title. All persons holding under such taxpayer, by purchase, devise or descent, before said seven years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of said taxes for the term aforesaid, shall be entitled to the benefit of this section: *Provided, however,* If any person having a better paper title to said vacant and unoccupied land shall, during the said term of seven years, pay the taxes as assessed on said land for any one or more years of said term of seven years, then and in that case such taxpayer, his heirs or assigns, shall not be entitled to the benefit of this section."

authorized are vacated.²² This statute, however, does not apply to roads which have been dedicated by plat or deeded to the state or a county, and it thus has a narrow scope. Before 1909 it did apply to these kinds of roads;²³ so it might have more utility if a road has been authorized but unopened for five years before 1909. In the case of roads which were authorized within five years before 1909, the more restrictive provisions of the present statute apply.²⁴ Obviously the statute has limited usefulness to a landowner who wishes to recover the use of a roadway across his land.

Three-year tax deed statute. A minor statute which will be adverted to only briefly is RCW 4.16.090, limiting the time for bringing actions to cancel or set aside tax sale deeds to three years after the issuance of the deed.²⁵ This has no aspect of adverse possession to it and is mentioned only that it may be compared with the connected-title statute, *supra*.

GENERAL CONSIDERATIONS

Quality of title derived from adverse possession. Title to land is normally the question involved in adverse possession cases, and it is so well settled in Washington that adverse possession continued for the period of limitations gives title that no authority need be cited for this general rule. The title obtained is an original one in fee simple and is of the same quality as title gotten by deed.²⁶ Therefore, it cannot be waived or renounced orally or by acts²⁷ but can be lost or given up only in the ways title acquired by deed could be,²⁸ which means of

²² RCW 36.87.090—"Any county road, or part thereof, which remains unopened for public use for a period of five years after the order is made or authority granted for opening it, shall be thereby vacated, and the authority for building it barred by lapse of time: *Provided*, That this section shall not apply to any highway, road, street, alley, or other public place dedicated as such in any plat, whether the land included in such plat is within or without the limits of an incorporated city or town, or to any land conveyed by deed to the state or to any county, city or town for highways, roads, streets, alleys, or other public places."

²³ *Turner v. Davisson*, 47 Wn.2d 375, 287 P.2d 726 (1955); *Lewis v. City of Seattle*, 174 Wash. 219, 24 P.2d 427, *aff'd on rehearing*, 174 Wash. 226, 27 P.2d 1119 (1933).

²⁴ *Gillis v. King County*, 42 Wn.2d 373, 255 P.2d 546 (1953).

²⁵ RCW 4.16.090—"Actions to set aside or cancel any deed heretofore or hereafter issued by any county treasurer after and upon the sale of lands for general, state, county or municipal taxes, or upon the sale of lands acquired by any county on foreclosure of general, state, county or municipal taxes, or for the recovery of any lands so sold, must be brought within three years from and after the date of the issuance of such treasurer's deed."

²⁶ *Mugaas v. Smith*, 33 Wn.2d 429, 206 P.2d 332 (1949); *McInnis v. Day Lumber Co.*, 102 Wash. 38, 172 Pac. 844 (1918); *Sunde v. Hanson*, 96 Wash. 221, 164 Pac. 917 (1917).

²⁷ *Johnson v. Ingram*, 63 Wash. 554, 115 Pac. 1073 (1911).

²⁸ *McInnis v. Day Lumber Co.*, 102 Wash. 38, 172 Pac. 844 (1918).

course that it may be conveyed by deed.²⁹ Once adverse possession title has been perfected, it will support affirmatively an action to quiet title or eject the disseised record owner.³⁰ Because adverse possession title is beyond the aegis of the recording acts, the recorded owner's conveyance to a bona fide purchaser does not cut off such title, though no evidence of it appears of record.³¹ This creates a problem for the title examiner which physical inspection of the land may not always solve, since the adverse possessor who had once perfected title would not lose it by merely vacating the land.

Persons who may possess adversely. The interesting case of *Prentice v. How*³² seems to be the only Washington case involving the question of whether personal characteristics of the possessor will prevent his possessing adversely. The case holds that an alien, though unable to own land, might possess it adversely so that his period of adverse possession would inure to the benefit of a grantee not under this disability, who thereby acquired title.

The only other class of case to be discussed at this point is that where the person claiming title by adverse possession has not personally occupied the land for the full limitation period but must claim through others purporting to hold through him. This he may do, and the cases have held that possession may be had through the claimant's tenants³³ or through a contract vendee in possession.³⁴

Entities against which adverse possession will not operate. One may not possess adversely lands owned in any capacity by the United States Government³⁵ or by the State of Washington.³⁶ Before 1903 it was possible, under the ten-year statute, to hold state lands other than shorelands or tidelands adversely, but the adoption of a statute³⁷ in that year removed this possibility.

²⁹ *Johnson v. Conner*, 48 Wash. 431, 93 Pac. 914 (1908).

³⁰ *Alexander v. Bennett*, 91 Wash. 688, 158 Pac. 534 (1916).

³¹ *Mugaas v. Smith*, 33 Wn.2d 429, 206 P.2d 332 (1949).

³² 84 Wash. 136, 146 Pac. 388 (1915).

³³ *O'Brien v. Schultz*, 45 Wn.2d 769, 278 P.2d 322 (1954); *Foote v. Kearney*, 157 Wash. 681, 290 Pac. 226 (1930); *Flint v. Long*, 12 Wash. 342, 41 Pac. 49 (1895).

³⁴ *McAuliff v. Parker*, 10 Wash. 141, 38 Pac. 744 (1894).

³⁵ *Roediger v. Cullen*, 26 Wn.2d 690, 175 P.2d 669 (1946) (no easement by prescription of federal lands); *Delacey v. Commercial Trust Co.*, 51 Wash. 542, 99 Pac. 574 (1909).

³⁶ *Bowden-Gazzam Co. v. Kent*, 22 Wn.2d 41, 154 P.2d 292 (1944); *State v. Scott*, 89 Wash. 63, 154 Pac. 165 (1916); *State v. Sturtevant*, 76 Wash. 158, 135 Pac. 1035 (1913); *State v. Seattle*, 57 Wash. 602, 107 Pac. 827 (1910); *O'Brien v. Wilson*, 51 Wash. 52, 97 Pac. 1115 (1908) (no adverse possession of lands granted state by federal government as school lands).

³⁷ RCW 4.16.160, which provides in part that "no claim of right predicated upon the lapse of time shall ever be asserted against the state...."

Adverse possession against a city or county is not possible as to lands it holds in a "governmental capacity," but it has been said adverse possession is possible as to lands held in a nongovernmental capacity, though none such has yet been identified for adverse possession purposes. Thus, there can be no adverse possession of a platted public street³⁸ or alley,³⁹ though it is possible to have adverse possession of a vacated road.⁴⁰ No adverse possession can be had of land a county holds by virtue of having bought it at its own tax sale⁴¹ nor of land it has acquired under tax foreclosure.⁴² A particularly important application of the latter rule is that a tax foreclosure will wipe out any rights gotten by adverse possession, whether or not the full period of limitations has run.⁴³ An exception to this is, however, that title gotten by adverse possession will not be lost if the adverse possessor had in fact paid taxes on the land foreclosed, but, because of a misdescription in the tax receipt, had not gotten credit for doing so.⁴⁴

A very special class of cases is those involving the Northern Pacific Railway, which are more of academic interest than anything else now. In 1864 the railway company received a 400-foot-wide right of way by act of Congress. In *Northern Pac. Ry. v. Ely*⁴⁵ and *Northern Pac. Ry. v. Hasse*,⁴⁶ Washington held adverse possessors acquired title to portions of these lands. The United States Supreme Court reversed these cases on the ground that it would contravene the purpose of the grant from Congress to allow individuals to acquire title to the lands granted.⁴⁷ In 1904, while the appeals to the Supreme Court were pending, Congress passed a statute validating conveyances theretofore made by the railway up to within 100 feet of the center of the line on either side. The effect of this was that, though reversing Washington in the *Ely* and *Hasse* cases, the Supreme Court did hold that adverse possessors who claimed land up to this 100-foot distance and who had main-

³⁸ *Mueller v. City of Seattle*, 167 Wash. 67, 8 P.2d 994 (1932); *Vetter v. K. & K. Timber Co.*, 124 Wash. 151 213 Pac. 927 (1923) (semble); *West Seattle v. West Seattle Land & Investment Co.*, 38 Wash. 359, 80 Pac. 549 (1905).

³⁹ *Rapp v. Stratton*, 41 Wash. 263, 83 Pac. 182 (1905).

⁴⁰ *Tamblin v. Crowley*, 99 Wash. 133, 168 Pac. 982 (1917).

⁴¹ *Gustavson v. Dwyer*, 83 Wash. 303, 145 Pac. 458, *aff'g*, 78 Wash. 336, 139 Pac. 194 (1915).

⁴² *Johnson v. Burgeson*, 25 Wn.2d 269, 170 P.2d 311 (1946).

⁴³ *Rushton v. Borden*, 29 Wn.2d 831, 190 P.2d 101 (1948).

⁴⁴ *Berry v. Pond*, 33 Wn.2d 560, 206 P.2d 506 (1949). As to whether this should be the rule, see Comment, *Security of Tax Foreclosure Titles*, Chapter 2, 25 WASH. L. REV. 83 (1950).

⁴⁵ 25 Wash. 384, 65 Pac. 555 (1901).

⁴⁶ 28 Wash. 353, 68 Pac. 882 (1902).

⁴⁷ *Northern Pac. Ry. v. Ely*, 197 U.S. 1 (1905); *Northern Pac. Ry. v. Hasse*, 197 U.S. 9 (1905). These cases were based in part upon *Northern Pac. Ry. v. Townsend*, 190 U.S. 267 (1903).

tained their possession for the period of limitations prior to 1904, acquired title by adverse possession. Several Washington cases since have adhered to that view.⁴⁸

Adverse possession among owners of different interests in same land. There have been a relatively large number of cases in Washington involving situations in which one person who had a partial interest in land claimed adverse possession against a second person who owned another partial interest, and the principles in this area are fairly well blocked out. As a general, if perhaps oversimplified, guide, it may be said that such possession, to be adverse, must be inconsistent with the second person's maintenance of his particular quality of interest, considering its peculiar characteristics and relation to the interest of the adverse possessor.

Among tenants in common, sole possession and collection of rents, issues and profits by one does not constitute adverse possession against the other, because it is not inconsistent with their legal relationship and gives no notice of adverse claim.⁴⁹ But if one tenant in common conveys to a stranger, purporting to grant the entire fee, then this is an inconsistent act and does allow the grantee to possess adversely by acts which would constitute adverse possession among strangers.⁵⁰ Similarly, if one tenant in common mortgages his interest and there is a foreclosure sale, the certificate of sale or deed purporting to include the entire fee, the purchaser at the sale may possess adversely against the remaining tenant in common in the same manner as against a fee owner.⁵¹ There is language in one case, probably amounting to an alternate holding, that one co-tenant's subdivision and sale of part of a tract, all without consulting with the other co-tenant, would be such an inconsistent act as to allow adverse possession by the former of parts of the tract retained.⁵² The court speaks in terms of an "ouster" of the dispossessed co-tenant and of "notice" to him of the inconsistent

⁴⁸ Northern Pac. Ry. v. Spokane, 45 Wash. 229, 88 Pac. 135 (1907); Northern Pac. Ry. v. Tuttle, 89 Wash. 699, 154 Pac. 796 (1916); State v. Ballard, 156 Wash. 530, 287 Pac. 27 (1930).

⁴⁹ McKnight v. Basilides, 19 Wn.2d 391, 143 P.2d 307 (1943) (husband and father had become tenant in common with children of community property upon wife's death, occupying one parcel himself and renting another); Graves v. Graves, 48 Wash. 664, 94 Pac. 481 (1908) (upon divorce certain community land, not being disposed of by decree, became held in common, and one ex-spouse had exclusive use and possession).

⁵⁰ Church v. State, 65 Wash. 50, 117 Pac. 711 (1911) (interest involved was tenancy in common in water rights).

⁵¹ Schlarb v. Castaing, 50 Wash. 331, 97 Pac. 289 (1908); Cox v. Tompkinson, 39 Wash. 70, 80 Pac. 1005 (1905).

⁵² Cox v. Tompkinson, *supra* note 51.

claim. The above cases are examples of ousters, and they also show that constructive notice will suffice.

Between vendor and vendee, if the vendee is in possession under an executory contract of sale, it is probable that he is estopped to assert adverse possession. The court has twice said this, once in dictum⁵³ and once in a statement which may or may not be a holding.⁵⁴ In the case last cited there definitely was a holding that the vendee in possession could not possess adversely as long as he continued to perform any of his obligations under the contract, even though he had refused to pay installments. If, however, the contractual obligations are performed, then the vendee may commence a period of adverse possession.⁵⁵

There seems to be only one case on the issue of adverse possession by a tenant against his landlord, and it holds there is no adversity in the tenant's erection of improvements, at least when they are useful in his use of the land for the purpose for which it was demised.⁵⁶ Since the case does not go on the broad ground that no adverse possession would be possible in any event, it is probably still open for contention that a tenant could, by acts wholly inconsistent with his subservient holding, oust his landlord and commence adverse possession.

The owner of a fee estate cannot possess adversely to an easement upon his land unless his acts prevent the enjoyment of the easement rights. For this reason there is no adverse possession against a railroad's easement of passage by farming the right of way up to the tracks.⁵⁷ It has even been held that there is no adverse possession against an unopened railroad right of way by farming and fencing the entire area, since this is not inconsistent with the railroad company's right to put in its line when it becomes ready to do so.⁵⁸ A unique situation similar to the railroad cases arose in *McCoy v. Lowrie*,⁵⁹ which held that, when there is a severance of mineral rights from surface

⁵³ *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30 (1892), *appeal dismissed*, *Dibble v. Bellingham Bay Land Co.*, 163 U.S. 63 (1896) (dictum because adverse possession was allowed on ground contract was performed and no longer executory).

⁵⁴ *Nethery v. Olson*, 41 Wn.2d 173, 247 P.2d 1011 (1952).

⁵⁵ *Bellingham Bay Land Co. v. Dibble*, *supra* note 53. This caveat should be added: The vendee-possessor had actually received a deed which was unrecorded and had been lost.

⁵⁶ *Bepple v. Reiman*, 51 Wn.2d 144, 316 P.2d 452 (1957) (tenant of farm built machine shed, gasoline tank, and other small improvements).

⁵⁷ *Northern Pac. Ry. v. McDonald*, 91 Wash. 113, 157 Pac. 222 (1916); *Northern Counties Inv. Trust v. Enyard*, 24 Wash 366, 64 Pac. 516 (1901).

⁵⁸ *Netherlands Am. Mortgage Bank v. Eastern Ry. & Lumber Co.*, 142 Wash. 204, 252 Pac. 916 (1927).

⁵⁹ 42 Wn.2d 24, 253 P.2d 415 (1953).

rights, the owner of the surface does not possess adversely to the owner of the underground mineral rights by making exclusive use of the surface.

Application of adverse possession to some special interests and situations. It is possible to acquire a mining claim by holding and working it for the ten-year period of limitations and possibly also under one of the seven-year statutes.⁶⁰ And the court has held that one who floods another's land by maintaining a dam for ten years acquires the right to continue doing so, though it was not decided if this occurred by operation of adverse possession or of prescription of an easement.⁶¹

The ten-year statute is the one which applies to the bringing of actions for constitutional taking or damaging⁶² or for ejectment⁶³ against a municipal corporation. Likewise, it is the period of limitation for bringing an action for constitutional taking or damaging against a public utility corporation having the power of eminent domain.⁶⁴

If adverse possession is maintained for the statutory period upon land which is mortgaged, the following have been held to be the rules: against the mortgagor or his grantee, the adverse possessor acquires title when the applicable adverse possession period of limitations has run; but against the mortgagee or his successor, who has no possessory right, the adverse possessor acquires a defense only upon the running of the six-year limitations period on the right to foreclose.⁶⁵

There may be no adverse possession against a remainderman under either the ten-year or color-of-title statute.⁶⁶ Since the reason for this is that the holder of future interests cannot eject a possessor, the same rule would presumably apply to reversioners,⁶⁷ though Washington has not so held.

Tacking. "Tacking" is the joining together of successive periods of possession by two or more adverse possessors, the purpose for doing so being to fill up the requisite period of limitation when no one possessor has himself possessed that long. Many, if not most, of the cases have involved tacking, but in surprisingly few instances have issues

⁶⁰ *Newport Mining Co. v. Bead Lake Gold-Copper Mining Co.*, 110 Wash. 120, 188 Pac. 27 (1920) (the ten-year statute appears to have been the one involved, though the court's language indicates it would have allowed application of a seven-year statute).

⁶¹ *McInnis v. Day Lumber Co.*, 102 Wash. 38, 172 Pac. 844 (1918).

⁶² *Litka v. City of Anacortes*, 167 Wash. 259, 9 P.2d 88 (1932).

⁶³ *Aylmore v. City of Seattle*, 100 Wash. 515, 171 Pac. 659 (1918).

⁶⁴ *Price v. Humptulips Driving Co.*, 127 Wash. 69, 219 Pac. 871 (1923).

⁶⁵ *Thornely v. Andrews*, 40 Wash. 580, 82 Pac. 899 (1905).

⁶⁶ *McDowell v. Beckham*, 72 Wash. 224, 130 Pac. 350 (1913).

⁶⁷ 4 TIFFANY, REAL PROPERTY 452 (1939).

been formed upon that circumstance. The court is wont to remark, more or less in passing, that the possessor and his "predecessors," or some such term, have been in possession, seldom analyzing the relationships that must exist between successive possessors for tacking to be allowed.

In the case of all three of the seven-year statutes, tacking is regulated by statute. With the color-of-title statute, those possessors connected by "purchase, devise or descent" may tack.⁶⁸ The tacking language applicable to the connected-title statute is "heirs, devisees and assigns,"⁶⁹ and there seem to be no cases amplifying upon these words. Nor have cases been found interpreting the tacking provisions of the vacant-land statute, which applies to persons holding under the original claimant by "purchase, devise or descent."⁷⁰

There is no tacking statute for the ten-year statute, but there have been a handful of cases on the subject. The general statement is that there is tacking of adverse possession if the successive occupants are in "privity."⁷¹ Definitely such persons are in "privity" if there is a deed running between them purporting to convey the land possessed.⁷² The result should be the same when the persons are connected by devise or intestate succession, although no case seems expressly to discuss and decide the point. Several have, however, allowed tacking where successive possessors were connected by devise or inheritance,⁷³ and it is so eminently reasonable that it should be allowed in this situation that it hardly seems worth questioning. And there is at least one situation in which there need be no deed or document at all if there is simply a passing of possession. This is where, when the original possessor has used a strip of land over his neighbor's boundary, usually under the mistaken impression it was part of his own land, he conveys his own land by deed and gives possession of both it and the mistaken area to his grantee. Here any number of cases have held, most of them without discussion of the point, that there is tacking of the periods of adverse possession of the mistaken area.⁷⁴ Whether the court would take

⁶⁸ RCW 7.28.070. *Prentice v. How*, 84 Wash. 136, 146 Pac. 388 (1915), held that tacking occurred under the color-of-title statute when the first adverse possessor purported to convey the lands possessed adversely by quitclaim deed.

⁶⁹ RCW 7.28.060.

⁷⁰ RCW 7.28.030.

⁷¹ *Faubion v. Elder*, 49 Wn.2d 300, 301 P.2d 153 (1956).

⁷² *Flint v. Long*, 12 Wash. 342, 41 Pac. 49 (1895).

⁷³ *Faubion v. Elder*, 49 Wn.2d 300, 301 P.2d 153 (1956) (successive possessors joined by devise); *Niven v. Sheehan*, 46 Wn.2d 152, 278 P.2d 784 (1955) (not clear if devise or intestate succession involved).

⁷⁴ *Buchanan v. Cassell*, 53 Wn.2d 611, 335 P.2d 600 (1959) (court recognized the

the next step and hold that, where the land possessed adversely is not used in connection with land owned, there may be tacking by merely transferring possession, is speculative. Tiffany says this is possible,⁷⁵ and, since the Washington court seems to treat the subject of tacking rather casually, it very well might follow that view.

Tolling. Tolling of all the adverse possession statutes is governed by statute, with the ten-year statute having far and away the most elaborate system. It is tolled by the following occurrences: Absence from or concealment in the state;⁷⁶ infancy, insanity, or incarceration;⁷⁷ war when the owner is an enemy alien;⁷⁸ application of the Soldiers' and Sailors' Relief Act to the owner;⁷⁹ and injunction or statutory prohibition against bringing an action by the owner.⁸⁰ Any of the above disabilities must exist when the owner's right of action accrues if he is to avail himself of it.⁸¹ If more than one disability exists when the action accrues, the period of limitations does not run until all are removed.⁸² Death of an owner does not toll the ten-year statute,⁸³ but

issue and discussed it); *Faubion v. Elder*, 49 Wn.2d 300, 301 P.2d 153 (1956); *Fisher v. Hagstrom*, 35 Wn.2d 632, 214 P.2d 654 (1950); *Skoog v. Seymour*, 29 Wn.2d 355, 187 P.2d 304 (1947); *Northern Pac. Ry. v. Concannon*, 75 Wash. 591, 135 Pac. 652 (1913), *reversed on other grounds*, 239 U.S. 382 (1915).

⁷⁶ 4 TIFFANY, REAL PROPERTY 434-35 (1939).

⁷⁶ RCW 4.16.180—"If the cause of action shall accrue against any person who is a non-resident of this state, or who is a resident of this state and shall be out of the state, or concealed therein, such action may be commenced within the terms herein respectively limited after the coming, or return of such person into the state, or after the end of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limit for the commencement of such action."

⁷⁷ RCW 4.16.190—"If a person entitled to bring an action mentioned in this chapter . . . be at the time the cause of action accrued either under the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution under the sentence of a court for a term less than his natural life, the time of such disability shall not be a part of the time limited for the commencement of action." [Emphasis added.] N. B. that the landowner who is under a disability under this statute had the full ten years after the end of his disability to bring his action to recover the land. *McMillan v. Walker*, 48 Wash. 342, 93 Pac. 520 (1908); *May v. Sutherland*, 41 Wash. 609, 84 Pac. 585 (1906).

⁷⁸ RCW 4.16.210—"When the enforcement of civil liabilities against a person in the military service of the United States has been suspended by operation of law, the period of such suspension shall not be a part of the period limited for the commencement of the action."

⁷⁹ RCW 4.16.220—"When the enforcement of civil liabilities against a person in the military service of the United States has been suspended by operation of law, the period of such suspension shall not be a part of the period limited for the commencement of the action."

⁸⁰ RCW 4.16.230—"When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action."

⁸¹ RCW 4.16.250.

⁸² RCW 4.16.260.

⁸³ *McAuliff v. Parker*, 10 Wash. 141, 38 Pac. 744 (1894).

his representative will have at least one year after his death to commence an action for recovery of the land.⁸⁴

Under both the color-of-title and vacant-land statutes, there is tolling when the owner is an infant or insane, but he must commence an action to recover his land within three years after the disability ceases.⁸⁵ There are no tolling provisions whatever for the connected-title statute.⁸⁶

When the statutes commence to run. Usually there is no special question of when the various adverse possession statutes commence to run, and they simply commence when the possessor begins a possession which meets all the requirements of adversity under the statute in question.⁸⁷ They will not commence running until the land is owned by someone against whom they may run, which most often means they will not run when the land is owned by some level of government against which adverse possession does not lie or by some person under a statutory disability. One novel application of this principle is that there may be no adverse possession begun against a homesteader from the United States until he has been issued his patent.⁸⁸

A different problem was involved in several cases which followed the lowering in 1881 of the period of limitations of the general adverse possession statute from twenty years to the present ten years. In several cases it was held that the new statute did not relate back to the beginning of an adverse possession period begun before its passage, though it would apply to such continuing adverse possession from 1881 on.⁸⁹ These cases would presumably be called into service if one of the present limitation periods should be changed.

Procedural aspects. As has already been stated, an adverse possessor who has thereby perfected title affirmatively asserts it as plaintiff in an action, which may be either one of ejectment or to quiet title. It is sufficient to allow him to offer proof of his perfection of title by

⁸⁴ RCW 4.16.200—"If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of the time and within one year from his death."

⁸⁵ RCW 7.28.090.

⁸⁶ *Schlarb v. Castaing*, 50 Wash. 331, 97 Pac. 289 (1908) (held that minors have no disability under connected-title statute).

⁸⁷ Thus, under the connected-title statute, there cannot be any running of the statute until the possessor has both taken possession and has obtained a colorable title traceable of record to the state or the federal government. *Krutz v. Isaacs*, 25 Wash. 566, 66 Pac. 141 (1901).

⁸⁸ *Slaght v. Northern Pac. Ry.*, 39 Wash. 576, 81 Pac. 1062 (1905).

⁸⁹ *Tacoma Bldg. & Sav. Ass'n v. Clark*, 8 Wash. 289, 36 Pac. 135 (1894); *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318 (1894); *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776 (1893); *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199 (1893).

adverse possession under the ten-year statute to allege in his complaint that he has title⁹⁰ or that he is the owner in fee.⁹¹ On trial he must offer proof, not only to show he had possession, but also to show that it was adverse to the true owner if the defendant shows record title.⁹² Under the color-of-title statute, the plaintiff claiming title by adverse possession must plead that his possession was under color of title and in good faith,⁹³ though apparently it is a sufficient pleading of color of title to plead holding under a deed.⁹⁴ From this it would seem that the plaintiff claiming adverse possession title under the connected-title statute, the color-of-title statute, or the vacant land statute should plead the special elements of adversity set out in those statutes.

When the plaintiff is the record owner claiming against an adverse possessor, he too may bring either an action of ejectment or quiet title.⁹⁵ In a quiet title action, the record owner may properly join as defendants both those claiming adversely to him who are in possession and those out of possession.⁹⁶ He sufficiently pleads his title if he alleges he was once seised, since there is a presumption seisin continues, and he need not anticipate the defense of adverse possession by pleading seisin within the last ten years.⁹⁷ Similarly, an allegation that the record owner is entitled to possession is sufficient.⁹⁸ Upon trial the record-title plaintiff must prove his own title or prior possession and cannot, if he fails to do so, rely upon weaknesses in the adverse possession defendant's defense to do it for him.⁹⁹ However, once such a plaintiff has proven his record title, the burden shifts to the defendant to show it was extinguished by adverse possession.¹⁰⁰

Miscellaneous aspects. An interesting, if little-used, substitute for adverse possession may lie in a theory of estoppel. In *Moore v. Brownfield*,¹⁰¹ an 1894 case, it was held that where a landowner had invited another to settle on his land and the other, relying upon this invitation, had done so and had made improvements, the owner was estopped to

⁹⁰ Metropolitan Bldg. Co. v. Fitzgerald, 122 Wash. 514, 210 Pac. 770 (1922).

⁹¹ Rogers v. Miller, 13 Wash. 82, 42 Pac. 525 (1895).

⁹² Schmitz v. Klee, 103 Wash. 9, 173 Pac. 1026 (1918); Northern Pac. Ry. v. Smith, 68 Wash. 269, 122 Pac. 1057 (1912).

⁹³ *In re Schnoor's Estate*, 31 Wn.2d 565, 198 P.2d 184 (1948).

⁹⁴ Jones v. Herrick, 35 Wash. 434, 77 Pac. 798 (1904).

⁹⁵ Carlson v. Curren, 48 Wash. 249, 93 Pac. 315 (1908). Both ejectment and quiet title actions are plentiful.

⁹⁶ *Ibid.*

⁹⁷ Balch v. Smith, 4 Wash. 497, 30 Pac. 648 (1892).

⁹⁸ Wilkeson v. Miller, 63 Wash. 680, 116 Pac. 268 (1911).

⁹⁹ Bryant Lumber & Shingle Mill Co. v. Pacific Iron & Steel Works, 48 Wash. 574, 94 Pac. 110 (1908).

¹⁰⁰ Santmeyer v. Clemmancs, 147 Wash. 354, 266 Pac. 148 (1928).

¹⁰¹ 10 Wash. 439, 39 Pac. 113 (1894).

recover possession. However, in a later case¹⁰² estoppel of a city to remove a garage the plaintiff had built several years before on a city street was not allowed, despite the fact that the city had mistakenly given a permit for the building. The court said that, since the city had no power to grant such a permit, it could not be estopped from asserting the inefficacy of the permit.

In one case, in which the adverse possessor had used a strip of his neighbor's land varying in width from one-fourth to seven-tenths of a foot, he attempted to defeat the neighbor's action for recovery on the novel theory that the rule *de minimis* would prevent recovery of such a small area. In allowing recovery, the court stated it was "extremely doubtful" that the rule *de minimis* applied at all to actions to recover land.¹⁰³

The remainder of this article will be devoted to a discussion of the elements of adverse possession required under the ten-year, color-of-title, connected-title, and vacant-land statutes.

ACTUAL POSSESSION

Legal principles. Possession is of course an element under all the adverse possession statutes under consideration here except for the vacant-land statute. The broadest principle in this area is that the possession must be of such a character as a true owner would make, considering the nature and location of the particular land in question.¹⁰⁴ This principle or test savors of the very essence of adverse possession and seems subject only to this limitation: The adverse possessor must at all events have some sort of physical occupation of the land, either by personally staying on the land, having it occupied by those claiming under him, or by putting on it objects of a kind that an owner would put on such land.¹⁰⁵ Therefore, merely paying taxes upon another's land is not possession of it,¹⁰⁶ nor is the filing of a plat showing boun-

¹⁰² *Mueller v. City of Seattle*, 167 Wash. 67, 8 P.2d 994 (1932).

¹⁰³ *Wells v. Parks*, 148 Wash. 328, 268 Pac. 889 (1928).

¹⁰⁴ *Young v. Newbro*, 32 Wn.2d 141, 200 P.2d 975 (1948); *Bowden-Gazzam Co. v. Hogan*, 22 Wn.2d 27, 154 P.2d 285 (1944); *Grays Harbor Commercial Co. v. McCulloch*, 113 Wash. 203, 193 Pac. 709 (1920); *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525 (1895); *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30 (1892), *app. dismissed*, *Dibble v. Bellingham Bay Land Co.*, 163 U.S. 63 (1896).

¹⁰⁵ *Snively v. State*, 167 Wash. 385, 9 P.2d 773 (1932) (state did not occupy bed of nonnavigable lake by making claim that lake was navigable and that state therefore owned bed); *Cartright v. Hamilton*, 111 Wash. 685, 191 Pac. 797 (1920) (no possession when claimant did not use up to neighbor's fence, which was over on neighbor's side of boundary line).

¹⁰⁶ *Loose v. Locke*, 25 Wn.2d 599, 171 P.2d 849 (1946); *Austrian American Benevolent Cemetery Ass'n v. Desrochers*, 124 Wash. 179, 214 Pac. 3, *aff'd on rehearing*, 124 Wash. 184, 216 Pac. 891 (1923).

daries overlapping another's land,¹⁰⁷ nor bringing a suit to contest another's ownership of land,¹⁰⁸ nor even giving another person actual notice that an adverse claim is made.¹⁰⁹ Possession is not proven merely by showing that the claimant was generally reputed in the community to be the owner of certain land.¹¹⁰ An intermittent trespass does not constitute possession.¹¹¹ And it seems that a person, though he actually resides on land, might not "possess" it, as would seem to be the situation where a child lives at home with his parents on the land.¹¹²

One fairly important question of which there may yet be some doubt concerns the possession of wild, remote land, such as timber or mountain land. Some early cases seem to hold that, with timber land, paying taxes upon it, cutting and selling timber from it, and having the reputation of owning it would be sufficient "acts of ownership" to be possession.¹¹³ Two later cases, though not involving the same kind of land as the earlier ones, seem to lean away from them in principle. *Murray v. Bousquet*,¹¹⁴ which is of particular interest, holds that there is no adverse possession of land in a high and uninhabited mountain valley by partially fencing it and using it for grazing horses, even though that is the sort of use a true owner would make of such land. In the other case¹¹⁵ the court said there had to be some form of occupation of unoccupied and logged-off land, though the holding on the facts is only that paying taxes alone was not possession of such land. So perhaps it should not be stated dogmatically that the earlier cases are no longer good law; however, this appears more likely than not to be so.

A question as to which the theory seems fairly clear concerns the extent to which a person who admittedly has put physical objects upon part of another's land may possess around those objects. Perhaps the best general statement of the rule here is that the possessor possesses such an additional area around the objects as is "reasonably needed to carry out his objective."¹¹⁶ It seems that an adverse possessor who

¹⁰⁷ *Ferry v. Hodson*, 22 Wn.2d 613, 156 P.2d 913 (1945).

¹⁰⁸ *Ibid.*

¹⁰⁹ *Booten v. Peterson*, 34 Wn.2d 563, 209 P.2d 349 (1949).

¹¹⁰ *McInerney v. Beck*, 10 Wash. 515, 39 Pac. 130 (1895).

¹¹¹ *Downie v. City of Renton*, 167 Wash. 374, 9 P.2d 372, reversing 162 Wash. 181, 298 Pac. 454 (1932) (trespass consisted of discharging water across another's land for two and one-half hours once a year).

¹¹² *Calhoun v. Nelson*, 47 Wash. 617, 92 Pac. 448 (1907).

¹¹³ *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525 (1895); *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30 (1892), app. dismissed, *Dibble v. Bellingham Bay Land Co.*, 163 U.S. 63 (1896).

¹¹⁴ 154 Wash. 42, 280 Pac. 935 (1929).

¹¹⁵ *Waldrip v. Olympia Oyster Co.*, 40 Wn.2d 469, 244 P.2d 273 (1952).

¹¹⁶ *State v. Stockdale*, 34 Wn.2d 857, 210 P.2d 686 (1949). This case, which merits more attention than it has gotten, holds that the State of Washington, claiming by

has a building resting partly on his own land and partly over his boundary on his neighbor's land will "possess" a walkway or approach area for access to the building,¹¹⁷ though there apparently would be no possession of such an area if no part of his building touched his neighbor's land.¹¹⁸ There is possession of parts of land used in connection with areas upon which improvements or crops have been put if there is "control and dominion" over the undeveloped areas.¹¹⁹

Examples of actual possession. The thought presents itself that, since possession is a question of fact, it might aid understanding of the subject matter to offer examples of factual situations. To that end, précis of selected cases in which the court has dealt with the facts in detail will be listed.

The following acts have been held to establish possession of rural land: Building a fence and cultivating or pasturing, or both, up to it;¹²⁰ clearing land, constructing and occupying buildings, and planting orchards;¹²¹ clearing, draining, fencing, and cultivating;¹²² clearing, fencing, planting an orchard, and building a road;¹²³ farming, pasturing, planting an orchard, and building irrigation ditches;¹²⁴ maintenance by the state of structures and lesser improvements in an area used as a park;¹²⁵ maintaining fishnets and equipment in season, driving pilings, and defending the area, underwater tidelands, against trespass-

adverse possession an area of Ginkgo State Park, "possessed" an area which must have amounted to several acres around buildings and other improvements it had put by mistake on another's land.

¹¹⁷ *Skoog v. Seymour*, 29 Wn.2d 355, 187 P.2d 304 (1947).

¹¹⁸ *Mourik v. Adams*, 47 Wn.2d 278, 287 P.2d 320 (1955) (house was about one foot from line for over ten years, but not certain claimant had had door opening out on that side for ten years).

¹¹⁹ *Alexander v. Bennett*, 91 Wash. 688, 158 Pac. 534 (1916) (where claimant maintained crops in field near lake, he also "possessed" fringe of shoreland around field which was logically connected with field, though not itself arable); *Olson v. Howard*, 38 Wash. 15, 80 Pac. 170 (1905) (claimant, who resided on part of parcel of land, also "possessed" connected portion over which he had "control and dominion").

¹²⁰ *Faubion v. Elder*, 49 Wn.2d 300, 301 P.2d 153 (1956); *Taylor v. Talmadge*, 45 Wn.2d 144, 273 P.2d 506 (1954); *Young v. Newbro*, 32 Wn.2d 141, 200 P.2d 975 (1948); *Jackman v. Germain*, 96 Wash. 415, 165 Pac. 78 (1917); *Alexander v. Bennett*, 91 Wash. 688, 158 Pac. 534 (1916); *Wisinger v. Reed*, 69 Wash. 684, 125 Pac. 1030 (1912).

¹²¹ *Metropolitan Bldg. Co. v. Fitzgerald*, 122 Wash. 514, 210 Pac. 770 (1922); *Kirchhoffer v. Harris*, 68 Wash. 316, 123 Pac. 455 (1912); *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936 (1901).

¹²² *Kent v. Holderman*, 140 Wash. 353, 248 Pac. 882 (1926).

¹²³ *Davies v. Wickstrom*, 56 Wash. 154, 105 Pac. 454 (1909).

¹²⁴ *Pacific Power & Light Co. v. Bailey*, 160 Wash. 663, 295 Pac. 943 (1931). See also *State v. Ballard*, 156 Wash. 530, 287 Pac. 27 (1930), which held fencing, farming, and building an irrigation ditch constituted "possession" of a railroad right of way easement.

¹²⁵ *State v. Stockdale*, 34 Wn.2d 857, 210 P.2d 686 (1949).

¹²⁶ *Grays Harbor Commercial Co. v. McCulloch*, 113 Wash. 203, 193 Pac. 709 (1920).

ers;¹²⁶ and flooding another's land by maintaining a dam.¹²⁷

The following acts have been held to establish possession of city lots: Erecting a fence or wall, constructing one or more buildings on another's land in reference to such fence, and maintaining a lawn and shrubbery up to it (cases cited vary slightly on facts);¹²⁸ building a fence, grading land, and planting a hedge and trees in reference to the fence;¹²⁹ fencing, building a house, and residing on the land;¹³⁰ building a house, constructing a bulkhead against the sea, and digging a well.¹³¹

The following acts have been held not to establish possession of rural or semi-rural land: Allowing the erection and maintenance of one, and part of the time two, advertising signboards;¹³² irregular use for gardening, piling wood, and mowing hay;¹³³ maintaining an irregular "fence" of poles and brush, taking timber, and once planting cabbages;¹³⁴ occasionally using uplands fronting on Puget Sound tidelands for picnics and putting on them a sign warning against beach fires;¹³⁵ and exacting rent from the owner's tenant in possession.¹³⁶

The following acts have been held not to establish possession of city lots: Keeping a lot cleared for over ten years and maintaining a fence for less than ten years;¹³⁷ clearing, grading, gardening, and fencing three sides of a lot situated in a sparsely populated edge of a city;¹³⁸ and according to dictum in one case, fencing, planting scattered trees and bushes, and irregular cultivation of small gardens.¹³⁹

A unique opportunity to study the question of possession under al-

¹²⁷ *McInnis v. Day Lumber Co.*, 102 Wash. 38, 172 Pac. 844 (1918) (case does not decide whether use described in text gave title by adverse possession or easement by adverse use).

¹²⁸ *Skoog v. Seymour*, 29 Wn.2d 355, 187 P.2d 304 (1947); *Foote v. Kearney*, 157 Wash. 681, 290 P.2d 226 (1930); *Weingarten v. Shurtleff*, 51 Wash. 602, 99 Pac. 739 (1909); *Flint v. Long*, 12 Wash. 342, 41 Pac. 49 (1895).

¹²⁹ *Thornely v. Andrews*, 45 Wash. 413, 88 Pac. 757 (1907).

¹³⁰ *Northern Pac. Ry. v. Concannon*, 75 Wash. 591, 135 Pac. 652 (1913), *reversed on other grounds*, 239 U.S. 382 (1915).

¹³¹ *Bowden-Gazzam Co. v. Kent*, 22 Wn.2d 41, 154 P.2d 292 (1944).

¹³² *Slater v. Murphy*, 154 Wash. Dec. 250, 339 P.2d 457 (1959). As this is written, there is a petition for rehearing pending on this case, an issue being made on whether the acts done constituted adverse possession.

¹³³ *Smith v. Chambers*, 112 Wash. 600, 192 Pac. 891 (1920).

¹³⁴ *White v. Branchick*, 160 Wash. 697, 295 Pac. 929 (1931).

¹³⁵ *Harkins v. Del Pozzi*, 50 Wn.2d 237, 310 P.2d 532 (1957).

¹³⁶ *Threlkeld v. Conway*, 121 Wash. 624, 209 Pac. 1088 (1922).

¹³⁷ *Loomis v. Stromburg*, 166 Wash. 567, 7 P.2d 973 (1932).

¹³⁸ *Peoples Sav. Bank v. Bufford*, 90 Wash. 204, 155 Pac. 1068 (1916). This case, which has been cited a number of times in subsequent cases, presents a fact situation worth studying, because it is probably very close to the line between what is and what is not "possession."

¹³⁹ *Spinning v. Pugh*, 65 Wash. 490, 118 Pac. 635 (1911) (dictum because acts not carried on for ten years).

most laboratory-like conditions can be had by comparing the first case of *Booten v. Peterson*¹⁴⁰ with the second case of the same name.¹⁴¹ On the first appeal it was held that there was no possession of land in a lot used for a home on the Hood Canal by the acts of clearing, running a single-strand fence from tree to tree, and maintaining a croquet court. In the second appeal, after remand and a retrial, it was held that when, added to these acts, there also was evidence that the disputed area had been used every weekend in the summers for camping and that the owner had acquiesced in the claimant's doing of all the acts, there was possession. One instructive point of the second case is that, while the owner's knowledge of or acquiescence in another's claim to his land does not give the other possession, it does seem to swell acts of possession which are present.

UNINTERRUPTED AND EXCLUSIVE

Uninterrupted. Cases which recite the elements for adverse possession invariably say it must be uninterrupted or continuous for the limitations period. During this period, that is to say, before title is perfected, as compared with after title is perfected, abandonment by the adverse possessor or re-entry by the owner will break the continuity. The period of adverse possession up to the break is then lost and cannot be added onto the time of a second period if adverse possession is resumed after a hiatus.¹⁴²

Apparently there need be no very long break to end a period of adverse possession, especially when there is a re-entry by the owner. In one such case a re-entry of five days seems to have been sufficient.¹⁴³ Even where the owner made no re-entry, the adverse possessor's selling his improvements to a third person and leaving the premises for several months broke the chain.¹⁴⁴ In another case the removal of trees and shrubs, the planting of which were the visible evidence of adverse possession, for about two years produced the same result.¹⁴⁵

Exclusive. To be in adverse possession the possessor must have exclusive possession. This does not mean he cannot possess through those claiming under him, such as tenants, because, as has already been seen, that is quite possible. Rather, it means for one thing that the pos-

¹⁴⁰ 34 Wn.2d 563, 209 P.2d 349 (1949).

¹⁴¹ *Booten v. Peterson*, 47 Wn.2d 565, 288 P.2d 1084 (1955).

¹⁴² For an application of this, see *George v. Columbia & P. S. R. R.*, 38 Wash. 480, 80 Pac. 767 (1905).

¹⁴³ *Ibid.*

¹⁴⁴ *Johnson v. Brown*, 33 Wash. 588, 74 Pac. 677 (1903).

¹⁴⁵ *Noyes v. Douglas*, 39 Wash. 314, 81 Pac. 724 (1905).

session and use must be different from and greater than that of the public in general.¹⁴⁶ This indicates of course that the public could not get title to land by adverse possession and that no large group of persons would be apt to do so. There are no Washington cases, but Tiffany says it is possible for adverse possession by occupants claiming as co-tenants.¹⁴⁷

Probably the most meaningful application of the requirement of exclusive possession is that the adverse possessor cannot share occupation with the true owner.¹⁴⁸ This rests upon the basis that in law possession is exclusive by its nature, and the owner, if on the land, can alone have it.

OPEN AND NOTORIOUS

Open. All recitations of the requisites of adverse possession contain the elements "open and notorious." No Washington case seems to have dealt with "open" by itself, and it is doubtful that it exists as a separate element. A fantastic case might be imagined in which the possessor kept hidden or camouflaged objects on the land or carried out possessory acts by night, but in such a case the occupation would not be notorious to the owner, as well as not being open. This suggests that "open" is a redundant expression of something which is of the same quality, though not even as strong, as "notorious."

Notorious. "Notorious" means that, for possession to be adverse, it must be such as to give actual or constructive notice of its existence to the landowner. Certainly it is enough if the owner has actual knowledge of that fact.¹⁴⁹ This is not necessary, however, if the acts of possession are such as to charge a reasonable man in the owner's position with notice of adverse possession.¹⁵⁰ Involving as it does the aspect of the "reasonable man," the element of notoriousness amounts to more of a test for whether possession is "adverse" than it does of an element in its own right. In several cases the court has used it as a test in deciding that possession either was¹⁵¹ or was not¹⁵² adverse. Notoriousness is

¹⁴⁶ *Moon v. Tumwater Paper Mills Co.*, 157 Wash. 453, 289 Pac. 24 (1930); *Turner v. Ladd*, 42 Wash. 274, 84 Pac. 866 (1906) (semble).

¹⁴⁷ 4 *TIFFANY, REAL PROPERTY* 423 (1939).

¹⁴⁸ *Scott v. Slater*, 42 Wn.2d 366, 255 P.2d 377 (1953) (adverse claimant used disputed area across boundary line, but owner used it also).

¹⁴⁹ *McAuliff v. Parker*, 10 Wash. 141, 38 Pac. 744 (1894).

¹⁵⁰ *Davies v. Wickstrom*, 56 Wash. 154, 105 Pac. 454 (1909).

¹⁵¹ *Kent v. Holderman*, 140 Wash. 353, 248 Pac. 882 (1926); *Davies v. Wickstrom*, *op. cit. supra* note 150.

¹⁵² *Downie v. City of Renton*, 167 Wash. 374, 9 P.2d 372, *reversing*, 162 Wash. 181, 298 Pac. 454 (1932); *Murray v. Bousquet*, 154 Wash. 42, 280 Pac. 935 (1929); *Nether-*

so interwoven with the elements of "actual possession" and "hostile" that it hardly can be viewed alone.

HOSTILE AND CLAIM OF RIGHT

Hostility is the very marrow of adverse possession under any of the statutes except of course the vacant land statute. Unfortunately it is also a matted and tangled jungle into which litigants enter, never to emerge. The trouble is not too few pathways but too many, for the area abounds in highly conceptual ideas bordering on the metaphysical and fine distinctions followed by only the most perspicacious or, more likely, credulous. It is, in short, an area of shadows and much shadow boxing.

General aspects of hostility. To say that possession, to be adverse, must be "hostile" does not import enmity or ill will but only means that the possessor occupies another's land in the manner a true owner would and in particular that he does not occupy it in a manner subservient to the owner.¹⁵³ It will be perceived that this sweeps in a good deal of "actual possession" and of "open and notorious." The real heart of the matter, though, is that hostility is the opposite of permissiveness. Probably the most useful test of hostility was stated in *Peoples Sav. Bank v. Bufford*,¹⁵⁴ where it was in substance stated thus: Considering the character of possession and the locale of the land, is the possession of such a nature as would normally be objectionable to owners of such land?

Claim of right. Many cases, including those under the ten-year statute as well as the color-of-title and connected-title statutes, recite that possession must be under "claim or right" to be adverse. This article takes the position that "claim of right" is the same as "hostile." It is true that some cases¹⁵⁵ seem to treat it as a separate element, though none actually says it is different from hostility. It also may be that a misconception of claim of right is responsible for some of the

lands *American Mortgage Bank v. Eastern Ry. & Lumber Co.*, 142 Wash. 204, 252 Pac. 916 (1927); *Daniel v. Daniel*, 106 Wash. 660, 181 Pac. 215 (1919); *Peoples Sav. Bank v. Bufford*, 90 Wash. 204, 155 Pac. 1068 (1916).

¹⁵³ *Fisher v. Hagstrom*, 35 Wn.2d 632, 214 P.2d 654 (1950); *Bowden-Gazzam Co. v. Hogan*, 22 Wn.2d 27, 154 P.2d 285 (1944); *Nixon v. Merchant*, 19 Wn.2d 97, 141 P.2d 411 (1943); *Roesch v. Gerst*, 18 Wn.2d 294, 138 P.2d 846 (1943); *Mittet v. Hansen*, 178 Wash. 541, 35 P.2d 93 (1934); *King v. Bassindale*, 127 Wash. 189, 220 Pac. 777 (1923); *Cameron v. Bustard*, 119 Wash. 266, 205 Pac. 385 (1922).

¹⁵⁴ 90 Wash. 204, 155 Pac. 1068 (1916).

¹⁵⁵ *Williamson v. Horton*, 157 Wash. 621, 289 Pac. 1025 (1930); *Miller v. O'Leary*, 44 Wash. 172, 87 Pac. 113 (1906); *Hesser v. Siepmann*, 35 Wash. 14, 76 Pac. 295 (1904); *Kline v. Stein*, 30 Wash. 189, 70 Pac. 235 (1902); *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936 (1901).

difficulties to be discussed later in the subsections on "subjective intent" and "mistake." However, as early as 1901 the court said claim of right was shown by acts of possession such as a true owner would do,¹⁵⁶ which is the usual description of hostility. Since then the court has stated flatly that the two elements are the same. *Bowden-Gazzam Co. v. Hogan*,¹⁵⁷ perhaps the leading adverse possession case in Washington, so states, adding that both of the elements simply mean the possessor acts as an owner would and does not recognize superior title. Several other cases, both before and after the *Hogan* case, have said the same thing.¹⁵⁸

Hostile possession is non-permissive. Possession will not be hostile and will not be adverse if it is by the owner's permission given to the possessor.¹⁵⁹ But a narrow distinction is made between permission, which will prevent hostility, and mere knowledge and acquiescence by the owner, which will not. That is, if the owner knows of the possession and allows it because he believes the possessor is actually the owner, the possession will be hostile.¹⁶⁰

Possession will be permissive if, during the period for which he claims adverse possession, the possessor leases the land from the owner.¹⁶¹ Permissiveness may also be found in asking the owner's permission to grant easements to third parties¹⁶² or even in litigating to *get* title.¹⁶³ On the other hand, buying a tax delinquency certificate does not acknowledge superior title or prevent hostility.¹⁶⁴

An odd group of cases which may fit in at this point are the "squatter" cases. The court tends rather to label than to define a "squatter" and, when he has been labeled, to deny him adverse possession. It may be said in general—and nothing much can be said in particular—that a "squatter" is one who resides in a shack, perhaps intermittently, and who makes no extensive use of the land. "Squatters" seem to be found

¹⁵⁶ *Bowers v. Ledgerwood*, *op. cit. supra* note 155.

¹⁵⁷ 22 Wn.2d 27, 154 P.2d 285 (1944).

¹⁵⁸ *Fisher v. Hagstrom*, 35 Wn.2d 632, 214 P.2d 654 (1950); *Nixon v. Merchant*, 19 Wn.2d 97, 141 P.2d 411 (1943); *Roesch v. Gerst*, 18 Wn.2d 294, 138 P.2d 846 (1943); *Cameron v. Bustard*, 119 Wash. 266, 205 Pac. 385 (1922).

¹⁵⁹ On this point generally see *Price v. Humptulips Driving Co.*, 116 Wash. 56, 198 Pac. 374 (1921) (prescriptive easement case); and *O'Connell v. McCool*, 89 Wash. 537, 154 Pac. 1090 (1916).

¹⁶⁰ *Hovila v. Bartek*, 48 Wn.2d 238, 292 P.2d 877 (1956); *Booten v. Peterson*, 47 Wn.2d 565, 288 Pac. 1084 (1955).

¹⁶¹ *Bowden-Gazzam Co. v. Kent*, 22 Wn.2d 41, 154 P.2d 292 (1944); *Northern Pac. Ry. v. George*, 51 Wash. 303, 98 Pac. 1126 (1908).

¹⁶² *O'Donnell v. McCool*, 89 Wash. 537, 154 Pac. 1090 (1916).

¹⁶³ *City of Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982 (1904).

¹⁶⁴ *Silverstone v. Hanley*, 55 Wash. 458, 104 Pac. 767 (1909).

along the periphery of undeveloped land, such as railroad tracks¹⁶⁵ or sparsely settled areas near towns.¹⁶⁶ Apparently the theory is that where squatters are common, their presence is so normal and so unobjectionable to the owner as to be presumed to be by his permission. Happily, with unsettled areas of the state becoming fewer, there do not seem to have been any recent "squatter" cases.

A specialized application of permissive possession appears in mistaken boundary cases where one neighbor possesses a strip of adjoining land. If the neighbors have agreed, at a time when they are not sure of their mutual boundary, that they will use up to a chosen line for convenience until the true line is fixed by survey, then whichever one turns out to be using his neighbor's land will not be doing so adversely.¹⁶⁷ The cases have not generally analyzed why this is so, but it clearly rests upon the theory that there is mutual permission by both neighbors. If confined to this situation, the result is sound enough. Unfortunately this particular fact pattern seems to have been confused at times with essentially different patterns occurring in the mistaken boundary area, and the court may have on occasion found an "agreement" on nebulous facts.¹⁶⁸

A close relationship between possessor and owner may imply permissiveness and militates against the element of hostility but does not always prevent it. Where a woman entered land with the permission and invitation of her daughter and son-in-law, maintained cordial relations with them, and lived part of the time at their home on the other land, her possession was held permissive.¹⁶⁹ The same result was reached where the owner's son and other relatives lived on land upon which they allowed the owner to pay taxes and insurance and make repairs.¹⁷⁰ However, adverse possession has been allowed recently where the disseisor and disseisee were brother and sister.¹⁷¹

Must original entry be hostile? It was once stated and apparently held that unless the original entry is hostile there can be no adverse possession.¹⁷² However, later cases have probably modified this case.

¹⁶⁵ Northern Pac. Ry. v. Devine, 53 Wash. 241, 101 Pac. 841 (1909).

¹⁶⁶ Blake v. Shriver, 27 Wash. 593, 68 Pac. 330 (1902).

¹⁶⁷ Beck v. Loveland, 37 Wn.2d 249, 222 P.2d 1066 (1950); Lindberg v. Davis, 164 Wash. 680, 4 P.2d 501 (1931); Davis v. Kenney, 131 Wash. 168, 229 Pac. 311 (1924); Wilcox v. Smith, 38 Wash. 585, 80 Pac. 803 (1905); Phinney v. Campbell, 16 Wash. 203, 47 Pac. 502 (1896).

¹⁶⁸ For a discussion of mistaken boundaries in general, see Comment, *Boundary Disputes in Washington*, 23 WASH. L. REV. 125 (1948).

¹⁶⁹ Schmitz v. Klee, 103 Wash. 9, 173 Pac. 1026 (1918).

¹⁷⁰ Santmeyer v. Clemmance, 147 Wash. 354, 266 Pac. 148 (1928).

¹⁷¹ Faubion v. Elder, 49 Wn.2d 300, 301 P.2d 153 (1956).

¹⁷² McNaught-Collins Improvement Co. v. May, 52 Wash. 632, 101 Pac. 237 (1909)

In one¹⁷³ adverse possession was held to have existed for a number of years, though there was apparently nothing at all shown as to the character or even time of original entry. The court's reasoning seems to have been that disseisin does not require a hostile entry, because adverse possession itself is disseisin. Another case,¹⁷⁴ one involving prescriptive easements, though not finding a non-permissive use, says that it is possible for an originally permissive entry to become adverse if there is an assertion of hostility brought to the owner's attention. This is consistent with cases already dealt with in which adverse possession has been allowed between tenants in common¹⁷⁵ and between vendor and vendee.¹⁷⁶ These cases, speaking of acts which are an "ouster," have certainly held adverse possession is possible when the original entry was permissive. Therefore, the rule should be that permissive possession can become hostile if the possessor does or says things unmistakably to show a holding inconsistent with the permission originally given.

Subjective intent. The effect of the would-be adverse possessor's subjective intent upon his claim is the most troublesome problem in all adverse possession. There are apparently some conflicting cases here, though, strange as it seems, this assertion is made with timorousness, because the shadings are so fine as to defy analysis in some instances. As used in the cases, "intent" usually partakes of the possessor's belief as to whether the land is or is not his own, though it is possible to intend to possess land whether or not there is a belief it is owned. Understood in any of these ways, the term denotes a subjective quality of the possessor's mind. It should not be used to refer to the dispossessed owner's thinking or to an interchange of ideas between disseisor and disseisee, the latter being properly "permissiveness" or "agreement." Cases have not always kept these ideal concepts well separated, adding to the researcher's dismay.

Why subjective intent should even be a part of adverse possession is unclear, but apparently it arises from connotations attaching to the word "claim" in "claim of right." Inasmuch as the position in Washington seems to be that "claim of right" is the same thing as "hostile"¹⁷⁷

(when original entry was made, land was owned by Government, against which there could be no adverse possession, but continuing possession, apparently adverse in character, was maintained for over ten years against purchaser from Government).

¹⁷³ Foote v. Kearney, 157 Wash. 681, 290 Pac. 226 (1930).

¹⁷⁴ Roediger v. Cullen, 26 Wn.2d 690, 175 P.2d 669 (1946).

¹⁷⁵ See cases cited in footnotes 50 and 51, *supra*.

¹⁷⁶ See footnote 55, *supra*, and its textual referent.

¹⁷⁷ See cases cited in footnotes 156, 157, and 158, *supra*, and textual referents to those footnotes.

it is somewhat inconsistent to derive a separate meaning from "claim of right." It is for this reason that "subjective intent" is here treated under its own heading.

A number of cases have held that a subjective intent by the possessor *not* to possess or acquire another's land—*negative* intent—will prevent adverse possession, though the other elements are present. Thus, in *Brown v. Hubbard*,¹⁷⁸ a mistaken boundary case, the possessor's claim to title by adverse possession was defeated by this testimony: "No. I wouldn't take her property, had I known it."¹⁷⁹ Similar cases have held in mistaken boundary situations that the possessor possessing up to a fence or wall on his neighbor's land does not get title by adverse possession up to that line if his subjective intent is to use up to it only until the true line can be set.¹⁸⁰ Variations occur when the possessor enters unsurveyed land with the intent not to possess such parts as a survey may show to be another's¹⁸¹ or where possession of previously vacant land is with the intent not to remain after the owner enters.¹⁸² In neither situation is there adverse possession. Another line of cases have inferred negative intent from events which have happened after the ten-year limitations period has run, as where a building maintained upon another's land was torn down when it was found to encroach¹⁸³ or where one who had bought another's land, less mineral rights, here claimed to have previously acquired the entire fee by adverse possession.¹⁸⁴ In the well-known case of *Skansi v. Novak*,¹⁸⁵ the court seems to have been willing to infer that the claimant intended not to own a disputed strip from the mere fact that he knew where his true

¹⁷⁸ 42 Wn.2d 867, 259 P.2d 391 (1953).

¹⁷⁹ *Id.* at 869.

¹⁸⁰ *Julien v. Herren*, 149 Wash. 573, 271 Pac. 891 (1928); *Noyes v. Douglas*, 39 Wash. 314, 81 Pac. 724 (1905); *Wilcox v. Smith*, 38 Wash. 585, 80 Pac. 803 (1905).

¹⁸¹ *Suksdorf v. Humphrey*, 36 Wash. 1, 77 Pac. 1071 (1904).

¹⁸² *Lohse v. Burch*, 42 Wash. 156, 84 Pac. 722 (1906); *Blake v. Shriver*, 27 Wash. 593, 68 Pac. 330 (1902). Both cases are somewhat unclear, because there are a number of factors present, and the court seemed to regard the occupants as "squatters." The reasoning appears to be that a squatter intends not to remain after the owner enters.

¹⁸³ *Milbank v. Rowland*, 63 Wash. 519, 115 Pac. 1053 (1911). From 1894 to 1904 the possessor's building encroached on his neighbor's lot. In 1904, apparently after the ten-year period, he discovered this fact and removed it. Later when he claimed to have acquired the disputed strip by adverse possession, the court inferred from his removing the building that he had never intended to own any land not his.

¹⁸⁴ *Morgan v. Northern Pac. Ry.*, 50 Wash. 480, 97 Pac. 510 (1908). The claimant had been in non-permissive possession of another's land and had erected substantial improvements from 1883 to 1899. He then paid for and got a deed, in which the grantor reserved mineral rights. Later, after coal was discovered, claimant asserted he had been in adverse possession before 1899, but the court held otherwise, inferring from his acknowledging the true owner by purchase in 1899 that he always intended no adverse claim.

¹⁸⁵ 84 Wash. 39, 146 Pac. 160 (1915).

property line was and supposed this was as far as he owned, though he had put a home, boathouse, and pier on the disputed strip.¹⁸⁶

Another specialized application of the "negative intent" rule occurs where the possessor of land actually belonging to a private person believes by mistake that it belongs to the state or Government. In 1893 the original case on this point, *Moore v. Brownfield*,¹⁸⁷ held that fact would not prevent adverse possession. But that portion of that case was overruled by *McNaught-Collins Improvement Co. v. May*,¹⁸⁸ which reasoned that, since adverse possession could not be had against the state or Government, a possessor believing one of them owned the land must have intended not to possess adversely at all and that this would prevent adverse possession against the whole world. This attenuated reasoning has not done much for the clarity of the law, but it has been followed by at least one case¹⁸⁹ and is probably at least an alternate ground for the result in *Skansi v. Novak*,¹⁹⁰ discussed *supra*. Moreover, the same reasoning explains the result of a case¹⁹¹ handed down before the *McNaught-Collins* case, though the court attempted to harmonize *Moore v. Brownfield*.

There is a direct split of authority on the question of negative intent, inasmuch as *Mittet v. Hansen*¹⁹² said and held that a subjective intent not to claim more land than the adverse claimant owned did not prevent adverse possession. The case seems contrary to the above cases on negative intent and further seems to reach a result opposite to *Brown v. Hubbard*, *supra*, on nearly identical facts.

The next question is, for adverse possession does the possessor have to have a belief he is the true owner or an intent *to* possess or acquire another's land—an *affirmative* intent? Here is a jungle so tangled and matted that, not only do litigants enter and never emerge, but also this article, while it must emerge, cannot say where it has been. In 1953 in *Brown v. Hubbard*,¹⁹³ the court, though probably holding only that negative intent defeated adverse possession, said, quoting in part from an earlier case: "The mere possession of land beyond the real

¹⁸⁶ There may be an alternate ground for the result of this case. See footnote 190, *infra*, and its textual referent.

¹⁸⁷ 7 Wash. 23, 34 Pac. 199 (1893). Followed in *Johnson v. Conner*, 48 Wash. 431, 93 Pac. 914 (1908).

¹⁸⁸ 52 Wash. 632, 101 Pac. 237 (1909).

¹⁸⁹ *State v. Sturtevant*, 76 Wash. 158, 135 Pac. 1035 (1913).

¹⁹⁰ 84 Wash. 39, 146 Pac. 160 (1915).

¹⁹¹ *Yesler Estate v. Holmes*, 39 Wash. 34, 80 Pac. 851 (1905).

¹⁹² 178 Wash. 541, 35 P.2d 93 (1934). In a mistaken boundary case, the adverse claimant testified he had no intention of claiming more land than to the true boundary. The court held this was not inconsistent with his claim to a strip of his neighbor's land.

¹⁹³ 42 Wn.2d 867, 259 P.2d 391 (1953).

boundary line is not sufficient to make such holding adverse. There must be, in addition to that, *an intention* to claim title to the disputed area and to hold as the owner' [Italics ours.]¹⁹⁴ This seems to call for an *affirmative* intent to hold as the owner, and several subsequent cases show judges through the state so understood.¹⁹⁵ But in 1954 in *O'Brien v. Schultz*,¹⁹⁶ the court denied that affirmative subjective intent had ever been required and attempted to harmonize a number of prior cases, including *Brown v. Hubbard*, *supra*, and *Skansi v. Novak*.¹⁹⁷ In substance the *O'Brien* case also stated that, though intention was required, it was generally inferred from the possessor's acts and that only where the acts were equivocal would a statement of no intent to possess another's land defeat adverse possession.¹⁹⁸ Since the *O'Brien* case, while cases have cited it several times, *Brown v. Hubbard* has been ignored, and "intent" has been inferred from the possessor's acts.¹⁹⁹ In fact, *Niven v. Sheehan*²⁰⁰ holds that no subjective affirmative intent is required.

Still, *O'Brien v. Schultz*, though it may be hoped to lay at rest the question of affirmative intent, does not come to grips with many cases involving *negative* intent—the intent *not* to own. The *O'Brien* case attempts to reconcile *Brown v. Hubbard* and *Mittet v. Hansen* and says an express *declaration* of negative intent will defeat adverse pos-

¹⁹⁴ *Id.* at 869.

¹⁹⁵ See in particular *Niven v. Sheehan*, 46 Wn.2d 152, 278 P.2d 784 (1955), and *O'Brien v. Schultz*, 45 Wn.2d 769, 278 P.2d 322 (1954).

¹⁹⁶ *Op. cit. supra*, note 195.

¹⁹⁷ 84 Wash. 39, 146 Pac. 160 (1915).

¹⁹⁸ "On the contrary, we had on several occasions, prior to the *Brown* [v. Hubbard] and *Beck* [v. Loveland] cases, held that *an express declaration of intention* to claim land adversely to the true owner is not necessary to initiate the running of the statutory period nor to support an action to establish title by adverse possession." *O'Brien v. Schultz*, 45 Wn.2d 769, 778, 278 P.2d 322 (1954). "Courts have had considerable difficulty in determining 'intention' in adverse possession cases, because intention may be evidenced (1) by the *acts* of a party, or (2) by his declarations . . . In jurisdictions such as ours, the *acts* of the user most frequently control. If his *acts* clearly evince an intention to claim land as its owner, a general *declaration* by the user that he did not intend to claim another's land will not prove lack of intention. . . . But a specific *declaration* by a user that he knew a fence was not a boundary and that he agreed to consider it as a temporary barrier will prove lack of intention. *Beck v. Loveland, supra*. [The court in this last sentence is speaking of an agreement between neighbors, which denotes permissive use rather than the unilateral intent of of the possessor.] And if his *acts* are equivocal or do not clearly evince his intention to claim as owner, his *declaration* that he did not intend to take another's land, though not conclusive proof of lack of intention, may be considered in determining his intention while using the land. *Brown v. Hubbard, supra*. . . ." *O'Brien v. Schultz, supra* at 780.

¹⁹⁹ *Buchanan v. Cassell*, 53 Wn.2d 611, 335 P.2d 600 (1959); *Malnati v. Ramstead*, 50 Wn.2d 105, 309 P.2d 754 (1957) (pipeline easement case); *Faubion v. Elder*, 49 Wn.2d 300, 301 P.2d 153 (1956); *Niven v. Sheehan*, 46 Wn.2d 152, 278 P.2d 784 (1955).

²⁰⁰ *Op. cit. supra*, note 195.

session only where his possessory acts are "equivocal."²⁰¹ Yet, in *Skansi v. Novak*, *supra*, in a number of other cases cited in the discussion on negative intent,²⁰² and possibly even in *Brown v. Hubbard*, *supra*, there were permanent improvements made by the possessors, and in all except the *Brown* case there was no express declaration at all. But the court was willing to infer from various kinds of circumstances a negative intent which overcame acts so substantial that they could hardly be termed "equivocal." So the *O'Brien* case, if it has brought peace to the affirmative intent problem, has only muddied the already murky waters of negative intent.

Perhaps the reader will agree that the law would have been clearer and in the long run more useful to the people if Washington had never gone into the "subjective intent" business at all. All, or perhaps even most, states have, and the common law of England seems to have, had no such element to adverse possession.²⁰³ Adverse possession revolves around the character of possession, and it is difficult to see why a man's secret thoughts should have anything to do with it. Maybe the idea originated in a confusion of permission or agreement between owner and possessor with unilateral intent in the possessor's mind. Whatever the reason, the court could yet perform a service by doing away with any requirement of subjective intent, negative or affirmative. Since a man cannot by thoughts alone put himself in adverse possession, why should he be able to think himself out of it?

Mistake. Though often occurring in connection with subjective intent and though sometimes confused with it, mistake is not intent. Intent is what a man thinks—a subjective emotion. Mistake is simply the quality of these thoughts being incorrect and is judged purely by objective standards.

In adverse possession "mistake" is nearly synonymous with mistaken boundary cases, of which there are many. In a typical case the possessor will occupy up to a fence, wall or hedge on what he mistakenly supposes to be his boundary line with his neighbor. Thirty cases could be cited as holding that, provided the other elements of adverse possession are present, a mistake as to the true ownership will not prevent adverse possession. Typical ones span the years from 1959 back to 1901.²⁰⁴

²⁰¹ See quotation from *O'Brien* case, *op. cit. supra* note 198.

²⁰² See for example *Millbank v. Rowland*, 63 Wash. 519, 115 Pac. 1053 (1911), cited in footnote 183, and *Morgan v. Northern Pac. Ry.*, 50 Wash. 480, 97 Pac. 510 (1908), cited in footnote 184.

²⁰³ 4 TIFFANY, REAL PROPERTY § 1147 (1939).

²⁰⁴ *Buchanan v. Cassell*, 53 Wn.2d 611, 335 P.2d 600 (1959); *Faubion v. Elder*, 49

A few aspects peculiar to mistaken boundary cases, though perhaps in strict logic belonging elsewhere, will be discussed here for convenience. It usually happens that there is a fence or wall, though in special circumstances this is not necessary if a well-defined line is otherwise present.²⁰⁵ If claim is made up to a fence, it should follow a regular line, because if it does not, this is evidence that it was not regarded as a line fence.²⁰⁶ It seems that the one claiming by adverse possession must introduce evidence showing he or his predecessors treated and regarded the fence as a line fence for the period of limitations.²⁰⁷ If a fence is not maintained as a line fence but for some other purpose, such as to regulate cattle, this infers it was for convenience only and that the possession up to it was permissive.²⁰⁸

The Washington court has developed a doctrine in connection with mistaken boundaries which, though many times a substitute for adverse possession, is not adverse possession. A line of cases which apparently date back to *Egleski v. Strozynk*²⁰⁹ in 1922 announce that if neighbors set a boundary fence or wall, expressly agree it is their boundary, and maintain the condition for ten years, the line set becomes the boundary, regardless of whether it was correct. By use of this doctrine it is possible in some circumstances to avoid having to prove all the elements necessary to establish adverse possession.

COLOR OF TITLE

"Color of title" is expressly required under both the color-of-title and vacant-land statutes. Under the connected-title statute there is a similar requirement, but this will be treated in a separate section.

As put succinctly in *Bassett v. City of Spokane*,²¹⁰ "color of title is that which is a semblance or appearance of title, but is not title in fact nor in law." Thus, it is a document, on its face appearing to carry title,

Wn.2d 300, 301 P.2d 153 (1956); *Niven v. Sheehan*, 46 Wn.2d 152, 278 P.2d 784 (1955); *Taylor v. Talmadge*, 45 Wn.2d 144, 273 P.2d 506 (1954); *Eubanks v. Buckley*, 16 Wn.2d 24, 132 P.2d 353 (1942); *Alverson v. Hooper*, 108 Wash. 510, 185 Pac. 808 (1919); *Naher v. Farmer*, 60 Wash. 600, 111 Pac. 768 (1910); *Schlossmacher v. Beacon Place Co.*, 52 Wash. 588, 100 Pac. 1013 (1909); *Erickson v. Murlin*, 39 Wash. 43, 80 Pac. 853 (1905); *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936 (1901).

²⁰⁵ *Skoog v. Seymour*, 29 Wn.2d 355, 187 P.2d 304 (1947).

²⁰⁶ *Scott v. Slater*, 42 Wn.2d 366, 255 P.2d 377 (1953); *Lappenbusch v. Florkow*, 175 Wash. 23, 26 P.2d 388 (1933); *White v. Branchick*, 160 Wash. 697, 295 Pac. 929 (1931) (alternate basis for result).

²⁰⁷ *Cabe v. Halverson*, 48 Wn.2d 172, 292 P.2d 220 (1956).

²⁰⁸ *Hawk v. Walthew*, 184 Wash. 673, 52 P.2d 1258 (1936).

²⁰⁹ 121 Wash. 398, 209 Pac. 708 (1922). See on this subject Comment, *Boundary Disputes in Washington*, 23 WASH. L. REV. 125 (1948).

²¹⁰ 98 Wash. 654, 168 Pac. 478 (1917), *affirming*, 93 Wash. 413, 161 Pac. 65 (1916).

but actually void. A sheriff's certificate of sale alone²¹¹ or certificate of sale and sheriff's deed²¹² are color of title, though void because of some defect in the sale²¹³ or the action out of which it arose²¹⁴ and even though unrecorded.²¹⁵ So is a void tax sale deed,²¹⁶ but a certificate of delinquent taxes is not.²¹⁷ A void administrator's²¹⁸ or guardian's²¹⁹ deed provides color of title, as also does a deed to community property executed by the husband alone.²²⁰ One case held that, once color of title was acquired, it was not destroyed by a foreclosure action in rem against the land, though the case said such an action in personam against the person who was the source of the colorable title would have destroyed it.²²¹ And it has been held several times that when adverse possession is claimed under color of title, the land adversely possessed can be no larger than that described in the colorable title documents.²²²

Nothing in the ten-year statute mentions color of title, but a number of older cases under it recite that possession to be adverse "must be under color of title or claim of right."²²³ Even under such statements color of title would be only an alternative requirement, and it has been held no color of title is required under the ten-year statute if there is a claim of right.²²⁴ As a practical matter, no one seems to have claimed adverse possession with color of title under the ten-year statute, which is understandable in view of the shorter limitation period of the color-of-title statute. At any rate, the latest case²²⁵ under the ten-year statute does not mention color of title at all, and neither do other recent

²¹¹ *Prentice v. How*, 84 Wash. 136, 146 Pac. 388 (1915); *Goetter v. Moore*, 53 Wash. 5, 101 Pac. 365 (1909); *Olson v. Howard*, 38 Wash. 15, 80 Pac. 170 (1905); *Philadelphia Mortgage & Trust Co. v. Palmer*, 32 Wash. 455, 73 Pac. 501 (1903).

²¹² *Johnson v. Bartlett*, 50 Wash. 114, 96 Pac. 833 (1908); *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005 (1905).

²¹³ *Johnson v. Bartlett*, *op. cit. supra* note 212.

²¹⁴ *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005 (1905).

²¹⁵ *Goetter v. Moore*, 53 Wash. 5, 101 Pac. 365 (1909).

²¹⁶ *Lara v. Sandell*, 52 Wash. 53, 100 Pac. 166 (1909).

²¹⁷ *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119 (1909).

²¹⁸ *Mary M. Miller & Sons v. Simmons*, 67 Wash. 294, 121 Pac. 462 (1912).

²¹⁹ *Hamilton v. Witner*, 50 Wash. 689, 97 Pac. 1084 (1908).

²²⁰ *Biggart v. Evans*, 36 Wash. 212, 78 Pac. 925 (1904).

²²¹ *Bassett v. City of Spokane*, 98 Wash. 654, 168 Pac. 478 (1917), *affirming*, 93 Wash. 413, 161 Pac. 65 (1916).

²²² *Harkins v. Del Pozzi*, 50 Wn.2d 237, 310 P.2d 532 (1957); *State v. Scott*, 89 Wash. 63, 154 Pac. 165 (1916) (alternate holding); *Snell v. Stelling*, 83 Wash. 248, 145 Pac. 466 (1915). See also *Schmitz v. Klee*, 103 Wash. 9, 173 Pac. 1026 (1918), which says, though it may be dictum, that extrinsic evidence cannot be resorted to to show the area covered by a colorable title document.

²²³ See for instance *McNaught-Collins Improvement Co. v. May*, 52 Wash. 632, 101 Pac. 237 (1909).

²²⁴ *Williamson v. Horton*, 157 Wash. 621, 289 Pac. 1025 (1930).

²²⁵ *Slater v. Murphy*, 154 Wash. Dec. 250, 339 P.2d 457 (1959).

cases.²²⁶ Whether the court may later lapse back into its older habit is interesting speculation but, based upon the fact that nothing much turned upon color of title under the ten-year statute, mainly academic.

GOOD FAITH

Color-of-title and vacant-land statutes. Both the color-of-title and vacant-land statutes require "color-of-title made in good faith." As used in these statutes, "good faith" seems to mean that the adverse claimant, has an honest belief that his colorable title document is genuine, though a paucity of cases makes generalizations difficult. It seems certain that his actual knowledge that someone else is the true record owner will prevent good faith.²²⁷ And, though it is not clear on the point, one case seems to say there is no good faith if the colorable document is received from a person who then has pending against him an action to contest his legal right to the land.²²⁸ There is, however, dictum in a case that notice of another's claim of interest, which the adverse claimant in good faith believes to be ill founded, does not destroy good faith.²²⁹

Ten-year statute. Though the ten-year statute makes no requirement of good faith, decisional law has injected one, possibly, which is undecipherable, probably. Nothing in the law of adverse possession in Washington, not even the question of subjective intent discussed in an earlier part of the article, is so wholly at odds with itself and, apparently, with the law of other jurisdictions.²³⁰

The early Washington cases do not seem to have stated any requirement of good faith under the ten-year statute.²³¹ But in 1909, in *Ramsey*

²²⁶ Examples are *Taylor v. Talmadge*, 45 Wn.2d 144, 273 P.2d 506 (1954), and *Scott v. Slater*, 42 Wn.2d 366, 255 P.2d 377 (1953), from which *Slater v. Murphy*, *Ibid.*, took its language. An earlier case to the same effect is *Bowden-Gazzam Co. v. Kent*, 22 Wn.2d 41, 154 P.2d 292 (1944), which quoted from *Roesch v. Gerst*, 18 Wn.2d 294, 138 P.2d 846 (1943), which may be the source of the language currently in use.

²²⁷ *Petticrew v. Greenshields*, 61 Wash. 614, 112 Pac. 749 (1911); *Brodack v. Morsbach*, 38 Wash. 72, 80 Pac. 275 (1905). See also *McDowell v. Beckham*, 72 Wash. 224, 130 Pac. 350 (1913) (probably dictum).

²²⁸ *May v. Sutherland*, 41 Wash. 609, 84 Pac. 585 (1906). It seems from the facts given in the opinion that the recipient of the document had no actual knowledge of the pendency of the action against his grantor. If not, then the court must have found constructive knowledge from the public record of the action's being brought (there was no *lis pendens* filed in it).

²²⁹ *Brodack v. Morsbach*, 38 Wash. 72, 80 Pac. 275 (1905).

²³⁰ The chapter on adverse possession in 4 *TIFFANY, REAL PROPERTY* 403-543 (1939), does not mention the existence elsewhere of a doctrine such as that Washington has worked out.

²³¹ See statements of requirements for adverse possession in *Erickson v. Murlin*, 39 Wash. 43, 80 Pac. 853 (1905), *Yesler Estate v. Holmes*, 39 Wash. 34, 80 Pac. 851 (1905), and *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936 (1901). In *Flint v.*

v. Wilson,²³² there was what appears to be a holding that *possession* had to be begun in good faith to ripen into title under the ten-year statute. In *Skansi v. Novak* in 1915 it was said that there had to be a "*claim of right* made in good faith."²³³ The most recent case under the ten-year statute²³⁴ and other ones upon which it relies²³⁵ speak of a "*claim*" or "*claim of right*" in good faith. The thing to be emphasized first is that, whereas under the color-of-title and vacant-land statutes there is a requirement of *color of title* in good faith, under the ten-year statute the court says it is imposing a requirement that "*claim of right*" be in good faith. As seen earlier, "*claim of right*" is the same as "*hostile*," and both mean the adverse possessor possesses as a true owner would. This is of course the heart of adverse possession, and the court is thus saying that under the ten-year statute the adverse possession itself must be in good faith.

There is a worse problem yet. It is not even certain the court means what it says about good faith. *State v. Stockdale*, a 1949 case,²³⁶ though reciting a requirement of good faith, allowed title by adverse possession where the possessor knew it did not own the land occupied, had been informed by the true owner of his ownership, and had negotiated with him to purchase the disputed area. The important case of *Bowden-Gazzam Co. v. Hogan*²³⁷ held there was adverse possession where the possessor knew he did not own the land but believed he would acquire title by adverse possession if he occupied it ten years.

Possibly *Ramsey v. Wilson*, *supra*, could be reconciled with the *Stockdale* and *Hogan* cases if the rule were stated to be that there is good faith if the possessor knows someone else is the owner but no good faith if he knows who that owner is. A better and happier solution would be for the *Ramsey* case to be overruled. Better yet, good faith could be forgotten entirely as far as the ten-year statute goes.

Long, 12 Wash. 342, 41 Pac. 49 (1895), the court conceded arguendo the necessity of color of title in good faith under the ten-year statute but expressly refused to pass upon the question.

²³² 52 Wash. 111, 100 Pac. 177 (1909). The possessor knew title was in the state when he entered. Possibly the court was developing the doctrine of *McNaught-Collins Improvement Co. v. May*, 52 Wash. 632, 101 Pac. 237 (1909), which is that there is a subjective intent not to possess adversely if the possessor believes the land belongs to the state or the Government. The results of the *Ramsey* and *McNaught-Collins* cases are the same, but in *Ramsey* the court professes to go on the theory of no good faith.

²³³ 84 Wash. 39, 44-45, 146 Pac. 160.

²³⁴ *Slater v. Murphy*, 154 Wash. Dec. 250, 339 P.2d 457 (1959).

²³⁵ See for example *Taylor v. Talmadge*, 45 Wn.2d 144, 273 P.2d 506 (1954), and *Scott v. Slater*, 42 Wn.2d 366, 255 P.2d 377 (1953).

²³⁶ 34 Wn.2d 857, 210 P.2d 686 (1949).

²³⁷ 22 Wn.2d 27, 154 P.2d 285 (1944).

PAYMENT OF TAXES

Payment of taxes for seven consecutive years is required under the color-of-title and vacant-land statutes only. Neither of these statutes will begin running until the first tax payment is made, not necessarily from the date of assessment.²³⁸ Taxes must be paid each of the seven years as they come due, not later after they are delinquent.²³⁹ If, by mistake, the state assesses two persons for taxes on the same land, one of them is not paying "all taxes legally assessed," as required by both statutes.²⁴⁰ And finally, where the interests in land are divided between surface and mineral rights but the state assesses only the surface owner, his payment of taxes is not payment of taxes on the mineral rights for purposes of adverse possession.²⁴¹

CONNECTED TITLE

The so-called "connected title," that is, title deducible of record back to the state or United States, is required only under the connected-title statute, RCW 7.28.050, which is fairly explicit. This statute will begin running only when the possessor acquires title or takes possession, whichever is later.²⁴² A void sheriff's certificate of sale and deed are "connected title."²⁴³ And a void state deed is sufficient for this purpose, even if the federal Government had also issued a patent to the same land.²⁴⁴

VACANT LAND

Of course the question of what is "vacant land" arises only under the vacant-land statute, RCW 7.28.080, which terms it "vacant and unoccupied land." There are few cases at all under this statute, and only one has been found construing the words quoted. It holds that land used for logging and having a lumber camp on a portion of it was not vacant land.²⁴⁵ Another case on a different point holds that where there is seven years total payment of taxes, part of the time while the land is vacant and part of it while the land was occupied in conformity to the

²³⁸ Tremmel v. Mess, 46 Wash. 137, 89 Pac. 487 (1907).

²³⁹ Brownstin v. Brelle, 193 Wash. 553, 76 P.2d 613 (1938); Kennedy v. Anderson, 88 Wash. 457, 153 Pac. 319 (1915); Seymour v. Dufur, 53 Wash. 646, 102 Pac. 756 (1909).

²⁴⁰ Grays Harbor Commercial Co. v. McCulloch, 113 Wash. 203, 193 Pac. 709 (1920).

²⁴¹ McCoy v. Lowrie, 42 Wn.2d 24, 253 P.2d 415 (1953).

²⁴² Krutz v. Isaacs, 25 Wash. 566, 66 Pac. 141 (1901).

²⁴³ Schlarb v. Castaing, 50 Wash. 331, 97 Pac. 289 (1908).

²⁴⁴ Aspinwall v. Allen, 144 Wash. 198, 257 Pac. 631 (1927); Grays Harbor Commercial Co. v. McCulloch, 113 Wash. 203, 193 Pac. 709 (1920).

²⁴⁵ McCoy v. Lowrie, 42 Wn.2d 24, 253 P.2d 415 (1953).

color-of-title statute, title is perfected by adding the times of the two statutes together.²⁴⁶

PRESCRIPTIVE EASEMENTS

For the most part, the law of adverse possession is applicable to the obtaining of easements by the adverse use of another's land for ten years. Essentially, the difference between the two doctrines is that in the one there is actual possession and in the other only use. Because by definition none of the other statutes discussed here are applicable to adverse use, only the ten-year one is involved. Cases under it are freely cited back and forth as authority for both adverse possession and use, and a number of adverse use cases have already been cited in this article. Therefore, only a brief sketch of some of the salient points or peculiar quirks of prescriptive easements will be noted here.

Most often the easement gained by prescription is one of passage, but it is possible to gain other kinds, such as for a pipeline²⁴⁷ or ditch,²⁴⁸ the nature of the easement always conforming to the nature of use. Once an easement has been acquired by prescription, it is the same as an easement by grant and is protectable by enjoining the owner of the servient estate from interfering with its use.²⁴⁹

One of the difficult areas in the law of prescriptive easements concerns the acquisition *vel non* of ways of passage across unenclosed and unoccupied land. Even with enclosed land, the use of a pathway without permission does not alone create a presumption such use is adverse, and the hostility must be separately proven.²⁵⁰ Rather, the presumption still remains that the use was "permissive," as the word is used in adverse possession. The presumption is nigh impregnable when the unenclosed and unoccupied land is involved. It is probably the rule that the public cannot get an easement of passage across unenclosed land by traveling upon it alone,²⁵¹ though most of the cases also seem to rely upon the fact that the travel was intermittent²⁵² or that there was not sufficient notice to the owner of a hostile claim.²⁵³ However, it is not

²⁴⁶ Philadelphia Mortgage & Trust Co. v. Palmer, 32 Wash. 455, 73 Pac. 501 (1903).

²⁴⁷ Malnati v. Ramstead, 50 Wn.2d 105, 309 P.2d 754 (1957).

²⁴⁸ Ochfen v. Kominsky, 121 Wash. 60, 207 Pac. 1050 (1922).

²⁴⁹ Ochfen v. Kominsky, *op. cit.* *supra* note 248.

²⁵⁰ Roediger v. Cullen, 26 Wn.2d 690, 175 P.2d 669 (1946).

²⁵¹ Stevens County v. Burrus, 180 Wash. 420, 40 P.2d 125 (1935), seems to say this flatly.

²⁵² Turner v. Davisson, 47 Wn.2d 375, 287 P.2d 726 (1955); Lewis v. City of Seattle, 174 Wash. 219, 24 P.2d 427, *aff'd on rehearing*, 174 Wash. 226, 27 P.2d 1119 (1933).

²⁵³ State *ex rel.* Shorett v. Blue Ridge Club, 22 Wn.2d 487, 156 P.2d 667 (1945).

impossible for a private person at least to acquire a prescriptive easement for a pipeline and for a pathway used in connection with it across unenclosed and unoccupied land.²⁵⁴

The reader who wishes a fuller background on the subject of prescriptive easements will find the cases cited in this section helpful, since most are leading cases. Another case which has a full-dress review of the doctrine and of other cases is *Northwest Cities Gas Co. v. Western Fuel Co.*,²⁵⁵ which is something of a classic.

²⁵⁴ *Malnati v. Ramstead*, 50 Wn.2d 105, 309 P.2d 754 (1957).

²⁵⁵ 13 Wn.2d 75, 123 P.2d 771 (1942).