Adverse Possession Elements

• (1) Actual possession
• (2) Open and notorious possession
• (3) Hostile possession (under claim of right)
• (4) Continuous possession
• (5) Exclusive possession
• (6) 1-5 all exist for required statutory period

Suppose that each fall from 1936 to 1958, Mrs. Winchester had asked her nephew to go onto the land and to cut enough timber off the land to heat her home for the winter (which he did)

• Would that have defeated Mullis’s claim for title by AP? Why or why not?
“Color of Title” [Invalid Deed]

• Having possession under color of title can be legally significant for three reasons
  • (1) It is deemed “hostile” and “under claim of right”
  • (2) In some states, it reduces the statutory period (note 3, p. 178), although not in MO
  • (3) Color of title can support a claim of constructive adverse possession

“Constructive” Adverse Possession

• O deeds Blackacre to A (by forged deed); A goes into possession of part of Blackacre
• A court may treat A’s actual possession of part of the parcel, but under color of title to the whole parcel, as constructive possession of entire parcel
• A series of possessors who are in privity can “tack” their periods of possession together to satisfy the necessary statutory period
  • “Privity” here refers to transactional relationship where one possessor intends to and does transfer all of her interest to the next

Tacking and Privity

• Rationale: where TO has remained silent/inactive in the face of a series of possessors, all of whom are in privity and each of whom had a sufficiently “adverse” claim, “clock” should continue to run against AP, who is “sleeping” on its rights
• Tacking unnecessary in Mullis (who could satisfy entire statutory period on his own)
• Court in *Mullis* correctly held Mullis’s payment of taxes to be proof of the continuity of his AP claim

• But the common law didn’t require a claimaint to pay taxes on the land to establish title by AP. Why not?
• Payment of taxes requirement makes good sense in the context of a “color of title” claim like Mullis (as we would expect someone claiming ownership of the entire parcel to pay taxes on it)

• But it makes no sense in a boundary dispute like Norman (in fact, it would preclude adverse possession in boundary disputes)
  • It would not be possible to pay taxes separately on the encroachment area (which is not a distinct “tax” parcel)
• Actual, open, continuous and exclusive possession of the land of another is **presumed to be hostile** [p. 186]

• What does this mean, and why should/does the law draw a presumption of hostility?

• Rationale—this presumption places an evidentiary burden on TO, either:
  • (1) to show that TO granted express permission to AP to take possession (explaining why TO hasn’t objected, as TO wouldn’t have viewed permissive possession as a challenge to TO’s title), or
  • (2) to take timely action to protect TO’s title from being extinguished (not to “sleep on their rights”)


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• If Norman’s possession is presumed hostile — as the court agreed [page 186] — then how did Norman lose the case?
• Why did the court conclude that his possession was not “hostile”?

• Held: Norman’s testimony that “he was just building a fence” is “positive proof” that his possession was not adverse to Bunselmeyer (but was instead permissive)
• Is that the most plausible interpretation of their conversation regarding the fence?
Division Fence Statute

• Missouri has a division fence statute applicable to large parcels like this [Note 4, page 190]
• An owner can build a “division fence” along the common border, and the other owner is obligated to pay ½ of the cost
• Does this statute put a different slant on the Norman/Bunselmeyer conversation?

• It is possible that they may have believed they were building the fence on the true boundary line, oblivious to being mistaken
• If this was meant to be a “division” fence, Norman would not have thought he needed “permission” in a legal sense (and thus there would’ve been no reason for him to ask for it)
  • Instead, he would have been merely being neighborly and “asking” so that Bunselmeyer wouldn’t have been angry to just get a bill for ½ of the fence
• Should Norman’s state of mind be relevant in evaluating whether his possession of the disputed land was “hostile” and “under claim of right”?
• If so, why? If not, why not?