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NOTES AND COMMENTS

Adverse Possession—Effect of Tenant’s Attornment to True Owner

In a recent decision, it was held that a tenant’s attornment to the true owner of land which was held adversely by tenant’s lessor, did not interrupt the running of the statute in favor of the adverse possessor, when the true owner had no notice of the tenancy relationship. The court based its opinion on the principles that the possession of the tenant is the possession of the landlord and that a tenant is estopped to deny the title of the landlord.

The North Carolina Supreme Court has defined adverse possession as: "actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely an occasional trespass. It must be as decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner." Adverse possession consists of five essential elements: (1) the possession must be hostile and under claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; and (5) it must be continuous. If any one of these elements is lacking, the holding will not be effective to allow acquisition of title by adverse possession.

One holding land adversely may do so through his tenant, and the possession of the tenant will be the possession of the landlord.
ever, the elements of adverse possession must still be present. If, then, the tenant voluntarily attorns to the true owner of the land, is not one of the essential elements destroyed? Voluntary attornment by the lessee of an adverse possessor to the record title holder would seem to divest the holding of its hostile character.

If the holding is to constitute an effective adverse possession, it must be continuous and uninterrupted on the part of the adverse claimant. Where a tenant who purports to be holding and acting for his landlord voluntarily attorns to the true owner, it would seem that this act would break the continuity of the holding.

The court, in the instant case, relied on the principle that a tenant is estopped to deny his landlord's title and applied it to a situation where the tenant voluntarily attorned to the true owner and where the true owner had no notice of the tenancy relationship.

In actions in ejectment or for collection of rent, there can be little doubt that the doctrine of estoppel as to tenants is sound, and the courts

Attornment has been variously defined as: "... the act of recognizing a new landlord. The word comes from a feudal law, where it signifies the transfer by the act of the lord with the consent of the tenant of all service, and homage of the tenant to some new lord who had acquired the estate." [Willis v. Moore, 59 Tex. 628, 636 (1883)] "... an acknowledgment or agreement by the tenant that the freehold is in another or that such person is his landlord." [Foster v. Morris, 10 Ky. 610, 611 (1821)] "... the acknowledgment by a tenant that he holds under a new lord who claims by title paramount, and not by grant of the reversion or as privy to the reversioner." [Rochester Sav. Bank v. Stoeltzer & Tapper, 176 Misc. 147, 26 N. Y. S. 2d 713, 716 (Sup. Ct. 1941).] See also Hankins v. Smith, 103 Fla. 892, 138 So. 494 (1935) ; Snyder v. Bernstein Bros., 201 Iova 931, 208 N. W. 503 (1926) ; Hemminger v. Klaproth, 15 N. J. Misc. 163, 189 Atl. 363 (C. P. 1937) ; Del-New Co. v. James, 111 N. J. L. 157, 167 Atl. 747 (Sup. Ct. 1933) ; New York Rys. Corp. v. Savoy Associates, 239 App. Div. 504, 268 N. Y. Supp. 181 (1st Dept. 1933) ; Commonwealth Mortgage Co. v. DeWaltorff, 135 App. Div. 33, 119 N. Y. Supp. 781 (1st Dept. 1909). See also III Am. Law of Property § 15.9 (1952) : "But it is clear, of course, that an attornment to the true owner by the tenant makes his possession that of such owner and therefore ends the adverse possession."

Because of the personal relationship of lord and tenant during the feudal system and the method of land holding then in vogue, it was necessary, to save the lord the expense and trouble of defending against disseisin, that a tenant not be allowed to deny his lord's title and acknowledge another as his lord. The principle was made statutory by 11 George II, c. 19, § 11 (1738) which provided that attornment to a stranger should be void unless pursuant to a decree of court or with consent of the lessor. [I Am. Law of Property, § 3.65 (1952).]

In actions for collection of rent or for possession, where a tenant has acquired possession of property, used it as his own without interference, and has received what he bargained for, he should not be relieved of his obligations merely by being
have so held in a substantial majority of the decided cases. But where the action involves only the title to land, a different situation arises. The purpose of the statutes concerning adverse possession is not to take property away from the true owner and give it to an adverse claimant, but to allow such an adverse claimant to acquire title to property which he has possessed and used as his own for the required number of years and which has been neglected by the true owner without any assertion of his rights of ownership.

Numerous cases hold that an attornment by an adverse possessor's tenant to a third party does not interrupt the running of the statute. Few situations, however, have come before the courts wherein the true owner had no notice of the tenancy relationship.

Generally, decisions on the question fall into three categories, wherein courts have held: (1) that an attornment by a tenant to another party does not interrupt the running of the statute in favor of tenant's lessor, regardless of the question of notice; (2) that such an attornment does allow to find flaws in his landlord's title and claim that his landlord does not have title to the land. [Vernam v. Smith, 15 N. Y. 327 (Ct. of App. 1857); Marmaduke v. McDonald, 51 P. 2d 484 (Okla. 1935).]


10 Thompson v. Pioche, 44 Cal. 508 (1872); Johnson v. Szumowicz, 63 Wyo. 211, 179 P. 2d 1012 (1947); Sailor v. Hertzog, 2 Barr 182 (Pa. 1843) ("The statute protects the occupant, not for his merit, for he has none, but for the demerit of his antagonist in delaying the contest beyond the period assigned for it, when papers may be lost, facts forgotten, or witnesses dead.") See also 4 TIFFANY, REAL PROPERTY, § 1134 (3d Ed. 1939).


12 Kepley v. Scully, 185 Ill. 52, 57 N. E. 187 (1900) (attorney induced attornment and facts indicate that he had full knowledge of tenancy); Bailey v. Moore and Munn, 21 Ill. 165 (1859) (attorney acquired title by sheriff's deed subsequent to tenant's entry for landlord, court holding tenant could not attorn to one acquiring a title hostile to that of landlord); Clifton Heights Land Co. v. Randell, 82 Iowa 89, 47 N. W. 905 (1891) (attorney unaware of tenancy); Ellsworth v. Eslick, 91 Kan. 287, 137 Pac. 973 (1914) (no indication that owner was aware of tenancy); Turner v. Thomas, 76 Ky. (13 Bush) 518 (1877) (attorney made as result of inducement by attorney who claimed under tax deed held to be invalid); Hayes v. Boardman, 119 Mass. 414 (1876) (no indication of whether attorney knew of tenancy); Blanchard v. Tyler, 12 Mich. 339 (1864) (attorney by tenant to party acquiring hostile title held of no effect. There attorney was advised by tenant of his tenancy.) Farrar v. Heinrich, 86 Mo. 521 (1885); Louisiana & Texas Lumber Co. v. Alexander, 154 S. W. 233 (Tex. Civ. App. 1913) (where the court,
interrupt the running of the statute;\textsuperscript{13} and (3) that such an attornment interrupts the running of the statute if the true owner had no notice of the tenancy relationship.\textsuperscript{14}

It would seem that the distinction recognized by this third group of cases would tend to create an exception to the general rule that a tenant is estopped to deny his landlord's title.\textsuperscript{15}

This would seem to follow, for where there is no evidence that the true owner has neglected his title or abandoned the property, and it comes to his attention that the property is occupied by one who voluntarily takes a lease from him or acknowledges his paramount title, the owner is not charged with more knowledge of the situation than could be inferred from the very fact of the possession or ascertained by reasonable inquiry.\textsuperscript{16}

feeling that evidence was clear that plaintiff's agent was fully aware of the tenancy relationship, said: "We are not prepared to say that this rule (that the continuity of possession of an adverse claimant is not broken by the attornment of his tenant to another without his knowledge or consent) should apply where the attornment is to the owner of the property and is obtained without any notice that the person in possession, who makes the attornment, is holding under one claiming adversely to him. In order to perfect his title by limitation, the adverse claimant of land must give continuous notice of his claim by a visible occupancy and appropriation of the land for the time prescribed by statute. He must in this way keep his flag continuously flying; and while he may do this by tenant, if such tenant lowers the flag by attorning to the owner, who acts in good faith and without notice that the person in possession who attorns to him, is the tenant of the adverse claimant, it may be that such attornment would break the continuity of the adverse claimant's possession. It would seem that in such case the owner has done all that could be required of him to protect his possession, and that the adverse claimant, who trusted his tenant to assert his claim for him, should suffer the consequences of his agent's infidelity."; Powell Lumber Co. v. Nobles, 44 S. W. 2d 774 (Tex. Civ. App. 1931) (citing and quoting with approval Louisiana & Texas Lumber Co. v. Alexander, this note supra).

\textsuperscript{13} Western Union Beef Co. v. Thurman, 70 Fed. 960 (5th Cir. 1895); Kaempfer v. Zeller, 28 F. Supp. 699 (W. D. La. 1938); Van Deventer v. Lott, 172 Fed. 574 (E. D. N. Y. 1909), aff'd, 180 Fed. 378 (2d Cir. 1910); Russell v. Erwin's Adm'r., 38 Ala. 44 (1861); De Forest v. Walters, 47 N. E. 297 (N. Y. Ct. App. 1897); Koons v. Steele, 19 Pa. St. 203 (1852); Frank C. Schilling Co. v. Detry, 203 Wis. 109, 233 S. W. 635 (1930).

\textsuperscript{14} Thompson v. Floche, 44 Cal. 508 (1872); Turpin v. Saunders, 32 Grat. 27 (Va. 1879) (the court said: "It is but fair to presume that if Cecil had been informed that Simpkins was Saunders' tenant, he would at once have taken necessary steps to protect his own rights."); But cf. Powell Lumber Co. v. Nobles, 44 S. W. 2d 774 (Tex. Civ. App. 1931); Louisiana & Texas Lumber Co. v. Alexander, 154 S. W. 233 (Tex. Civ. App. 1913).

\textsuperscript{15} Such a distinction is suggested in 4 TIFFANY, REAL PROPERTY, § 1168 (3d ed. 1939) ("... in a few cases it has been decided that it (tenant's acknowledgment of true owner's title) causes such interruption if the rightful owner does not know of the relation of tenancy. These latter cases would seem to indicate the proper distinction in this regard. If the rightful owner has no reason to suspect that the person wrongfully in possession of his land is so in possession, not in his own behalf, but in behalf of another, he is justified in assuming that the person in possession has full power to characterize his possession as being hostile or the reverse, and if such person acknowledges the true owner's title, the latter is not guilty of laches in failing to take legal proceedings."); See also, 2 C. J. S., Adverse Possession, § 139 (1936).

\textsuperscript{16} See, E.g., Hulvey v. Hulvey, 92 Va. 182, 23 S. E. 233 (1895), where the court said: "No one is required to watch the clerk's office to see that those in possession
The situation in the principal case has not come before the North Carolina courts. However, the North Carolina court has consistently held that a tenant cannot deny his landlord's title. Further, in *Wise v. Wheeler*, the court held as inadmissible in evidence the testimony of a tenant against his landlord in an action for possession instituted against the tenant where the landlord was substituted as defendant. In the case of *Lawrence v. Eller*, the court, by way of dictum, said: "It has been said that the estoppel referred to does not prevail in actions involving an issue as to title, but if such a limitation on the general rule prevails in this jurisdiction, it applies only to actions involving strictly the issue as to title, and does not extend to those where the possession and the right growing out of or incident to it are presented or in any way affected."

Where the true owner evidences his ownership by giving a lease to the only person he knows to be holding without authority from him and has no notice that the tenant is holding in behalf of another claiming adversely to the owner, it would seem that justice and a fair interpretation of the law would not deprive the owner of his title.

The view, expressed by the dissenting opinion in the principal case, that an attornment to the true owner by the tenant of an adverse possessor, where the true owner has no notice of the tenancy relationship, interrupts the running of the statute in favor of the adverse possessor, seems practical and just. If the true owner is aware of the tenancy of property in privity with him or in subordination to his title are not (sic) acquiring rights adverse to him," and Thompson v. Pioche, 44 Cal. 508 (1872), where, to the contention that the possession of the tenant was notice of the title of his landlord, the court replied that such possession was not of itself notice, but that it was sufficient to put a person dealing with the property upon inquiry and that it would be proof of notice, unless it be shown that the inquiry, after having been pursued with due diligence, did not disclose the title of the person in possession.

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17 Lassiter v. Stell, 214 N. C. 391, 199 S. E. 409 (1938); Prudential Ins. Co. of Am. v. Totten, 203 N. C. 431, 166 S. E. 316 (1932); Hobby v. Freeman, 183 N. C. 249, 111 S. E. 1 (1922); Lawrence v. Eller, 169 N. C. 211, 85 S. E. 291 (1915); State v. Howell, 107 N. C. 835, 12 S. E. 569 (1890); Springs v. Schenck, 99 N. C. 551, 6 S. E. 405 (1888); Clapp v. Coble, 21 N. C. 177 (1835); Belfour's Heirs v. Davis, 20 N. C. 443 (1839).

18 28 N. C. 196 (1845). See also STANSBURY ON EVIDENCE, § 175 (1946) ("Statements by a devisee are not competent as admissions against other devisees since their interests are not joint. . . . and the same is true of admissions of a tenant offered against his landlord.")


20 Note, 5 ALA. L. REV. 123 (1952), where the writer in commenting on *Kimble v. Willey*, 198 F. 2d 812 (8th Cir. 1952) said: "In the instant case, the tenant, in effect perpetrated a fraud on each of the principal parties. The rule here laid down is intended to protect the record owner as against the adverse possessor where the equities of the parties are substantially equal. Had the plaintiff had any actual notice of the presence of an adverse claimant, and then failed to act on such notice, the adverse claimant would have properly prevailed."

21 *Kimble v. Willey*, 204 F. 2d 238, 243 (8th Cir. 1953).
relationship, his failure to resort to legal process to protect his title is sufficient to indicate his acquiescence in the adverse possession. The fact that he gives the tenant a lease when unaware of any other tenancy relationship, rather than resort to legal process, should not operate to deprive him of his legal title. To allow this result would seem to give an unfair supremacy to the relationship of landlord and tenant to the detriment of the holder of the legal title and would seem to be contrary to the purpose and reason for statutes allowing the acquisition of title to property by adverse possession.

NAOMI E. MORRIS

Constitutional Law—Due Process—Admissibility of Confessions

The decision in the "Reader's Digest Murder Case,"1 recently handed down by the United States Supreme Court, presents quite a dilemma to state courts in their determination of the admissibility of confessions. In a line of decisions beginning at least as early as 1936,2 the Supreme Court has set aside as violative of the Due Process Clause of the Fourteenth Amendment convictions in which "third degree" methods were used to extract confessions from the accused.3

The common law principle of exclusion of involuntary confessions rested on the theory that they were untrustworthy testimony; that the accused may have given an untrue confession to avoid or end present pain and coercion.4 A new test of what constitutes an involuntary confession has evolved in the last decade and, until the decision in the principal case, appeared to be becoming an established principle of constitutional law. While this test is not enunciated in any case as a uniform

1 Stein v. New York, 73 Sup. Ct. 1077 (1953). The case rose to the Supreme Court on writ of certiorari after the Court of Appeals of New York affirmed conviction. 303 N. Y. 856, 104 N. E. 2d 917 (1952).
2 Brown v. Mississippi, 297 U. S. 278 (1936). Involuntary confessions were excluded by federal courts on the ground that they were in violation of the Fifth Amendment privilege against self-incrimination as far back as the leading case of Bram v. United States, 168 U. S. 532 (1897). Judicial thinking tended then to consider involuntary confessions only in the light of the self-incrimination clause of the Fifth Amendment which, of course, was inapplicable to the states. But as Chief Justice Hughes said in Brown v. Mississippi: "Compulsion by torture to extort a confession is a different matter. The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . The freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law." 297 U. S. 278, 285 (1936).
4 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).