Maryland Law Review

Volume 17 | Issue 3 Article 8

The Basis of Title by Adverse Possession - Sterling v. Sterling

Dene L. Lusby

The Basis Of Title By Adverse Possession

Sterling v. Sterling[1]

In March or April of 1935, Jake Sterling erected a crabbing shanty on pilings in the navigable waters of Ape's Hole Creek. He made the shanty generally available, and many of the watermen used it for the purpose of shucking oysters, dumping the shells over into the creek. Through the depositing of these oyster shells an artificially formed island began to appear in November or December of 1935, and had developed into a formation of substantial proportions. On April 29, 1955, the State of Maryland issued a patent to the said island to Guy Sterling, who, on May 16, 1955, brought suit in equity to enjoin Jake from trespassing on the island and to remove the buildings and floats which he had constructed thereon. Jake answered that he had gained title to the island by adverse possession. On appeal from a dismissal of the bill by the Circuit Court for Somerset County, the Court of Appeals reversed.

As pointed out by the Court, the land above water aspect of the case was conclusively governed by Article 57, Section 10 of the 1951 Code, which provides that:

[1] 211 Md. 493, 128 A. 2d 277 (1957).

> ". . . if it shall appear in evidence that the person . . . or those under whom (he) claim(s) have held the lands in possession for twenty years before the action brought, such possession shall be a bar to all right or claim derived from the State under any patent issued . . ."[2]

The defendant's own testimony admittedly showing that the island in question was not *in esse* prior to November or December of 1935 and the action having been instituted on May 16, 1955, the defendant's possession fell several months short of the twenty year period statutorily requisite, *inter alia*, for an adverse possessor or disseisor to gain title to the land in dispute.

In the land under navigable waters aspect of the case, although apparently arriving at the correct holding, the Court erred in basing its holding upon the premise that the foundation of title by adverse possession is the presumption of a lost grant, for that confuses the basis of adverse use with adverse possession; title by adverse possession rests upon the running of the Statute of Limitations of 21 James I, c. 16,[3] in effect in Maryland by virtue of the Maryland Constitution.[4]

The Court pointed out that by virtue of an Act of 1862, since re-enacted and amended,[5] the State has neither the authority nor the power to convey land under navigable waters: ". . . no patent shall hereafter issue for land covered by navigable waters".[6] Therefore, the Court in reversing the Circuit Court, reasoned that since the State is powerless to grant land under navigable waters, it necessarily follows that there can be no presumption of such a grant in favor of an adverse possessor of such land. This reasoning would be sound if the presumption of a lost grant were the basis for the accrual of title by adverse possession in Maryland. In support of the lost grant presumption as a theoretical basis, the instant case refers to the leading Maryland case in this area of the law, *Sollers v. Sollers*,[7] by quoting from its opinion:

> ". . . title by possession presumes a grant, and such a presumption cannot be entertained as against one incapable of granting . . . No title, therefore, could be

[2] Parenthetical material supplied.
[3] 2 ALEX. BRIT. STAT. (2d ed., 1912) 599.
[4] DECLARATION OF RIGHTS, Art. V.
[5] MD. CODE (1951) Art. 54, Sec. 48; Md. Laws 1955, Ch. 47.
[6] *Ibid.*
[7] 77 Md. 148, 26 A. 188 (1893).

> acquired by possession as against the State, in the face of the statute, which expressly provides that no such grant shall be made . . ."[8]

Likewise in *Hodson v. Nelson*,[9] a case in which the facts are similar to those of the instant case, the same doctrine was reiterated.

The earliest reported case dealing with adverse possession was *Cheney's Lessee v. Watkins*[10] in 1804, in which the Court promulgated the theory that from great length of possession of the land, the payment of taxes, etc., the jury may presume a conveyance from the patentee. After reaffirming this principle in a series of cases,[11] the Court in 1844 decided the oft-cited case of *Casey v. Inloes*,[12] in which it held that a continuous possession of twenty years or upwards, in a party, or those claiming under him, would authorize him or them to supply the absence of a conveyance to such party from one seized before him, by requiring the court to instruct the jury to presume such a conveyance.[13]

Finally eleven years later, the case of *Armstrong v. Risteau*,[14] held out the hope that the Court was going to correct itself, when it stated that:

> "More than a century and a half ago it was decided by Lord Holt, that 'if A has possession of land for more than twenty years uninterrupted, and then B gains possession, upon which A brings ejectment, though A is plaintiff, yet his possession for twenty years will be a good title for him as well as if A had then been in possession, because possession for twenty years, by virtue of the Statute of *James I, ch. 16*, is like a descent at common law, which tolls the entry.' *Stocker v. Berny, 1 Lord Raymond, 741* . . ."[15]

Nevertheless, the proper approach of resting the doctrine of adverse possession upon the running of the Statute of Limitations was forgotten when the next case in point

[8] *Ibid*, 152.
[9] 122 Md. 330, 89 A. 934 (1914).
[10] 1 H. & J. 527 (Md., 1804).
[11] Dale v. Fassett, 3 H. & J. 119 (Md. 1810); Bradford v. McComas, 3 H. & J. 444 (Md. 1813); Mundell v. Clerklee, 3 H. & J. 462 (Md. 1814); Hammond v. Ridgely, 5 H. & J. 245 (Md. 1821); Lee v. Hoye, 1 Gill 188 (Md. 1843).
[12] 1 Gill 430 (Md. 1844).
[13] *Ibid, circa* 497.
[14] 5 Md. 256 (1853).
[15] *Ibid*, 270.

arose, in 1863, the Court again falling back upon its old statement that:

> ". . . the consistency of the possession . . . constitutes the evidential fact from which the law infers that it originated in grant."[16]

And two years later, citing *Casey v. Inloes,* the Court again stated:

> "Presumptions of deeds for the protection of ancient possessions, are made upon principles of public policy."[17]

And so this assumption that title by adverse possession rests upon the presumption of a lost grant has been carried through a further series of cases[18] up to and including the instant one.

Several early English statutes limited the time within which an action to recover seisin could be brought, not by defining a set number of years before the institution of the action as is the mode of more recent legislation, but by naming a particular year back of which a litigant could not go for the purpose of establishing his title.[19] Under the earliest statute of limitations a litigant could not allege the seisin of his ancestor prior to the beginning of the reign of Henry I (1100); this was altered by the Statute of Merton to the beginning of the reign of Henry II (1154).[20] The final statute to utilize this method of limiting real actions was the Statute of Westminster I, 3 Edward I, c. 39 (1275), which stipulated that one could not allege the seisin of his ancestor beyond the beginning of the reign of Richard I (1189).[21] The effect of these statutes was that seisin at the prohibitive date, even if tortious, became the paramount source of title.[22]

The first statute to adopt the modern method of fixing limitations on real actions was that of 32 Henry VIII, c. 2 (1540), which limited any allegation of seisin in the litigant to within thirty years of the teste or date of the original writ, in regard to both droitural and possessory actions, and

[16] Colvin v. Warford, 20 Md. 357, 395 (1863).

[17] Balto. Chem. Manf. Co. v. Dobbin, 23 Md. 210, 218 (1865).

[18] Crook v. Glenn, 30 Md. 55 (1869); Lannay v. Wilson, 30 Md. 536 (1869); Cadwalader v. Price, 111 Md. 310, 73 A. 273 (1909). 2 ALEX. BRIT. STAT. (2d ed. 1912) 599-628.

[19] TIFFANY, REAL PROPERTY (Abr. ed. 1940), 776, Sec. 743; Ballantine, *Title By Adverse Possession,* 32 Harv. L. Rev. 135, 137 (1918).

[20] TIFFANY, *loc. cit., ibid,* fn. 2.

[21] Ballantine, *supra,* n. 20, 137.

[22] *Ibid.*

any allegation of seisin in an ancestor to within fifty years in a possessory action, and to within sixty years in a droitural action.[23]

However, this statute applied only to the old real actions, and when ejectment took their place, the Statute of 21 James I, c. 16 (1623), was enacted to preclude, or limit, the right of entry, and thus the action of ejectment, to within twenty years of the accrual of the right or title in controversy. Therefore, under this statute, a possession maintained adversely and continuously for twenty years becomes a source of title paramount in ejectment to any title derived from an older possession, grant, or patent.[24]

The Statute of 21 James I, c. 16, being Maryland law by virtue of Article 5 of the Maryland Declaration of Rights,[25] our courts should take cognizance of its existence for the sake of accurate jurisprudence and not continue to confuse title by adverse possession with the somewhat similar doctrine of prescription.

DENE L. LUSBY

[23] *Ibid*, 138.

[24] *Ibid*. The Statute of 21 James I, c. 16, 2 ALEX. BRIT. STAT. (2d ed. 1912) 599, however, did not bar real action by writ of right which ran for an additional forty years. (This problem did not arise in Maryland, however, as the writ of right was not a recognized form of action.) To rectify this situation in England, the Statute of 3 and 4 William IV, c. 27 (1833), stipulated the extinguishment of the former title after twenty years. The Statute of 37 and 38 Victoria, c. 57, popularly known as the Real Property Limitation Act of 1874, reduced the period of limitation to twelve years.

[25] 2 ALEX. BRIT. STAT. (2d ed. 1912) 599-628.