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Adverse Possession: Personal Property: Tacking and Payment of Taxes [Student Comment]

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Recent Inheritance Tax and Estate Tax Decisions

THIS review will not attempt to be exhaustive but will merely present some of the more significant and important inheritance tax and federal estate tax cases which have been decided since the excellent note on this subject which appeared in this journal in September, 1921.¹

For the purpose of presenting this summary in an orderly way, we have arbitrarily divided the decisions into three main classes:

- I. Those involving constitutional law questions;
- II. Those involving general questions of taxation;
- III. Those involving questions of procedure.

I

CONSTITUTIONAL LAW DECISIONS

The most important case involving constitutional questions which has been decided within the last few years is the case of *Frick v. Commonwealth of Pennsylvania*,² decided on June 1st of this year by the United States Supreme Court. This case involved three main questions:

(1) Whether a state can, in levying an inheritance tax, include the full value of tangible personal property, e. g., paintings, statuary, household furnishings and farming implements, situated outside of its boundaries;

(2) Whether a state, in levying an inheritance tax on foreign corporation stocks which it has a right to tax, but which are also properly taxed in other jurisdictions where the corporations were

¹ 9 California Law Review, 505.

² (1925) 69 L. Ed., Adv. Ops. 692, 45 Sup Ct. Rep. 603.

Comment on Cases

ADVERSE POSSESSION: PERSONAL PROPERTY: TACKING AND PAYMENT OF TAXES—In the course of a comment in a recent issue of this REVIEW¹ it was pointed out that the District Court of Appeal in the case of *San Francisco Credit Clearing House v. Wells*,² in effect approved the doctrine of tacking the adverse possession of personal property by successive adverse holders. The case was reversed in the Supreme Court³ which held by way of dictum that there could be no tacking even though there be privity between the successive holders. The later dictum is based upon the ground that the original holder was guilty of conversion by disposing of the property before acquiring title to it and his successors were also converters as soon as they acquired possession. A new right of action thus accrued to the owner with each new conversion. The dictum is opposed to the weight of authority on the subject in this country.⁴ The same result, however, has been reached in England,⁵ Tennessee⁶ and South Carolina.⁷ The dictum was not necessary to a decision in the case, but since the court raised the question, it might well have recognized the doctrine of tacking as generally accepted both as to land and chattels.⁸ The vital question appears to be, if the defendant claims through and under his predecessors all of whom have held a connected, consistent and continuous claim of title for the statutory period should not the cause of action against them be considered in essence one and the same cause of action? Should there not be a relation back of the possession of the defendant to the original taking, thus blending the successive possessions into one?⁹ The important consideration is not that there

¹ 13 California Law Review, 256.

² (Nov. 12, 1924) 45 Cal. App. Dec. 642.

³ (August 29, 1925) 70 Cal. Dec. 253, 239 Pac. 319.

⁴ *Hicks v. Fluit* (1860) 21 Ark. 463; *Gaillard v. Hudson* (1888) 81 Ga. 738, 8 S. E. 534; *Luter v. Hutchinson* (1902) 30 Tex. Civ. App. 511, 70 S. W. 1013; *Dragoo v. Cooper* (1873) 9 Bush (Ky.) 629.

⁵ *Miller v. Dell* [1891] 1. Q. B. 468, 60 L. J., Q. B. 404, 63 L. T. 693.

⁶ *Wells v. Ragland* (1852) 31 Tenn. 398, 1 Swan (Tenn.) 501.

⁷ In South Carolina the rule against tacking applies to land as well except in cases of descent. *Beadle v. Hunter* (1848) 3 Strob. (S. C.) 331; *King v. Smith* (1838) Rice Law Rep. (S. C.) 10; *Garrett v. Weinberg* (1896) 48 S. C. 28, 26 S. E. 3, 18.

⁸ *Gaillard v. Hudson*, supra, n. 4 (horse); *Collins v. Gray* (1908) 154 Cal. 131, 97 Pac. 142 (land).

⁹ The "relation back" doctrine or fiction is resorted to only in the demands of justice and fairness. In situations like that in the instant case the necessity for its application arises only when the action is brought after the several adverse holders have had possession for the statutory period. The same considerations of justice and fairness do not require the denial of a new right of action against the last converter when the action is brought before instead of after the running of the statute. An analogy in this regard might be pointed out in the law of accession to personal property. There, in what would seem to be a somewhat involved situation, there is at one and the same time a relation back to the original conversion and a new right of

has been a substitution of possessors but that the owner's title has been continuously and uninterruptedly denied for the statutory period. As Professor Ballantine has put it with respect to real property so it is with regard to personal property: "The same flag has been kept flying for the whole period. It is the same ouster and disseisin. If the statute runs it quiets a title which has been consistently asserted and exercised as against the true owner and possession of the prior holder justly enures to the benefit of the last."¹⁰ If the purpose of the statute is to quiet titles openly asserted, the dictum in this case is apparently contrary to that purpose. It must be admitted, however, that due to the ambulatory character of personal property the owner is in a more disadvantageous position in protecting himself than the owner of realty. The adverse possessor and the personalty may move from place to place within the state or even from state to state entirely unknown to the owner who has no opportunity to assert his title. In the case of realty the situs remains fixed. However this can be taken into consideration in determining whether the possession of the personalty has been open and notorious.¹¹ The statute begins to run as soon as the possession is open and notorious regardless of the knowledge of the owner.¹² If the property is shown to have been held continuously, openly, and notoriously for the statutory period by several successive possessors, all claiming under the same title but no one of whom

action on the ground of a new conversion. If an innocent converter improves the chattel and then sells it to a *bona fide* purchaser, the latter is guilty of converting the improved chattel, the title to which is in the owner. It has been held, however, that since the owner could recover from the original converter only the value of the chattel at the time of the original conversion, he is limited to the same amount in his recovery against the innocent purchaser. *Whitney v. Huntington* (1887) 37 Minn. 197, 33 N. W. 561; *Wall v. Holloman* (1911) 156 N. C. 275, 72 S. E. 369. *Contra*: *Wing v. Milliken* (1898) 91 Me. 387, 40 Atl. 138. The "relation back" doctrine is applied in other branches of the law, e.g., delivery and acceptance of deeds, *De Conick v. De Conick* (1908) 154 Mich. 187, 117 N. W. 570, 22 L. R. A. (N. S.) 417 (delivery of deeds); *Green v. Skinner* (1921) 185 Cal. 435, 197 Pac. 60; *Hibbard v. Smith* (1885) 67 Cal. 547, 4 Pac. 473, 8 Pac. 46 (acceptance of deeds), and acquisition of title by satisfaction of judgment. *White v. Martin* (1834) 1 Port (Ala.) 215, 26 Am. Dec. 365.

¹⁰ Henry W. Ballantine, *Title by Adverse Possession*, 32 *Harvard Law Review*, 135, 158.

¹¹ It is for the jury to determine whether or not there has been open and notorious possession. *Thomas v. England* (1886) 71 Cal. 456, 12 Pac. 491; *Pendill v. Marquette County Agric. Soc.* (1893) 95 Mich. 491, 55 N. W. 384. Thus, the open and notorious character of the holding would seem to depend, not so much upon an absolute standard of "openness" as upon the nature of the particular chattel and the circumstances of the particular case. A circumstance that should be given some weight is whether or not the owner had a reasonable opportunity of knowing the whereabouts of the property and of asserting his title. It has generally been held that an action is barred against an innocent purchaser of stolen property holding for the statutory period, for the possession of a *bona fide* purchaser is uniformly considered to be sufficiently open to satisfy the requirements of the statute even though the owner does not know the whereabouts of his property. *Fears v. Sykes* (1858) 35 Miss. 633.

¹² *Yore v. Murphy* (1896) 18 Mont. 342, 45 Pac. 217 (sheep).

alone has held for the statutory period, is it not unfair to innocent purchasers to give a new right of action with each change in possession? It would seem that the owner of the personalty is given ample consideration if the statute does not commence to run against him until the possession becomes open and notorious. It is to be hoped that the court will not feel itself bound by its dictum which leads to a rule of title to personal property inconsistent with the well established rule as to real estate.¹³

A further question was raised by the instant case, but dismissed with little discussion, namely, does possession for the statutory period by the adverse holder of personalty bar the remedy only or vest the possessor with title?¹⁴ The Civil Code section 1007 provides that "Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar action for the recovery of property confers a title thereto, denominated a title by prescription, which is sufficient against all." Would it not be an extremely narrow construction of this section to confine it to section 318, Code of Civil Procedure which bars the action for real property and not apply it as well to section 338 of the Code of Civil Procedure which bars the action for the recovery of personal property? This problem has already been sufficiently discussed in the previous note on the instant case.¹⁵ However it may be asked, if the courts in a given jurisdiction hold that title is gained by adverse possession for the statutory period will they necessarily permit tacking? Does denial of title imply a denial of tacking? Is title something which slowly grows as the statute runs, attaining its maturity at the end of the statutory period or is it spontaneously transferred immediately after the statute has run? If the property is sold before the statute has run and title could have been gained by holding the full period the purchaser is in effect buying a title that has not quite "matured" and it would seem unjust for the court to give a new right of action on the ground of a new conversion. In such cases one would expect to find, and does find, tacking allowed.¹⁶ On the other hand it would seem that courts holding that title is not created by adverse possession of a chattel for the statutory period have but a short step to take to hold that there can be no tacking even with privity. The right of action in such case is gone, but the title remains in the owner who might readily be given a new right of action with each new interference with that title. This was

¹³ *Collins v. Gray*, supra, n. 8; *Botsford v. Eyraud* (1906) 148 Cal. 431, 83 Pac. 1008.

¹⁴ Mr. Justice Seawell did not consider it necessary to answer that question but stated that "a careful examination of the decisions of this state has failed to disclose to our investigation a single case in which section 1007, Civil Code, has been applied to the acquisition of title to personal property." 70 Cal. Dec. 253, 257. Mr. Chief Justice Myers in his concurring opinion stated that he is not prepared to say there can be no tacking of successive possessors who are in privity with one another if title to personal property may be acquired by prescription.

¹⁵ 13 California Law Review, 256.

¹⁶ *Hicks v. Fluit*, supra, n. 4; *Gaillard v. Hudson*, supra, n. 4.

the view of the English court in the case of *Miller v. Dell*,¹⁷ in which title and tacking were denied in the same case.

A second and surprising dictum in the instant case holds that payment of taxes is one of the essential elements of the acquisition of title to personal property by adverse possession. The Supreme Court has formerly held that payment of taxes is not an element of adverse possession unless made so by express statutory requirement.¹⁸ The Code of Civil Procedure, section 325, pertains to land exclusively in requiring payment of taxes for the acquisition of title by adverse possession. Is the court reversing its former holding or does it mean to amend the Code to embrace personal property?

R. J. T.

