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Requisites for Adverse Possession in Montana

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REQUISITES FOR ADVERSE POSSESSION IN MONTANA

On February 17, 1949, the Supreme Court of Montana decided the case of *Laas* v. *All Persons Claiming Any Interest In or Lien Upon Real Property Herein Described et al.*[1] The *Laas* case was a suit to quiet title. A patent to the land involved in this case was issued by the government of the United States on April 5, 1918, to the heirs of Katie Robowoitra, and the defendants as such heirs claim title to the property. The plaintiff Lizzie Laas claimed title to said land under a tax deed to Nick Laas, plaintiff's husband, dated December 19, 1922. The plaintiff also asserted a claim to said land by *adverse possession.*

In the case the Justice said:

> ". . . it is incumbent upon the plaintiff to establish the following facts in order to claim adverse possession: viz: (b) An entry into the possession of the property *under claim of title founding such claim upon a recorded instrument* as being a conveyance of the property in question, and that there has been a continued occupation and possession of the property included in such instrument for 10 years; . . ."[2]

This statement will leave one reading the case in doubt as to some rules of law previously considered well settled in Montana. The questions raised by this statement concern the necessity of a written instrument when claiming title by adverse possession, and the necessity of recording such instruments.

The Montana Supreme Court in many decisions has stated the elements which are necessary to constitute title by adverse possession. The Montana court has repeatedly said:

> ". . . Possession for the statutory period *under color* or *claim of title,* which possession is actual, visible, exclusive, hostile, open and notorious, or a possession of such a character as to raise a presumption of notice, and so patent that the owner could not be deceived, and so brought home to the owner as to enable the latter to institute an action for possession during the running of the statute of limitations, will vest title by perscription in the occupant. . . ."[3]

[1](1948) .....Mont....., 189 P.(2d) 670.
[2]*Supra* note 1.
[3]LeVasseur V. Roullman (1933) 93 Mont. 552, 20 P.(2d) 250; Morrison v. Linn (1915) 50 Mont. 396, 147 P. 166; Newton v. Weiler (1930) 87 Mont. 164, 286 P. 133; Blackfoot Land Development Co. v. Murks (1921) 60 Mont. 544, 199 P. 685; Ferguson v. Standley (1931) 89 Mont. 489, 300 P. 245.

The Montana Court, in saying possession for the statutory period, etc., under color or claim of title, clearly recognizes that possession under either may ripen into title. These terms, *color of title* and *claim of title* are very important, and to establish their relationship to the problems involved in this comment it is necessary to show the development of the doctrines.

Claim or Title. Claim of title, or claim of right, when used in connection with adverse possession may be defined as the use of property as one's own to the exclusion of the rights of all other persons irrespective of any written instrument, or legal title upon which the claim is founded. There need be no written instrument or semblance of title to hold under claim of title. The party holding property under claim of title need not have any claim, and, in fact may be a trespasser. In a leading Montana case, *Morrison* v. *Linn,* the Court said:

> ". . . Claim of title, in the law of adverse possession, is nothing more than the claim asserted by a disseisor of his intention to appropriate and use the land as his own, to the exclusion of the rights of all other persons, and irrespective of any semblance of color, right, or title as the foundation of his claim. viz: A naked trespass may initiate the claim of an adverse occupant to title by adverse possession; there being no necessity that his entry into possession be made under pretense of right or title. . . ."[4]

The other Montana cases on this subject are in full accord.[5]

As noted *supra,* under claim of title as well as under color of title, it is necessary for a person claiming by adverse possession to have had actual, visible, etc., possession for the statutory period. The possession which is required is actual possession of the property. Montana has provided, in R.C.M. 1947, Section 93-2511 (9022), what possession will be deemed to constitute actual possession when holding property under claim of title.

> R.C.M. 1947, Section 93-2511 (9022). "*What constitues adverse possession under claim of title not written.* For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:
> 1. Where it has been protected by a substantial inclosure;
> 2. Where it has been usually cultivated or improved."

[4](1915) 50 Mont. 396, 147 P. 166.
[5]Ferguson v. Standley (1931) 89 Mont. 489, 300 P. 245.

In R.C.M. 1947, Section 93-2510 (9021), a limitation is put on what may be claimed by adverse possession. The code provision declares:

> "*Premises actually occupied under the claim of title deemed to be held adversely.* Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely."

From these statutes and many cases[6] it is clear that Montana recognizes that a party holding under claim of title not written may get title by adverse possession. R.C.M. 1947, Section 93-2511 (9022) gives the guide as to what constitutes possession, and R.C.M. 1947, Section 93-2510 (9021) indicates that adverse possession under claim of title will ripen into title only to that property which is actually occupied or possessed.

Color of title. Color of title when used in connection with adverse possession may be defined as a writing that purports to give good title to realty, but which does not do so. In *Wright* v. *Mattison*[7] the Supreme Court of the United States said:

> ". . . The courts have concurred, it is believed, without exception in defining 'color of title' to be that which in appearance is title, but which in reality is no title. . . ."

The Montana cases[8] are fully in accord with this statement in *Wright* v. *Mattison.*

Color of title in adverse possession was an innovation of the American law which was unknown at the earlier common law.[9] The doctrine of color of title in adverse possession came about because of necessity, and the reason for its development explains its purpose. During the early expansion in our country, land was sold in large tracts and due to the unsettled conditions, etc., much of it was sold several times over. This resulted in great confusion of land titles. Many innocent parties had seemingly

[6]Scott v. Jardine Gold Mining and Milling Co. (1927) 79 Mont. 485, 257 P. 406; Blackfoot Land Development Co. v. Burks (1921) 60 Mont. 544, 199 P. 485.

[7](1855) 59 S.Ct. 280, 15 L.Ed. 280, 18 How. 50.

[8]Fitschen Bros. Commercial Co. v. Noye's Estate (1926) 76 Mont. 175, 246 P. 773; Ferguson v. Standley (1931) 89 Mont. 489, 300 P. 245; Morrison v. Linn (1915) 50 Mont. 396, 147 P. 166; Sullivan v. Neel (1937) 105 Mont. 253, 73 P.(2d) 206.

[9]Phipps, *Adverse possession—Color of title—Origin of doctrine,* 18 ORE. L. REV. 188 (1932).

valid paper titles which were of no value, and held such large tracts that it was impossible to possess the whole tract. With this situation, under rules of adverse possession of the time, it was impossible for many to get title because adverse possession required possession of all property claimed. Because of this the courts and legislators sought a way to secure the party in possession under an invalid title what was due him, and so the doctrine of *color of title* arose.[10]

Under color of title one who entered upon land was presumed to have entered in accordance with the instrument and his actual possession of a portion of the property would, by presumption of law, constructively extend his possession to the boundary defined in the instrument. In other words, a man who has possession of a part of a tract and who holds under color of title, has constructive possession of the entire tract.

R.C.M. 1947, Section 93-2508 (9019) provides when occupation under a written instrument will be deemed adverse:

> "*Occupation under a written instrument or judgment—when deemed adverse.* When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, *or of some part of the property,* under such claim, for ten years, the property so included is deemed to have been held adversely."

This Montana statute clearly indicates by the words, *or of some part of the property,* that all of the property included within an instrument may be held adversely by possession of a part. The Montana decisions are in accord.[11]

In R.C.M. 1947, Section 93-2509 (9020) we find what possession is necessary to constitute actual possession when claiming under color of title:

> "*What constitutes adverse possession under written instrument or judgment.* For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

[10] *Supra* note 9.
[11] Fitschen Bros. Commercial Co. v. Noye's Estate (1926) 76 Mont. 175, 246 P. 773; Morrison v. Linn (1915) 50 Mont. 396, 147 P. 166.

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial enclosure.
3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, either for the purpose of husbandry, or for pasturage, or for the ordinary use of the occupant.
4. Where a known farm or lot that has been partly improved, the portion of such farm or lot that has been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

Under this statute, which applies when one claims under *color of title*, the acts which will constitute actual possession are not as limited as those acts necessary when holding under claim of title.[12]

As can be seen by R.C.M. 1947, Sections 93-2508 (9019), 93-2509 (9020), 93-2510 (9021), 93-2511 (9022), above, and the decisions under those statutes,[13] the basic differences between holding property under color of title, and holding under claim of title not written, is that possession of land with color may ripen into title, not only to the land actually occupied, but to all the land described in the muniment, while possession under mere claim of title may ripen into title only to the land actually occupied; also, the acts which will constitute adverse possession when holding under color of title are not as limited as when holding under claim of title not written.

Whether a claimant attempts to gain title with, or without color of title, the essential requirements of an adverse possession[14] remain the same. The writer could find no case in Montana where *color of title* added or detracted from the ordinary rules of adverse possession, except, as provided by statute, under color of title there may be constructive possession by actual possession of a part, and, when holding under color of title the acts which will constitute actual possession are not as limited as when holding without color. Color of title does not change the requirement of actual possession of the property, but merely modifies that requirement.

Claim of title is always a requirement of adverse possession,

[12] *Supra* note 4.
[13] *Supra* notes 4 and 11.
[14] *Supra* note 3.

and must be established whether the claimant holds under color of title or not. In the Montana case of *Fitschen Bros. Com. Co.* v. *Noyes Estate*[15] the Court said:

> ". . . Color of title, without claim is of little effect. Claim of title, without color, may ripen into title only to the land actually occupied, while with it (color), it may ripen into title not only to the land actually occupied but to all described in the color of title, if that actually occupied be a part thereof. viz: *Claim* of title is of course essential to impart to possession the element of hostility. Where land is claimed adversely, *color of title, except where required by statute, is not required . . .*"

The *Fitschen* case clearly indicates that claim of title is an essential in any claim of adverse possession in Montana, and that color is never required except by statute.

The only affect color of title has had on the ordinary rules of adverse possession is to modify them at two points; that is, it allows a broader basis for actual possession, and allows constructive possession by possession of a part. From this it seems logical that color of title is absolutely necessary to constitute adverse possession only: when the claimant has not been in actual possession of the whole tract, or when his possession is not sufficient to constitute actual possession under mere claim of title, but is sufficient under color of title.

Color of title may always be used as a basis for adverse possession, but it is not necessary except as noted. If a claimant has color of title he will be on safer ground if he claims adverse possession thereunder. Color of title is always good evidence of the intent necessary for claim of title, the hostility, notoriety, or notice to the owner, etc., but color of title is not absolutely required except as noted *supra.*

The Justice in the *Laas* case said that it was incumbent upon the plaintiff to establish an entry into possession under claim of title, founding such claim upon a written instrument, etc. This amounts to the same thing as saying that the plaintiff must establish an entry into possession under *color of title.*[16] After a survey of the doctrine of color of title in adverse possession, it is evident that this statement by the Justice is not entirely correct for the facts of the *Laas* case.

The facts in the case constituting possession[17] clearly show

[15](1926) 76 Mont. 175, 246 P. 773.
[16]*Supra* notes 7 and 8.
[17](Summary of facts constituting plaintiff's adverse possession.) The

acts sufficient for *actual possession of the entire tract claimed,* as is required when entry is made under claim of title not written.[18] As previously noted, the elements which must be proved are the same in any adverse possession action. There must always be an adverse possession, and the only time color of title is needed is when required by statute. By the facts of the case the plaintiff, Lizzie Laas, established beyond a doubt, an actual possession of the entire tract, and a possession sufficient to constitute actual possession whether she held under color of title, or claim of title without color. It is therefore not necessary to show entry under color of title because the reasons for requiring a showing of color are not present.

The statement that Lizzie Laas must found her claim upon a written instrument, was made by the Court without qualification, explanation, or exception, while in fact there were sufficient grounds for adverse possession whether or not there was a written instrument, or color of title, under which the plaintiff entered into possession.

For these reasons the writer feels that the statement in the case, requiring entry under a written instrument, is at least doubtful, and worthy of comment.

Another question arises in the case from the requirement that the instrument under which the plaintiff claimed must have been *recorded.*[19] The writer can find no basis for such a requirement. In Montana there are no decisions or statutes, which say anything about recording such instruments before they may be used as a basis for founding a claim in adverse possession.

The rule as stated in American Jurisprudence is:

> ". . . In the absence of statutory authority to the contrary, an instrument relied on as color of title need not be recorded.. So, the failure to record a sheriff's receipt for the amount bid at a tax sale, although such receipt is required by statute to be recorded, does not affect the efficacy of the tax deeds as color of title, even though it may affect its validity as a conveyance. . . ."[20]

plaintiff and her predecessors in interest, from December of 1922 until the commencement of the suit to quiet title in 1943, have been in open and notorious possession of the property claiming at all times to be the legal owners. They built and maintained fences, reservoirs, and outbuildings. The property was used for pasture, and was cultivated. The plaintiff and her predecessors paid all taxes levied against the property, and exercised other acts of ownership including the execution of contracts and oil and gas leases.

[18]R.C.M. 1947 §§93-2510 (9021), 93-2511 (9022) *Supra* p. 89, 90.

[19]*Supra* note 2.

[20]AM. JUR., *Adverse Possession* §204.

This rule is the great weight of authority in the American jurisdictions.[21] In a small minority of jurisdictions it is specifically provided by statute that color of title must be recorded to be effective in adverse possession.[22]

Whether a claimant holds under color of title, or claim of title without color, there must be an adverse possession. There must still be an actual, visible, exclusive, hostile, open and notorious possession of such a character as to raise a presumption of notice, and so brought home to the owner as to enable the latter to institute an action for possession during the running of the statute of limitations. Though a recording may prove very useful in evidence to establish these requirements, the recording adds nothing that is not already required.

The American common law does not require the color of title be recorded before it may be used in adverse possession, and until it is specifically required, there is no basis for assuming that color of title must be recorded in Montana.

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[21]2 C.J. *Adverse Possession* §§348, 349, 350.
[22]*Supra* note 22.

THE CHARITABLE TRUST DOCTRINE IN MONTANA

I. INTRODUCTION AND BACKGROUND

Trusts, from an early time, have been administered exclusively as a part of equity jurisprudence. They are classified in two general categories—private trusts and charitable trusts. Closely related to, and treated in most classifications with, charitable trusts are unconditional gifts to charitable corporations and gifts to charitable corporations for specific purposes. Gifts to unincorporated charitable associations are also included under the general heading of charitable trusts.

Chancery courts in England enforced charitable trusts before 1601 as a part of their inherent jurisdiction of equitable suits. Due to neglect in their enforcement, the Statute of Charitable Uses was passed in that year.[1] This statute provided new methods for the enforcement of charities and also named some of the more common charities of the day.

An early U.S. Supreme Court case had much to do with the development of the doctrine in this country. This case was

[1]43 ELIZ. c. 4.