Missouri Law Review

Volume 13
Issue 1 *January 1948*

Article 9

1948

Masthead and Comments

MISSOURI LAW REVIEW

Published in January, April, June, and November by the
School of Law, University of Missouri, Columbia, Missouri.

Volume XIII JANUARY, 1948 Number 1

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Subscription Price $2.50 per volume 85 cents per current number

"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

ALIENABILITY OF RIGHTS OF ENTRY AND POSSIBILITIES OF REVERTER IN MISSOURI

The recent case of *Farmer's High School Consolidated Dist. No. 3, Johnson County, v. Parker*[1] raises a number of problems concerning rights of entry and possibilities of reverter.

1. 203 S. W. 2d 516 (Mo. 1947).

In 1881 one Neff conveyed an acre of land to School Dist. No. 66 "for the purpose of erecting a school building" and "require(d) as a condition" that the directors were "to enclose the same with a good and lawful fence, and keep the same in repair, and for a failure on the part of said directors to maintain" said fence "will forfeit the title to the above described acre of land and will fall back to the said Jacob S. Neff and to his heirs." No fence was maintained around the west side of the tract after 1906. Neff died in 1909. In 1916 Dist. No. 66 was absorbed by consolidation in Con. Dist. No. 3. Defendant took possession of the acre in 1945 under a Sheriff's deed in partition which was made in pursuance to a judgment in partition suit between certain parties who acquired the land "as heirs and devisees under the will of William J. Pollock." It was not shown how Pollock acquired title to the land. The deed purported to convey a 60 acre tract in which the acre was located "subject to the rights of the school district." Con. Dist. No. 3 brought this action in ejectment against Parker for possession of the acre of land.

The defendant contended that the breach of the condition subsequent forfeited the title of the school district, so that it had no title to assert against one in possession. The court stated that there was "no question but that the provision in the Neff deed . . . amounts to a condition subsequent"; but in order to terminate the estate of the school district there must be an entry by Neff or his heirs after the condition was breached; and since there was no evidence of such an entry the district had sufficient title to maintain the action. The decision is sound since there was no evidence of an entry by anyone who owned the interest which remained in Neff when he conveyed the land to the school district, which, as the court apparently held, was a right of entry for condition broken. Although Parker acquired title to the entire tract through Pollock, there was no showing that Pollock got his title through Neff or that the right of entry for condition broken was conveyed along with the adjoining land.

However there was dicta in the opinion which might be questioned. The court stated: "In reference to a condition subsequent . . . it is said that such a condition gives rise to an interest that is not an estate but merely a possibility of reverter which may or may not eventuate. The effect of the deed is to immediately vest the whole of the fee title in the grantee, subject to be defeated by a breach of the condition and re-entry by the grantor and his heirs. This interest is inalienable, unassignable, and cannot be devised, but is descendible." A number of questions are raised by the case and the dicta: (1) What are the interests created by the Neff deed? (2) Is the interest retained by Neff, the grantor, transferable? (3) As the condition was breached in 1906 and no entry was made until 1945, (assuming that Parker succeeded to the interest retained by Neff) was his interest destroyed or barred by the statute of limitations or laches?

1. A fee simple on special limitation, generally called a fee simple determinable,[2]

2. Sometimes referred to as a base or qualified fee. 1 TIFFANY, REAL PROPERTY, § 220 (3d ed. 1939); Hudson, *Conditions Subsequent in Conveyances in Missouri*, U. OF MO. BULL. L. SER. 5, page 3, 7 (1914).

is created by conveying land in fee and by the use of such words as "until", "during", and "so long as",[3] limiting its duration to the continuation of an existing situation or until the happening of an event.[4] The interest left in the grantor is a possibility of reverter.[5] A fee simple subject to a condition subsequent is created when land is conveyed in fee but the estate may be defeated by the happening of the condition and re-entry[6] by the grantor.[7] Typical words used to introduce the condition are "on condition", "provided that", and "but if".[8] Words of re-entry also indicate that a condition subsequent was intended, but if it is clear that the grantor intended a condition subsequent words of re-entry are not necessary and yet a right of entry for condition broken[9] remains in the grantor as incident to the estate conveyed.[10]

The estates are distinguishable in that an instrument granting a fee simple determinable does not purport to convey the entire fee, but the estate conveyed is limited to some indefinite time which is potentially infinite;[11] whereas an instrument granting a fee simple subject to a condition subsequent purports to convey the entire fee and attaches to it a condition. The estates are alike in that both leave an interest in the grantor which may on the occurrence of an event become possessory; but they should be sharply distinguished, for a fee simple determinable automatically terminates upon the happening of the event because its end provided for in its creation has been reached,[12] while a fee simple subject to a condition subsequent is defeated only by the occurrence of the condition and an entry by the grantor.[13]

Where words of condition and words of reverter or forfeiture are used an

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3. 1 SIMES, LAW OF FUTURE INTERESTS, § 181 (1936).

4. 1 SIMES LAW OF FUTURE INTERESTS, § 17, 177 *et. seq.* (1936); RESTATEMENT, PROPERTY, § 45 (1936); see Chouteau v.. City of St. Louis, 331 Mo. 781, 55 S. W. 2d 299 (1932).

5. I SIMES, LAW OF FUTURE INTERESTS, § 177 (1936).

6. At common law it was necessary to make an actual entry but today any act which shows an election to declare a forfeiture is sufficient. That an action in ejectment is adequate see Ellis v. Kyger, 90 Mo. 600, 3 S. W. 23 (1886). Notice of forfeiture served on the premises with a request for possession, although possession is not given, is an entry. St. Joseph Lead Co. v. Fuhrmeister, 353 Mo. 232, 182 S. W. 2d 273 (1944).

7. 1 SIMES, LAW OF FUTURE INTERESTS, § 159 *et. seq.* (1936); RESTATEMENT, PROPERTY, § 45 (1936); 1 TIFFANY, REAL PROPERTY, § 188 (1939); Missouri Historical Society v. Academy of Science, 94 Mo. 459, 8 S. W. 346 (1887).

8. 1 SIMES, LAW OF FUTURE INTERESTS, § 163 (1936).

9. 1 SIMES, LAW OF FUTURE INTERESTS, § 159 (1936).

10. Ruddick v. St. Louis, Koekuk & N. W. Ry. Co., 116 Mo. 25, 22 S. W. 499 (1893); Brooks v. Gaffin, 192 Mo. 228, 251, 95 S. W. 418 (1905).

11. 1 TIFFANY, REAL PROPERTY, § 220 (1939); see Chouteau v. City of St. Louis, 331 Mo. 781, 55 S. W. 2d 299 (1932).

12.. White v. Kentling, 345 Mo. 526, 134 S. W. 2d 39 (1939); Hudson, *supra* note 2 at p. 8.

13. O'Brien v. Wagner, 94 Mo. 93, 7 S. W. 19 (1887); Ruddick v. St. Louis, Koekuk & N. W., Ry. Co., 116 Mo. 25, 22. S. W. 499 (1893); Adams v. Lindell, 5 Mo. App. 197 (1878), *aff'd* 72 Mo. 198; 1 TIFFANY, REAL PROPERTY, Sec. 117 (1939).

estate subject to a condition subsequent is granted.[14] As the court held, there seems to be "no question but that the provision in the Neff deed . . . amounts to a condition subsequent" for the deed clearly states that the provision is required "as a condition". Although the deed further provides that the title will be forfeited and will "fall back", the Missouri Supreme Court has frequently held that such words in a deed along with words of condition do not automatically void the title upon the occurrence of the event, but will be read as voidable at the election of the grantor.[15] The court further indicated that the estate conveyed was one subject to a condition subsequent by saying: "The effect of the deed is to immediately vest the whole of the fee title in the grantee, subject to be defeatd by a branch of the condition and re-entry by the grantor and his heirs." The court called the intrest left in Neff a possibility of reverter rather than a right of entry for condition broken, but many courts although distinguishing the two interests refer to both as possibilities of reverter.[16]

2. At common law both the right of entry for condition broken and the possibility of reverter were not estates but were mere possibilities of estates and were inalienable.[17] However, Mo. REV. STAT. 1939, § 3401, providing that "Conveyances of land, or of any estate or interest therein, may be made by deed . . ." would seem to make them transferable, depending, as indicated by Ellison, J., in *University City v. Chicago, R. I. Ry.*[18] on what is meant by an "interest" in land. It comes apparent that both a right of entry for condition broken and a possibility of reverter are interests in land, and it has been so held in other states with similar statutes.[19] In Grimes v. Rush,[20] in which the Missouri Supreme Court held that contingent remainders are alienable under this statute, Bohling, C., speaking for the court, stated: "Contingent remainders of this class were considered merely a possibility of an estate at common law and, for that reason, not alienable inter-

14. Adams v. Lindell, 5 Mo. App. 197 (1878), *aff'd* 72 Mo. 198 (1880); Ellis v. Kyger, 90 Mo. 600 3 S. W. 23 (1886); Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217 (1918).

15. Note 14, *supra.*

16. In 1 SIMES, LAW OF FUTURE INTERESTS, Sec. 159 (1936), with reference to the right of entry for condition broken it is stated: "This interest is also frequently called a 'possibility of reverter' even by courts which discriminate carefully between a true possibility of reverter and a right of entry for breach of condition. Such a usage is believed to be misleading and is not followed here."

17. 3 SIMES, LAW OF FUTURE INTERESTS, Sec. 716 (1936). The possibility of reverter automatically becomes possessory upon the happening of the event and can be transferred before possession is gained. After re-entry, following the breach of a condition subsequent, the land may be transferred even before possession is gained. St. Joseph Land Co. v. Fuhrmeister, 353 Mo. 232, 182 S. W. 2d 273 (1944). Where the grantor retained a reversion along with a right of entry for condition broken or a possibility of reverter, they were alienable as incident to the reversion.

18. 347 Mo. 814, 149 S. W. 2d 321 (1941).

19. Hamilton v. City of Jackson, 157 Miss. 284, 127 So. 302 (1930), ("any interest in or claim to land . . ."); Fulton v. Teager, 183 Ky. 381, 209 S. W. 535 (1919), ("any interest in, or claim to real estate . . .").

20. 197 S. W. 2d 310 (1946).

vivos to strangers. . . . The reasons for restraints on alienation under the feudal system no longer exist." This reasoning would seem likewise to apply to rights of entry for condition broken and possibilities of reverter.

It is stated by way of dictum in *Catron v. Scarrett Institute*,[21] with reference to the common law rule that rights of entry for condition broken were inalienable, that "That rule seems to be modified by our statute permitting the assignment of any interest whatever in real estate." In *Brown v. Weare*,[22] Douglas, J., although expressing no opinion on the matter, stated: ". . . we observe in passing that by authority of the Restatement of Property, Section 159,[23] a possibility of reverter is said to be transferable and by Section 3401, R. S. 1939, Mo. Stat. Ann. § 3014, p. 1862, the conveyance of 'any estate or interest' in lands is provided for." The court in the principal case cites *Davis v. Austin*[24] as authority for the rule that rights of entry for condition broken are inalienable, which, however, says that *"Under the common law,*[25] this interest is not an estate, but is inalienable, unassignable, and cannot be devised, but is descendible." The Davis case cites *University City v. Chicago, R. I. & Ry., supra,* in which Ellison, J., gives the same rule and adds that it is contended that the rule has been changed by the statute; that there have been decisions both ways in other jurisdictions; and that it is stated that one must look to the common law to determine what is an interest in land; but that it is unnecessary to determine the question to decide the case. The dicta in the principal case accurately states the common law rule, but unlike that in the previous cases does not recognize that it is only the common law rule and that it may have been changed by the statute.

The reason for the common law rule is unknown,[26] but it was probably an outgrowth of the feudal system which greatly restricted the alienability of land. The trend of the law has been toward making all interests in land freely alienable, and there is no reason today for the rule prohibiting the transfer of these interests.[27] It is very desirable that all interests in land be freely alienable and the Missouri statute seems broad enough to include rights of entry for condition broken and possibilities of reverter.[28]

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21. 264 Mo. 713, 724, 175 S. W. 571 (1914).
22. 348 Mo. 135, 140, 152 S. W. 2d 649 (1941).
23. Sec. 159, "(1) The owner of any reversionary interest in land has the power, by an otherwise effective conveyance inter vivos, to transfer his interest or any part thereof . . . Comment; a . . . It includes all reversions and possibilities of reverter . . ." Sec. 160, Comment d provides that rights of entry for condition broken are made transferable by statutes providing for the assignment of "any interest in or claim to real estate."
24. 348 Mo. 1094, 156 S. W. 2d 903, 905 (1941).
25. Italics mine.
26. I TIFFANY, REAL PROPERTY, Sec. 209 (3d ed. 1939).
27. 3 SIMES, LAW OF FUTURE INTERESTS, Sec. 715 716 (1936).
28. The question may become an important one if a compulsory school consolidation law, for which there is now much agitation, is passed by the state, in view of the fact that many of the plots that rural schools are built on were given to the district subject to a condition subsequent or as a fee simple determinable.

3. If the estate of the school district was a fee simple determinable it would automatically terminate when the directors failed to maintain the fence, and the entire fee would revert to the holder of the possibility of reverter. The possession of the school district would become adverse and it would acquire title by adverse possession at the end of the period of limitation of ten years.

Where the estate, as in the principal case, is a fee simple subject to a condition subsequent, a more difficult problem is presented and the law is not well settled. After the condition is broken the holder of the right of entry for condition broken may do one of three things: (1) He may enter and terminate the estate or elect to declare a forfeiture by some action equivalent in law to an entry. Possession of the district following the election would be adverse and an action to regain possession would be barred at the end of the statutory period. (2) He may waive the breach of the condition by some appropriate action. (3) He may neither express an intention to forfeit the estate nor to waive the breach. The grantee is still rightfully in possession even after the breach and is the holder of the title until the grantor elects to forfeit. It would seem that so far as adverse possession and the statute of limitations are concerned, the grantor would not lose his right of entry by delay.[29] This is true even where the election may be made by bringing an action in ejectment because the action serves both the purpose of gaining possession and the common law entry, and the grantee's title is not forfeited until the action is begun. However some of the cases indicate that the statute of limitations may apply to the right of entry itself; and, although the courts generally speak in terms of waiver, the right of entry may be barred by a rule similar to laches. Because the law does not favor a forfeiture the slightest act by the grantor will have the effect of a waiver.[30]

It was held in *Tower v. Compton Hill Imp. Co.*[31] that an action in ejectment to recover possession of land following the breach of a condition subsequent was barred by the statute of limitations with the time beginning to run with the breach of the condition, although the point apparently was not pressed by the plaintiff. The court stated: "The defendant company violated the terms of the deed in July, 1890. The plaintiffs' cause of action accrued at that time. This action was not instituted until January 18, 1901. . . . The action is therefore barred by the statute of limitations." The court overlooked the fact that theoretically the cause of action does not accrue until an election is made, and the bringing of the action of ejectment also serves as that election. In theory it would seem that even if the holder of the right of entry has only the statutory period of ten years after the breach of the condition to elect to forfeit the estate, that not until the election is he entitled to possession, so that he would have another ten years from the time of the election to bring an action in ejectment. From the breach of the condition, if he elected near the end of the ten year period, he would have a total of almost twenty years to bring an action in ejectment for possession of the land. However no such

29. 1 SIMES, LAW OF FUTURE INTERESTS, Sec. 170 (1936).
30. Garnhart v. Finney, 40 Mo. 449 (1867).
31. 192 Mo. 379, 91 S. W. 104 (1905).

election was made in this case and if there had been the opinion of the court might have been different.

In *Hoke v. Central T. P. Farmers' Club*[32] the court seems to hold that (1) the statute of limitations applies to the right of entry,[33] (2) that the right of entry may be waived by the mere failure to declare an election within a reasonable time, and (3) where the property was conveyed unconditionally by the grantee to a third person who claimed exclusive ownership, title was obtained by adverse possession. That the land was conveyed to a third person should make no difference because he too is rightfully in possession and has title until the entry. It would seem that the grantee could not hold adversely to the right of entry, which is merely a power of termination.[34] In *Pierce v. Lee*[35] the testator devised property to his wife subject to the condition subsequent that she pay each of two sons one-third the value of the land upon their reaching the age of twenty-one. The plaintiff, who was the elder son, became twenty-one 14 years before the suit. He subsequently accepted one-third of the rents from the land, did not object to a lease made by his mother and brother to the defendant, and accepted rents under the lease. The court held in an action in ejectment against the lessee, declaring a forfeiture for breach of the condition, that the plaintiff had waived his right of entry for condition broken. It was held in *Brendell v. Kerr*,[36] where the heirs of the grantor, knowing of the breach, did not declare a forfeiture for over a year, during which time vast sums of money was expended on the property, that they had waived their right to a forfeiture. Since no action was taken by the heirs they did not waive the breach of the condition, but rather the action was barred by an estoppel.[37] In *Robinson v. Cannon*[38] it was held, where conditions subsequent as restrictions on the sale of liquor were breached for many years, that inaction and silence by the grantors

32. 194 Mo. 576, 91 S. W. 394 (1906).

33. "So that, whether entry for condition broken be made under the statute, or as at common law, it must be done by some positive, unequivocal act, as by bringing suit or by doing something equivalent manifesting an intention to assert a right in the land, within ten years after condition broken. This suit was instituted April 18, 1902, or more than ten years after the date of the sale of the land to James Miller. If, then, the discipline of the church gave the trustees the right to sell the property to Miller, and there was no entry upon the land, such as is contemplated by law, by the plaintiffs or by those under whom they claim, within ten years after the date of such sale, when the condition was broken, it is plain that they cannot recover." Hoke v. Central Twp. Farmer's Club, *supra*.

34. RESTATEMENT, PROPERTY, Sec. 24, Comment b. (1936).

35. 197 Mo. 480, 95 S. W. 426 (1906).

36. 242 Mo. 317, 147 S. W. 105 (1912). "While mere lapse of time alone, within the period of limitation, will not bar his right of entry to enforce a forfeiture, yet, if the grantor delays an unreasonable length of time before asserting his right, and knows that the grantee, on faith of his title, is making valuable improvements on the property, so that there exists in the case the elements of an estoppel, he will be held to have waived his right to a forfeiture." Does the court by using the phrase "within the period of limitations" mean that the statute of limitations would be applied?

37. Hudson, *supra* note 2 at p. 25.

38. 346 Mo. 1126, 145 S. W. 2d 146 (1940).

waived the conditions and a forfeiture could not be declared for a breach at a later date. Failure to elect to forfeit, where the breaches extended over many years, had the effect of destroying the condition.

It should be noted that in all these cases the action was brought by the heirs of the grantor, and that the court emphasized in each case that the law did not favor a forfeiture. The cases show that where it is inequitable to declare a forfeiture, mere inaction by the holder of the right of entry for condition broken will, in some cases, destroy the right. Although the court has generally spoken in terms of waiver, two of the earlier cases indicate that the statute of limitations would be applied. Even if Parker had succeeded to the right of entry for condition broken, so far as was shown no entry or election was made for 39 years after the breach of the condition. The court might have decided the case on the alternative ground that the lapse of time had barred the action, but it is not clear from the decided cases that such a decision would have been made.

MURRY LEE RANDALL

THE THIRTY-ONE YEAR STATUTE OF LIMITATIONS

MO. REV. STAT. (1939) § 1008 provides as follows: "Whenever any real estate, the equitable title to which shall have emanated from the government more than ten years, shall thereafter, on any date, be in the lawful possession of any person, and which shall or might be claimed by another, and which shall not at such date have been in possession of the said person claiming or who might claim the same, or of anyone under whom he claims or might claim, for thirty consecutive years, and on which neither the said person claiming or who might claim the same nor those under whom he claims or might claim has paid any taxes for all that period of time, the said person claiming or who might claim such real estate, shall, within one year from said date, bring his action to recover the same, and in default thereof he shall be forever barred, and his right and title shall, *ipso facto,* vest in such possessor: *Provided, however,* that in all cases such action may be brought at any time within one year from the date at which this section takes effect and goes into force."

For the so-called thirty-one year statute to be applicable, the following things must appear:[1] (1) that the person sought to be barred or those under whom he claims has paid no taxes for thirty consecutive years; (2) that the person sought to be barred or those under whom he claims has not been in possession for thirty consecutive years; (3) that the equitable title emanated from the government more than ten years ago; (4) that the person sought to be barred has failed to bring an

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1. Collins v. Pease, 146 Mo. 135, 47 S. W. 925 (1898); Fairbanks v. Long, 91 Mo. 628, 4 S. W. 499 (1887). In Collins v. Pease, *supra,* the court points out that the statute as originally enacted, Mo. Laws 1874, p. 118, applied only to the thirty year period immediately preceding the effective date of the statute. After the court in Fairbanks v. Long, *supra,* brought this fact to the attention of the legislature, the statute was amended to its present form so as to apply to any thirty year period.

action to recover the land within one year following the above-mentioned thirty-year period; (5) that the person relying on the statute has been in lawful possession for at least one year. It is unnecessary to plead this statute as the facts showing its applicability may be given in evidence under the general issue.[2]

Nonpayment of taxes for thirty years may be shown by circumstantial evidence,[3] but the burden of proof is upon the person relying on the statute.[4] It appears that there must be an actual payment of taxes to defeat the running of the statute since an unaccepted offer to pay the taxes has been held insufficient,[5] and a payment made at a sale of the land to satisfy a judgment for taxes has been held not within the statute as a payment of taxes.[6] The fact that no taxes were assessed furnishes no excuse.[7]

The possession necessary to defeat the statute is actual possession,[8] although where the person relying on the statute fails to produce affirmative evidence showing nonpossession by the opposing party, the presumption that possession is in the record title holder applies.[9] The possession required on the part of the party relying on the statute is "lawful possession," the term used in the statute. This was defined by the court in *Collins v. Pease*[10] as meaning one who "has not entered as a mere

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2. *Ibid.*

3. Bevier v. Graves, 213 S. W. 74 (Mo. 1919) (evidence of non-payment of taxes held insufficient where taxes were assessed to record owner and were paid with records not showing by whom); Davis v. Dawson, 273 Mo. 499, 201 S. W. 524 (1918) (evidence held sufficient where claimants under the statute paid the taxes for all but ten years of the period in question. Record owners testified that they had never paid any taxes and evidence indicated that their predecessor-in-title did not know of her interest in the land and so could not have paid any taxes); Hunter v. Moore, 202 S. W. 544 (Mo. 1918) (evidence held insufficient where records showed payment but not by whom for four particular years. This was in spite of testimony by an heir of the record owner that to her knowledge the taxes were not paid).

4. Laclede Land Co. v. Epright, 265 Mo. 210, 177 S. W. 386 (1915); Rollins v. McIntyre, 87 Mo. 396 (1885).

5. Byrd v. Hall, 227 Fed. 537 (C.C.A. 8th 1915).

6. Dunnington v. Hudson, 217 Mo. 93, 116 S. W. 1083, 1084 (1909). In this case, the payment at the sale did not cover even the court costs, much less the back taxes, but the court stated that "Aside from that . . . we do not think that even the full payment of all costs and the judgment for taxes by a purchaser at a tax sale . . . is a payment of taxes within the meaning of the statute. This statute contemplates the voluntary payment of taxes by some person upon whom the moral and legal duty rests. It does not contemplate the payment by a stranger to the title . . . as is a mere purchaser at such a sale."

7. Abeles v. Pillman, 261 Mo. 359, 168 S. W. 1180 (1914).

8. Crain v. Peterman, 200 Mo. 295, 98 S. W. 600 (1906), where cutting of grass by a supposed lessee was held to be of small force to show actual possession on the part of the record title holder. But in Hancock v. York, 210 S. W. 63 (Mo. 1919), it was held that the possession of one co-tenant is equally the constructive possession of the other co-tenants so as to defeat the running of the statute against them.

9. Huston v. Graves, 213 S. W. 77 (Mo. 1919), where the presumption of possession in the record title holder was not rebutted by a showing that the land was wild and uncultivated.

10. 146 Mo. 135, 47 S. W. 925 (1898).

intruder or trespasser, but in good faith, claiming to be the owner."[11] It was early held that possession under color of title satisfies the requirement of "lawful possession."[12] Then the question arose as to whether color of title is required. In *Abeles v. Pillman*,[13] the court, while admitting that color of title had been found in perhaps all the cases to that date, held that color of title was not required saying, "color of title at most could be nothing more than the *evidential basis* of good faith . . . or the territorial extent of the possession. . . . The rule announced in the case of *Collins v. Pease, supra,* only states the ultimate facts which must be proven, *e.g.*, possession in good faith under claim of ownership, and does not in any manner limit the proof by which those ultimate facts may be shown."[14] The lawful possession must be actual, however, and such acts as payment of taxes and the cutting of timber alone are not sufficient.[15] The familiar rule that actual possession of a part of a tract under color of title as to the whole constitutes possession of the whole applies under the thirty-one year statute.[16] Where no one has been in actual possession the statute of course does not apply.[17] The outstanding advantage of this statute is that it requires a minimum of only one year's adverse possession by the claimant under the statute.

Although the thirty-one year statute speaks only of equitable titles which have emanated from the government, it was early held that it applied to both legal and equitable titles.[18] In *Charles v. Morrow*,[19] the statement was made that where it is a "contest between two purely legal titles . . (the statute) does not apply."[20] This, however, was expressly overruled in *Laclede Land Co. v. Epright*,[21] the court saying, "When a patent is legally issued it carries the equitable title, and the further fact that such patent also conveys the legal title, thus merging the two titles, does not prevent the thirty-year statute from becoming applicable."[22]

The most difficult question that has arisen under the thirty-one year statute revolves around a determination of what persons are barred by satisfaction of all the requirements of the statute. The statute is couched in broad terms and no exception is made for persons under disability; consequently one of the first cases directly touching the statute held that the disability of minority was no bar to the

11. *Id.* at 139, 47 S. W. at 926.
12. Mansfield v. Pollock, 74 Mo. 185 (1881).
13. 261 Mo. 359, 168 S. W. 1180 (1914).
14. *Id.* at 375, 168 S. W. at 1185.
15. Brannock v. McHenry, 252 Mo. 1, 158 S. W. 385 (1913). Other cases holding possession insufficient are Bevier v. Graves, 213 S. W. 74 (Mo. 1919); Chilton v. Comanianni, 221 Mo. 685, 120 S. W. 1174 (1909); Weir v. Lumber Co., 186 Mo. 338, 85 S. W. 341 (1905); Nye v. Alfter, 127 Mo. 529, 30 S. W. 186 (1895).
16. Pharis v. Bayless, 122 Mo. 116, 26 S. W. 1030 (1894).
17. Kline v. Groeschner, 280 Mo. 599, 219 S. W. 648 (1920); Haarstick v. Gabriel, 200 Mo. 237, 98 S. W. 760 (1906).
18. Collins v. Pease, Fairbanks v. Long, both *supra* note 1.
19. 99 Mo. 638, 12 S. W. 903 (1890).
20. *Id.* at 646, 12 S. W. at 905.
21. 265 Mo. 210, 177 S. W. 386 (1915).
22. *Id.* at 216, 177 S. W. at 388.

running of the statute.[23] It seems clear today that the current disabilities, minority, insanity, and imprisonment,[24] do not prevent the running of the statute.[25]

There are many cases involving the effect of coverture on the running of the statute.[26] Coverture, insofar as the wife was concerned, was formerly a disability but received treatment entirely different from other disabilities. This resulted from the fact that coverture as a disability was unique in that it deprived the wife of the right to possession of her own separate realty. As a result, the cases show some confusion in at least one situation and possibly another. Certain propositions appear to be settled, however. Where the marriage took place prior to 1889 (in which year married women were given the right to possession of their separate realty thereafter acquired[27]), and the land was owned by the wife prior to that date, the wife or the person claiming under her was barred even though she could not sue for possession, if the adverse possession began before the marriage or before the land was obtained by the wife.[28] Where the adverse possession began subsequent to the marriage and the consequent loss by the wife of her right to possession, the statute did not run against the wife.[29] Where the adverse possession began subsequent to the marriage, and the wife preceded the husband in death, the wife's heirs had ten years from the death of the husband to recover the land.[30] Where the husband precedes the wife in death, the wife and her heirs should have ten years from the date of the husband's death to recover the land, but the cases are not clear.[31] A case to which these principles apply could arise today, *viz.*, *W* married *H* in 1888 both being 18 years of age; *W* owned the property before the marriage and died intestate in 1890, one child surviving; adverse possession began in 1897. Under the above principles, if *H* is still living (at the age of 77), or has died within the past ten years, *W's* heir, the surviving child, is not yet barred by the statute even though the adverse claimant has been in possession and paid all taxes for fifty years. These principles are not affected by the Married Women's Act of 1889[32] where the property

23. Fairbanks v. Long, 91 Mo. 628, 4 S. W. 499 (1887).
24. Mo. Rev. Stat. § 1004 (1939).
25. No cases involving the disability of imprisonment have been found. As to insanity, DeHatre v. Edmonds, 200 Mo. 246, 98 S. W. 744 (1906), held it to be no bar to the thirty-one year statute.
26. See on this generally, Silvers, Missouri Titles § 125 (2d ed. 1923).
27. Mo. Rev. Stat. § 6869 (1889).
28. Laster v. Cunningham Land Co., 213 S. W. 89 (Mo. 1919); DeHatre v. Edmunds, 200 Mo. 246, 98 S. W. 744 (1906); Collins v. Pease, 146 Mo. 135, 47 S. W. 925 (1898); *cf.* Graham v. Ketchum, 192 Mo. 15, 90 S. W. 350 (1905).
29. Lewis v. Barnes, 272 Mo. 377, 199 S. W. 212 (1917); Vanata v. Johnson, 170 Mo. 269, 70 S. W. 687 (1902).
30. Mathis v. Melton, 293 Mo. 134, 238 S. W. 806 (1922); Wells v. Egger, 303 Mo. 26, 259 S. W. 437 (1924); Jones v. Himmelberger-Harrison Lumber Co., 223 S. W. 63 (Mo. 1920).
31. Compare Hubbard v. Keen, 297 Mo. 29, 247 S. W. 1000 (1923), with Powell v. Bowen, 279 Mo. 380, 214 S. W. 142 (1919) and cases cited therein.
32. See note 25, *supra.*

was owned and the marriage occurred before 1889.[33] Neither are these principles affected by the character of the husband's interest, whether it be *jure uxoris*,[34] curtesy initiate,[35] or curtesy consummate.[36]

On the same general principle, it is held that the statute will not run against remaindermen and reversioners who have no right to possession. Hypotheticals illustrate the possibilities here. (1) *A* conveys, in 1940, to *B* for life, remainder to *C* and his heirs. Adverse possession began in 1939. The statute will run against both *B* and *C* as the adverse possession began before the conveyance.[37] (2) *A* conveys, in 1940, to *B* for life, remainder to *C* and his heirs. Adverse possession begins in 1941. The statute does not start to run against *C* until *B's* death.[38] In the two hypotheticals, if the conveyance was only to *B* for life, leaving a reversion in *A*, the results would be the same respectively.[39] If, in the second hypothetical, *B* dies in 1942, *C* has ten years to bring suit.[40] These principles, as applied to married women, remaindermen, and reversioners, were not affected by the fact that in 1897[41] they were given the right to sue to determine interest.[42] This would seem to make clear the proposition that the thirty-one year statute will not run against those who have no right to possession unless the statute was already running at the time of the division of the estates.

Dower presents a similar situation. Where the wife claims dower in land conveyed prior to 1900 by the husband without the wife joining, there is, of course, no problem since the dower interest is either barred or will show in the abstract of title some time between 1917 and 1919.[43] As to the wife's dower interest in her husband's lands, which lands were conveyed subsequent to 1900, since there is no cause of action until the husband's death, the thirty-one year statute should not begin to run until that time.[44] It would seem that there is no occasion, however, to use the thirty-one year statute in this connection since, by virtue of Mo. Rev. Stat. (1939) § 363, an action for the recovery of dower by the wife must be commenced within ten years after the death of the husband. This has been held to be so regardless of adverse possession[45] and of disability.[46]

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33. Vanata v. Johnson, 170 Mo. 269, 70 S. W. 687 (1902); Mathis v. Melton, 293 Mo. 134, 238 S. W. 806 (1922).
34. Vanata v. Johnson, 170 Mo. 269, 70 S. W. 697 (1902).
35. Wells v. Egger, 303 Mo. 26, 259 S. W. 437 (1924).
36. Mathis v. Melton, 293 Mo. 134, 238 S. W. 806 (1922).
37. *See* Nichols v. Hobbs, 197 S. W. 258, 260 (Mo. 1917).
38. Nichols v. Hobbs, 197 S. W. 258 (Mo. 1917).
39. Coulson v. LaPlant, 196 S. W. 1147 (Mo. 1917).
40. Hall v. French, 165 Mo. 430, 65 S. W. 769 (1901).
41. Mo. Laws 1897, p. 74.
42. Armor v. Frey, 253 Mo. 474, 161 S. W. 829 (1913); Powell v. Bowen, 279 Mo. 280, 214 S. W. 142 (1919); Wells v. Egger, 303 Mo. 26, 259 S. W. 437 (1924).
43. See Mo. Rev. Stat. § 1009 (1939).
44. McCrillis v. Thomas, 110 Mo. App. 699, 85 S. W. 673 (1905). In this case the land was conveyed prior to 1900 but the case arose prior to the passage of Mo. Rev. Stat. § 1009 (1939) in 1917).
45. Belfast Inv. Co. v. Curry, 264 Mo. 483, 175 S. W. 201 (1915).
46. *Ibid.*

The thirty-one year statute furnishes a basis for a suit to quiet title under Mo. REV. STAT. (1939) § 1684[47] or Mo. REV. STAT. (1939) § 1687.[48] If there has been a sufficient period of adverse possession, however, a suit to quiet title based on Mo. Rev. Stat. (1939) § 1002 (the ten year statute) or on Mo. Rev. Stat. (1939) §§ 1004, 1007 (the twenty-four year statute plus the statute giving heirs an additional three years), which bar persons under disability, is equally as effective. Moreover, the complicating factors of proof of non-possession and non-payment of taxes would not be encountered in a suit under these statutes. The value of affidavits under the thirty-one year statute to clear very old breaks in the chain of title and thus establish marketable title is purely speculative. Whether an attorney would pass an abstract using such affidavits would not depend on any magic found in the thirty-one year statute, but largely on the age of the break in title and the number of years the present possessor and his predecessors have been in possession.[49] In such case, Mo. REV. STAT. (1939) §§ 1002, 1004, 1007 are just as reliable a basis for affidavits as the thirty-one year statute since those statutes will bar any persons barred by the thirty-one year statute. An affidavit under those statutes should also be easier to secure than an affidavit under the thirty-one year statute due to reluctance of any disinterested person to swear, in particular, as to who paid the taxes on the land for the past thirty years. In any case, one could not be certain until a court of competent jurisdiction declared the title to be marketable. The conclusion then, is that the thirty-one year statute is helpful only where the period of adverse possession has been less than ten years, or less than the number of years required to bar persons under disability, if one can satisfy the requirements of the statute.[50]

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47. 2 CARR, MISSOURI CIVIL PROCEDURE § 1761 (1st ed. 1947); 4 HOUTS, MISSOURI PLEADING AND PRACTICE § § 1061-1068 (1st ed. 1937).

48. 2 CARR, MISSOURI CIVIL PROCEDURE § 1764 (1st ed. 1947); 4 HOUTS, MISSOURI PLEADING AND PRACTICE § 1069 (1st ed. 1937).

49. See generally, Final Report of Title Examination Standards Committee, October 2, 1947, 11 Mo. BAR J. 225 (1947). None of the seventeen recommendations made by the committee deals with the use of affidavits of adverse possession to cure old breaks in the chain title.

50. On the thirty-one year statute in general, the following sources are helpful: SILVERS, MISSOURI TITLES § § 122, 123, 125 (2d ed. 1923); GILL, MISSOURI TITLES § § 1383, 1473 (3d ed. 1931).