Curing Title Defects in Unregistered Land – Adverse Possession and other Remedies

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The doctrine of adverse possession has generated a lot of controversy over the last 10 years or so. My paper today focuses on only one small aspect of the important questions that have been raised about the doctrine and its role in modern day land law. Some of you might view it as a very technical point but at a more general level it does suggest that certain basic assumptions that have always been made to justify the doctrine should be examined. I have to begin by briefly outlining the reforms were introduced to the English law on adverse possession by the Land Registration Act 2002. These may be very familiar to some of you but not others. The 2002 Act reformed the doctrine as it applies to registered land. It dramatically improves the position of the registered owner. It allows the owner to veto an adverse possession application unless the applicant falls within one of three exceptional situations. These exceptions or qualifications to the veto were designed by the Law Commission to cater for situations where it felt the balance of fairness lay with the adverse possessor; these were ‘deserving’ squatters. Basically, the owner is now warned of the adverse possession application before his title is extinguished. He can object to the application unless the applicant is also entitled to be registered because of the doctrine of proprietary estoppel or because they possess an entitlement on the basis of an informal transaction or transmission. The third exception operates if the applicant owns adjacent land and can prove that throughout the limitation period he believed he owned the boundary plot. The Law Commission felt that the reforms would ensure that the doctrine continues to restore the marketability of abandoned land. Provided the registered owner keeps his contact details up to date on the register, it can probably be assumed that if he fails to object to the application, he has abandoned the land. In all other circumstances, the Law Commission felt that this new qualified veto system of adverse possession would operate in a manner that is fairer to the owner and prevent the immoral appropriation of land.

The feature which my paper focuses on is the Law Commission’s refusal to extend this additional protection of the veto to the owners of unregistered land, that is land which has not been registered in the Land Registry. One of the main reasons which the Commission gave for limiting the reforms in this way was that the doctrine plays a vital role in the investigation of title to unregistered land. The Commission pointed out that gaps in a paper title are not infrequently cured by showing possession of the land for the limitation period. It concluded that making the requirements for adverse possession of unregistered land too demanding could weaken the security of title to that land. The Law Commission acknowledged that the existing law can produce harsh results but maintained that they are counterbalanced, in the context of unregistered land, by the essential role played by the doctrine in facilitating

1 Please note that this conference paper is a work in progress.
2 Ibid, para 10.9; Law Com no 271, para 14.2.
3 Law Com no. 271, para 14.2.
conveyancing. While the Commission’s approach clearly encourages the owners of unregistered land to voluntarily apply for first registration of their titles in the land registry, it also quite severe on the owners of unregistered land who fail to register and are therefore deprived of the strong protections afforded by the 2002 Act. This paper examines the role played by adverse possession and other remedies in unregistered conveyancing and discusses whether the introduction of a veto system of adverse possession in Ireland could be extended to unregistered land in a manner which would not raise concerns about the functionality of the conveyancing system.

The extension of the veto system to unregistered land would ensure consistency in the level of protection afforded to the registered and the unregistered owner against the risk of squatting. A system of land law which makes it more hazardous to leave land vacant if the title is unregistered probably makes little sense to the average landowner who would have paid the same price for the land regardless of whether it was registered or not. In addition to affording more protection to the unregistered owner, the legislation implementing such reforms to the doctrine could be designed to compliment and facilitate the extension of registered title.

The role of adverse possession within the unregistered conveyancing system

To cut to the chase, I think that the role played by the doctrine in unregistered conveyancing may have been exaggerated and it doesn’t provide a firm basis for denying owners of unregistered land this increased protection against squatters.

The fundamental danger underlying all conveyancing transactions in relation to unregistered land is that the deed from the vendor may not operate to confer good title on the purchaser. I’m not talking about priority disputes here or the danger that the vendor may have already dealt with some other party who has acquired rights which would trump the purchasers. In any event, the solicitor acting for the purchaser can deal with this risk by conducting searches in the registry of deeds and raising the standard requisitions on title. I want to focus on the implications for the purchaser where the deed which the vendor executes in his favour or some other deed forming part of the chain of title is in some way defective.

It may be helpful to first outline the types of defects which could arise. There could be a technical defect in the deed. For example, until recently, a failure to include the correct words of limitation eg ‘in fee simple’ meant that only a life estate was conferred on the grantee. This is one defect we no longer have to worry about as s 67 (1) of the Land and Conveyancing Law Reform Act 2009 which operates retrospectively in most situations provides that a fee simple will be conferred in such circumstances. Another technical defect which has been cured by the 2009 Act was a failure to enrol a disentailing assurance (remember this was a deed where the owner of a fee tail conferred a fee simple on a purchaser). s13(3) of the 2009 Act has automatically most of such base fees into fee simples. Many defects unfortunately are not cured by the 2009 Act. The defect in question could simply be a matter of failing to comply with the statutory formalities for the execution of deeds eg if the company failed to seal the deed in accordance with its articles of association or if the signatures of the parties were not witnessed. In relation to a failure to comply with formalities it may be possible to argue that the vendor is estopped from denying that the deed was validly executed. However, defects can also be more substantive and ignore the rights
of third parties - here the list is endless but I’ll just mention two possibilities. Perhaps a deed purported to act as a conveyance of a fee simple when in actual fact the vendor was only entitled to a leasehold interest. Another common problem is where a discrepancy arises between the boundaries as delineated on the maps attached to various deeds or between the map and the boundaries as they appear on the ground.

Obviously, if the defect is discovered before the sale is completed, the contract can be rescinded and the purchaser may even be entitled to claim damages. However, if the sale has been completed, the remedies available under the contract for sale are no longer available. This is because of the doctrine of merger which provides that the contract is deemed to have merged in the conveyance. If the deed executed by the vendor was defective, the purchaser may be able to rely on certain covenants for that are implied in a conveyance to protect the purchaser against the operation of the doctrine of merger. For example, it is implied that the vendor has full power to convey the property and that the grantee will receive the property freed from incumbrances. The purchaser may be able to sue the vendor for damages if he is in breach of any of these covenants. Another implied covenant provides that the vendor will do anything reasonable requested in order to further assure the property to the purchaser. Therefore, the purchaser may be entitled to insist on the vendor providing a fresh effective deed of conveyance or rectification. It is important to remember though that a conveyance cannot operate to convey title which the vendor does not possess; if the defect arose in an earlier deed, title wouldn’t have passed to the vendor and so he can’t resolve the problem. In certain circumstances the benefit of these implied covenants may have passed down through the chain of title and be enforceable by the purchaser against the original covenantor. Admittedly, it may not be practical to seek a remedy against a predecessor in title. If the mistake in the vendor’s deed meant that the purchaser did not acquire the title he had bargained for, he could alternatively pursue the equitable remedy of rectification of the deed or possibly rescission.

It is important to remember that one weak link in the chain of title can have serious repercussions on the marketability of the title as the principle of nemo dat is applicable to land transactions. Defects which arose decades ago may be impossible to correct. It is this situation which makes the investigation of title conducted on behalf of purchasing clients so important and where it is alleged that the doctrine of adverse possession plays a vital supporting role.

The vendor is obliged to deduce title or prove that he is in a position to transfer the property he has contracted to convey to the purchaser for the estate he has agreed to sell. However, as Farrand points out that the vendor is not required to give anything like a complete history of the property’s ownership. He notes

> ‘conveyancing practice and law has limited the proof of ownership, in effect, to possession for a period long enough only to make better legal rights improbably, not impossible... To make better rights impossible the proof would have to start with the grant to Adam and Eve, but even this was save

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4 Although technically this duty does not arise until after the contract for sale has been entered into, in practice some documentary evidence of typically furnished with the contract for sale
and except the Garden of Eden and one is not even sure whether they took as joint tenants or tenants in common.\textsuperscript{6}

The vendor is therefore only required to deduce title for the statutory period commencing with a good root.\textsuperscript{7} Initially, conveyancers were satisfied with proof of sixty years title in a contract which did not make specific provision for title. It gradually became common for conveyancers to shorten the period of title through the inclusion of conditions. This practice was reflected in section 1 of the Vendor and Purchaser Act 1874 which reduced the statutory period of title to 40 years. S 56 of the Land Law and Conveyancing Law Reform Act 2009 reduces this period to 15 years.

It has been argued that the vendor is only required to prove his title over a minimum period of fifteen years as the Statute of Limitations provides ‘a kind of qualified guarantee that any possible outstanding claims to ownership by third parties are time-barred.’ \textsuperscript{8} The Statute of Limitations was designed to fulfil this purpose. The \textit{First Report of the Real Property Commissioners}\textsuperscript{9} points out that one of the aims of the Real Property Limitation 1833 Act in shortening the period of limitation for actions to recover land was to save ‘vexation and expense’ on the alienation of land.\textsuperscript{10} Dockray argues that the length of the limitation period influenced how the statutory period for proof of title was fixed. The English Law Commission’s \textit{Interim Report on Root of Title to Freehold Land}\textsuperscript{11} recommended a reduction of the minimum period of title to fifteen years as it ‘would allow a reasonable margin over the normal limitation period of twelve years…’ The Commission emphasised, however, that proof of fifteen does not provide an absolute guarantee to a purchaser that all prior rights have been extinguished as extensions to the limitation period are provided for in certain circumstances. For example, time will not run against owners of future interests or a landlord’s reversion until they fall into possession and the period of limitation may be postponed in cases of disability or fraud and a longer period operates in the case of land owned by the Crown. The Law Commission acknowledged that the reduction of the minimum period of title to fifteen years would increase the risk that certain defects in title would not come to light but, after discussing these defects, concluded that level of risk involved was acceptable. If the root of title is at least fifteen years old, many pre-root adverse interests will be barred after twelve years adverse possession. As Cretney highlights

\textquoteleft(t)he real threat is, in practice, not the assertion of a claim to the whole of the land in question, but of a claim to a part onto which an encroachment has taken place. The shortening of the period of title unquestionably increases the risk of a purchaser failing to detect discrepancies between plans on earlier

\textsuperscript{6} \textit{Ibid} at 86-87.

\textsuperscript{7} The definition of a good root provided in \textit{Williams on Vendor and Purchaser} (4\textsuperscript{th} ed) at 124 is often referred to: ‘An Instrument of disposition dealing with or proving on the face of it, without the aid of extrinsic evidence, the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified and showing nothing to cast any doubt on the title of the disposing parties.’

\textsuperscript{8} M Dockray, ‘Why do we need adverse possession?’[1985] Conveyancer and Property Lawyer 272, 278.

\textsuperscript{9} First Report, Parliamentary Papers, 1829.

\textsuperscript{10} \textit{Ibid} at 41.

\textsuperscript{11} Law Com no. 9, 1966.
conveyances which might raise suspicions. Thus in areas of substantial leasehold or settled estates, the risk is clearly increased by the Act. Such estates are common in areas of high land value.\(^{12}\)

It is clear, therefore, that certain interests, which may not be revealed by an investigation of title for the statutory period, will survive the standard twelve year limitation period. No proof of adverse possession is adduced in the average conveyancing transaction which makes the reliance placed on the operation of the limitation period to bar pre-root rights in relation to the land appear even more foolhardy. Adverse possession requires *animus possidendi* and unequivocal acts of possession on the part of the claimant. Although successive dispositions during the statutory period imply possession throughout that period, the land may have been left vacant or someone with a superior right may also have been engaged in acts of user. Once a purchaser is assured that vacant possession will be provided on completion, he will generally be unconcerned about the history of possession of the vendor and his predecessors in title. A purchaser will only insist on an affidavit setting out such a history if he discovers a defect in the title deduced by the vendor for the statutory period or the possibility that someone else went into adverse possession during that period. Even if such an affidavit became a standard requirement, it would not preclude someone with a superior right disputing the facts averred. To conclude, although conveyancers investigating an unregistered title may assume that the doctrine of adverse possession has barred any pre-root adverse interests, the possibility that the limitation period may have been postponed and the absence of any practice of seeking proof that the vendor was in possession for even a twelve-year period represent substantial holes in this comfort blanket.

**The role of first registration within the unregistered conveyancing system**

It could be argued that these holes in the comfort blanket should not concern the average purchaser or their solicitor in 2012 as the transaction in their favour will trigger the requirement for first registration of the title in the Land Registry and this registration will cure any defects existing in the prior title.\(^ {13}\) The entire country is now an area of compulsory first registration. Section 31 of the 1964 Act provides that the register is deemed to be conclusive evidence of the title of the owner to the land as appearing on the register. The first registration of a person as owner with an absolute title operates to vest in the registered owner the estate transferred, subject to any burdens registered under section 69 or recognised by section 72.\(^ {14}\) In one English case, *Argyle Building Society v Hammond*,\(^ {15}\) Slade LJ described registration as operating a certain ‘statutory magic’ which can reverse the effect of the *nemo dat quod non habet* rule. This suggests that if a pre-root deed included too much land in the plan or purported to operate as a conveyance rather than an assignment of a lease, although subsequent deeds would be ineffective, first registration on the basis of such deeds would operate to confer a statutory title.


\(^{13}\) See the Registration of Title Act 1964, s 24.

\(^{14}\) Registration of Title Act 1964, s 37.

That sounds wonderful but it ignores three vital points: first of all, the requirement to apply for first registration is dependent on a triggering transaction, currently a sale. These triggers could of course be extended so that any dealing with the land could make first registration compulsory, but it still ignores the fact that land can remain in families for decades or even generations without formally changing hands. In such circumstances, it seems unlikely that those with current entitlements would take the initiative and voluntarily apply for first registration and so this land may remain unregistered for the foreseeable future.

The second difficulty with relying on first registration to cure all title defects is that the Land Registry have to accept the title before it will be registered. It might be helpful to understand this process. If the purchase money does not exceed €1,000,000, currently registration can take place on the basis of a form 3 application which includes a declaration that the purchaser’s solicitor has investigated the title and certifies that it is in order. The Land Registry will not investigate the title and will register on the basis of the solicitor’s certificate. Certification by the solicitor is not the appropriate route to apply for first registration where anything out of the ordinary is revealed by the solicitor’s investigation of the title or any plans accompanying the deeds. In such circumstances, the application is made pursuant to form 1 which places the onus on the deputy registrar or examiner of title to investigate the title. The examination of title conducted on behalf of the authority is designed to ascertain that the applicant has a good holding title. Generally the root must be at least 15 years old, although the Authority may accept a root that is at least 12 years old if the market value of the property does not exceed €1,000,000. The Land Registry have actively pursued a pro-registration policy over the last few decades and if a deed of rectification is not a feasible option, it may be satisfied that certain adverse interests have been barred by the possession of the applicant’s predecessor in title and register with an absolute title on that basis. It should be noted that it is now possible to apply for first registration of a qualified title. This might be appropriate where the period of title shown is too short. With the extension of compulsory first registration, it was recognised that there may be situations where these proofs of an absolute title simply cannot be obtained. An application can be made to convert qualified title to absolute when appropriate eg where the root is now of sufficient length or the estate or interest mentioned by the qualification has since been extinguished. The investigation of title conducted by the Land Registry may identify and hopefully resolve certain title defects. However, the defect may have arisen in a deed executed before the deed which is being treated as the good root. Also, in some circumstances the defect may not be apparent on an inspection of the title alone, eg where there is a discrepancy between the identity of the land conveyed on the ground and on the plan attached to the deed. In such circumstances those with adverse interests which have not been extinguished by the doctrine of adverse possession and are affected by the defect may come out of the woodwork after the title has been registered to challenge that title.

This leads us to the third difficulty with relying on the register to cure title defects, section 31 which recognises the conclusive nature of the register also notes that nothing in this Act shall interfere with the jurisdiction of any court to make an order directing the register to be rectified. Essentially, this preserves the jurisdiction of the court to grant the equitable remedy of rectification. To cut to the chase, the defect may give rise to proceedings to rectify the register or an application for compensation from the state. As Gray and Gray note,
‘(t)itle plans may be ever so slightly awry; pre-registration deeds and subsequent dispositionary documents may themselves contain inaccuracies; undisclosed interests may suddenly emerge as affecting the land; initial assessments of the reliability of the title offered for first registration may turn out, in the event to have been misjudged.’ 16

The jurisdiction of the court to order a rectification of the register in such circumstances appears to be limited to circumstances where it can be achieved without injustice to any person. Fitzgerald notes that this would imply that the court would not upset the registration of a registered owner who was registered on foot of a transfer for value and purchased the lands in good faith. It is also worth noting that if an order for rectification is made or refused there may be an entitlement to compensation from the State.

In light of the defects which we mentioned earlier, when would the court grant the equitable remedy of rectification. First, it should be mentioned that rectification of a deed is typically ordered where it does not reflect the original agreement of the parties and where it is possible to give effect to that agreement. Presumably, the same principles would apply to the rectification of the register. Therefore, in a straightforward case where the vendor conveyed too much of his land to a purchaser who then proceeded to register his title, there would be no difficulty in the vendor obtaining a rectification of the register to reflect the true agreement if this can be proved. Matters are less straightforward if the remedy of rectification accrued in an earlier transaction. I have located caselaw which shows that the remedy of rectification may be claimed by successors in title to the original agreement or third parties affected by the defect who were not privy to the original agreement. However, if a transaction in favour of a purchaser has taken place since first registration, the remedy of rectification may not be awarded as a purchaser is entitled to rely on the register as conclusive. Recently, however, an exception to this general principle was recognised by the High Court in Boyle v Connaughton: 17 if the person entitled to the remedy of rectification was in actual occupation of the land in question or in receipt of the rents or profits from the land, this may be construed as an overriding interest which will bind a purchaser even though it is not apparent from the register, unless enquiries are made and the interest is not revealed. In that case, a discrepancy between the boundaries as they appeared on the ground and on the land registry map gave the defendant’s predecessor in title a right to rectify the register which passed to the defendant when he bought the land. When his neighbour’s land which included the disputed plot was sold to the plaintiff, as it was occupied by the person with the right of rectification, it was held to bind the plaintiff as an overriding interest. The register could to be altered to give effect to such an overriding interest and as Oonagh Breen points out, the purchaser in such circumstances has no entitlement to compensation from the State. 18 What about where a lessee conveyed the land in a deed executed many decades ago and someone has now been registered as the owner of a fee simple on that basis but the landlord has now appeared on the scene. Perhaps the landlord’s interest would also amount to an overriding interest binding a purchaser as he would be in receipt of the rent from the land. I think however that it wouldn’t as

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16 K Gray and SF Gray Elements of Land Law (5th edn, Oxford University Press 2009) para 2.2.60.
the landlord was not actually receiving or demanding the rent. Unless the right affected amounts to an overriding interest, the court won’t upset the registration of a purchaser for value who relied on the register.

To summarise therefore, if the person possessing a right to rectify was in actual occupation their right will constitute an overriding interest which binds a purchaser without appearing on the register. However, if the owner of the adverse interest is not in actual occupation, first registration could be viewed as the first step in cleansing any defects in title without the need for reliance on the doctrine of adverse possession. The second step is of course a transaction in favour of a purchaser who relies on the register in good faith. Therefore, the extension of compulsory first registration does not solve all defects in title and they can come back from the dead, so to speak.

On reflection, the resolution of issues arising from defects in title seems to happen in a fairly satisfactory manner due to the inter-linking of a number of doctrines, conveyancing practices, systems of registration and remedies. Some adverse interests arising out of defects in title are defeated by adverse possession while others are not, due to the postponement of the limitation period or the inability to prove possession throughout that limitation period. Some defects may be revealed on an investigation of title and result in a qualification on first registration in the land registry which in many cases will eventually be cured through the passage of time. Other defects may not be revealed on investigation of title and may even survive first registration or a dealing with a purchaser relying on the register. It would appear that the courts will only order the rectification of the register if it will not cause injustice and in such circumstances a person who has been adversely affected may be entitled to compensation. The recognition that such a right can be converted into an overriding interest when coupled with actual occupation achieves a good balance identifying the point at which the dynamic security of purchasers should give way to the static security of the owner of the interest. Adverse possession therefore plays a role in curing title defects but only a complementary one.

**Quieting title: the United States experience**

In this next part of my paper I want to look at two approaches which have been adopted in the United States to quiet title. The registered title system never really took off in the US. The investigation of title traditionally required establishing a chain of title back to the original grant from the government. Recording Acts were introduced to provide a public record of conveyancing transactions and, like our own registration of deeds system, it is used to resolve priority disputes. However, while our Registration of deeds system was devised to reduce the reliance on the doctrine of notice, they use the system of recording to fix a subsequent purchaser with constructive notice of the recorded deed. Under both approaches, a failure to register or record the deed means that a subsequent purchaser will typically take the land free from any interest created by the deed. The recording system eventually became bogged down by its own weight; as ownership passed from person to person the period of search became longer and the number of instruments that made up the chain of title increased. The title examination process in the US became “dominated by
overabundant caution and ultra-meticulous judgments, fostering an atmosphere where title insurance has flourished.

Although the doctrine of adverse possession plays a role in curing title defects in the United States, lawyers there are more willing to acknowledge that the doctrine is inadequate, on its own, to secure the position of purchasers, as the limitation period does not run against the owners of future interests, persons under disabilities and the State. Ortman notes that the Statute of Limitations does not eliminate the necessity of tracing and examining the title back to its origin. However, a more serious limitation of the doctrine in its role in quieting title is that you have to go to court in all cases to secure a title by adverse possession in the US. Here of course there is the facility to apply to the Land Registry for registration on the basis of adverse possession, although the decision may be appealed to the court.

Because of the difficulties involved in investigating titles, marketable title legislation in many states in the 1940s and 50s. Although marketable title legislation varies slightly from state to state, Basye lists certain universal features:

'It reduces the period of search; it eliminates repetitive examinations all the way back to the Government or some recognised root of title on each transfer; it makes problems of unmarketability less likely to occur or become a point of controversy; it quiets titles more effectively than statutes of limitation; and finally by express terms or by implication, it creates a positive functional concept of marketability.'

The Forty Year Marketable Title Act introduced in Michigan in 1945 has been praised by many legal scholars and has served as a model for similar legislation in other states. It provides that any person who has an unbroken chain of title of record to any interest in land for 40 years, shall at the end of such period be deemed to have a marketable title provided that no other person is in hostile possession of the land. It also operates as a statute of limitations extinguishing all claims and interests which originate prior to that period of time unless a notice of the relevant interest has been recorded within the period. Even the interests of persons suffering from a disability and future interests are extinguished by the Marketable Title Act, in contrast with their more privileged position under the doctrine of adverse possession. However, the Act expressly allows anyone to record a notice on behalf of a person under disability, a minor or someone whose identity cannot be established or is uncertain at the time.

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21 See Basye, above note 18 at 268.
23 The requirement that no other person be in hostile possession is designed to eliminate the possibility of wild deeds and separate chains of title. Other marketable title acts deal with this problem by requiring the person relying on the act to be in possession of the land. The Model Marketable Title Act requires neither possession nor the absence of hostile possession but provides that marketable title is held subject to the rights of any person arising from a period of adverse possession which was in whole or in part subsequent to the effective date of the root of title. See Powell, ‘Marketable Record Title Act: Wild, Forged and Void Deeds as Roots of Title’ 22 (1969) U Fla L Rev. 669 at 272; Jossman, ibid, at 429.
Typically, however, the extinguishment provisions of marketable title legislation do not apply to interests of lessors, apparent easements and land owned by the United States. It has been acknowledged that such exceptions have to be strictly limited as otherwise they may extend the title search beyond the 40 years which would render the whole concept of marketable title meaningless. Marketable title legislation has not been immune from controversy or criticism, but it does show that it is possible to shorten the investigation of title without recourse to the doctrine of adverse possession.

I did initially think that there might be some advantages in introducing something similar in Ireland, as it could reduce the importance of the doctrine of adverse possession in investigating unregistered titles and perhaps eliminate the potential for claims for rectification of the register once first registration had occurred. However, on reflection we already have a functioning concept of marketability which only requires title to be shown for 15 years beginning with a good root. Although, certain pre-root adverse interests may not be extinguished by the doctrine of adverse possession and could emerge to cast a cloud on the title of the current owner, it is submitted that the current approach achieves a good balance between static and dynamic security. A rectification will not be ordered against a purchaser who relies on the conclusive nature of the register unless the right amounts to an overriding interest. Admittedly it may perhaps be necessary to re-visit this notion of whether the right to rectify the register can amount to an overriding interest or whether the court should simply rely on its ancillary jurisdiction to rectify the register, as in certain circumstances it may seem harsh to deprive a purchaser of compensation from the State.

**Colour of Title Adverse Possession**

A second mechanism used to quiet title in the UL is the provision made for colour of title adverse possession. In the Common Law world this category of adverse possession, where the claimant can prove “colour of title”, is unique to the United States. Colour of title has been exhaustively defined, but to give an example of one definition. The Arkansas Supreme Court described it as follows:

Colour of title is in law, no title at all. It is a void paper, having the semblance of a muniment of title, to which, for certain purposes, the law attributes certain qualities of title…. It must purport to pass title. In form, it must be a deed, a will or some other paper or instrument by which title usually and ordinarily passes.

Why did this spin on the doctrine of adverse possession develop in the US and not in England or Ireland? Basically, it appears to have been the product of legislative and judicial responses to distinctly American economic and geographic realities in the context of the early settlement of the country. The land was wild and uncultivated and tended to be granted by the government and resold in large tracts. In the early days, records of state grants were not well kept and grants were often duplicated or overlapped. Many deeds were defective as few lawyers resided in the back country.

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25 See, for example, comment, ‘Constitutionality of Marketable Title Legislation’ 47 (1961-1962) Iowa L. Rev 413.
and speculative trading resulted in land being sold several times over, resulting in a great confusion of land titles. Colour of title conferred a number of benefits on the adverse possessor. Such a claimant benefits from a much shorter limitation period, often only five or seven years. It was felt that if settlement and development of the colony was to be encouraged, a relatively short time period needed to be provided for the protection of settlers who had been induced to settle upon and improve land under instruments which purported to pass title but turned out to be defective. The claimant also benefits from the doctrine of constructive possession. This doctrine of constructive development developed as in the early pioneer days families lived on such huge tract of lands that it was impossible to actually possess the whole. They began the long and arduous task of cultivating and improving the land but because of its wild and primitive nature, it could take years for a settler to establish actual dominium and control over any significant acreage. Yet they worked the land for years under the impression that they were entitled to the entire tract relying on the paper title which they held, though in fact it was worthless. It was easy for the judiciary to sympathetic to their plight. Under the doctrine of adverse possession as traditionally applied, a claimant may only gain title to the land which he or she actually possesses, but this rule was not reasonable in light of the conditions prevailing. However, the doctrine of constructive possession under colour of title deems the claimant who was only in possession of part of the tract to be in constructive possession of the entire tract as described in the deed constituting colour of title. It was later limited so that the constructive possession of the adverse possessor under colour of title could not extend to land in the actual possession of the rightful owner. This doctrine may also be based on an analogy with real title which deems the owner in possession of part of his land to be in possession of the entire plot.

The conditions prevailing in pioneer days no longer exist in the US and there have been some lone voices calling for the abolition of colour of title adverse possession on that basis. However, others recognise its value and the way it has developed to cater for the various defects in conveyancing which can arise in modern times. Kalo notes that colour of title is not an outdated historical curiosity.26 Adverse possession under colour of title represents a significant method of curing defective titles and its potential should not be overlooked.

What constitutes colour of title?

Despite some dicta to the contrary it seems to be accepted that colour of title requires some written instrument. This written instrument must purport to pass title to a definitely described tract. Private and official Deeds, wills, and judgements have all been held to constitute colour of title. Colour of title AP is commonly used in the US where a tax deed is ineffective to confer title on the purchaser due to some procedural defect in the manner in which the sale was carried out. It also seems to be accepted that a quitclaim deed may constitute colour of title, that is a deed whereby the grantor conveys whatever right, title or interest, if any, he has in the property. Certain other limitations have been imposed, although these may vary from State to State. In the absence of a good faith requirement, frequently a deed cannot constitute colour of title if it contains a defect which renders it so obviously ineffective that no man of ordinary capacity could be misled by it. The standard applied by the courts is that of a

layman unskilled in the law and the court must ignore the general rule that every man is presumed to know the law. Applying this standard, the omission of a seal would have been no obstacle to an instrument’s ability to serve as colour of title. It has been noted that the courts do not tend to use this as an independent basis for disqualifying an instrument. It must also be recorded or registered to constitute colour of title where the dispute involves a purchaser for value or lien creditor who derives his rights from the same source as those asserted by the adverse claimant.

I think that the adoption of this American concept of colour of title adverse possession could allow the veto system of adverse possession to be extended to unregistered land. Someone with an adverse interest in the land due to a defect in a deed in the chain of title would not be entitled to object to or veto an application for first registration where someone who can prove adverse possession can also prove that the possession commenced under colour of title.

This facility could operate in tandem with the option for an applicant to apply for first registration with a qualification on the title if it is not yet possible to prove adverse possession for the limitation period. In due course, most defects would be cured by the passage of time. We are in a compulsory registration environment and certain transactions will trigger a requirement for first registration. Someone purchasing a title which is defective would therefore have the option of applying for first registration with a qualification on title or if their predecessor was in possession for the limitation period, they could make an application for registration as an absolute owner on the basis of their colour of title adverse possession. Most defects on title would continue to be cured by the passage of time. This approach in fact emulates what is happening in practice in the Land Registry which adopts a pro-registration approach and will often register on the basis of an imperfect title which cannot be cured if it is accompanied by proof of 12 years possession.

It is submitted however that the recognition of colour of title adverse possession should be limited to the land in actual possession of the claimant; it is not appropriate to adopt the US concept of constructive possession in such circumstances. Disputes over boundary land could continue to be resolved by other remedies such as adverse possession and proprietary estoppel. I’ve argued before that if we make an exception to the veto system which requires good faith to be proved in relation to adverse possession of boundary land, it would have to be accompanied by the simultaneous introduction of building encroachment legislation. It is also submitted that the existence of defects appearing on the face of the deed should not preclude proof of colour of title. As colour of title would be accompanied by a much longer limitation period than in the US, it seems fair to be lenient in this respect. It is important to remember that if the defect could have been rectified in a more expedient manner that would have happened. The main aim should be to allow the land to be brought within the registration of title system.

The Law Commission of England and Wales has noted that it would not be easy to replicate the new veto system in relation to unregistered land.\(^{27}\) The most obvious difficulty arises where the paper owner or his address cannot be ascertained. In such circumstances it would be impossible to obtain details of the extinguished title and, of

\(^{27}\) Law Com no 254, para 10.45.
course, he would have been denied the benefit of the opportunity to veto the application. If such a squatter applies for first registration on the basis of adverse possession and the registrar proceeds to register him with a fee simple absolute, there is a danger that a lessor or the owner of a future interest whose interest has not been extinguished could come out of the woodwork and bring a claim for rectification of the register or claim compensation from the State.

The new scheme should require reasonable efforts to be made to identify the owner and obtain details of his title, for example, through the display of site notices and newspaper advertisements. However, if such efforts fail, the hazards of registering an applicant with a fee simple absolute need to be reduced. It could be argued that the Land Registry should register the applicant with only a qualified title in such circumstances. However, it must be possible to convert such a title to absolute in the future as otherwise the marketability of such land would be perpetually reduced. It is proposed that a long-stop limitation period of a further 12 years should be introduced in relation to the interests of those possessing a lessor’s or a future interest in the land. This is already the situation in relation to those operating under a disability, once thirty years has expired such a person can no longer bring an action to recover land. The difficulty is, of course, that someone with a lessor’s or future interest in the land could be blissfully unaware of that someone is in adverse possession and patiently looking forward to the time when their interest vests before they take any action. To confer some extra protection on them, in addition to the requirement for a further period of 12 years before the title could be converted to absolute, it is submitted that we could borrow one element of the Marketable title approach to resolve this problem. Someone in possession of a lessor’s or a future interest in the land should be required to register a caution against first registration in order to protect their interest from the dangers of adverse possession. This facility to register a caution already exists. The failure to do so, would mean that their title would be extinguished after 24 years adverse possession and they could not seek to rectify the register or claim compensation from the state.

**Conclusion**

This paper attempts to demonstrate that a qualified veto system of adverse possession, if introduced in Ireland, could be extended to unregistered land in a manner which would not affect the functionality of the unregistered conveyancing system. The divergence between adverse possession of registered and unregistered land introduced by the English Land Registration Act 2002 is far from ideal and it is submitted that reform of the doctrine need not necessarily lead to two different laws on adverse possession. In relation to unregistered land the veto could not be exercised by someone in possession of rights because of a defect in the chain of title, once the adverse possessor can produce colour of title. Where evidence of the title which has been extinguished is not forthcoming an adverse possessor of unregistered land would be registered with a qualified title which could be converted to absolute following the expiration of a further 12 years unless the owner of the interest whose interest was not extinguished by 12 years adverse possession has registered a caution against first registration. This approach ticks all the boxes, it allows the owners of unregistered land to benefit from the veto and it ensures that the registration of title system can ultimately be extended to the most uncertain of titles.