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Item Type	Meetings and Proceedings
Authors	Woods, Una
Citation	Irish Association of Law Teachers Annual Conference;
Download date	2026-05-16 08:16:15
Item License	https://creativecommons.org/licenses/by-nc-sa/1.0/
Link to Item	https://hdl.handle.net/10344/4306

The Case for Bad Faith Adverse Possession – An Irish Perspective

Conference Paper delivered at the Irish Association of Law Teachers Annual Conference, Belfast, November 2013¹

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In this paper I will be examining the position of the squatter who, knowing the land belongs to another, purposefully sets out to acquire it through the doctrine of adverse possession. This type of squatter is sometimes described as a bad faith adverse possessor while a person who believes that they own the land in question may be referred to as a good faith adverse possessor. It would be easy to assume that bad faith adverse possessors are universally viewed as moral degenerates or scoundrels who do not deserve to benefit from the doctrine of adverse possession. It is true that a lot of the academic literature condemns this individual and legislatures are increasingly attempting to devise ways of limiting the extent to which such undeserving squatters can benefit from the doctrine. However, there is also a growing body of literature which challenges the consensus view and defends bad faith squatters. In fact, Professor Lee Anne Fennell argues that only the bad faith adverse possessor should be permitted to succeed under the doctrine of adverse possession. In this paper I examine the relevance of Fennell's arguments in the Irish context.

In her article which was published in 2006,² Fennell makes a number of very interesting points:

First, she takes issue with using this term 'bad faith' in the context of adverse possession. She also challenges the negative reflexive association between acquisitive adverse possession and theft.

Second, she believes that adverse possession no longer plays a significant role in resolving two property law dilemmas traditionally ascribed to the doctrine 1) the resolution of disputes over mistaken boundaries and improvements and 2) quieting titles. She believes that the doctrine should be taken off these jobs and either abolished outright or else confined to a modern niche which she has identified for it.

This leads us to her third and most controversial main point – that adverse possession should only operate in favour of a bad faith adverse possessor. She claims that this would ensure that the doctrine would only operate when the markets break down and facilitate the re-allocation of the property to the squatter who values it more highly than the paper owner. She maintains that the bad faith squatter is the one who most carefully weighs up the risks and benefits of trespass and adverse possession and therefore relies on the doctrine in a more efficient manner than the good faith adverse possessor or the adverse possessor who is uncertain about his title.

¹ Please note that this conference paper is a work in progress.

² 'Efficient Trespass: The Case for "Bad Faith" Adverse Possession' 100(2006) Nw UL Rev 1037.

Bad faith and theft labels

In relation to her question, ‘what is so bad about bad faith?’ she makes a convincing case for re-classifying it as knowing or advertent adverse possession. She refers to the definition of bad faith from Black’s Law Dictionary as ‘generally implying actual or constructive fraud, or a design to mislead or deceive another’ – ‘a state of mind operating with furtive design or ill-will.’ She notes that a knowing trespass may not involve any of these things and if it did it probably wouldn’t qualify as adverse possession. Fraud usually postpones the running of the limitation period and ‘furtive’ or secretive possession does not qualify as adverse possession. It may even be unfair to label a knowing adverse possessor as bearing ‘ill-will’. Is there ill-will involved in using land that appears to have been left abandoned by the owner? Remember, also, that it has recently been clarified by English caselaw that the only intention necessary on the part of the squatter is an intent to possess and a willingness to take a lease if one was offered does not negate *animus possidendi*.³ Fennell also seems piqued by the widespread use of the term ‘theft’ to categorise this type of acquisition of title. As she points out, adverse possession is a perfectly legal method of acquiring title. Granted, it does initially involve a person committing a trespass which is a crime and a tort punishable by the law and this initial interference with the property owner’s rights is, of course, the fault of the trespasser. The moral conundrum seems to arise because the passage of time appears to convert a legal and a moral wrong into a right.⁴ She claims that the real moral difficulty flows not from the fact that someone intended to acquire title when the trespass was carried out but that they managed to do so. She quite reasonably argues that a desire to acquire title is not immoral, the moral difficulty arises because the law allows it to happen out of a trespass. This is a second interference with the property rights of the owner and this interference is not the trespasser’s fault – it is the legislature’s fault. So the question arises – should we just abolish the doctrine of adverse possession?

Redundant roles assigned to the doctrine

This is her next task which involves a critical evaluation of the functions of performed by this doctrine in a modern property system.

Mistaken boundaries and improvements

She begins by examining the justifications which focus on the expectations or investments of the possessor. Her real concern in this section is whether adverse possession is a suitable remedy for the resolution of the disputes which arise when a person mistakenly constructs a building or improvement on the wrong side of the boundary with his neighbour. She notes that it is sometimes suggested that adverse possession is necessary to protect inadvertent encroachers from ‘extortion’ by a neighbour who watches him build over the property line in the hopes of later using the threat of an injunction to extract huge payments from him. She is completely right to point out that this thinking is flawed for two reasons – adverse possession only protects the builder/improver many years later – the owner has 12 years to engage in extortion. The second more fundamental flaw is that adverse possession doesn’t prevent this type of behaviour; in reality there are a variety of equitable remedies that provide protection to the innocent encroacher in these circumstances. She notes that these remedies may not be perfect but they can be improved if they are found wanting. The crux of her argument here is

³ *JA Pye (Oxford) Ltd v Graham* [2002] 3 All ER 865.

⁴ She half-heartedly attempts to justify this by referring to the doctrine of relation back – which means that the initial trespass is retroactively cured by the expiry of the limitation period. However, she acknowledges that no legal doctrine can turn a moral wrong into a right.

that adverse possession is an unnecessary remedy in this context – it is at this point that we disagree. In a previous conference paper I outlined the broad range of remedies which are available in Ireland to resolve the disputes that may arise in connection with boundaries; proprietary estoppel and adverse possession were revealed as playing a critical role in this context. However, I made the point that a mistaken improver may fall between two stools when it comes to availing of these two remedies. If the improvements were carried out in reliance on a representation by the owner or if the owner acquiesced in a mistake made by a neighbour, the improver will be entitled to a remedy under the doctrine of proprietary estoppel. Alternatively, someone who can prove adverse possession of a boundary plot for the limitation period will acquire title to it. However, if there has been no representation or acquiescence by the owner⁵ and the limitation period has not expired, no adequately structured remedy is available to the mistaken improver. It is easy to imagine a scenario where the owner simply has not noticed the encroachment until it is too late. In England the remedial vacuum is even more pronounced in this context because they have imposed a good faith requirement on a person seeking to claim adverse possession of registered boundary land. This means that an encroaching builder who was uncertain about the position of the boundary or a mistaken improver who discovered that he was not the owner of the plot during the limitation period will not acquire title by adverse possession. I've argued previously that our boundary dispute remedies should be supplemented by the introduction of legislation targeted at protecting mistaken improvers akin to the legislation which operates in Australia and Canada. Ideally this legislation would facilitate the consideration of a broad range of factors and provide for flexible remedies to resolve such difficulties.⁶

What about if there is no building encroachment or mistaken improvement on the boundary plot – should we allow a transfer of ownership under the doctrine of adverse possession in these circumstances? It is at this point that it becomes helpful to consider the endowment effect. Oliver Wendell Holmes has explained adverse possession by saying that 'man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life.' Stake uses experimental psychology to develop this rationale further, calling it a loss aversion theory. This theory basically concludes that people become more attached to items in their possession, such as land (or mugs in his experiment!), and suffer a greater loss than those who lose out on the financial value of the item. So basically adverse possession is justified as it minimises the overall losses for the parties concerned. Fennell half-heartedly argues that this endowment effect 'might' justify the introduction of a compensation requirement which would allow the adverse possessor to obtain the land by paying a fair market value. Stake argues that this approach wouldn't work because the adverse possessor will not be able to afford to compensate the owner, without selling the land he has become attached to. Also, in boundary disputes, the legal costs of determining value would outweigh the value of the land itself.⁷ I believe that a compensation requirement is just too costly to administer when no sunk investment is involved or the owner is not in a position to extort the possessor. In these circumstances, I believe that the doctrine of adverse possession should only be available for

⁵ Assuming that the precedent set by the decision in *McMahon v Kerry County Council*[1981] ILRM 419 is not followed.

⁶ It may be that, in time, the importance of proprietary estoppel in this context would be reduced as the mistaken improver legislation could allow the courts to factor in the owner's culpability in deciding on the appropriate remedy.

⁷ He does go on to qualify his argument saying that in cases of bad faith, a compensation requirement would increase the fairness of the doctrine and that justice would be worth its costs in terms of the judicial time required to listen to evidence on the issue of bad faith.

those who have developed a very strong psychological attachment to the land. Such an attachment is more likely to develop if the occupier believed himself to be the owner over a long period of time which is most likely to happen when an error is made over the position of a boundary. A requirement for good faith throughout the limitation period ensures that the doctrine of adverse possession operates in a more targeted fashion to provide a remedy for those who deserve it and cannot be accommodated by other legal mechanisms.

I believe that mistaken improver legislation, the doctrine of proprietary estoppel and good faith adverse possession should operate in tandem to provide alternative methods for settling a boundary dispute.

Quieting titles in repose

The second set of goals set out by Fennell revolve around making titles more stable and secure and less prone to challenges arising out of the past. In Ireland it is acknowledged that the doctrine of adverse possession plays an essential role in the investigation of title to unregistered land by curing title defects, thereby facilitating transactions in relation to such land. The majority of claims which arise from a conveyancing error are unenforceable following twelve years' adverse possession. This provides a comfort blanket to a purchaser's solicitor that a vendor who can establish a chain of title back to a good and sufficiently elderly root of title will also have extinguished any such claims.

Fennell is dubious that the doctrine can be justified on this basis as the doctrine requires the successful claimant to establish a variety of elements each of which is open to judicial interpretation. She touches here on a serious impediment to the doctrine's quieting title function in the US – the fact that a court application is necessary to secure a title by adverse possession. In contrast, most Irish adverse possession claims are dealt with by the Property Registration Authority⁸ and it is not unusual for affidavits of possession to be relied on in conveyancing transactions to deal with certain title defects or to supplement secondary evidence of a lost title.

Fennell notes that even if the required elements can be established, the characteristics of the owner or his title may postpone or lengthen the limitation period, eg if the owner has a disability/ is a state authority or only holds a leasehold interest. US Lawyers have been more willing to acknowledge this failing of the doctrine in curing title defects than Irish lawyers. However, it is also important to bear in mind some fundamental differences in the conveyancing systems of the US and Ireland when looking at this issue. I agree that the role played by adverse possession in curing title defects is sometimes exaggerated but nevertheless, in Ireland, it remains, an important element of a multi-faceted, inter-connected system which achieves a fair result when such defects surface. It is a matter which I have discussed in a previous conference paper so I will only summarise my conclusions here - issues arising from defects in title tend to be resolved in a satisfactory manner in Ireland through the operation of a combination of doctrines and remedies (eg rescission, rectification, reliance on implied covenants for title), but also through conveyancing practices and the requirement for a first registration. Adverse possession plays a role in curing title defects, but only a complementary one. Some adverse claims which are not revealed by a standard investigation of title are defeated by adverse possession, while others are not because of the postponement of the limitation period or the inability to prove adverse possession throughout

⁸ In Ireland it is possible to apply to the Property Registration Authority for registration of an absolute or good leasehold title on the basis of adverse possession (s 49 of the Registration of Title Act 1964), although the decision of the Authority in this regard may be appealed to the court (s 19 of the 1964 Act).

the limitation period. Other defects may be revealed on an investigation of title by the purchaser's solicitor or the Property Registration Authority and if they cannot be cured they may result in a qualified title being conferred on first registration; this qualification may eventually be cured through the passage of time. It is also possible that certain defects may not be revealed on an investigation of title and may survive first registration and perhaps even a transaction in favour of a purchaser for value relying on the register. A right of rectification may be converted into an overriding interest when coupled with actual occupation of the land and this identifies the point at which the dynamic security of purchasers should give way to the static security of the owner, achieving a fair result. It is interesting to contrast this approach the investigation of title with the one which operates in the US.

The registered title system never enjoyed much success in the United States⁹ and investigation of title traditionally required establishing a chain of title back to the original grant from the government. In the early days of settlement, the land in question was typically wild and uncultivated and was often granted by the government and resold in large tracts. In these 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. There was speculative trading which resulted in land being sold several times over and great confusion over title. There were a number of legislative responses to this confusion: Recording Acts were introduced to provide a public record of conveyancing transactions and to resolve priority disputes, but 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.¹⁰ The title examination process in the US became 'dominated by overabundant caution and ultra-meticulous judgments'¹¹ – an ideal environment for the growth of the title insurance industry. Another legislative response was to reduce the limitation period for adverse possessors who could show 'colour of title' – this is a deed which purports to grant title but does not actually do so, typically due to some defect in the chain of title or perhaps a procedural deficiency in the execution of a tax sale.¹² A third legislative response was the introduction of marketable title legislation. Fennell claims that this legislation is much better placed to provide title security and protect against old defects in title than the doctrine of adverse possession.¹³ Typically, such legislation 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. It also extinguishes all claims and interests which originate prior to that period of time unless a notice of the relevant interest has been

⁹ See Barnet, 'The Uniform Registered State Land and Adverse Possession Reform Act, A Proposal for Reform of the United States Real Property Law' 12 (2004) *Buff Env'l LJ* 1, 19-20.

¹⁰ Cross, 'Weaknesses of the Present Recording System' 47 (1962) *Iowa L Rev* 245; Basye, 'Trends and Progress – The Marketable Title Acts' 47 (1962) *Iowa L Rev* 261.

¹¹ See Basye, *ibid*, 265.

¹² Fennell notes later in her article that imposing a bad faith and documented knowledge requirement on adverse possessors as she suggests will withdraw the protection of the law from adverse possessors who hold under colour of title. She claims that if marketable title legislation or title insurance cannot resolve their problems they may be able to sue on a warranty in the deed. If the general warranty is not available it is likely that the purchaser received a discount in the price and they are getting just what they bargained for – a somewhat less certain holding to land.

¹³ Fennell also mentions title insurance as another source of assurance against clouds on title. She notes that Merrill has argued that adverse possession may reduce the cost of title insurance by eliminating more defects in title but Fennell doubts this given the difficulties in proving adverse possession and instead argues that marketable title legislation is more effective in this respect. Title insurance is only rarely necessary in Ireland as the registered title system is underpinned by a state guarantee of title. This is an expensive and unnecessary solution to a problem which is currently being managed in Ireland in an effective manner.

recorded within the period. While similar legislation could be introduced in Ireland, it is submitted that such an approach is unnecessary as we already have a functioning concept of marketability and our current approach satisfactorily resolves the conflict of interests which may occur once a title defect comes to light. Instead, it is submitted that the role played by adverse possession in achieving this delicate balance should be preserved.

Punishing sleeping owners and rewarding working or higher-valuing possessors

She refers to the final cluster of justifications for the doctrine as revolving around punishing the sleeping owner and rewarding the working or, more pertinently, the higher-valuing possessor. She is dismissive of the 'sleeping versus working' rationale although it gestures clumsily in the direction of a much more legitimate social goal.

Fennell's modern niche for adverse possession

This goal she identifies as the task of moving scarce resources into the hands of those who place the highest value on them. Typically, we rely on the markets to accomplish this allocational task – however the market sometimes breaks down. She says that the doctrine of adverse possession should encourage efficient trespass and discourage inefficient trespass. An efficient trespass is a calculation that a trespasser makes by weighing up the risks of being prosecuted or sued for trespass and having to give back the land if discovered before the limitation period expires against the benefits of acquiring title if he manages to successfully make it through the limitation period. A test of the relative subjective valuations of the property is built into this calculation as she says that we can quite plausibly assume that an owner is more likely to interrupt the trespass if they value the property highly while the trespasser's willingness to take the risk of getting caught corresponds with the value he places on the property. If you take this reasoning to its logical conclusion, Fennell seems to be implying that a squatter is more likely to take this risk if the land looks abandoned. Therefore, you could conclude that Fennell's modern niche for adverse possession is not necessarily that modern at all – adverse possession has always played an acknowledged role in restoring abandoned land to the market. She claims that allowing the doctrine to operate in favour of good faith or uncertain adverse possessors is inefficient; it encourages people to make mistakes or remain ignorant about true boundary lines and it acts as a disincentive to voluntary market transactions. It may even facilitate immoral behaviour as it does nothing to prevent squatters from lying that they had a belief in ownership to avoid a potential liability for the trespass which takes place before the expiry of the limitation period.

Fennell acknowledges that under her approach there is a danger that someone may claim to be good faith possessor up until the expiry of the limitation period, but if they successfully evade getting caught out, they may claim to have been a knowing trespasser all along. To guard against this possibility she suggests what she claims is a simple solution. It would be necessary to establish proof of the squatter's knowledge of wrongful entry at the time of the entry to trigger the limitation period. This knowledge requirement would have to be publicly recorded but one option would be for the squatter to deliver a purchase offer to the owner. A purchase offer, of course is generally construed as precluding adverse possession, amounting in most cases to an implicit written acknowledgement of the owner's title. Presumably, this rule would have to be modified but Fennell makes the point that a requirement for a purchase offer would help prove the unavailability of a market transaction. If the owner cannot be tracked down, it would be possible to document the knowledge requirement by registering something akin to a *lis pendens*. The documented knowledge requirement would perform a

dual role of evidencing the state of mind of the adverse possessor and providing the owner with notice of the adverse possession. Although her primary concern appears to be disputes between neighbouring landowners, she refers, in passing, to the landless squatter and notes that the reforms she advocates could respond to a fundamental shortcoming of markets to effect transactions in favour of those who lack conventional resources. Although we can presume in this situation that the squatter knows that the land belongs to someone else, she intimates that this type of squatter should be required to perform a non-trivial permanent improvement on the land to provide visible notice of occupation to the owner before the limitation period could be triggered.

This paper submits that Fennel's case for the introduction of a mandatory bad faith requirement and her insistence that other more suitable remedies adequately protect the good faith adverse possessor do not hold water in the Irish context where the doctrine continues to play a vital role outside the narrow context of abandoned land which seems to be Fennel's primary concern. The requirement for documented knowledge or an improvement as a technique for putting the owner on notice of the adverse possession appear cumbersome and unnecessary when considered next to the veto or early warning system of adverse possession introduced in England and Wales. While the veto system of adverse possession regime deals with the problem of abandoned land, it also preserves the doctrine's role in resolving certain other matters, such as resolving boundary disputes and preserving the doctrine's role in curing title defects in relation to unregistered land.